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**Organization for Security and Co-operation in Europe
Office of the Representative on Freedom of the Media**

**SPECIAL REPORT ON THE FIFTH ROUNDTABLE OF THE
SAFETY OF JOURNALISTS PROJECT**

LEGAL HARASSMENT

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Foreword

In December 2018, the Ministerial Council of the Organization for Security and Co-operation in Europe (OSCE) adopted Decision 3/18 on the Safety of Journalists. In this landmark document, the participating States committed themselves to improve the safety of journalists on different inter-related aspects, including physical, legal, economic and online threats and attacks, with a special focus on the distinct risks faced by women journalists. In 2022, the year in which we marked the 25th anniversary of the Mandate of the OSCE Representative on Freedom of the Media (RFoM), the current RFoM Teresa Ribeiro decided to devote special attention to the topic of safety of journalists and launched a new project.

The project consists of seven roundtables, each covering another aspect of the topic of safety of journalists: (1) data collection, analysis and reporting on attacks and violence against journalists and promotion of journalistic work; (2) secure working conditions; (3) safety of journalists in conflict situations; (4) intersectional perspectives; (5) legal harassment; (6) digital safety; (7) police prevention and fight against impunity.

The fifth roundtable took place on 16 May 2023, in the framework of the South East Europe Media Conference in Skopje, with the participation of six distinguished experts: Senior Legal Adviser for the European Centre for Press and Media Freedom Flutura Kusari; Head of Media Law Practice Group at Haynes Boone Laura Prather; Legal Counsel at Greenpeace International, member of the CASE Steering Committee and co-chair of the UK Anti-SLAPP Coalition Charlie Holt; Lawyer Jovana Kisin Zagajac; Investigative Reporter for the Crime and Corruption Reporting Network Milica Vojinovic; and human rights lawyer specialized on SLAPP cases and Executive Director of the Access to Information Programme in Bulgaria Alexander Kashumov. During the Central Asia Media Conference in Bishkek, on 6 July 2023, another roundtable was held with four experts from the region: Regional Media Law Adviser for Internews Kazakhstan Olga Didenko; Media Lawyer Madina Tursunova; Officer in Charge of International Mechanisms of the National Human Rights Commission of Mongolia Ganbat Ganbold; and Supreme Court Judge of the Republic of Kazakhstan Yelena Maxyuta. Although discussed in these regional settings, this does in no way mean that the issue is restricted to these two geographical areas. Instead, the problem of legal harassment and violations of the legal safety of journalists is a widespread phenomenon across the OSCE region.

This report is a reflection of the contributions and discussions from these roundtables, with additional information from supporting material and literature. It does not suggest to be complete in its coverage, but rather aims to provide guidance to the participating States in their endeavour to further journalists' safety.



I. Introduction

“At one point, we had more lawsuits against us than we had journalists”

Media workers face a multitude of threats in the OSCE region – this has become ever clearer from the roundtables held so far in the framework of the RFoM’s Safety Journalists project.

On top of the danger of online and physical abuse and violence, media workers also face a genuine risk of being targeted with legal harassment and unfounded litigation, with the law being misused to prevent them from doing their work, or as a means of retaliation for their unwanted investigations or reporting. This risk comes in many forms, ranging from administrative sanctions or criminal prosecution, to (the threat of) extensive and expensive civil litigation by powerful individuals and organisations – a phenomenon that is oftentimes also referred to as Strategic Lawsuits Against Public Participation (SLAPPs). Such legal harassment can pose a serious threat to the safety of media and the economic basis of outlets and, hence, has a strong chilling effect on media pluralism, undermining journalistic freedom in the OSCE region.

The fifth roundtable – held during the ninth South East Europe Media Conference (SEEMC) on 16 May 2023 in Skopje, North-Macedonia, with an additional meeting on legal safety during the 24th Central Asia Media Conference (CAMC) on 6 July in Bishkek, Kyrgyzstan – was therefore dedicated to this particular topic. The issues discussed ranged from the misuse of criminal and administrative law to the misuse of private law to intimidate, threaten, hinder and stifle media outlets and journalists.

From the discussions, it was clear that abusive legal procedures put grave (psychological) pressure on journalists and media outlets, while the money and time media have to spend to fight such legal claims (oftentimes brought by people that do claim a damage for reputation but refuse to specify the alleged falsehoods) cannot be used for journalistic reporting. The documentary *Rise in defamation cases against media restricts freedom*, produced by the OSCE Mission to Bosnia and Herzegovina (BiH) in co-operation with the Balkan Investigative Reporting Network BiH (BIRN), paints a bleak picture of the impact such lawsuits have on media workers in the country. Also in other countries, it was noted that especially defamation cases have a huge negative effect on the functioning of the media, with injunctions not to publish mostly ordered by lower courts, and with assets and property all too often being frozen in the course of the legal actions against media outlets and journalists. In parts of Central Asia and Mongolia, it was remarked that journalists regularly face legal pressure from high-ranking politicians and powerful persons, subjecting them to penalties and torts because of their



journalistic work. One of the experts noted that in some countries media organizations and journalists are the targets of more than half of all defamation prosecutions.

In all these circumstances, journalists do not enjoy the legal protection that they deserve, with their safety remaining at risk. They are forced to self-censor, while severe financial consequences limit the growth or sustainability of independent and investigative media. As it is clear from many OSCE documents, including the 2018 Ministerial Council Decision on the safety of journalists, legal safety is a prerequisite for media freedom and the ability for journalists to conduct their crucial task in society. Hence, it is clear that legal harassment and abuse of the legal and judicial system to hinder journalists and stifle media freedom goes against these very same OSCE commitments and principles.

II. Laws and lawyers

The importance of the topic at hand and the need for awareness raising about it, was clearly underlined by the fact, pointed by many of the experts, that the judiciary in some countries is either unaware of the issue of abusive legal claims, or sometimes even prone to accept political motivation behind such claims, protecting the powers that be. An expert referred to the remark made by a judge in a court case, where the media outlet had brought forward the vexatious nature of the claim that “SLAPP cases do not exist in the country”.

All experts agreed that the participants in the judicial process, especially judges, should be educated about the existence and countering of manifestly unfounded legal procedures. For lawyers, including barristers and solicitors, there should be some way to establish accountability for unethical behaviour in this respect. In the UK, for example, the Solicitors Regulation Authority (SRA) released a warning on SLAPPs in November last year, stating that behaviours likely to result in regulatory action include “seeking to threaten or advance meritless claims, including in pre-action correspondence, and including claims where it should be clear that a defence to that type of claim will be successful based on what you know”.

An important worrying trend put forward during the roundtables is the rise in draconic laws in the OSCE region. These laws, including laws on extremism or terrorism; on disseminating so-called false information; on privacy rights; and many other legal provisions, are easily misused to stifle media freedom. Laws on defamation and insult warrant separate mentioning as they are prone to vexatious use and stifling of media freedom. All such legislation can be found in the realm of public (administrative and criminal) law and in the realm of private law. Many of these laws consist of vague definitions with a broad scope, using different terms, leaving much



room for individual interpretation. A recent report by the Center for International Media Assistance (on the 105 laws to address mis- and disinformation that were passed by 78 countries worldwide between 2011 and 2022) shows that many laws include components that are detrimental to media freedom, oftentimes used to silence journalists.

Therefore, it is clear that any attempt to counter abuses of the legal and judicial system to stifle public participation starts with the repealing of laws that are ill defined and prone to such misuse.

At the same time, the experts underlined the importance of implementing dedicated legislation to counter legal harassment at the national level, replacing possible current rules on abuse of process/procedures that clearly do not function properly in countering legal harassment.

III. Some international perspectives

The United States of America has a long history when it comes to countering abuse of legal and judicial procedures, with the first anti-SLAPP legislation stemming from over 30 years ago. Although the US provides an extensive space for free expression (without criminal defamation or the legal possibilities to restrain publications beforehand), civil cases can have a huge potential to effectively silence public watchdogs. The experience of anti-SLAPP laws in the US is diverse, with different states implementing different regulations that vary in scope and effect. This trend got an extra impetus in 2010 when it became clear that the Internet had a large impact, with broad-based regulation. The main features of such regulations entail the early dismissal of claims that are manifestly unfounded and have no merit; the shift of burden of proof from defendant to claimant; and the adjudication of attorney fees. Another important point is the stay of procedures, a ruling by a court to stop or suspend a proceeding or trial temporarily, once an anti-SLAPP motion has been filed. In recent years, a uniform law commission has created a model law (the Uniform Public Expression Enforcement Act) as an example for states that have no, or weak, anti-SLAPP laws. There are to date no laws on federal level.

Until recently, Canada was the only other OSCE participating State with specific anti-SLAPP legislation passed in a number of provinces. In June 2023, however, the United Kingdom joined with amendments added to the economic crime and corporate transparency bill that create an early dismissal mechanism in the courts based on two tests: whether a case is a SLAPP and whether the claim has a reasonable chance of being successful. The onus is on the complainants to prove that their case has merit, rather than on the defendant. This new law is limited to



information in the public interest related to economic crime, which at least 70% of UK SLAPP cases relate to, according to research from the Foreign Policy Centre (FPC).

As the UK, with its wide possibilities for starting (cross-border) legal cases on defamation and similar issues is an important country when it comes to SLAPPs, these amendments mark a good first move, experts say, while also arguing that the law should be protecting all public interest speech more broadly.

Civil society in the UK has advocated for such anti-SLAPP measures for quite some time now, and agree that some progress has been made, especially when it comes to awareness raising. Still, more needs to be done, it was mentioned. The current systems for summary judgements are not sufficient and the hurdles for pursuing malicious abuse of the legal system are too low. SLAPPs must stop to be seen as a viable business practice, it was noted. Therefore, and notwithstanding the fact that the UK has a common law system, more and better legislation is much needed, the experts argued.

A European Union (EU) anti-SLAPP directive was first proposed by the EU Commission in 2022 and published on 27 April 2023. It aimed at combating the increasing use of abusive lawsuits designed to silence journalists and activists. The Commission's original proposal focused on cases with "cross-border implications", a label that would apply to all cases where the parties involved are domiciled in different countries and those where the public participation concerned is seen as a matter of public interest in more than one member state. The directive was meant to be accompanied by a recommendation detailing how member states can enact similar measures for domestic cases that do not have international implications. On 9 June 2023, the Council of Ministers of the European Union agreed on a general approach to this directive. According to some of the experts, the Directive has been watered down drastically, as amongst others it would no longer contain an article covering cases with cross-border implications; as provisions on dismissal proceedings, potential security for costs and damages, and penalties were removed; and as the threshold for cases to fall within the directive's scope was considerably raised. In an open letter on 12 July 2023, the UN Special Rapporteur on Environmental Defenders under the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters makes a clear appeal to the EU Member States regarding the firmness of the Draft. "Through the present legislative process, the European Union has the opportunity to establish itself as the global pioneer in efforts to combat SLAPPs around the world. This however will only happen if, in the current negotiations, the European Union takes strong and far-reaching efforts to ensure a broad and truly effective directive against SLAPPs. If it does, the directive will serve not only as a model for all member States but for



countries elsewhere too. If however the European Union falters in its level of ambition now, it will, quite simply, fail to protect those persons who act each day to protect us all.”

With the help of an Expert Committee on SLAPPs, the Council of Europe (CoE) is currently in the process of drafting a Recommendation on Countering Strategic Lawsuits against Public Participation. This Recommendation was opened for public consultations and a fourth and last meeting of the Expert Committee has been scheduled for October 2023. This draft Recommendation aims to protect public participation against SLAPPs and prevent the further use of SLAPPs in Council of Europe member states; to be realised as part of member states’ fulfilment of their broader obligations under the European Convention on Human Rights to ensure a safe and favourable environment for participation in public debate. The fulfilment of those obligations, as stated in the draft Recommendation, is guided by an awareness that a range of different kinds of threats create a chilling effect on participation in public debate and lead to self-censorship, thereby depriving societies of the pluralistic offer of information and ideas that individuals need in order to make informed decisions. The draft Recommendation clearly aims to provide broad protection, by naming specific forms of SLAPPs; by naming a list of safeguards, and remedies; naming forms of support for victims and targets of SLAPPs; and by referring to education, training and awareness raising and to national coordination and international co-operation mechanisms.

IV. Countering legal harassment

As stated above, proper legal rules addressing the issue of legal harassment and abuse of the legal and judicial system are much needed to counter the grave impact vexatious legal claims can have on media freedom in the OSCE region. As some experts noted, such a framework needed to empower the judiciary, but also push judges into action who might not feel comfortable without clear legal regulations on the matter.

It is also very clear, according to the experts, that an essential part of such legislation must entail some form of an early dismissal procedure, to take away as soon as possible the financial, time and psychological pressure on the victims of vexatious legal procedures. Some experts called for the need to establish “speedy procedure” to decide on an early dismissal claim, during which the proceedings should be suspended.

As also mentioned before, the judiciary and participants in the legal system need to be made aware and trained in the recognition of and dealing with legal harassment. In this light, the joint EU and CoE program “Reinforcing Judicial Expertise on Freedom of Expression and the Media



in South-East Europe” (JUFREX) was mentioned, as it comprises a series of training activities targeting the judiciary.

Aside, many of the experts underlined the importance of reporting, documenting and registration of vexatious legal cases, including a public register of cases that have been classified as SLAPPs (for the topic of monitoring and documenting, see also the report of the first Roundtable of the OSCE RFoM Safety of Journalists project: <https://www.osce.org/representative-on-freedom-of-media/530605>).

An important part of the discussion was spent on the so-called cultural conditions, as active public awareness and participation warrants higher protection. Broad coalitions of stakeholders are needed to shape the public opinion and explain to the public, lawmakers and legal professionals the detrimental effect of legal harassment on freedom of expression and, hence, on society as a whole. For this, national coalitions were advised, although international pressure (including by international organizations like the OSCE) might also be needed, especially for some smaller countries. One expert mentioned the growing anti-SLAPP movement in Bulgaria, where new initiatives were being pushed and crowd-funding was used to support victims of a vexatious legal claim.

For media under attack of legal harassment it was recommended to consider the option to go public with the vexatious accusations, to inform the public about the abusive claimant and the lawyers representing them.

A last important issue concerned the need for a change in the legal position of the defendant. The expert mentioned that the burden of proof and the bearing of the legal costs should shift to the claimant once the vexatious nature of the claim has been established. Also, the introduction of a system of effective, proportionate and dissuasive penalties to deter further SLAPPs was discussed. Next, the provision of proper remedies, such as compensation of damages, was mentioned as was the need to provide for aid, including legal, financial, psychological and practical assistance.

For further reading, please see an earlier report published by the OSCE RFoM on this topic: <https://www.osce.org/representative-on-freedom-of-media/505075>