

BRINGING PREDATORS OF FREEDOM OF INFORMATION TO JUSTICE

Violence and crimes¹ against journalists and other news providers are attacks not only on the victims themselves but also on the right to inform and its corollary, the right to be informed². Most attacks and murders that target journalists go unpunished. In its 2012 annual roundup, Reporters Without Borders speaks of the decimation of those working in news and information, with 88 journalists and 47 citizen journalists killed. A damning indictment. The impunity enjoyed by the perpetrators of abuses encourages them to pursue their breaches of human rights and freedom of information.

INADEQUATE NATIONAL PROTECTION

In the first instance, the protection of journalists and others involved in the media is the responsibility of every government. Government authorities are responsible for protecting and assisting their citizens and everyone on their territory or within their jurisdiction⁴. National courts are the rightful instruments for the punishment of attacks on the physical or psychological wellbeing of journalists.

With this in mind, the special rapporteurs for freedom of expression⁵ have called for **the formal criminalisation of crimes against freedom of expression and have drawn up a series of recommendations for governments**

In a joint statement on 25 June 2012, the four special experts said: "The category of crimes against freedom of expression should be recognised in the criminal law, either explicitly or as an aggravated circumstance leading to heavier penalties for such crimes, taking into account their serious nature; and crimes against freedom of expression, and the crime of obstructing justice in relation to those crimes, should be subject to either unlimited or extended statutes of limitations (i.e. the time beyond which prosecutions are barred)⁶."

¹ See RWB's Barometer of Press Freedom <http://en.rsf.org/press-freedom-barometer-journalists-killed.html?annee=2013>

² These are guaranteed by, among other things, Article 19 of the 1948 Universal Declaration of Human Rights <http://www.un.org/en/documents/udhr/index.shtml#a19>, the 19th Article of the International Covenant on Civil and Political Rights <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> and regional instruments such as Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>, article 9 of the African Charter on Human and Peoples' Rights <http://www.achpr.org/instruments/achpr/>, Article 13 of the American Convention on Human Rights <http://www.cidh.org/Basicos/English/Basic3.American%20Convention.htm>

³ 2012 was the deadliest year for journalists since RWB published its first roundup in 1995 : <http://en.rsf.org/2012-journalists-netizens-decimated-19-12-2012,43806.html>

⁴ See European Court of Human rights *Dink v. Turkey* (applications no. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09)

⁵ The United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe Representative on Freedom of the Media, the Organization of American States Special Rapporteur on Freedom of Expression, the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information

⁶ Joint Declaration on crimes against freedom of expression : <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12384&LangID=E>

The special rapporteurs and representatives also note it is essential that governments conduct **“independent, speedy and effective investigations into and prosecutions of crimes against freedom of expression”**.

Similarly, a draft resolution drawn up by Reporters Without Borders and presented to the UN Security Council by France in October 2006 called on governments to investigate “all acts of violence or lethal incidents involving journalists, those who work in the media and associated personnel which occur on their territories, as well as those occurring abroad in which their armed or security forces may have been involved, including those due to friendly fire”.

Too often, however, governments are negligent, whether through lack of political will to prevent such abuses, or because their judicial system is weak or non-existent or the authorities are complicit in the abuses by ordering, encouraging or tacitly accepting them⁸.

INTERNATIONAL LEGAL PROTECTION FOR JOURNALISTS

At an international level, legal protection for journalists is guaranteed by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights⁹, the 1949 Geneva Conventions¹⁰ and their 1977 first and second additional protocols¹¹; the International Convention for the Protection of All Persons from Enforced Disappearance, UN Security Council Resolution 1738 (2006), UN Human rights Council Resolution 12/16 (the right to freedom of opinion and expression), the Medellin Declaration by UNESCO in 2007, the 2010 UNESCO Decision on the Safety of Journalists and the Danger of Impunity and 2012 UN Human rights Council Resolution on the safety of journalists¹².

In particular, UN Security Council resolution 1738¹³ passed in 2006 reminds all parties to armed conflicts – government and non-government – of their obligations to protect journalists, those working in the media and associated personnel, to prevent acts of violence and retribution, to fight impunity and to protect media equipment and installations. Jurists could well interpret resolution 1738 as establishing customary international humanitarian law, since it states the law as it stands, confirms custom and practice by formulating and establishing it, and defining its scope.

⁷ <http://en.rsf.org/somalia-impunity-war-on-somalia-s-23-11-2012,43711.html>

⁸ See case of impunity deplored by RWB, in countries such as Honduras Mexico, Gambia, Turkey and Russia : <http://en.rsf.org/honduras-robber-gets-28-years-in-prison-for-12-09-2012,43373.html>
<http://en.rsf.org/mexico-two-cases-fuel-controversy-about-10-04-2013,44359.html>
<http://en.rsf.org/afrique-norbert-zongo-and-deyda-hydera-14-12-2012,43793.html>
<http://en.rsf.org/gambia-six-years-after-journalist-s-16-12-2010,39063.html>
<http://rzsnnl.bianet.org/english/media/10610-the-toll-journalists-killed-1992-2001>
<http://rzsnnl.bianet.org/english/freedom-of-expression/142238-20-journalists-20-stories>
<http://en.rsf.org/russia-leading-independent-journalist-16-12-2011,41562.html>

⁹ Human Rights Committee's interpretation - General Comment No34 <http://www.ohchr.org/english/bodies/hrc/comments.htm>

¹⁰ See Article 4A, section 4, of the 3rd Geneva convention (1949)

¹¹ See Article 79 of the first protocol (1977)

¹² A/HRC/21/L.6, especially paragraphs 7 and 8

¹³ <http://www.un.org/News/Press/docs/2006/sc8929.doc.htm>

It is important to emphasise international standards, and even more so to implement them. For this reason, RWB recommends the formation of a group of independent experts to monitor how UN member states comply with and follow up on resolution 1738. Moreover, most acts of violence and other crimes against journalists do not occur during times of conflict, so it is essential to extend the scope of resolution 1738 to circumstances besides armed conflict, to cover peacetime, civil disturbances, internal tension or public emergencies.

Such international standards, and the UN Plan of action on the safety of Journalists¹⁴ are a reminder of how much remains to be done in the fight against impunity for those who carry out attacks on journalists and those working in the media.

Thus, the 2006 resolution 1738 on the safety of journalists states in paragraph 7 that states have a responsibility “to comply with the relevant obligations under international law to end impunity and to prosecute those responsible for serious violations of international humanitarian law”¹⁵.

The establishment of the International Criminal Court (ICC) kindled hopes of progress in the fight against the impunity that applies to most crimes against journalists and information providers. But the failure of governments to prosecute those behind the most serious abuses has not been escalated to international level. Obstacles preventing the court from exercising its jurisdiction have prevented the trial of those behind attacks on those working in news and information.

OBSTACLES TO THE OPERATION OF THE INTERNATIONAL CRIMINAL COURT

The ICC was established on the basis of long negotiations, the drafting of a code of crimes against peace and international security, and the experience of ad hoc tribunals. It was created on the affirmation that the most serious crimes would not go unpunished¹⁶.

Its mission is to investigate crimes under international law committed after 1 July 2002 and to try the most senior officials.

It complements national jurisdictions and any case before it will be judged inadmissible if it is, or has been, the subject of an investigation or prosecution by a state that has jurisdiction in the case, unless the state is unwilling or genuinely unable to carry out the investigation or prosecution.

The ICC has jurisdiction for crimes specified in its Statute, namely war crimes, crimes against humanity and crimes of genocide. But its jurisdiction may only be exercised if certain criteria are met.

¹⁴ <http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/safety-of-journalists/un-plan-of-action/>
<http://en.rsfo.org/rsf-welcomes-un-s-commitment-to-28-02-2013,44150.html>

¹⁵ http://www.rsfo.org/IMG/pdf/Resolution_en.pdf

¹⁶ Preamble to the Statute of the International Criminal Court.

As a pre-requisite, the criminal behaviour being addressed must have taken place on the territory of a state that is party to the Statute of the International Criminal Court.

Up to now, 122 states¹⁷ are party to the convention. China, Iran, Somalia, Syria, Pakistan, Russia, the United States and Vietnam are not among them.

The court may also have jurisdiction in a case where the accused person is a national of State party, even if the crime was committed elsewhere.

The court's jurisdiction may be exercised in three ways:

- A State party state refers the case to the prosecutor, as occurred for example with the Democratic Republic of Congo and Mali.
- The Security Council refers a case to the court under Chapter VII of the United Nations Charter (threat to the peace, breach of the peace, or act of aggression); such was the case with the situation in Darfur and Libya.
- Finally, the prosecutor opens an investigation on his own initiative; as for the example the situation in Kenya.

Up to now the conflict in Syria has not met any of these criteria. Indeed, even if the crimes committed there could be qualified as war crimes or crimes against humanity, Syria is not party to the Statute. Furthermore, none of those alleged to be responsible appear to be nationals of any other state than Syria.

What is more, the permanent members of the Security Council could not agree on possible action under Chapter VII of the charter. That is why the Syrian conflict has not been referred to the court, despite many calls for this to be done ¹⁸.

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¹⁷ http://www.icc-cpi.int/EN_Menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx

¹⁸ http://www.icc-cpi.int/EN_Menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx

¹⁹ http://www.franceonu.org/IMG/pdf/Letter_Security_Council_Syria_14_January_2013.pdf, <http://www.ohchr.org/EN/NewsEvents/Pages/PillayToSecurityCouncil.aspx>

Failure to criminalize deliberate attacks on journalists

Under Article 5¹⁹ of the Rome Statute, the ICC has the jurisdiction to try the most serious crimes of concern to the international community as a whole. **No provisions of the Rome Statute criminalize deliberate attacks on journalists, despite their fundamental role in informing and alerting the public during internal and international conflicts.**

The appeals chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) recognises, however, that journalists played a major role in the coverage of conflicts since “vigorous investigation and reporting by war correspondents enables citizens of the international community to receive vital information from war zones” and “journalists reporting on conflict areas play a vital role in bringing to the attention of the international community the horrors and realities of the conflict”²⁰.

Making it a specific crime at the international level would be a way of implementing resolution 1738 and stepping up the fight against impunity.

Article 8 defines war crimes during internal and international armed conflict. It includes grave breaches of the 1949 Geneva Conventions as well as “other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law”. Although Article 8 provides for the protection of humanitarian assistance and peacekeeping personnel (paragraph 2 b iii), there is no such provision criminalizing attacks on journalists, media workers and associated personnel, or on media equipment and installations. However, making this an offence would have a strong deterrent effect on attacks on the media, such as the those on the Palestine and Sheraton hotels in Baghdad²¹ in April 2003, or the missile attack on the media centre in Gaza City on 18 November last year²².

For this reason Reporters Without Borders has called since 2008 for an amendment to Article 8 of the ICC Statute relating to war crimes, to include deliberate attacks on journalists, media workers and associated personnel²³.

Article 7 of the ICC Statute lists a series of acts that constitute crimes against humanity, which are not confined to armed conflict when they are “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”. These include murder, extermination, imprisonment or “other severe deprivation of physical liberty in violation of fundamental rules of international law”, torture, enforced disappearance and “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”.

²⁰ http://www.icty.org/x/file/Legal%20Library/jud_supplement/supp38-e/talic.htm²¹ [http://fr.rsf.org/IMG/pdf/rapport_](http://fr.rsf.org/IMG/pdf/rapport_irak_2003-2010_fr.pdf)

²¹ http://en.rsf.org/IMG/pdf/rapport_irak_2003-2010_gb.pdf

²² <http://en.rsf.org/palestinian-terr-rwb-condemns-air-strikes-on-news-18-11-2012,43690.html>

7. A crime against humanity may be committed by a government or a non-government body such as a terrorist group.

A systematic or widespread attack on civilians, including journalists and netizens, in given circumstances could be classified as a crime against humanity by the ICC. For example the murder of the Colombian journalist José Eustorgio Colmenares Baptista was recently classified as a crime against humanity by the public prosecutor in the city of Cucuta. The murder of another journalist, Guillermo Cano, was similarly classified by the prosecuting authorities. The prosecutor referred to the Rome Statute in his submission on 11 March this year²³, concluding that Colmenares Baptista's murder "was part of a systematic plan by the National Liberation Army against those it considered enemies for ignoring its orders and not carrying out the guerrillas' instructions via their media organizations". This description meant the offence could not be subject to a statute of limitations and thus could be investigated even after a lapse of 20 years.

As hopes for a genuinely global international criminal court dwindle, it falls to national and other international courts to pursue the fight against impunity. The international community must continue its campaign for the ICC to have jurisdiction over crimes committed in Syria.

As a matter of urgency, attacks on those involved in news and information must be made a specific offence under international law, by including them in the Rome Statute. Such a step forward, and the creation of a mechanism for monitoring compliance with resolution 1738 by UN member states, would motivate governments to criminalize offences against journalists, such as attacks and disappearances, and strengthen the fight against impunity²⁴.

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²³ <http://www.flip.org.co/resources/documents/9c4cd8980d2fe4a5956b771fadaa5a5f.pdf>

²⁴ the implementation of the recommendations in the joint statement on freedom of expression issued on 25 June 2012, and in the UN Plan of action on the safety of Journalists published on 27 February 2013 (see above), is essential to strengthening the fight against impunity.