



**IN THE MATTER OF:  
THE ASSASSINATION OF DAPHNE CARUANA GALIZIA**

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**LEGAL OPINION PROVIDED TO THE BEREAVED FAMILY  
CONCERNING MALTA'S RESPONSE TO THE ASSASSINATION OF  
DAPHNE CARUANA GALIZIA**

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### 1 INTRODUCTION AND SUMMARY

- 1.1 Daphne Caruana Galizia, the investigative journalist, writer and anti-corruption activist, was murdered on 16<sup>th</sup> October 2017, in a brutal, intricate assassination. Undoubtedly the most famous investigative journalist in Malta, Ms Caruana Galizia was murdered for her journalism; the victim of a car bomb close to her home in Bidnija, Malta. She has been described as *“Malta’s crusading scourge of official corruption, cronyism and incompetence... the embodiment of investigative journalism: forthright, uncompromising and totally fearless.”*<sup>1</sup> The impact of her investigative journalism has been summarised by one publication as follows: *“In that tiny country, her scoops consistently made life uncomfortable for the powerful, whether in banks or the prime minister’s office.”*<sup>2</sup>

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<sup>1</sup> Citation for the 2018 Commonwealth Press Union Media Trust Astor Award, awarded posthumously to Daphne Caruana Galizia on 17<sup>th</sup> April 2018.

<sup>2</sup> The Atlantic, ‘Who murdered Malta’s most famous journalist?’ 8<sup>th</sup> February 2018, available at <https://www.theatlantic.com/international/archive/2018/02/who-murdered-daphne-caruana-galizia/552623/>

- 1.2 Within days of her death, four United Nations (“UN”) experts issued a statement, calling on the Government of Malta to “*honour its commitment to a prompt, independent investigation*” into her murder, stating:

*“We are pleased that the Maltese authorities have initiated an investigation into the murder. We now urge a prompt, thorough and independent public inquiry and investigation, followed by a full judicial process to hold all the perpetrators to account. Concerns expressed by Caruana Galizia’s family in relation to the independence of the investigating judge should be taken seriously...”*

*At a time of rising insecurity for journalists and anti-corruption activists worldwide it is imperative that the Government do more than pursue investigations and accountability. It is also crucial that the Government – indeed all Governments – devote resources to protect journalists and activists and to encourage a vibrant space for the watchdog role of independent reporting, especially reporting critical of government, officials and politicians.”<sup>3</sup>*

- 1.3 It is now over nine months since Ms Caruana Galizia’s assassination and since the call by the UN experts for a “*prompt, thorough and independent public inquiry and investigation.*” During this time, grave concerns have been raised by numerous international bodies, including the Council of Europe and Members of the European Parliament (“**MEPs**”), regarding the progress and remit of the investigations underway, and the rule of law in Malta. Further, there has been a recent finding by a Maltese court that the senior officer leading the police investigation into her death, Deputy Police Commissioner Silvio Valletta, should cease to have any involvement in that investigation, and that every act and decision so far taken in the investigation be retaken by his replacement. This ruling has yet to be complied with by Malta, as the Attorney General has appealed, and that appeal is ongoing.
- 1.4 We are asked to advise Ms Caruana Galizia’s husband, Mr Peter Caruana Galizia, and their sons Paul, Andrew and Matthew Caruana Galizia (“**the Family**”). Ms Caruana Galizia is also survived by her parents and three sisters.

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<sup>3</sup> Joint Statement of 19<sup>th</sup> October 2017 by Ms Agnes Callamard, Special Rapporteur on extrajudicial, summary or arbitrary executions; Mr Michel Forst, Special Rapporteur on the situation of human rights defenders; Mr Juan Pablo Bohoslavsky, independent expert in the effects of foreign debt and human rights; and Mr David Kaye, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22262&LangID=E>

In this Opinion we consider the obligation upon Malta to ensure that an independent and effective investigation is conducted into the circumstances of Ms Caruana Galizia's death, pursuant to Article 2 of the European Convention on Human Rights (“ECHR”). This investigative obligation under Article 2 is triggered where the possibility of state culpability and/ or system failure is inherent in the circumstances of a death. In order to be Article 2 compliant, an independent and effective investigation must take place which analyses factors which may have caused or contributed to the death. This includes, in this case, not only the question of who detonated the device on 16<sup>th</sup> October 2017, but also wider questions, including criminal culpability of any masterminds behind the assassination, what steps were or ought to have been taken by the Maltese authorities to protect Ms Caruana Galizia and her family from known risks to her life; and any contributing system failures. To meet the Article 2 requirement of efficacy, the investigation must have certain key features, including sufficient promptness and adequate involvement of the bereaved family. International human rights standards require no less.

- 1.5 Within eight weeks of Ms Caruana Galizia's assassination, clear concerns were beginning to emerge regarding limitations to the inquiries<sup>4</sup> being undertaken by the Maltese authorities. On 8<sup>th</sup> December 2017 we provided an urgent Advice (“**the December Advice**”) to the Family. On the information then available, we advised that it appeared that Malta was at that stage failing to meet its Article 2 investigative duty in relation to Mrs Caruana Galizia's death.
- 1.6 This further Opinion now takes account of developments in the intervening seven months. As explained below, we are of the view that Malta continues to fail to meet its investigative obligation under Article 2 ECHR, with the emergent concerns expressed in our December Advice have been compounded and exacerbated by developments in the intervening months.

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<sup>4</sup> The term ‘inquiry’ here, and throughout this Opinion, is used to include any form of independent inquiry or investigation.

## *Summary of our Legal Opinion*

1.7 In summary, we advise that:

- (i) Independent and effective examinations of possible State breaches of the protective obligation under Article 2 ECHR are of vital importance to bereaved families and to the wider public, given they are the mechanism for lessons to be learned and for changes to be made to prevent future deaths. As identified by Lord Bingham in *R (Amin) v. Secretary of State for the Home Department* the purpose is: “*to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.*”<sup>5</sup>
- (ii) Yet, over nine months after her assassination, Malta has failed to institute any form of inquiry into the wider circumstances surrounding Ms Caruana Galizia’s assassination. There is no Article 2 compliant process examining whether Malta complied with its protective obligation to her, i.e. (a) whether Malta knew, or ought to have known, of a real and immediate risk to her life; (b) the adequacy of any steps taken by Malta to guard against that risk; and (c) any steps that Malta needs to take to prevent future deaths of investigative journalists or campaigners in similar circumstances.
- (iii) The criminal processes currently underway in Malta, i.e. the criminal proceedings against the alleged assassins and the magisterial inquiry in relation to any directive mind (by which we mean any puppet-masters), are focused purely upon criminal culpability. They are not tasked or equipped to explore the wider questions surrounding Malta’s protective obligation to Ms Caruana Galizia. Even were those proceedings operating entirely independently and effectively (i.e. regardless of the

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<sup>5</sup> [2003] UKHL 51; [2004] 1 AC 653, at [32].

concerns raised regarding Deputy Commissioner Valletta), they would have limited scope and not operate to investigate the full set of wider circumstances surrounding Ms Caruana Galizia's assassination. This includes the crucial question of whether her life could and should have been saved. Accordingly the current processes are also inherently unable to perform another key function under Article 2, that of preventing future deaths.

- (iv) We are further concerned that no measures have been taken to protect the integrity of Ms Caruana Galizia's journalistic work and in particular her sources, a matter of the gravest importance given the nature of her writing. To the contrary, government officials and governing MPs continue to seek to smear Ms Caruana Galizia and to target those they consider to be her sources.
- (v) Accordingly, it is imperative that an independent and effective inquiry is immediately established to ascertain whether Malta knew, or ought to have known, of a real and immediate risk to Ms Caruana Galizia's life; whether any steps taken to address that risk were adequate; and whether any lessons must be learned to prevent other deaths in future. In order to comply with Article 2, this investigation must be conducted independently of state authorities, including the Maltese police, Government and politicians. It must have comprehensive, transparent and accessible terms of reference. It must provide for meaningful involvement by the family, including access to disclosure; an opportunity to put questions to witnesses; and consideration of a public hearing stage. These are minimum requirements to comply with Article 2, including by engendering public confidence in the process and allaying public concern.
- (vi) There is a potential mechanism within Maltese domestic law which could be used to meet these Article 2 requirements, namely an enhanced version of an inquiry under the Inquiries Act, with terms of reference which mandate Article 2 compliance. As a signatory to the European Convention on Human Rights, it is concerning that Malta has not taken

urgent action to put in place such an inquiry. Instead it has rejected a proposal for a far more limited inquiry.<sup>6</sup> If Malta fails to agree to institute an Article 2 public inquiry, the international community must ensure that another form of investigative mechanism is put in place to enable the bereaved family to realise their rights under the ECHR.

## 2 BACKGROUND

2.1 Ms Caruana Galizia's biography and the circumstances of her death are well known, and only the most salient points are mentioned here.

### *Daphne Caruana Galizia's work*

2.2 Ms Caruana Galizia was a journalist and prolific blogger who focussed particularly upon financial and political corruption in Malta. Her blog, *Running Commentary*, was hugely influential, sometimes attracting 400,000 readers a day, more than the combined circulation of the country's newspapers, and bearing in mind that Malta's population is only around 430,000. The topics she covered included nepotism in government and between government and business, money laundering, links between Malta's growing gambling industry and organised crime, the corrupt sale of Maltese passports, and criminal links between Malta and the government of Azerbaijan.

2.3 There were clear threats to her physical safety, linked to her journalism. We understand that she was first attacked in 1996, when her front door was set alight using petrol, and shortly before that the family dog was killed and its corpse left outside her home, with a slit throat. In 2006 a serious arson attack upon the family home took place. She repeatedly received death threats and threats of violence, over a sustained period. In the year prior to her death, these threats and retaliatory attacks escalated. During that year, Ms Caruana Galizia had made a number of revelations about senior Maltese politicians, and was a perpetual thorn in the side of the Maltese political establishment. She broke the story in 2016 about secret Panamanian companies which top government politicians had set up days after getting into power, and she later reported that a third secret company in Panama belonged to the wife of the Prime Minister. In

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<sup>6</sup> 19<sup>th</sup> December 2017, Parliament of Malta.

2017 she was undertaking substantial investigative and reporting work on a range of issues including: Pilatus Bank, Henley and Partners and their links to government and each other; allegations of money laundering and tax evasion against the leader of the Nationalist Party, Adrian Delia; and allegations that Economy Minister Chris Cardona had, along with his aide Joe Gerada, visited the FKK Acapulco brothel in Velbert, while in Germany to take part in a forum on the digitisation of European industry.

- 2.4 Many of the allegations arising from Ms Caruana Galizia's reporting attracted legal action, or the threat of legal action, and at the date of her death her bank account had been frozen following a request presented in court by the Economy Minister and Deputy Leader of the Labour Party, Chris Cardona. She was a defendant in five criminal libel cases which abated upon her death, and 42 civil defamation claims, 34 of which are ongoing. Those civil defamation claims include: one case brought by Malta's Prime Minister Joseph Muscat; two cases brought by Minister for Tourism Konrad Mizzi; two cases brought by the Prime Minister's Chief of Staff Keith Schembri; one case brought by former Deputy Governor of the Central Bank Alfred Mifsud; one case brought by the head of Malta's 2015 Commonwealth Heads of Government Meeting task force Phyllis Muscat; five cases arising out of the allegations against Cardona and Gerada; and 19 cases brought by businessman Silvio Debono.

#### ***Daphne Caruana Galizia's death***

- 2.5 Ms Caruana Galizia was assassinated on 16<sup>th</sup> October 2017. She was the victim of a car bomb near her home in Bidnija, aged 53.
- 2.6 Since Ms Caruana Galizia's assassination, her husband Peter has remained in Malta; however, her three sons, after taking independent advice, have chosen not to permanently reside there for fear that their safety may not be guaranteed.

#### ***Concerns raised by the Family regarding independence and effectiveness***

- 2.7 From the very outset, the family has repeatedly raised concerns regarding the independence and effectiveness of the investigation. The first magistrate tasked with securing evidence and co-ordinating the investigation in the vital hours immediately following Ms Caruana Galizia's death had herself brought criminal



defamation proceedings against Ms Caruana Galizia, but only stood down 17 hours after the Family formally applied for her to abstain from the case, by which time she had already taken significant steps.

- 2.8 Just as concerning was the Family’s complaint as to the central involvement of Deputy Commissioner Silvio Valletta, who along with his wife, Minister Justyne Caruana, had been the subject of highly critical stories on Ms Caruana Galizia’s blog. In particular, Ms Caruana Galizia had investigated Malta’s Financial Intelligence Analysis Unit (“**FIAU**”), and the Deputy Commissioner is a member of its board. Valletta’s role in the investigation has nevertheless continued until very recently, and the Family were forced into taking formal legal action in Malta’s Constitutional Court relying on Article 2 ECHR, in order to end and examine his involvement.

#### ***The arrest and detention of three suspects***

- 2.9 On Monday 4<sup>th</sup> December 2017 the Prime Minister announced that ten people had been arrested in connection with Ms Caruana Galizia’s death. On Wednesday 6<sup>th</sup> December it was announced that three of those people (Vince Muscat, 55, Alfred Degiorgio, 52, and George Degiorgio, 54) had been charged with murder, conspiracy, forming part of a criminal gang, using explosives to kill, being in possession of explosives, and “*relapsing*” (this followed their arraignment before a magistrate on 5<sup>th</sup> December).<sup>7</sup> They have pleaded not guilty to all charges and remain in custody. The remaining seven arrestees were released on bail.

#### ***Concerns from international institutions***

- 2.10 On 24<sup>th</sup> October 2017 a debate took place in the European Parliament concerning the protection of journalists and the defence of media freedom in Malta, and in particular about Ms Caruana Galizia’s work, her death and the adequacy of (a) investigations in Malta into the allegations she had made of corruption and other illegal activity, and (b) the investigation into her death.<sup>8</sup> During the debate many MEPs were highly critical of Malta. For example,

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<sup>7</sup> See for example: <http://www.independent.com.mt/articles/2017-12-05/local-news/Three-to-be-arraigned-so-far-over-murder-of-Daphne-Caruana-Galizia-6736182304>

<sup>8</sup> Available at <http://audiovisual.europarl.europa.eu/malta-press-freedom>

European People’s Party MEP Esteban Gonzalez Pons said: “*she died with 42 cases against her and without access to her bank account. They began killing her already before they finished her off. We failed Daphne. Europe failed her*”. Green MEP Sven Giegold argued that it was clear why the murderers had chosen to place a bomb under Ms Caruana Galizia’s car rather than under that of the Police Commissioner or Attorney General, and he called for an international investigator to examine money laundering and corruption claims concerning Malta.<sup>9</sup> Many MEPs queried how the Prime Minister, the government and the police could investigate themselves, given the likely links between her assassination and her investigative journalism work which involved allegations of corruption at the heart of the Maltese Government, judicial system and on the part of Maltese police officers.

2.11 A number of weeks later, on 14<sup>th</sup> November 2017, in plenary session the European Parliament considered the rule of law in Malta and passed a highly critical resolution.<sup>10</sup>

2.12 On 11<sup>th</sup> January 2018 a delegation, led by Ana Gomes MEP, of Members of the European Parliament from the Committee on Civil Liberties, Justice and Home Affairs, and the Committee of Inquiry into Money Laundering, Tax Avoidance and Tax Evasion, published a report following a fact-finding mission to Malta to investigate alleged contraventions and maladministration in the application of Union law in relation to the remits of those Committees. The delegation met with senior representatives of Malta’s FIAU including the Chair of its Board of Governors, Dr Peter Grech, who is also Malta’s Attorney General. The delegation pursued lines of inquiry relating to Pilatus Bank and the sale of Maltese Passports. The delegation also met with the Police Commissioner Lawrence Cutajar, and his Deputy Mr Valletta; with Prime Minister Joseph Muscat and Chief of Justice Mr Silvio Camilleri; and with the Maltese Financial Services Authority. Meetings were held with journalists, NGOs, representatives of Pilatus Bank, representatives of KPMG (Pilatus Bank’s auditors) and with Jonathan Ferris, former police inspector and FIAU investigator. The delegation

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<sup>9</sup> See further <https://www.timesofmalta.com/articles/view/20171024/local/meps-debate-fallout-from-daphne-caruana-galizias-murder.661274>

<sup>10</sup> Available at <http://audiovisual.europarl.europa.eu/malta-press-freedom>

also heard from Ms Maria Efimova, a former employee of Pilatus Bank, then in hiding.

2.13 The delegation produced a 36 page report which was highly critical of the integrity of Malta's key institutions, and questioned the effectiveness of steps taken to combat corruption in Malta. Specifically in relation to Ms Caruana Galizia, the delegation found as follows: *“the perceived culture of fear, dramatically escalated with the assassination of Mrs. Daphne Caruana Galizia, demands that the law is properly enforced and is seen as being properly enforced, and that includes ensuring that investigators really investigate and that there is effective protection for investigative journalists and whistle-blowers.”*

2.14 The delegation noted serious concerns about, *“the unclear separation of powers, which has been the source for the perceived lack of independence of the judiciary and the police ... and the mentions of Maltese politically exposed persons in the Panama Papers and their continuing presence in government.”* The delegation made a sweeping set of recommendations for the reform of Maltese institutions to ensure proper separation of powers, the effective participation of civil society organisations in Maltese civic life, and to properly protect Malta from financial crime and corruption.

2.15 On 23<sup>rd</sup> April 2018 the Legal Affairs and Human Rights Committee of the Council of Europe appointed Dutch MP Pieter Omtzigt to produce a special report into the assassination of Ms Caruana Galizia. This is the first time that a special rapporteur has been appointed by the Council of Europe to scrutinise an EU state, and only the third time that the mechanism has been used in relation to a specific case (the previous two cases being political murders in Russia, those of Boris Nemtsov and Sergei Magnitsky).

2.16 It is noted that a controversy has also arisen as to the extent to which the Maltese authorities have been co-operating with Europol, with a letter from Europol's outgoing Director to MEPs appearing to register some concern in this regard. The Maltese Police have refuted this, but the position remains unclear.

Europol's letter pointed to the "highly complex" nature of the investigation and called for better co-operation from Maltese authorities.

2.17 In early June 2018 continuing concerns were expressed by members of the European Parliament as to the lack of progress in the investigation into Ms Caruana Galizia's assassination. As a result of this a new monitoring group of MEPs has been established specifically to support all efforts to seek justice for Ms Caruana Galizia, as well as for murdered Slovak journalist Jan Kuciak. The European Parliament's Civil Liberties Commission has established a Rule of Law Monitoring Group chaired by Dutch MEP Sophia in 't Veld, intended to build upon the ad hoc visits to Malta and Slovakia already undertaken. The group's mandate includes possible hearings, meeting, fact finding missions, reporting, and the proposal of a final resolution for potential adoption by the European Parliament.

2.18 On 1<sup>st</sup> June 2018 the delegation led by Ana Gomes MEP returned to Malta. On 12<sup>th</sup> June they issued a further report, detailing conclusions which contain serious criticisms regarding the rule of law generally in Malta, and the following specific concerns regarding the investigation into the wider circumstances of Ms Caruana Galizia's assassination:

*"The investigation on the assassination of Daphne Caruana Galizia is stalling. People we spoke to suspect that the plan may be to ensure the blame rests with the three suspected bombers and to eventually let them go free, after 20 months of detention."*

*"Magistrate Vella, who has been in charge of the murder investigation, has been offered a promotion to become a judge and should, in a few weeks, leave the case. This is interpreted by many as a way to delay the case."*

*"The Police is ostensibly not following all relevant leads to find out who ordered the assassination. Excuses provided go from lack of resources to impossibility to investigate all people exposed by the deceased who might have had a motive to silence her."*

*"Quite shockingly, the Police appeared not to have thoroughly investigated witness accounts – published by international media –*

*that Minister of Economy, Chris Cardona (exposed by Mrs. Caruana Galizia and suing her for libel) had been seen drinking with one of the suspects prior to their arrest.”*

*“The Police has denied that policeman Sargent Cassar had tipped off the detainees. However, he was transferred from the investigations brigade. During the interrogation following the arrest, one Police inspector asked suspects who had tipped them off about their imminent arrest: they had no keys or phones with them, and one of the men had written his partner’s number on his arms.”*

*“No Malta Secret Services’ records on the murder suspect that had been under surveillance prior to and after the murder, were provided to the Magisterial investigation so far.”*

*“There is no communication between the magisterial investigation and that of the Police: In Malta it is the Police who controls the inquiry, not the judiciary.”*

*“Mrs. Caruana Galizia’s family has not been kept informed of developments in the investigations and is facing libel lawsuits inherited from the journalist, which were not dropped by their initiators, even after the murder.”*

2.19 The delegation has recommended as follows:

*“1. The new LIBE WG<sup>11</sup> overseeing rule of law in Malta and Slovakia should request an urgent meeting in camera with EUROPOL officers who assist the investigation in Malta in order to clarify the nature and origin of limitations mentioned by former Europol Director Mr Wainwright, in the letter sent to MEP Gomes and others on the 26 April 2018.*

*2. The new LIBE WG and the EP Special Committee TAX3 should soon dispatch a Delegation to Malta to take stock with the Caruana Galizia family, their lawyers, and with the authorities, - including the Police Commissioner, the FIAU, Magistrates and*

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<sup>11</sup> ‘LIBE WG’ refers to the Working Group (WG) of the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE).

*Attorney General – of developments regarding both Police and Magisterial investigations.*

*3. The Maltese Police should foster a partnership with the Italian Guardia di Finanza in the criminal investigation of the assassination of Daphne Caruana Galizia, as well as with other anti-terrorism and organised crime prosecutorial and police authorities in Italy, namely with a view to combat oil smuggling.”*

### **3 RECENT AND ONGOING CONCERNS <sup>12</sup>**

#### *Deputy Commissioner Silvio Valletta*

- 3.1 The involvement of Deputy Commissioner of the Maltese Police, Silvio Valletta, in the police investigation has been a controversial issue from the outset. He is married to Gozo Minister Justyne Caruana; holds a position within the FIAU; and both he and his wife were the subjects of various critical articles written by Ms Caruana Galizia before her death. This issue was addressed in our December Advice, raising serious concerns about the Article 2 ECHR compliance of the Deputy Commissioner playing a central (or indeed any) role in the police investigation in these circumstances. These concerns were also raised with Deputy Commissioner Valletta and the Maltese authorities by the Family, their lawyers in Malta, and the international community. However, he refused to stand down.
- 3.2 As a result, the Family had no option other than to bring a human rights challenge within the Maltese courts, focused upon the involvement of Deputy Commissioner Valletta. The challenge was brought in December 2017 by Peter, Matthew, Andrew and Paul Caruana Galizia against the Commissioner of Police, the Attorney General, and Deputy Commissioner Valletta.

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<sup>12</sup> This Opinion summarises some of the recent and ongoing concerns of particular relevance; it is not a complete list of all such concerns.

3.3 Judgment of the Honourable Judge Silvio Meli was handed down on 18<sup>th</sup> June 2018. Having considered alleged violations of Articles 2 and 6 ECHR, he found:

- (i) It was not contested that failure to observe proper [“verifications”] during the investigation could amount to a breach of Article 2 of the Convention (see [21] of the judgment);
- (ii) In order to comply with Article 2, the investigation must be conducted impartially, independently, effectively and objectively (see [27]);
- (iii) Deputy Commissioner Valletta was the subject of various articles written by Ms Caruana Galizia in his capacity as a member of the police corps, as a consort of a member of the Cabinet, and as the consort of someone who was herself a target of Ms Caruana Galizia ([28]), but was nevertheless himself playing a central leadership role in the investigation ([30], [34]);
- (iv) It is possible that whoever ordered Ms Caruana Galizia’s assassination is a politically exposed person, whilst at the same time the Deputy Commissioner, as the consort of a member of the Cabinet, is himself a politically exposed person ([32]-[33]);
- (v) Furthermore, although the investigation concurrently being carried out by the investigating magistrate is notionally independent of the police investigation, two of the police officers supporting the magistrate (Inspectors Arnaud and Zahra) as a matter of fact are directly answerable to the Deputy Commissioner ([31], [35]) and their loyalties are therefore split (and there is some suggestion that the magistrate’s recommendations have been ignored without apparent reason ([36]));
- (vi) The Deputy Commissioner’s involvement, given the objective facts set out, and without necessarily casting any aspersions on his character, will give rise to legitimate concerns as to the effectiveness of the inquiry ([39]-[40]);
- (vii) In view of the above, there is a breach of Article 2 ECHR; and
- (viii) In light of the shortcomings identified in relation to Article 2, and bearing in mind that it is not possible to seek civil redress until the criminal procedures have established definitively those responsible for

the crime, the Judge also upheld the breach of Article 6 ECHR ([49]-[53]).

- 3.4 In the result, the Judge accepted the family's claims in full, and rejected the defendants' pleas. The court ordered Deputy Commissioner Valletta to desist from continuing or participating in the investigation further ([59.3]); and significantly also ordered that every act and decision so far taken in the investigation be re-examined by the person appointed to take over from him ([59.4]).
- 3.5 It is also noted that the Judge, in a preamble to his substantive findings, was critical of the approach taken to the case by the defendants. This included what he described as the "*veiled threat*" contained in their submission to the effect that the family should "*review their position*" in relation to the challenge in the light of the arraignment of the three suspected murderers. The implication being that it was not in the family's interests to bring such a challenge whilst the authorities were conducting this investigation and they should withdraw it if they knew what was best for them. The Judge's rebuke was, rightly, sharp: "[T]his procedural interference is deemed to exceed the limits of acceptable legal behaviour ... and it merits the utmost level of censorship." (See [9]-[13] of the judgment.)
- 3.6 This challenge was narrowly focused upon the involvement in the case of Deputy Commissioner Valletta, and it was based upon the position as it was then understood in December 2017. Even so, it is respectfully observed that the judgment is a powerful and cogent application of the principles of Articles 2 and 6 ECHR to the relatively narrow circumstances under review.
- 3.7 Regrettably, the Attorney General has nevertheless appealed this outcome, with a determination of that appeal due in October 2018, a year after Ms Caruana Galizia's assassination.

### ***Scope of the Current Investigations***

- 3.8 The scope of the ongoing inquiries remains narrow. Until recently an investigation headed by Magistrate Vella was proceeding to gather evidence concerning the circumstances of Ms Caruana Galizia's assassination to establish who (if anyone) was responsible for its procurement. That investigation had appointed experts and was about to receive a significant tranche of forensic



evidence. However, it was announced towards the middle of May 2018 that Magistrate Vella was to be appointed judge, with the effect that his investigation would be halted. The Family had concerns about what would happen to the evidence he had gathered and that which was about to come into his possession, fearing a setback into this crucial and sensitive aspect of the criminal investigation. However, Magistrate Vella has been replaced by Magistrate Camilleri.

3.9 To the best of our knowledge, potential lines of investigation based on Ms Caruana Galizia's work as an investigative journalist investigating corruption do not appear to have been explored to date. For example, many of those who were the subject of criticism in her investigative reporting have not yet been interviewed, including members of the Maltese Government. This is extremely surprising given the Family's concern that Ms Caruana Galizia's assassination is likely to have been ordered by a subject of her reporting.

3.10 Moreover, there is the complete absence of any investigation into the crucial question of whether Ms Caruana Galizia's assassination could and should have been prevented.

## **4 LEGAL FRAMEWORK**

### ***Article 2, ECHR***

4.1 Article 2 of the ECHR, which safeguards the right to life, "*ranks as one of the most fundamental provisions in the Convention, from which no derogation is permitted... Together with Article 3, it also enshrines one of the basic values of the democratic societies making up the Council of Europe*": *Makaratzis v. Greece* (2005) 41 EHRR 49, [56] (Grand Chamber). The European Court of Human Rights ("ECtHR") has repeatedly made clear that, as the object and purpose of the Convention is "*as an instrument for the protection of individual human beings, [this] also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective*": *Makaratzis*, above, [56], citing *McCann v. UK* (1996) 21 EHRR 97, [146]-[147].

4.2 The first sentence of Article 2(1) provides that, “*everyone’s right to life shall be protected by law.*” The ECtHR has repeatedly held that this sentence, “*enjoins the state not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction*” (see, e.g., *Kemaloğlu v. Turkey* (2015) 61 EHRR 36, [32]; *LCB v. UK* (1999) 27 EHRR 212, [36]).

4.3 Article 2 imposes both substantive and procedural obligations upon States. In brief outline, these various obligations are:

4.3.1 The substantive obligations:

- (i) A negative obligation, requiring States not to take life unless “*absolutely necessary*”;
- (ii) A general positive obligation to, “*establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life*”: *Öneryildiz v. Turkey*, (2005) 41 EHRR 20, [89]; *R (Amin) v. Secretary of State for the Home Department* [2004] 1 AC 653, [30]; *R (Middleton) v. West Somerset Coroner* [2004] 2 AC 182, at [2]; *Mitchell and another v. Glasgow City Council* [2009] 1 AC 874, per Lord Rodger at [66], 902A-B; *R (AP) v. HM Coroner for Worcestershire* [2011] EWHC 1453 (Admin), [50]-[52]; *Smith v. Ministry of Defence* [2013] UKSC 41 at [68], 121F. This includes a general obligation to put in place appropriate systems for the protection of life, including matters such as employing competent staff, for example. This is often referred to as the “systems duty”. The ECtHR has made clear that the systems duty must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake; and, where the obligation applies, the authorities are required to assess all the potential risks inherent in the relevant activity, and to take practical measures to ensure the effective protection of those whose lives might be

endangered by those risks: *Öneryildiz*, above, [71]; *Kolyadneko v. Russia* [2012] ECHR 338, [158], [166];

- (iii) A positive obligation, often described as the “operational obligation,” to take preventative measures to protect an identified individual whose life is at risk where the authorities know, or ought to know, of the existence of a real and immediate risk to the individual’s life. Where the operational obligation arises, the authorities must take such steps within the scope of their powers which, judged reasonably, might be expected to avoid the risk to life: *Osman v. UK* (2000) 29 EHRR 245, [116]; *Rabone v. Pennine Care NHS Trust* [2012] 2 AC 72 [15] –[18], [21]-[25]; *Sarjantson v. Chief Constable of Humberside* [2013] EWCA Civ 1252, [18]-[22], [26]-[29], [31]. The broad nature of this positive obligation has been confirmed by the Grand Chamber of the ECtHR: see e.g. *Öneryildiz v. Turkey* (2005) 41 EHRR 20.

4.3.2 The procedural obligation or investigative duty: an obligation to conduct an independent, effective investigation into possible violations of the substantive obligations under Article 2.

- 4.4 The investigative duty clearly applies where there has been an arguable breach of the substantive duties under Article 2: *Edwards v. UK* (2002) 35 EHRR 487; *McCann*; *R (Middleton) v. HM Coroner for West Somerset* [2004] 2 AC 182. The threshold for considering whether there has been an “arguable” breach of the substantive obligations of Article 2 is a low one. There have been a number of cases in the ECtHR on this point, but it is put most clearly in a domestic UK case, *R (AP) v. HM Coroner for the County of Worcestershire* (2011) Med LR 397, [2011] EWHC 1453 (Admin), [60]: “arguable” is anything more than “fanciful,” Hickinbottom J held. This reflects the language in the leading cases of *Hurst* and *Middleton*, in which it was made clear that the investigative obligation is triggered “where the state may bear responsibility for the death,” or “agents of the state are, or may be, in some way implicated” (see *Hurst* at [28]; *Middleton* at [2] and [3]).

### ***Application of the Investigative Duty in this case***

- 4.5 It is plain that the investigative duty is triggered in this case. It is beyond doubt that there has been an arguable breach of the operational obligation to protect Ms Caruana Galizia, in addition to an arguable breach of the systems duty. It is clear that state authorities “*may bear responsibility for the death,*” or that they “*are, or may be, in some way implicated,*” adopting the language of the leading cases of *Hurst* and *Middleton*. For the purpose of Article 2, the state involvement in question may result from a failure to prevent a death at the hands of a third party and/or direct involvement. In respect of the operational and systems duties, an investigation is required into the adequacy of the steps taken by Maltese authorities to protect Ms Caruana Galizia, and the policies and practices of the Maltese authorities, including the police, in ensuring appropriate protection is in place when the lives of journalists are known to be at risk. Each of these aspects must be investigated in an Article 2 compliant manner.

### ***Purposes of an Article 2 Investigation***

- 4.6 An investigation which discharges the investigative duty has a number of purposes, including:
- 4.6.1 To expose and bring to public notice culpable and discreditable conduct, ensuring the accountability and punishment of those at fault (*Jordan v. UK* (2001) 37 EHRR 52, [105]; *Edwards v. UK* (2002) 35 EHRR 19, [69], [71]; *Öneryildiz v. Turkey* (2005) 41 EHRR 20, [91];
  - 4.6.2 To secure the effective implementation of the domestic laws which protect the right to life (*Jordan v. UK*, [105]);
  - 4.6.3 Investigate all the facts surrounding the death thoroughly, impartially and carefully (*R (Sacker) v. West Yorkshire Coroner* [2004] 1 WLR 796, [11]);
  - 4.6.4 Rectify dangerous practices and procedures, correct mistakes and learn lessons, ensuring that those who have lost a relative may at

least have the satisfaction of knowing that lessons learned from her death may save the lives of others (*R (Amin) v. Secretary of State for the Home Department* [2004] 1 AC 653, [31]);

4.6.5 Allay rumour or suspicions as to how the death occurred (*Jordan v. UK*, above, [128], [144]).

***Necessary Elements of an Article 2 Investigation***

4.7 In a series of cases, many of which concerned deaths in Northern Ireland in which there was a suspicion of state involvement, or a state failure to prevent, paramilitary murders, the ECtHR has established that there are a number of minimum requirements which must be satisfied in order for an investigation to pass Article 2 muster. See, in particular, *Jordan v. UK* (2001) 37 EHRR 52, [105]-[109] and *Edwards v. UK* (2002) 35 EHRR 19, [69]-[73].

4.8 The essential, bare minimum ingredients of relevance here are that the investigation must be independent, and effective i.e. the authorities must act of their own motion in initiating the investigation; it must examine the circumstances surrounding the death; it must be capable of identifying and punishing those responsible; reasonable steps must be taken to secure evidence; it must be prompt; the investigation must involve a sufficient element of public scrutiny; and the next of kin must be involved to the extent necessary to safeguard their legitimate interests.

4.9 We have serious concerns regarding each of these requirements, but in this Opinion we focus upon two headline concerns:

(1) The ongoing failure to ensure independence in the criminal investigation, given the position of Deputy Commissioner Valletta, subject to the judgment of the Constitutional Court on the Attorney General's appeal; and

(2) The total absence of any investigation into the wider circumstances of Ms Caruana Galizia's death, in particular into the critical question of whether her death could and should have been prevented.

***(1) Independence in the Criminal Investigation***

- 4.10 The persons responsible for and carrying out the investigation must be independent from those implicated in the events being investigated. This means not only a lack of hierarchical or institutional connection but also practical independence: see, amongst many authorities, *Jordan v. UK*, [106].
- 4.11 In many Council of Europe member states, suspicious or violent deaths which have occurred in circumstances where there is a suspicion of potential state involvement or a failure to act appropriately by an agent of the state (e.g. gender-based violence cases in which the police are alleged to have taken insufficient steps to respond to the risk posed by the perpetrator) are investigated by an independent, external body, such as the UK's Independent Office for Police Conduct or the Prison and Probation Ombudsman. There is no such body in Malta, which has resulted in the Maltese police investigating themselves in this case. Whilst there is an investigation underway with magisterial oversight, magistrates in Malta have no prosecuting power, and so the product of this investigation will be passed to the police if there is to be any wider criminal prosecution. This appears to discount the possibility that it may be appropriate to institute criminal proceedings against state agents, subject to the evidence uncovered by the investigation.
- 4.12 Of grave concern is the involvement in the investigation of Deputy Commissioner Valletta, which appears to us to be in clear breach of Article 2's guarantees. It is surprising and regrettable that this officer failed to recuse himself or be removed from the investigation at the earliest opportunity, requiring the Family to issue proceedings in the Maltese courts. Although it is understood that Deputy Commissioner Valletta has now finally been removed from the investigation, it is clearly concerning that the matter remains unresolved as a matter of principle given the Attorney General's appeal.

- 4.13 The Family has many other unresolved concerns regarding the independence and efficacy of the ongoing criminal investigation. There is a particular concern in the Prime Minister appearing to act as a spokesperson for the investigation into the assassination of his most relentless and effective critic. The Family is concerned that this, at the very least, gives rise to a perception of bias, raising concern that anyone with sufficiently close ties to the Prime Minister will be shielded from investigation, despite the Family considering that a number of potential suspects fall within that group.
- 4.14 There has been some external involvement in the ongoing criminal investigation by the FBI, Europol and the National Investigations Bureau of Finland; however it is understood that this has involved technical support rather than any oversight, directive or strategic role in the investigation. In our opinion, in view of the absence of an independent organisation in Malta to police the police and in all the exceptional circumstances of the assassination of Ms Caruana Galizia, it is necessary in order to comply with Article 2 ECHR for the ongoing criminal investigation to be the subject of a parallel investigation by Europol.<sup>13</sup>
- 4.15 Magistrate Camilleri's ongoing work is important, but as explained above the product of that investigation would ultimately be passed to the police in any event. There are serious and well-founded concerns about the overall coordination of the ongoing police investigation, particularly given the role of Deputy Commissioner Valletta. Rather than the national authorities being responsible for such coordination, we consider that this is a situation in which Europol would be better placed to perform this role.

***(2) Public Inquiry into the Protective Obligation***

- 4.16 Regardless of the outcome of the Attorney General's appeal, and regardless of the work by the Magistrates, the most glaring omission in the Maltese state's response to Ms Caruana Galizia's assassination is the total absence of any investigation into the wider circumstances of her death. In particular, the

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<sup>13</sup> We make no comment regarding the existing proceedings against the three accused. Our recommendation here concerns the ongoing, pending criminal investigation by Magistrate Camilleri into whether any other individuals are suspected of involvement in Ms Caruana Galizia's murder.

absence of any investigation into the critical question of whether the Maltese authorities complied with their protective obligation to her under Article 2 ECHR i.e. could Ms Caruana Galizia's death have been prevented? That no such wider investigation is even in contemplation at this stage, over nine months after her death, is a matter of the utmost concern, including for the protection of other investigative journalists and anti-corruption campaigners. The existing international oversight mechanisms are important, but the focus of the vast majority of these processes is upon the adequacy of the existing investigations, which are narrow and focused upon criminal culpability.

4.17 The mandate of the Council of Europe Special Rapporteur is broader, which is welcome. He is tasked with examining the “*full context*” of the assassination. In particular it is hoped that, as a result of his work, “*the Assembly should help shed some light on the background of the crime, in co-operation with the relevant Maltese authorities.*”

4.18 Article 2 requires that reasonable steps must be taken to secure all relevant evidence concerning the assassination and its wider circumstances. This includes a requirement to act with sufficient speed to avoid perishable evidence being lost: *Jordan v. UK*, [107]; *Edwards v. UK*, [71]; *Kakoulli v. Turkey* (2007) 45 EHRR 12, [123]; *Ramsahai v. Netherlands* (2008) 46 EHRR 43, [321]. The expectation on the authorities is a high one; even a relatively short delay in evidence collection, or difficulties in doing so caused by ongoing civil war and regular terrorist attacks, have been held not to alter the requirement to take reasonable steps: *Yasa v. Turkey* (1999) 28 EHRR 408, [104]; *Al-Skeini v. UK* (2011) 53 EHRR 18, [173]. The inquiry and investigation must be adequate to ensure that the quality of evidence is not undermined: *Jordan v. UK*, [107]; *Ramsahai v. Netherlands*, [330].

4.19 In the context of suspected police collusion, it has been held that officers conferring can breach the procedural obligation: *Ramsahai*, [321], [330] (and see also the UK case of *R (Saunders and Tucker) v. Independent Police Complaints Commission* [2009] 1 All ER 379, [38]-[40], where appropriate steps were not taken to prevent officers conferring following a death, even where they did not in fact confer).



- 4.20 It is extremely concerning that no wider investigation has yet been instituted by Malta. The result is that, over nine months from Ms Caruana Galizia's death, evidence on these wider issues is not being gathered or examined by the state authorities. Evidence has not been gathered, for example, regarding whether the police or other Maltese authorities or public officials knew or should have known of a risk to her life prior to her assassination; whether that risk was real and immediate; any steps which were taken to attempt to avert that risk, and the adequacy or appropriateness of those steps (including, when reviewing the appropriateness of any such measures, the nature of Ms Caruana Galizia's investigative journalism and the importance of source protection – see further below); and whether there were any additional steps which could and should have been taken to protect Ms Caruana Galizia's right to life.
- 4.21 Time is being lost at a period which should be critical to the evidence gathering process. This wider investigation must now be instituted by Malta, as a matter of urgency, by way of an enhanced public inquiry.

***Article 10, ECHR: Freedom of expression***

- 4.22 We note that many of the key principles governing the right to freedom of expression (which includes the right to both impart and receive information) and the duties upon states to safeguard the constituents of that right, as protected by Article 10 of the Convention, were recently reaffirmed in a *Joint Declaration on Media Independence and Diversity in the Digital Age* by the Special Rapporteurs/Representatives on Freedom of Expression from the United Nations, the Organization for Security and Co-operation in Europe, the Organization of American States, and the African Commission on Human and Peoples' Rights.
- 4.23 The Joint Declaration, which was issued on 2<sup>nd</sup> May 2018 against a background of specific recent events including the assassination of Ms Caruana Galizia, and following discussions between the representatives and experts from Article 19, Global Campaign for Free Expression, and the Global Centre for Law and Democracy, includes recitals:

*4.23.1 deploring ongoing threats to the safety of journalists and others disseminating information in the public interest, including high*

*levels of assassinations, and the persistent impunity for such attacks, both of which undermine media independence and freedom of expression;*

4.23.2 *denouncing the special challenges faced by female journalists, including gender-specific attacks, online harassment, inequality within the media and general discrimination against women in society which creates barriers to working as a journalist;*

...

4.23.3 *alarmed by new threats to the role of free media in democratic societies, including statements by leading politicians that are specifically designed to attack and undermine media independence and the rise of populism;*

4.23.4 *emphasizing the important role that investigative journalism can play through exposing corruption and other crimes, including at the international level;*

4.24 The Joint Declaration goes on to set out minimum standards for states wishing to comply with their duties in relation to the right to freedom of expression, including:

1. *General Principles:*

a. *States are under a positive obligation to create a general enabling environment for seeking, receiving and imparting information and ideas (freedom of expression), including through the following measures:*

...

v. *ensuring that defamation laws are exclusively civil rather than criminal in nature and do not provide for excessive damages awards.*

b. *States also have a positive obligations to protect media freedom, including through the following measures:*

i. *enabling a safe working environment for journalists;*

...

vii. *guaranteeing the right to protect confidential sources of information, including through protection of source-identifying material such as notes and professional archives in different ways, including through the encryption of communications;*

...

ix. *creating appropriate safeguards against search and seizure of journalistic material.*

2. *Threats to Media Safety:*

a. *States are under a positive obligation to provide protection to journalists and others who are at risk of being attacked for exercising their right to freedom of expression, to launch effective investigations when such attacks do occur, so that those responsible may be held accountable, and to offer effective remedies to victims.*

4.25 The section, “Threats to Media Safety” is particularly important, and relevant, and emphasises that states must launch effective investigations where journalists are attacked. Given that states are also under an overriding positive duty to create a general enabling environment for journalists, and a specific duty to enable a safe working environment for journalists, where a journalist is assassinated in circumstances such as those in the present case, the Article 2 duty to properly investigate Ms Caruana Galizia’s death is plainly triggered. Further the breadth of the investigation necessary to satisfy that duty plainly encompasses the extent to which the Maltese state had complied with those duties it owed to Ms Caruana Galizia as a journalist whilst she was still alive. This is regardless of the general nature and specific identity of Ms Caruana Galizia’s investigative targets, but once it is recalled that those targets were mostly politically exposed persons, tied to the heart of the Maltese state, the duty, and the necessity to examine the ‘bigger picture’, are fortified yet further.

4.26 It is noted that as at the time of writing a new law decriminalising defamation in Malta has been approved by the Maltese House of Representatives and come into force, seemingly at least in part as a direct result of prolonged and intense outrage at the prosecutions faced by Ms Caruana Galizia during her lifetime for investigating matters that since her death have in many cases been found to have required investigation. Pending criminal defamation suits have been converted into civil actions between the relevant parties. It is noted too that this new law preserves the reach of civil defamation law in Malta, which is considerable, including permitting actions to be continued against Mrs Caruana Galizia’s estate, something that continues to be a source of profound concern for her surviving husband, sons and other immediate family.

4.27 This change in the law, whilst welcome to an extent, must not detract from the need for any investigation into the circumstances in which Ms Caruana Galizia came to be assassinated to inquire as to how the law as it was in Malta up until the time of her death contributed to an atmosphere of hostility towards journalists, and potentially to the attitude of impunity for those who may have sought to harm journalists.

### ***Source Protection Rights***

4.28 Source protection rights are a fundamental aspect of Article 10 of the Convention. In 2011 the UN Human Rights Committee adopted General Comment no. 34 concerning ICCPR, Article 19 which provided that states parties were to “*recognise and respect that element of the right to freedom of expression that embraces the limited journalistic privilege not to disclose information sources.*”<sup>14</sup> The Special Rapporteur on Freedom of Expression further underscored and elaborated upon this point in his 2015 report to the UN General Assembly:

*“Revealing or coercing the revelation of the identity of a source creates disincentives for disclosure, dries up further sources to report a story accurately, and damages an important tool of accountability. In the light of the importance attached to source confidentiality, any restrictions must be genuinely exceptional and subject to the highest standards, implemented by judicial authorities only.”* [21]

4.29 Source protection rights are afforded a high degree of protection in Strasbourg jurisprudence. The ECtHR has repeatedly and specifically recognised the importance of maintaining the confidentiality of journalistic sources.

4.30 In *Goodwin v. UK* (1996) 22 EHRR 393 the ECtHR stated:

*“Protection of journalistic sources is one of the basic conditions for press freedom... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined, and the ability of the press to provide accurate and reliable information may be adversely affected.”* [39]

4.31 *Sanoma Uitgevers BV*<sup>15</sup> concerned photographs, to be used for an article on illegal car racing, which a Dutch magazine publishing company was compelled to hand over to police investigating another crime, despite the journalists’

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<sup>14</sup> United Nations Human Rights Committee, General Comment No. 34: Article 19: Freedoms of opinion and expression, 12<sup>th</sup> September 2011.

<sup>15</sup> *Sanoma Uitgevers v. The Netherlands*, Appn 38224/03.

strong objections to being forced to divulge material capable of identifying confidential sources. The Grand Chamber considered that there had been a violation of Article 10 ECHR. The interference with the applicant company's freedom of expression had not been 'prescribed by law,' there having been no procedure with adequate legal safeguards available to it to enable an independent assessment as to whether the interest of the criminal investigation overrode the presumptive public interest in the protection of journalistic sources.

4.32 The breadth of the concept of a journalistic source was confirmed in the case of *Telegraaf Media*<sup>16</sup>:

*"The court's understanding of the concept of journalistic 'source' is 'any person who provides information to a journalist'; it understands 'information identifying a source' to include, as far as they are likely to lead to the identification of a source, both 'the factual circumstances of acquiring information from a source by a journalist' and 'the unpublished content of the information provided by a source to a journalist'." [86]*

4.33 In the same case the court underlined the vital principle that any interference with the right of a journalist to protect his or her sources must be strictly proscribed by law:

*"The court reiterates its case law according to which the expression 'in accordance with the law' not only requires the impugned measure to have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects. The law must be compatible with the rule of law, which means that it must provide a measure of legal protection against arbitrary interference by public authorities with the rights safeguarded by art 8(1) and art 10(1)."*

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<sup>16</sup> *Telegraaf Media Nederland Landelijke Media BV and others v. Netherlands*, App. No. 39315/06.

4.34 In *Nagla v. Latvia*<sup>17</sup>, the ECtHR emphasised that the right of a journalist not to disclose his or her sources could not be considered a privilege, dependent on the lawfulness or unlawfulness of the sources, but rather an intrinsic part of the right to information which should be treated with the utmost caution.

4.35 See also the Council of Europe's *Recommendation No. R (2000) 7 on the Right of Journalists not to reveal their sources of information*:

*“Domestic law and practice in member states should provide for explicit and clear protection of the right of journalists not to disclose information identifying a source in accordance with Article 10 of the Convention for the Protection of Human Rights and Freedoms.”*

4.36 In a case such as this, it must be ensured at all times, that despite Ms Caruana Galizia's death, the source protection rights of any of those connected to her work are maintained, and those must be preserved with equally strong protection as if she were still alive and working. As we understand it there are no or no sufficient procedures in place to give effect to this requirement in this investigation.

#### ***What is Now Needed***

4.37 It is imperative that an enhanced public inquiry into the question of whether Malta breached its protective obligation under Article 2 ECHR to Ms Caruana Galizia is now instituted as a matter of urgency. Vital time has been lost since October 2017.

4.38 This wider investigation must have the following features, at a minimum:

- (i) Independence. It must be truly independent of the Maltese police, Government and politicians. Given the international concerns raised by Ms Caruana Galizia's death and the Maltese Government's response, it would ideally be an investigation conducted by a panel, including respected international Judges, retired Judges and/ or suitably qualified individuals with no political or government links.

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<sup>17</sup> Appn no. 73469/10, judgment of 16<sup>th</sup> July 2013.

- (ii) Transparent and Comprehensive Terms of Reference: the inquiry's Terms of Reference (“**ToR**”) should encompass the questions arising in relation to the protective obligation under Article 2 ECHR, and also the closely related Article 10 ECHR issues concerning Ms Caruana Galizia's investigative journalism work. The ToR should make clear that the investigation must consider whether the Maltese police and/ or Government and/ or other State authorities were, or should have been, aware of a real and immediate risk to her life; whether they took all reasonable steps available to them which may have prevented that risk being realised, bearing in mind the Article 10 imperative of protection of journalistic sources; and what steps should now be taken to protect investigative journalists and / or anti-corruption campaigners in Malta, including to prevent future such deaths.
- (iii) Source Protection: The investigation must contain a mechanism giving effect to source protection rights of any third parties connected or potentially connected to Ms Caruana Galizia.
- (iv) Involvement of the Family: the investigation should involve the Family to the extent necessary to safeguard their legitimate interests. This should include the Family being able to review and comment upon the draft Terms of Reference of the investigation; the Family having publicly funded legal representation during the investigation; the Family being permitted to suggest lines of inquiry and to put questions to witnesses on the basis of adequate disclosure.
- (v) Public Hearings. As part of the investigation, there should be open and transparent public hearings at an appropriate juncture, with witnesses questioned. It is recognised that at least some parts of the public hearings stage of the investigation may need to await the conclusion of related criminal proceedings; however, it is vital that the process of preserving and gathering evidence regarding the wider circumstances of Ms Caruana Galizia's assassination begins without further delay.

*Could this Wider Investigation be Instituted under Maltese Law?*

- 4.39 The Inquiries Act (Cap. 273), originally passed in 1977 and subsequently amended, empowers the Prime Minister to appoint a Board of Inquiry to investigate the facts or circumstances of a case. A Board appointed under the Act has power to summon witnesses and procure evidence under oath, and to compel the production of documents. The Act has in-built flexibility and could provide a statutory basis for the setting up in Malta of an Article 2 compliant inquiry, provided the minimum requirements described in this Opinion are met.
- 4.40 As to transparency, we note that the Inquiries Act does not appear to provide for secrecy, and section 6 of Act does stipulate that evidence given before a Board of Inquiry established under the Act is to be treated in the same way as evidence before a court of law, which would presumptively mean that such evidence is taken in public. This makes a procedure under the Inquiries Act likely to be – in this respect at least – compliant with the requirement that it be transparent, which is a necessary pre-condition for the essential ingredients of sufficient public scrutiny, and independence.
- 4.41 Further, in relation to independence, we see no barrier to framing any inquiry under the Inquiries Act so that it meets the Article 2 requirement, for example by inclusion on the Board of Inquiry of respected national and inter-national judges of sufficient seniority and experience. To the extent that the strict provisions of the Inquiries Act may need to be deviated from or amended in the exceptional circumstances of this inquiry, effect should be given to any such derogations by means permitted in Maltese law.
- 4.42 It is noted that the Inquiries Act appears to have been drafted so as to give maximum flexibility in its application, with its key drawback being that any Board of Inquiry appears to be subject to appointment by sitting politicians. This drawback could be minimised by ensuring that the Prime Minister is advised on the appointment of an independent and effective board by an independent or cross-party body charged only with advising him on its composition, and ensuring that the Family's views are canvassed in order to engender the confidence of the bereaved and the wider public in this inquiry.



- 4.43 However it is appointed, the board's remit must include each of the elements identified above as necessary to satisfy an Article 2 compliant investigation, and its powers must be sufficiently robust and judicial, to enable it to adequately investigate any aspect of Maltese Government which might call for investigation in this case.
- 4.44 If Malta refuses to institute such a wider investigation under the Inquiries Act, it is likely that the international community will need to consider imposing such a mechanism. It is to be hoped that Malta will instead engage in constructive dialogue with the Family rather than forcing the bereaved to fight for their basic entitlements under Article 2 ECHR through the courts.

## **5 SUMMARY OF OPINION**

- 5.1 For the above reasons, we consider Malta to be in continuing violation of its Article 2 investigative duty. The position has in fact deteriorated since our December Advice, in that:

5.1.1 Deputy Commissioner Valletta remained closely involved in the ongoing criminal investigation until very recently and the Government continues to contest a court ruling that his involvement was unlawful;

5.1.2 There is a complete absence of any investigation into the crucial issue of whether Ms Caruana Galizia's death could have been prevented.

5.1.3 The Maltese Government continues to politicise this case.

- 5.2 Taking account of all of the above issues, we are of the opinion that Malta should without further delay (a) invite Europol to conduct a parallel criminal investigation alongside the ongoing criminal investigation by Magistrate Camilleri; and (b) establish a public inquiry under the Inquiries Act, which should be independent, effective, transparent and capable of determining:

5.2.1 Whether the Maltese authorities knew, or ought to have known, of a real and immediate risk to Ms Caruana Galizia's life;

- 5.2.2 Whether Ms Caruana Galizia's assassination could have been prevented; and
- 5.2.3 Whether any changes to the law, policies or practices are required in order to protect the lives of investigative journalists and/ or anti-corruption campaigners in Malta.
- 5.3 In view of the widespread concern, both nationally and internationally, regarding the circumstances surrounding Ms Caruana Galizia's assassination and their investigation, the Board of Inquiry of the Public Inquiry must include one or more senior judicial figure with complete and demonstrable independence from the Maltese authorities.
- 5.4 The Family should now ask the Maltese Government to take these steps as a matter of priority. Should they fail or refuse to do so, we will advise further on next steps.

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**9<sup>th</sup> August 2018**