

2009, District Court of Aomori, Japan

Case of Junichi Sato and Toru Suzuki

Submission / Legal Opinion

on the aspects of freedom of expression in the case of Junichi Sato and Toru Suzuki

Why the action of the two Greenpeace Japan campaigners is protected under the right of freedom of expression and why their prosecution, and their possible conviction, disregards the international standards guaranteeing the right to gather, express, impart and receive opinions and information on matters of public interest

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1. Qualifications and expertise.

I'm a professor at Ghent University (Belgium), Faculty of Political and Social Sciences and Faculty of Law, teaching courses in Media Law, Copyright Law and Journalism Ethics. Since 2004 I'm also lecturing Comparative and European Media Law at Copenhagen University (Denmark). Since 2002 I have participated in the Media Lawyers Advocate Programme at Oxford University (PCMLP, Programme for Comparative Media Law and Policy) and IMLA (International Media Lawyers Association). I'm a member of the advisory committee of the International Media Law Moot Court Competition, hosted at Oxford University, PCMLP/IMLA and since 1992 I have regularly worked as an expert for the Council of Europe, Directorate of Human Rights, in projects on media law, human rights and freedom of expression, *inter alia* in Russia, Ukraine, Moldova, Georgia, Azerbaijan, Serbia/Montenegro, Slovenia, Romania, Czech Republic, Slovakia and Turkey. My expertise and interests include freedom of expression, democracy and human rights; rights and responsibilities of journalists and media; media and restrictions on hate speech, racism and discrimination; censorship

and freedom of artistic expression; access to administrative documents; media ethics and self-regulation.

I'm a member of the editorial board of two legal journals specialised in media- and communication law (*Auteurs & Media*, Brussels, Larcier and *Mediaforum*, Amsterdam, VMC/IVIR, Otto Cramwinckel Publishers) and I have published contributions and articles in several legal journals and books regarding media and information law. I've been a member of the Belgian Federal Commission on Access to Administrative Documents (1994-2004) and at present I'm a member of the Flemish Media Council (since 1998), the Flemish Regulator for the Media (since 2006) and of the Federal Commission for Film Classification (since 2007). I've been invited as an expert in several hearings in the Belgian parliaments, including on matters of protection of journalistic sources and broadcasting law. I have (co)organised academic conferences in Gent, Amsterdam, Brussels and Strasbourg on access to official documents, protection of journalistic sources, broadcasting law, media ethics and developments in the European case law on freedom of expression.

I'm a founding member of *Legal Human Academy* (Copenhagen, Oxford, Gent).

Most recently I published a handbook on media law (D. Voorhoof, *Handboek Mediarecht*, Larcier, Brussels, 2007), an article on access to official documents (W. Hins and D. Voorhoof, "Access to State-Held Information as a Fundamental Right under the European Convention on Human Rights", *European Constitutional Law Review (EuConst)* 2007/1, 114-126), I edited a book on protection of journalistic sources (D. Voorhoof (ed.), *Het journalistiek bronnengeheim onthuld*, Die Keure, Brugge, 2008) and I wrote a few articles on whistleblowing and on the impact of Article 10 of the European Convention on Human Rights (D. Voorhoof, "Vrijheid van meningsuiting", in J. VANDELANOTTE en Y. HAECK (eds.), *Handboek EVRM*, Antwerpen-Oxford, Intersentia, 2004, 837-1061 and D. Voorhoof, "Krijgen journalisten een streepje voor in Straatsburg?", *Mediaforum* 2008/5, 197-203).

In October 2008 I co-organised a conference in the European Court of Human Rights in Strasbourg on recent trends in the Court's case law regarding freedom of expression and information. Since 1995 I regularly report about the European Court's case law in the monthly magazine *Iris*, Legal Observations of the European Audiovisual Observatory.

For more information see my website www.psw.ugent.be/dv and the Academic Bibliography of Ghent University at <https://biblio.ugent.be/input?func=search> (search on author "Dirk Voorhoof").

2. Instructions

I've been asked to provide a written opinion and to act as an expert witness on the conformity of the prosecution of Junichi Sato and Toru Suzuki with the right to freedom of expression from the perspective of international standards, focussing on the protection of freedom of expression and information under the European human rights system. More specifically I was requested to analyse whether under the European Convention of Human Rights and Fundamental Freedoms, seeking information and activities of newsgathering are an exercise of freedom of expression, whether this right is enjoyed by NGOs and whether it is related to the right of the public to be properly informed on matters of public interest. The content of this submission and the analysis and statements it contains are based on my independent judgment and on my earlier academic publications referred to in the section above. I have not been instructed by Greenpeace or by anyone else to reach any particular conclusion.

The analysis focuses on the limits of interferences by public authorities in the freedom of expression as indeed prosecutions, sanctions, punishment, searches and confiscations in the area of whistleblowing, investigative journalism and reporting on illegal activities, fraud or corruption are in principle to be regarded as violations of the right to freedom of expression. The established case law of the European Court of Human Rights provides an interesting and inspiring framework how to balance the action of state authorities with the rights of journalists and NGOs exercising an essential role in a democracy, by informing public opinion about matters of crucial interest for society.

I've been informed that Prof. dr. William Schabas, director of the Irish Centre for Human Rights and professor at Galway University, will submit a legal opinion on the general international system for the

protection of human rights. As the testimony of Prof. Schabas focuses on the International Covenant on Civil and Political Rights (ICCPR) and Japan's obligations to give effect to it, my submission regarding freedom of expression under the European human rights system indicates how criminal law and freedom of expression need to be balanced in their application in matters of informing public opinion in a democratic state.

3. Summary

The basic assumption of this submission is that the prosecution (and the possible conviction) of Sato and Suzuki is to be considered as an unjustifiable interference in their freedom of expression, as their action constituted in investigating, gathering and communicating information about allegations of whale meat embezzlement, i.e. a matter of public concern the people in Japan and the international community had the right to be informed of.

The aim of the action of Sato, Suzuki and Greenpeace Japan was to inform the public as well as the official authorities about allegedly illegal activities which went on for some time, an intercepted box of salted whale meat being the evidence of their findings. The information about their findings on the whale meat embezzlement was made public at a press conference and by press releases and received wide media coverage. On the same day of the press conference Sato and Suzuki delivered the intercepted box to the Tokyo Public Prosecutor's office, they filed a report about the suspected embezzlement and they offered full collaboration in order to help the authorities investigate further on this matter.

The subsequent arrest, detention and prosecution of Sato and Suzuki on suspicion of trespass and theft and moreover the searching of Greenpeace offices and homes of Greenpeace staff members and the confiscation of a range of items including the office server are, according to international standards, to be considered as unjustified and disproportionate interferences in the freedom of expression of Sato, Suzuki and Greenpeace Japan.

This submission will give evidence for this point of view, analysing and describing how under the European system for protection of human rights interferences such as in the case of Sato and Suzuki would be considered as violating the freedom of expression and information as protected under Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter: the Convention), guaranteeing freedom of expression and information "*without interference by public authority*" unless the very strict conditions referred to in the second paragraph of that Article are met. This submission explores and analyses the jurisprudence of the European Court of Human Rights on this matter because the European Court's case law should be considered relevant to a case being heard by a Japanese criminal court as the ICCPR, which is binding on Japan, is greatly inspired by and similar to the practice of the European Convention on Human Rights.

It is to be underlined that the European Court of Human Rights has considered that in a democratic society, apart from the press, also NGOs or campaign groups like Greenpeace, "*must be able to carry on their activities effectively and that there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment*" (ECtHR 15 February 2005, *Steel and Morris v. UK*. See also ECtHR 27 May 2004, *Vides Aizsardzības Klubs (VAK) v. Latvia*).

The European Court of Human Rights has regularly emphasized that particular attention shall be paid to the public interest involved in the disclosure of information, when the disclosure of certain information contributes to debate on questions of public interest (Grand Chamber judgment, ECtHR 12 February 2008, *Guja v. Moldova*). As the Court stated in the *Guja*-judgment : "*In a democratic system the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion. The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence*". In such circumstances a journalist, a civil servant, an activist or a staff member of an NGO should not be prosecuted or sanctioned because of breach of confidentiality or the use of illegally obtained documents (ECtHR 21 January 1999, *Fressoz and Roire v. France*; ECtHR 25 April 2006; *Dammann v. Switzerland*; ECtHR 7 June 2007, *Dupuis a.o. v. France* and ECtHR 12 February 2008, *Guja v. Moldova*).

Prosecuting and sanctioning persons who contributed to making important and reliable information available to the media and to the public authorities is to be considered in breach with Article 10 of the Convention, precisely because open discussion of topics of public concern is essential to democracy. Sanctioning Sato and Suzuki could also have a serious chilling effect on others to report on embezzlement or other wrongdoing. There is obviously no sufficient "*pressing social need*" to justify in the context of this case the prosecution of Sato and Suzuki. A criminal conviction of Sato and Suzuki for actions that are inherently connected to the activities of gathering and communicating information of major public interest would amount to a violation of the right of freedom of expression and the right of the public to be properly informed about the whale meat embezzlement in Japan.

Provisions in the criminal code regarding the prohibition and punishment of trespass and theft are as *such* indeed justified in order to protect the individual's right of private property and the right of privacy and family life. The same is true regarding the protection of the honour and reputation of individuals, just like there is legitimate interest in guaranteeing the confidentiality of information and documents. Hence it is legitimate to consider libel, defamation and breach of confidentiality as offences, prohibited and sanctioned in accordance to the law. Each of these rights, based on property rights, the right of privacy or "rights of others" are indeed fully justified principles, but also these principles and interests "*cannot be protected at any price*" (see ECtHR 10 December 2007, Stoll v. Switzerland). The prosecution of Sato and Suzuki on suspicion of trespass and theft, being offences in order to protect the right of private property and the right of privacy, is in the context of this case an unjustified, disproportionate and unnecessary action by the public authorities and cannot be considered as responding to a "*pressing social need*" from the perspective of freedom of expression.

Moreover, the searching of the offices of Greenpeace Japan and the homes of five Greenpeace Japan staff members and the confiscation of documents and the office server of Greenpeace Japan are manifestly to be considered as violating the freedom of expression of Greenpeace Japan. On several occasions the European Court of Human Rights was of the opinion that the searches at media offices or at the home and place of work of journalists or reporters, are to be considered as interferences by public authorities in the freedom of expression. In several cases the Court came to the conclusion that such interferences amounted to a violation of Article 10 of the Convention (Roemen and Schmit v. Luxembourg; ECtHR 15 July 2003, Ernst a.o. v. Belgium; ECtHR 22 November 2007, Voskuil v. the Netherlands and ECtHR 27 November 2007, Tillack v. Belgium). There are no indications in this case that an "*overriding requirement in the public interest*" can legitimise such far-reaching interferences in the freedom of expression of the persons involved.

4. Legal opinion / submission

4.1. Article 10 of the European Convention of Human Rights

This submission will give evidence for the assumption that the interferences by the police and the judicial authorities in the case of Sato and Suzuki under the European human rights system would be considered as violating their freedom of expression and information as protected under Article 10 of the European Convention for the protection of Human Rights and Fundamental Freedoms (hereafter: the Convention). This article indeed guarantees freedom of expression “*without interference by public authority*” as a basic principle¹.

Article 10 of the European Convention reads as follows:

“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”.

Applying its established case law the European Court at many occasions has reiterated that “*freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment*”. Freedom of expression is there to contribute to “*pluralism, tolerance and broadmindedness, without which there is no democratic society*”. The necessity of any restriction or sanction related to the use of freedom of expression must be established convincingly, as this freedom is subject only “*to the exceptions set out in Article 10 § 2, which must, however, be interpreted narrowly*”. The adjective “*necessary*”, within the meaning of Article 10 § 2, implies the existence of a “*pressing social need*”. The Court's jurisprudence manifestly demonstrates that “*there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest*”².

Over the last 30 years, the European Court of Human Rights has established a substantial body of case law, upgrading the level of freedom of expression. At many occasions indeed the Court found violations of Article 10 of the Convention, also in member states with a long tradition of freedom of speech and a high level of press freedom, such as Norway, Denmark, Finland, Belgium, The Netherlands, France and the United Kingdom.

The Court's practice over a period of 30 years illustrates how the case law of the Strasbourg Court applying Article 10 of the Convention has manifestly helped to create an added value for the protection of freedom of expression in democratic states and for the right of the public to be properly informed on matters of public interest. Applying Article 10 of the Convention as a living and dynamic instrument the European Court of Human Rights has succeeded to help to develop freedom of expression and information as a fundamental, effective and functional right in a democracy.

¹ For more information about the Convention, see www.echr.coe.int

² See ECtHR 26 April 1979, Sunday Times v. United Kingdom. See also more recently some Grand Chamber judgments of the ECtHR confirming this approach: ECtHR 10 December 2007, Stoll v. Switzerland and ECtHR 12 February 2008, Guja v. Moldova.

**European Court on freedom of expression and on rights of journalists/media:
number of cases and violations**

| | | |
|---------------|-----|--|
| 1950 - 1960: | - | |
| 1960 - 1969 : | 1 | (De Becker v. Belgium, struck out of the list) |
| 1970 - 1979 : | 3 | (1 violation: Sunday Times nr. 1 v. UK) |
| 1980 - 1989 : | 12 | (2 violations: Barthold v. Germany and Lingens v. Austria) |
| 1990 - 1999 : | 75 | (38 violations) |
| 2000 - 2008 : | 460 | (315 violations) |

4.2. The particular importance of freedom of expression and information that contributes to debate of public interest

Already in its judgment in the Sunday Times case (26 April 1979) the European Court has emphasised that freedom of expression “*is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population*”³. The Court held that there had been a violation of Article 10 by reason of an injunction restraining the publication in the *Sunday Times* of an article concerning a drug and the litigation linked to its use (thalidomide case). The injunction, based on the English law on contempt of court and confirmed by the House of Lords, was not found to be “*necessary in a democratic society*” in the eyes of the Court. With the judgment in the *Sunday Times* case the European Court established a higher level of protection for journalistic reporting on matters of public interest, also recognising “*the right of the public to be properly informed*”.

National law prohibiting or sanctioning the publication of opinions and information may only be applied if the interference by the authorities is based on an a sufficiently precise and accessible law, is pertinently justified by a legitimate aim and especially is to be considered as “*necessary in a democratic society*”, these being the conditions of Article 10 § 2 for any interference by public authorities in one’s freedom of expression. Also national law that prohibits or sanctions newsgathering activities has to be applied in full accordance with the conditions and standards of Article 10 of the Convention (cfr. *infra*). Consequently, an interference with the exercise of freedom of expression or press freedom cannot be compatible with Article 10 of the Convention “*unless it is justified by an overriding requirement in the public interest*”⁴.

Most of the violations of Article 10 found by the European Court concerned criminal convictions of journalists, editors, publishers, broadcasters or activists (such as animal rights defenders, environmentalists, members of labour unions or human rights activists), convicted in application of domestic laws regarding defamation, right of privacy or breach of confidential information. Although these convictions were prescribed by law and served a legitimate interest, the European Court in hundreds of judgments came to the conclusions that the sanctions in application of national provisions in criminal law were not “*necessary in a democratic society*”, giving priority in deciding so to the right to freedom of expression and to genuinely contributing to public debate over the other rights and interests involved in these cases. The European Court did so at many occasions, each time “*in the light of the case as a whole*” and after balancing the interest related to the rights of others with the interest related to freedom of expression in a democracy. The European Court of Human Rights considers that the press and NGOs enjoy a similarly strong protection of freedom of expression and information. Where in its jurisprudence the Court refers to the freedom of expression of ‘journalists’, ‘press’ or ‘media’ the same principles apply to NGO researchers and campaigners, as will be explained in section 4.4 in detail.

At many occasions the Court has emphasized the importance of making information available to the public. In the Guja-judgment the Court emphasised that “*In the first place, particular attention shall be paid to the public interest involved in the disclosed information*”⁵. The Court even went a step further in many judgments by underlining that it is not only a right of the media and journalists to impart information of public interest, but that the media have “*the task of imparting such information and*

³ See also ECtHR 7 December 1976, Handyside v. United Kingdom.

⁴ ECtHR 21 January 1999, Fressoz and Roire v. France.

⁵ ECtHR 12 February 2008, Guja v. Moldova. See also ECtHR 26 February 2009, Kudeshkina v. Russia.

ideas”, while “the public also has a right to receive them”⁶. The Court has regularly recalled “the key importance of freedom of expression as one of the preconditions for a functioning democracy”⁷.

In its Grand Chamber judgment in the Stoll case, the Court confirms that “press freedom assumes even greater importance in circumstances in which State activities and decisions escape democratic or judicial scrutiny on account of their confidential or secret nature. The conviction of a journalist for disclosing information considered to be confidential or secret may discourage those working in the media from informing the public on matters of public interest. As a result the press may no longer be able to play its vital role as “public watchdog” and the ability of the press to provide accurate and reliable information may be adversely affected”⁸.

Especially in cases where information is published on alleged corruption, fraud or illegal activities where politicians, civil servants or public institutions are involved in, journalists, publishers, media or NGOs can count on the highest standards of protection of freedom of expression⁹. The Court emphasized in the Voskuil case that “in a democratic state governed by the rule of law the use of improper methods by public authority is precisely the kind of issue about which the public has the right to be informed”¹⁰. In a judgment of 14 November 2008 the Court expressed the opinion that “the press is one of the means by which politicians and public opinion can verify that public money is spent according to the principles of accounting and not used to enrich certain individuals”¹¹. In the Guja-judgment the Court stated that “in a democratic system the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion. The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence”.

A concrete example in which the Court recognised a “vital public interest in ensuring an informed public debate over a matter of local and national as well as international interest”, is the case in which a local newspaper revealed a secret report on violations of the seal hunting regulations in Norway, the case of *Bladet Tromsø and Stensaas v. Norway*¹². The conviction for defamation of the newspaper and its editor was considered by the European Court as a violation of Article 10 of the Convention.

Bladet Tromsø and Stensaas v. Norway (ECtHR 20 May 1999)

In 1992 the Newspaper Company *Bladet Tromsø* and its editor, Pal Stensaas, were convicted by a Norwegian district court for defamation. The newspaper had published several articles on seal hunting as well as an official - but secret - report that referred to a series of violations of the seal hunting regulations (Lindberg report). The article and the report more specifically made allegations against five crew members of the seal hunting vessel M/S *Harmoni* who were held responsible for illegal methods of killing seals. Although the names of the concerned persons were deleted, the crew members of the M/S *Harmoni* brought defamation proceedings against the newspaper and its editor. The district court was of the opinion that some of the contested statements in the article and the report as a matter of fact were “null and void” and the newspaper and its editor were ordered to pay damages to the plaintiffs, as the allegations were considered defamatory.

The European Court however came to the conclusion that the conviction for defamation was in breach of

⁶ ECtHR 29 March 2005, *Ukrainian Media Group v. Ukraine*. See also ECtHR 24 February 1997, *De Haes en Gijssels v. Belgium*; ECtHR 20 May 1999, *Bladet Tromsø and Stensaas v. Norway*; ECtHR 3 October 2000, *Du Roy and Malaurie v. France*; ECtHR 29 March 2001, *Thoma v. Luxembourg*; ECtHR 25 June 2002, *Colombani a.o. v. France*.

⁷ ECtHR 24 September 2003, *Appleby a.o. v. United Kingdom*.

⁸ ECtHR 10 December 2007, *Stoll v. Switzerland*. See also ECtHR 27 March 1996, *Wingrove v. United Kingdom*.

⁹ See e.g. ECtHR 28 September 1999, *Dalban v. Romania*; ECtHR 29 March 2001, *Thoma v. Luxembourg*; ECtHR 12 July 2007, *Feldek v. Slovakia*; ECtHR 25 June 2002, *Colombani a.o. v. France*; ECtHR 27 May 2004, *Vides Aizsardzības Klubs (VAK) v. Latvia*; ECtHR 29 March 2003, *Sokolowksi v. Poland*; ECtHR 28 September 2004, *Sabou en Pîrcălab v. Romania*; E.H.R.M. 16 november 2004, *Karhuvaara en Iltalehti t. Finland*; ECtHR 29 March 2005, *Ukrainian Media Group v. Ukraine*; ECtHR 13 November 2008, *Kayasu v. Turkey*. See also most Russian cases related to criticizing politicians or other public figures: ECtHR 27 July 2005, *Grinberg v. Russia*; ECtHR 14 December 2006, *Karman v. Russia*; ECtHR 22 February 2007, *Krasulya v. Russia*; ECtHR, 26 July 2007, *Makhmudov v. Russia*; ECtHR 31 July 2007, *Dyuldin and Kislov v. Russia*; ECtHR 31 July 2007, *Chemodurov v. Russia*; ECtHR 14 October 2008, *Dyundin v. Russia* and ECtHR, 23 October 2008, *Godlevskiy v. Russia*.

¹⁰ ECtHR 22 November 2007, *Voskuil v. the Netherlands*.

¹¹ ECtHR 14 November 2008, *Krone Verlag GmbH & Co (nr. 5) v. Austria*.

¹² ECtHR 20 May 1999, *Bladet Tromsø and Stensaas v. Norway*.

Article 10 of the Convention. The Court took account of the overall background against which the statements in question had been made, notably the controversial practice that seal hunting represented at the time in Norway and the public interest in these matters. According to the Court *“the impugned articles were part of an ongoing debate of evident concern to the local, national and international public, in which the views of a wide selection of interested actors were reported”*. The Court underlined that Article 10 of the Convention does not guarantee an unrestricted freedom of expression even with respect to media coverage of matters of public concern, as the crew members can rely on their right to protection of their honour and reputation or their right to be presumed innocent of any criminal offence until proven guilty. According to the Court some allegations in the newspaper’s articles were relatively serious, but the potential adverse effect of the impugned statements on each individual seal hunter’s reputation or rights was significantly attenuated by several factors. The European Court reached the following conclusion: *“Having regard to the various factors limiting the likely harm to the individual seal hunter’s reputation and to the situation as it presented itself to Bladet Tromsø at the relevant time, the Court considers that the paper could reasonably rely on the official Lindberg report, without being required to carry out its own research into the accuracy of the facts reported. It sees no reason to doubt that the newspaper acted in good faith in this respect”*.

4.3. The protection of freedom of expression includes the protection of news and information gathering activities, even - under circumstances - of an illicit or illegal character

Although Article 10 of the Convention does not explicitly guarantee the right to “seek” information¹³, the European Court in interpreting and applying the Convention at several occasions has referred to the aspect of news- and information gathering. According to the Court’s jurisprudence there is no doubt that Article 10 of the Convention gives protection to journalists in relation to their confidential sources¹⁴ and their activities of newsgathering. As the Court underlined in the case of *Dammann v. Switzerland*, Article 10 is not only protecting the expression or public communication of ideas or information, but also the preparatory activities and the journalist’s research, *“les activités de recherche et d’enquête d’un journaliste”*¹⁵. The Court underlined that *“la présente requête ne porte pas sur l’interdiction d’une publication en tant que telle ou sur une condamnation à la suite d’une publication, mais sur un acte préparatoire à celle-ci, à savoir les activités de recherche et d’enquête d’un journaliste. A ce titre, il y a lieu de rappeler que non seulement les restrictions à la liberté de la presse visant la phase préalable à la publication tombent dans le champ du contrôle par la Cour, mais qu’elles présentent même des grands dangers, et, dès lors, appellent de la part de la Cour l’examen le plus scrupuleux”*. In other words (unofficial translation), *“the Court noted that the case did not concern the restraining of a publication as such or a conviction following a publication, but a preparatory step towards publication, namely a journalist’s research and investigative activities. It reiterates that this preparatory phase not only falls within the Court’s scrutiny, but also calls for the most scrupulous examination on account of the great danger represented by that sort of restriction on the freedom of expression”*. Hence the European Court made very clear that an interference by public authorities by means of prosecution or other judicial measures with regard to the journalist’s research and investigative activities calls for the most scrupulous examination from the perspective of Article 10 of the Convention¹⁶.

This does not imply that a journalist or a person involved in investigative reporting can *ipso facto* be excused from a (minor) criminal offence, because it was committed in the course of newsgathering. The European Court, recognising the vital role played by the press in a democratic society, stresses *“that journalists cannot, in principle, be released from their duty to obey the ordinary criminal law on the basis that Article 10 affords them protection”*¹⁷. Persons involved in research and investigative activities do not enjoy a general licence to break or disrespect the law. The case law of the European

¹³ Compare with Article 19, 2 ICCPR guaranteeing explicitly the right to seek information.

¹⁴ ECtHR 27 March 1996, *Goodwin v. United Kingdom*, ECtHR 25 March 2003, *Roemen and Schmit v. Luxembourg*, ECtHR 15 July 2003, *Ernst a.o. v. Belgium*, ECtHR 22 November 2007, *Voskuil v. the Netherlands* and ECtHR 27 November 2007, *Tillack v. Belgium*

¹⁵ ECtHR 25 April 2006, *Dammann v. Switzerland*. See also ECtHR 23 September 1994, *Jersild v. Denmark* and ECtHR 29 March 2001, *Thoma v. Luxembourg*.

¹⁶ See ECtHR 24 February 1997, *De Haes and Gijssels v. Belgium*; ECtHR 21 January 1999, *Fressoz and Roire v. France*; ECtHR 20 May 1999, *Bladet Tromsø and Stensaas v. Norway*; ECtHR 3 October 2000, *Du Roy and Malaurie v. France*; ECtHR 29 March 2001, *Thoma v. Luxembourg*; ECtHR 25 June 2002, *Colombani a.o. v. France*; ECtHR 27 May 2004, *Vides Aizsardzības Klubs (VAK) v. Latvia*; ECtHR 19 December 2006, *Radio Twist S.A. v. Slovakia*; ECtHR 29 March 2005, *Ukrainian Media Group v. Ukraine*; ECtHR 7 June 2007, *Dupuis v. France*.

¹⁷ ECtHR 21 January 1999, *Fressoz and Roire v. France* and ECtHR 10 December 2007, *Stoll v. Switzerland*

Court however made clear that in each case it must be assessed whether the importance of the public being informed about important matters in society outweighs the interests served by the criminal law. The jurisprudence of the Court demonstrates that in some of these cases the national authorities indeed violated Article 10 of the Convention by prosecuting and convicting journalists or persons for facts related to their research or activities of newsgathering. This is especially the case where the information concerned an important matter of public interest and where the illicit or illegal character of the way the information was obtained, was not causing any serious harm to public interest or did not damage seriously any private interest.

Hence, it is necessary to take the greatest care in assessing the need, in a democratic society, to punish journalists for using information obtained through a breach of the secrecy of an investigation, a breach of professional confidence or through an offence of trespass or any other (minor) offence, when those journalists are contributing to a public debate of such importance and are thereby playing their role as “watchdogs” of democracy. This means that under certain conditions, those engaged in newsgathering or investigative journalism, can be shielded against prosecutions and convictions, that is if they have acted according to ethical standards and with the aim of publishing or imparting accurate and reliable information on a matter of public interest. As the Court stated : “*Article 10 protects the right of journalists to divulge information on issues of public interest provided that they are acting in good faith and on an accurate factual basis and provide “reliable and precise” information in accordance with the ethics of journalism*”¹⁸.

Two concrete cases illustrate this approach by the European Court.

Dupuis a.o. v. France (ECtHR 7 June 2007)

In the case of *Dupuis a.o. v. France* the European Court was of the opinion that the conviction of two journalists who had written a book based on illegally obtained documents, was a violation of Article 10 of the Convention. Although all the elements of the offence of handling illegally obtained items (*recef*) were sufficiently established and it was not in dispute that the documents that the journalists had used were necessarily obtained illegally, the Court came to the conclusion that by convicting the journalists the French courts had disregarded the interest involved in freedom of expression. Although the Court recognised “*that journalists cannot, in principle, be released from their duty to abide by the ordinary criminal law on the basis that Article 10 affords them protection*”, it considered that “*the interest in the public's being informed about a case of major public interest outweighed the “duties and responsibilities” the applicants had as a result of the suspect origin of the documents that had been transmitted*”. The Court also underlined that “*it transpires from the applicants' undisputed allegations that they acted in accordance with the standards governing their profession as journalists, since the impugned publication was relevant not only to the subject matter but also to the credibility of the information supplied, providing evidence of its accuracy and authenticity*”. In conclusion, the Court considers that the judgment against the applicants constituted a disproportionate interference with their right to freedom of expression and that it was therefore not necessary in a democratic society. Accordingly, there has been a violation of Article 10 of the Convention¹⁹.

Radio Twist S.A. v. Slovakia (ECtHR 19 December 2006)

In this case a radio broadcasting station (*Radio Twist*) was sanctioned for having broadcast information that was gathered and obtained illegally. The Court is however not convinced that the mere fact that the recording had been obtained contrary to the law can deprive the applicant company which broadcast it of the protection of Article 10 of the Convention. The Court observed that there is no indication that the journalists of the applicant company acted in bad faith or that they pursued any objective other than reporting on matters which they felt obliged to make available to the public.

According to the Court it follows that the reasons invoked by the Slovakian authorities for the interference in issue were too narrow and thus insufficient. Hence the interference with the broadcaster's right to impart information neither corresponded to a pressing social need, nor was it proportionate to the legitimate aim

¹⁸ ECtHR 21 January 1999, *Fressoz and Roire v. France*; ECtHR 25 April 2006, *Dammann v. Switzerland* and ECtHR 7 June 2007, *Dupuis v. France*.

¹⁹ ECtHR 7 June 2007, *Dupuis v. France*.

pursued. It thus was not “necessary in a democratic society”. This brought the Court to the conclusion that that there had been a violation of Article 10 of the Convention²⁰.

4.4. The strong public interest of the right of freedom of expression for NGOs

It is important to underline that Article 10 guarantees freedom of expression and information to “everyone”, and that this right is enjoyed by NGOs or individuals or staff-members of NGOs also being “watchdogs of society”, just like the press or the media in general. In the case of *Steel and Morris v. United Kingdom*, the European Court considered that “in a democratic society even small and informal campaign groups, such as London Greenpeace, must be able to carry on their activities effectively and that there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment”²¹.

Also in many other cases the interferences by public authorities were not directed against journalists or (mainstream) media, but against NGOs or activists campaigning for environment protection, social justice, human rights, women’s rights, reproductive rights, minority rights, labour rights or animal rights²². In each of the cases referred to, the Court came to the conclusion that the interferences or sanctions against the NGOs or its members violated freedom of expression of the applicants, as in essence their actions, campaigns, publications or leaflets contributed to important debates in society.

In a recent judgment the Court was of the opinion that the action by a member of a union revealing alleged misconduct and misusing of public property and funds by a school director, was protected under Article 10 of the Convention. The Court states that “the signalling of illegal conduct or wrongdoing in the public sector must be protected, in particular as only a small group of persons was aware of what was happening”. The applicant as an employee and union leader was thus best placed to act in the public interest by alerting the employer or the public at large²³.

A few examples in which the European Court awarded a high level of protection to the freedom of expression of NGOs or NGO-activists confirm the importance for NGOs and their activists or staff members of the protection under freedom of expression :

Vides Aizsardzības Klubs (VAK) v. Latvia (ECtHR 27 May 2004)

The applicant, an NGO based in Riga activating for environment protection, was convicted for publishing defamatory allegations about a mayor who, according to VAK, had signed illegal documents, decisions and certificates and had wilfully omitted to comply with the instruction of the relevant authorities to halt illegal building works. VAK was sued in court and in a judgment of 23 August 1999 it was ordered to publish an official apology and to pay damages to the mayor for publishing defamatory statements in a resolution that was also published in a regional newspaper.

In its judgment the European Court emphasised that the main issue of the resolution of VAK had been to draw

²⁰ ECtHR 19 December 2006, *Radio Twist S.A. v. Slovakia*. Notice that in this case the illegal making of a copy of a private telephone conversation was allegedly not made by the journalists of the radio station but by a third person from whom they received this illegal copy. At no stage it has been alleged that the applicant company or its employees or agents were in any way liable for the recording or that its journalists transgressed the criminal law when obtaining or broadcasting it.

²¹ ECtHR 15 February 2005, *Steel and Morris v. United Kingdom*. See also ECtHR 27 May 2004, *Vides Aizsardzības Klubs (VAK) v. Latvia*

²² ECtHR 29 October 1992, *Open Door and Dublin Well Women v. Ireland*; ECtHR 19 December 1992, *Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria*; ECtHR 9 February 1995, *Vereiniging Weekblad 'Bluf!' v. the Netherlands*; ECtHR 25 August 1998, *Hertel v. Switzerland*; ECtHR 7 February 2002, *E.K. v. Turkey*; ECtHR 28 June 2001, *Verein gegen Tierfabriken VGT v. Switzerland* ECtHR 27 May 2004, *Vides Aizsardzības Klubs (VAK) v. Latvia*; ECtHR 15 February 2005, *Steel and Morris v. United Kingdom*; ECtHR 7 November 2006, *Mamère v. France*; ECtHR 4 October 2007 *Verein gegen Tierfabriken Schweiz VGT v. Switzerland*; ECtHR 8 July 2008, *Vajnai v. Hungary*; ECtHR 17 July 2008, *Riolo v. Italy*; ECtHR 21 October 2008, *Salihoğlu v. Turkey*; ECtHR 6 November 2008, *Kandzhov v. Bulgaria*; ECtHR 20 January 2009, *Csánics t. Hungary*; ECtHR 3 February 2009, *Women on Waves a.o. v. Portugal* and ECtHR 10 February 2009, *Güçlü v. Turkey*.

²³ ECtHR 19 February 2009, *Marchenko v. Ukraine*. See also ECtHR 12 February 2002, *Guja v. Moldova*.

the public authorities' attention to a sensitive issue of public interest, namely the malfunctions in an important sector managed by the local authorities. As an NGO specialised in the relevant area, VAK had thus exercised its role of "watchdog" under the Environmental Protection Act. According to the European Court that kind of participation by an NGO in public debate contributes to the transparency of public authorities' activities and is essential in a democratic society. The European Court is of the opinion that VAK succeeded to establish sufficiently the truth of its factual allegations against the mayor. Given the limits on permissible criticism of a public figure, and taking into account the Latvian mayor's powers with regard to environmental protection, the criticism of the mayor for the policy of an entire local authority could not be regarded as an abuse of the freedom of expression. In a democratic society public authorities are to be exposed to permanent scrutiny by citizens and everyone has to be able to draw the public's attention to situations that they consider unlawful. Describing the mayor's conduct as "illegal" is considered by the European Court as expressing a personal legal opinion amounting to a value judgment of which the accuracy cannot be required to be proven. For all these reasons and despite the discretion afforded to the national authorities, the Court held that there had not been a reasonable relationship of proportionality between the restrictions imposed on the applicant organisation's freedom of expression and the legitimate aim pursued. The Court found a violation of Article 10 of the Convention.

Steel and Morris v. United Kingdom (ECtHR 15 February 2005)

The European Court of Human Rights in a judgment of 15 February 2005 came to the conclusion that the United Kingdom had violated Article 6 (*fair trial*) and Article 10 (*freedom of expression*) of the European Convention on Human Rights in a libel case brought by McDonald's Corporation against two United Kingdom nationals, Helen Steel and David Morris, who had distributed leaflets as part of an anti-McDonald's campaign organised by London Greenpeace²⁴. In 1986 a six-page leaflet entitled "*What's wrong with McDonald's?*" was distributed by Steel and Morris and in 1990 McDonald's issued a writ against them claiming damages for libel. The trial took place before a judge sitting alone from June 1994 until December 1996. On appeal the judgment of the trial judge was upheld in substance, the damages awarded were reduced by the Court of Appeal to a total of GBP 76,000. Leave to appeal to the House of Lords was refused. The European Court reached the conclusion that there has been a violation of Article 10 of the Convention. Although it is not in principle incompatible with Article 10 to place on a defendant in libel proceedings the onus of proving to the civil standard the truth of defamatory statements, it is considered essential by the Court that when a legal remedy is offered to a large multinational company to defend itself against defamatory allegations, also the countervailing interest in free expression and open debate must be guaranteed by providing procedural fairness and equality of arms to the defendants in such a case. The Court also emphasizes the general interest in promoting the free circulation of information and ideas about the activities of powerful commercial entities, as well as the potential "chilling" effect on others an award of damages for defamation in this context may have. The European Court of Human Rights considered that in a democratic society, apart from the press, also NGOs or campaign groups like Greenpeace, "*must be able to carry on their activities effectively and that there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment*". Moreover the award of damages was disproportionate to the legitimate aim served in order to protect the right and reputation of McDonalds, as the sum of GBP 76,000 was not in a reasonable relation of proportionality to the injury to reputation suffered. Given the lack of procedural fairness and the disproportionate award of damages, the Court found that there has been a violation of Article 10 in this case.

4.5. The importance of substantial evidence or of a sufficient factual basis in case of investigative or critical reporting

It is established case law by the European Court that value-judgments and opinions on political matters or issues of general interest are highly protected by Article 10. The Court at many occasions has reiterated that a "*factor of particular importance (...) is the distinction between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10. However, even where a statement amounts to a value judgment, the proportionality of an interference*

²⁴According to the Court's judgment the applicants "*were associated with London Greenpeace, a small group, unconnected to Greenpeace International, which campaigned principally on environmental and social issues*" (§ 9).

*may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive*²⁵.

Concrete allegations and statements of facts must have a more solid basis. An allegation of fact is indeed susceptible of proof. Indeed, while the role of the press (and NGOs) certainly entails a duty to alert the public where it is informed about presumed misappropriation on the part of public officials or by corporate organisations, the fact of directly accusing specific individuals or organisations by mentioning their names and positions places journalists and activists under an obligation to provide a sufficient factual basis for their assertions²⁶.

When journalists or media or NGOs do not endeavour before the national courts to provide any justification for their allegation and when its veracity has never been proven, the protection of Article 10 is refused. Without sufficient reliable evidence, without sufficient factual or authoritative basis those making information public that tarnishes the honour or reputation of persons allegedly involved in illegal or unethical activities, will be held liable for libel, defamation or injurious offence. There is in other words, also under Article 10 of the Convention, a clear and even high burden of proof on the defendant in cases of defamation or libel.

However, as seen above, in cases where journalists or NGOs could rely on pertinent and reliable evidence, the European Court in balancing the competing rights involved, gave a more prominent role to the importance of freedom of expression in a democracy, finding the convictions of the journalists and NGOs or their members a violation of Article 10 of the Convention²⁷.

In cases where the journalists did not succeed to give relevant evidence for their allegations, insinuations or accusations, the Court accepted the convictions and sanctions imposed by the national authorities as not being in breach with Article 10 of the Convention²⁸. In cases where journalists reported only in a sensationalist way²⁹ or when the revealed documents did not concretely or effectively contribute to public debate³⁰, the Court neither gave priority to the interests related to freedom of expression. In some cases the obvious lack of evidence of published allegations made the Court even decide to the (manifest) inadmissibility of a complaint under Article 10 of the Convention³¹. Journalists or NGOs whose right, - and according to the European Court even whose task -, it is to make information on matters of public interest available to society need to take the necessary steps in order to make sure that any of the statements or allegations damaging the reputation of others can be supported by evidence of proof. Journalists or activists have not only adequately to verify the facts from reliable sources and comply with the customary rules of investigative journalism or research, at the end they must also be in a position to prove in court the accuracy and reliability of their accusations. Even when this evidence is obtained by illicit or even illegal methods, the journalists, publishers or NGOs revealing this information are still under the protection of Article 10 of the Convention, as the relevant case law of the European Court has demonstrated. In these cases the

²⁵ ECtHR 8 Juli 1986, *Lingens v. Austria*. See also ECtHR 27 February 2001, *Jerusalem v. Austria*; ECtHR 19 May 2005, *Turhan v. Turkey*; ECtHR 19 December 2006, *Dabrowski v. Poland* and ECtHR 24 February 2009, *Długolecki v. Poland*.

²⁶ ECtHR 27 May 2004, *Vides Aizsardzības Klubs (VAK) v. Latvia*; ECtHR 17 December 2004, *Cumpănă and Mazăre v. Romania* and ECtHR 18 December 2008, *Mahmudov and Agazade v. Azerbaijan*.

²⁷ ECtHR 21 January 1999, *Fressoz and Roire v. France*; ECtHR 25 April 2006, *Dammann v. Switzerland* and ECtHR 7 June 2007, *Dupuis v. France*. See also ECtHR 19 December 2006, *Radio Twist S.A. v. Slovakia*.

²⁸ See ECtHR 26 April 1995, *Prager and Oberschlick v. Austria*; ECtHR 27 June 2000, *Constantinescu v. Romania*; ECtHR 7 May 2002, *Mc Vicar v. United Kingdom*; ECtHR 6 May 2003, *Perna v. Italy*; ECtHR 30 March 2004, *Radio France v. France*; ECtHR 29 June 2004, *Chauvy v. France*; ECtHR 17 December 2004, *Cumpănă and Mazăre v. Romania*; ECtHR 17 December 2004, *Pedersen and Baadsgaard v. Denmark*; ECtHR 21 December 2004, *Busuioc v. Moldova*; ECtHR 31 January 2006, *Stângu en Scutelnicu v. Romania*; ECtHR 14 February 2008, *Rumyana Ivanova v. Bulgaria*; ECtHR 22 May 2008, *Alithia Publishing Company Ltd. & Constantinides v. Cyprus*; ECtHR 8 July 2008, *Backes v. Luxembourg*; ECtHR 29 July 2008, *Flux (nr. 6) v. Moldova*; ECtHR 16 September 2008, *Cuc Pasco v. Romania*; ECtHR 14 October 2008, *Petrina v. Romania*; ECtHR 4 November 2008, *Mihaiu t. Romania* and ECtHR 18 December 2008, *Mahmudov and Agazade v. Azerbaijan*.

²⁹ ECtHR 10 December 2007, *Stoll v. Switzerland*.

³⁰ ECtHR 9 November 2006, *Leempoel and SA Ciné Revue v. Belgium*.

³¹ See e.g. ECtHR 4 April 2006, *László Keller v. Hungary* (Appl. 33352/02); ECtHR 15 June 2006, *Corneliu Vadim Tudor v. Romania* (Appl. 6928/04 and 6929/04); ECtHR 8 February 2007, *Falter Zeitschriften GmbH v. Austria* (Appl. 3540/04); ECtHR 21 October 2008, *Tomasz Wolek, Rafal Kasprów en Jacek Łęski v. Poland* (Appl. 20953/06) and ECtHR 21 October 2008, *Vittorio Sgarbi t. Italië* (Appl. 37115/06).

Court came to the conclusion that also in such circumstances, in balancing the rights and interests involved, the interests related to freedom of expression needed to prevail³².

In the case of Sato and Suzuki, it is to be underlined that the allegations on whale meat embezzlement in which crew members of the *Nisshin Maru* were allegedly involved were well-founded and were made public in good faith, *i.e.* in compliance with the requirements applicable to those who engage in these kinds of issues and public debate and in line with the European Court's case law guaranteeing the full protection of freedom of expression under Article 10 of the Convention. The box with whale meat taken from the depot belonging to *Seino Transportation* was meant as a crucial and manifest element of evidence for presenting their findings regarding the alleged whale meat embezzlement to the media at a press conference and later to the Public Prosecutor's Office in Tokyo. Sato and Suzuki obviously had no intention to steal the whale meat, as their action only aimed at revealing the whale meat embezzlement and to deliver evidence of this, together with the other information, documents and pictures they produced during their investigation. The box with whale meat taken from the depot of *Seino Transportation Company* was however the '*smoking gun*', the persuasive and "authoritative basis" for the whale meat embezzlement allegation that Greenpeace Japan revealed to public opinion and to the authorities, for further debate and/or investigation. Sato and Suzuki presented their findings of their research at a press conference and the same day, on their own initiative, they delivered the box with the whale meat to the Public Prosecutor and filed a police report about the suspected embezzlement. In these circumstances, it would be a manifest breach under Article 10 of the European Convention on Human Rights to convict Sato and Suzuki for trespass and/or theft as the interest related to bringing this information under the attention of the public and the authorities should prevail.

4.6. The protection of confidential sources

A last element that is to be looked at from the perspective of Article 10 of the European Convention on Human Rights, is the subsequent action undertaken by the Japanese authorities in terms of searching the offices of Greenpeace Japan and the homes of staff members, involving some 40 policeman in this action. During these searches a range of items was confiscated included the office server of Greenpeace Japan.

At several occasions the European Court of Human Rights was of the opinion that the searches at media offices or at the home and place of work of journalists or reporters, are to be considered as interferences by public authorities in the freedom of expression. In several cases the Court came to the conclusion that such interferences amounted to a violation of Article 10 of the Convention³³. There are no indications in the case of Sato and Suzuki that an "*overriding requirement in the public interest*" can legitimise such far-reaching interferences in the freedom of expression and the right not to disclose sources of information. The searches and confiscations were surely not aimed at preventing or sanctioning a major crime and there are no indications that no other reasonable alternative measures were available to the public authorities to investigate the case.

It is to be underlined that the right to be in principal protected against searches and confiscations from the perspective of Article 10 is not only a right of media or (professional) journalists. This right extends to "*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 communication*"³⁴.

³² ECtHR 21 January 1999, *Fressoz and Roire v. France*; ECtHR 25 April 2006, *Dammann v. Switzerland and ECtHR 7 June 2007, Dupuis v. France*. See also ECtHR 19 December 2006, *Radio Twist S.A. v. Slovakia and ECtHR 27 November 2007, Tillack v. Belgium*.

³³ *Roemen and Schmit v. Luxembourg*, ECtHR 15 July 2003, *Ernst a.o. v. Belgium*, ECtHR 22 November 2007, *Voskuil v. the Netherlands and ECtHR 27 November 2007, Tillack v. Belgium*.

³⁴ See Recommendation R (2000)7 on the right of journalists not to disclose their sources of information, Council of Europe, Committee of Ministers, 8 March 2000. In Belgium recently the Constitutional Court broadened the scope of persons that can invoke the protection of their information. The application "*ratione personae*" of the Belgian Law on protection of sources is guaranteed in respect of "*Anyone who directly contributes to the gathering, editing, production or distribution of information for the public by way of a medium*" Constitutional Court 7 June 2006, nr. 91/2006, www.arbitrage.be

In this perspective the searches and confiscation organised and undertaken by the Japanese authorities in the case of Sato and Suzuki are to be considered as a violation of Article 10 of the European Convention.

4.7. No disproportionate sanctions

A very last element, in subsidiary order in this submission, is the aspect of the nature and severity of the eventual penalties that Sato and Suzuki risk to be imposed.

It is established case law by the European Court of Human Rights, when journalists or reporters have breached provisions of national (criminal) law related to their newsgathering or newsreporting, still from the perspective of Article 10 the sanction imposed by the national authorities needs to be proportionate. The European Court in some of its judgments accepted that a sanction as *such* against a journalist or editor or publisher could be justified, but the Court considered sentences to imprisonment as manifestly disproportionate interferences by the authorities³⁵. In some cases also high financial damages were considered as disproportionate and hence violating Article 10 of the Convention³⁶.

The Court at several occasions reiterated that *“the nature and severity of the penalties imposed are factors to be taken into account when assessing the proportionality of an interference with the freedom of expression guaranteed by Article 10”* and that *“the Court must also exercise the utmost caution where the measures taken or sanctions imposed by the national authorities are such as to dissuade the press from taking part in the discussion of matters of legitimate public concern”*.

The Court made clear that States should not interfere in the freedom of expression and information by imposing imprisonment sentences in a way *“that unduly deters the media from fulfilling their role of alerting the public to apparent or suspected misuse of public power. Investigative journalists are liable to be inhibited from reporting on matters of general public interest if they run the risk, as one of the standard sanctions imposable for unjustified attacks on the reputation of private individuals, of being sentenced to imprisonment. A fear of such a sanction inevitably has a chilling effect on the exercise of journalistic freedom of expression”*³⁷.

In a recent case the Court underlined that *“each applicant was sentenced to five months’ imprisonment. This sanction was undoubtedly very severe, especially considering that lighter alternatives were available under the domestic law”*. The Court reiterates that, *“although sentencing is in principle a matter for the national courts, the imposition of a prison sentence for a press offence will be compatible with journalists’ freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in cases of hate speech or incitement to violence”*. The Court finally considered in this case that there was no justification for the imposition of a prison sentence, *“as such a sanction, by its very nature, has a chilling effect on the exercise of journalistic freedom”*. The Court concluded that *“by sentencing the applicants to imprisonment, the domestic courts contravened the principle that the press must be able to perform the role of a public watchdog in a democratic society”*³⁸.

The Parliamentary Assembly of the Council of Europe in its Resolution 1577 (2007) has urged the member States which still provide for prison sentences for defamation, even if they are not actually imposed, to abolish them without delay³⁹.

This rejecting approach toward prison sentences in the sector of news reporting and revealing information of public interest, does not mean however that lenient sanctions or financial damages are easily to be considered as necessary or proportionate interferences in the freedom of expression of journalists, media or NGOs active in news reporting or investigative journalism. In the case of

³⁵ ECtHR 18 December 2008, Mahmudov and Agazade v. Azerbaijan.

³⁶ ECtHR 22 February 2005, Pakdemirli v. Turkey. See also ECtHR 13 July 1995, Tolstoy Miloslavsky v. United Kingdom.

³⁷ ECtHR 17 December 2004, Cumpănă and Mazăre v. Romania

³⁸ ECtHR 18 December 2008, Mahmudov and Agazade v. Azerbaijan.

³⁹ Resolution *Towards decriminalisation of defamation*, adopted on 4 October 2007. See also recently ECtHR 24 February 2009, Długolecki v. Poland.

Dammann v. Switzerland, although the penalty imposed on the journalist had not been very harsh, the Court reiterated “that what mattered was not that he had been sentenced to a minor penalty, but that he had been convicted at all. While the penalty had not prevented the applicant from expressing himself, his conviction had nonetheless amounted to a kind of censure which would be likely to discourage him from undertaking research, inherent in his job, with a view to preparing an informed press article on a topic of current affairs. Punishing, as it did, a step that had been taken prior to publication, such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community and was thus liable to hamper the press in its role as provider of information and watchdog”. In these circumstances the Court considered “that Mr Dammann’s conviction had not been reasonably proportionate to the pursuit of the legitimate aim in question, having regard to the interest of a democratic society in ensuring and maintaining the freedom of the press”⁴⁰.

⁴⁰ ECtHR 25 April 2006, *Dammann v. Switzerland*. See also ECtHR 19 December 2006, *Radio Twist S.A. v. Slovakia*.

5. Conclusion

The prosecution and possible conviction of Sato and Suzuki, viewed against the background of a limited interference with the right of property of *Seino Transportation Company* and taking into regard the manifest public interest connected to the revelation of the whale meat embezzlement, discloses a striking disproportion between the competing interests of the protection of the right of property and the freedom of expression and information. From the perspective of Article 10 of the European Convention of Human Rights such an interference by the authorities is to be considered a violation of the right to freedom of expression and information because such an interference does not correspond to a “pressing social need”. The prosecution and a possible conviction of Sato and Suzuki amounts to an interference by the authorities in the freedom of expression and information and is, in the light of the European Court’s case law, not to be considered as “necessary in a democratic society”. Hence the action undertaken by the authorities and the prosecution of Sato and Suzuki is to be considered a violation of their rights and of Greenpeace Japan under Article 10 of the European Convention.

In subsidiary order there are legitimate reasons to consider a criminal conviction, sentencing Sato and/or Suzuki to imprisonment, as a manifest disproportionate and hence unacceptable sanction from the perspective of Article 10 of the European Convention and the European Court’s case law. A more lenient sanction, such as a conviction to pay a fine of a modest amount, could conceivably meet the standards of the European Court’s case law regarding the (dis)proportionate character of the nature and severity of penalties in the light of Article 10 of the Convention. It is to be underlined however that even sentences to a minor penalty or a fine, at many occasions have been considered by the European Court as having a detrimental chilling effect on the freedom of expression and information in a democratic society. Hence also such minor sanctions can be regarded as violating Article 10 of the European Convention.

With reference to the European Court’s case law it has also been demonstrated that the searches and confiscation organised and undertaken by the Japanese authorities in the case of Sato and Suzuki are to be considered as a violation of Article 10 of the European Convention.

In short:

Any conviction of Sato or Suzuki is to be considered as a disproportionate measure and as an unnecessary interference in the right of freedom of expression and information, taking into regard :

- that the minor offences committed by Sato and Suzuki, if proven, did not cause substantial harm or damage to *Seino Transportation Company* nor to any individuals to enjoy their (legitimate) property;
- that due to the action undertaken by Sato and Suzuki, qualified by the Japanese authorities as trespass and theft, they obtained authoritative evidence of whale meat embezzlement;
- that Sato and Suzuki and Greenpeace Japan have promptly, accurately and correctly informed the media, public opinion and the Public Prosecutor’s office of their investigation and their findings;
- that a conviction would be likely to have a chilling effect and hamper the role of Greenpeace Japan or other NGOs in this area as provider of information and public watchdog on embezzlement and other wrongdoing, *i.e.* matters of public interest.