

***IMPUNITY AND KILLINGS OF JOURNALISTS WORLDWIDE - Peter Noorlander, Legal Director of the Media Legal Defence Initiative, London, with additional material by William Horsley, CFOM, University of Sheffield.***

***Assessment Paper for the Initiative on Impunity and the Rule of Law Working Conference on “Safety and Protection of Journalists: A responsibility for the World” held on 1 June 2011***

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***Highlighted in bold are passages cited in the Political Aspects Study***

There has been increasing concern in the international media freedom community as well as within certain Inter-Governmental Organisations about the issue of 'impunity' for journalists killings - the phenomenon of governments and other authorities conspicuously and repeatedly failing to bring to justice the perpetrators of murder and violent attacks on journalists.

While there have been numerous condemnations of such killings, and international bodies such as the Council of Europe have issued numerous recommendations and statements concerning the issue, the reality, as documented by INSI and the IFJ etc, is that the record of killings and other violence against journalists is growing worse, not better. INSI says that 2009 was the worst in recent times, with over 130 dead including the Philippines massacre, the worst single incident ever recorded. Agnes Callamard, the Director of Article 19, spoke in 2009 (on October 6 at a UK government side session on Freedom of Expression at the ODIHR Human Dimension Implementation Meeting in Warsaw) of a gruesome pattern of “copycat” killings and assaults against journalists across parts of the Former Soviet Union, characterised by a series of brutal group attacks by several unidentified assailants on a single journalist close to his home or office, in which clubs, baseball bats or metal bars have been used, in many cases resulting in crippling or life-threatening injuries. UNESCO's figures, issued at the most recent meeting, in Paris in March 2010, of the Council of the IPDC (International Programme for Development of Communication), showed that 80% of journalists' killings worldwide are targeted assassinations, most of which take place in non-official-conflict zones.

In order to make recommendations for reform it is useful to break down the incidents into two categories: incidents that take place in time of war or armed conflict, and those that take place elsewhere.

**Attacks during armed conflict**

During times of war or armed conflict (there are definitional issues which it is important to be aware of) a different body of laws applies than at other times. The Geneva Conventions and associated documents and standards offer a degree of protection and status to journalists that clearly differentiates them from combatants. Targeting of journalists – like targeting of humanitarian personnel, or civilians for that matter – constitutes a war crime under international humanitarian law. The landmark UN Security Council Resolution 1738 of December 2006:-

“Emphasizes the responsibility of States to comply with the relevant obligations under international law to end impunity and to prosecute those responsible for serious violations of international humanitarian law ...

Urges all parties involved in situations of armed conflict to respect the professional independence and rights of journalists, media professionals and associated personnel as civilians;

Requests the Secretary-General to include as a sub-item in his next reports on the protection of civilians in armed conflict the issue of the safety and security of journalists, media professionals and associated personnel.”

The UNSC Resolution adds nothing new to the existing body of international humanitarian law. But it draws attention to the important principle that media professionals and associated personnel fall into the same category as civilians in terms of the duty of states to do everything possible to protect them from harm. Most importantly, perhaps, it explicitly reminds States of their obligation *to prosecute those responsible for deliberate attacks on journalists during time of armed conflict*.

**War crimes** can be prosecuted in nearly all countries around the world. The law is not an issue in initiating these prosecutions, but political will is.

There is very little international supervision and enforcement as regards the implementation of States’ duties in this field. The Secretary General’s reports under the Resolution are an opportunity to request further and more State action, but so far any such appeals have lacked any special urgency and have had little impact. In the Secretary-General’s most recent annual report, on 11 November 2011, attacks on journalists in conflict situations, including killings which took place in a total of eleven States, occupy just one paragraph in a 30-page report.\*

### **Attacks outside areas or situations of armed conflict**

The largest number of journalists who are killed around the world each year die in violent attacks outside situations of armed conflict. Some of those murders apparently have no particular connection to their work, but very often they are clearly targeted for stories they have published. The murder in 2005 of the investigative journalist and anti-corruption campaigner Marlene Garcia-Esperat in the Philippines is one well-attested example of such a case; as is, for example, the murder of Anna Politkovskaya in Russia in 2006.

### **Bad and worsening record of investigations/prosecutions and effective impunity**

It is a crime in all countries to commit a murder or to violently attack a person. One might have thought, therefore, that attacks and murder of journalists would be pursued -- and generally that prosecutions, and serious efforts to convict those responsible, would result, as in most other cases of violent assault and murder. The reality is different. Experience shows that in the great majority of cases, killings of journalists go unsolved in all countries where the trend is endemic. The reasons for this are complex and touch on issues of corruption and official connivance in criminal activity. In Mexico, for example, most cases of killings of journalist are connected with the drugs trade. Most of these cases are not or only halfheartedly investigated because, evidence shows, police at local and provincial level are frequently themselves involved in the drugs trade, or have been bought off.

It is also a violation of international human rights law, which applies in every part of the world, to fail to investigate a murder. Such failure would constitute a violation of the right to life which is protected under all main human rights treaties, including the UN Covenant on Civil and Political Rights, as well as the African, European and Inter-American regional human rights treaties. For example, Russia has been found in violation of its obligations under Article 2 of the ECHR for failing to investigate killings. Only very few States around the world have not signed any of these instruments, and even these States would be bound under customary international law to protect the right to life. In theory, therefore, one might suppose the protective framework of law to apply universally everywhere where effective government exists, that killing journalists is a crime under national law, and failing to investigate murders is a violation of a State’s duties under international

law, which would prompt serious international concern, accompanied by strong measures to tackle the problem .

Again, the reality is different. An evident lack of political will to fulfil that obligation leads to poor supervision of the implementation of States' international commitments. While there are standing committees that supervise the implementation of human rights treaties under the African, European and UN human rights systems, these committees are generally slow and only have recourse to 'soft' means of seeking effective justice. In other words, they rarely point fingers of blame at any state which is in breach of its obligations; and when they do, they lack the necessary teeth to enforce their declarations of concern and requests for remedial action. The Council of Europe, for example, issues countless statements of concerns and recommendations through its Parliamentary Assembly and Committee of Ministers, but these are routinely ignored by some States and openly violated by others. The Council of Europe conspicuously lacks any tools to demand and secure compliance in areas which are politically sensitive; that lack of means is all too obvious in the lack of any concerted or detailed mechanism requiring Council of Europe Member States properly to investigate and prosecute those who kill journalists.

In addition, while there are international courts that can issue binding decisions on the violations of rights, getting good judgments is not easy, and is very time-consuming. The world's foremost human rights court – the European Court of Human Rights – has accumulated a backlog of more than 100,000 cases, so that cases generally take 6 or 7 years to reach the Court. This has rendered that court an illusory -- or at least a very ineffective --- remedy for most Russians as well as citizens of other countries within its jurisdiction.

The Inter-American system is strong in theory, but little tested; the main African system is slow (even slower than the ECHR) and often politically influenced; and for most Asian countries the only international avenue of appeal is to the UN Human rights Committee, which is slow and whose decisions are often ignored. The ASEAN human rights commission as yet doesn't have jurisdiction to hear individual complaints, although cases are being brought to it; one of the lawyers representing the widows of murdered Filipino journalists has petitioned it to find the Philippines in violation of the right to life.

What is lacking, therefore, is not substantive law, since international humanitarian law, as well as international human rights law, makes it abundantly clear that murders of journalists are not to be tolerated, and violate the right to life. What is patently lacking are the tools that are required to effect compliance with agreed standards and principles.

### **Existing political mechanisms to supervise the implementation of human rights law are unsatisfactory:**

- The UN Human Rights Council has developed into a deeply politicised body where countries engage in horse-trading around human rights violations and other political issues. The British Foreign Office is among those states which sees the Universal Periodic Review process, which examines the record of each Member State once every four years, as very important. However, its findings are of interest to a small minority; they are rarely taken up seriously or in detail by the world's media; and their measurable impact on the behaviour of states appears severely limited.
- The UN Human Rights Committee, the body of independent experts that reviews the implementation of the International Covenant on Civil and Political Rights and other main UN human rights treaties, also reviews states only every four years, and its recommendations, too, are regularly ignored. There are, however, mechanisms for inter-state complaints and for individual complaints. More could be done to give INGOs the ability to take action here. The Committee meets three times per year.

- The Southeast Asian region, which includes the Philippines, one of the most troubled countries when it comes to judicial impunity, has no effective regional human rights body whatsoever;
- In Europe, **the Council of Europe has diminishing authority in human rights matters. The Committee of Ministers, meeting as the Member States' Ambassadors in Strasbourg every week, is the body responsible for ensuring the Execution of Judgements made by the European Court of Human Rights. Despite a pattern of long delays in the implementation of the Court's rulings by States found to be in violation of the Human Rights Convention, the Committee of Ministers' role and way of working has been accepted by national governments without any major groundswell of demand for changes. In sharp contrast, concerned groups, including the MLDI, have long seen this process as ineffective.**
- The OSCE, mainly in the person and the office of its Representative on Freedom of the Media, has no powers to enforce its recommendations, because of the consensus-based character of the organisation. The RFOM's provides a unique service, as an inter-governmental body, of telling states publicly when they have breached OSCE standards. Quite often forceful language is used in the RFOM's quarterly reports as well as in regular statements on particular issues, including cases of violence and intimidation of journalists and inadequate judicial follow-up. The FROM's office also provides expert advice and assistance to participating states to help them resolve a variety of shortcomings. However, the important work of the OSCE over recent years, together with that of the Council of Europe, has not been able to prevent a widely-acknowledged trend to higher levels of targeted violence against journalists as well as high rates of impunity related to those crimes.

The picture is, with some notable exceptions, remarkably similar in every major region of the world: when journalists are killed because of their work there is a marked absence of will and determination to prosecute those responsible for those murders. This pattern of behaviour is often more marked in cases when the victims are journalists than it is in the case of other severe human rights violations.

**International human rights courts such as the European Court of Human Rights could provide an effective remedy but they often underperform, either because they are overloaded or underfunded, or because they lack the authority to enforce their decisions, or a combination of the above.**

In international humanitarian law (which applies in situations of armed conflict), the overriding factor behind the violent deaths of journalists appears to be political will, combined with the special difficulty of gathering evidence in times of armed conflict.

The practical effects of the unanimous passage of UN Security Council Resolution 1738 in 2006, which was intended to help remedy the general lack of political will in this area, have been frankly disappointing. It is impossible to escape the conclusion that UN Member States have shown a signal lack of political will to give effect to the principled and clear call for all states to honour their obligations to protect journalists as civilians and, in particular, to ensure that killings in violation of those duties are duly investigated and prosecuted.

**The proposed international conference examining the issue should pay particular attention to the following, as part of an open-ended initiative, involving governments, IGOs and INGOs, journalist reps, lawyers, academics and other experts:-**

- **The need for the international community to agree and establish the means to enforce recommendations and judgments from international bodies and courts in individual cases. A system of standing review committees, at regional and/or global level, might be put in place with a mandate to achieve that goal. But in order for it to be effective and to inspire confidence, such bodies should be constituted independently from any particular state authority; and must involve independent NGOs in a meaningful way in their work.**

The closest existing model for such an oversight body, the Committee of Ministers of the Council of Europe, which is charged with the Execution of ECtHR decisions, not only lacks enforcement powers, but as a body representing states, it must always be open to suspicions of compromise on political grounds.

- The leadership role played by 'influential' States in all regions, together with that of the permanent members of the UN Security Council --the US, UK, France, China and Russia -- should be recognised as part of a UN-led process of seeking to achieve better levels of compliance by all states in this area. Importantly, as a necessary confidence-building measure, the P5 states should be called on not only to support declarations calling for compliance, such as UNSC Resolution 1738; their special status should also be reflected in requirements that they set an example in terms of transparency, openness and public scrutiny of their own conduct.
- The urgent need to establish a standing court or tribunal for human rights violations in Southeast Asia. The ASEAN human rights body might be developed to take on such a role, through the sincere efforts of regional states and active support from the wider international community.
- The role that NGOs can play as reporters of human rights violations, as monitors of State action, and especially as sources of information for IGOs bodies tasked with the supervision of international human rights treaties, should be significantly enhanced. Without that innovation, experience suggests, there is a very real risk that the record of cases of violence and impunity will continue to deteriorate even further.
- The need to establish a standing committee that can investigate and provide a rapid response to suspected situations of human rights violations, both on a regional basis and globally. Hopes which were raised several years ago that effective protection might be provided by the "Justice Rapid Response" mechanism, which would provide quick and coordinated interventions in response to urgent need, appear to have faded. Available evidence suggests that up to early 2010, at least, the effective usage of this mechanism was so low as to be hardly measurable. Among the most problematic regions are Russia, North Caucasus, Philippines, Sri Lanka, and Mexico. The MLDI was set up in 2009 specifically with the goals of increasing the coordination between governments and HR Law experts, and providing legal services rapidly in defence of journalists who find themselves under attack in various forms. The MLDI's actual experience in practice demonstrates, unfortunately, that existing mechanisms are severely inadequate to support those tasks.
- The need for international bodies to be authorised to issue binding decisions as well as advisory recommendations, and for them to have the funding necessary to carry out their mandates.
- UNESCO now compiles regular audits on all murders of journalists, and requests information from the States concerned about the follow-up by judicial authorities. But the system is voluntary for member-states and lacks any kind of enforcement mechanism. Any moves by UNESCO member states to show a real determination to tackle the deep-seated evil of

journalists' killings and failures to investigate them and bring the perpetrators to justice must end this crucial deficiency, and provide the UNESCO Director-General and her staff, as well as member states acting together, the means to see that solemn international commitments are honoured.

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The OSCE has elaborate rules and standards in this field and the Office of the OSCE Representative on Freedom of the Media has achieved much by personal intervention and well-argued pressure. But the OSCE RFOM's Office has a severely limited operating budget, and its survival depends on the goodwill of all participating states, including some which remain hostile to close scrutiny and where impunity has taken root. Most importantly, the record of cases from the whole OSCE area over the past ten years unfortunately shows that overall compliance with the expected standards with respect to countering targeted violence against journalists and ending impunity has not improved, and by many measures has grown systematically worse. (ends)