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**The Safety of Journalists and the Danger of Impunity: International Legal  
Standards**

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Ladies and gentlemen,

I have been asked to focus on the issue of safety of journalists from the perspective of international law, my area of expertise. I note at the outset that this is just one aspect of the wider problem, albeit an important one.

There are two bodies of international law that are applicable in this context, human rights law and humanitarian law. The two run in parallel, rather than separately. In theory, these bodies of law are fully consistent and I will provide an interpretation which I believe is both accurate and yet ensures compatibility between these two systems of law.

I would like to start by dispelling a commonly held misperception, which is that during times of war human rights law is suspended and humanitarian law comes into play. That is not correct. Human rights are applicable in wartime as they are in peace. Although humanitarian law is designed for conflict situations, with the specific goal of trying to mitigate some of the barbarities of war, it neither overrides nor replaces human rights rules. It is true that during states of emergency, as narrowly defined under international law, States may derogate from certain rights, including freedom of expression. However, these derogations are limited and, for current purposes, I note that it is hard to see how they might affect the question of the safety of journalists.

**Human Rights Law**

A number of rights have some relevance for the issue of safety of journalists – including the right to security and possibly to non-discrimination – but I would like to focus here on what I see as the main right in issue, namely the right to freedom of expression. This right is guaranteed by Article 19 of both the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*. The former states:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

I would like to start by highlighting two key characteristics of the right to freedom of expression which are of particular importance in this context. First, although we normally think of the right to speak, the right to impart information and ideas,

freedom of expression has a dual nature. It also protects the right of the listener, and this is reflected in the fact that international guarantees refer not only to the right to impart but also to 'seek and receive' information and ideas. As the Inter-American Court of Human Rights put it so well in an Advisory Opinion they delivered in 1985, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*:

[W]hen an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to "receive" information and ideas. The right protected by Article 13 consequently has a special scope and character.... Its second aspect ... implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others. ... For the average citizen it is just as important to know the opinions of others or to have access to information generally as is the very right to impart his own opinions.

I would like to highlight the last point from this quote, namely the idea that the right to receive information is just as important as the right to impart information and ideas, arguably more important for the average citizen.

It is the right of the listener, the ordinary citizen, that is really the key driver for the special attention given to the media and other social communicators, including human rights defenders and NGOs, under the guarantee of freedom of expression. Journalists do not have special rights to impart information and ideas but, because of the key role they play in ensuring the right of everyone to receive information, international law recognises certain special protections for them.

Second, we normally think of freedom of expression as a right to be free of State interference, a so-called negative right. Thus, the State should not prosecute individuals for exercising their legitimate right to freedom of expression, close down media outlets, etc. However, freedom of expression also has a positive aspect, whereby States must take positive measures to ensure respect for the exercise of this right. Some examples of this are the right to information, pursuant to which States must enact enabling legislation to give effect to this right and then take a series of measures to implement it. Another is broadcast regulation, where again States must enact enabling legislation and take other steps to create an environment in which free, independent and pluralistic broadcasting can flourish.

The impact of attacks on journalists and others on freedom of expression, understood as the free flow of information and ideas in society, is pretty clear. The special mandates on freedom of expression at the UN, OAS and OSCE have described this problem as 'censorship by killing'. The aim of these attacks is only partly to silence the individual who is the subject of the attack. The wider aim is to send a message to anyone who would report on certain matters that they are at risk in the hope that this will exert a chilling effect on all public discussion of the issue. Of course not all attacks on journalists aim to silence them. Journalists, like other members of society, may get embroiled in other situations which involve attacks, for example involving family violence.

State responsibility for such attacks can be engaged in two key ways. First, where officials are directly involved in these attacks, the States bears direct responsibility for

those officers, as its agents. Unfortunately, analysis suggests that this is more common than one might wish to believe. In these cases, the State is under a direct obligation to make a serious effort to put an end to this form of interference with the right to freedom of expression.

The State also has a wider obligation pursuant to freedom of expression guarantees to take positive steps to prevent all attacks which are motivated by a desire to silence social communicators. As the special mandates on freedom of expression put it so succinctly in a Joint Declaration issued on 30 November 2000:

States are under an obligation to take adequate measures to end the climate of impunity and such measures should include devoting sufficient resources and attention to preventing attacks on journalists and others exercising their right to freedom of expression, investigating such attacks when they do occur, bringing those responsible to justice and compensating victims.

The same idea is reflected in Article 12(2) of the UN Declaration on Human Rights Defenders, which calls on States to take ‘all necessary measures’ to protect human rights defenders against attacks, discrimination and any other measure aimed at preventing them from exercising their rights.

### **International Humanitarian Law**

I now turn to international humanitarian law, which provides a very different framework for protecting the safety of journalists. Unlike human rights law which, as I noted at the outset is applicable at all times, humanitarian law only comes into play in the context of armed conflict.

The main rule under humanitarian law is that journalists should be treated as civilians, as non-combatants. This may be defeated where journalists take actions that qualify them as combatants, for example by participating in the conflict. Furthermore, Conventions I-III provide for ‘war correspondents’ to be treated in the same way as members of the armed forces for purposes of treatment of the sick, wounded, shipwrecked or captured in certain situations, namely where they accompany the armed forces, and have been authorised to do so, as evidenced by an identity card.

Humanitarian law prohibits attacks on civilians, including journalists. Such attacks are considered to be war crimes (except where they are collateral to genuine military activities, and are reasonable). States are required to investigate grave breaches of the Geneva Conventions – which include killing or seriously injuring civilians – and to bring the perpetrators to justice, insofar as possible.

It may be noted that the two bodies of law provide for reasonably similar results. Both prohibit direct attacks by the State or State actors against journalists, and both require the State to take action to investigate attacks (or serious cases thereof), and to prosecute those responsible. A key difference, however, is that human rights law places particular emphasis on investigating and prosecuting attacks on journalists, whomever is responsible, given that they represent an attack on freedom of expression.

### **Scope of Protection**

I turn now to the question of the scope of protection afforded under these two bodies of law and, in particular to three questions: who is entitled to the protection; what form should the protection take; and how much protection can the beneficiaries demand.

Frequently, as reflected in the title of this session, discussions on safety focus on journalists. This is natural given that they are frequently the main target of attacks. At the same time, from the perspective of human rights law, anyone who is targeted for the exercise of his or her right to freedom of expression is covered. A good example of this is Salman Rushdie, who was provided with protection for many years by the British government due to the risk he faced of being attacked for his writings. At the same time, as a matter of practicality, protection systems do often focus on journalists.

The title of this session refers to impunity, which implies a post facto focus, a need to bring those who have already committed crimes to justice. The reason for this is that, for the most part, providing protection to prevent an attack is simply not possible. There are a small number of high profile cases, the Salman Rushdie case is one, where the risk of attack is so high that protection is warranted. Outside of these cases, however, it is not realistic to expect the State to provide protection. Furthermore, most journalists would not want such protection, even if it were available, among other things because of the very real risk of such protection being abused to prevent them from exercising their right to freedom of expression. In other words, most journalists would not want to have a State provided 'minder' accompanying them all the time.

It may be noted that that a claimed need to protect journalists cannot justify State action to exclude them from dangerous areas. In other words, it is up to journalists, not the State, to decide whether or not to take risks in dangerous contexts. There may be certain cases where military prerogatives do require the exclusion of journalists from certain territory, although this is far less often the case than is often claimed by military forces.

As a result, the main practical implication of the right to freedom of expression for safety of journalists is to promote the investigation of attacks where they do occur and the taking of steps to bring those responsible to justice. Where the State bears direct responsibility through its agents for an attack, it should also compensate the victims for its wrongdoing.

Finally, we come to the question of how much effort the State must make to combat impunity. Most of the international cases addressing this issue involve quite extreme and clear cases of State failures, and often State commission of or complicity in the offence in the first place. International law thus provides limited guidance as to the question of the extent of resources that States should allocate to this task. It may be noted that international courts are extremely poorly equipped to address the question of resources and that even national courts struggle with resource issues. As a result, international standards in this area are probably more relevant as providing a basis for advocacy than in prescribing specific levels of State responsibility.

### **Possible Measures to be Taken**

I turn, finally, to the question of what measures might be taken in practice to promote implementation of these State obligations. First, I note that experience in other areas

of promoting human rights has demonstrated the importance of awareness-raising in addressing human rights abuses. Often, simply promoting knowledge about the content of human rights can help mitigate abuses. In this case, awareness-raising efforts should be directed at journalists about their right to be free from attacks, at the general public on the harm attacks on journalists causes to their right to receive information, and at officials about their obligations not to perpetrate attacks and to investigate them when they do occur.

Second, training is clearly needed to help journalists protect themselves. The documents provided by UNESCO indicate that 80% of those murdered were over 30 years of age, suggesting that these are reasonably seasoned journalists and that what is primarily required here is specialised training on safety measures. At the same time, I would like to caution against seeing training as a panacea in this area. It is not possible to prepare journalists to protect themselves against determined assassins.

Third, a range of targeted legal measures may be helpful. As suggested in some of the UNESCO documents, no statute of limitations should apply to criminal attacks designed to silence journalists. Heavier penalties are warranted in cases where crimes are motivated by a desire to limit freedom of expression. Many legal systems provide for heavier penalties where crimes are motivated by racial hatred, an analogous approach.

Finally, as noted in Resolution 29 of the 29<sup>th</sup> General Conference of UNESCO, adopted in November 1997, incitement to attacks on journalists should itself be a crime. I would just like to note, however, that the Resolution used the term ‘instigate’ rather than incite. The notion of incitement is well-defined in international law and has a clear and narrow meaning, as appropriate in this context. Overbroad limitations on freedom of expression, even where the goal is to protect journalists against attacks, should be avoided. I note that both the *International Covenant on Civil and Political Rights* and Security Council Resolution 1738 on attacks on journalists use the term ‘incitement’.

Fourth, measures could be taken to support those investigating attacks. This is a specialised area of law and sharing of best practices could be helpful. Fifth, international actors, including at the highest level, should continue to condemn attacks when they occur. I am pleased to note that this is the case within UNESCO, and that the Director-General continues to issue a number of condemnations annually.

Finally, I would like to note the importance of openness in this area. The draft Decision being presented to this Council calls for States to inform the UNESCO Director-General of steps taken in this area. This is certainly a positive step but far more profound measures of openness are needed. The World Bank has done important research on the notion of social accountability, whereby civil society and other actors can hold government to account through horizontal systems of accountability. The Bank has identified five key environmental factors which underpin the effectiveness of this form of accountability, of which openness is one.

It is significant that in a recent case being promoted at the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights has called, among other remedies, for the victims to be given full access to information about the case.

This is presumably motivated, at least in part, by a sense that it is necessary to supplement the efforts of the authorities by those of private actors.

Just one example of how information could be a powerful force for change in this area would be the publication of statistics on the percentage of crimes against journalists which remain unsolved, as compared to the figure for ordinary crimes. In many countries there would no doubt be a large gap in these figures, and much could be made of this.

This suggests that far more far-reaching openness measures are needed. Support could be provided to civil society to research and promulgate information in this area. But ultimately, the responsibility lies with governments to make sure that a wide range of relevant information on attacks on journalists is broadly disseminated.

Thank you.