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RESEARCH DIVISION**

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

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INTRODUCTION

At the request of the Directorate General of Human Rights and the Rule of Law, the Research and Library Division of the Registry of the European Court of Human Rights has updated the report on “Internet: case-law of the European Court of Human Rights”, published in June 2011.

This latest version, as updated in June 2015, covers the Court’s case-law on various related or interconnected subjects. Leading judgments are accordingly cited in various places. Therein lies the added value of this study: it offers a transversal approach based on clear, pertinent, ready-to-use information. The complex subject covered here relates to your many centres of interest on various levels.

The report provides reliable, up-to-date access, a thread to guide the reader safely through the Court’s judgments and pending cases concerning the Internet, a constantly developing area of the law.

I. 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 to the territory of that State (*Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 131, ECHR 2011).

However, transactions or publications on the Internet may 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 case of *Premininy 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. Similarly, no one challenged the competence of the Turkish courts when they decided to block access to *Google Sites* and all the sites hosted there (*Ahmet Yıldırım v. Turkey*, no. 3111/10, § 67, ECHR 2012).

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 in 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.

The more recent judgments in the cases of (*Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04, 8252/05 and 18454/06, § 103-115, ECHR 2012 (extracts), and *Jaloud v. the Netherlands* [GC], no. 47708/08, ECHR 2014) narrow down the scope of the concept of “*jurisdiction*”, albeit in a very different context. They nevertheless lay down the guiding principles applicable to the exercise by a contracting State of its “*jurisdiction*” outside its territory within the meaning of Article 1 of the Convention. Situations may arise, therefore, where the offending act is located outside the national borders but nevertheless falls within the “*extraterritorial jurisdiction*” of the State for the purposes of the Convention. The key factor is the exercise by the Member State of effective power and control outside its national territory. The Court also bases its

decisions on the rules of international law (see, for example, *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, ECHR 2012).

Liability in such cases arises from the fact that Article 1 cannot be interpreted as authorising a contracting State to perpetrate violations of the Convention in another State that it would not have the right to commit on its own soil.

In short, therefore, it is not, *a priori*, out of the question that an act committed in the territory of another State should fall within the “*jurisdiction*” of a different State as an “extraterritorial act” (see, by contrast, *Ben El Mahi v. Denmark* (dec.), cited above).

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.

When a matter falls within the jurisdiction of the courts in the State against which the application is lodged, the Court cannot substitute itself for that State’s domestic courts. It did not agree with an applicant who argued before it that the courts should have applied other legislation to the case, and in particular European legislation governing Internet service providers. The Court’s position is clear: it is not its role “*to express a view on the appropriateness of methods chosen by the legislature of a respondent State to regulate a given field. Its task is confined to determining whether the*

methods adopted and the effects they entail are in conformity with the Convention” (Delfi AS v. Estonia [GC], no. 64569/09, § 127, 16 June 2015).

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

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).

The principle is that Article 8 protects personal information which individuals can legitimately expect should not be published without their consent (*Flinkkilä and Others v. Finland*, no. 25576/04, § 75, 6 April 2010; *Saaristo and Others v. Finland*, no. 184/06, § 61, 12 October 2010), such as their home address, for example (*Alkaya v. Turkey*, no. 42811/06, 9 October 2012).

The publication of information about a person mentioning the person’s full name regularly constitutes an interference with the right to respect for one’s private life (*Kurier Zeitungsverlag und Druckerei GmbH v. Austria* (no. 2), no. 1593/06, 19 June 2012). Using a person’s first name alone without their consent can also, in certain cases, interfere with the person’s private life, for example where the first name is mentioned in a context that makes it easy to identify the person concerned and when it is used for the

purpose of advertising (*Bohlen v. Germany*, no. 53495/09, § 45, 19 February 2015).

Private life includes the privacy of communications, which covers the security and privacy of mail, telephone, e-mail and other forms of communication; and informational privacy, including online information (*Copland v. the United Kingdom*, no. 62617/00, ECHR 2007-I).

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 videos which contain a person's image will fall within the scope of Article 8. In fact the right to the protection of one's image presupposes the individual's right to control the use of that image, including the right to refuse publication thereof (*Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 96, ECHR 2012). This is relevant for the storing of images on communal or social websites. This is an area where the protection of the reputation and the rights of others takes on a special importance, as photos may contain highly personal or even private information about an individual or his or her family. The *Verlagsgruppe News GmbH and Bobi v. Austria* case (no. 59631/09, 4 December 2012) is interesting in this connection. Photos were taken in the course of a private event in the applicant's apartment. They were taken with his agreement but were not meant for the eyes of outsiders (§ 86). They concerned his private life and were not essential to the offending article, so the claimant's interest in the protection of his image prevailed (§§ 89-90).

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 *Khmel v. Russia* (no. 20383/04, 12 December 2013) the applicant complained that he had been filmed while in the police station and that the video footage had been sent to the regional television; the Court found a violation of Article 8.

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 more 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.¹

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*, cited above, § 30).

(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). As far as the general principles are concerned, the Court considers that the power to order the secret surveillance of citizens is admissible for the purposes of Article 8 only where sufficient and effective

¹ 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.

safeguards exist against abuse. Account must be taken of all relevant circumstances, including the nature, scope and duration of possible measures, the grounds required for ordering them, the authorities competent to permit, carry out and supervise them, and the remedies provided by national law (*Kennedy v. the United Kingdom*, no. 26839/05, 18 May 2010; see also *Shimovolos v. Russia*, no. 30194/09, 21 June 2011, violation).

The case of *Youth Initiative for Human Rights v. Serbia* (no. 48135/06, 25 June 2013) concerned access to information obtained by the Serbian intelligence service through electronic surveillance. The Court found that the stubborn refusal of the intelligence service to comply with a final and binding decision ordering it to supply the information it had collected was arbitrary (violation of Article 10 of the Convention). That finding of a violation also had practical consequences. Under Article 46 (Binding force and execution of judgments), the Court invited the intelligence service to give the NGO concerned the information requested concerning the number of people who had been placed under electronic surveillance.

(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 freedoms of others and that in the circumstances the measure could be said to have been “*necessary in a democratic society*”.

The Grand Chamber 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.

Unlike that case, *M.K. v. France* (no. 19522/09, 18 April 2013) concerned a scheme for keeping fingerprints - of people suspected of having committed offences but not convicted - that was limited in time (to 25 years) and in theory offered possibilities of having the data deleted (but not a right). Here too the Court found a violation of Article 8, stressing the importance of maintaining a fair balance between the competing public and private interests in issue in this type of situation.

In the *Peruzzo and Martens v. Germany* decision (no. 7841/08 and 57900/12, 4 June 2013), the disputed interference concerned individuals convicted of serious offences. For the first time the Court looked into the question of the guarantees linked to the collection, retention and use of DNA material in this context. The Court rejected the application, considering the measure proportionate and necessary in a democratic society.

(5) Storage of other personal data on public databases

In *B.B. 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* (no. 24029/07, 13 November 2012), the applicant complained about the retention and disclosure of a police caution given for child abduction which had not been removed from her police record. The Court considered that a system for the retention and disclosure of criminal record data should afford sufficient safeguards to ensure that data relating to an individual's private life are not disclosed in violation of the right to respect for private life (which it did not in this case: violation).

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), VIS (Visa Information System) and EURODAC (the European fingerprint database). These systems are 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*".²

The impact on the right to respect for private life is clear and the Court has been particularly vigilant as regards the duration of retention of data and the existence of a real (not a fictitious) possibility of requesting their deletion. A case in point is the *Brunet v. France* judgment (no. 21010/10, 18 September 2014), concerning a police database containing information from investigation reports, including the identities of the accused and the victims. The applicant's details appeared in the database even though the criminal proceedings against him had been discontinued. The Court found a violation

² Opinion of the Data Protection Supervisor, 14 January 2011.
http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2011/11-01-14_Personal_Data_Protection_EN.pdf.

of Article 8, considering that there was no possibility for the applicant in practice to have the information concerning him deleted, and that the 20-year period for which the information could be kept in the database was virtually an indefinite period. More intimate details, or information disputed by the individual concerned, may also be held against the subject's will in official public records (*Khelili v. Switzerland*, no. 16188/07, 18 October 2011, violation).

The European Court of Human Rights is being faced with new concepts such as that of data portability and the right to be forgotten,³ 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 needed for processing.

It has not yet had the opportunity to rule on these matters in the specific context of the Internet, as the Luxembourg Court did in a judgment of 13 May 2014.⁴ One case is pending before the Strasbourg Court, however, in connection with the right to be forgotten on the Internet: it concerns convicted individuals who have served their sentences and complain about the refusal to anonymise their personal details which appear in reports on their criminal trial in online archives.⁵

(6) Data protection with specific reference to the Internet

Questions of 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.

For example, in the case of *Bureau of Investigative Journalism and Alice Ross v. the United Kingdom*, currently under examination, the applicants complain under Articles 8 and 10 of the Convention about the interception of communications, including on the Internet, (case no. 62322/14, communicated to the respondent Government on 5 January 2015).⁶ More precisely, they consider that the statutory regime in relation to the interception of external communications has affected their ability to undertake their work of investigative journalism without fear for the security of their communications. Ultimately, they argue, this poses a risk to the public watchdog role of the press. *Big Brother Watch and Others v. the United Kingdom* (no. 58170/13) is another case in point, which was

³ *Ibid.*

⁴ CJEU, *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* – [GC] - C-131/12.

⁵ *M.L. v. Germany and W.W. v. Germany*, no. 60798/10 and no. 65599/10, communicated to the respondent Government under Article 8 of the Convention on 29 November 2012.

⁶ See: <http://hudoc.echr.coe.int/fre?i=001-150946>

communicated to the respondent Government on 7 January 2014.⁷ The applicants complain about the interception of communications by the intelligence services. This application, which is pending, concerns the compatibility with Article 8 of the collection, analysis, storage and destruction of the information thus intercepted.

Telecommunications companies each year provide large quantities of communications data to government agencies in response to lawful requests.⁸ A case concerning this issue is currently under examination. It concerns the legal obligation for an Internet access provider to divulge to the police the personal details attached to an *IP address*, without the consent of the subscriber, in the event of an investigation into pornography. The Court has asked the respondent Government whether the system provided for in the Code of Criminal Procedure is compatible with the right to respect for the privacy of communications (*Benedik v. Slovenia*, n° 62357/14, communicated in April 2015).⁹ The legal possibility for the authorities to obtain personal information from Internet providers about their subscribers is the subject of other pending applications under Article 8 (see, for example, *Ringler v. Austria*, no. 2309/10, communicated to the respondent Government in May 2013).¹⁰

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, in principle, 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 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.

The Court observed (§§ 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

⁷. See: <http://hudoc.echr.coe.int/fre?i=001-140713>

⁸. *Communications Data Retention in an Evolving Internet*, by Ian Brown, International Journal of Law and Information Technology, Oxford University Press 2010.

⁹. See: <http://hudoc.echr.coe.int/fre?i=001-154288>

¹⁰. See: <http://hudoc.echr.coe.int/fre?i=001-120348>

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 telephone, e-mail or Internet usage 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.”

Accordingly, the member States have an obligation to provide sufficiently clear and accessible rules governing the use of Internet in the workplace.¹¹

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.

Internet can also relay personal information which is not meant initially to be posted on line. A simple press release, for example, issued in an individual case with no intention of its being posted on the Internet, may well be picked up by third parties and discussed on the Web to the detriment of the individual’s right to protection of private life. That is what happened in *P. and S. v. Poland*, (no. 57375/08, 30 October 2012). The information thus made public, while not nominative, was detailed enough to enable others to find the applicants’ contact details and contact them, either by mobile phone or personally. The pressure of numbers then came into play, to the detriment of the applicants, information on the Internet being accessible to a wider – potentially infinitely wide – audience (§ 130). The Court reiterated the importance of protecting the private and family life of private individuals and in particular details of their sexual life (§§ 133 and 134).

¹¹. An application concerning the monitoring of Internet use by an employee of a private company is pending: *Bărbulescu v. Romania*, no. 61496/08, communicated to the respondent Government on 18 December 2013.

III. INTERNET AND FREEDOM OF EXPRESSION

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) The Court’s general principles concerning freedom of expression apply to the Internet

Article 10 of the Convention applies to the Internet as a means of communication (*Delfi AS v. Estonia* [GC], cited above, § 131), whatever the type of message and even when used for commercial purposes (*Ashby Donald and Others v. France*, no. 36769/08, § 34, 10 January 2013). In that case the Court held for the first time that the publication of photographs on an Internet site devoted to fashion which offered the public pictures of fashion shows for consultation, free of charge or for a fee, and also for sale, fell within the exercise of the right to freedom of expression (§ 34).

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).

Comments on matters of general interest or political issues generally enjoy a high level of protection of freedom of expression - which means that the margin of appreciation left to the authorities is particularly narrow (*Axel Springer AG v. Germany* [GC], no. 39954/08, § 90, ECHR 2012, and *Morice v. France* [GC], no. 29369/10, § 125, 23 April 2015). That margin of appreciation is broader, however, where commercial speech is concerned (*Mouvement raëlien Suisse v. Switzerland* [GC], no. 16354/06, § 62, ECHR 2012).

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 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 *Süreç 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 (*Gündiüz 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 *online 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). Irreverent satire certainly enjoys the protection of the Convention. The Court considers that this form of expression can play a very important role in open discussion of matters of public concern, an indispensable feature of a democratic society.¹² Criminal penalties for satirical commentary on topical issues are likely to have a chilling effect (*Eon v. France*, no. 26118/10, §§ 60-61, 14 March 2013).

By contrast, offensive and injurious speech on the Internet that goes beyond the satirical and defamatory register, leads the Court to reject an application (*Bartnik v. Poland* (dec.), no. 53628/10, 11 March 2014). As regards vulgar and insulting comments posted on an Internet discussion site, the question arises in the case of *Buda v. Poland* (no. 38940/13), which was communicated to the respondent Government under Article 8 on 19 January 2015¹³).

Journalistic freedom also includes possible recourse to a degree of exaggeration or even provocation. Concerning Internet discussion sites, the Court recently held that the limit of admissible criticism is broad where the comments are those of professional journalists well-known to the public who are commenting on matters of general interest (*Niskasaari and Otavamedia Oy v. Finland*, no. 32297/10, §§ 9 and 54-59, 23 June 2015).

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*”.

Frequently these cases pit the protection of freedom of expression under Article 10 against the right of offended parties to protect their reputation, which, as an aspect of their private life, is protected by Article 8. In such cases the Court verifies whether the national authorities have struck a fair balance between these two rights, which it considers to be of equal importance. For the Court these cases call for “*a balancing exercise between the right to freedom of expression and the right to respect for private life*” (*Axel Springer AG v. Germany* [GC], cited above, § 87). The outcome of the application should not, in principle, vary according to whether it was lodged with the Court under Article 8 of the Convention by the person who was the subject of the offending article or under Article 10 of the Convention by the publisher who published it. Indeed, these rights “*deserve equal respect*” and the margin of appreciation should in principle be the same in both cases.

In *Axel Springer AG* (§§ 89-95) and *Von Hannover v. Germany* (no. 2) [GC] (§§ 108-113), both cited above, the Court summarised the relevant

¹². For a case concerning humorous advertising, see also *Ernst August von Hannover v. Germany*, no. 53649/09, 19 February 2015.

¹³. See <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-152345>

criteria when balancing the right to freedom of expression and the right to respect for private life, which include contribution to a debate of general interest, whether the person concerned is a public figure, the subject of the report, the form and repercussions of the publication and the severity of the penalty imposed. Consequently, 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.

More generally, the limits of admissible criticism are broader in respect of the government or a public figure than for a private individual. Thus it is that in a democracy the actions or omissions of the government must be placed under the watchful scrutiny of the press and public opinion.

The Court has said that political reporting and investigative journalism attract a high level of protection under Article 10 (*Mosley v. the United Kingdom*, no. 48009/08, § 129, 10 May 2011).

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. 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”

(a) Principles

The Court has made the following observation (*Delfi AS v. Estonia* [GC], cited above, § 133):

“(...) the Internet plays an important role in enhancing the public’s access to news and facilitating the dissemination of information in general (see *Ahmet Yildirim*, cited above, § 48, and *Times Newspapers Ltd*, cited above, § 27). At the same time, the risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press (see *Editorial Board of Pravoye Delo and Shtekel*, cited above, § 63).”

The Internet differs as an information tool from the printed press, and the risk it poses to the rights protected by Article 8 de la Convention is certainly higher (*Węgrzynowski and Smolczewski v. Poland*, no. 33846/07, § 98, 16 July 2013). In *Editorial Board of Pravoye Delo and Shtekel v. Ukraine* (cited above, § 63), the Court said:

“It is true that the Internet is an information and communication tool particularly distinct from the printed media, especially as regards the capacity to store and transmit information. The electronic network, serving billions of users worldwide, is not and potentially will never be subject to the same regulations and control. The risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press.”

The availability of information on the Internet has allowed the Court to justify restrictions on the freedom to impart information or ideas via the printed media. In the *Mouvement raëlien Suisse v. Switzerland* [GC]

judgment, cited above, the prohibition of an association's public poster campaign was found to be in conformity with the Convention, in part because the association's Internet site remained accessible (with other means of communication). The Court said in particular (§ 75):

“(...) it might perhaps have been disproportionate to ban the association itself or its website on the basis of the above-mentioned factors ... To limit the scope of the impugned restriction to the display of posters in public places was thus a way of ensuring the minimum impairment of the applicant association's rights. The Court reiterates in this connection that the authorities are required, when they decide to restrict fundamental rights, to choose the means that cause the least possible prejudice to the rights in question (...) In view of the fact that the applicant association is able to continue to disseminate its ideas through its website, and through other means at its disposal such as the distribution of leaflets in the street or in letter-boxes, the impugned measure cannot be said to be disproportionate.”

The availability on the Internet of the content of a book revealing confidential information renders maintaining the ban on the sale of the book illegitimate, as confidentiality can no longer constitute an overriding requirement (*Editions Plon v. France*, cited above, § 53).

The availability of information on the Internet also gave the Court reason to justify restrictions on access to broadcast media. In the case of *Animal Defenders International v. the United Kingdom* [GC] (no. 48876/08, § 119, ECHR 2013 a restriction on access to radio and television was offset by access to other means of communication (such as Internet and the social networks). More generally, the Court indicated that “*other media remain open to the present applicant and access to alternative media is key to the proportionality of a restriction on access to other potentially useful media*”.

(b) Limits

The Court has stated its views on the influence of the Internet compared with the other, more traditional, broadcast media and considered its impact to be less strong. That is why restrictive measures applied to the broadcast media may spare the Internet. For example, it is coherent to limit a ban on political advertising to certain specific media (radio and television), because of the “*particular influence*” of those traditional media (*Animal Defenders International v. the United Kingdom* [GC], cited above, § 119). The position of the Court, which is not shared by certain judges, reads as follows:

“In particular, the Court recognises the immediate and powerful effect of the broadcast media, an impact reinforced by the continuing function of radio and television as familiar sources of entertainment in the intimacy of the home (...) In addition, the choices inherent in the use of the Internet and social media mean that the information emerging therefrom does not have the same synchronicity or impact as broadcasted information. Notwithstanding therefore the significant development of the Internet and social media in recent years, there is no evidence of a sufficiently

serious shift in the respective influences of the new and of the broadcast media (...) to undermine the need for special measures for the latter.”

A telephone interview aired in a programme available on an Internet site also has a less direct impact on viewers than a television programme (*Schweizerische Radio- und Fernsehgesellschaft SRG v. Switzerland*, no. 34124/06, § 64, 21 June 2012).

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

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 v. the United Kingdom*, 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.)).”

i 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, for example 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,¹⁴ 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). 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, promoting “*geniocracy*” and proposing cloning-related services was justified to protect health and morals and to prevent crime and met a pressing social need (*Mouvement raëlien suisse*, cited above, § 76). Note that the issue in this case was a ban on advertising in public places imposed on an Internet site that had a certain proselytising function, rather than the actual content of the site.

ii Whistle blowers

Whistle blowers must use appropriate means to achieve their aims. Their role is to be able to divulge facts likely to interest the public and, in so doing, contribute to transparency in the dealings of representatives of the public authorities. However, they must proceed “with the necessary vigilance and moderation”. The rights of whistle blowers end where the need to protect other people's personalities, and particularly their

¹⁴. Where the minor has not reached the statutory age of criminal responsibility.

reputations, begins. Nor do the rights of whistle blowers extend to the publication of false or deformed information.

It is for the domestic courts - which are better placed than the Court to appreciate all the facts and evaluate the impact of the statements made - to weigh up all the interests in issue. A proper balance must be struck between the competing interests and there must be no arbitrariness in the decisions of the domestic courts. That was the Court's view in case brought by an association whose aim is to fight corruption in public administration (*Růžový panter, o.s. v. the Czech Republic*, no. 20240/08, § 33, 2 February 2012). The Court set out the following principle, applicable in all circumstances (§ 32):

“The distortion of the truth, in bad faith, may sometimes overstep the limits of acceptable criticism: a true statement may be accompanied by additional remarks, value judgments, suppositions, even insinuations that could give the public the wrong picture.”

In this case the militant association had published a press release on its website relating to light heating oils and a case of massive tax evasion which had received widespread media attention. The press release took the form of a summons addressed to an MP and Vice-President of the Chamber of Deputies, who subsequently became Interior Minister and who was invited to clarify his relationship with certain people. The association complained about the damages it had been ordered to pay. The courts had punished it for having published information about the MP which was inaccurate and distorted, and therefore misleading. The Court found no violation of Article 10:

“34. The Court accepts that in publishing the offending information the applicant association's intention was to run a check, in the public interest, on the personal connections of the MP I.L., about whom they had doubts. It notes, however, that the applicant association could easily have used appropriate measures to achieve its aims (...), without having to use the full name of T.P., who was mentioned in the press release as a private individual, or to refer to him in misleading terms.

35. Accordingly, the Court concludes that the “penalty” pronounced against the applicant association was based on “relevant and sufficient” reasons.

36. As to the “proportionality” of the penalty, the Court notes that the applicant association was found guilty in civil proceedings and instructed to delete the press release from its website, to publish an apology and to pay T.P. damages in the amount of (...) (approximately 3,300 euros at the time). (...) In the Court's opinion the measures taken against the applicant association were not disproportionate to the legitimate aim pursued, the applicant association had difficulty complying with them. (...)”

iii Protection of personality

Protection of personality may also justify an injunction against certain Internet postings (*PETA Deutschland v. Germany*, no. 43481/09, § 49, 8 November 2012). To ban a poster campaign, launched by an animal rights organisation, showing photos of prisoners in concentration camps alongside photos of animals in mass breeding facilities, was possible, in particular in order to protect the “*rights of others*”. The Court found that there had been no violation of Article 10, agreeing with the German courts in this case, which had rightly considered that the poster campaign was a reminder of the suffering and persecution of which the applicants had been victim. They were right to hold that this “*instrumentalisation*” of the applicants’ suffering violated their personality rights as Jews residing in Germany and as survivors of the Holocaust. The facts of the case cannot be considered independently of the historical and social context. A reference to the Holocaust must be examined in the specific context of Germany’s past.

In addition, no criminal sanction had been pronounced, only a civil injunction on the applicant association to refrain from publishing seven posters. What is more, the applicant association had other means at its disposal for drawing public attention to the protection of animals (*ibid.*, § 49).

(4) The “duties and responsibilities” of an Internet news portal as regards online comments posted by users

Delfi AS v. Estonia [GC], cited above, § 110, was the first case in which the Court had been called upon to examine a complaint concerning the liability of a company running an Internet news portal because of comments posted on the portal by its users. The portal provided a platform, run on commercial lines, for user-generated comments on previously published content. In such cases some users – whether identified or anonymous – can post clearly unlawful comments which infringe the personality rights of others. The Court held that the commercial operator of an Internet news portal may be held accountable for offensive comments posted on the portal by users.

Two specific features distinguished this eagerly awaited case:

- it concerned a major professionally and commercially operated Internet news portal publishing news articles written by its staff on which users were invited to comment. The Court pointed out that this case did not concern other types Internet fora where third-party comments could be posted, such as Internet discussion groups, bulletin boards or social media platforms (§ 116).
- the comments posted by users – whether identified or anonymous – violated the personality rights of others and constituted hate speech

advocating acts of violence against others (see also section VI-3 below).

The applicant company, Delfi AS, complained that the domestic courts had found it liable for the offensive comments left by its users under one of its online news articles, about a ferry company. Delfi AS removed the offending comments, at the request of the lawyers of the owner of the ferry company, some six weeks after they were published.

The clearly unlawful comments infringed the personality rights of others. The question was not whether the rights of the authors of the comments to freedom of expression had been infringed, but whether finding Delfi AS liable for these third-party comments had infringed its right to impart information.

On this new question the Grand Chamber held (§ 113):

“(…) the recognition of differences between a portal operator and a traditional publisher, is in line with the international instruments in this field, which manifest a certain development in favour of distinguishing between the legal principles regulating the activities of the traditional print and audiovisual media on the one hand and Internet-based media operations on the other. In the recent Recommendation of the Committee of Ministers to the member States of the Council of Europe on a new notion of media, this is termed a “differentiated and graduated approach [that] requires that each actor whose services are identified as media or as an intermediary or auxiliary activity benefit from both the appropriate form (differentiated) and the appropriate level (graduated) of protection and that responsibility also be delimited in conformity with Article 10 of the European Convention on Human Rights and other relevant standards developed by the Council of Europe” (see § 7 of the Appendix to Recommendation CM/Rec(2011)7, quoted in paragraph 46 above). Therefore, the Court considers that because of the particular nature of the Internet, the “duties and responsibilities” that are to be conferred on an Internet news portal for the purposes of Article 10 may differ to some degree from those of a traditional publisher, as regards third-party content.”

Furthermore, a professional Internet publisher should be familiar with the legislation and case-law, as it can easily seek legal advice on these matters. The Court considered that the publisher was in a position to assess the risks related to its activities and to foresee, to a reasonable degree, the consequences which these could entail in terms of its “*liability and duties*”:

“129. (...) as a professional publisher, the applicant company should have been familiar with the legislation and case-law, and could also have sought legal advice. (...) Thus, the Court considers that the applicant company was in a position to assess the risks related to its activities and that it must have been able to foresee, to a reasonable degree, the consequences which these could entail. It therefore concludes that the interference in issue was “prescribed by law” within the meaning of the second paragraph of Article 10 of the Convention.”

The Grand Chamber then laid down four criteria for determining whether or not the finding that Delfi AS was liable for comments posted by third parties had violated its freedom of expression. It took into account:

- the extreme nature of the comments in question (they violated “*human dignity*” and were “*clearly unlawful*”);
- the fact that the comments were posted in reaction to an article published by the applicant company on its professionally managed news portal run on a commercial basis (readers being invited to post their comments without registering their names or providing any means of identification);
- the insufficiency of the measures taken by the applicant company to remove the offending comments without delay after publication (they were left on line for six weeks);
- and the moderate sanction imposed on the applicant company (320 euros).

In the end the Court found no violation of Article 10.¹⁵ The decision of the Estonian courts to hold Delfi AS accountable was justified and did not constitute a disproportionate restriction on the company’s right to freedom of expression. So, for the first time the Court acknowledged that the liability of the operator of a commercial news portal was engaged as a result of offensive comments posted by its users.

(5) *Press publications on the Internet: reinforcement of journalists’ “duties and responsibilities”*

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.”

More recently, the Court has specified (*Delfi AS v. Estonia* [GC], cited above):

“134. In considering the “duties and responsibilities” of a journalist, the potential impact of the medium concerned is an important factor and it is commonly acknowledged that the audiovisual media often have a much more immediate and powerful effect than the print media (see *Purcell and Others v. Ireland*, no.15404/89, Commission decision of 16 April 1991, Decisions and Reports 70, p. 262). The methods of objective and balanced reporting may vary considerably, depending among other things on the media in question (see *Jersild*, cited above, § 31).”

¹⁵. See also the separate opinions appended to the judgment.

Clearly the publication of false information on the Internet is not protected by the Convention (*Schuman v. Poland* (dec.), no. 52517/13, 3 June 2014).

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).

In the *Times Newspapers Ltd* case (§ 47) the Court:

“(…) does not consider 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.”

However, the “duties and responsibilities” of journalists do not go as far as to require the removal from the public electronic archives of the press of all traces of past publications deemed defamatory in final court decisions. In the *Węgrzynowski and Smolczewski v. Poland* case (cited above), the Court found no violation of Article 8 in respect of a press article considered defamatory that had been kept in a newspaper’s Internet archives. Indeed, the legitimate interest of the public in access to the public Internet archives of the press is protected under Article 10 of the Convention. Furthermore, it is not the role of judicial authorities to engage in rewriting history by ordering the removal from the public domain of all traces of publications which have in the past been found defamatory by final judicial decisions. In a situation such as this, to add a comment to the article on the website informing the public of the outcome of the defamation proceedings is one means of reconciling the competing interests in issue (protecting a person’s reputation and freedom of the press) (§§ 60-68).

Freedom of the press on the Internet 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. The need to protect people’s personality rights and reputations is at stake. Consequently, information already published on the Internet – and thus in the public domain – does not give the press an absolute right to reproduce it. In *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, cited above, the Court said (§ 63):

“(…)The risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press. Therefore, the policies governing reproduction of material from the printed media and the Internet may differ. The latter undeniably have to be adjusted according to the technology’s

specific features in order to secure the protection and promotion of the rights and freedoms concerned.”

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 (*Aleksey Ovchinnikov v. Russia*, cited above, § 50), where the Court reasoned as follows:

“50. That being said, the Court considers that in certain circumstances a restriction on reproducing information that has already entered the public domain may be justified, for example to prevent further airing of the details of an individual's private life which do not come within the scope of any political or public debate on a matter of general importance. The Court reiterates in this connection that in cases of publications relating the details of an individual's private life with the sole purpose of satisfying the curiosity of a particular readership, the individual's right to the effective protection of his or her private life prevails over the journalist's freedom of expression (...).”

The Court has held that 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 (*ibid.*, §§ 50-52).

It is possible, on the other hand, to publish a photo of a politician in connection with a report on a matter of general interest, especially when his photo is to be found on a professional website (*Krone Verlag GmbH & Co. KG v. Austria*, no. 34315/96, § 37, 26 February 2002).

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).

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*, cited above. 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 online version of the article had received more than 400,000 hits.

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

(a) 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.

(b) 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).

The Court regularly reiterates that there is very little scope under Article 10 § 2 for restrictions on political speech or debates on matters of general interest (see the recent case of *Mouvement raëlien Suisse v. Switzerland* [GC], cited above, § 61, and, for an exception in view of the specific context, *PETA Deutschland v. Germany*, cited above, § 46).

As for trade unions, their representatives must be able to express their demands concerning working conditions to their employer, failing which they would be deprived of an essential means of action; disproportionate penalties must not dissuade trade union representatives from seeking to defend their members' interests (*Szima v. Hungary*, no. 29723/11, § 28, 9 October 2012).

(c) 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).

The posting on line of personal attacks that exceed what can legitimately be called a debate of ideas is not protected (*Tierbefreier e.V. v. Germany*, no. 45192/09, § 56, 16 January 2014, no violation of Article 10).

In the eyes of the Court the posting on line of statements attributed to third parties and placed in inverted commas amounts to affirming the existence of a fact; it is accordingly for the person who posted the reference to demonstrate that it is genuine (*De Lesquen du Plessis-Casso v. France (no. 2)*, no. 34400/10, § 35, 30 January 2014, no violation of Article 10).

The pressing social need to maintain discipline in the police force may justify sanctions for criticism that undermines the credibility of the police. The publication on the website of a police trade union of statements by the union leader denigrating the police force and its leaders is capable of undermining the authority of the police. For the Court this trade union leader had considerable influence and should have had to exercise her right to freedom of expression in accordance with the “duties and responsibilities” which that right carries with it in the specific circumstances of her status and in view of the special requirement of discipline in the police force (*Szima v. Hungary*, cited above, § 32, no violation of Articles 10 and 11 of the Convention).

Lastly, a case has been brought before the Court concerning a music video published on line and considered “*extremist*”, to which Internet filters have been applied (*Alekhina and Others v. Russia*, no. 38004/12, communicated to the respondent State¹⁶).

(7) The chilling effect on freedom of expression

The nature and severity of the sanctions imposed must be taken into account when examining the proportionality of a restrictive measure (*Morice v. France* [GC], cited above, § 127; *Cumpăună and Mazăre v. Romania* [GC], no. 33348/96, § 111, ECHR 2004-XI).

Generally the Court has held that when the national authorities restrict the fundamental rights of private individuals or legal entities, they are required “to choose the means that cause the least possible prejudice to the

¹⁶. Case communicated *inter alia* under Article 10 of the Convention on 2 December 2013.

rights in question” (*Mouvement raëlien Suisse v. Switzerland*, [GC], cited above, § 75).

Where journalists in particular are concerned, the authorities must not deter journalists “*from contributing to public discussion of issues affecting the life of the community*” (*Lingens v. Austria*, 8 July 1986, § 44, Series A no. 103). So exceptions to freedom of expression must be interpreted narrowly (*Oberschlick v. Austria* (no. 2), 1 July 1997, § 29, *Reports of judgments and decisions* 1997-IV; for a case of overstepping admissible “*provocation*”, however, see *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, ECHR 2007-IV, no violation).

Imposing a prison sentence for press-related offences will only exceptionally be compatible with journalists’ freedom of expression, in cases of serious breaches of fundamental rights, for example, such as 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.¹⁷ The fear of a prison sentence will have a “*chilling effect*” on the exercise of freedom of the press (*Fatullayev*, cited above, §§ 100-103). In the *Belpietro v. Italy* judgment (no. 43612/10, § 61, 24 September 2013), the Court held that the imposition of a prison sentence, even suspended, may have a significant chilling effect.

Where fines are concerned, the relatively moderate nature of this type of sanction would not suffice to negate the risk of a chilling effect on the exercise of the right to freedom of expression (*Morice v. France*, cited above, § 176). The Court has held, for example, that criminal penalties for satirical commentary are likely to have a chilling effect (*Eon v. France*, cited above, §§ 60-61).

The position of strength occupied by a government commands it to show restraint in the use of criminal proceedings, especially when there are other means of responding to the unjustified attacks and criticisms of the opposition or the media. That is why holding an investigative journalist in pre-trial detention for his comments against the government is likely to “*create a climate of self-censorship for him and for all investigative journalists wishing to research and comment on the conduct and activities of State bodies*” (*Nedim Şener v. Turkey*, no. 38270/11, § 122, 8 July 2014).

The Court has affirmed that political reporting and investigative journalism attract a high level of protection under Article 10 and that the threat of criminal sanctions or punitive fines would create a chilling effect in this regard (*Mosley v. the United Kingdom*, cited above, § 129).

In finding that there is no legal obligation of prior notification under the Convention when the press posts texts, pictures or videos on the Internet,

¹⁷. [Resolution 1577 \(2007\)](#) of the Parliamentary Assembly, *Towards decriminalisation of defamation*, to which the Strasbourg Court has referred on a number of occasions.

the Court referred *inter alia* to the chilling effect such an obligation was likely to have on the media, thereby underlining its concern about this sensitive issue (*Mosley v. the United Kingdom*, cited above, § 126).

The obviously detrimental chilling effect of a sanction must be assessed in each particular case. Even a civil or a lenient sanction may raise a problem (*Axel Springer AG v. Germany* [GC], cited above, § 109). For example, a mere civil injunction on any new publication of a passage from a news article can have a chilling effect according to the Court's case-law (*Axel Springer AG v. Germany* (no. 2), no. 48311/10, § 76, 10 July 2014, with further references).

It may be reasonable, however, to consider that a purely financial penalty would not constitute sufficient punishment or deterrent (*Palusinski v. Poland* (dec.), no. 62414/00, ECHR 2006-XI). In Internet-related cases the Court has referred to the following factors (*Perrin*, (dec.) cited above):

“(…) Unlike in the above-cited *Cumpănă and Mazăre* case and as noted above, the purpose of the present expression was purely commercial and there is no suggestion that it contributed to any public debate on a matter of public interest or that it was of any artistic merit: the applicant's conviction cannot therefore be said to engender any obviously detrimental chilling effect. Moreover, given that the applicant 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.”

Accordingly, the nature and interest of the publication complained of and the possibility of making money from it are relevant considerations when measuring the impact of the sanction, deterrent or otherwise, for the purposes of the Convention.

IV. INTERNET AND INTELLECTUAL PROPERTY

(1) 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.

(2) Intellectual property falls under Article 1 of Protocol No. 1 to the Convention

(a) 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:

i. 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).

ii. 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).

iii. 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).

iv 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.

v 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 and 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.

(b) Moral rights

The case-law on this component of intellectual property law has become more abundant in recent years.

i Article 1 of Protocol no. 1

The Court has 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 (*SC Editura Orizonturi SRL v. Romania*, no. 15872/03, 13 May 2008 - violation).

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.

The Court has recently held that copyright holders are protected by the guarantees enshrined in Article 1 of Protocol No. 1 to the Convention (*Neij and Sunde Kolmisoppi v. Sweden* (dec.), no. 40397/12, 9 February 2013). The applicants in the case concerned had contributed in various ways to the creation of an Internet site called "*The Pirate Bay*", (PB) one of the world's leading file-sharing services on the Internet. Via this service, which used what was called the BitTorrent protocol, users could contact with each other through torrent files (which in practice function as Internet links). Once in contact, the users could then, outside TPB's computers, exchange digital material through file-sharing. The applicants were found guilty of complicity to commit crimes in violation of the Copyright Act, for helping users of the site to infringe the copyright protecting music, films and computer games. The Court stressed the weight to be accorded to the protection of copyright holders (see below).

ii Other provisions

By facilitating the communication of information Internet sites can make it possible to share music, films and computer games in violation of copyright (*Neij and Sunde Kolmisoppi v. Sweden* (dec.), cited above). For the Court, the respondent State must "*balance the two competing interests protected by the Convention*". On the one hand there is the interest of the Internet sites in facilitating the sharing of information under Article 10 of the Convention and, on the other hand, there is respect for the rights of the authors of protected works, which come under Article 1 of Protocol No. 1.

The Court has held that the existence of author's rights which need to be protected restricts the scope freedom of expression. Consequently, the State has a wide margin of appreciation (see also).

The *Neij and Sunde Kolmisoppi v. Sweden* decision, cited above, concerned the conviction of the operators of an Internet site that allowed its users to share files in violation of copyright. The application was rejected and the Court stated, *inter alia*, that:

"(...) the interference pursued the legitimate aim of protecting the plaintiffs' copyright to the material in question. Thus, the convictions and damages awarded

pursued the legitimate aim of “protection of the rights of others” and “prevention of crime” within the meaning of Article 10 § 2.”

The Court held that the obligation on national authorities to protect the plaintiffs’ property rights, in accordance both with copyright laws and with the Convention, was a valid reason for restricting freedom of expression. Furthermore, in this case the applicants had not taken any action to remove the offending files, despite having been urged to do so.

The case of *Ashby Donald and Others v. France*, cited above, concerned the criminal conviction of photographers for having posted on the Internet photographs of fashion shows without the authorisation of the rights holders. The Court found no violation of Article 10. Posting photographs on the Internet for commercial purposes without the authorisation of the rights holders - the fashion houses whose creations appeared in the offending photographs - is an infringement of the lawful protection of copyright. That being so, the domestic courts rightly put the rights of the fashion designers before the photographers’ right to freedom of expression.

In the more recent case of *Akdeniz v. Turkey* (dec.) (no. 20877/10, 11 March 2014) the Court reiterated that “*when it comes to balancing the possibly conflicting interests in issue, such as “the right to freedom to receive information” and “the protection of authors’ rights” (...) the domestic authorities have a particularly wide margin of appreciation*”. The application was lodged with the Court by a regular user of Internet sites specialising in the dissemination of music. He complained that the authorities had blocked the two websites because they were disseminating musical works in defiance of the rules regulating copyright on those works. The application was declared inadmissible (cf. part V, 5 below).

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 masking his face and

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).

(3) 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 in relation to Article 1 of Protocol No. 1 to the Convention are few in number.

As regards the approach to the protection of the rights concerned, it is noteworthy that the Court's approach does not differ from that which it usually adopts; in particular, it balances the different rights and interests in issue, and the necessity and proportionality of interference with the various rights protected by the Convention. The case-law highlights the importance of protecting authors' rights on the Internet.

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 to 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 restrict information received from abroad only 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 generally been 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 either that that provision was 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 interpreted freedom to receive information more broadly (*Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, § 35, 14 April 2009). In the case of *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria* (no. 39534/07, § 41, 28 November 2013) the Court moved towards a broader interpretation of the notion of “*freedom to receive information*”, acknowledging a right of access to information. 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, and *Társaság a Szabadságjogokért*, cited above). Another significant case is *Youth Initiative for Human Rights v. Serbia*, cited above. In that judgment the Court stressed once again that “*freedom to receive information*” includes the right of

access to information, in line with the reasoning in *Kenedi v. Hungary* (no. 31475/05, 26 May 2009).

Also, the function of creating forums for public debate is not limited to the press. That function may also be exercised by non-governmental organisations, the activities of which are an essential element of informed public debate (see *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung*, cited above, §§ 33-34).

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 State archives is an essential element of the exercise of Article 10 rights (*Kenedi*, cited above). The Court also found in favour of a journalist who wanted to publish information on the use of public funds by the municipal authorities, pointing out that his intention was to make a legitimate contribution to the public debate on good governance (*Roşiiianu v. Romania*, no. 27329/06, 24 June 2014).

The Court has further emphasised the importance of the right to receive information also from private individuals and legal entities. While political and social news might be the most important information protected by Article 10, 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). The Grand Chamber has emphasised the importance of the principle of the “*free exchange of opinions and ideas*” (*Gillberg v. Sweden* [GC], no. 41723/06, § 95, 3 April 2012).

(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 a 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).

If 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, and *Appleby and Others*, cited above, §§ 41-49).

(5) Access to Internet

It is clear to begin with that blocking Internet access may be “*in direct conflict with the actual wording of paragraph 1 of Article 10 of the Convention, according to which the rights set forth in that Article are secured ‘regardless of frontiers’*” (*Ahmet Yildirim v. Turkey*, cited above, § 67).

That judgment merits particular attention. It concerns a preventive court order blocking access to all *Google Sites*. The applicant owns and runs a website on which he publishes his academic work, among other things. The website was created using the Google Sites website creation and hosting service (which facilitates the creation and sharing of a website within a group). In the course of criminal proceedings against a third-party site, under a law prohibiting insults against the memory of Atatürk, all access to Google Sites was blocked (neither Google Sites as such, nor the applicant's site were the subject of the criminal proceedings). The measure was to remain in place until such time as a decision was given on the merits, or the illegal content of the site hosted by Google Sites was removed. The measure therefore amounted to prior restraint, as it was imposed prior to any judgment on the merits.

In preventing the applicant from accessing his own site, this general blocking of access to a part of the Internet affected his right to receive and impart information and ideas. It also blocked access to all sites hosted by

Google Sites. The fact that it was a “restriction on Internet access” (and not a wholesale ban), “does not diminish its significance, especially since the Internet has now become one of the principal means by which individuals exercise their right to freedom of expression and information, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest.”. The Court found a violation of Article 10, based inter alia on the following principles (§ 64):

“(…)the Court considers that such prior restraints are not necessarily incompatible with the Convention as a matter of principle. However, a legal framework is required, ensuring both tight control over the scope of bans and effective judicial review to prevent any abuse of power (…). In that regard, the judicial review of such a measure, based on a weighing-up of the competing interests at stake and designed to strike a balance between them, is inconceivable without a framework establishing precise and specific rules regarding the application of preventive restrictions on freedom of expression (…).”

In that case the Court found fault with the national authorities:

- for failing to examine whether a method could have been chosen whereby only the offending website was made inaccessible;
- for failing to take into consideration the fact that such a measure, by rendering large quantities of information inaccessible, substantially restricted the rights of Internet users and “had a significant collateral effect”;
- because there were insufficient procedures for avoiding abuse: domestic law should provide for safeguards to ensure that a blocking order in respect of a specific site is not used as a means of blocking access in general (§§ 66-68).

The Court found no violation, on the other hand, in a complaint lodged by a regular user of Internet sites specialising in the dissemination of music (“myspace.com” and “last.fm”) when the authorities blocked the two websites because they were disseminating musical works in violation of copyright (*Akdeniz v. Turkey*, (dec.), cited above). The applicant complained before the Strasbourg Court that this measure violated his right to receive information. Unlike in the *Ahmet Yıldırım* case against the same State, however, the Court rejected the application. The mere fact that users of an Internet site disseminating musical works suffered the indirect consequences of a blocking measure did not suffice to make them “victims” within the meaning of Article 34 of the Convention. The users concerned were deprived of only one among many means of listening to music and could easily access a whole range of musical works in many other ways without infringing copyright laws. Furthermore, the applicant did not claim that he

had been deprived of an important means of communication or of the possibility of taking part in debate on matters of general interest.

The Court has communicated an application against Turkey under Article 10 concerning a decision to block access to *YouTube*.¹⁸ And in September 2010 it communicated an application against Lithuania lodged by a detainee who was refused access to the Internet in order to enrol at a university.¹⁹

(6) *Conclusion*

The above short overview demonstrates that the right to information has received increasing recognition by the Court. According to the recent case-law, the Internet is a tool that enables citizens to exercise their right to “*freedom of information*” (*Ahmet Yildirim*, cited above, § 54). The Convention thus has an increasingly important role to play in this area. The *Ahmet Yildirim* case also refers to texts on this subject produced by the Council of Europe, the European Union and the United Nations, as well as to a comparative analysis of national systems (§§ 19-37).

State interference in the form of blocking or restricting access to the Internet is subject to strict scrutiny by the Court. Recent case-law shows that the extent of the States’ obligations in the matter depends on the nature of the information posted on line, the subject matter, and the status of the applicant (owner or user of a site). Where infringements of “*copyright protection*” are concerned which do not raise any important question of general interest, the Court considers that the domestic authorities enjoy a particularly wide margin of appreciation (*Akdeniz v. Turkey* (dec.), cited above, § 28). This also applies to users of commercial websites, but the margin of appreciation enjoyed by the States must be put in perspective when what is in issue is not a strictly “*commercial*” message but one that contributes to a debate on matters of “*general interest*” (*Ashby Donald and Others*, cited above, § 41).

The situation is different when it is impossible for the owner and user of a website to access his own site because of a broader blockage of access to Google. In such a case, in order to comply with Convention standards it is necessary to adopt a particularly strict legal framework - one that limits the restriction and provides an effective safeguard against possible abuse. In this case the blocking of Internet access produced a serious “*collateral censorship*” effect (*Ahmet Yildirim*, cited above, §§ 64-66. In this case the Court acknowledged and upheld the “*rights of Internet users*” and the need

¹⁸. Cases communicated on 16 April 2014: *Engiz, Akdeniz, Altıparmak v. Turkey*, no. 48226/10 and no. 14027/11, see:

<http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-144097>

¹⁹. *Jankovskis v. Lithuania*, no. 21575/08; for the facts and the questions to the parties see: <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=875334&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

for the national authorities - including the criminal courts - to weigh up the competing interests at stake. Any restrictions must be limited to what is strictly necessary to achieve the legitimate aim pursued.

Also, issues may arise if a State provides a public service exclusively through Internet which is not widely accessible or is costly to access.²⁰

VI. OBLIGATION OF STATES TO COMBAT VIOLENCE AND OTHER CRIMINAL OR UNLAWFUL ACTIVITIES

1) Internet: positive obligations of States and protection of individuals' rights

(a) Protecting the integrity of vulnerable individuals, including children and minors

In the course of its judgments the Court has identified various categories of people it considers “vulnerable”. This vulnerability has certain consequences when the Court has to decide whether or not there has been a violation of the rights enshrined in the Convention, for example with regard to positive obligations the Court has identified which are closely linked to the vulnerability of the applicants.

In the Internet context the Court has recently taken into consideration the impact data accessible on line can have on children (*Mouvement raëlien suisse v. Switzerland* [GC], cited above, § 72). Several other judgments merit special attention where the Internet is concerned.

i 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

20. 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.
[http://hudoc.echr.coe.int/sites/eng-comold/Pages/search.aspx#{"appno":\["30502/05"\]}](http://hudoc.echr.coe.int/sites/eng-comold/Pages/search.aspx#{)

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.

ii 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 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.”

(b) Online publication of photos showing sexual practices

i Responsibility of Internet users

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.

ii 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."

(c) Internet and defamation, threats and insults

In *Delfi AS v. Estonia* [GC], cited above, comments had been posted in reaction to an article published on an Internet news portal. They were denigrating and defamatory since they were vulgar, degraded human dignity and contained threats (§§ 114 and 117). The Delfi AS news portal did not remove them until after they were notified by the offended party a few

weeks later. The Court found that the comments were not protected by Article 10. It laid down the following principles (§ 110):

“The Court notes at the outset that user-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression. That is undisputed and has been recognised by the Court on previous occasions (see *Ahmet Yildirim v. Turkey*, no. 3111/10, § 48, ECHR 2012, and *Times Newspapers Ltd (nos. 1 and 2) v. the United Kingdom*, nos. 3002/03 and 23676/03, § 27, ECHR 2009). However, alongside these benefits, certain dangers may also arise. Defamatory and other types of clearly unlawful speech, including hate speech and speech inciting violence, can be disseminated like never before, worldwide, in a matter of seconds, and sometimes remain persistently available on line. These two conflicting realities lie at the heart of this case. Bearing in mind the need to protect the values underlying the Convention, and considering that the rights under Article 10 and 8 of the Convention deserve equal respect, a balance must be struck that retains the essence of both rights. Thus, while the Court acknowledges that important benefits can be derived from the Internet in the exercise of freedom of expression, it is also mindful that liability for defamatory or other types of unlawful speech must, in principle, be retained and constitute an effective remedy for violations of personality rights.”

(d) Protection of immigrants and foreigners

i Racist or xenophobic discourse 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*".

ii Incitement to 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).

(e) Internet and the disclosure of financial and wealth data

i Importance of transparency in politics

In *Wypych 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.”

Publishing an article on the financial situation of a member of the European Parliament, on the other hand, did not raise a problem. Among other considerations, the Court took into account that the photo in question could be found on the Internet, so the applicant could not complain of any violation of his privacy in that respect. Furthermore, he was a politician, and having thus entered the public arena he had to accept the fact that he would be the object of considerable media attention (*Krone Verlag GmbH & Co. KG*, cited above, § 37).

ii 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 online 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 the potentially defamatory articles should be removed from the 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.

(f) Protection of Internet communications and States' obligations

Internet-related disputes are on the increase and more cases will certainly be brought before the Court. It will then be called upon to apply the principles it has already elaborated in other contexts. Those principles are explained below.

2) Positive obligations of States to prevent violence and other criminal or illegal activities, as developed in other contexts

(a) 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.

(b) Positive obligation to protect individuals against physical harm and sexual abuse

i Positive obligation to punish rape and other violences and sexual abuse, under Articles 3 and 8

As a matter of principle, measures must exist at the national level to guarantee respect for human dignity and the protection of the best interests of the child (*C.A.S. and C.S. v. Romania*, no. 26692/05, § 82, 20 March 2012). In that judgment the Court clearly acknowledges that the States have an obligation under Articles 3 and 8 to ensure that an effective criminal investigation is carried out in cases of violence against children. The Court also refers expressly to the international obligations of States and in particular the *United Nations Convention on the rights of the child*.

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.

ii Other positive obligations under Article 8

The member States also have positive obligations under the Convention in respect of less serious offences committed by private individuals that violate children’s privacy or harm them physically or mentally. In the case of *Söderman v. Sweden* [GC] (no. 5786/08, ECHR 2013) the Court found a violation of the right to respect for one’s private life (Article 8 of the Convention) because of the lack of clear legal provisions criminalising the act of filming a child naked in her home and without her knowledge. Even though this case did not involve any physical violence, abuse or contact, there should have been “*an adequate legal framework providing the applicant with protection*” against such conduct (§§ 85 and 89).

(c) Positive obligation to combat racism, hate speech, discrimination, intolerance and the glorification of violence and terrorism

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

– *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

“(…) tolerance and 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.

The Court has also emphasised that, without amounting to a direct call to acts of hate, some statements may be serious and detrimental in a manner contrary to the Convention. It has repeatedly held that discrimination based on sexual orientation is as serious as that based on race, origin or colour (*Vejdeland v. Sweden*, no. 1813/07, 9 February 2012). So particular vigilance is necessary in respect of online comments by Internet users, even if it is not their intention to express scorn for individuals or groups. Sometimes a debate on a legitimate subject can degenerate and trigger discriminatory comments detrimental to the dignity, the rights or the reputation of minority or vulnerable groups, in violation of the Convention.

According to Article 17 of the Convention, speech incompatible with the values proclaimed and guaranteed by the Convention is not protected by Article 10. Examples of such speech include negation of the Holocaust, the justification of a pro-Nazi policy, associating all Muslims with a serious act of terrorism, calling Jews “*the source of all evils in Russia*” (*Lehideux and Isorni v. France*, 23 September 1998, §§ 47 and 53, *Reports 1998-VII*; *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003-IX; *Norwood v. the United Kingdom* (dec.), no. 23131/03, ECHR 2004-XI; *Witzsch v. Germany* (dec.), no. 7485/03, 13 December 2005, and *Pavel Ivanov v. Russia* (dec.), no. 35222/04, 20 February 2007). “(...) 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*, cited above, §§ 53 and 47) 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 (see also *Garaudy v. France (dec.)*, (cited above).

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 does not benefit from the protection of Article 10 (*Pavel Ivanov*, cited above). The same applies to other remarks directed against the Convention's underlying values: racist and anti-Semitic (*Garaudy*, cited above) or islamophobic remarks (*Norwood*, cited above).

APPENDIX - LIST OF JUDGMENTS AND DECISIONS

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- [A.D. v. the Netherlands](#) (dec.), no. 21962/93, 11 January 1994
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[Airey v. Ireland](#), 9 October 1979, Series A no. 32
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[Amann v. Switzerland](#) [GC], no. 27798/95, ECHR 2000-II
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[Axel Springer AG v. Germany](#) [GC], no. 39954/08, ECHR 2012
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- [B.B. v. France](#), no. 5335/06, 17 December 2009 (*French only*)
[Bartnik v. Poland](#) (dec.), no. 53628/10, 11 March 2014
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[Bohlen v. Germany](#), no. 53495/09, 19 February 2015
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- [C.A.S. and C.S. v. Romania](#), no. 26692/05, 20 March 2012
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[Comité de rédaction de Pravoye Delo et Shtekel c. Ukraine](#) , n° 33014/05, 5 mai 2011
[Copland v. the United Kingdom](#), no. 62617/00, ECHR 2007-I
[Cox v. Turkey](#), no. 2933/03, 20 May 2010

[Cumpăna and Mazăre v. Romania](#) [GC], no. 33348/96, § 111, ECHR 2004-XI

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[Dalea v. France](#) (dec.), no. 964/07, 2 February 2010 (*French only*)
[De Haes and Gijssels v. Belgium](#), 24 February 1997, § 48, *Reports of Judgments and Decisions* 1997-I
[De Lesquen du Plessis-Casso v. France \(no. 2\)](#), no. 34400/10, 30 January 2014
[Delfi AS v. Estonia](#) [GC], no. 64569/09, 16 June 2015

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[Editions Plon v. France](#), no. 58148/00, ECHR 2004-IV
[Editorial Board of Pravoye Delo and Shtekel v. Ukraine](#), no. 33014/05, 5 May 2011
[Eon v. France](#), no. 26118/10, 14 March 2013

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[Fatullayev v. Azerbaijan](#), no. 40984/07, 22 April 2010
[Féret v. Belgium](#), no. 15615/07, 16 July 2009, 16 July 2009 (*French only*)
[Flinkkilä and Others v. Finland](#), no. 25576/04, 6 April 2010

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[Gardel v. France](#), no. 16428/05, 17 December 2009 (*French only*)
[Gaskin v. the United Kingdom](#), 7 July 1989, Series A no. 160
[Gillberg v. Sweden](#) [GC], no. 41723/06, § 95, 3 April 2012
[Guerra and Others v. Italy](#), 19 February 1998, *Reports of Judgments and Decisions* 1998-I
[Gündüz v. Turkey](#), no. 35071/97, ECHR 2003-XI

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[Halford v. the United Kingdom](#), 25 June 1997, *Reports of Judgments and Decisions* 1997-III
[Handyside v. the United Kingdom](#), 7 December 1976, Series A no. 24
[Hirsi Jamaa and Others v. Italy](#) [GC], no. 27765/09, ECHR 2012

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[Jaloud v. the Netherlands](#) [GC], no. 47708/08, ECHR 2014
[Jersild v. Denmark](#), 23 September 1994, § 30, Series A no. 298

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[K.H. and Others v. Slovakia](#), no. 32881/04, 28 April 2009
[K.U. v. Finland](#), no. 2872/02, 2 December 2008
[Kenedi v. Hungary](#), no. 31475/05, 26 May 2009
[Kennedy v. the United Kingdom](#), no. 26839/05, 18 May 2010
[Khelili v. Switzerland](#), no. 16188/07, 18 October 2011
[Khmel v. Russia](#), no. 20383/04, 12 December 2013
[Khurshid Mustafa and Tarzibachi v. Sweden](#), no. 23883/06, 16 December 2008
[Kinnunen v. Finland](#), no. 24950/94, Commission decision of 15 May 1996
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[Krone Verlag GmbH & Co. KG v. Austria](#), no. 34315/96, 26 February 2002
[Kurier Zeitungsverlag und Druckerei GmbH v. Austria \(no. 2\)](#), no. 1593/06, 19 June 2012

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[Leander v. Sweden](#), 26 March 1987, Series A no. 116
[Lehideux and Isorni v. France](#), 23 September 1998, *Reports of Judgments and Decisions* 1998-VII
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[Leroy v. France](#), no. 36109/03, 2 October 2008 (*French only*)
[Liberty and Others v. the United Kingdom](#), no. 58243/00, 1 July 2008
[Lindon, Otchakovsky-Laurens and July v. France](#) [GC], nos. 21279/02 and 36448/02, ECHR 2007-IV
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[M.C. v. Bulgaria](#), no. 39272/98, ECHR 2003-XII
[M.G. v. the United Kingdom](#), no. 39393/98, 24 September 2002
[M.K. v. France](#), no. 19522/09, 18 April 2013
[M.M. v. the United Kingdom](#), no. 24029/07, 13 November 2012
[McGinley and Egan v. the United Kingdom](#), 9 June 1998, *Reports of Judgments and Decisions* 1998-III

[McVeigh, O'Neill and Evans v. the United Kingdom](#), nos. 8022/77, 8025/77 and 8027/77, Commission report of 18 March 1981, Decisions and Reports 25

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[Morice v. France](#) [GC], no. 29369/10, 23 April 2015

[Mosley v. the United Kingdom](#), no. 48009/08, 10 May 2011

[Mouvement Raëlien Suisse v. Switzerland](#), no. 16354/06, 13 January 2011

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[Nedim Şener v. Turkey](#), no. 38270/11, 8 July 2014

[Neij and Sunde Kolmisoppi v. Sweden](#) (dec.), no. 40397/12, 9 February 2013

[News Verlags GmbH & Co.KG v. Austria](#), no. 31457/96, ECHR 2000-I.

[Niemietz v. Germany](#), 16 December 1992, Series A no. 251-B

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[Norwood v. the United Kingdom](#) (dec.), no. 23131/03, 16 November 2004

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[Observer and Guardian v. the United Kingdom](#), 26 November 1991, Series A no. 216

[Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria](#), no. 39534/07, § 41, 28 November 2013

[Özgür Gündem v. Turkey](#), no. 23144/93, ECHR 2000-III

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[P. and S. v. Poland](#), no. 57375/08, 30 October 2012

[P.G. and J.H. v. the United Kingdom](#), no. 44787/98, ECHR 2001-IX

[Paeffgen GmbH v. Germany](#) (dec.), nos. 25379/04 and others, 18 September 2007

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[Pla and Puncernau v. Andorra](#), no. 69498/01, ECHR 2004-VIII

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[Saaristo and Others v. Finland](#), no. 184/06, 12 October 2010

[SC Editura Orizonturi SRL v. Romania](#), no. 15872/03, 13 May 2008
(*French only*)

[Schuman v. Poland](#) (dec.), no. 52517/13, 3 June 2014

[Schweizerische Radio- und Fernsehgesellschaft SRG v. Switzerland](#), no. 34124/06, 21 June 2012

[Sciacca v. Italy](#), no. 50774/99, ECHR 2005-I

[Sdružení Jihočeské Matky v. the Czech Republic](#) (dec.), no. 19101/03, 10 July 2001 (*French only*)

[Shimovolos v. Russia](#), no. 30194/09, 21 June 2011

[Smith Kline v. the Netherlands](#) (dec.), no. 12633/87, 4 October 1990

[Söderman v. Sweden](#) [GC], no. 5786/08, ECHR 2013

[Stoll v. Switzerland](#) [GC], no. 69698/01, ECHR 2007-XIV

[Sürek v. Turkey \(no. 1\)](#) [GC], no. 26682/95, ECHR 1999-IV

[Szima v. Hungary](#), no. 29723/11, 9 October 2012

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[Tierbefreier e.V. v. Germany](#), no. 45192/09, 16 January 2014

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[*Van der Velden v. the Netherlands*](#) (dec.), no. 29514/05, ECHR 2006-XV (extracts)

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[*Verlagsgruppe News GmbH and Bobi v. Austria*](#), no. 59631/09, 4 December 2012

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[*Weber and Saravia v. Germany*](#) (dec.), no. 54934/00, ECHR 2006-XI

[*Węgrzynowski and Smolczewski v. Poland*](#), no. 33846/07, 16 July 2013

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