

In the European Court of Human Rights

Application no. 38680/23

Between:

Henrik Nils John Evertsson and Linus Andersson

v

Sweden

WRITTEN COMMENTS OF THE THIRD-PARTY INTERVENER

31 July 2026

Introduction

1. These written comments are submitted by Media Defence (the ‘Intervener’), pursuant to leave granted by the President of the First Section of the Court in accordance with Rule 44(3) of the Rules of Court.¹
2. The present case concerns criminal sanctions imposed on the applicants under the Swedish Estonia Act, which introduced a blanket ban on underwater activities in the vicinity of the wreck of the MS Estonia, a passenger ferry which sank in the Baltic Sea on 28 September 1994 with the loss of 852 lives. As part of their research for a documentary, the applicants had used a remote-controlled diving robot to film the exterior of the wreck, revealing previously undocumented damage to the ship’s hull which prompted renewed official investigations by the Swedish, Finnish and Estonian authorities.
3. One of the key issues arising in this case is the extent to which restrictions on access to locations which may serve as important sites for information gathering and the investigation of topics that are in the public interest is permitted under Article 10 the European Convention on Human Rights (‘the Convention’). In assessing the compatibility of such restrictions with freedom of expression, the essential role of the press as a public watchdog in democratic societies and the importance of first-hand newsgathering must be given significant weight. This is particularly the case where restrictions are absolute in nature, do not allow for exemptions, or exceptions for journalistic purposes, and where their breach carries the threat of criminal sanctions.
4. The outcome of this case has, therefore, important implications for the ability of the press to conduct research, gather information that has a public interest dimension, and disseminate it among the general public. In these written comments, the Intervener, relying on the Court’s jurisprudence and comparative international legal standards, will highlight three matters relevant to the Court’s determination of the case – (i) the importance of newsgathering as an essential component of the right to freedom of expression and the circumstances where restrictions imposed on access to locations engage that protection; (ii) the factors relevant to an analysis of the necessity and proportionality of such restrictions; and (iii) recognising that the relevant law was enacted to safeguard the sanctity of the victims of a major maritime disaster and reflected a commitment to Estonia and Finland to criminalise such activities, the extent to which a State’s obligation under an international treaty may constitute a legitimate aim capable of justifying an interference with Article 10.

Protection of newsgathering under Article 10, and the circumstances in which restrictions on journalists’ access to locations of public interest engage that protection

¹ Permission to intervene was granted by way of letter from the Deputy Registrar dated 19 June 2026 directing that submissions should be filed by 31 July 2026. In accordance with the instructions in that letter, these submissions do not address the facts and merits of the case, instead focusing on the principles applicable to the proper determination of the case.

5. The Court has held that freedom of expression under Article 10 encompasses not only the right to impart information and ideas but also the right to gather them.² The press performs an indispensable democratic function, not merely as a vehicle for disseminating information already in the public domain, but as the primary means by which information capable of eliciting public debate is uncovered and brought to light.³ It discharges this function as a ‘public watchdog’, holding State authorities to account. This function is considered to be one of the crucial elements of the democratic ideal enshrined in the Convention.⁴ The Court has consistently held that, in consequence, State authorities enjoy only a narrow margin of appreciation when assessing the pressing social need for any interference with press freedom, and that such interference requires careful scrutiny.⁵
6. The protective scope of Article 10 extends beyond the act of publication to encompass the preparatory steps that make publication possible. In *Társaság a Szabadságjogokért v Hungary*, the Court confirmed that the gathering of information is an essential preparatory step in journalism and an inherent, protected part of press freedom.⁶ This principle reflects the practical reality that the right to impart information would be of limited value if journalists could lawfully be prevented from obtaining it in the first place. Consistent with this, the Court has held that obstacles which hinder the methods by which journalists gather information are capable of discouraging participation in public debate and producing a chilling effect on press freedom, even where the obstacle merely makes access to information more difficult rather than impossible.⁷ Where restrictions go further and attach criminal liability to the act of newsgathering itself, the interference with Article 10 is particularly serious and calls for the most careful scrutiny.⁸
7. Access to locations of public interest, whether in person or remotely, is often an indispensable component of effective newsgathering. The Court has explicitly recognised the additional value of information obtained first-hand or independently verified by journalists, noting that alternatives such as official statements, third-party accounts or interviews conducted at a remove do not eliminate a journalist’s legitimate interest in direct observation.⁹ Reporting grounded in first-hand observation carries an evidential weight and public credibility that derivative sources cannot replicate. Its importance can be enhanced where that observation is recorded.

² *Jersild v. Denmark*, Application No. 15890/89 (23 September 1994), §31; The Court has found that not only does the press enjoy a right to freedom of expression, it also has a duty “to impart information and ideas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of ‘public watchdog’. Although formulated primarily with regard to the print media, these principles doubtless apply also to the audiovisual media”.

³ *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, 20 May 1999, §59; *Jersild v. Denmark*, no. 15890/89, 23 September 1994, §31.

⁴ *Pentikäinen v. Finland* [GC], no. 11882/10, 20 October 2015, §87-89; *Bladet Tromsø*, cited above, §59.

⁵ *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, 10 November 2015, §96.

⁶ *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, 14 April 2009, §27.

⁷ *Ibid.*, §§26, 38.

⁸ See for example, *Dammann v. Switzerland*, no. 77551/01, 25 April 2006, §57-58.

⁹ *Szurovecz v. Hungary*, no. 15428/16, 8 October 2019, §§73-74.

8. The Court has addressed the Article 10 implications of restrictions on journalists' access to physical locations in a number of cases. In *Gsell v Switzerland*, it held that a general prohibition on travel that prevented a journalist from attending an event he intended to report on constituted an interference with his right to freedom of expression, notwithstanding that the measure was not directed at him in his capacity as a journalist.¹⁰ In that case, the Court, highlighting the blanket nature of the restriction, said the following -

*The Court observes that the legal measure in question was not directed specifically at the applicant in his capacity as a journalist, but he had been a victim of a ban imposed generally by the Cantons Police on all those who wanted to travel to Davos. Nonetheless, taking everything into account, according to the Court, the measure is an 'interference' in the exercise of his freedom of expression, because he wanted to travel to Davos in order to write an article on a particular subject.*¹¹

9. In *Pentikäinen v. Finland*, the Grand Chamber emphasised that the presence of journalists at events of public interest, including demonstrations and incidents of public disorder, serves as a guarantee that the authorities can be held to account, and that restrictions on their access in such circumstances are subject to strict scrutiny.¹² In other cases, the Court has confirmed that Article 10 protects not only the substance of information but the form in which it is gathered and conveyed, with the consequence that restrictions on particular newsgathering techniques require independent justification rather than relying on an assessment of whether other techniques were available.¹³
10. The weight to be given to a restriction on access, and the intensity of scrutiny it attracts, is informed by a number of considerations that bear directly on the proportionality analysis. Where physical access to a location is restricted for legal or factual reasons, such as by reason of geography, State control, or, as in the present case, the operation of the criminal law, the press serves a particular function in enabling information about that location to reach the public. Where the State holds an effective monopoly over access to a location, restrictions on journalistic presence and activity at that location carry a censorial quality that the Court has held must attract the most careful scrutiny, since they vest in the authorities the power to determine what information the public is able to receive about the activities conducted there.¹⁴ Where the information at issue is of significant public interest, concerning, for instance, the conduct of State authorities, the fate of victims, or matters that have given rise to public controversy, the imperative of independent journalistic access is at its most acute. According to the UN Human Rights Committee, it is incompatible with the right to freedom of expression "to restrict the freedom of journalists and others who seek to exercise their freedom of expression (such as persons who wish to travel to human rights-related meetings) to travel outside the

¹⁰ *Gsell v. Switzerland*, no. 12675/05, 8 October 2009, §49.

¹¹ *Ibid.*

¹² *Pentikäinen v. Finland* [GC], cited above, §§89, 114.

¹³ *Jersild v. Denmark*, cited above, §31; *Szurovecz v. Hungary*, cited above, §74.

¹⁴ *Társaság a Szabadságjogokért v. Hungary*, cited above, §§35–36; *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria*, no. 39534/07, 28 November 2013, §34.

State party, [and] to restrict the movement of journalists ... within the State party (including to conflict-affected locations, the sites of natural disasters and locations where there are allegations of human rights abuses)".¹⁵

11. These considerations apply with particular force where, for example, the newsgathering activity in question produces information that was not available to the public by other means, reveals facts previously unknown to the authorities themselves, and that directly prompts the authorities to take action with respect to a matter of established and serious public concern. In such circumstances, a restriction on the act of newsgathering, and in particular a restriction that takes the form of criminal liability with no mechanism for proportionality assessment on the issue of liability, engages Article 10 at its most fundamental level and requires the careful scrutiny that the following section addresses.

Factors relevant to the necessity and proportionality analysis under Article 10, including where journalistic newsgathering activity attracts criminal liability

12. Where a restriction on newsgathering engages Article 10, the State must demonstrate that the interference was prescribed by law, pursued a legitimate aim, and was necessary in a democratic society. The requirement of necessity is of central importance. The Court has consistently held that the necessity test requires a pressing social need and that any interference must be proportionate to the legitimate aim pursued. Where the restriction takes the form of a criminal sanction imposed on a journalist for conduct undertaken in the course of a public interest investigation, the margin of appreciation afforded to the State must be narrow and the restrictive measure subject to close scrutiny.¹⁶
13. The extent to which the public interest is served by the newsgathering activity is of primary relevance to that analysis. The Court has emphasised that there is little scope under Article 10 for restrictions on expression or the gathering of information where a matter of genuine public interest is at stake, and that in such cases a high level of protection will ordinarily be accorded.¹⁷ Particular weight must be afforded where reporting is capable of contributing to a lively debate of public interest,¹⁸ in particular where that debate has persisted over a considerable period of time. The close scrutiny required where a State imposes restrictions on journalists' investigative activities reflects the greater danger that such restrictions represent for the proper functioning of the press as public watchdog.¹⁹ That scrutiny must be applied with particular rigour where the public interest character of the newsgathering is demonstrated in practical terms - where,

¹⁵ UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of opinion and expression*, UN Doc. No. CCPR/C/GC/34 (12 September 2011), §§45–46.

¹⁶ *Pentikäinen v. Finland* [GC], no. 11882/10, 20 October 2015, §§87–89; *Stoll v. Switzerland* [GC], no. 69698/01, 10 December 2007, §101.

¹⁷ *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, 10 November 2015, §96; *Bédat v. Switzerland* [GC], no. 56925/08, 29 March 2016, §§51–52.

¹⁸ See *Salihu and Others v. Sweden (dec.)*, no. 33628/15, § 57, 10 May 2016.

¹⁹ *Dammann v. Switzerland*, no. 77551/01, 25 April 2006, §52; *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, 14 April 2009, §26. This approach is also reflected in the Inter-American Court of Human Rights, see *Claude Reyes et al. v. Chile* case (19 September 2006, Series C no. 151), §58: "The disclosure of State-held information should play a very important role in a democratic society, because it enables civil society to control the actions of the government to which it has entrusted the protection of its interests."

for instance, the information gathered reveals facts previously unknown to the relevant authorities and directly prompts official action that could not otherwise have been taken.

14. A further consideration is the nature of the newsgathering activity itself. Not all restrictions on newsgathering carry the same weight, and the proportionality of an interference must be assessed with reference to the specific character of the act restricted. The analysis should distinguish between circumstances where the impugned conduct physically disturbs a protected site, intrudes upon human remains, or poses a risk to public order,²⁰ and situations where the activity is non-invasive, causes no physical disturbance to any protected interest, and is directed solely at the gathering of information. Where the activity falls within the latter category, for example where it is conducted by means of technology that substitutes for physical presence, produces no interference with the interests the restriction is designed to protect, and results in information of documented public significance, the proportionality of a criminal sanction requires particularly careful examination.
15. The manner in which domestic courts address the issue of journalistic purpose is also of significance. Where courts recognise a legitimate journalistic interest in an investigation but decline to treat that interest as a substantive element of the criminal liability analysis, confining its relevance to mitigation at the sentencing stage, a question of considerable importance arises under Article 10. The Court has established that the proportionality assessment required by Article 10 is not discharged by mitigation of any sanction imposed. It requires an examination of whether the interference, including the fact of criminal liability, was justified in the first place.²¹
16. A legal framework where the impugned act is journalistic in character, non-invasive in its execution, and produces a well-documented public benefit, and these factors are treated as a sentencing consideration rather than a substantive element of the proportionality analysis is, the Intervener submits, insufficient to discharge the requirements of Article 10. In such circumstances, the Court's assessment should engage with the question of whether criminal liability itself was justified.²² In the case of *Stoll*, the Court considered it necessary to examine whether the conviction of a journalist, for disclosing confidential information in breach of the criminal law, was necessary, and in so doing, adopted the following criteria - the interests at stake; the review of the measure by the domestic courts; the conduct of the applicant; and, whether the penalty imposed was proportionate.²³ This analysis should also include a consideration of measures taken by the journalist to mitigate the impact on competing interests.²⁴

²⁰ *Pentikäinen v. Finland* [GC], no. 11882/10, 20 October 2015

²¹ See *Stoll v. Switzerland* [GC], no. 69698/01, 10 December 2007, §112; see also *Jersild v. Denmark*, no. 15890/89, 23 September 1994, §§35, 37; *Dammann v. Switzerland*, cited above, §52. Note paragraph 28 to 30 below.

²² *Szurovecz v. Hungary*, no. 15428/16, 8 October 2019, §§57–58; *Pentikäinen v. Finland* [GC], cited above, §§113–114.

²³ *Stoll v. Switzerland* [GC], cited above, §101.

²⁴ See *Szurovecz v. Hungary*, no. 15428/16, § 69, 8 October 2019.

17. Closely related to this analysis is the question of whether less restrictive means are available. The Court has consistently held that a restriction on expression or newsgathering is not necessary in a democratic society if the legitimate aim pursued could have been achieved by measures that interfere less seriously with Article 10 rights.²⁵ Where the domestic legal framework admits of no exception, no licensing mechanism, and no procedure by which a journalist might seek authorisation for activity that is non-invasive in character and limited in its scope, the absence of any graduated response is itself a factor relevant to the proportionality analysis. A blanket ban that treats qualitatively different categories of conduct identically, without any mechanism for case-by-case assessment, is unlikely to satisfy the requirement of necessity in the context of journalistic newsgathering conducted in the public interest. Connected to that, consideration should be given to the principle that it is not for the courts to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists.²⁶
18. The chilling effect of criminal liability in this context warrants separate consideration. The Court has recognised on numerous occasions that criminal sanctions, even where modest in terms of their immediate impact, carry a deterrent effect that extends well beyond the individual case.²⁷ A conviction for newsgathering activity that served a demonstrable public interest sends a signal to investigative journalists about the risks of accessing restricted areas in pursuit of matters of genuine public concern. That concern is not reduced by the modest level of any penalty imposed, and in fact may be reinforced by the fact of conviction itself,²⁸ which attaches to the journalist a criminal record for the act of reporting.
19. The careful scrutiny that the necessity and proportionality analysis requires in this context is illustrated by the Court's approach in *Pentikäinen v Finland*, where the Grand Chamber examined the conviction of a journalist who had remained at a dispersed demonstration. Notwithstanding that the Grand Chamber found no violation on the specific facts of that case, it emphasised that the public watchdog role of the press assumed particular importance and that restrictions on journalists' ability to discharge that role were subject to strict scrutiny.²⁹ That case is distinguishable in important respects from circumstances in which the journalistic activity in question poses no risk to public order, is conducted in an environment remote from any police operation or public safety concern, and addresses a matter that could not have been investigated by any other available means.³⁰ Those distinctions should bear directly on the margin of appreciation and the intensity of proportionality review that the Court is required to apply.

²⁵ *Glor v. Switzerland*, no. 13444/04, 30 April 2009, §94.

²⁶ *Jersild v. Denmark*, already cited, §31.

²⁷ *Goodwin v. the United Kingdom*, no. 17488/90, 27 March 1996, §39; *Nagla v. Latvia*, no. 73469/10, 16 July 2013, §85.

²⁸ See *Dammann v. Switzerland*, cited above, §57.

²⁹ *Pentikäinen v. Finland* [GC], cited above, §§89, 114.

³⁰ *Ibid.*, §114, "The Court therefore concludes that the interference with the applicant's right to freedom of expression can be said to have been "necessary in a democratic society" within the meaning of Article 10 of the Convention. The Court would stress that this conclusion must be seen on the basis of the particular

20. *Stoll v Switzerland* is also instructive in that regard. There, the Grand Chamber upheld a conviction for publishing information obtained from a leaked classified document, noting that the conviction was justified by the manner of publication rather than the act of investigation itself.³¹ The significance of that distinction for present purposes is that criminal liability was addressed to an editorial decision, that is, the choice to publish confidential material in a particular way, rather than to the act of newsgathering. Where, by contrast, criminal liability attaches to the act of gathering information itself without any suggestion of bad faith, unlawful interference with a third party's rights, or independent concern about the manner of publication, the proportionality assessment calls for even closer examination than *Stoll* required.
21. These considerations must be assessed against the Court's recognition that the press performs an essential function in exposing matters that would otherwise remain concealed from public scrutiny. In *Társaság a Szabadságjogokért*, the Court observed that obstacles which hinder methods of gathering information are capable of producing a chilling effect on press freedom even where they fall short of a direct prohibition on publication.³² Where the obstacle takes the form of criminal liability for the act of gathering information itself, and where the information gathered subsequently proves to be of significant public importance, the interference with Article 10 calls for the most exacting proportionality assessment. It is in that context that the question addressed in the next section falls to be determined.

Whether a State's obligation under an international treaty may constitute a legitimate aim capable of justifying an interference with Article 10

22. Where the restriction on access to a location is a consequence of a law introduced to satisfy a treaty obligation, the starting point in assessing compatibility with Article 10 is the scope of the treaty obligation itself - what that obligation, properly construed, requires the State to implement in domestic law. Not every aspect of the implementing legislation will necessarily be required by the treaty obligation. Where the State has gone further than the treaty demands, for instance by interfering with Article 10 rights and in so doing excluding any mechanism for proportionality assessment, or journalistic exemptions or exceptions, those are legislative decisions that require justification in order to be considered Convention compliant.
23. Where those treaty obligations are in tension with the Convention, the Court's established approach is to construe them harmoniously, so as to coordinate their effects and avoid conflict between them. The Grand Chamber has emphasised that when States create new international obligations, they are assumed not to derogate from their previous ones, and that apparently diverging commitments must be harmonised as far as possible

circumstances of the instant case, due regard being had to the need to avoid any impairment of the media's 'watchdog' role."

³¹ *Stoll v. Switzerland* [GC], cited above, §§141–162.

³² *Társaság a Szabadságjogokért v. Hungary*, cited above, §38.

so that they produce effects fully in accordance with existing law.³³ According to this Court's case law a State cannot rely on the binding nature of a treaty obligation as a reason for interfering with a Convention right. It must demonstrate that it sought, as far as possible, to implement that obligation in a manner compatible with its Convention commitments.³⁴

24. Even accepting that a treaty obligation constitutes a legitimate aim, the necessity and proportionality assessment required by Article 10 remains independent and must be satisfied on its own terms. The broader principle that binding treaty obligations do not displace the Article 10 analysis finds support in the Court's case law in other contexts. For example, in *Hirsi Jamaa and Others v Italy*, Italy was bound under bilateral agreements with Libya to intercept migrants at sea and return them to that country. The binding character of those bilateral obligations provided no answer to the question of whether Italy had violated the applicants' Convention rights.³⁵ In *Matthews v the United Kingdom*, the Court found a violation of Article 3 of Protocol 1 notwithstanding the United Kingdom's obligations under EC treaty law, holding that to accept that those treaty obligations removed certain matters from the reach of Convention rights would risk undermining one of the fundamental tools by which effective political democracy can be maintained.³⁶
25. The Court has addressed the relationship between compliance with other treaty obligations and Convention obligations in more specific contexts involving international organisations and binding resolutions.³⁷ The question of how much flexibility a State retains when implementing a treaty obligation, and the requirement to exercise that flexibility in a Convention-compatible manner, is most directly addressed in *Nada v. Switzerland*. In that case, Switzerland was required to implement United Nations Security Council resolutions that expressly required States to take measures affecting Convention rights. Those resolutions carried the force of Article 103 of the UN Charter, representing an international obligation of the highest authority. Notwithstanding their explicit and binding character, the Grand Chamber found that Switzerland retained real, if limited, flexibility in determining how the resolutions were to be implemented in the domestic legal order.³⁸
26. The Grand Chamber held that it was not sufficient for Switzerland to confine itself to relying on the binding nature of the Security Council resolutions. The question was whether Switzerland had taken, or at least attempted to take, all possible measures to implement the sanctions regime compatibly with the Convention.³⁹ Where the underlying

³³ *Nada v. Switzerland* [GC], no. 10593/08, 12 September 2012, §170; *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, §126, ECHR 2010.

³⁴ *Nada v. Switzerland* [GC], cited above, §197.

³⁵ *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, 23 February 2012, §§128–158.

³⁶ *Matthews v. the United Kingdom* [GC], no. 24833/94, 18 February 1999, §§42–43.

³⁷ *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, 30 June 2005, §§155–156; *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, 21 June 2016, §§115–117.

³⁸ *Nada v. Switzerland* [GC], cited above, §180.

³⁹ *Ibid.*, §197.

treaty obligation is of lesser international authority, the implications are significant. If a State must exercise such flexibility even when implementing the most authoritative form of binding international obligation, that obligation to seek Convention-compatible means must apply with considerably greater force to bilateral or multilateral agreements of more limited standing. Where domestic implementation takes the form of a blanket ban affecting a fundamental Convention right, the obligation to demonstrate that Convention-compatible alternatives were considered becomes correspondingly more pressing. As the Court held in *Waite and Kennedy v Germany*, it would be incompatible with the purpose and object of the Convention if Contracting States were absolved from their responsibility under the Convention by reason of obligations assumed under other international instruments, since the Convention is intended to guarantee rights that are practical and effective.⁴⁰

27. The case law discussed above addresses situations in which an apparent tension arises between the Convention and obligations owed to an external legal order. The legal framework developed in those cases was designed for circumstances in which there is a genuine structural question about the relationship between the Convention and an external legal order of different or competing authority. A materially different situation arises in circumstances like those in the present case. Where all of the State parties to the relevant agreement are themselves Contracting States to the Convention both at the time the agreement was concluded and at the time of the impugned measures, the issues that animate that body of case law simply do not arise in the same way. States that are each bound by the Convention cannot, by agreement *inter se*, create obligations that override the rights guaranteed by it. The case law discussed above reinforces this conclusion *a fortiori*.
28. This raises the question of how the domestic legislation implementing a treaty obligation in that context fares when measured against the requirements of Article 10, and in particular the necessity and proportionality analysis that the Court applies to criminal sanctions imposed on journalists.⁴¹ The particular difficulty arises where, as noted above, the domestic legal framework implementing a treaty obligation takes the form of a blanket ban affecting a Convention right, with no mechanism for proportionality assessment when considering criminal liability.
29. The Grand Chamber in *Stoll* in considering the position of the press *vis a vis* the criminal law stated as follows –

all persons, including journalists, who exercise their freedom of expression undertake ‘duties and responsibilities’, the scope of which depends on their situation and the technical means they use ... Thus, notwithstanding the vital role played by the press in a democratic society, journalists cannot, in principle, be released from their duty to obey the ordinary criminal law on the basis that Article 10 affords them protection. Paragraph 2 of Article 10 does not,

⁴⁰ *Waite and Kennedy v. Germany* [GC], no. 26083/94, 18 February 1999, §67.

⁴¹ In cases concerning press freedom, the margin of appreciation afforded to States is narrow, see *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, 10 November 2015, §96; *Wingrove v. the United Kingdom*, 25 November 1996, §58, *Reports of Judgments and Decisions* 1996-V.

*moreover, guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern.*⁴²

30. However, in that case, notwithstanding that the journalist was found to have violated the criminal law, the Court recognised that the necessity and proportionality assessment must still be carried out. The alternative scenario, where Contracting States would be able to subject journalists to criminal sanctions whenever they came close to uncovering corruption for example, would subvert the vital role of the press in the functioning of a democratic society.⁴³ So, while “a journalist cannot claim an exclusive immunity from criminal liability for the sole reason that ... the offence in question was committed during the performance of his or her journalistic functions”,⁴⁴ the assessment of whether there was a pressing social need to interfere with a journalist’s right under Article 10 is materially different from cases where other individuals exercise the right to freedom of expression.⁴⁵
31. The Intervener also draws the Court’s attention to the chilling effect that this approach creates specifically for investigative journalism in areas subject to international protective agreements. A number of locations and sites across Council of Europe member States are subject to access restrictions arising from bilateral or multilateral treaty arrangements. If the existence of such an arrangement were treated as significantly curtailing the Article 10 scrutiny applied to domestic implementing measures or as effectively displacing the proportionality analysis the result would be to insulate from scrutiny precisely those areas where public interest reporting may be most significant. The Court has consistently recognised that where journalists are prevented from gathering information about matters of genuine public concern, the chilling effect extends well beyond the individual case.⁴⁶
32. The implications of accepting treaty compliance as sufficient, in itself, to render the criminalisation of journalistic newsgathering necessary in a democratic society are significant. States would in effect be able to contract out of their Convention obligations by implementing such agreements in terms more restrictive than the underlying obligation demands. The Court has never endorsed that logic, consistently treating the necessity assessment as a safeguard that operates independently of the source of the domestic measure that resulted in the criminal conviction.⁴⁷ To hold otherwise would be to create a category of interference with press freedom immune from proportionality review by virtue of their international legal status. This would be irreconcilable with the Court’s established approach to Article 10 and with the primacy of Convention rights within the Council of Europe legal order.

Padraig Hughes

⁴² *Stoll v. Switzerland*, cited above, §102

⁴³ On this point, see Dissenting Opinion of Judge Spano et al in *Pentikäinen v. Finland* [GC], cited above.

⁴⁴ *Pentikäinen v. Finland* [GC], cited above, §91.

⁴⁵ *Stoll v. Switzerland*, cited above, §112.

⁴⁶ *Társaság a Szabadságjogokért v. Hungary*, cited above, §38.

⁴⁷ *Nada v. Switzerland* [GC], cited above, §§189–197; *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], cited above, §§140–145; *Matthews v. the United Kingdom* [GC], cited above, §§29–35.

Media Defence