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20 August 2010

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By post and by fax

Judge Jean-Paul Costa
President of the Grand Chamber
European Court of Human Rights
Council of Europe
F-67075 Strasbourg Cedex
France

Dear President Costa

RE: WRITTEN COMMENTS IN THE CASES OF *CAROLINE VON HANNOVER V. GERMANY*, *ERNST-AUGUST VON HANNOVER V. GERMANY*, AND *AXEL SPRINGER AG V. GERMANY* (APPLICATION NOS 40660/08, 60641/08 AND 39954/08, RESPECTIVELY)

We refer to the letter and fax sent by the Court, dated 13 July and 21 July 2010 respectively, granting us permission to make submissions in the above cases by 21 August 2010. We enclose our written comments in these cases and respectfully request that the Court gives them due consideration.

If we may be of any further assistance to the Court, please contact William Elliott of this office.

For the interveners,

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Media Legal Defence Initiative | **International Press Institute** | **World Association of Newspapers and News Publishers**

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WRITTEN COMMENTS
IN THE CASES OF

Caroline von Hannover v Germany
Application No. 40660/08;

Ernst-August von Hannover v Germany
Application No. 60641/08; and

Axel Springer AG v Germany
Application No. 39954/08

A submission to the European Court of Human Rights on behalf of the Media Legal Defence Initiative, the International Press Institute, and The World Association of Newspapers and News Publishers (WAN-IFRA).

20 August 2010

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Media Legal Defence Initiative **International Press Institute** **The World Association of Newspapers and News Publishers**

Pursuant to leave granted on 13 July 2010 by the President of the Grand Chamber under Rule 44 §3 of the Rules of the Court, the above named organisations ("**the Organisations**") hereby submit written comments on the legal principles that should govern the resolution of the issues presented by these cases. In particular the Organisations comment upon how the courts of certain contracting members states of the Council of Europe balance the competing rights under Arts 8 and 10, including how they have interpreted and applied ECHR jurisprudence (including the original *von Hannover* decision[1], hereafter "***von Hannover (No 1)***") and the relative weights attached to the public prominence of a person about whom allegedly private information is, or may be, published.

The German Federal Government has already performed a limited comparative analysis of the privacy regimes of different contracting member states (see Annex 3 to the Observations of the Federal Government in *von Hannover v Germany* (Applications No. 40660/08 and 60641/08) and *Springer v Germany* (Application No. 39954/08)), dealing in particular with Germany, and the UK.[2] The Organisations' written comments therefore focus upon Greece, Hungary, Italy, the Netherlands, France, Poland, and Sweden. The Organisations also explain how the equivalent balance is drawn in New Zealand, which the Organisations submit provides a useful and appropriate comparator outside the Council of Europe but against a broadly analogous legal and social context.

1. **SUMMARY**

1.1 On review, we consider that:

(a) domestic courts of contracting member states have demonstrated a broad trend towards the assimilation of the principles and standards relating to the protection of the right to freedom of expression and respect to private and family life articulated by the Court, and this is reflected in a substantial body of established case law (particularly regarding Art.10) on which domestic courts draw;

(b) a number of factors are consistently considered by domestic courts across contracting states when balancing Art.8 against Art.10;

(c) notwithstanding such trend, there still remain differences between the privacy regimes of contracting states and the decisions reached in different states on broadly comparable factual situations; and

(d) owing to:

(i) the competing and private nature of the rights guaranteed under Arts 8 and 10;

(ii) the difficulty faced by the Court in articulating an inflexible "one-size fits all" set of standards that is able to account for domestic variations in the social, economic, and cultural interests of the public, the local significance of a given public figure, the circumstances of any particular publication and existing legislative, regulatory (including self-regulatory) and jurisprudential differences in the privacy regimes across member states; and

(iii) the risk that such articulation will, given the nature of the parties to disputes that involve a conflict between Arts 8 and 10, open the

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[1] Application No. 59320/00.

[2] The Organisations understand that further details and analysis of the position in the UK will be given in the submissions of the Media Lawyers Association.

> Strasbourg floodgates to a multitude of claims, and unravel the hard-won victories in domestic implementation of the Court's case law in this area,

a wide margin of appreciation should be afforded to contracting member states in determining the balance between such competing rights, and, in particular, that the Court should only overturn decisions where the domestic courts have completely failed to consider significant relevant factors, have considered irrelevant factors to be significant, or where the outcome of the balancing act performed by the domestic courts is manifestly wrong. Such an approach is consistent with the fundamental structure of the Convention and its mechanics, which are predicated on the basis of subsidiarity and effective implementation by contracting states.

2. DOMESTIC PROTECTIONS OF PRIVACY AND FREEDOM OF EXPRESSION: THE POSITION IN MEMBER STATES FOLLOWING *VON HANNOVER (NO 1)*

Greece[3]

2.1 The rights to respect for private life and to freedom of expression are codified in the Hellenic Constitution,[4] and these provisions are applied together with Arts 8 and 10. Any restrictions imposed on such rights must be proportionate.[5] The infringement of a person's right to private life by the press may be proportionate where there is "justified interest" in the relevant publication. Such interest may apply in respect of the publication of photographs and articles in relation to the behaviour of persons of public interest (including persons fulfilling a public function or occupying public posts).[6]

2.2 Specifically, interference with a person's private or family life is permissible where: a) such person exercises public functions, uses public money or has a role in public life, be it political, economical, artistic, social or sport related; and b) the publication of the information is necessary for the formation of the public opinion[7], serves the need of the public to be informed and contributes to a dialogue of public interest. Interference is not permissible where it merely serves to further financial aims or satisfy curiosity (Hellenic Data Protections Authority 17/2008, Council of State no. 248/2009, and Athens CFI 829/1994). There is however a sphere of an individual's private life (pertaining, for example, to a person's sexual activities) that is inviolable.[8]

2.3 In determining a fair balance between the rights guaranteed under Arts 8 and 10 in respect of public figures, the courts consider the prominence of the individual concerned (Athens CA 4054/1992), the extent to which the individual has previously sought publicity or exposure of their private and family life in the media[9], and the extent to which they hold themselves out or are generally perceived to be role models (Xanthi CFI 139/2007). Specifically, the courts acknowledge the existence of a justified interest not only in the activities of individuals holding public office, but also in individuals (including, for example, artists) who exercise functions of public interest, on the condition that the information published concerns their public and not their private life (Supreme Court Criminal Department 1591/2003).

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3 The authors are grateful to Georgios A. Papageorgiou of Anagnostopoulos Bazinas Fifis for his assistance with this part of these written comments.
4 Arts 2(1) and 9(1), and Art. 14 respectively.
5 Art. 25(1) of the Hellenic Constitution.
6 E.g. Supreme Court case nos. 159.2008, 256.3008, and 1337/2008.
7 Thessaloniki CA 2147/2001 and 3424/1989.
8 E.g. Council of State 3545/2002; and Supreme Court in plenum 13/1999.
9 Supreme Court 854/2002.

2.4 Photographs are viewed as being, by their nature, more intrusive than articles and therefore require greater justification (Supreme Court 543/2009, 195/2007). In general, the publication of photographs without consent is not acceptable, unless the photograph satisfies the two conditions referred to above (eg Supreme Court 782/2005, 1609/2009). Thus in the case of a well known actress, the Court has ruled that the publication, for commercial purposes, of photographs showing the actress naked, was not permissible, even though the public's interest in the actress was legitimate (Athens CFI 2364/2002); whereas in a similar case, the Court emphasized that publication of such a photograph did not serve to inform the public opinion, but instead satisfied lucrative aims (Supreme Court 782/2005).

Hungary

2.5 The Convention was implemented into Hungarian law with the Act XXXI of 1993, so Arts 8 and 10 are directly applicable.

2.6 In line with the Court's case law, the contribution made to the public interest is of critical importance to the Hungarian courts' determination of whether an infringement of a person's privacy by the press is justified and necessary, and the press are afforded broader freedom in respect of publications relating to those with executive powers[10], while those active in public life (e.g. famous actors) also have to tolerate the activities of the press more than other private citizens.

2.7 In respect of the publication of photographs, individuals have very strong rights to control the publication of their image, with consent generally required from the subject of the photograph. For example, in one case, a public figure appeared at a public event and photographs were taken of him, but the journalist did not obtain the person's approval for the use of such photographs. The court established that the consent of such person should have been required for the use of the photographs taken especially of him, because he had attended that event as a private individual. However, use and publication of photographs would have been allowed without restriction if such photographs had been taken of the relevant person at an event where the participants might reasonably expect photographs to be taken.[11] In most of the cases reviewed the publication of the photograph could not be said to serve any public interest but the right to prior approval appears to apply even where it does: where a journalist published a photograph of the plaintiff and his minor partner without their prior consent, the court held that this breached the right of privacy of the plaintiff by proving his relationship with a minor. In addition, the court awarded compensation for non-material damages as the photographs brought to light the relationship, resulting in the plaintiff's humiliation at work.[12] Such requirements are applicable even where photographs have already been widely disseminated by a third party.[13]

Italy

2.8 In determining whether an article or photograph unreasonably encroaches on the privacy of a public figure, the Italian courts consider whether there is a legitimate public interest in the information being conveyed by the publication.[14] Typically a legitimate interest will only be found to exist where the publication directly concerns the public function performed by the individual, or the area of activity for which they are publicly known, and is capable of altering the relationship between the individual and public. For example, it is

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[10] Case no. 7.Pf.21.159/2007

[11] Supreme Court decision no. 2006.282.

[12] Case no. 2.Pf.21.059/2009.

[13] See footnote 12 above.

[14] Art. 97 of Law no. 633 of April 22, 1941.

lawful to disclose information relating to the consumption of cocaine by a footballer, as this may affect the footballer's performance, or the sexual relationship between a cardinal and a married woman, as this affects the cardinal's relationship with the public. In 2006, Lapo Elkann, descendant of the Agnelli family and marketing director for the famous Italian company FIAT, was hospitalised due to a cocaine overdose after spending the night in a flat with two transsexuals; it was held that the information relating to the cocaine but not that relating to his sexual conduct could be lawfully disclosed as only the former affected his position.[15] This requirement effectively prevents the disclosure of purely private information. Territorial restrictions also apply, such that only local newspapers may publish information about a person whose notoriety does not extend beyond his or her immediate locale.[16]

2.9 With respect to photographs, under Italian law an image of a person may generally only be published with the consent of the person concerned. Otherwise, a photograph may only be published if it depicts an activity relating to the exercise of a public role, or an event taking place in public, or the photograph otherwise relates to scientific, educational or cultural purposes, or facts, events or ceremonies of public interest.[17] Even then, the publication of certain images may be unlawful where such publication affects the honour, reputation or dignity of the subject. Additionally, there are certain inviolable spheres of private life that always require consent of the interested parties, including photographs and other information which disclose health conditions, political orientation, religious views or sexual life. Taking pictures of a person within their home, regardless of the public prominence of the individual, is a criminal offence.

The Netherlands

2.10 The Dutch courts have similarly held that, where the publication of an article or photograph would infringe a public figure's constitutional right to privacy, then in order to be justified it must fairly support a public debate about a matter of general interest.[18] Even where such interest exists, it must be balanced against the competing rights of the individual concerned, as none of the constitutional rights takes precedence over the others.[19]

2.11 Findings of unjustified intrusions upon privacy made by the Dutch courts include cases in which a photograph of a woman engaged in a sexual act in public was published,[20] and in which stories and photographs were published by a gossip magazine about the children of a Dutch princess whom the magazine had followed around.[21] The latter case can be contrasted with a case involving the publication of gossip about the editor of a famous gossip magazine, which was found to be justified in part because of the manner in which he worked.[22]

France

2.12 In France, the determination of a fair balance between the rights guaranteed by Art.8 and Art.10 ECHR is subject to the concept of proportionality and the contribution made by the relevant image or article to a general interest debate.[23] The dividing line between what is, and what is not, a "public event subject to general interest" is dependent on the facts

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15 Regulation of January 12, 2006 of the Italian Privacy Autority (Garante per la Protezione dei Dati Personali).
16 Decision of the Italian Privacy Authority of September 3, 2001.
17 Court of Cassation no. 21172 of 29 September 2006.
18 See e.g. Case no. AMI 2009/2.
19 See e.g. NJ 2008.274.
20 Court of Amsterdam 10 July 1996, Mediaforum 1996-10, pp. B136-B138 (*Wasteland*).
21 Supreme Court 4 March 1988, NJ 1989/367 (*Children De Bourbon Parma*).
22 Supreme Court 21 January 1994, NJ 1994/473 (*Ferdi E.*).
23 ECHR 14 June 2007, Hachette Filipacchi c/ France; and France Cass. 1ere Civ. 24th October 2006, 04-16.706.

relevant to the particular case. The Court of Cassation has for, example, held that the revelation of a princess' pregnancy was in the general interest of the public,[24] but that the disclosure of the existence of an illegitimate child in the same royal family was a private matter.[25] In general, following *von Hannover (No 1)* the courts have established that an encroachment on an individual's privacy will not normally be justified where the person does not have a public function or is not participating in a public event.[26]

2.13 The French courts do, however, accept that the protection afforded to the privacy of persons of repute is not as extensive as it is for the unknown: "*the protection of the limits of privacy, when it concerns a person who is famous because of his/her birth or his/her position or his/her job, cannot be construed as strictly as it would be for an unknown citizen, who remains far from the media attention because of his way of life".*[27]

2.14 In addition, while still affording a greater degree of protection to the privacy of public figures than many of the other contracting states, the introduction of the principle of proportionality has seen limitations imposed on the extent of protection of the right to privacy conferred by Article 9 of the French civil code, with the courts taking into account the consequences and seriousness of the information exposed in assessing any potential infringement.[28] The courts have also established the concept of a "topical event" (sujet d'actualite), in respect of which the press is granted a broader freedom of expression.

2.15 In respect of the publication of photographs, the French courts consider the legitimacy of the public interest in the content of the information conveyed[29], and/or in the relevant context to evaluate whether there is a link between the picture and the event, and the contribution made by such information to the public interest debate. In respect of the publication of photographs of public figures and celebrities, the determination of a fair balance between Art.8 and Art.10 will also depend on, among other factors, the event photographed, the treatment of the event reported[30], the location, whether the photograph was taken by a hidden camera[31] or by surprise.[32]

Poland

2.16 As with other member states, Poland provides for a differentiated standard and scope of protection of privacy depending on the degree of public prominence of the individual identified in a given publication. However, the courts always require the existence of a legitimate public interest in the information conveyed before they will condone intrusion into the private life of even a public figure; as The Supreme Court recently held, "*interference in the private sphere* [of a public figure] *is admissible exceptionally and can only cover the facts, which are directly linked with the public activity conducted by such person*".[33] The mere fact that a person is a "*celebrity*" does not create any such "*direct link*" between their public and private activities.[34]

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24 Cass. 2eme Civ. 19 February 2004 case no. 02-11.122.
25 Cass. 1ere Civ. 27 February 2007 no. 06-14.273.
26 Cass. 2eme Civ. 25 Novermber 2004 no. 02-10.954.
27 Cass. 1ere Civ. 31 may 2007 case no. 06-13.0008 - a case concerning the publication of revelations about the health of the wife of a high profile judge.
28 Cass. 1ere 3rd April 2002 no 99-19.852.
29 Cass. 2eme Civ. 4th November 2004 no. 03-15.397.
30 Cass. 1ere Civ. 03 April 2002 no. 99-19/852 - the break-up of a princely couple can be treated as a topical question depending on the way the newspaper discloses the event.
31 E.g. TGI Paris 1 April 1997.
32 E.g. Court of Appeal Paris, 25 June 1997.
33 Supreme Court Judgment of 11 May 2007, Case No I CSK 47/07.
34 Supreme Court Judgment of 24 January 2008, Case No. I CSK 341/07.

2.17 Any interference with the privacy of a public figure needs to be justified by "*important arguments concerning public interest*", "*connected with the performed public function*"[35] or be important in view of evaluating the credibility of publicly presented views.[36] It should be assumed that any such interference must also be proportionate to the legitimate aim trying to be achieved[37]. It cannot be justified if it is published solely to serve commercial purposes or is aimed "*only at satisfying pure need for sensation of the information recipients*".[38]

Sweden[39]

2.18 Under Swedish law, an action in respect of publications that might violate Art. 8 lies only where the publication is "defamatory" or contains "insulting language or behaviour".[40] Where there is doubt as to whether a publication is defamatory or insulting, the Freedom of Press Act instructs the courts to "acquit rather than convict".[41]

2.19 In the one case in which the Swedish Supreme Court has addressed *von Hannover (No 1)*, a case concerning a private individual filming his neighbours, the court questioned whether the absence of a general prohibition of non-consensual photographing or filming was consistent with the right to privacy under Article 8.[42] A number of Swedish legal scholars have questioned, more generally, whether Swedish law (and in particular the Freedom of Press Act) is compatible with the Court's decisions in *von Hannover (No 1)*.[43]

3. DOMESTIC PROTECTIONS OF PRIVACY AND FREEDOM OF EXPRESSION: THE POSITION IN A COMPARABLE JURISDICTION

New Zealand[44]

2.20 In *Hosking*[45] the Court of Appeal of New Zealand confirmed the existence of a tort of invasion of privacy, and this has been reaffirmed by the Supreme Court in *Television New Zealand Ltd v Rogers*.[46] To establish that the tort has been committed a claimant must demonstrate the existence of facts in respect of which there was a reasonable expectation of privacy, and that the publicity given to those private facts would be considered highly offensive to an objective, reasonable person (akin to showing an interference with rights guaranteed by Article 8). It is a defence, however, to establish that the publication of those facts is "justified by a legitimate public concern in the information".

2.21 In relation to the degree of privacy enjoyed by public figures and celebrities, at paragraph 121 of the judgment, the court said:

> "*The right to privacy is not automatically lost when a person is a public figure, but his or her reasonable expectation of privacy in relation to many areas of life will be correspondingly reduced as public status increases. Involuntary public figures*

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35 Supreme Court Judgment of 11 October 2001. Case No. II CKN 559/99.
36 Constitutional Tribunal Judgment of 20 March 2006, Case No. K 17/05.
37 Court of Appeals Nos. I ACa 459/09 and I ACa 385/06.
38 Supreme Court Judgment of 11 October 2001. Case No. II CKN 559/99.
39 The authors are grateful to Mannheimer Swartling for their assistance with this part of these written comments.
40 Chapter 7, Article 4(14) and 4(15) of the Freedom of Press Act respectively.
41 Chapter 1 Article 4 Freedom of the Press Act.
42 NJA 2008 p. 946.
43 Bergendahl, Märit, Integritetsskyddet vid smygfotografering, Svensk Juristtidning, 2009, p. 452 (462).
44 The authors are grateful to Simpson Grierson of New Zealand for their assistance with this part of these written comments.
45 *Hosking v Runting* [2005] 1 NZLR 1.
46 [2008] 2 NZLR 277.

may also experience a lessening of expectations of privacy, but not ordinarily to the extent of those who willingly put themselves in the spotlight."

Analysis

2.22 It is clear that the right to respect for private and family life currently receives considerable legal protection in each of the jurisdictions considered above, arguably other than in Sweden. Save in Sweden, the contracting states do not establish a primacy of either freedom of expression or the right to privacy; neither right taking precedence over the other. Rather, the requirement at Article 8(2) ECHR, that any derogation from, or restriction imposed upon, the right to respect for private and family life should be "*necessary in a democratic society*" is embodied in the concept of "proportionality" and the "legitimate public interest" requirement present in various guises[47], both legislative and jurisprudential, across contracting member states.

2.23 In each contracting state[48], the existence of a legitimate public interest in the information being disseminated is a pre-condition to balancing the competing rights of Art. 8 and Art. 10. In striking such a balance the domestic courts weigh a number of factors, including the potential damage to reputation caused by publication, to determine whether the interference in the individual's privacy is proportionate to the societal contribution made by dissemination of the relevant information.

2.24 While the precise terminology or legislative/judicial expression used to describe this balancing mechanism may vary between contracting states, all such balancings give effect to the concepts of "proportionality" and "legitimate aim" inherent in the derogations provided for in Art. 8(2) and Art.10(2).

2.25 These comparative reports, therefore, not only demonstrate a broad trend across contracting states towards an approximation of the standards articulated by the Court, but also illustrate the adoption of, and consensus towards, a general framework for the determination of a fair balance between the right to privacy and freedom of expression. While the individual weights given to a particular factor may vary between states, the legislative, regulatory and jurisprudential machinery underlying the balancing acts in each state closely accord with the principles codified in the Convention.

2.26 It is also apparent that each balancing act is carried out on a case by case basis highly dependent on the facts. Absent is the fettering of the Courts' ability to exercise its discretion that arguably characterised the German law concept of an "absolute persons of contemporary history" (criticised by the Court in *von Hannover (No 1))*, and paramount to the determination of a fair balance throughout is the existence of a legitimate public interest in the publication, and the concept of proportionality.

3. CONCLUSIONS AND SUBMISSIONS

3.1 The Organisations submit that, beyond ensuring that the mechanics, standards and principles applied by the domestic courts are in conformity with the principles laid down by the Court in respect of Articles 8 and 10 – which as shown above, they largely are – States should be granted a wide margin of appreciation for, among others, the following reasons:

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[48] Other than Sweden.

(a) Art. 53 of the Convention argues for a wide margin of appreciation[49];

(b) in *Chassagnou v France*[50], the Court indicated that it would as a matter of principle allow a wide margin of appreciation in situations of conflicting rights.

(c) states are generally granted a wider margin of appreciation in respect of positive obligations (ie intervening in relationships between private parties such as the press and public persons);

(d) a wide margin is given to matters on which opinions within a democratic society may reasonably differ widely: see, eg, *Fretté v France*[51]. The outcome of the balance between Articles in any particular set of circumstances (as opposed to the general principles to be applied) is precisely such a matter; and

(e) the Court has in fact already confirmed the breadth of such margin in the context of Arts 8 and 10 in *A. v Norway* (Appl. No. 28070/06):

> 66. "*...the Court considers that the competent authorities in the respondent State should be accorded a* ***wide margin*** *of appreciation in assessing the need to protect the applicant's private life under Article 8...*" (emphasis added).

3.2 In cases involving the determination of a fair balance between the rights guaranteed by Art. 8 and Art.10 ECHR, the Organisations submit that the Court's role is to confirm whether (a) a contracting state has in place an appropriate legislative/judicial mechanism for the determination of a fair balance, and (b) whether the particular factors taken into account by the national courts in striking such a balance are consistent with the Convention and its jurisprudence, affording the courts of contracting states a wide margin of appreciation to perform the balancing acts themselves.

3.3 In *White v Sweden*,[52] the Court indicated that the approach that the Organisations advocate is the correct one, namely to ascertain "whether the courts applied standards which were in conformity with the principles embodied in Articles 8 and 10 of the Convention". In *Chauvy v France*, marginal no. 70, the Court held that its supervisory role included "*verify[ing] whether the authorities struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other*". The Organisations submit that in verifying that a fair balance has been struck, the Court should determine whether the mechanisms, principles and standards applied by the domestic courts were consistent with the principles embodies in Art. 8 and Art. 10 of the Convention: if so, then it follows that a fair balance has been struck. The Court is not required to go further in seeking to re-determine *ab initio* the balance, and indeed it should not do so for the reasons given here.

3.4 The principle of subsidiarity, suggests that the Court's intervention is only justified where it would be more effective than any action taken at the national level, such as where domestic courts are unable adequately to protect the human rights of their citizens. The Organisations submit that a re-assessment of the balancing act performed by the domestic courts is contrary to such principle. Careful consideration should be given as to whether the Court's intervention is in fact justified where a member state has a legislative

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49 See, for example, paragraph 40 of the German Federal Government's Observations in *Caroline von Hannover v Germany* (Application no. 406608/08) and *Ernst August von Hannover v Germany* (Application no. 60641/08).

50 Judgment of 29 April 1999, 29 EHRR 615.

51 (2002) 38 EHRR 438.

52 Application No. 42435/02.

or regulatory framework in place that is able to adequately take into account those factors relevant to the determination of a fair balance.

3.5 In particular, the Organisations submit that, unless the weights attributed to the factors taken into account by the national courts in performing this balancing act are manifestly inappropriate and therefore result in a decision which clearly falls outside the member state's margin of appreciation, the findings of local courts in favour of free expression should be "set aside" only if they are shown to be clearly arbitrary or summarily dismissive of the privacy/reputational interests at stake. To do otherwise would be wrong in principle, for the reasons given, and would have severe practical consequences for parties, the Court, and the domestic implementation of the Convention through national measures.

3.6 As noted in the German Government's observations[53], in each of the applications before the Court it is quite possible that the opposing party at the domestic level would be the applicant before the Court had it been unsuccessful at a domestic level. If the Court were to take on the role of reconsidering the balance itself, then it risks being regarded as a *de facto* final court of appeal by unsuccessful parties, leading to an unsustainable growth in the number of such claims coming before the Court and undermining the system of domestic implementation and enforcement.

3.7 The Organisations have noted, for example, an increase in the number of privacy claims, together with a relative decline in the number of defamation claims.[54] Such a rise may reflect a perceived inadequacy of the legislative machinery at domestic level for the protection of reputation or personality by complainants. If so, Council of Europe member states are capable of rectifying any such inadequacies, as is presently demonstrated by the debate provoked by Lord Lester's Defamation Bill in the UK; and should do so. Alternatively, as suggested by the Federal Government at paragraph 30 of its Observations in *Axel Springer v Germany*, the increase may reflect a perception that the Court is willing to entertain such applications, characterising each one as posing a fundamental question, and to reconsider itself the balance struck at a domestic level.

3.8 In conclusion, the Organisations submit that the Court should focus on the principles adopted by domestic courts in balancing Articles 8 and 10, upon which there is a broad consensus amongst Member States, while affording a wide margin of appreciation to Council of Europe member states in determining the precise balance between such rights in individual cases, in particular only overturning decisions made in favour of the protection of freedom of expression where the balancing act performed by the domestic courts is manifestly wrong.

RICHARD MUNDEN
5 RAYMOND BUILDINGS

20 August 2010

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[53] At e.g. paragraph 39 of the German Federal Government's Observations in Caroline von Hannover v Germany (Application no. 406608/08) and Ernst August von Hannover v Germany (Application no. 60641/08).

[54] See the earlier submission in the case of Pauliukiene and Pauliukas v. Lithuania (application still pending) made by, among others, Media Legal Defence Initiative, in which it is argued that it is open to claimants to abuse Art. 8 by bringing ill-founded defamation claims under the guise of an alleged violation of a right to respect for private and family life.

ANNEX A

BACKGROUND INFORMATION ABOUT THE INTERVENERS

The Media Legal Defence Initiative ("**MLDI**") operates globally to help media and journalists defend their rights. It offers both financial and substantive litigation support to small and independent media outlets as well as to individual journalists, and maintains close links with bar associations and media freedom organisations in Asia, Africa, Europe and Latin America. MLDI has previously been granted leave to intervene in several other cases relating to freedom of expression that have been heard by the Court (including *MGN v. the United Kingdom* on the point of the cost of defending privacy claims, *Sanoma v. Netherlands* on searches of media premises, *Mosley v. the United Kingdom* on prior notification in news stories that concern privacy, and *Pauliukienė and Pauliukas v. Lithuania* on the relationship between privacy and defamation) and regularly intervenes in standard-setting cases at other constitutional courts and tribunals. The issue under consideration in the present pending cases – the determination of a fair balance between the competing rights of Article 8 (*right to respect for private and family life*) and Article 10 (*freedom of expression*) of the European Convention on Human Rights (the "**Convention**") – is a recurring issue in many of the cases that MLDI supports and is of strong concern to the organisation.

The International Press Institute ("**IPI**") is a global network of editors, media executives and leading journalists, with members in over 120 countries. IPI is dedicated to the furtherance and safeguarding of press freedom, the protection of freedom of opinion and expression, the promotion of the free flow of news and information, and the improvement of the practices of journalism. Based in Vienna, Austria, IPI is the oldest global press freedom group in the world. It was formed in October 1950 by 34 leading editors from 15 countries, and was founded on the belief that a free press would contribute to the creation of a better world. The media executives, managing editors and leading journalists who constitute IPI's membership are drawn from prestigious media organisations such as CNN, the BBC, ITV News, Deutsche Welle, the New York Times, the Los Angeles Times, the Boston Globe, the Guardian, the Neue Zuercher Zeitung, and The Hindu. The International Press Institute holds consultative status with the United Nations and the Council of Europe, and has intervened in standard-setting cases at the Court including *Lingens v. Austria.*

The World Association of Newspapers and News Publishers ("**WAN-IFRA**") is a non-profit, non-governmental organization made up of 76 national newspaper associations, 12 news agencies, 10 regional press organisations and individual newspaper executives in 100 countries. Founded in 1948, the association represents more than 18,000 publications on five continents. Among its main objectives are the defence of press freedom, the promotion of cooperation, and the exchange of good practice. In pursuit of these objectives, the World Association of Newspapers campaigns and represents the newspaper industry in international discussions on media issues, and occasionally intervenes in legal cases. Most recently, it intervened in the case of *Gutiérrez Suárez v. Spain.*