DOUBLING DOWN ON SAFETY OF JOURNALISTS

AN ANALYSIS AND POSITIONING OF OSCE MINISTERIAL COUNCIL DECISION NO. 3/18 - SAFETY OF JOURNALISTS (2018) IN A WIDER CONTEXT

Study by

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Executive summary

OSCE Ministerial Council Decision No. 3/18 – Safety of Journalists has rightly been described as a "pioneer" document within the OSCE system. It is a dedicated and comprehensive document, focusing on numerous inter-related aspects of the safety of journalists. It was adopted by consensus, breaking a lengthy period of successive failed attempts to reach full agreement on a Ministerial Council text on the topic of safety of journalists.

Although the Ministerial Council Decision consolidates existing commitments rather than creating new ones, its strength derives from the fact that it achieved the necessary consensus among OSCE participating States.

This study sets out the institutional, political and diplomatic context in which the Ministerial Council Decision was adopted. It then analyses the Decision's substantive provisions and explains their congruence with comparable work on the safety and protection of journalists by other international organisations. Particular attention is paid to substantive consistency with relevant instruments by the United Nations Human Rights Council, the Council of Europe's Committee of Ministers and the annual joint declarations on freedom of expression adopted by the OSCE Representative on Freedom of the Media and equivalent international and regional specialized mechanisms on freedom of expression.

Having analysed the substantive provisions of the Ministerial Council Decision and explained their underdocumented consistency with other comparable texts, the study then positions the Decision in broader terms. It first positions the Decision in relation to the work of the OSCE Representative on Freedom of the Media and the OSCE High Commissioner on National Minorities. It then looks beyond the OSCE to the approaches taken by the other two European-level recommendations on the safety of journalists – by the Council of Europe and the European Union.

The study concludes with a reaffirmation of the importance of the Ministerial Council Decision for closing the implementation gap between international standards and OSCE Commitments on the one hand and national laws, policies and practice on the other hand. It recommends that OSCE participating States use the Decision as a starting point for inclusive dialogue with all relevant stakeholders geared towards ensuring a safe and enabling environment for journalists. It also recommends that participating States use the Decision as a central reference point for the envisaged review and revision (where necessary) of national laws, policy and practice, to ensure their full compliance with international human rights law and OSCE Commitments. Finally, it recommends that participating States make good use of the guidance offered by the Decision for the development of national action plans to ensure the safety and freedom of journalists in practice.

1. Introduction

OSCE Ministerial Council Decision No. 3/18 – Safety of Journalists,[1] has been hailed by the OSCE Representative on Freedom of the Media (RFoM) as "groundbreaking" and by academics as "pioneer". The Decision addresses safety of journalists in a focused and comprehensive manner. It is the most focused and comprehensive engagement with relevant issues in a dedicated formal OSCE text. As such, it strengthens existing OSCE commitments dealing with freedom of expression, media freedom, access to information and journalistic freedoms and security.

This study paints the institutional backdrop to the Decision, giving a brief overview of relevant OSCE commitments and explaining the difficulty of achieving consensus among the 57 participating States on the topic, safety of journalists. This contextualisation helps to understand the significance of the Decision within the OSCE.

After this scene-setting, the study takes an analytical turn. It analyses the substantive provisions of the Decision and links them, as relevant, with similar approaches taken by various bodies of other intergovernmental organisations, such as the United Nations Human Rights Council and the Council of Europe's Committee of Ministers, both of which have engaged actively with safety of journalists in recent years.

The study then positions the Decision in a wider context, first within the OSCE, where the specialized bodies, the RFoM and the High Commissioner on National Minorities, have conducted work on the relevant issues, and second in respect of the Council of Europe and the European Union – the other two regional organisations in Europe that have been working on the same issues. This broader positioning reveals an overall consistent approach, with particular emphases per organisation.

The study's conclusion includes recommendations about the future uptake and implementation of the Decision by the OSCE participating States.

[1] OSCE Ministerial Council Decision No. 03/18, "Decision on the Safety of Journalists" (MC.DEC/3/18. Milan, 7 December 2018).

2. Institutional scene-setting

2.1 OSCE Commitments

Ever since the foundation of the OSCE, its participating States have entered into extensive political commitments to uphold freedom of the media, freedom of expression and the free flow of information.[2]

In the Helsinki Final Act of the Conference on Security and Co-operation in Europe, participating States undertook to "fulfil their obligations as set forth in the international declarations and agreements in [the field of human rights and fundamental freedoms], including the International Covenants on Human Rights, by which they may be bound".[3] The Helsinki Final Act contains extensive sections on freedom of information, expression and the media. Participating States have since consistently reaffirmed that "freedom of expression is a fundamental human right and a basic component of a democratic society" and have stated that they "take as their guiding principle that they will safeguard this right".[4] Participating States have also recognized the "need to strengthen the implementation of OSCE commitments in the field of media, taking into account, as appropriate, the work of other international organizations",[5] to which end they decided to establish the office of the RFoM.[6] In December 2018, the OSCE Ministerial Council called on participating States to take a number of courses of action to strengthen the safety of journalists.[7]

These commitments have been conveniently itemised and summarised in the OSCE RFoM's 2021 Communiqué on the right of the media to freely collect, report and disseminate information, news and opinions, regardless of frontiers.[8]

These commitments exist alongside political commitments on other topics, and they have also been supplemented by other OSCE instruments and initiatives. Chapter 4.1 focuses on the annual Joint Declarations adopted by the RFoM together with other specialized international mandates on freedom of expression and/or the media, and the RFoM's Communiqués. Several Joint Declarations and Communiqués address themes that feature in the Ministerial Council Decision. Chapter 4.2 focuses on the OSCE High Commissioner on National Minorities' Tallinn Guidelines on National Minorities and the Media in the Digital Age, which also address the safety of journalists.

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[2] The OSCE Commitments on Freedom of Expression, Freedom of the Media and the Free Flow of Information, 1975–2017 (4th Edition), available at: https://www.osce.org/representative-on-freedom-of-media/354081.
[3] Final Act of the Conference on Security and Co-operation in Europe, Helsinki, 1 August 1975, under 1. (a) Declaration on Principles Guiding Relations between Participating States, VII. Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief.
[4] Budapest Document: Towards a Genuine Partnership in a New Era, Budapest Decisions, Summit of Heads of State or Government, Budapest, 5–6 December 1994, VIII. Human Dimension, Para. 36.
[5] Lisbon Summit Declaration, Summit of Heads of State or Government, Lisbon, 2–3 December 1996, Para. 11.
[6] Establishment of the Office of the OSCE Representative on Freedom of the Media, Mandate of the OSCE Representative on Freedom of the Media, Decision No. 193 of the Permanent Council, 5 November 1997.
[7] OSCE Ministerial Council Decision No. 03/18, "Decision on the Safety of Journalists" (MC.DEC/3/18. Milan, 7 December 2018).
[8] Communiqué No. 1/2021, adopted on 3 May 2021, available at: https://www.osce.org/representative-on-freedom-of-media/485186..

2.2 Context

The Ministerial Council Decision has been described as a "pioneer decision" by Andrei Richter and Deniz Yazici.[9] It is perhaps more accurate to describe it as a "pioneer decision" *within the OSCE*. Its pioneering character can be explained by a few related factors: it is the OSCE's first *dedicated* political instrument focusing *exclusively and in detail* on the *safety of journalists*. For all the recurrent emphases in the OSCE's Commitments on freedom of expression, freedom of the media and freedom of information, prior to 2018, the Organization did not have such a dedicated high-level decision on the safety of journalists. This has much to do with the rule that decisions by the OSCE decision-making bodies, including the Ministerial Council, shall be adopted by consensus.[10] Consensus is understood as "the absence of any objection expressed by a participating State to the adoption of the decision in question".[11] Within the OSCE, at least since 2009, safety of journalists has been under "constant debate without consensus".[12]

Richter and Yazici have traced the winding political and diplomatic roads that led to the Ministerial Council Decision. They have documented in considerable detail a litany of close, but ultimately unsuccessful, attempts to secure consensus among all 57 participating States on the topic of safety of journalists. Those attempts span numerous Chairmanships: Greece (2009); Lithuania (2011); Ireland (2012); Ukraine (2013); Switzerland (2014); Serbia (2015); Germany (2016); Austria (2017). A breakthrough was achieved under the Italian Chairmanship in 2018, an achievement partly attributable to the influence of an informal Group of Friends on Safety of Journalists within the OSCE.[13]

As will be shown in Chapter 3, the significance of the Ministerial Council Decision derives largely from the 'breakthrough' political consensus behind it. The substance of the text is best described as 'consolidating' existing standards and commitments rather than as 'innovating' for new ones.

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[9] For explanation and brief commentary, see Andrei Richter and Deniz Yazici, 'Pioneer Decision on Safety of Journalists in the Preceding Context', in P. Czech, L. Heschl, K. Lukas, M. Nowak, & G. Oberleitner (Eds.), *European Yearbook on Human Rights 2019*, pp. 339-368.

[10] OSCE Ministerial Council, Rules of Procedure of the Organization for Security and Co-operation in Europe, MC.DOC/1/06, 1 November 2006, II. OSCE decision-making and informal bodies, (A) General provisions, para. 2.

[11] *Ibid.*

[12] Richter and Yazici, 'Pioneer Decision on Safety of Journalists in the Preceding Context', *op. cit*., p. 346.

[13] The information in this paragraph has been distilled from Richter and Yazici, who provide much more contextual detail and analysis: *ibid*., pp. 346-351.

3. Analysis

Richter and Yazici have categorized the "essential elements" of the Ministerial Council Decision as:[14]

1. Compliance with the international obligations and OSCE Commitments;
2. Recognition of certain functions of journalists;
3. Current threats against journalists;
4. Digital safety of journalists;
5. Access to foreign news and information services.

While this categorization is useful, the approach taken below is mainly a paragraph-by-paragraph commentary focusing on the substantive paragraphs of the Ministerial Council Decision. The commentary is preceded by a brief overview of the preamble. The "essential elements" can be detected throughout the commentary.

The Ministerial Council Decision consistently reaffirms existing provisions in international and European standards on the safety and protection of journalists. It draws on or reflects, in particular:

- UN Human Rights Council (HRC) Resolutions 2012, 2014, 2016 and 2018 on the safety of journalists;[15]
- Joint Declarations by the Specialized International Mechanisms on Freedom of Expression and/or the Media, including the Joint Declarations from 2000, 2006, 2010, 2012, 2015, 2016 and 2017;[16] and
- the Council of Europe's Committee of Ministers' Recommendation CM/Rec(2016)4 on the protection of journalism and the safety of journalists and other media actors.[17]

The analysis aims to show how the Ministerial Council Decision draws on, or reflects, some of the substantive focuses of the aforementioned instruments. This helps to contextualize the Decision, given that it does not refer to any of the named instruments, either in its preamble or in its substantive part.

The preamble shows a broad appreciation of the importance of the role that journalists play in society, including their investigative work and their coverage of elections. It recognizes the risk of violence for journalists and their families arising from their journalistic work, and that

[14] *Ibid*., pp. 356 *et seq*.
[15] UN Human Rights Council Resolution 21/12 of 27 September 2012 on safety of journalists, UN Doc. A/HRC/RES/21/12; UN Human Rights Council Resolution 27/5 of 25 September 2014 on the safety of journalists, UN Doc. A/HRC/RES/27/5; UN Human Rights Council Resolution 33/2 of 29 September 2016 on the safety of journalists, UN Doc. A/HRC/RES/33/2; UN Human Rights Council Resolution 39/6 of 27 September 2018 on the safety of journalists, UN Doc. A/HRC/RES/39/6.
[16] The Specialized International Mechanisms on Freedom of Expression and/or the Media: the 2000 Joint Declaration – current challenges to media freedom, 30 November 2000; the 2006 Joint Declaration, 19 December 2006; the 2010 Joint Declaration - Ten key challenges to freedom of expression in the next decade, 3 February 2010; the 2012 Joint Declaration on crimes against freedom of expression, 25 June 2012; the 2015 Joint Declaration on freedom of expression and responses to conflict situations, 4 May 2015; the 2016 Joint Declaration on freedom of expression and countering violent extremism, 3 May 2016; the 2017 Joint Declaration on freedom of expression, "fake news", disinformation and propaganda, 3 March 2017.
[17] Recommendation CM/Rec(2016)4 of the Council of Europe's Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors, 13 April 2016.

threats and violence are increasingly coming from terrorist groups and criminal organizations. It underscores the need for authorities and politicians to foster confidence in the work of journalists, e.g. by condemning threats and violence against journalists. The transfrontier nature of freedom of expression and information are stressed, including the right to receive foreign broadcasts and publications. Distinct threats to female journalists are another focus of attention, as are threats to the digital security of journalists, and the confidentiality of their communications. There is also attention for the dangers of impunity for the perpetrators of attacks against journalists and the specific challenge of ensuring protection for journalists in conflict situations. The wide canvas of the preamble provides the backdrop to the substantive provisions.

The substantive part of the Ministerial Council Decision opens with a call on participating States to "[f]ully implement all OSCE commitments and their international obligations related to freedom of expression and media freedom" (para. 1). This topic returns in para. 12, which calls on participating States to "[i]mplement more effectively the applicable legal framework for the protection of journalists and all relevant OSCE commitments". These emphases point to the importance of existing standards and the need to close the implementation gap.

Participating States are called on to "[b]ring their laws, policies and practices, pertaining to media freedom, fully in compliance with their international obligations and commitments and to review and, where necessary, repeal or amend them" (para. 2). The purpose of this review, revise and/or repeal exercise is to ensure that national laws, policies and practices "do not limit the ability of journalists to perform their work independently and without undue interference". A rigorous review, revise and/or repeal mechanism is also at the heart of CM/Rec(2016)4 (para. 7ii) and it features in the HRC's Resolutions from 2016 (para. 8) and 2018 (para. 10) as well. The general thinking behind such approaches or mechanisms is that systematic, ongoing scrutiny for how laws, policies and practices impact freedom of expression, media freedom and journalistic freedoms, can help to pinpoint and address specific legislative and other threats to those freedoms. Their aim is, in short, to ensure better implementation of existing international obligations and OSCE commitments at the national level.

In para. 3, the Decision calls on States to "[c]ondemn publicly and unequivocally all attacks and violence against journalists", following very similar calls in: CM/Rec(2016)4 (para. 15); the HRC's 2012 Resolution (para. 8d), 2014 Resolution (para. 1), 2016 Resolution (para. 1) and 2018 Resolution (para. 1); and the 2012 Joint Declaration on Crimes against freedom of expression (para. 1a). It gives examples of different types of attacks and violence: "killing, torture, enforced disappearance, arbitrary arrest, arbitrary detention and arbitrary expulsion, intimidation, harassment, and threats of all forms, such as physical, legal, political, technological or economic, used to suppress their work and/or unduly force closure of their offices, including in conflict situations". This itemization is very confronting, but also very revealing.

Threats are understood broadly. The inclusion of "legal" threats, for instance, recognises the serious chilling effect that vexatious or intimidatory lawsuits can have on journalists, the media, and other public watchdogs. CM/Rec(2016)4 also pays attention to the chilling effect of such legal threats (Guidelines, para. 36). Such lawsuits, often referred to as SLAPPs (Strategic Lawsuits against Public Participation), are designed to silence critical voices by subjecting them to intense financial and emotional pressure. The failure of participating States to reach

agreement on the inclusion of apposite references to "psychological safety" is, as noted by Richter and Yazici, a notable shortcoming of the text.[18]

The reference to "conflict situations" is the only instance of follow-through on the preambular references to UN Security Council Resolutions 1738 (2006) and 2222 (2015) concerning the position of journalists and other media workers in situations of armed conflict.[19]

Para. 4 issues a similar – but more specific - call on participating States to "condemn publicly and unequivocally attacks on *women journalists* in relation to their work" (emphasis added). It lists as examples of attacks: "sexual harassment, abuse, intimidation, threats and violence, including through digital technologies". The language used in para. 4 is similar to that of para. 2 in the HRC Resolutions from 2016 and 2018. This specific focus, including the reference to the digital dimension, provides important linkage to ongoing work on the safety of female journalists online by the Office of the OSCE RFoM. A significant early impulse for that work was the Representative's 2015 Communiqué on the growing safety threat to female journalists online.

The work has been coordinated under the #SOFJO – Safety of Female Journalists Online campaign. The campaign has done pioneering work, naming the specific safety-related threats to the work and lives of female journalists, unpacking the different layers of harm and viciousness, and educating and warning about the dangers they pose. The Representative's 2019 Communiqué on media pluralism, safety of female journalists and safeguarding marginalized voices online also draws on insights gained during the #SOFJO campaign. This communiqué refers to the Ministerial Council Decision.

In para. 5, it calls on participating States to "[u]rge the immediate and unconditional release of all journalists who have been arbitrarily arrested or detained, taken hostage or who have become victims of enforced disappearance". This reflects actual practice by the OSCE Representative on Freedom of the Media and seeks to make it routine practice for States as well. The HRC's 2016 Resolution contains a very similar provision in its para. 9, as does the HRC's 2018 Resolution in its para. 5.

Ending impunity for crimes against journalists is rightly singled out as a "key element in preventing future attacks" (para. 6). Among the envisaged "effective measures" by participating States to end impunity are: "ensuring that law enforcement agencies carry out swift, effective and impartial investigations into acts of violence and threats against journalists, in order to bring all those responsible to justice, and ensure that victims have access to appropriate remedies". These detailed provisions are well-grounded in international and European standards that cover the issue of impunity, and in the case-law of the European Court of Human Rights.[20] More specifically, the focuses and language of para. 6 are close to those in equivalent provisions in CM/Rec(2016)4 (which devotes an entire section to Prosecution, with a special focus on impunity) and the HRC Resolutions from 2012 (para. 7), 2014 (para. 3), 2016 (para. 4) and 2018 (para. 4). Some of the annual joint declarations also contain relevant

[18] Richter and Yazici, 'Pioneer Decision on Safety of Journalists in the Preceding Context', *op. cit*., p. 365 (see also p. 362).
[19] UN Security Council Resolution 1738 (2006), UN Doc. S/RES/1738 (2006), 23 December 2006; UN Security Council Resolution 2222 (2015), UN Doc. S/RES/2222 (2015), 27 May 2015.
[20] See further, Council of Europe, Safety of Journalists Platform, 'Impunity against perpetrators of physical attacks on journalists', Thematic factsheet, available at: https://fom.coe.int/en/fichesthematique/details/9.

focuses. One of the main focuses of the 2006 Joint Declaration is impunity in cases of attacks against journalists; the 2015 Joint Declaration on freedom of expression and responses to conflict situations links the problem of impunity and the need for effective investigations (para. 5c); the 2012 Joint Declaration on crimes against freedom of expression sets out detailed requirements for effective investigations (para. 4).

The Ministerial Council Decision also addresses the broader political and societal context in which impunity can emerge. Para. 7 accordingly urges "political leaders, public officials and/or authorities to refrain from intimidating, threatening or condoning – and to unequivocally condemn – violence against journalists". When political leaders and public officials and figures fail to outrightly condemn all threats and attacks on journalists, including female journalists, impunity gains its first firm foothold in society. Moreover, if such threats and crimes are not forcefully condemned or remain unpunished, this can undermine "trust in the credibility of journalists as well as respect for the importance of independent journalism". This resonates strongly with para. 15 of CM/Rec(2016)4. The HRC's 2018 Resolution also touches on these issues (para. 8).

Para. 8 taps into the growing awareness of the digital dimension of the safety and security of journalists and other media actors. The call to "[r]efrain from arbitrary or unlawful interference with journalists' use of encryption and anonymity technologies" (para. 8) may seem modest, but it bears explicit mention. It reaffirms similar, but more generally-worded, concerns in CM/Rec(2016)4 (para. 7), and a more specific articulation of the same concerns in the HRC's 2016 Resolution (para. 13) and 2018 Resolution (para. 14). Various joint declarations also draw attention to these issues, e.g. the 2015 Joint Declaration on freedom of expression and responses to conflict situations (para. 8) and the 2016 Joint Declaration on freedom of expression and countering violent extremism (para. 2j).

The Decision also repeats familiar – but nonetheless important – calls for awareness-raising and training initiatives on the safety of journalists by State bodies and law enforcement agencies, involving civil society where appropriate (para. 9). Such calls are a standard feature of other comparable texts, e.g. CM/Rec(2016)4 (Guidelines, paras. 12 (training for all State authorities) and 30 (in partnership with civil society and the media)), and (specifically for prosecutors and the judiciary) the HRC Resolutions from 2012 (para. 8b), 2014 (para. 5d), 2016 (para. 6d) and 2018 (para. 9f). The last-cited provision is broader as it also includes law enforcement officers and military and security personnel.

Para. 10 calls for the establishment, or strengthening, where possible, of "national data collection, analysis and reporting on attacks and violence against journalists", following equivalent calls in the HRC's Resolutions from 2014 (para. 5e), 2016 (para. 6e) and 2018 (para. 9d), and in the 2012 Joint Declaration on crimes against freedom of expression (para. 3c). The availability of such (disaggregated) data would yield valuable insights into the scope of the problem and provide a statistical evidence base for developing policies and action lines. The task of collecting such data could moreover usefully be included in national action plans for the safety of journalists.

Para. 11 strikes a cautionary note about one of the enduring threats to the freedom of expression of journalists: defamation laws. Participating States should ensure that defamation laws "do not carry excessive sanctions or penalties that could undermine the safety of journalists and/or effectively censor journalists and interfere with their mission of informing the public". States

should calibrate their defamation laws in accordance with international human rights standards on freedom of expression and, where necessary, revise and repeal such laws. This is very much in line with para. 2, even though there is no cross-reference to the earlier paragraph. The Council of Europe's Committee of Ministers (CM/Rec(2016)4, para. 6) and the European Court of Human Rights are also wary of the chilling effect of criminal defamation laws and sanctions on the right to freedom of expression.[21] Various Joint Declarations tend to go even further, by calling for the outright decriminalization of defamation, e.g. the 2000 Joint Declaration, the 2010 Joint Declaration - Ten key challenges to freedom of expression in the next decade (para. 2) and the 2017 Joint Declaration on "Fake News", Disinformation and Propaganda (para. 2b). The RFoM has addressed the specific question of criminal defamation laws protecting foreign heads of state in a 2016 communiqué.

The Ministerial Council Decision's concluding paragraphs, 13 and 14, are very closely related. Para. 13 underscores the need for participating States to "[c]o-operate fully with the OSCE Representative on Freedom of the Media, including on the issue of safety of journalists". Para. 14 then reaffirms the importance of the Representative's mandate and work by calling on states to: "[e]ncourage the OSCE Representative on Freedom of the Media's continued advocacy and promotion of safety of journalists in all OSCE participating States, in line with his/her mandate."

While all of the substantive provisions mentioned above are more or less covered by existing instruments, that does not undermine the perceived milestone status of the Ministerial Council Decision. After all, the Decision brings an array of existing commitments into the OSCE fold, in a dedicated political document, which was agreed by consensus, and in a detailed and coherent manner. While it lacks some of the more "progressive language" or ambition of comparable texts developed in other institutional contexts, it remains a pioneering document within the OSCE.[22] There is much to be said for the fact that the required consensus for the decision was forged out of persistent failures to broker unanimous agreement by the 57 participating States. There is also much to be said for the re-affirmation and reinforcement of existing international legal obligations and OSCE political commitments. Politically, this doubles down on the extensive promises that participating States should already be fulfilling.

[21] See generally: Tarlach McGonagle *et al*., *Freedom of expression and defamation: A study of the case-law of the European Court of Human Rights* (Council of Europe Publishing, 2016), available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806ac95b.

[22] Richter and Yazici, 'Pioneer Decision on Safety of Journalists in the Preceding Context', *op. cit*., p. 364.

4. Broader positioning

Whereas Chapter 2 presented the institutional backdrop to the Ministerial Council Decision, this chapter will position the Decision within broader institutional and inter-institutional contexts. The focus will first be on how the specialized OSCE mandates on freedom of the media (4.1) and on national minorities (4.2) have engaged with safety of journalists.

The focus will then extend beyond the OSCE and consider the flagship recommendations on safety of journalists adopted by the Council of Europe's Committee of Ministers in 2016 (4.3) and by the European Commission in 2021 (4.4). Clearly, the relevance of the Council of Europe and European Commission recommendations for OSCE participating States will vary, depending on whether or not they are members of the organisations in question. Both recommendations will be discussed here because, together with the Ministerial Council Decision, they constitute a set of leading political texts by the three main regional intergovernmental organisations in Europe. By aligning the three texts, we can form a coherent overview of current approaches to the safety of journalists at the European level. We can also identify, compare and contrast different institutional emphases. We can also see how these approaches have developed chronologically.

4.1 OSCE Representative on Freedom of the Media

The Office of the OSCE RFoM was established in 1997 to observe "relevant media developments in all participating States" and, on that basis and in close co-ordination with the Chairman-in-Office, to "advocate and promote full compliance with OSCE principles and commitments regarding freedom of expression and free media", playing "an early-warning function".[23] The mandate also requires the RFoM to "address serious problems caused by, *inter alia*, obstruction of media activities and unfavourable working conditions for journalists".[24] The RFoM is to concentrate "on rapid response to serious non-compliance with OSCE principles and commitments by participating States in respect of freedom of expression and free media".[25]

The RFoM has progressively developed a wide and flexible set of instruments and formats for reporting, public interventions and output: regular reports to the OSCE Permanent Council, joint declarations with other specialized international mandates, communiqués, statements, speeches, studies and reports, and publications of different kinds. Brief consideration will now be given to joint declarations and communiqués, due to their status and their thematic relevance for the OSCE Ministerial Council Decision.

4.1.1 Joint Declarations

Since 1999, the RFoM has, together with the other specialized international mandate-holders for freedom of expression and/or freedom of the media, adopted annual joint declarations on

[23] OSCE Permanent Council Decision No. 193, Mandate of the OSCE Representative on Freedom of the Media, 5 November 1997, Para. 2.
[24] *Ibid.*
[25] *Ibid.*, para. 3.

various themes.[26] The other specialized international mandates are: the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. The adoption of these annual joint declarations is very much in keeping with the RFoM's mandate, which provides for regular cooperation with other relevant international organizations, including the UN and its specialized agencies.[27]

While the Joint Declarations are not legally binding, the united front presented by the Specialized Mandates lends them considerable political authority. They are widely regarded as persuasive contemporary interpretations of the right to freedom of expression, in respect of the themes they address.[28]

As the analysis in Chapter 3 has shown, a number of Joint Declarations appear to have influenced Ministerial Council Decision, in particular: Ten Key Challenges to Freedom of Expression in the Next Decade (2010) and Crimes against freedom of expression (2012). Each of these Joint Declarations contains provisions and/or focuses that are reflected or replicated in the Ministerial Council Decision. In the absence of a documented paper trail, it is difficult to ascertain whether the linkage is direct, indirect or coincidental. At the very least, it is possible to speak of consistent approaches to common themes.

4.1.2 Communiqués

Since 2014, the RFoM has been issuing communiqués – formal statements setting out the Representative's position on particular issues, aligned with international standards and OSCE political commitments.[29] The safety and working conditions of journalists have been recurrent focuses in the communiqués adopted to date. The most relevant communiqué for the Ministerial Council Decision was the 2015 Communiqué on the growing safety threat to female journalists online, which had a trail-blazing function. It highlighted the urgency of the need for a gender-specific approach to the protection of female journalists, including online aspects. It laid the basis for the #SOFJO campaign that pushed the issue on the OSCE agenda and beyond.

The relationship between the RFoM's communiqués and the Ministerial Council Decision is not one-directional; the Decision has been recalled in all three communiqués adopted since 2018, which focus on: media pluralism, safety of female journalists and safeguarding marginalized voices online (2019); the right of the media to freely collect, report and

[26] Adeline Hulin, Ed., *Joint Declarations of the representatives of intergovernmental bodies to protect free media and expression* (Vienna, OSCE Representative on Freedom of the Media, 2013), available at: https://www.osce.org/files/f/documents/5/5/99558.pdf.
[27] Mandate of the OSCE Representative on Freedom of the Media, *op. cit.*, para. 11.
[28] For analysis, see: Toby Mendel, 'The UN Special Rapporteur on freedom of opinion and expression: progressive development of international standards relating to freedom of expression', in Tarlach McGonagle & Yvonne Donders, Eds., *The United Nations and Freedom of Expression and Information: Critical Perspectives* (Cambridge, Cambridge University Press, 2015), pp. 235-268, and Sejal Parmar, 'The significance of the Joint Declarations on freedom of expression', *Netherlands Quarterly of Human Rights*, Vol. 37, No. 2, 2019, pp. 178-195.
[29] For analysis, see: Tarlach McGonagle, 'Another string to the bow of media freedom: an analysis of the communiqués of the OSCE Representative on Freedom of the Media (2014-2022)', Office of the OSCE RFoM, forthcoming, 2022.

disseminate information, news and opinions, regardless of frontiers (2021); and a call to protect media freedom during armed conflict and to stop propaganda for war (2022).

4.2 OSCE High Commissioner on National Minorities

The Office of the OSCE High Commissioner on National Minorities (HCNM) was established in 1992 as a mechanism to provide early warnings of, and prevent, conflicts involving national minorities within the OSCE region.[30] The HCNM regularly develops thematic recommendations and guidelines for participating States on specific themes that are relevant to the HCNM's mandate.

The HCNM issued the Tallinn Guidelines on National Minorities and the Media in the Digital Age in February 2019.[31] The Guidelines provide the participating OSCE States with detailed guidance on how to create and safeguard an inclusive space for public debate in diverse societies. They pay particular attention to how persons belonging to national minorities and other groups interact in a fast-changing media environment, and how digital technologies can be used to counter hate speech and (online) disinformation.

The Guidelines stress the importance of the safety of journalists, even though this is not their central focus. The Guidelines seek to foster robust, public debate in which everyone, including persons belonging to national minorities, can participate effectively and without fear. They recommend that States put in place and implement "effective systems of legal and practical protection to guarantee the safety and security of everyone wishing to participate in public debate" (Guideline 3).

The Guidelines also exhort State and/or public officials to refrain from undermining or threatening journalists and other media actors, or inciting hatred or discrimination against them, on the grounds of belonging to a national minority or for reporting on issues relating to national minorities (Guideline 4). This Guideline is infused with the understanding that attacks on the integrity of journalists or other media actors, for example by deliberately making false accusations against them, can jeopardize their safety. State and/or public officials are called on to "publicly and unequivocally condemn all threats and violence against journalists and other media actors, irrespective of the source of those threats and acts of violence" (Guideline 4).

The Tallinn Guidelines underscore the importance of safety of journalists as a key feature of the enabling environment for freedom of expression and media freedom that States must ensure.[32]

4.3 Council of Europe

The Committee of Ministers' Recommendation CM/Rec(2016)4 on the protection of journalism and the safety of journalists and other media actors urges States authorities to

[30] Mandate of the OSCE HCNM, as originally set out in CSCE Helsinki Document 1992 – The Challenges of Change, 9-10 July 1992, available at: https://www.osce.org/hcnm/107878.
[31] OSCE High Commissioner on National Minorities, Tallinn Guidelines on National Minorities and the Media in the Digital Age, 1 February 2019, available at: https://www.osce.org/hcnm/tallinn-guidelines.
[32] An animation presenting the Tallinn Guidelines is available at: https://www.osce.org/hcnm/410759.

redouble their efforts to ensure more effective protection of journalists and other media actors. It builds on the European Convention on Human Rights and relevant principles from the case-law of the European Court of Human Rights. It unpacks relevant State obligations and spells out what they mean in practice for State authorities, offering guidance on how to fulfil them.

Recommendation CM/Rec(2016)4 comprises a Preamble, an operative part (para. 7), a set of Guidelines and an explanation of the principles from the case-law of the European Court of Human Rights, on which the Guidelines are based. The Guidelines have four pillars: Prevention; Protection; Prosecution (general focus and specific focus on impunity); Promotion of information, education and awareness-raising. The very detailed provisions of each pillar are summarized here:

Pillar	Key points
Prevention	• States should ensure a **favourable environment** for freedom of expression, including **media pluralism** and an **independent public service broadcasting system**. • A **comprehensive legislative framework** for protection of journalists and other media actors should include legal protection for **journalistic sources and whistleblowers**. • There should be independent, substantive **reviews of national laws and practice** at regular periodic intervals, which include attention for: o **Gender-related issues**, and o **Anti-terrorism, extremism and national security**. • **National review mechanisms** should be independent, have authoritative mandates and adequate resources. • **Defamation laws** should include freedom of expression **safeguards**. • **State surveillance** should include **safeguards** against misuse and be subject to **effective oversight mechanisms**.
Protection	States are called upon to: • Take preventive operational measures, like providing **police protection** or **voluntary evacuation to a safe place** • Encourage the establishment of or support the operation of **hotlines** and **24-hour emergency contact points** • Fully support the Council of Europe **Platform to promote the protection of journalism and safety of journalists** • Develop **protocols** and **training programmes** for all State authorities: o Judges, other legal professionals, law enforcement officers • Take into account the **specific democratic role and value** of journalism, especially in times of crisis, during election periods, at public demonstrations and in conflict zones • **Publicly condemn** all threats and violence against journalists and other media actors • Encourage media organisations to fulfil their **institutional responsibilities** towards **journalists and free-lancers** in all aspects of safety
Prosecution (general focus and specific focus on impunity)	• **Specific rules and procedures** for the **effective investigation and prosecution** of crimes against journalists. The importance of **involving victims and/or their families** in the investigation process is underscored. • **Specific provisions** aimed at preventing and ending **impunity for crimes against journalists**. When investigations and prosecutions do not lead to the bringing to justice of the perpetrators of killings of journalists or other

	media actors, **commissions of inquiry** or other such bodies may be established.
Promotion of information, education and awareness-raising	States should: • promote the **translation** of the Recommendation into domestic languages, its **dissemination** and **awareness-raising about its content**. • capitalize on the **publicity opportunities** afforded by **designated international days**, such as World Press Freedom Day (3 May) and International Day to End Impunity for Crimes against Journalists (2 November).

The Council of Europe has also developed an Implementation Guide for the Recommendation.[33]

As suggested in Chapter 3, CM/Rec(2016)4 has influenced or informed OSCE Ministerial Council Decision No. 3 in respect of some general and specific focuses.

4.4 European Union

In September 2021, the European Commission adopted a Recommendation on ensuring the protection, safety and empowerment of journalists and other media professionals in the European Union.[34] This was the European Commission's first direct engagement with these topics in a recommendation to the 27 EU Member States.

The Recommendation provides guidance to the Member States on how to take "effective, appropriate and proportionate measures to ensure the protection, safety and empowerment of journalists". It is framed in terms of EU law, policy and support measures; the Charter of Fundamental Rights of the European Union is an important reference point.

The main substantive focuses of the Recommendation are as follows: a statement of purpose; general recommendations; three sets of specific recommendations, and 'provision of information, reporting and monitoring'. The three sets of *specific* recommendations address particular issues of concern: 1) the protection and safety of journalists during protests and demonstrations; 2) ensuring online safety and digital empowerment, and 3) empowering and protecting female journalists and those belonging to minority groups or reporting on equality.

The Commission intends to monitor Member States' compliance with the Recommendation. Member States are expected to provide the Commission with all relevant information it needs for monitoring purposes no later than 18 months after the adoption of the Recommendation, and thereafter upon request.

The sets of detailed general and specific recommendations are reproduced in summary form here:

Recommendations	Key points

[33] 'How to protect journalists and other media actors?', Implementation Guide to Recommendation CM/Rec(2016)4 on the Protection of journalism and safety of journalists and other media actors, Council of Europe DGI(2020)11, June 2020.

[34] European Commission, Recommendation on ensuring the protection, safety and empowerment of journalists and other media professionals in the European Union, 16 September 2021.

General recommendations	• Effective and impartial investigation and prosecution of criminal acts • Cooperation between law enforcement authorities, journalists and associations representing journalists • Independent response and support mechanisms • Access to venues and sources of information • Training • Economic and social protection
Specific recommendations on protests and demonstrations	• Role of journalists during protests and demonstrations • Standard operating procedures and risk mitigation strategies • Communication between journalists and law enforcement authorities before and during protests and demonstrations • Methods of visual identification of journalists during protests and demonstrations • Regular dialogue and reporting
Specific recommendations on online safety and digital empowerment	• Cooperation with public authorities and industry • Cooperation with online platforms and civil society • Protection against online surveillance
Specific additional recommendations to empower and protect female journalists and those belonging to minority groups or reporting on equality	• Empowering female journalists, journalists belonging to minority groups and those reporting on equality issues • Transparency and reporting • Equality and inclusion in the media industry • Awareness raising campaigns and provision of information

The European Commission's Recommendation was adopted three years after the OSCE Ministerial Council Decision. Although both texts have some shared focuses, the European Commission's Recommendation does not refer explicitly to the OSCE Decision.

5. Conclusions and recommendations

OSCE Ministerial Council Decision No. 3/18 – Safety of Journalists emerged on the back of a series of unsuccessful attempts to broker the consensus needed for such a high-level decision. It is therefore appropriate to describe the Decision as a breakthrough text within the OSCE.

The substantive provisions of the Decision consolidate rather than innovate. They consolidate references in other documents within the OSCE, such as Joint Declarations adopted by the RFoM (together with specialized international mandates) and Communiqués adopted by the RFoM. The substantive provisions also benefit from cross-fertilization from relevant texts by other intergovernmental organisations, in particular UN HRC Resolutions and the Council of Europe's Committee of Ministers' 2016 Recommendation. This ensures that the Decision, as the OSCE's new focal text for the safety of journalists, is well-aligned with other regional and international approaches. The consistency of the overarching approach at the European level is completed by the European Commission's Recommendation from 2021 (included in the above analysis in the interest of comprehensiveness).

The status of the Decision as the OSCE's new focal text and point of reference for the organization's work on safety of journalists is already clear. It has been routinely referenced in the RFoM's three communiqués adopted since 2018 and it has been cited several times in the Explanatory Note to the HCNM's Tallinn Guidelines on National Minorities and the Media in the Digital Age.

Three factors, in particular, contribute to the central reference value of the Decision within the OSCE:

1. the political consensus underlying the Decision;
2. the explicit and detailed reaffirmation of participating States' obligations and commitments regarding the safety of journalists in a coherent fashion;
3. the specific emphases on women journalists and digital threats.

The Decision can be seen not only as a central reference point, but as a text that sets out a baseline level of protection for journalists across the OSCE. It can prove an important political tool for closing the implementation gap, if it is used effectively by the RFoM and other OSCE institutions, and crucially, by participating States as they operationalize the political consensus that engendered the Decision in the first place.

In very practical terms, participating States could take the Ministerial Council Decision as a starting point for an inclusive dialogue with journalists, the media, civil society, and all relevant stakeholders about how to ensure a safe and enabling environment for journalists in their countries. The Ministerial Council Decision could also be a central reference point for the envisaged review and revision (where necessary) of national laws, policy and practice, to ensure their full compliance with international human rights law and OSCE Commitments. The Decision's detailed and coherent focuses also make it eminently suitable as a central reference document for the development of national action plans to ensure the safety and freedom of journalists in practice.

Appendix: OSCE Ministerial Council Decision No. 3/18 - Safety of Journalists

OSCE

Organization for Security and Co-operation in Europe
Ministerial Council
Milan 2018

MC.DEC/3/18
7 December 2018

Original: ENGLISH

Second day of the Twenty-Fifth Meeting
MC(25) Journal No. 2, Agenda item 7

DECISION No. 3/18
SAFETY OF JOURNALISTS

The Ministerial Council,

Reaffirming all relevant OSCE commitments on the right to freedom of expression, freedom of the media, and free flow of information, including the 1975 Helsinki Final Act, and the 1990 Copenhagen Document, where the participating States reaffirmed that the right to freedom of expression includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers,

Mindful that everyone has the right to freedom of opinion and expression, in accordance with the Universal Declaration of Human Rights, particularly Article 19, and the International Covenant on Civil and Political Rights (ICCPR), particularly Article 19, and that it constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and development,

Mindful also that any restrictions on the right to freedom of expression may only be such as are provided by law and are necessary on the grounds set out in paragraph 3 of Article 19 of the ICCPR,

Reaffirming that independent media are essential to a free and open society and accountable systems of government and are of particular importance in safeguarding human rights and fundamental freedoms, as stated in the 1991 Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE,

Acknowledging that journalism and technology are evolving and that this contributes to the public debate, while it may also expand the range of risks that undermine the safety of journalists,

Taking note of the importance of promoting and protecting the safety of journalists for the implementation of the relevant Sustainable Development Goal and Targets of the United Nations 2030 Agenda for Sustainable Development,

Recognizing that the work of journalists can put them, and their family members, at risk of violence, as well as of intimidation and harassment, including through digital technologies, which can deter journalists from continuing their work or lead to self-censorship,

Noting with concern that the use of undue restrictive measures against journalists can affect their safety, and prevents them from providing information to the public, and thus negatively affects the exercise of the right to freedom of expression,

Reaffirming that the media in their territory should enjoy unrestricted access to foreign news and information services, that the public will enjoy similar freedom to receive and impart information and ideas without interference by public authority regardless of frontiers, including through foreign publications and foreign broadcasts, and that any restriction in the exercise of this right will be prescribed by law and in accordance with international standards, as stated in the 1991 Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE,

Concerned that violations and abuses of the right to be free from arbitrary or unlawful interference with privacy may affect the safety of journalists,

Deeply concerned by all human rights violations and abuses committed in relation to the safety of journalists, including those involving killing, torture, enforced disappearance, arbitrary arrest, arbitrary detention and arbitrary expulsion, intimidation, harassment and threats of all forms, such as physical, legal, political, technological or economic, intended to suppress their work,

Concerned by the distinct risks faced by women journalists in relation to their work, including through digital technologies, and underlining the importance to ensure their greatest possible safety and that the experiences and concerns of women journalists are effectively addressed,

Recognizing the crucial role of journalists in covering elections, in particular in informing the public about candidates, their platforms and ongoing debates, and expressing serious concern about threats and violent attacks that journalists can face in this regard,

Recognizing the importance of investigative journalism, and that the ability of media to investigate, and to publish the results of their investigations, including on the Internet, without fear of reprisal, can play an important role in our societies, including in holding public institutions and officials accountable,

Alarmed that targeted campaigns undermining the work of journalists are increasing, eroding public trust and confidence in the credibility of journalism, and recognizing that this can increase the risk of threats and violence against journalists,

Also alarmed at instances in which political leaders, public officials and/or authorities intimidate, threaten, condone or fail to condemn violence against journalists,

Expressing deep concern at the growing threat to the safety of journalists posed, *inter alia*, by terrorist groups and criminal organizations,

Emphasizing also the particular risks with regard to the safety of journalists in the digital age, including the particular vulnerability of journalists to becoming targets of hacking or unlawful or arbitrary surveillance or interception of communications, undermining

enjoyment of their right to freedom of expression and their right to be free from arbitrary or unlawful interference with privacy,

Reiterating that participating States condemn all attacks on and harassment of journalists and will endeavour to hold those directly responsible for such attacks and harassment accountable, as stated at the 1994 Budapest CSCE Summit, and also recognizing that accountability for crimes against journalists is a key element in preventing future attacks,

Stressing the significance of commemoration of 2 November as the International Day to End Impunity for Crimes against Journalists (IDEI) proclaimed by the United Nations General Assembly,

Noting with concern the climate of impunity that prevails when violent attacks committed against journalists remain unpunished, and recognizing the role of governments, legislators and the judiciary in enabling a safe working environment and ensuring safety of journalists by, *inter alia*, publicly condemning and bringing to justice all those responsible for crimes against journalists,

Recalling United Nations Security Council resolutions 1738 (2006) and 2222 (2015), which condemn all violations and abuses committed against journalists, media professionals and associated personnel in situations of armed conflict, and which state that journalists, media professionals and associated personnel engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians and shall be protected as such, provided that they take no action adversely affecting their status as civilians,

Calls on participating States to:

1. Fully implement all OSCE commitments and their international obligations related to freedom of expression and media freedom, including by respecting, promoting and protecting the freedom to seek, receive and impart information regardless of frontiers;

2. Bring their laws, policies and practices, pertaining to media freedom, fully in compliance with their international obligations and commitments and to review and, where necessary, repeal or amend them so that they do not limit the ability of journalists to perform their work independently and without undue interference;

3. Condemn publicly and unequivocally all attacks and violence against journalists such as killing, torture, enforced disappearance, arbitrary arrest, arbitrary detention and arbitrary expulsion, intimidation, harassment, and threats of all forms, such as physical, legal, political, technological or economic, used to suppress their work and/or unduly force closure of their offices, including in conflict situations;

4. Also condemn publicly and unequivocally attacks on women journalists in relation to their work, such as sexual harassment, abuse, intimidation, threats and violence, including through digital technologies;

5. Urge the immediate and unconditional release of all journalists who have been arbitrarily arrested or detained, taken hostage or who have become victims of enforced disappearance;

6. Take effective measures to end impunity for crimes committed against journalists, by ensuring accountability as a key element in preventing future attacks, including by ensuring that law enforcement agencies carry out swift, effective and impartial investigations into acts of violence and threats against journalists, in order to bring all those responsible to justice, and ensure that victims have access to appropriate remedies;

7. Urge political leaders, public officials and/or authorities to refrain from intimidating, threatening or condoning – and to unequivocally condemn – violence against journalists, in order to reduce the risks or threats that journalists may face and avoid undermining trust in the credibility of journalists as well as respect for the importance of independent journalism;

8. Refrain from arbitrary or unlawful interference with journalists' use of encryption and anonymity technologies and refrain from employing unlawful or arbitrary surveillance techniques, noting that such acts infringe on the journalists' enjoyment of human rights, and could put them at potential risk of violence and threats to their safety;

9. Encourage State bodies and law enforcement agencies to engage in awareness-raising and training activities related to the need to ensure safety of journalists, and to promote the involvement of civil society in such activities, where appropriate;

10. Establish or strengthen, where possible, national data collection, analysis and reporting on attacks and violence against journalists;

11. Ensure that defamation laws do not carry excessive sanctions or penalties that could undermine the safety of journalists and/or effectively censor journalists and interfere with their mission of informing the public and, where necessary, to revise and repeal such laws, in compliance with participating States' obligations under international human rights law;

12. Implement more effectively the applicable legal framework for the protection of journalists and all relevant OSCE commitments;

13. Co-operate fully with the OSCE Representative on Freedom of the Media, including on the issue of safety of journalists;

14. Encourage the OSCE Representative on Freedom of the Media's continued advocacy and promotion of safety of journalists in all OSCE participating States, in line with his/her mandate.