

Countering Impunity for Attacks on Press Freedom: The Need for Renewed International Commitment

Dr. Carmen Draghici, Senior Lecturer in Law, City, University of London

1. I am grateful to the Al Jazeera studio in London for this opportunity to contribute to the works of the Doha Conference on the Defence of Freedom of Expression. The organisers of the conference have asked me to focus my presentation on the issue of impunity, which is by and large one of the most acute problems facing the protection and promotion of freedom of expression worldwide. I therefore set out to discuss what the international community can do in terms of normative and enforcement action in order to counter impunity more efficiently. I will first outline the legal roots of the limited efficacy of the current international regime. I will then consider the benefits of adopting a binding instrument dedicated to the protection of journalists and the provisions on impunity it should ideally include. Finally, I will highlight the merits of a new international enforcement mechanism dealing with alleged violations perpetrated against the rights of journalists.

2. Numerous resolutions adopted in recent years by the UN General Assembly, the Human Rights Council and the Security Council deplored the impact of attacks against media professionals on the public's right to information and expressed concern at the chilling effect that such attacks, especially when perpetrated with impunity, have on the media as a whole. There is also express recognition now that the work of media professionals often places them at specific risk of intimidation, harassment and violence (UN Security Council Resolution 2222 (2015), UN Human Rights Council Resolution 33/2 of 29 September 2016, and UN General Assembly Resolution 70/162 of 17 December 2015 on the safety of journalists and the issue of impunity). In addition, it has been widely recognised that ensuring accountability for all forms of violence against journalists and other media professionals is a key element in preventing future attacks.

The limited success of the international community so far is probably explained by the fact that international law currently lacks a comprehensive binding instrument spelling out the obligations of States in relation to the protection of media professionals. Those obligations may be inferred from general human rights and humanitarian law provisions, as well as judgments, decisions and interpretative reports of monitoring bodies. The law is thus fragmented in many indirect sources. Effective implementation requires as a first step the codification of all applicable norms in a single, coherent instrument. The international community could also seize this opportunity to promote the progressive development of the law on the basis of the good practices recommended in the Report of the Office of the UN High Commissioner for Human Rights on "The safety of journalists" of 1 July 2013.

3. I mentioned that the law is merely inferable from general human rights and humanitarian law. In fact, there are no binding norms establishing safeguards for media workers specifically. In principle, journalists reporting from conflict zones benefit from the protection afforded by international humanitarian law to civilians. Common article 3 to the four Geneva Conventions 1949 and Additional Protocol I require the belligerent parties not to subject civilians to violence and ill-treatment, to distinguish civilians from legitimate military targets, and to refrain from attacks likely to result in excessive incidental loss of civilian life or injury to civilians. Although Protocol I contains an express recognition of the civilian status of journalists (art 79), the UN Security Council had to reiterate in its Resolution 1738 (2006) that journalists must be treated as civilians. Moreover, the silence of Geneva law as regards media workers fails to acknowledge that they face greater risks when compared to other civilians. There is a strategic advantage to be gained from targeting the media for those who wish to prevent the dissemination of information and any international scrutiny over the conflict. Moreover, unlike other civilians, journalists do not avoid conflict areas, they deliberately remain close to those areas to be able to inform world audiences about the conduct of hostilities. A further problem during conflict is the ambiguity surrounding the so-called 'dual-purpose objectives', that is, civilian facilities which also have a military function; a party may claim that a broadcasting facility assists the enemy's military communications and thus is a legitimate target (the bombing of the Serbian TV and Radio Station by the NATO campaign in 1999 is a notorious example). Another uncertainty under Geneva law regards the loss of 'civilian status' where civilians engage in activities supporting the other party to the conflict. There is need for a clear provision designed to avoid the mis-categorising of the act of reporting as dissemination of information to the hostile party, war propaganda or espionage. In addition, there is no enforcement mechanism at the suit of individuals in connection with violations of Geneva obligations.

4. International human rights law, which applies both in times of peace and during conflict, is equally silent on journalists' rights. To be sure, every individual is entitled to the protection of their right to life, personal liberty and security, to freedom from torture, freedom of expression and to an effective remedy when their rights have been breached. These rights are guaranteed to everyone under the UN Covenant on Civil and Political Rights and its regional counterparts (the European Convention on Human Rights, the EU Charter, the Inter-American Convention, the African and the Arab Charters). Yet the current human rights regime fails to take into account the risks associated with the journalistic profession. The exercise of freedom of expression by media professionals is distinct: they are involved in the circulation of information and ideas on a regular basis, with a much wider impact on mass audiences. This provides an incentive for those who wish to censor unfavourable speech to physically target journalists and other media workers.

5. International law addressing the situation of journalists specifically is limited to soft law instruments of a declarative or recommendatory nature. These include the 2009 Human Rights Council Resolution 12/16 on 'Freedom of opinion and expression', UNESCO Resolution 29 'Condemnation of violence against journalists' (1997) and the 2007 Medellin

Declaration Securing the Safety of Journalists and Combating Impunity, as well as a number of regional declarations (Resolution 1535 (2007) of the Council of Europe Parliamentary Assembly on 'Threats to the lives and freedom of expression of journalists', the declarations of principles on freedom of expression of the Inter-American Commission (2000) and of the African Commission (2002)).

6. Against this background, a new binding international instrument dedicated to the safety of journalists, including a specific enforcement mechanism, would improve the international response to attacks against journalists and the culture of impunity. A Convention on the Safety of Media Workers, potentially negotiated within the UN General Assembly, would present the advantage of systematising the relevant obligations inferable from multiple legal texts and making them more accessible to decision-makers and law-enforcement authorities. The new instrument would select and bring together the applicable human rights and humanitarian law norms, tailoring them to the situation of journalists. At the IFJ's request, I have prepared a draft Convention and hopefully it can provide the starting point for discussion in the relevant fora. The Convention includes, e.g., the obligation to protect journalists against attacks on their life, arbitrary arrest, violence and intimidation campaigns, the obligation to protect against forced disappearances and kidnapping (by state agents or private actors), the obligation to carry out effective investigations into alleged interferences and to bring the perpetrators to justice; in the context of armed conflict, the obligation to treat media workers and facilities as civilians (and hence illegitimate targets) and to conduct military operations with due diligence in such a way as to avoid unnecessary risks to journalists reporting on the conflict.

7. Importantly, the Convention should contain provisions specifically aimed at combating impunity. My draft includes an obligation to take appropriate steps to ensure accountability through the conduct of impartial, prompt, thorough, independent and effective investigations into all reports of threats and attacks against journalists and media professionals, and to bring all perpetrators, including those who command, conspire to commit, aid and abet or cover up such crimes to justice, as well as to ensure that victims and their families have access to adequate remedies. The text I propose further includes a requirement to develop and implement strategies for combating impunity for those committing violence against journalists and other media professionals and recommends some of the good practices noted by the report of the UN High Commissioner for Human Rights on "The safety of journalists", for instance ensuring investigations into suspected attacks are carried out by a special investigative unit or an independent national mechanism, established by law to monitor and carry out investigations into cases related to the protection of media professionals, empowered to coordinate policy and action between different government authorities, and having the competence to make recommendations to the relevant State authorities. Moreover, States should commit to dedicating the resources necessary to prosecute attacks against media professionals through the development of specific protocols or the appointment of a specialised prosecutor. In criminal proceedings relating to

attacks against journalists, any link between the attack and the victim's professional activities should be taken into account and treated as an aggravating circumstance.

8. As regards humanitarian law, the new convention should explicitly require all parties to armed conflict to make appropriate efforts to bring to an end any violations and abuses committed against journalists and other media professionals. In particular, States should be required to take all necessary steps to ensure accountability for crimes committed against journalists in situations of armed conflict: to search for persons alleged to have committed, or to have ordered the commission of, a grave breach of the Geneva Conventions, and to conduct impartial, independent and effective investigations in respect of alleged crimes committed within their jurisdiction. States should also commit to prosecuting those responsible for serious violations of international humanitarian law in their own courts, regardless of their nationality, or hand them over for trial to another concerned State.

9. In terms of enforcement, a new monitoring body should be established under the Convention. I have named it the Committee on the Safety of Journalists for working purposes. In my proposal for the Convention, all States Parties accept the competence of the Committee to receive complaints as mandatory. Alternatively, this procedure could be set up under an optional protocol rather than incorporated into the Convention itself, as with the Committee on Persons with Disabilities. It is important for the independence and authoritativeness of the Committee that its members serve in their personal capacity, therefore acting as a body of independent experts rather than a political body made up of State representatives. This would be similar to the treaty-based committees established under several UN conventions (e.g. Committee Against Torture). This body should be competent to consider communications from individuals or groups of individuals who claim to be victims of a violation of the Convention by a State Party. After examining a communication, the Committee would determine whether there has been a violation of any provision and forward its recommendations to the State concerned and to the authors of the communication. While these recommendations are not technically binding in the same way as court judgments are, in practice recommendations of bodies such as the Human Rights Committee established under the International Covenant on Civil and Political Rights are seen as authoritative and are generally followed.

The main advantage of a dedicated body for press freedom complaints would be that it provides a more expedite procedure in case of violations and it avoids the loss of political pressure stemming from the fragmentation of international avenues for redress. Another benefit of this individual complaints procedure would be the option of interim measures. At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee would be able to transmit to the State Party concerned for its urgent consideration a request for such provisional measures as may be necessary to avoid irreparable damage to the alleged victim.

In addition to the individual communications procedure, I suggest that the mandate should

also include a procedure for grave or systematic violations. The Committee should be able to act upon reliable information received not necessarily from victims, indicating grave or systematic violations by a State, and invite it to submit observations. The Committee should be able to designate one or more of its members to conduct an inquiry and to report back urgently, including, where warranted and with the consent of the State Party, a visit to its territory. After examining the findings of the inquiry, the Committee would transmit the findings to the State concerned together with any recommendations. The State would then have six months to submit its observations to the Committee.

The Committee would report annually to the UN General Assembly and summarise its activities in relation to individual communications and investigations into reports of grave or systematic violations. The publicity of the Committee's reports, and hence the prospect of reputational damage, is likely to bring about greater compliance.

10. To be sure, the objection may be raised that negotiating a new instrument and setting up an enforcement machinery implies further expenditure. However, any costs required by a specific Convention and its monitoring Committee would be justified by the benefits achieved. First, legal certainty and accessibility. I have already noted that international obligations on the protection of journalists in conflict and non-conflict situations are currently dispersed in various treaty provisions, judgments and decisions and non-binding declarations. With clearly defined obligations, monitoring commitment is also facilitated. Secondly, a new convention and its own enforcement mechanism would enhance the collective oversight over compliance with the relevant obligations. A specialised international mechanism for complaints would avoid backlog in the general courts and committees, where cases take on average 5 years to be decided. Significantly, it would include a procedure open not only to the direct victims, who may be discouraged from denouncing a violation or may not have the resources to bring proceedings, but also to members of the public in cases of significant patterns, which better reflects the societal impact of attacks on media workers. Thirdly, a dedicated Convention would renew States' commitment to enforce journalists' rights and would make an important political statement that the international community is determined to eradicate impunity for attacks against journalists. This is likely to generate greater peer pressure in the international arena.

The claim that financial efforts should concentrate on the implementation of existing laws is discredited by the persistence of attacks carried out with impunity. This alarming reality was lamented in several international instruments, such as the UN General Assembly Resolution 70/162 of 17 December 2015 on the safety of journalists and the issue of impunity and UN Human Rights Council Resolution 33/2 of 29 September 2016. If concerns over the costs of enhancing protection for vulnerable categories had prevailed in the past, we would not have had influential treaties such as the Conventions on the Elimination of Discrimination against Women and on the Rights of the Child, and the contributions of the Committees they set up. Even though women and children were protected as human beings under general instruments, specific norms were adopted as a reaction to the factual observation that

general instruments are insufficient. Similarly, journalists are a vulnerable category due to the fact that they are targeted on account of their profession.

A new international instrument of global reach dedicated to the safety of journalists would acknowledge their distinctiveness and their exposure to risk. It would attach particular stigma to violations of journalists' rights and increase peer pressure on States to punish attacks against them, which is at the core of compliance with international law. Such a major legal development would also emphasise the value of journalistic work to society and intensify international scrutiny over domestic efforts to combat impunity. Thank you.

Short Biography

Dr Carmen Draghici is Senior Lecturer in Law at The City Law School, City, University of London, where she joined in 2009. She teaches European Human Rights Law and Family and Child Law at undergraduate/ graduate-entry level. She was formerly a Visiting Fellow at the Harvard Law School's Human Rights Program (2015), a Visiting Research Scholar at the Fletcher School of Law and Diplomacy, Tufts University (2012), and a Leverhulme Visiting Post-doctoral Research Fellow at the Centre on Human Rights in Conflict, University of East London (2008). She also acts as a Visiting Professor in Public International Law at the Open University of Catalonia, Barcelona (since 2009). Dr. Draghici holds a PhD degree in International Law and Human Rights from the University of Rome 'Sapienza' (awarded in 2007). Her main research interests concern the judicial interpretation of the European Convention on Human Rights and the responsibility of States and international organisations for breaches of human-rights obligations; her work has focused in particular on the right to respect for private and family life, non-discrimination, freedom of expression, the protection of civil liberties in the context of counter-terrorism, and the relationship between the Convention and domestic law. Her publications include articles and chapters published in UK, US and European journals and edited collections, as well as a book titled 'The Legitimacy of Family Rights in Strasbourg Case Law: 'Living Instrument' or Extinguished Sovereignty?' (Oxford, Hart Publishing, 2017). Dr. Draghici is also a member of the policy-oriented Centre for Child and Family Law Reform (since 2010); in that capacity she has contributed to responses to Law Commission consultations.