



IN THE EUROPEAN COURT OF HUMAN RIGHTS

APPLICATION NO. 5865/07

BUTKEVICH v. RUSSIA

**JOINT SUBMISSIONS BY THE INTERVENERS: MEDIA LEGAL DEFENCE INITIATIVE,
MASS MEDIA DEFENCE CENTRE & ARTICLE 19**

I. INTRODUCTION AND SUMMARY

1. These written comments are submitted jointly by three organisations, the Media Legal Defence Initiative (“MLDI”), the Mass Media Defence Centre (“MMDC”) and ARTICLE 19: Global Campaign for Free Expression (“ARTICLE 19”), pursuant to leave granted by the President of the European Court of Human Rights (“the Court”) under Rule 44(3), Rules of Court on 19 January 2016. MLDI is a charity which helps journalists and independent media outlets around the world to defend their rights. ARTICLE 19 is an independent human rights organisation that works around the world to protect and promote the rights to freedom of expression and freedom of information. MMDC is a Russian non-profit organisation specialising in the promotion of freedom of expression standards in Russia.
2. This Intervention provides an international and comparative perspective on the following issues:
 - a. international standards on press freedom in respect of protests (Section II below);
 - b. the need for journalists to wear distinctive clothing and clearly show press passes (Section III);
 - c. the requirement of “good faith” on the part of journalists (Section IV);
 - d. sanctions and their potential “chilling effect” (Section V).
3. The Interveners respectfully submit that the scope and contours of Article 10 should be interpreted in accordance with evolving national and international norms on press freedom and newsgathering to ensure that journalists can carry out their essential watchdog function in an effective and real way.

II. INTERNATIONAL STANDARDS ON PRESS FREEDOM IN RESPECT OF PROTESTS

4. The protection of journalists and media freedom forms an integral part of the protection of the right to freedom of expression, opinion and speech under Article 19 of the International Covenant on Civil and Political Rights (“ICCPR”) and Article 10 of the European Convention on Human Rights (“ECHR”). These principles are particularly relevant in the context of protests concerning politically or socially sensitive issues, where there is usually a compelling public interest in reporting upon the substance of

the protests. Freedom to impart information and ideas is of the greatest importance for the political life and the democratic structure of a State.¹

5. Full exercise of this freedom must allow for free criticism of government, a key indicator of a free and democratic State. In this context, the Court has repeatedly emphasised that it is incumbent on the press, “to impart information and ideas on political issues just as on those in other areas 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.”² Moreover, there are often public interest issues that arise regarding the policing and monitoring of protests by police and other State agencies. This is, in itself, a matter which attending journalists can consider and report upon.
6. It is well recognised in the Court’s case law that there are particular risks to freedom of expression which arise in the context of newsgathering and reporting at and about protests. For example, *Najafli v. Azerbaijan* concerned a journalist who had been beaten by the police while covering an unauthorised protest in Baku. The Court found in particular that the physical ill-treatment, by State agents, of journalists carrying out their work and observing a public protest had seriously hampered the exercise of their right to receive and impart information.³
7. The Grand Chamber has recently stated in *Pentikäinen v Finland* that “information on the conduct of journalists during demonstrations remained scarce” and that “European and international regulations, standards, recommendations or public announcements concerning the conduct of journalists are predominantly silent as to the coverage of demonstrations or similar events.”⁴ To this end, the Interveners herein present the Court with some international and comparative material below which emphasises the importance of non-interference with press coverage in protests, to be taken into account in the interpretation of Article 10.
8. The vital role of the press in documenting human rights violations and abuses committed in the context of peaceful protests has long been recognised by a number of human rights bodies and instruments,⁵ and by Member States’ national authorities. Two such standards emanating from the United Nations’ Human Rights Committee (“HRC”) are General Comment 34 (“GC 34”)⁶ and *The promotion and protection of human rights in the context of peaceful protests*.⁷ The Interveners also refer the Court to the seminal case of *Vélez Restrepo and Family v. Colombia* before the Inter-American Court of Human Rights (“IACtHR”), which affirms the importance of press presence and reporting of protests. The IACtHR emphasised the role of journalists in encouraging transparency and

¹ *Handyside v. UK* (1976) 1 EHRR 737.

² E.g. *Lingens v. Austria* (1986) 8 EHRR 103; *Sener v. Turkey* [2014] ECHR 30; *Thoma v. Luxembourg* (2003) 36 EHRR 21.

³ Application no. 2594/07, 2nd October 2012. See also *Demir v. Turkey* (2001) 22 EHRR 43, at [65]-[86].

⁴ Application no. 11882/10, 25th October 2015, at [54]-[56].

⁵ See, for example, United Nations Human Rights Committee (“HRC”), General Comment 34, *Article 19 - Freedoms of opinion and expression*, 12th September 2011, CCPR/C/GC/34.

⁶ General Comment 34, *Article 19 - Freedoms of opinion and expression*, 12th September 2011, CCPR/C/GC/34

⁷ 11th April 2014, A/HRC/RES/25/38.

promoting accountability in the context of recording soldiers attacking defenceless individuals during a protest; it also recognised the importance of journalists in documenting protests, noting that disseminating information about such events enables those who receive it to “*observe and verify whether, during the demonstration, the members of the armed forces were performing their duties correctly, with an appropriate use of force.*”⁸ It further sets out the State’s positive obligations to protect journalists covering protests, noting that States should adopt measures to protect the life and integrity of “*journalists who face this special risk owing to factors such as the type of events they cover, the public interest of all the information they disseminate, or the area they must go to in order to do their work...*”⁹

9. To similar effect, the OSCE Representative on Freedom of the Media has highlighted the need to provide protection to journalists reporting on public assemblies, recommending that “*Law enforcement officials have a constitutional responsibility not to prevent or obstruct the work of journalists during public demonstrations. Journalists have a right to expect fair and restrained treatment by the police,*” and, “*senior officials responsible for police conduct have a duty to ensure that officers are adequately trained about the role and function of journalists and particularly their role during a demonstration. In the event of an over-reaction from the police, the issue of police behaviour vis-a-vis journalists should be dealt with separately, regardless of whether the demonstration was sanctioned or not. A swift and adequate response from senior police officials is necessary to ensure that such an over-reaction is not repeated in the future and should send a strong signal that such behaviour will not be tolerated.*”¹⁰
10. The Interveners recognise that the Grand Chamber’s decision in *Pentikäinen* was highly fact-specific; as the Chamber stressed at [114], the conclusions reached were on the basis of the particular circumstances of the case. However, there are a number of issues which arose in the judgment which may wrongly be interpreted as having wider ramifications. This would not be a correct reading of this highly fact-sensitive judgment. Below, at Sections III-V of this Intervention, we draw particular attention to three aspects of the case, which may (if incorrectly given a broader interpretation) have an unintended “chilling effect” on journalists covering protests and, in fact, place media personnel at grave risk.

III. THE NEED TO WEAR DISTINCTIVE CLOTHING AND CLEARLY SHOW PRESS PASSES

11. In *Pentikäinen* the Grand Chamber placed emphasis on the journalist’s failure to wear “*distinctive clothing or other signs capable of identifying him as a journalist*” (see [98-99] and [2] of the

⁸ *Velez Restrepo and Family v. Colombia (Preliminary objection, merits, reparations and costs)*, Judgment of 3rd September, 2012, Serie C No. 248, at [145] (available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_248_ing%20.pdf).

⁹ *Ibid.* at [145] and [194].

¹⁰ Miklos Haraszti (the then postholder), *Special Report: Handling of the media during political demonstrations, Observations and Recommendations* (OSCE, Vienna, June 2007), available at: http://www.osce.org/documents/r_fm/2007/06/25176_en.pdf.

dissenting opinion of Judges Spano, Spielmann, Lemmens and Dedov).¹¹ Whilst this was a fact-specific finding in that particular case, were the Court to create a *general* requirement to wear distinctive clothing from protestors and to clearly show press badges during protests, this would fail to take into account (a) the evolving concept of “journalism” and (b) the realities of reporting on protests in different contexts.

12. (a) Evolving concept of journalism: Importantly, digital technologies enable a broader range of actors to be engaged in “journalistic” activity in relation to protests. Protestors can now directly bring external attention to their actions, both within and outside their country, and digital technologies help to provide more diverse coverage of protests. As recent examples from several countries show,¹² covering protests is especially important in States where the legacy media are heavily controlled. Increasingly, coverage by the mainstream media relies heavily on content created by protestors. This trend is already reflected in the international standards, in which “journalism” is no longer seen as a “profession” but as a “function.”¹³ It has been well established that mandatory licensing or registration of journalists is incompatible with the right to freedom of expression.¹⁴ Similarly, under international standards, accreditation schemes (if needed) must be specific, fair and reasonable, and their application must be transparent.¹⁵
13. Realities of reporting protest: In certain circumstances, a requirement to wear distinctive clothing could threaten journalists’ rights under Articles 2, 3 and 10 ECHR, and these risks are now widely recognised. For example, the International Federation of Journalists’ *Safety Guidelines for Covering Demonstrations and Civil Unrest* (2014) (“the IFJ Guidelines”) include the following:
- “7. *Wear color distinctive clothing from police forces and army...*
12. *Always carry press identification but conceal it if it attracts unwarranted attention. Do not introduce yourself as a member of the press, you do not want to agitate the crowd further...*
13. *Take as few notes as possible not to attract attention. Do not bring notebooks with media logo on it.*”¹⁶
14. While the IFJ Guidelines state that bringing a high-visibility vest may be an option (alongside a stab-proof vest) they also recognise that journalists may be attacked by protestors for covering

¹¹ The Court has previously placed emphasis on identification clothing of journalists in a case concerning physical force used against a journalist during a protest: see *Rizvanov v. Azerbaijan* (2012) ECHR 692, [50].

¹² This includes Ukraine, see e.g. the briefing of Ivan Šimonović, Assistant Secretary-General for Human Rights on the situation in Ukraine, 16th April 2014, which mentions “*biased media reporting, fuelling fear and insecurity among the ethnic Russian community,*” (available at <http://www.voltairenet.org/article183483.html>).

¹³ GC 34: “*journalism is a function shared by a wide range of actors, including ... bloggers and others who engage in forms of self-publication in print, on the Internet or elsewhere.*” It also states that general State systems of registration or licensing of journalists are incompatible with freedom of expression guarantees of Article 19(3) ICCPR: [44]. The Council of Europe’s Committee of Ministers *Recommendation No. R (2000)7*, 8th March 2000, defines journalist as “*any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication.*”

¹⁴ HR Committee, Concluding observations on Lesotho, 08/04/1999, UNDoc. No. CCPR/C/79/Add.106, [23].

¹⁵ See further below at [17]; HRC, *Gauthier v. Canada*, 7th April 1999, Communication No. 633/1995, UN Doc. CCPR/C/65/D/633/1995, [13.6].

¹⁶ *IFJ Safety Guidelines for Covering Demonstrations and Civil Unrest*, Ukraine, 10th March 2014, available at http://www.ifj.org/fileadmin/images/Europe/Europe_documents/IFJ_Safety_Guidelines_Ukraine_10.03.14.pdf.

demonstrations and riots. This means that for their own safety journalists should be careful not to wear distinguishing clothing or to show their press badges as this may place them in danger. To similar effect, Reporters Without Borders in their *Safety Guide for Journalists: A handbook for reporters in high-risk environments*, advise journalists as follows:

“Where applicable, identify yourself as a journalist to the police at the start of the demonstration so that they won’t take you for a protester later on. Find out what weapons or other means may be used so you can work out the risks and prepare yourself. Also, depending on the size of the crowd or the type of demonstration, try to determine if it would be better to be clearly identified as a journalist or if that might arouse hostility on the part of the demonstrators... Wear discreet protective clothing appropriate for the season, for instance a motorcycle jacket and a baseball cap with a protective liner... Consider wearing an anti-riot jacket, which protects against handguns and other weapons and absorbs blows from batons. However, first assess the risks – you could be taken for a plain clothes police officer if you try to cover it up, and if you wear a PRESS sign you may expose yourself to anti-journalist violence by the demonstrators.”¹⁷

15. The EU has stated in its Guidelines that it “attaches the highest priority to the safety of journalists and other media actors.”¹⁸ The HRC has called upon “all States to pay particular attention to the safety of journalists and media workers covering peaceful protests, taking into account their specific role, exposure and vulnerability”.¹⁹ Protecting the safety of journalists means recognising that different events, contexts and countries require different best practices and protocols for journalists. In some circumstances, this may mean wearing a high visibility vest and clear press signs. In other situations, this may place journalists in situations of danger.
16. Some Member States have adopted guidelines on these matters following negotiations between journalist federations and the police. In the Netherlands, for example, the press card (“politieperskaart”) explicitly states that journalists and police both serve the public interest. The press card means that journalists, following identification to the police, can operate freely within locations fenced off from the public as long as they do not act in a manner detrimental to the emergency services, public safety or the police investigation. Similarly, in Belgium and France professional journalists can obtain press cards.²⁰
17. While many Member States have laws which regulate the press through professional press cards, and afford them certain privileges on this basis, international instruments make it clear that having a press card or displaying it should not be a requirement under international human rights law. In GC 34, the

¹⁷ *Safety Guide for Journalists: A handbook for reporters in high-risk environments*, p. 57. Available at: http://en.rsf.org/IMG/pdf/guide_journaliste_rsf_2015_en.pdf

¹⁸ EU Human Rights Guidelines on Freedom of Expression Online and Offline. Foreign Affairs Council Meeting, Brussels, 12th May 2014, [29], available at http://eeas.europa.eu/delegations/documents/eu_human_rights_guidelines_on_freedom_of_expression_online_and_offline_en.pdf

¹⁹ HRC Res 25/38, n. 2, [8].

²⁰ See *Wet van 30 December 1963* for the law in Belgium governing ID documents (“identificatiedocumenten”) and professional journalists (“beroepsjournalist”) and *KB van 12 april 1965 tot instelling van identificatiedocumenten en – kentekens ten behoeve van beroepsjournalisten en persbedrijven*, BS 21 mei 1965 for further details on the system of identification cards.. In France, la carte d’identite des journalistes professionnels is provided by a Commission. Article L 7111-3 of the French Labour Code defines “professional journalist.”

HRC explicitly stated that, “*limited accreditation schemes are permissible only where necessary to provide journalists with privileged access to certain places and/or events. Such schemes should be applied in a manner that is non-discriminatory and compatible with Article 19 and other provisions of the ICCPR, based on objective criteria and taking into account that journalism is a function shared by a wide range of actors.*”²¹ GC 34 also highlights that journalists may be provided with “*privileged access*” given their watch-dog role in a democratic society.²² The Special Rapporteur has made it clear that while journalists may register for the purposes of obtaining an identification card to allow them to have access to certain events and certain privileges, “*under no circumstances should such conditions be imposed by State authorities as preconditions to practice journalism, given that journalism as a profession can only fulfil its role if it has full guarantees of freedom and protection.*”²³

18. In any balancing exercise regarding Article 10 it is imperative that the Court takes these reporting realities into account. The safety of journalists and their watch-dog role in covering protests requires a nuanced analysis embedded in the circumstances and context of the case. In some contexts journalists and media personnel may face danger from protestors, whereas in others the danger may come from the security forces themselves – and in some situations there may be danger from both. In some situations, threats to public order and security considerations may necessitate journalist identification; however, a blanket identification requirement fails to take into account the evolving nature of journalism, or the safety and interests of media personnel. It will simply not be necessary or proportionate in certain circumstances.

IV. “GOOD FAITH” REQUIREMENT

19. The Grand Chamber in *Pentikäinen* referred to the concept of “good faith” and responsible journalism, expanding a concept which has traditionally related to the faithful content of publications to the lawfulness of the conduct of a journalist, including his or her public interaction with the authorities when exercising journalistic functions. At [91] it was stated:

“... notwithstanding the vital role played by the media in a democratic society, journalists cannot, in principle, be released from their duty to obey the ordinary criminal law on the basis that, as journalists, Article 10 affords them a cast-iron defence.”

20. In making this decision, the Grand Chamber placed weight on the fact that the majority of European States do not have laws conferring a special status on journalists. In particular, it held that journalist may sometimes face a conflict between the ordinary criminal laws and their professional duties, and that “*responsible journalism*” requires journalists to be aware that they “[*assume*] the risk of being

²¹ General Comment No. 34, *op.cit.* para 44.

²² Journalists also have other privileges including non-disclosure of sources: [44]. The GC also reminds States that journalists should not have their travel and freedom of movement restricted when reporting on allegations of human rights abuses and they should not be penalized for carrying out their legitimate activities [46].

²³ *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* (Frank La Rue), 4th June 2012, A/HRC/20/17, [6]. IACtHR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion*, OC-5/85 (1986).

subject to legal sanctions, including those of a criminal character, by not obeying the lawful orders of, inter alia, the police” (at [110]).

21. The Interveners submit that the approach in *Pentikäinen* is particular to the facts and context of that case, and should not be automatically applied more broadly in other contexts. Were there to be general emphasis on the duties and responsibilities of media and press personnel, regardless of context, and regardless of the draconian nature of the applicable criminal law in other Member States, this would fail to provide adequate protection under Article 10. The Court’s jurisprudence recognises this – see, for example, *Rizvanov v. Azerbaijan*.²⁴
22. The Interveners submit that, first, although the “good faith” requirement has become a part of the Court’s reasoning when assessing whether a restriction imposed on journalism by the authorities is necessary within a democratic society, many jurists have pointed out serious flaws in this concept. Critics have warned that if the “good faith” requirement is applied, it implies that it is a pre-condition to the protection of freedom of expression. This creates a danger of guaranteeing human rights only to those who perform their duties to a community whose codes and values they accept and share; jurists have argued that such a conception would be “*antithetical to both the unconditional nature of the rights and freedoms (which are not “meritorious”) and their universal nature.*”²⁵ There is nothing peculiar to freedom of expression which requires such a special emphasis upon “good faith.” All human rights involve equal respect for the rights of others. Any suggestion that freedom of expression, in particular, may be limited by reference to “good faith” is contrary to the very spirit of human rights, as they belong not just to the virtuous but to all without qualification.
23. Second, it is important to emphasise that those carrying out journalism do not claim exclusive immunity from criminal laws generally, but, crucially, the press perform a different role to protestors when newsgathering. In line with the reasoning in *Rizvanov*, Member States should have to establish that arresting a journalist in the circumstances is necessary for the prevention of disorder and crime. The Court should specifically examine the actions of the journalists and the State response as a whole in determining whether there is a breach of Article 10.
24. The above accords with the practice of some Member States which emphasise that journalists should not be taken into detention when reporting on protests, although they may later face investigation and/or prosecution where this is proportionate. For example, the Dutch *Leidraad over de positie van de pers bij politieoptreden* of 1980 (amended 1988) makes it clear that police will refrain from taking a

²⁴ (2012) ECHR 692, at [50]. The Court refused to accept the government’s justification for a police officer hitting a journalist covering a protest with a truncheon. The government had alleged that the journalist was posing a risk to himself and to others. The Court stated that, “*it has not been convincingly established at the outcome of the criminal inquiry and other domestic proceedings that, by using the metal construction as a viewpoint, the applicant was actually creating serious danger for the people in the square and that the police had actually given him a warning in this respect and a reasonable opportunity to comply with it, prior to resorting to the use of force.*”

²⁵ F. Tulkens, “Pour une approche dialectique des droits et responsabilités – Conclusions”, in H. Dumont, F. Ost et S. van Drooghenbroeck, *La responsabilité, face cachée des droits de l’homme*, Bruylant, Bruxelles 2005, p. 525

journalist into detention during a protest if “*he refrains from acts which are not deemed to relate to performing his job*” and can identify himself as a journalist. The Interveners are aware of two cases from the Netherlands where journalists have been prosecuted and fined,²⁶ but these cases demonstrate a sophisticated proportionality analysis prior to conviction and further illustrate the extreme circumstances of the arrests.²⁷

25. The UK courts have given detailed consideration to the Article 10 implications of seizure by police of footage or photographs obtained at demonstrations, and the very real risks to journalists which arise (in addition to the “chilling effect” upon sources or potential sources of journalistic material). The Courts in the UK have long recognised “*the importance of ensuring that members of the press can photograph and report what is going on without fear of their personal safety*”.²⁸ Further they have drawn attention to the importance of press independence. For example, Eady J in *R (BSkyB and Others) v. Chelmsford Crown Court and Essex Police* [2012] 2 Cr. App. R. 33 said,

“if the perception takes hold that such people are working on behalf of the police, or are likely to cooperate with them by supplying such material routinely, life could become very difficult. They might find it more difficult to gain access to areas where demonstrations are taking place or to work in the vicinity of those who are prone to violence... At the moment, to the extent that they are perceived as being separate from the police and relatively neutral... they have more opportunity of carrying out their task and correspondingly the public has a greater opportunity of receiving the coverage they intend to provide.”

26. Non-interference and independence are thus two important underpinning principles of press freedom. Production orders, confiscation of materials and sanctions can all undermine press independence and reporting in the public interest. The citation emphasises that cooperation between the press and police prior to and during demonstrations can in itself jeopardise journalists’ safety and ability to report when covering such demonstrations.
27. Third, in relation to “duties and responsibilities”, the Court has repeatedly recognised “*the duty of the press to impart information and ideas on matters of public concern*”²⁹ and in *Sener v. Turkey* it stressed that, “*Contracting States cannot, with reference to the protection of territorial integrity or national security or the prevention of crime or disorder, restrict the right of the public to be informed of them by bringing the weight of the criminal law to bear on the media.*”³⁰ In *Pentikäinen* the Grand Chamber recognised the conflicting duty but – in that particular context only - prioritised criminal justice and security justifications over the professional responsibilities of journalists.

²⁶ *Court of Almelo of 3rd May 2004, 08/010817-03, available in Dutch online at <http://deepink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBALM:2004:A08788>; and Court of Almelo of 7th July 2004 <http://deepink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBALM:2004:AP8633>*

²⁷ In both cases, the sanction was upheld since the journalists’ behaviour involved significant threats to the safety and operation of emergency services and posed a risk to the personal security of the journalist.

²⁸ *R v Bristol Crown Court, ex parte Bristol Press and Picture Agency Limited* [1987] 85 CAR 190.

²⁹ *Observer and Guardian v. United Kingdom*, (1991) 14 EHRR 153.

³⁰ *Sener v. Turkey*, no. 26680/95 [2014] ECHR 30.

28. Fourth, the Court's reference to "responsible journalism" appears to place the breach of criminal laws in Finland in that particular case as a "*most relevant, albeit not decisive*" issue when considering whether that journalist acted responsibly. The UN Special Rapporteur has noted that journalists should adopt standards developed and adopted by media workers themselves, such as the *Declaration of Principles on the Conduct of Journalists of the International Federation of Journalists*.³¹ The Court has also stated that "good faith" journalism means providing "*accurate and reliable information in accordance with the ethics of journalism*."³² With this in mind, the starting point of considering responsible journalism and "good faith" in covering protests should be journalistic standards on protests and demonstrations, not the general criminal law.³³

V. CHILLING EFFECT OF SANCTIONS

29. Sanctions against journalists and others engaged in newgathering or reporting in relation to demonstrations are a matter of increasing concern, as is the "chilling effect" of the threat of such sanctions. In addition to criminal sanctions, other more general measures which result in imprisonment or fines, whether criminal, administrative or regulatory in designation, also have a "chilling effect".

30. The Court has developed a sophisticated jurisprudence on sanctions and their "chilling effect", even where no detention results or is even threatened. In *Dupuis and others v. France*, for example, the Court found that, "*on numerous occasions, interference with freedom of expression might have a chilling effect on the exercise of that freedom (see, mutatis mutandis, Cumpănă and Mazăre v. Romania [GC], no. 33348/96, § 114, ECHR 2004-XI) – an effect that the relatively moderate nature of a fine would not suffice to negate*."³⁴ The Court's jurisprudence takes account of the fear and insecurity which arises from a threatened or potential criminal prosecution or other sanction. Any criminal, administrative or regulatory sanction, including a fine or conviction, is a form of punishment capable of having a "chilling effect".³⁵ As the Court has noted in a different context "*uncertainties might have arisen entailing a chilling effect on freedom of expression and self-censorship*."³⁶ In addition the Court has made it clear that the measures should target those causing the disturbance rather than the journalists seeking to gain access and report the protests.³⁷ Further, the cumulative effect of potential sanctions must be considered.

³¹ *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* (Frank La Rue), 4th June 2012, A/HRC/20/17 [60].

³² *Fressoz and Roire v. France* (1999) 31 EHRR 38; *Bergens Tidende and Others v. Norway*, (2001) 31 EHRR 16.

³³ An example of these duties and responsibilities might be that "*journalists should identify themselves clearly as much, should refrain from becoming involved in the action of the demonstration and should report objectively on the unfolding events, particularly during a live broadcast or webcast. Journalists' unions should agree on an acceptable method of identification with law enforcement agencies and take the necessary steps to communicate this requirement to media workers. Journalists should take adequate steps to inform and educate themselves about police measures that will be taken in the case of a riot*." See OSCE Representative on Freedom of the Media, *Special Report: Handling of the media during political demonstrations, Observations and Recommendations* (June 2007).

³⁴ *Dupuis and Others v. France* (2007) 47 EHRR 52.

³⁵ *Ibid* [44].

³⁶ *Vajnai v Hungary* (2010) 50 EHRR 44 [54].

³⁷ *Gsell v. Switzerland*, Application No. 12675/05, October 8, 2009.

31. In addition to the Court’s jurisprudence, international organisations have expressed concern about the significant growth of administrative and other penalties in the context of reporting protests. For example, the OSCE has noted that it is good practice for the police not to detain, arrest or use violence against media that perform their role by covering all aspects of the political process, as well as protests and other events in public places.³⁸ They have emphasised that even short-term detention of members of the media presents a form of harassment and intimidation and a very real and serious risk to freedom of expression and the rights of the media and the wider public.³⁹
32. In *Pentikäinen*, the Grand Chamber departed from its clear and established case law on “chilling effects”. More recent cases have again reiterated the different types of sanctions which have resulted in a finding of a “chilling effect” by the Court, such as in *Dilipak and Karakaya v Turkey* [44].⁴⁰ This judgment emphasised that the “chilling effect” on the applicants could result in a broader negative impact on all journalists, thus confirming the importance of emphasising the fact- and context-specificity of *Pentikäinen*.
33. The Interveners submit that all exceptions to the right to freedom of expression must be construed strictly and the need for restrictions must be convincingly established. Such restrictions must be necessary and proportionate. The use of criminal sanctions and measures such as arrest and detention which prevent journalists from reporting and expressing their opinions through written or visual mediums are contrary to Article 10 of the Convention. The starting point under Article 10 should be that sanctions against journalists for carrying out their duties when covering protests are not necessary in a democratic society.

VI. CONCLUSION

34. In *Pentikäinen*, the Grand Chamber noted at [89] that the Court must adopt a “strict scrutiny” approach in cases where journalists are removed from protests. The strict scrutiny approach identified in *Pentikäinen* should be adopted together with a narrower margin of appreciation where journalists and members of the press face danger, arrest, detention and/or sanction for carrying out their watchdog duties. We have noted above the compelling public interest considerations which often arise in relation to newsgathering at and about, and the reporting of, demonstrations, particularly those on politically and socially sensitive issues. The balancing exercise between public order and freedom of expression must ensure that journalists are able to impart information in a real and effective way. Considerations of policing and public order should not place the safety of journalists, and their role as watchdogs during protests, in jeopardy.

³⁸ OSCE *Safety of Journalists Guidebook*, Second Edition, Office of the Representative on Freedom of the Media, Vienna, 2014.

³⁹ *Ibid.*

⁴⁰ *Dilipak and Karakaya v Turkey* [2014] ECHR 229. .

**CAOILFHIONN GALLAGHER
KEINA YOSHIDA
Doughty Street Chambers, London**

**MLDI
MMDC
ARTICLE 19**

23rd February 2016