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**WRITTEN REPLIES TO QUESTIONS FROM WILLIAM HORSLEY FOR
THE POLITICAL ASPECTS STUDY OF THE INITIATIVE ON IMPUNITY
AND THE RULE OF LAW; Received 8/5/2011**

Highlighted in bold is passage cited in the Political Aspects Study

Q1) The defining characteristics of impunity and the liability of Council of Europe states in case of failure to protect threatened journalists or to investigate crimes against journalists with due diligence

BB: My own case of *Özgür Gündem v Turkey* (23144/93, judgment of 16 March 2000) first laid down the positive duty of the state to protect freedom of expression. A number of journalists working on the paper had been murdered. The Court found that Turkey had failed to take adequate protective and investigative measures to protect *Özgür Gündem's* exercise of its freedom of expression.

The Court held (para 44) "the authorities were aware that *Özgür Gündem*, and persons associated with it, had been subject to a series of violent acts and that the applicants feared that they were being targeted deliberately in efforts to prevent the publication and distribution of the newspaper. However, the vast majority of the petitions and requests for protection submitted by the newspaper or its staff remained unanswered. The Government have only been able to identify one protective measure concerning the distribution of the newspaper which was taken while the newspaper was still in existence. The steps taken after the bomb attack at the Istanbul office in December 1994 concerned the newspaper's successor. The Court finds, having regard to the seriousness of the attacks and their widespread nature, that the Government cannot rely on the investigations ordered by individual public prosecutors into specific incidents. It is not convinced by the Government's contention that these investigations provided adequate or effective responses to the applicants' allegations that the attacks were part of a concerted campaign which was supported, or tolerated, by the authorities."

Thus it follows that the government will be liable if it has failed to protect in the sense set out above. In that case substantial damages were ordered in favour of the publisher of the paper and its editors.

It was not possible to prove that the journalists had been murdered on the orders of the government, and I don't know of any cases, except perhaps *Gongadze*, where this has been possible.

"Impunity" is therefore the failure of the government to give the necessary instructions to the prosecutors, or the prosecutors to do their job properly.

Again, political interference or manipulation of the judiciary is extremely difficult to

prove. but there are many cases in which the courts do not put adequate pressure on the prosecutors, or prosecutions are subject to excessive delay.

Q2) The authority of the ECtHR and the Committee of Ministers, respectively, to order protective action and enforce the Execution of Judgements: what further means could be developed to achieve better compliance?

BB: The ECtHR has the power to order "Interim Measures", the equivalent of an injunction, in "life and limb" cases, usually where a person is to be extradited to a place where she will be tortured or killed, or in cases where medical treatment is denied, for example Aleksanyan v Russia. If it were possible to present compelling evidence that a journalist has been targeted and that the state is complicit - and I think it would be very hard to obtain such evidence - then the Court could order interim measures. See http://www.echr.coe.int/NR/rdonlyres/5F40172B-450F-4107-9514-69D6CBDECF5C/0/Practice_Direction_Requests_for_Interim_MeasuresRule_39DEC2009.pdf; and <http://www.echr.coe.int/ECHR/EN/Header/Applicants/Interim+measures/General+presentation/>.

Protocol 14 is intended to give the CoM greater powers of enforcement.

See <http://conventions.coe.int/Treaty/EN/Treaties/Html/194.htm>; and <http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm>.

The relevant provision is as follows:-

“Article 46 – Binding force and execution of judgments

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.
3. If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the Committee.
4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.
5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case.”

My own NGO -- EHRAC -- is seeking to make use of the new provision, which came into force on 1 June 2010. At the end of the day this is a question of political pressure on the state concerned, the ultimate sanction being suspension or even expulsion from the CoE. But this is the "nuclear option". For further toughening up or reform, it would be necessary to show that the new mechanism had failed.

The other possibility is an "Inter-State Case". There were examples of such complaints to the Court against Turkey and Greece when under military rule. It is necessary to get a state or states to take such a course of action, and it was not possible to find a single such state to take a case against Russia with respect to Chechnya in 2000. There are now two inter-State cases brought by Georgia against Russia.

3) The effectiveness of "soft laws" and of the application of political pressures, for example through "naming and shaming" in the European area

BB: I am not aware of further proposals with regard to the EU or Council of Europe. Soft law is by definition soft law, and is of use when making presentations for the UPR in the Human Rights Council at the UN, or in making complaints to the Human Rights Committee or other Treaty Bodies. However, in contrast to the ECtHR these bodies give their "views", which are enforceable only through strong criticism of the government concerned in the next reporting cycle. "Naming and shaming" is always a good idea, though Turkey and Russia have shown that they are not readily amenable to attempts to bring pressure in that way.

4) Assessment of the merits of seeking to introduce and apply additional legally binding measures using the European Convention and ECtHR system

BB: In view of the creative jurisprudence of the ECtHR in *Özgür Gündem v Turkey*, which has effectively read a whole new right -- the positive duty on the state -- into Article 10 of the ECHR, I am not sure whether amendment to the ECHR by way of an additional protocol is necessary, and this would anyway be a very long process. In my view what is needed is for the greatest possible use to be made of Article 10 as expanded, with requests for Interim Measures where appropriate.

Q5) Assessment of the prospects for common agreement among Council of Europe states to accept a stronger supranational regime to enforce compliance with ECtHR judgements and European Convention norms and standards

BB: The Council of Europe does not have armed forces or even its own police or bailiffs. The whole system is based on peer pressure in the Committee of Ministers (of Foreign Affairs). As noted above, there are the "nuclear options" of suspension or expulsion. Russia came close in 2000, and there was a resolution for Russia's suspension in the Parliamentary Assembly (PACE) but within 10 days Tony Blair invited [then Russian President-elect Vladimir] Putin to London on a private visit, sending the clearest possible signal to the Committee of Ministers that the UK would block any such action. Germany has played a similar role. In my opinion there would need to be a number of murders of journalists with the clearest possible evidence of

Government involvement before such a move would gain the support of the leading states.