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The Initiative on Impunity and the Rule of Law:

A Policy Research and Advocacy Project of the Centre for Law, Justice and Journalism (CLJJ) at City University London, and the Centre for Freedom of the Media (CFOM) at the University of Sheffield

"Safety and Protection of Journalists: A Responsibility for the World"

Research and Recommendations from the Working Conference at City University, London, on 1 June 2011.

Electronic copy available at: http://ssrn.com/abstract=2241802

An Appeal by Archbishop Desmond Tutu for Action to End Violence Against Journalists and Impunity

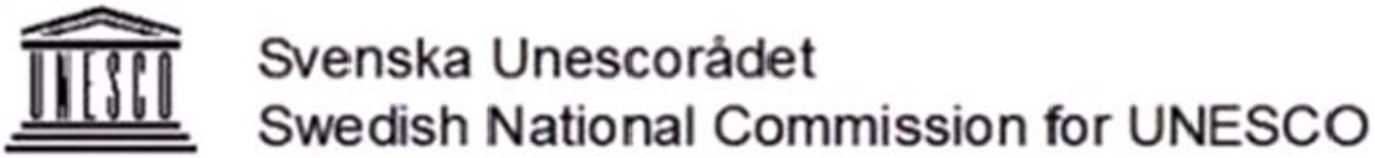
Archbishop Desmond Tutu, the Nobel Peace Prize winner and chairman of The Elders, sent this message and appeal to world governments on the occasion of the Working Conference of the Initiative on Impunity and the Rule of Law, meeting in London on 1 June 2011.

> "In the struggle against apartheid, journalists willing to report the truth were among our most important allies, and we knew that they often took great personal risks to do so. The right of journalists to report freely is of vital importance to people in all parts of the world, and those who use violence, assassination or detention to try and intimidate journalists must be held accountable for their actions. The high toll of deaths and injuries among media workers around the world in recent years is outrageous and unacceptable. I appeal to governments everywhere to ensure that law-enforcement and judicial authorities protect journalists' rights and take action to end impunity for such crimes."

Electronic copy available at: http://ssrn.com/abstract=2241802

Published by CLJJ, City University London and CFOM, University of Sheffield 2011.

The Directors of the Initiative on Impunity and the Rule of Law thank the sponsors who made possible this research and the Working Conference: the Open Society Foundation; the Norwegian PEN Centre and the Swedish National Commission for UNESCO.



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The published texts from the Working Conference are publicly available on the websites of the Centre for Law Justice and Journalism, City University London http://www.city.ac.uk/lawjusticejournalism and the Centre for Freedom of the Media at the University of Sheffield www.cfom.org.uk, partners in the Initiative on Impunity and the Rule of Law.

Foreword

By William Horsley

The Initiative on Impunity and the Rule of Law was set up in 2010 as a joint project of the Centre for Freedom of the Media (CFOM) at the University of Sheffield and the Centre for Law, Justice and Journalism (CLJJ) at City University, London.

Its founding goal and continuing purpose is to develop legal and political remedies for violence against journalists and judicial impunity.

Records on the numbers of journalists killed because of their work are constantly updated by non-governmental monitoring organisations and by UNESCO, the United Nations agency with the mandate to uphold freedom of expression. The figures published by different organisations vary, but all show that in recent years journalists have become the targets of an alarmingly high number of physical assaults, including murders, and of many forms of intimidation including arbitrary administrative and judicial harassment by state authorities and wrongful imprisonment.

In a disproportionately large number of cases where journalists are the victims of assaults or murder, the perpetrators are not identified and those crimes go unpunished.

There is clear evidence that such patterns of targeted violence and effective impunity have a severe chilling effect on freedom of expression and freedom of the media, which are indispensible for accountable government and impartial justice to exist. The resulting climate of fear often leads to widespread self-censorship; and in situations where independent media voices are stifled or sidelined free and fair elections may be impossible. Those conditions are closely associated with systemic corruption and with authoritarian forms of government, in which expressions of dissent or criticism are liable to be suppressed by force.

To advance our aims the Initiative conducts collaborative research and consultation among academic and legal experts, national government officials, Inter-Governmental Organisations, and civil society and media representatives.

The Working Conference on “Safety and Protection of Journalists: A Responsibility for the World” was held on 1 June 2011 as an occasion for the Initiative to present our original research, and to make the case for more effective international mechanisms to counter such crimes and end impunity. The one-day gathering of UNESCO and other international and British Foreign Office officials, together with experts from academic and NGO sectors from many parts of the world, assessed the existing legal, political and institutional safeguards against violence directed at journalists, and the merits of various additional international measures.

The obligation of states to protect the rights and the physical safety of journalists, in recognition of the special value of their public role and their part in affirming the freedom of expression and opinion, is acknowledged in a number of different ways in international instruments. Their legal effect and mandates are set out here in the Legal Instruments Study, together with an assessment of shortcomings and several well-considered proposals for ways in which States may act, if they so choose, to implement effective remedies.

UNESCO has identified the need for more coherent and practical measures at a global level to combat targeted violence and to eradicate impunity as something that requires a coordinated response by states as a matter of high priority. To that end UNESCO has organised a UN Inter-agency meeting on 13 and 14 September 2011.

Achieving any further international agreements on these issues depends on the will of States to establish more robust mandates for existing institutions, or to set up new, more intrusive institutions or legal instruments to achieve compliance The Political Aspects Study examines the record of European States in this regard, analyses the political choices that lie behind the widely perceived loss of European leadership, and sets out a range of alternative future courses of action at national and international level.

The Initiative’s own research and the exchange of information and views at the Working Conference enabled us to identify and list a number of recommendations which may be considered at the UN

Inter-agency Meeting and in further deliberations among concerned parties. They appear at the end of this publication.

Any consideration of these issues requires a workable definition of who is to be considered a journalist. The impact of the Internet has greatly expanded the numbers who may identify themselves as performing the work of journalists, while such claims may also be more likely to be contested. However, the definition adopted by the Council of Europe has been widely accepted, and the European Court of Human Rights has elaborated a substantial body of case law in its judgements concerning the rights that are relevant in cases involving journalists.

We have been fortunate in having had excellent cooperation from many respected organisations engaged in monitoring and campaigning for freedom of expression and media freedom. Several of those NGOs have contributed to the Political Aspects Study, which examines the international political context of attempts to establish more effective measures against violence and impunity.

My particular thanks go to the members of the Initiative's Advisory Committee, whose advice and support has been vital to our work. Edward Mortimer, who worked for UN Secretary-General Kofi Annan for many years, co-chaired the London meeting; Peter Noorlander of the Media Legal Defence Initiative and Rodney Pinder of INSI were among the speakers; and Miklos Haraszti, a former Representative on Freedom of the Media of the Organisation for Security and Cooperation in Europe, provided inspiration and ideas through his advice and a recorded interview which is among the materials posted on our website as a resource for the future.

The Working Conference was held under the Chatham House Rule, which means that participants in the meeting are free to use the information received, but neither the identity nor the affiliation of any speaker or participant may be revealed.

W. Horsley, London, June 2011

Co-directors, Research Team and Advisory Committee of the Initiative on Impunity and the Rule of Law

A Policy Research and Advocacy Project of the Centre for Law, Justice and Journalism (CLJJ) at City University London, and the Centre for Freedom of the Media (CFOM) at the University of Sheffield

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Rodney Pinder, Director, International News Safety Institute

Welcome Remarks

By Professor Howard Tumber

Working Conference on “Safety and Protection of Journalists: A Responsibility for the World”

I am pleased to welcome you all to City University London today, especially those who have travelled a long way to discuss with us the important and urgent subject of this Working Conference. As the title of the event suggests, our focus will be on an exchange of knowledge and ideas aimed at identifying practical remedies, and at supporting the attempts by UNESCO and other international bodies to help turn them into reality.

The Working Conference has been jointly organised by the Centre for Media Freedom (CFOM) at Sheffield University and the Centre for Law Justice and Journalism (CLJJ) at City University London. I thank both Universities for providing resources to facilitate our research and supporting the conference. In particular I thank my colleagues at Sheffield University -- William Horsley for his tireless efforts on behalf of our joint Initiative on Impunity and the Rule of Law and for his Political Aspects Study, and Professor Jackie Harrison, the chair of CFOM; as well as my colleagues at City University, Dr Carmen Draghici and Professor Lorna Woods, authors of the Legal Instruments Study, Dr Dimitris Xenos for his valuable research work on the Scoping Exercise which has been published on our website, and Sarah Muzio for her administrative help with the arrangements.

I also express our very sincere thanks to our sponsors, who are supporting our ongoing research and whose commitment has enabled today’s event to take place. They are:

> The Open Society Foundation, which provided funds for the research whose findings are presented today; the OSF is represented here by Algirdas Lipstas, the deputy head of their Media Program, who is personally much engaged with issues of impunity;
>
> The Swedish National Commission for UNESCO, which has played a consistent and leading part in international activities related to the issues we are discussing today, and which is represented today by its deputy Secretary-General, Dr Kerstin Lundman;
>
> And the Norwegian PEN Centre, represented by Ann-Magrit Austena, a member of its board. The Norwegian funds have made it possible for highly-regarded experts and practitioners to come from Colombia, Mexico, and Washington DC. Unfortunately, visa problems have prevented others from Russia and Africa from joining us as we had hoped.

An unacceptable climate of impunity in respect of deliberate and widespread violence against journalists and suppression of free opinion and expression has taken root in recent years. Only yesterday the brutal murder was reported in Pakistan of the investigative journalist, Saleem Shahzad. Our project meets an urgent need for investigation into the nature and spread of all acts of violence directed at journalists because of what they publish or seek to expose, including murders, assaults and threats, as well as abuses of law; and for the development of effective measures of a legal and political kind to counter impunity. We intend that our Initiative, in cooperation with others, will inform and assist efforts to implement effective international actions to end impunity for those responsible for killing, threatening or suppressing the work of journalists, editors, publishers and others who report on matters of public concern.

This conference represents an important stage in the development of our Initiative. We are grateful to you all for being part of this exceptional “platform” of governmental and non-governmental experts whom we have brought together for this exchange; and we trust that the work we have done so far, and our plans for future policy work, will complement and provide a useful resource for the work that you are engaged in, on the issues that concern us all. Thank you.

Programme

Impunity and the Rule of Law

Working Conference on the Safety and Protection of Journalists: A responsibility for the World, 1st June 2011

Hosted by the Initiative on Impunity and the Rule of Law

(City University London, CLJJ, and University of Sheffield, CFOM), supported by Norwegian PEN; the Open Society Foundation; and the Swedish National Commission for UNESCO

Session One **Mapping international structures and mechanisms in response to targeted violence and impunity: indicators of ways forward to solutions.**

Chair: Edward Mortimer, Senior Vice-President, Salzburg Global Seminar

Welcome remarks: Prof Howard Tumber, Head of Journalism, City University Centre for Law, Justice and Journalism

Opening remarks: Janis Karklins, UNESCO Assistant Director-General for Communication and Information: Outlook for the UN Inter-Agency Dialogue on countering targeted violence and ending impunity:

Carmen Draghici, Lecturer in Law, City University: The world map of Legal Instruments. Presentation of Research and Indicators for further Discussion:

- Weak and strong legal structures and mechanisms at global and regional level
- Shortcomings in the working of international instruments: the case for and against a new legal instrument; other options and points for discussion

William Horsley, International Director of the Centre for Freedom of the Media, University of Sheffield: Violence and impunity: Presentation of key points from the Political Aspects Study:-

- Success and failure of attempts to strengthen mandates and institutions: political interests and weakness of international responses
- Some draft proposals for international action: a more robust framework for compliance with State obligations

Responses and interventions: Merits and demerits of a legal instrument; alternative approaches

Discussants:

- Peter Noorlander, Legal Director, Media Legal Defence Initiative
- Susan Hyland, UK Foreign Office Director of Human Rights

Session Two **Focus on Europe: the European Convention on Human Rights – Prospects for Reform and the political environment**

Chair: William Horsley, Co-Director of the Initiative on Impunity and the Rule of Law

Agenda-setting remarks

Roland Bless, Director of the Office of the OSCE Representative on Freedom of the Media

“Tackling the causes of violence and impunity – the regional and global challenge”

Discussants and issues:

- John Crowfoot, International Federation of Journalists, London: Russia’s Record on violence and impunity tracked on an advanced database – a model for other regions? An analysis of findings
- Prof Bill Bowring, European Human Rights Advocacy Centre: Re-assessing the workings of the European Convention and ECtHR systems: addressing systemic failures of national jurisdictions; shortcomings in Execution of Judgements; the case for further reforms.
- Gavin Simpson, Office of the Commissioner for Human Rights: uses and limits of the Convention and the Strasbourg court in protecting the safety and rights of journalists and stopping impunity; maximising the effectiveness of Council of Europe mechanisms.
- Dr Kerstin Lundman, Swedish National Commission for UNESCO, Swedish concept and proposal on

United Nations cooperation to fight impunity.

Topics for recommendations and options:

- What should Europe do to achieve compliance at home?
- How can the European Convention system serve as a model for the world?

Responses and new approaches:

- Barbora Bukovska, Senior Director for Law and Policy, Article 19
- Jean-Paul Marthoz, Senior European Adviser, Committee to Protect Journalists
- Dorothea Krimitsas, ICRC: Developing the ICRC's role in protecting journalists on dangerous assignments

Chair: Inter-active summary of progress: towards a list of recommendations

Session Three **Setbacks and opportunities in Africa, Asia and Latin America: a responsibility for the regions and for the United Nations**

Chair: Edward Mortimer

Speakers and discussants:

- Dario Ramirez, Article 19, Mexico and Central America: the lessons of experience in Mexico and the region.
- Carlos Cortes Castillo, former Executive Director of Fundacion Para La Libertad De Prensa: the record and limitations of the Inter-American Commission on Human Rights; responding to endemic violence in fragile states and regions
- Michael Camillero (Office of the Special Rapporteur for Freedom of Expression, Inter-American Commission on Human Rights),

Responses and priorities at regional and global level:-

- Sylvie Coudray, UNESCO Head of Freedom of Expression programme.
- Ann-Magrit Austena, Norwegian PEN
- In-country policies for protection and judicial transparency; regional mechanisms; transfer of best practice.
- Enabling a constructive role for civil society, lawyers and the academic world.
- Responsibilities and self-help by journalists and media owners: training, information-sharing and public awareness.

Chair: Inter-active summary of points to be refined in Session 4

Session Four **Proposals for effective measures to improve protections for journalists and improve compliance**

Co-Chairs: William Horsley and Edward Mortimer

Speakers and discussants will include Rodney Pinder (INSI), Jim Boumelha, Susan Hyland (FCO), and Sylvie Coudray (UNESCO).

A Structured, open Discussion among Working Conference participants to draw up recommendations and options for consideration at the UN Inter-Agency Dialogue meeting, including:-

- An international agreement on the Safety of Journalists: expanding the mandates of Special Rapporteurs and concerned UN bodies.
- Emergency alerts and missions; intrusive inspections and mandatory sanctions– developing or renewing existing systems.
- Transparency and effectiveness: taking fuller account of non-governmental organisations and civil society.
- Collective responsibilities of states: monitoring and peer review processes; sharing information-and public policy making; oversight at national and international level.
- Effectiveness and coordination in UN agencies and bodies: enforcement of UNSC Resolution 1738; a question of leadership.

Janis Karklins: Next steps for collaboration among UN agencies and programmes for the safety of media professionals

The Initiative on Impunity and the Rule of Law

Towards an international framework to protect journalists from violence and to end impunity

LEGAL INSTRUMENTS STUDY

By Dr Carmen Draghici and Professor Lorna Woods, the City Law School, City University London

Presented at the Working Conference, 1 June 2011

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Executive summary

Context and objectives of the Impunity Initiative

The persistent disregard for the fundamental rights of journalists as they exercise their profession has led to a climate of impunity affecting not only victims but also freedom of expression and the rule of law in the societies concerned. The Impunity and the Rule of Law initiative set out to identify the normative and enforcement gaps under international law, and explore more effective solutions for the prevention and sanction of similar violations.

Scoping review and problems identified

Our mapping exercise suggested that the rights at stake – right to life, personal liberty and integrity, freedom from torture, freedom of expression, right to an effective remedy – are guaranteed in all general human rights instruments. They all commit States to refrain from killings, ill-treatment, unlawful arrest, and other interferences likely to have a chilling effect on all media operators and the citizenry at large. Moreover, these provisions have been interpreted broadly to impose positive obligations which should end the impunity of the perpetrators through the investigation and punishment of their crimes and the provision of effective remedies to the victims. Also, in times of war journalists are entitled to protection as civilians, a status expressly recognised in Protocol I to the Geneva Conventions: as such, they benefit from the belligerent parties' obligation to discriminate civilians from legitimate military targets, and observe proportionality in planning attacks likely to result in collateral damage.

Numerous non-binding instruments have also been adopted, both at UN and regional level, to reinforce and explain the scope of treaty obligations, some of which address explicitly the issue of impunity. As part of our mapping exercise, we have noted the trend in systems promoting economic integration towards cooperation in the field of human rights, though the level of protection guaranteed by such systems varies, especially in terms of effectiveness of monitoring systems.

Notwithstanding this multiplicity of normative systems, there are few instruments specifically concerned with the situation of journalists. While there are many instruments calling upon States to end the culture of impunity - through criminalization and independent investigations leading to the punishment of those responsible - none are binding. NGO-promoted instruments have further contributed to non-binding standard-setting, which may ultimately transform State behaviour, but all these initiatives operate incrementally. From the range of treaties and other instruments, it is clear that the problem of impunity is well recognised and that the description, across the majority of instruments, of the rights to protect journalists seems complete. The major hindrance for the protection of journalists derives not from the scope of the rights but from implementation deficits. States are reluctant to accept supra-national monitoring institutions due to concerns over the erosion of State sovereignty, a factor which is perhaps reflected in the scarcity of international monitoring and enforcement bodies with actual binding powers. Further, the lack of resources affects the implementation of positive obligations (e.g. the establishment of effective police and judicial systems) as well as the functioning of relevant international bodies.

In terms of universal mechanisms, the Security Council's binding powers are circumscribed to situations amounting to a threat to the peace, a breach of the peace or an act of aggression, but there is no general competence to take action against countries where killings and intimidating acts occur in peacetime. The only effective UN mechanism is the Human Rights Committee's quasi-judicial individual communications procedure, but its jurisdiction is optional, and the reports, albeit authoritative, are not legally binding. No other UN treaty-based monitoring bodies (Committees against Torture, on the Elimination of Racial Discrimination, or on the Elimination of Discrimination against Women) can adopt binding decisions. Another global mechanism, the UNESCO International Programme for the Development of Communication is a follow-up mechanism on a voluntary basis, concerned with killings of journalists rather than all forms of violence and harassment.

Regional systems have established more far-reaching enforcement mechanisms, through regional courts issuing binding judgments on individual complaints. The Council of Europe has the most effective such mechanism, due to the compulsory jurisdiction of the European Court to receive individual complaints and the monitoring of execution by the Committee of Ministers, who can bring States before the Court for non-compliance and even decide the suspension and expulsion of States for serious human-rights violations. Comparable, though less incisive regimes, are established by the American and African systems, the main weaknesses being limits on the ability of the individual to

bring a complaint and the fact that many States have not ratified the necessary Protocols to give the relevant courts jurisdiction. In this, however, we should note that some of the economic courts (that in the EU and ECOWAS) have more open rules allowing access to the courts. Other regional systems have much weaker enforcement mechanisms: the Arab Human Rights Committee only reviews periodic reports, the ASEAN Intergovernmental Commission on Human Rights is a consultative organ designed to promote, rather than enforce, human rights, and the South Asian Association for Regional Cooperation has no specific human-rights body. Even where there is an individual right of access to a court, the excessive length of the proceedings, the costs, the ignorance of the legal avenues available and the intimidation of lawyers may severely impair the effectiveness of each system.

Proposals for enhanced enforcement of journalists' rights

Legal responses to the current situation may encompass new instruments and/or new enforcement mechanisms. A specific instrument for the protection of journalists appears justified on account of their vulnerability as a category and the impact of attacks against them upon the public's right to information and democratic control over ruling elites. The success of conventions for special categories (children, women, minorities, disabled) or rights (protection against torture, non-discrimination) confirms that they consolidate the guarantees in general instruments, and attach particular stigma to violations.

The stronger option is a convention, negotiated within the UN General Assembly or the UNESCO General Conference, systematizing and detailing existing obligations in respect of media workers. The alternative would be a Declaration of Principles in a UN General Assembly resolution, expressing the determination of the international community to counter impunity, and setting the foundations for the adoption of a binding instrument (as with other human-rights law areas, e.g. rights of child and women, racial discrimination). Without excluding regional action, a global instrument would be preferable, as it would cover regions with modest inter-governmental cooperation and set uniform standards, reflecting the trans-border dimension of the phenomenon of violence against journalists.

The new instrument should include the obligation to protect journalists against attacks on their life, forced disappearances and kidnapping (by state or private actors), arbitrary arrest, intimidation, deportation/refusal of entry, confiscation/ damage to property etc. It should also include humanitarian law provisions, thus achieving a comprehensive codification of all applicable rules in a single instrument. As regards possible institutional solutions to address enforcement, an *ad hoc* body of independent experts monitoring compliance of the aforesaid convention, with mandatory competence to receive complaints and power of inquiry would allow for a more expedite procedure and avoid the loss of political pressure ensuing from the fragmentation of initiatives. Alternatively, the creation of a specialist sub-Committee within the Human Rights Council, made up of an equal number of governmental agents and representatives of media workers' NGOs (a model similar to the International Labour Organisation assembly) and empowered to undertake studies, issue recommendations, and report to the Council on individual/ NGOs'/ State communications may receive easier approval, though the lack of binding powers would be a weakness.

A further option yet would be to expand the prerogatives of existing bodies, e.g. amending the statute of the Human Rights Council to remove the prior consent requirement for country visits, and to introduce a mechanism of complaints for less exceptional cases. The UNESCO IPDC Council could be reinforced, by introducing more frequent meetings, and including in its mandate the power to adopt non-binding reports on individual/ collective communications, as well as to undertake country visits; its autonomy as a body concerned with media issues would increase visibility of the challenges facing journalists and provide a centralized forum for reaction. The powers of regional courts could be amended to include a priority procedure (modelled after the EU post-Lisbon speed procedure for persons deprived of liberty) in media violations cases, given their wider public implications on freedom of expression. Less radical initiatives include enhancing the effectiveness of existing organs within their current competence, with States members of international bodies taking a more pro-active role (e.g. inclusion of provisions on media protection in Security Council authorisations of peace-keeping missions); some of the regional bodies may take action through linking trade agreements with compliance with human rights (inspired by EU experience of conditionality for accession, association and cooperation agreements).

While none of these solutions is immune from objections in terms of desirability or feasibility, the legal inertia of the international community is likely to perpetuate the *status quo*, despite the notional existence of rules prohibiting violence against journalists and unwarranted interference with freedom of expression.

Part 1 - Introduction

A. Background

In recent years, disquieting evidence of the scale of attacks against the physical safety of journalists as well as of incidents affecting their ability to exercise freedom of expression – threats of prosecution, arrest, denial of journalistic access, and failures to investigate and prosecute crimes against journalists – has been repeatedly brought to the attention of the international community by inter-governmental organisations, NGOs and various stakeholders. Numerous resolutions and reports, from UNESCO, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Parliamentary Assembly of the Council of Europe, the OSCE Representative on Freedom of Media and others, have identified the spread of a climate of impunity in some States as a threat to human rights and the democratic process, and called for urgent action to bring it to an end. Statistical data provided by the International News Safety Institute and the Committee to Protect Journalists, amongst others, also indicate high numbers of media casualties during armed conflict.

In 2010 the United Nations Special Rapporteur on freedom of expression drew the attention to the increase in the politically motivated killings of journalists, identifying as categories at risk journalists reporting on social problems, including organised crime or drug trafficking, those voicing criticism of government or powerful elites, reporting on human rights violations or corruption, or reporting from conflict zones (*Addendum to the Report* of the Special Rapporteur, *Tenth anniversary joint declaration: Ten key challenges to freedom of expression in the next decade,* 25 March 2010). Concerns about meeting the challenge of protecting journalists in conflict zones and ending impunity have been further acknowledged by *UN Security Council Resolution 1738* (2006). However, findings by the UNESCO suggest that the majority of journalists' killings take place away from conflict zones, and that the vast majority of deaths are the result of targeted assassinations.

The impact of impunity for acts against journalists should not be underestimated. As well as constituting an infringement of the rights of an individual, impunity has an adverse systemic effect. A number of (quasi-) judicial bodies have noted the 'chilling effect' of the failure to investigate, with deleterious consequences for information flows in the public sphere (e.g. Inter-American Commission on Human Rights – *Héctor Félix Miranda*). Impunity denies the rule of law and suggests violence is an appropriate response to disagreement, an approach to dispute resolution which could clearly threaten political and social stability. Conversely, the ending of impunity is the start of a virtuous cycle whereby human rights are embedded as values that are respected, rather than means to achieve recompense when a violation has already occurred.

The initiatives so far embarked upon by inter-governmental and non-governmental agencies have failed to bring to a close the widespread persecution of journalists, which is aimed at deterring journalists from acquiring evidence or disseminating views unwelcome to those who are in a position of authority.

B. Introduction to Project

Against this background, the purpose of the Impunity and the Rule of Law initiative, launched in 2010 by the Centre for Freedom of the Media (CFOM), University of Sheffield and the Centre for Law, Justice and Journalism (CLJJ), City University London, is to explore viable international solutions to prevent, and stop impunity for, the killing and intimidation of journalists as well as for the suppression of their professional activities. To that end a scoping exercise was carried out, aimed at identifying the gaps, whether in scope or application, in the existing international mechanisms designed to counter violence against journalists. The scoping exercise was carried out by Dr Dimitris Xenos and this report is based on the reports he prepared as part of that exercise. The reports are available on the Impunity website *www.cfom.org.uk* and at *www.city.ac.uk/lawjusticejournalism*.

The working definition of "journalist" we rely on is the one provided in the *Recommendation 4* of 3 May 1996 of the Committee of Ministers of the Council of Europe encompassing:

> "all representatives of the media, namely all those engaged in the collection, processing and dissemination of news and information including cameramen and photographers, as well as support staff such as drivers and interpreters".

The comprehensive definition of 'journalists' for the purposes of human rights and humanitarian law has been more recently confirmed by *UN Security Council Resolution 1738* (2006).

Our research was focused on the mapping and analysis of current international (global and regional) legal norms, non-binding instruments and procedures available for the prevention of abuses against journalists, and for securing an effective remedy once a violation has occurred. We have considered both conflict and non-conflict situations, general mechanisms to protect personal security and freedom of expression as well as those specifically addressing the situation of media operators, taking into account the threats deriving from State (in)action as well as from private parties. In doing so, we do not limit ourselves to instruments which describe themselves as being for the protection of human rights but consider also those which may have that effect notwithstanding their stated purpose (e.g. free-trade treaties). The current report will firstly provide an overview of the existing regimes, summarise our conclusions on the gaps in the existing instruments and mechanisms evidenced by the scoping exercise outlined above, and then address potential solutions for additional and more effective measures based on our assessment of some of the strengths and weaknesses of current regimes.

Part 2 – Scoping review and problems identified

A. General Instruments

1. Introduction

To date there is no specific instrument aimed at protecting the personal security and the freedom of expression of journalists. However, provisions protecting the right to life, personal liberty and integrity, freedom from torture, freedom of expression, and the right to an effective remedy exist in all general human rights instruments. As detailed below, all human rights treaty-based bodies have interpreted these provisions as imposing a broad range of positive obligations upon the contracting parties. Moreover, the right to life and the right to freedom from torture are non-derogable under all the instruments considered (Article 4 of the *International Covenant on Civil and Political Rights*, Article 15 of the *European Convention on Human Rights*, Article 27 of the *Inter-American Convention on Human Rights*, Article 4 of the *Arab Charter on Human Rights*), and therefore cannot be suspended even in times of war or other emergency threatening the life of the nation. Moreover, save for express derogations from conventional obligations, the remaining (derogable) rights continue to be applicable in conflict situation alongside the provisions of international humanitarian law.

2. Global Instruments

(a) ICCPR and General Comments

The *Universal Declaration on Human Rights* (UDHR) proclaimed in the December 10, 1948 UN General Assembly resolution is the most authoritative reference in international human rights law and the drafting model of numerous regional human rights instruments. Although the principles contained in the Declaration were non-binding aspirational aims at the time of their adoption, they are currently considered to represent, at least in their core aspects, customary international law, and as such to bind all members of the international community regardless of their express acceptance. Article 19 of the Universal Declaration states that:

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

The Declaration also secures the "right to life, liberty and security of person" (Article 3), the right not to be subjected to "torture or to cruel, inhuman or degrading treatment or punishment" (Article 5) or arbitrary arrest (Article 9), and the right to an effective remedy for violations of one's rights (Article 8).

All the above-mentioned guarantees (as, more generally, the so-called "civil and political" rights enshrined in the UDHR) have binding correspondent provisions in the norms of the 1966 *International Covenant on Civil and Political Rights* (ICCPR). Articles 2.3 (effective remedy), 6 (right to life), 7 (prohibition of ill-treatment), 9 (right to liberty and security of the person) and 19 (freedom of expression) of the ICCPR, if applied properly, cover the different types of interference with the role of journalists referred to in the Introduction. The General Comments of the Human Rights Committee have usefully clarified the extent of State obligations under these provisions. Thus, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (2004) clarified that States must adopt legislative, judicial, administrative and other appropriate measures to prevent, promptly investigate, punish, and redress the harm caused by, detrimental acts of State agents as well as of private persons; failure to bring the perpetrators to justice was singled out as a separate violation of Article 2 (obligation to secure ICCPR rights).

In its *General Comment No. 6: The right to life (art. 6)* (1982), the Human Rights Committee underlined that "States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces", and that "the law must strictly control and limit the circumstances in which a person may be deprived of his life by [State]

authorities". The Comment further stated that "States parties should also take specific and effective measures to prevent the disappearance of individuals", and to "establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life".

Moreover, the *Draft General Comment No. 34 - Article 19* (2010), which clarifies the scope of States' obligations under Article 19 ICCPR, underlines that States "must also ensure that persons are protected from any acts of private persons or entities that would impair the enjoyment of freedoms of opinion and expression" and that "harassment, intimidation or stigmatisation of a person, including arrest, detention, trial or imprisonment for reasons of the opinions they may hold" amount to a breach of that provision. In the same Draft Comment, the Committee further emphasises that:

> "under [no] circumstances, can an attack on a person, because of the exercise of his or her freedom of opinion or expression, including such forms of attack as arbitrary arrest, torture, threats to life and killing, be compatible with article 19 […] All allegations of attacks on or other forms of intimidation or harassment of journalists, human rights defenders and others should be vigorously investigated, the perpetrators prosecuted, and the victims, or, in the case of killings, their representatives, be in receipt of appropriate forms of redress".

The jurisprudence of the Human Rights Committee has also stressed States' obligation to fully investigate allegations of forced disappearances (*Grioua v. Algeria*, 2007; *Bashasha et al. v. Libya*, 2010; *El Abani (El Ouerfeli) v. Libya*, 2010); the duty to investigate allegations of torture by police officers, and provide effective remedy by identifying and prosecuting those responsible (*Rajapakse v. Sri Lanka*, 2006); the duty to prevent interference with the right to life by private parties, in particular to investigate and provide protection in the face of death threats (*Jayawardena v. Sri Lanka*, 2002); and the obligation not to use lethal force without lawful reasons (*Chongwe v. Zambia*, 2000).

With particular reference to the unlawful persecution of journalists, the Committee held that the arrest, detention and conviction of a journalist for criticizing the President of the State constitutes a violation of the States' obligations under the ICCPR, and that the individual is entitled to an effective remedy (*Marques de Morais v. Angola*, 2005). The same conclusions were formulated in respect of similar persecution for advocacy of multi-party democracy (*Mukong v. Cameroon*, 1994). In *Njaru v. Cameroon* (2007), the Committee found that the State had violated Article 9 (right to security of the person) by failing to take measures against police brutality and death threats intended to deter and punish a journalist for the publication of articles denouncing corruption and violence of the security forces; it stressed that the victim's persecution was a restriction of the freedom of expression incompatible with Article 19.3, and that an effective remedy presupposed the prompt prosecution and conviction of those responsible, as well as full compensation. The Committee also stated that, in the light of the obligation to provide an effective and enforceable remedy where a violation of ICCPR has been established, it wished to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. A similar seeking of follow-up information can be seen in the activities of UNESCO and the International Programme for the Development of Communication (IPDC) (see below).

In addition to the provisions of the ICCPR, as clarified by the General Comments and views of the Human Rights Committee on individuals communications, the UN system encompasses sectoral conventions, such as the *UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984, in force since 1987) and the *International Convention for the Protection of All Persons from Enforced Disappearance* (2006, in force since 2010), which could also be relied upon in the case of ill-treatment of journalists.

(b) Non-binding instruments

The principle organs of the UN have adopted a series of declaratory instruments that reinforce the human rights at stake in cases of persecution of journalists by reason of their profession. They include the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* adopted by the General Assembly in 1985 (resolution 40/34 of 29 November 1985), the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* recommended by the Economic and Social Council (resolution 1989/65 of 24 May 1989), and the *Principles on the Effective*

Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment recommended by General Assembly resolution 55/89 of 4 December 2000. The *Declaration on the human rights of individuals who are not nationals of the country in which they live*, adopted by the UN General Assembly in Resolution 40/144 of December 13, 1985, established that aliens enjoy, among other rights, the right to freedom of expression and the right to peaceful assembly. The issue of impunity was specifically considered in the *Question of the impunity of perpetrators of violations of human rights (civil and political): final report prepared by Mr. L. Joinet, pursuant to Subcommission decision 1996/119)*, submitted by the Sub-commission on Prevention of Discrimination and Protection of Minorities [Renamed as the Subcommission on the Promotion and Protection of Human Rights] (2 October 1997).

(c) Humanitarian law

The number of casualties occurring amongst journalists during the Iraq war, the NATO bombardment of Radio Television Serbia in Belgrade in 1999, and the American bombing of Al Jazeera television in Kabul and Baghdad, reveal both the considerable risks faced by journalists in the exercise of their profession in conflict zones, and their lack of adequate protection under international law.

The existing international humanitarian law instruments do not confer any special status to journalists involved in conflict zones. The only express mention of journalists can be found in Article 4.A (4) of the Third Geneva Convention, under which "war correspondents" (the modern equivalent of which are the "embedded journalists", i.e. those moving around with the troops of one belligerent party; independent journalists covering a conflict would not be so regarded) are listed amongst the categories entitled to the status of prisoners of war, consequently protected under Article 13 (must be humanely treated, acts or omissions by the detaining power causing death or seriously endangering their health are prohibited, must be protected against acts of violence or intimidation and against insults and public curiosity). Further, common Article 3 of the four Geneva Conventions, applicable to non-international armed conflicts, stipulates that persons who do not take active part in the hostilities must be treated humanely and without discrimination; in particular, they cannot be subjected to cruel treatment, outrages upon personal dignity or taken hostages.

In addition to the protection given to "war correspondents", media workers reporting from conflict zones are entitled to the protection afforded to the civilian population. There is an explicit recognition of the journalists' civilian status in Article 79 of the 1977 Protocol I to the Geneva Conventions of 1949, relating to the protection of victims of international armed conflicts. It specifies:

> "1. Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians […]
>
> 2. They shall be protected as such under the Conventions and this Protocol, provided that they take no action adversely affecting their status as civilians, and without prejudice to the right of war correspondents accredited to the armed forces to the status provided for in Article 4 A (4) of the Third Convention".

This provision is significant in the light of the obligation imposed by Protocol I on the belligerents to distinguish between civilian and military objectives (Article 48), and to exercise precaution in the conduct of the attack, in accordance with the principle of proportionality (Articles 51 (5) b) and 57 (2) a) iii)). However, a weakness lies in the fact that the Protocol does not bind the States parties of the Geneva Conventions that did not ratify it, save to the extent that it corresponds to customary law.

The obligation of the belligerents to treat journalists as civilians has been reiterated in various documents, such as the 2010 *Report of the UN Special Rapporteur to the Human Rights Council* or *Security Council Resolution 1738* (2006) and, according to the Red Cross, is reflected in many domestic legal systems and military guidance, if not in practice.

According to the General Assembly Resolution on *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, targeted journalists would be entitled to reparation in case of a breach of their rights under both human rights and humanitarian law.

(d) UNESCO

The United Nations Educational, Scientific and Cultural Organisation is a UN specialized agency established in 1945 and currently counting 193 Member States and seven Associate Member States. The objective of the organisation, according to Article 1 of its Constitution, is "to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms".

Whilst its remit is not primarily concerned with standard-setting in the field of human rights, UNESCO has adopted a variety of instruments fostering worldwide human-rights protection. Most notably, the UNESCO General Conference (the supreme organ of the organisation) has adopted a series of declarations setting forth universal principles: *Declaration on Race and Racial Prejudice* (1978), *Declaration on Fundamental Principles concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racialism, Apartheid and Incitement to War* (1978), *Declaration of Principles on Tolerance* (1995), *Universal Declaration on the Human Genome and Human Rights* (1997), *Universal Declaration on Cultural Diversity* (2001), *International Declaration on Human Genetic Data* (2003), *Universal Declaration on Bioethics and Human Rights* (2005). Further, through the use of Recommendations, the General Conference formulates principles and norms and "*invites* Member States to take whatever legislative or other steps may be required […] to apply [them]" (Article 1 (b) Rules of procedure). As with the Declarations, Recommendations possess great moral authority but lack binding legal value. One such example is the *Recommendation against Discrimination in Education (1960)*.

The General Conference also acts as a treaty-negotiating forum, insofar as it adopts draft Conventions subject to the ratification or accession of States, such as the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (2005).

3. Regional Systems

Regional systems in the human rights context seen as a generic group may be assessed in different ways. One response is to suggest that allowing the development of such systems is contrary to the universal nature of human rights, as they do not impose the same standard across all States. As well as being philosophically difficult, at a practical level regionalism could lead to some areas receiving different scope and level of protection. Conversely, the differences approach may be seen positively, as the 'home-grown' version of the norms may be perceived as more legitimate and respectful of traditions and receive greater support. Practically, it may be easier to agree the terms of an instrument when there are fewer States to accommodate, which States may be more homogeneous in tradition, outlook and culture. The so-called 'Paris principles', approved by the UN Commission on Human Rights (*Resolution 1992/54*, 3 March 1992) and the UN General Assembly (*Resolution 48/134*, 20 December 1993), give support to the development of human rights protection at regional level. Of course, the underlying weakness remains: a possible lack of coherence and coordination of human rights protection globally.

(a) Europe

i. Council of Europe

As with the UN system, the *European Convention on Human Rights* (ECHR) contains protections for rights that are relevant to the situation of journalists: Article 2 (right to life); Article 3 (freedom from torture); Article 10 (freedom of expression) and Article 13 (right to an effective remedy). Thus, under the ECHR provisions, States already have an obligation to refrain from deliberately interfering with the right to life of journalists and from search-and-arrest operations likely to have a chilling effect on all media operators (see *Ozgur Gundem v. Turkey*, 2000, for a case involving a newspaper forced to cease publication). States parties also have a series of positive obligations: to take effective measures to protect journalists' lives against acts of violence perpetrated by third parties (*Dink v. Turkey*, 2010), and to carry out effective investigations into the circumstances of their death (*Kilic v. Turkey*, 2000).

Clarifying the negative obligation under Article 2, the European Court of Human Rights held that the circumstances in which there may be interference with the right to life must be narrowly construed: any lawful use of lethal force (i.e. for the purpose of defending a person from unlawful violence, effecting an arrest, or quelling a riot or insurrection), must be proportionate ("no more than absolutely necessary"), and police operations must be planned in such a way as to minimize the loss of innocent life (*Stewart v. UK,* 1984; *Ergi v. Turkey*, 1998). Similarly, military operations in conflict areas need to be planned and executed "with the requisite care for the lives of the civilian population" (*Isayeva et al. v. Russia*, 2005).

Intimidation other than physical violence is covered by Article 10 ECHR, insofar as actions having a chilling effect constitute an impermissible interference with the right to freedom of expression. The boundaries of permissible free speech have been recognized by the Court as significantly wider in case of criticism of government as opposed to cases involving private parties, given the public interest at stake (*Castells v. Spain*, 1992). In relation to this, the European jurisprudence has stressed that Article 10 also covers offensive or unpopular ideas (*Handyside v. UK*, 1976).

ii. The European Union

The European Union started life as an economic treaty organisation, established by the Treaty of Rome, 1957. As such, protection of human rights was not considered to be part of the treaty remit. The European Court of Justice (ECJ), in the face of constitutional concerns in certain member States, was effectively forced to reassess the position, from the case of *Stauder* (1969) onwards. This jurisprudential development received political support. Crucially in the Maastricht Treaty on European Union member States committed themselves to respect human rights, particularly as encapsulated in the ECHR. Importantly, respect for human rights now constitutes a condition for EU membership. A further novelty introduced by the Maastricht Treaty was the provision allowing a member State's voting rights in Council to be suspended for a serious violation of human rights. The EU subsequently proclaimed a Charter of Fundamental Rights, a charter which now, post-Lisbon, has the same status as the EU foundational treaties, despite some member States' reservations regarding the Charter's effectiveness in their internal legal order.

Substantively then, the EU gives the right to life, the right to freedom from torture, freedom of expression and the right to an effective remedy a double protection (in addition to that provided by any national constitution): once via the recognition of the terms of the ECHR and secondly via the terms of the Charter. Additionally, the Charter gives a specific right to the media, which is only implicit in ECHR itself. It is important to note, however, that the EU does not have an independent human rights competence and human rights issues can only be raised as a point ancillary to some other matter, though this still leaves a potentially broad field of action. It would be possible to argue that a journalist who feared to travel to another EU member State because of the impunity for crimes against journalists was encountering an obstacle to his or her right of free movement.

iii. The Organisation for Security and Cooperation in Europe (OSCE)

The OSCE is an international organisation consisting of 56 States from Europe, Central Asia and North America. It considers a wide range of security-related and economic development issues, including the promotion of human rights and fundamental freedoms. It provides a forum for political negotiations and decision-making in its working areas. There are, however, no legally binding human rights instruments adopted by OSCE.

(b) Americas

i. The Organisation of American States (OAS)

The *American Declaration of the Rights and Duties of Man* (1948) protects the right to life, liberty and security (Article I), the right to freedom of investigation, opinion, expression and dissemination (Article IV), and the right to protection from arbitrary arrest (Article XXV). Though adopted in the form of a declaration, its provisions have been accepted by the OAS bodies as expression of the obligation to protect human rights enshrined in the OAS Charter, and therefore as being endowed with binding legal value.

Furthermore, the *American Convention of Human Rights* (1969) protects the right to life (Article 4), right to humane treatment (Article 5), the right to personal liberty (Article 7), and freedom of thought and expression (Article 13). However, only 24 of the 35 OAS States have ratified the Convention.

The OAS organs have contributed to clarifying the scope of these provisions along the lines of the UN and ECHR bodies. Thus, the Inter-American Commission on Human Rights stressed in its 2009 *Report on citizen security and human rights* that the obligation to protect life encompasses the adoption of effective measures of protection against actions of private parties, the use of lethal force by the State's security forces within internationally recognised boundaries, and the investigation and punishment of violations of the right. A similar approach has been taken in its decisions. For example, in *Héctor Félix Miranda* v. *México* (1999), the Commission emphasises the procedural aspects of the right to life and the systematic effects of impunity:

> "A State's refusal to conduct a full investigation of the murder of a journalist is particularly serious because of its impact on society. […] [T]he impunity of any of the parties responsible for an act of aggression against a reporter--the most serious of which is assuredly deprivation of the right to life--or against any person engaged in the activity of public expression of information or ideas, constitutes an incentive for all violators of human rights. At the same time, the murder of a journalist clearly has a "chilling effect", most notably on other journalists but also on ordinary citizens, as it instills the fear of denouncing any and all kinds of offenses, abuses or illegal acts."

In the *Special Study on the Status of Investigations into the Murder of Journalists during the 1995–2005*, the Commission recalled that the State is internationally responsible for both actions or omissions in relation to the killing of journalists, stressing the positive obligation to guarantee the exercise of the rights by taking all appropriate measures to protect and preserve the right to life. The *Report on citizen security and human rights* emphasised the obligation to investigate cases of violations as arising from the general obligation to guarantee the conventional rights. Further, the *Report on the situation of human rights defenders in the Americas* pointed out that "[o]ne of the main violations of the duty to ensure rights is impunity".

The case law of the Inter-American Court on Human Rights has confirmed that the harassment, physical and verbal assault, as well as hindrance to broadcast, committed by State agents and private individuals against journalists and supporting staff violates Articles 5(1) and 13(1) (*Perozo et al v. Venezuela*, 2009). It also established that States breach their conventional obligations where they fail to conduct an effective investigation into unlawful killings, try and punish those responsible, and offer redress to the victims' next of kin (*Plan de Sánchez Massacre v. Guatemala*, 2004). The Court also had an opportunity to address forced disappearances (*Velásquez Rodríguez v. Honduras*, 1988), and the deterring effect of killings and injuries upon journalists reporting on issues related to armed conflict (*Hugo Bustios Saavedra v. Peru*, 1997). In *Ivcher Bronstein* v. *Peru*, the Court found that stripping the Israeli-born majority stockholder of an independent TV channel of his Peruvian nationality, because of his channel's critical view of the government, constituted an indirect restriction of freedom of expression.

ii. The Union of South American Nations (UNASUR)

A subsystem on the American continent, the UNASUR, is the result of the merger in 2008 of Mercosur and the Andean Pact. Though modelled after the EU and therefore perhaps expected to contemplate human rights protection, it is only marginally concerned with human rights. The constitutive treaty of the organisation mentions in the Preamble that the integration is based, *inter alia*, on the universal and indivisible human rights, establishes that cooperation in immigration matters must occur in the respect of human rights, and includes within the objectives of political dialogue cooperation to promote democracy and human rights. There are no other specific provisions, no instruments have been adopted, and there is no body entrusted with monitoring human rights. Therefore, any references to the American continent initiatives hereinafter will only focus on the Organisation of American States.

(c) Africa

i. The African Union

The Organisation of African Unity adopted in 1981 the African Charter on Human and People's Rights (ACHPR), which entered into force in 1986, and has been ratified by all 53 member States of the current African Union. Like the other main regional instruments examined above, it contains all the substantive rights potentially infringed in cases of violence against journalists: Article 4 guarantees individuals against arbitrary deprivation of the right to life, Article 5 establishes an absolute prohibition of torture and other inhuman or degrading treatment, Article 6 guarantees the right to liberty and security of the person, and Article 9 is concerned with freedom of expression.

Interestingly, unlike with the two other regional conventions, the right to freedom of expression is qualified imprecisely: "1. Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions *within the law*." (emphasis added). This may apparently provide a loophole for unwarranted interference with freedom of expression. However, the African Commission has mitigated the effect of this clause through an original interpretation of the concept of "law" as international norms. In Communication 275/03 – *Article 19 / Eritrea,* it stated:

> "Such provisions of the Charter [like Article 9] are sometimes referred to as "claw–back clauses," because if "law" is interpreted to mean any domestic law regardless of its effect, States Parties to the Charter would be able to negate the rights conferred upon individuals by the Charter. However, the Commission's jurisprudence has interpreted the so–called claw–back clauses as constituting a reference to international law, meaning that only restrictions on rights which are consistent with the Charter and with States Parties' international obligations should be enacted by the relevant national authorities". (paras. 91-92)

Significantly, the African Commission was defining the scope of the limitation by reference to international law rather than domestic law standards. Naturally, even where they cannot successfully argue a violation of the right to freedom of expression, victims of ill-treatment could still rely on Article 5 (freedom from torture), which is unqualified.

A series of soft law instruments further consolidate the importance of some of the above-mentioned rights of the Banjul Charter on the African continent. The *Guidelines and measures for the prohibition and prevention of torture, cruel, inhuman or degrading treatment or punishment in Africa (the Robben Island Guidelines)* adopted by the African Commission on Human and Peoples' Rights in Banjul on 17 - 23 October 2002 place further emphasis on the prohibition of torture, by stressing the obligation to counter impunity and to afford a remedy to victims, in particular by carrying out effective and impartial investigations.

Other regional initiatives include the *Kigali Declaration*, adopted on May 8, 2003 at the first African Union ministerial conference on human rights in Africa in Kigali (Rwanda), which contains a general review assessment of the protection of human rights on the continent, as well as development plans regarding democracy, governance and civil society, humanitarian obligations, the promotion of a human rights culture and the development of the domestic legal and administrative framework in accordance with the standards of the African Charter.

The jurisprudence of the organs of the African Charter seems to follow the interpretative line of the European and American jurisprudence, often cross-referenced in the decisions. Thus, in *Communication 275/03 – Article 19 / Eritrea*, the African Commission stated that "the imprisonment of journalists "deprives not only the journalists of their rights to freely express and disseminate their opinions, but also the public, of the right to information" (para. 105), and that "banning the entire private press on the grounds that it constitutes a threat to the incumbent government is a violation of the right to freedom of expression, and is the type of action that Article 9 is intended to proscribe", for "[a] free press is one of the tenets of a democratic society, and a valuable check on potential excesses by government" (para. 106). In *Communications 140/94, 141/94, 145/95 – Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda / Nigeria*, the Commission defined freedom of expression as:

> "a basic human right, vital to an individual's personal development and political consciousness, and participation in the conduct of public affairs in his country", which "comprises the right to receive information and express opinion" (para. 36).

The Commission also noted that, since, in contrast to other international human rights instruments, the African Charter does not contain a derogation clause, "limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances", and "[t]he only legitimate reasons for limitations […] are found in Article 27(2), that is, that the rights of the Charter "shall be exercised with due regard to the rights of others, collective security, morality and common interest"" (*Communications 140/94, 141/94, 145/95 – Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda / Nigeria*, para. 41; reiterated in *Communication 279/03 – Sudan Human Rights Organisation & The Sudan 296/05 – Centre on Housing Rights and Evictions / The Sudan*, para. 165).

ii. Sub-regional systems in Africa

The Economic Community of West African States (ECOWAS)

The ECOWAS is a sub-regional organisation established by the 1975 Treaty of Lagos, with the objective of promoting economic integration across the region via an economic and trade union, as well as security cooperation through mutual assistance. The organisation currently has 15 members: Benin, Burkina Faso, Cape Verde, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo. Article 4 (g) of the Revised Treaty of ECOWAS, signed in Cotonou in 1993, lists amongst the fundamental principles of the Union "the recognition promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights".

While there are other sub-regional communities on the African continent, they appear to be at under-developed stage especially as regards the human rights dimension, and will therefore remain outside the scope of the present report.

(d) Asia

i. The Association of Southeast Asian Nations (ASEAN)

The Association of Southeast Asian Nations (ASEAN) was founded by Indonesia, Malaysia, Philippines, Singapore and Thailand with the signing of the Bangkok Declaration (1967), but currently numbers ten member states, with the joining of Brunei Darussalam, Viet Nam, Lao PDR, Myanmar and Cambodia. East Timor also plans to join. While it is not primarily a human rights organisation, its focus being on the acceleration of economic growth, social progress and cultural development as well as the expansion of trade, its aims do encompass the "promot[ion of] regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries of the region and adherence to the principles of the United Nations Charter". There is arguably a slight resemblance between ASEAN and the European Union, in that they both evolved from an organisation based on free trade towards more complex forms of cooperation, including in the field of human rights protection. The mandate of the ASEAN Intergovernmental Commission on Human Rights (AICHR), inaugurated only recently in September 2009 (*Cha-Am Hua Hin Declaration*), includes the development of an ASEAN Human Rights Declaration, as well as capacity building for the effective implementation of international human-rights treaty obligations undertaken by ASEAN Member States. The establishment of a group for the drafting of the human rights declaration is now underway. Whilst the drafting of a human-rights instrument is still in process, we can assume, given the aim of compliance with UN treaties, that it will contain rights to life, freedom from torture, freedom of expression, though the precise form (and scope of any limitations) is unknown.

ii. The South Asian Association for Regional Cooperation (SAARC)

The South Asian Association for Regional Cooperation (SAARC) is an association aimed at economic, technological, social, and cultural development emphasizing collective self-reliance. There were seven founding nations: Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka. Afghanistan

joined in 2005. One of the key issues for SAARC States has been the eradication of terrorism, as illustrated by the discussions leading to the 2008 summit declarations (15th Summit). There the leaders agreed to cooperate, especially through the exchange of information on terrorism and organised crime, but there seemingly was no discussion on issues which might arise in this process, such as the protection of human rights.

Nonetheless, SAARC has established a *Charter of Democracy* which, in addition to aiming to reassert democratic principles, recognises 'that undemocratic and unrepresentative governments weaken national institutions, undermine the Constitution and the rule of law and threaten social cohesion and stability in the long-run' and therefore commits its members to 'guarantee the independence of the Judiciary and primacy of the rule of law' and 'adhere to the UN Charter and other international instruments to which Member States are parties'. There is, however, no express reference to human rights generally in this charter, and there is a strong linkage made between democracy and development. In 2004, at the 12th SAARC Summit, the SAARC States signed a *Social Charter* which spells out a range of laudable goals, including promotion of tolerance, pluralism, human dignity, and the protection of the rights and interests of minorities. Further specific charters have been developed through linking some aspects of human rights to security, for example in the field of human trafficking. Some aspects relating to the protection of journalists may be included, but there is far from the clear statement we see in the European or American arenas.

(e) Arab states

An *Arab Charter on Human Rights* was adopted by the League of Arab States and came into force on 15 March 2008. So far it has been ratified by ten Arab States: Algeria, Bahrain, Jordan, Libya, Palestine, Qatar, Saudi Arabia, Syria, the United Arab Emirates, and Yemen. It reaffirms the principles of the *Charter of the United Nations*, the *Universal Declaration of Human Rights* and the provisions of the ICCPR and the *International Covenant on Economic, Social and Cultural Rights*, while having regard to the *Cairo Declaration on Human Rights in Islam*. Although it may be seen as a step forward from the previous 1994 Charter, there are some limitations. The Charter restricts the exercise of freedom of thought, conscience, and religion, and the protection granted is not always extended to non-nationals.

Nonetheless, in terms of substantive rights, Article 5 recognizes the inherent right to life and prohibits arbitrary deprivation of life. Article 8 prohibits "physical or psychological torture or […] cruel, degrading, humiliating or inhuman treatment" and establishes an obligation for States to take effective measures to ensure protection against ill-treatment, including criminalization, as well as an obligation to afford redress to the victims. Article 14 enshrines the right to liberty and security of person, and expressly prohibits "arbitrary arrest, search or detention without a legal warrant". Article 23 establishes an obligation for States to ensure an effective remedy in case of violations of the Charter rights, whether committed by a State agent or not. Freedom of expression is guaranteed, in fairly standard format, by Article 32. It is to be exercised "in conformity with the fundamental values of society" which could be seen broadly, though the provision continues that restrictions are "subject only to such limitations as are required to ensure respect for the rights or reputation of others or the protection of national security, public order and public health or morals".

The Charter also contains a derogation clause for officially proclaimed emergencies threatening the life of the nations (Article 4), allowing States to suspend the exercise of a right "to the extent strictly required by the exigencies of the situation", in a manner consistent with their other obligations under international law and without discrimination. The extensive list of non-derogable provisions includes the provisions on life, torture, slavery, fair trial, compensation for unlawful arrest, non-retroactivity of criminal law, right to (hold and manifest) thought, conscience and religion, as well as "the judicial guarantees required for the protection of the aforementioned rights".

As with other regional instruments, it has the potential for greater acceptance within the region than global instruments, and may therefore go some way to mitigate resistance to human rights protection in that geopolitical area as it is a product of the selfsame region. Crucially in this regard, the revised charter begins by affirming the universality and indivisibility of human rights.

4. General Comments

The picture revealed is of a multiplicity of systems, in no formal hierarchy of relationship to one another and having different scope and objectives. While the development of regionalism may lead to some overlap between systems, it must be remembered that only some systems will be relevant to any one situation. Having said that, there remains the issue of equality of protection. Virtually all regional human rights instruments contain provisions relevant to the issue of journalists' protection. One question which remains for the newer systems is how the relevant provisions will be interpreted, especially as far as positive obligations on the State and responsibility for non-State actors are concerned. Again, this seems in the main covered by the texts discussed. Further, the experience from regional courts so far has evidenced that there has been form of judicial conversation, by which the various courts refer to arguments found in the judgments of other courts. Thus the African court has referred to the Inter-American court, which in turn has referred to the European Court of Human Rights. On this basis, it would seem likely that there will be further judicial transfer in this regard and various non-binding documents below also show parallels in approach. While the regional documents clearly reflect the scope of UDHR and ICCPR, there has been less interplay between the judges of the regional courts (with the exception of perhaps the African courts) and the decisions of UN bodies and UNESCO.

B. Measures Specific to the Situation of Journalists

1. Introduction

Whilst there is a plethora of international legal instruments, binding and non-binding, addressing human rights in general, very few instruments are specifically concerned with the situation of journalists. In recent years there has been an increasing tendency towards the adoption of legal initiatives, both at UN level and in virtually all regional fora, designed to respond to the specific human rights violations experienced by journalists and other media operators. However, as evidenced below, the measures envisaged are all non-binding in nature.

2. UN System

(a) General

The UN has long acknowledged the need for a specific instrument addressing the position of journalists in conflict (e.g. General Assembly Resolution 3058 (*XXVIII*) of 2 November 1973). More recently, on October 12, 2009, the Human Rights Council adopted *Resolution 12/16 – Freedom of opinion and expression,* which called upon States to take all necessary measures to put an end to violations by ensuring legislative compliance with international human rights obligations, effective implementation, and an effective remedy for the victims, and by investigating threats and acts of violence against journalists thoroughly, including during armed conflict, with a view to "bring[ing] to justice those responsible in order to combat impunity". The resolution further

> "[c]alls on all parties to armed conflict to respect international humanitarian law […] and to allow […] media access and coverage, as appropriate, in situations of international and non-international armed conflict".

(b) UNESCO

UNESCO has become increasingly involved in raising awareness on the importance of freedom of expression and information as a fundamental human right since the adoption of its New Communication Strategy of 1989. Resolution 29 entitled *Condemnation of violence against journalists*, adopted in November 1997, called upon UNESCO member States:

> "to take the necessary measures to implement the following recommendations: that governments adopt the principle that there should be no statute of limitations for crimes against persons when these are perpetrated to prevent the exercise of freedom of information and expression or when their purpose is the obstruction of justice; that

> governments refine legislation to make it possible to prosecute and sentence those who instigate the assassination of persons exercising the right to freedom of expression; that legislation provide that the persons responsible for offenses against journalists discharging their professional duties or the media must be judged by civil and/or ordinary courts".

In a series of events, UNESCO has issued a range of declarations which deal with the need to ensure the safety of journalism and to end impunity, notably the *Belgrade Declaration on Media in Conflict Areas and in Countries in Transition* (2004) and the *Medellin Declaration Securing the Safety of Journalists and Combating Impunity* adopted in May 2007. The latter Declaration calls upon States:

> "[t]o fulfil the duty incumbent upon them to prevent crimes against journalists, media professionals and associated personnel, to investigate them, to sanction them, to provide witness protection for those testifying against them and to repair the consequences so that such crimes do not go unpunished".

3. Europe

(a) Council of Europe

While the European Court of Human Rights is perhaps the best known of the Council of Europe mechanisms, other institutions within the Council of Europe system have also become involved in the issue of media workers' protection. Resolution 1535 (2007) of the Parliamentary Assembly of the Council of Europe on *Threats to the lives and freedom of expression of journalists* "recall[ed] the legal obligation of member states, in accordance with Articles 2 and 10 of the ECHR, to investigate any murders of journalists as well as acts of severe physical violence and death threats against them".

The specific issue of impunity has been considered, though in a wider context, by the Committee of Ministers of the Council of Europe, which is currently discussing the *Draft Guidelines on Eradicating Impunity for Serious Human Rights Violations*. While there are numerous documents reflecting these concerns we should note the *Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis*, adopted on 26 September 2007, which highlights the problems of impunity within conflict zones. Within the context of protection of investigative journalism, the Committee emphasised the need for a broad scope of protection, beyond physical safety: the need to ensure journalists' safety; to ensure freedom of movement of journalists; protection of sources; and "to ensure that deprivation of liberty, disproportionate pecuniary sanctions, prohibition to exercise the journalistic profession, seizure of professional material or search of premises are not misused to intimidate media professionals and, in particular, investigative journalists" (*Declaration by the Committee of Ministers on the protection and promotion of investigative journalism* adopted on 26 September 2007).

(b) The Organisation for Security and Co-operation in Europe (OSCE)

The draft decision on *Fostering Freedom of the Media and Enhancing Pluralism* considered by the OSCE Ministerial Council on December 1st, 2009, but not adopted, reaffirmed in paragraph 6 of the Preamble "the participating States' commitment to condemn all attacks on and harassment of journalists and to endeavour to hold accountable those directly responsible". The decision called on States to "undertake to actively combat violence against journalists, by making this undertaking one of the top priorities of political leadership" (operative paragraph 3).

4. Americas

The *Declaration of Chapultepec*, adopted at the Hemisphere Conference on Free Speech of March 11, 1994, was originally the product of NGOs drafting efforts but has received State endorsement. It lists the behaviours that should be eradicated: "Assassination, terrorism, kidnapping, pressures, intimidation, unjust imprisonment of newspaper reporters, physical destruction of the means of communication, violence of any sort and the impunity of the aggressors seriously hamper freedom of expression and of the press".

The *Declaration of Principles on Freedom of Expression* adopted on October 24, 2000 by the Inter–American Commission on Human Rights summarises in Principle 9 the obligations of States in respect of the attempts to hinder journalists, though in referring to 'social commentators' it may have sought to protect a broader group:

> "The murder, kidnapping, intimidation of and/or threats to social communicators, as well as the material destruction of communications media violate the fundamental rights of individuals and strongly restrict freedom of expression. It is the duty of the state to prevent and investigate such occurrences, to punish their perpetrators and to ensure that victims receive due compensation".

5. Africa

The *Resolution on the adoption of the declaration of principles on freedom of expression in Africa*, adopted by the African Commission on Human and Peoples' Rights on October 23, 2002 in Banjul, stresses that freedom of expression and information, both the right to seek and to impart information and ideas, "is a fundamental and inalienable human right and an indispensable component of democracy". The declaration circumscribes the admissible interferences in a manner evocative of the ECHR language: "1. No one shall be subject to arbitrary interference with his or her freedom of expression. 2. Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society."

Most important, Principle XI of the declaration specifically considers violence against journalists, and spells out States' obligations to "take effective measures to prevent [attacks such as the murder, kidnapping, intimidation of and threats to media practitioners] and, when they do occur, to investigate them, to punish perpetrators and to ensure that victims have access to effective remedies". There is, slightly more unusually, also an express reference to obligations deriving from international humanitarian law: "In times of conflict, States shall respect the status of media practitioners as non–combatants."

The African Commission returned to this topic in the *Resolution on the situation of freedom of expression in Africa,* adopted on November 29, 2006 in Banjul.

6. NGOs

A range of NGOs have been involved in awareness-raising campaigns and training initiatives. In terms of the establishment of norms, the *Declaration on the safety of journalists and media personnel in situations involving armed conflict* was drafted by the Reporters Without Borders and opened for signature in January 2003. It recalls the applicable rules of humanitarian law protecting journalists and proposes improvements to the law. Similarly, another such attempt can be found in the Press Emblem *Global Consultation on a Draft Proposal for an International Convention to Strengthen the Protection of Journalists in Zones of Armed Conflicts and Civil Unrest*. Neither appears to address the seemingly far more dangerous situation of non-conflict journalists.

7. General Comments

It may be easy to dismiss non-binding instruments because of their nature, assessing them as having no effect. Non-binding standard-setting is not without impact, however. Even if States sign up to them on the basis that this is a cost-free act, these measures are indicative of international values and may give a lever for legal argument before national courts and within civil society debate, which may ultimately be transformative in terms of State behaviour. Nonetheless, while such arguments may be valid, soft law instruments tend to operate incrementally; change on this basis is evolutionary rather than revolutionary. As with the general instruments, there may be issues arising from the complex and overlapping nature of the initiatives. Coordinated responses, such as the Joint Declarations of the Special Rapporteurs on Freedom of Expression, are rare.

C. Issues Affecting Effectiveness

While the substantive scope seems to cover issues relating to journalistic safety, the figures of deaths, disappearances and other forms of harassment and intimidation suggest that the systems are not effective. It is striking that although some cases come to the regional courts and similar issues have been dealt with within the UN system, there is not a correspondence between the number of these cases and the incidence of action against journalists. This may be due to the nature of the systems themselves; i.e. being of non-binding nature, or issues of access. We now consider a number of factors which may have an impact in this regard.

1. Geographic incompleteness/scarcity of norms

A certain number of States, for example in South-East Asia, are not currently bound by any regional human rights system. They are bound to some extent by the UN regime, at least by the general obligation under the UN Charter to respect and promote human rights, and they are also bound by customary international human rights law.

2. Political sensitivity and sovereignty concerns

In some cases, the reluctance of States to accept human-rights international commitments and supra-national monitoring institutions is to be ascribed to concerns over external interference with domestic affairs and erosion of State sovereignty. This is perhaps best illustrated by the safeguard clauses in the rules governing the functioning of the ASEAN Intergovernmental Commission on Human Rights, set forward in the so-called Terms of Reference. The AICHR Terms of Reference specify that the AICHR is to:

> "bear [...] in mind national and regional particularities and mutual respect for different historical, cultural and religious backgrounds, and taking into account the balance between rights and responsibilities". They also re-emphasise principles in Art. 2 ASEAN Charter: "a) respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States; b) non-interference in the internal affairs of ASEAN Member States; c) respect for the right of every Member State to lead its national existence free from external interference, subversion and coercion".

While one objective of this institution is "[t]o uphold international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN Member States are parties", there are some important caveats, based on sovereignty, non-interference in domestic affairs, and subsidiarity in human rights protection and "[r]ecognition that the primary responsibility to promote and protect human rights and fundamental freedoms rests with each Member State".

These references suggest that ASEAN will be hesitant to interfere or impose enforcement mechanisms that limit state sovereignty to any marked degree. It is questionable whether AICHR (or ASEAN) could intervene even in the case of gross human rights violations.

3. Resources

Another problem stems from the fact that positive obligations in relation to civil and political rights require a certain amount of resources, e.g. to set up a functional police and judicial system. To be sure, relying on the argument of insufficient resources does not exonerate States. Thus, in *Fillastre v Bolivia* (UN Doc CCPR/C/43/D/336/1988), the Human Rights Committee found that the lack of financial resources for the administration of the criminal system did not justify unreasonable delays in the adjudication of criminal cases (reaching a judicial decision 4 years after the applicant's arrest was unreasonable and amounted to a violation Art. 9 (3)). That said, the actual standard of protection offered is undoubtedly affected by States' available resources.

The issue of resources may also affect the functioning of relevant international bodies. Though there has been no empirical research which proves there is a correlation between funding and effectiveness,

it seems likely. In this regard, co-ordinated action rather than duplication would seem to allow for a more effective use of resources.

4. Monitoring and enforcement

The observance by States of their international human rights commitments, and the level of compliance with decisions signalling violations thereof, are critically affected by the absence of international bodies endowed with binding powers.

(A) Universal mechanisms

(a) UN bodies

i. General Assembly

The General Assembly is the UN's main deliberative organ that is composed of all member states. It has a significant role in the process of standard-setting and the codification of international law. Among its functions and powers, the General Assembly receives and considers reports from other UN organs, initiates studies and makes recommendations to promote inter alia the realisation of human rights and freedoms (Article 13.1 (b) UN Charter). The General Assembly is assisted in its work by six Committees, the third of which is the Social, Humanitarian Cultural Affairs Committee. Of the 64 draft resolutions considered by the Third Committee in the Sixty-fourth session of the General Assembly, more than half were submitted under the human rights agenda alone. The General Assembly regularly adopts human rights-related instruments, and also those that have previously been adopted by the Human Rights Council. On 1 March 2011, the General Assembly in its 76th Plenary meeting decided to suspend Libya's membership in the Human Rights Council, which had urged the suspension in a resolution of its own. The action against Libya is a rare example of this type of mechanism being used.

ii. Security Council

The Security Council is one of the very few international bodies with actual binding powers – in fact pursuant to Article 25 of the UN Charter States undertake to comply with its resolutions. However, there are several problems with the role the Security Council can play to alleviate the situation complained of.

On the one hand, whereas the General Assembly has general competences under the UN Charter, the Security Council has a specific mandate to ensure international peace and security. In particular, compulsory decisions can be made only pursuant to a determination of a threat to the peace, a breach of the peace or an act of aggression, within the meaning of Article 39 of the Charter. This means that the Security Council is not a global legislator or law-enforcer, but rather empowered to respond to specific situations: its action is statutorily confined to conflict situations, or to circumstances presenting a threat to international security, no matter how broadly understood. Whereas the Security Council was willing to find such threat in the case of humanitarian crises (even in the absence of a proper threat to the peace), because of the spill-over effects of such crises in the whole region concerned, it is very difficult to see the legal basis for any action against countries with poor records in terms of journalists' killings and intimidation in peace time. In fact, so far the attention of the Security Council has been directed towards the protection of journalists in armed conflict. In *Resolution 1738* (2006), condemning the deliberate attacks, in many parts of the world, against journalists, in armed conflicts, the Security Council called on all parties to armed conflict to put an end to such practices, to respect the professional independence and rights of journalists, and comply with their obligations under international law to protect civilians in armed conflict – in fact, journalists are to be considered civilians, to be respected and protected as such (without prejudice to war correspondents' right to the status of prisoners of war under the *Third Geneva Convention*). The frequency of acts of violence against journalists and breaches of humanitarian law may thus justify the intervention of the Security Council in conflict situations already under the scope of Article 39 of the *UN Charter*. However, there is little the Security Council can do in respect of peace time violations. No comprehensive answer to the problem can thus be expected from the Security Council.

A second problem with the possible contribution of the Security Council lies in the existence of a veto right, amongst other things benefiting countries with notorious problems in terms of repression of journalists, such as the Russian Federation. In fact, in 2009 the Human Rights Committee expressed concern at:

> "the alarming incidence of threats, violent assaults and murders of journalists and human rights defenders in [the Russian Federation], which has created a climate of fear and a chilling effect on the media, including for those working in the North Caucasus, and regrets the lack of effective measures taken by the State party to protect the right to life and security of these persons" (*Report of the Human Rights Committee, Volume I, General Assembly, Official Records, 65th session Supplement No. 40 (A/65/40)*).

iii. Human Rights Council

The Human Rights Council, a subsidiary organ of the General Assembly composed of 47 Member States, is a key UN body responsible for human rights. The Council serves as an international forum for human rights dialogue and review of States' human-rights records, but its mandate is largely limited to recommendations. The Council essentially monitors States' adherence to their human rights obligations through the *Universal Periodic Review*, which does not depart from the traditional, self-reflective State reporting mechanism, and adopts a report based thereon. It also makes recommendations to the General Assembly for the development of international human rights law. A complaint procedure is also provided for in the resolution establishing the Council, in order to deal with "consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstance" (*Human Rights Council Resolution* 5/1, A/HRC/RES/5/1 (18 June 2007), para. 85), but the Council has so far taken action on very few communications under this procedure.

The Council is assisted by the Human Rights Council Advisory Committee (which replaced the former Sub-Commission on the Promotion and Protection of Human Rights), but the Committee has no decision-making power (as the new designation itself suggests), and does not have the power to issue recommendations. It merely provides expertise, by undertaking studies and research on issues that concern the Council's work, liaising with other UN agencies, intergovernmental organisations, civil society stakeholders, states and national human rights institutions.

The Council supervises and develops the Special Procedures mechanisms introduced by the former Commission on Human Rights. These mechanisms are organised and carried out by Independent Experts who work individually or as working groups to address thematic issues or country-specific situations. Importantly for our purposes, the Special rapporteur on the promotion and protection of the right to freedom of opinion and expression has very limited powers: it gathers information on violations of the right to freedom of expression including issues of threats, violence, harassment against persons seeking to exercise the right to freedom of expression; seeks, receives and responds to Governments, NGOs, and any other parties regarding these issues; provides recommendations and suggestions including technical assistance; undertakes fact-finding country visits (not many visits though); sends urgent appeals and letters to members states on alleged violations which are summarised in its annual report submitted to the Human Rights Council. The Special rapporteur merely reminds States of their obligations, but has no authority to go beyond this exhortative function. Thus, the recent *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* (20 April 2010) reads:

> "With regard to the alarming number of journalists who have been killed, kidnapped or threatened, States are reminded of their duty to investigate and prosecute those responsible for planning and perpetrating such acts in order to eliminate the culture of impunity that perpetuates violence" (para. 133).

The continuing nature of the problem can be seen through the history of reports which deal with violence against journalists and impunity (see e.g. *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the right to development* (30 April 2009)).

iv. The Office of the UN High Commissioner for Human Rights

The UN High Commissioner for Human Rights (a post created by the General Assembly in 1993 with *Resolution 48/141*), appointed by the Secretary General with the approval of the General Assembly for 4 years based on a principle of geographical rotation, has limited powers as regards ensuring compliance with human rights. The main activities of the Commissioner concern the coordination of initiatives for human rights promotion and protection, the technical and financial assistance in the field of human rights, public information programmes promoting human rights, and action enhancing the visibility of human rights activities (publications, conferences etc.). Its impact on State action is largely limited to the provision of advisory assistance. The power of making recommendations to the competent UN bodies for improving the protection and promotion of human rights is also rather toothless.

v. The Human Rights Committee

The Human Rights Committee established by the International Covenant on Civil and Political Rights (1966) is arguably the most effective treaty-based monitoring body in the UN, due to the individual "communications" procedure introduced by the Optional Protocol to the Covenant which, while culminating in a report manifesting the "views of the Committee", is very similar to a judicial mechanism. In fact, the Human Rights Committee itself has clarified in its *General Comment 33* (2008) that, despite the fact that its views are non-binding, they "exhibit some important characteristics of a judicial decision". A follow-up mechanism is facilitated by a Special Rapporteur. However, States who have not accepted the competence of the Committee under the Protocol are only bound by the periodic report procedure in the ICCPR itself, which is not particularly far-reaching.

vi. Other treaty-based monitoring bodies within the UN system

The UN treaty-based monitoring human rights bodies – in particular the Committee against Torture, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women, the Migrant Workers Committee – are generally assigned a limited power of reviewing States' reports on their compliance with the international obligations in those specific sectors. The periodic reports mechanism usually has the disadvantage of severe delays in the submission of the reports, of State control over the information contained, and of the little impact of the recommendations based on the reports, save for publicity through annual reports to the General Assembly. Another typical prerogative of such committees is the undertaking of visits *in loco*, but here again there are difficulties, such as the fact that prior consent of the State concerned is needed, the possible restrictions to certain areas/ facilities etc. The optional individual complaints systems have been accepted by a relatively small number of States, and the resulting activity is rather limited, especially when compared to the Human Rights Committee.

vii. International humanitarian law

Undoubtedly, deliberate attacks against journalists and media equipment runs contrary to the principle that civilians and non-military objectives cannot be targeted during armed conflict, provided they do not take active part in the hostilities. However, the extant enforcement mechanisms under the Geneva Conventions are particularly scarce. Options include designating "protecting powers" to monitor the belligerent parties' compliance with the laws of war and humanitarian law, but this mechanism is seldom used in practice. If a party to the conflict alleges that the other party has acted in breach of its obligations, they can resort to classical international law diplomatic (*viz*. non-binding) dispute-settlement procedures. Thus, Article 132 of the *Third Geneva Convention* and Article 149 of the *Fourth Geneva Convention* provide for an enquiry procedure, the institution of which presupposes, nonetheless, the parties' agreement. Article 90 of Protocol I establishes an International Fact-Finding Commission composed of fifteen members "of high moral standing and acknowledged impartiality", whose competence may be recognised by the contracting states upon signature or ratification/ accession or at any subsequent time, on a basis of reciprocity. The acceptance of the Commission is therefore optional, and even so the Commission's intervention is confined to inquiry and mediation, in fact it is only competent to "[e]nquire into any facts alleged to be a grave breach" and to [f]acilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol". In case of humanitarian emergencies, such as the Darfur crisis (see *resolution 1564* (2004)), the UN

Security Council may request the Secretary-General to establish an international commission of inquiry to investigate violations of humanitarian law and identify the perpetrators; however, their actual accountability will depend on the cooperation of the States concerned.

(b) UNESCO

The International Programme for the Development of Communication (IPDC)

While not part of a formal enforcement mechanism, UNESCO has established a system for monitoring the safety of journalists and preventing the impunity of those who perpetrate crimes against them through the International Programme for the Development of Communication (IPDC). Since 2006, when the Intergovernmental Council of the IPDC held a discussion on the topic of safety of journalists and impunity, every two years the Director-General of UNESCO submits to the IPDC Council a report on The Safety of Journalists and the Danger of Impunity as a monitoring tool for follow-up. The second of these reports (2010) is the most recent. IPDC notes that, out of the 28 countries and territories condemned in 2006-2007 for the killing of journalists, fifteen provided detailed information on judicial follow-up. Despite *Resolution 29* and the unanimous support for the 2008 and 2010 decisions, on reading the report, however, it is apparent that a judgment or settlement has been obtained in only a small minority of cases. The practical effect of these initiatives has therefore yet to take full effect. Further, the report concerns killings, not other forms of violence and harassment which remain outside the scope of this initiative. The *Decision on the Safety of Journalists and the Issue of Impunity* adopted by the IPDC Intergovernmental Council in March 2010 stresses the need for inter-agency coordination. In fact, IPDC:

> "requests the Director-General of UNESCO to consult with Member States on the feasibility of convening an inter-agency meeting of all relevant UN agencies with a view to formulating a comprehensive, coherent and action-oriented approach to the safety of journalists and the issue of impunity".

(B) Regional bodies

(a) Europe

i. Council of Europe

(ia) European Court of Human Rights

Under the original scheme of the 1950 European Convention, declarations accepting individual complaints and the jurisdiction of the Court were optional (only inter-State complaints were compulsory). The system was based on the shared jurisdiction of a European Commission of Human Rights and a European Court: the Commission dealt with admissibility, and issued a report on the merits; if the Commission believed there was a violation, the Commission or the State could refer the case to the Court. After Protocol 9, victims have been able to directly refer a case declared admissible by the Commission to the Court. However, in cases where the Court did not have jurisdiction, the Commission reported to the Committee of Ministers, who decided *in camera* by a 2/3 majority if there had been a violation – a quasi judicial role seen as inappropriate for a political body.

Protocol 11 (effective since 1998) has introduced compulsory jurisdiction (States can no longer ratify the Convention without accepting individual complaints and the jurisdiction of the Court). It also abolished the Commission, creating a single full-time European Court of Human Rights, in which the judges (same number as Council of Europe member States, currently 47) sit in Committees of 3 (can unanimously declare a complaint inadmissible), Chambers of 7 (decide admissibility and merits), and a Grand Chamber of 17 hearing exceptional cases, where a Chamber relinquishes jurisdiction (if the case raises a serious question affecting the interpretation of the Convention, or where the resolution of a question might have a result inconsistent with a previous judgment), or in case of referral. While the Chamber examines the merits the Registrar will see if a friendly settlement can be achieved between parties.

(ib) Committee of Ministers

The Committee of Ministers of the Council of Europe is the Council of Europe's decision-making body, composed of the Foreign Affairs Ministers of all the member States, or their permanent diplomatic representatives. Pursuant to Article 15.a of the Statute, the Committee of Ministers "shall consider the action required to further the aim of the Council of Europe, including the conclusion of conventions and agreements". Article 15.b of the Statute provides for the Committee of Ministers to make recommendations to member States on matters for which the Committee has agreed "a common policy". Recommendations are not binding on member States. In addition to being a collective forum for political dialogue, it also monitors the compliance of the member States with their commitments under the treaties promoted by the Council of Europe. Most notably, the Committee monitors the execution of judgments of the European Court of Human Rights, in accordance with Article 46 ECHR. The Committee completes each case by adopting a final resolution, which is public. The publicity of the resolution acts as a form of political pressure, but there are no other consequences attached. As the US State Department noted in its 2010 country report on human rights practices, there was almost complete failure on the part of Russia to react to ECHR rulings requesting legislative amendments. *Protocol 14* to the ECHR introduced a new mechanism to assist enforcement of judgements by the Committee of Ministers. The Committee can ask the Court for an interpretation of a judgement and can bring a member State before the Court for non-compliance of a previous judgement.

Article 8 of the *Statute of the Council of Europe* provides for the suspension and ultimately for expulsion of States which have “seriously violated Article 3 [obligation to accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms]”. In the case of a member of the EU, a determination under Article 8 could have serious consequences (see below). This has not been used whether in the context of EU member States or otherwise.

(ic) Commissioner for Human Rights

Under *Resolution 99 (50)* (1999), the Committee of Ministers set up the office of the Commissioner for Human Rights, with the mandate, among other responsibilities, to foster observance of human rights and to identify shortcomings in the law. The Commissioner cannot receive individual complaints but engages in dialogue with the various countries through the carrying out of missions to a State, culminating in a published report which includes recommendations. In these reports, the Commissioner has also commented on the State's response to particular European Court of Human Rights judgments (see e.g. Azerbaijan, 2010, CommDH(2010)21, paras. 12, 18). The Commissioner will then carry out a follow up visit to check whether the recommendations have been implemented. The Commissioner may also, either at the request of a State or on his own initiative, give opinions on draft laws and specific practices and has also made third party interventions under Article 36 (2) ECHR.

ii. EU

The EU has become renowned for having an almost uniquely effective system of implementation of treaty obligations, through the development of judge-made doctrines (direct effect, state liability and supremacy) as well as the treaty provisions for enforcement. The key driver in this was the interplay between the national courts and European Court of Justice using the preliminary rulings reference by which a national court at any stage of the proceedings may make a reference on a question of interpretation of EU law, or validity of secondary acts.

While the EU has been effective in enforcement *vis à vis* its Member States, some have questioned the ECJ's commitment to human rights protection when those rights face a different direction from the economic rights, or even when there is serious political controversy (infamously, *Grogan*). Furthermore, there is no direct right of action for human rights violations; any claim must fall within the Treaty competence already (e.g. *Kaur*) and the Charter does not change this. As suggested above, in the event that problems occurred in a Member State, a case might rely on Treaty freedoms (see e.g. *Säger v. Dennemeyer* for definition of restriction), but this would be dependant on the co-operation of the national judiciary to make the reference. Individuals do not have a direct right of access to the ECJ to challenge actions of member States (as opposed to the institutions themselves).

Post-2000, we have seen the introduction of a network of independent experts on fundamental rights to review the implementation of the Charter rights in the member States. A new Fundamental Rights Agency has also been established, though there have been questions about its range of competence and what powers it has; it is not an enforcement mechanism. The European Parliament established a committee to review human rights, the scope of which goes beyond the member States of the EU, and may pass resolutions on particular issues, as can be seen in the case of Fatullayev in Azerbaijan (Resolution of 17 December 2009). The effectiveness of this as a mechanism is doubtful, though it may feed in to the EU process of negotiating trade agreements with third countries.

iii. OSCE

An important contribution is due to the OSCE Representative on Freedom of the Media, who observes media developments in the member States and publishes regular reports, articles, press statements that address, among other things, the issue of the safety of journalists. In addition, the office holder issues early warnings on violations of freedom of expression and assists States in complying with the OSCE principles on media freedom, including by providing technical expertise in forensic science and medicine to assist in the investigation process.

Significantly, the most recent regular report of the OSCE Representative on Freedom of the Media to the Permanent Council (the main decision-making body in the OSCE), presented on March 17, 2011, evidences various obstacles to media freedom, from the issue of physical safety of journalists, deterring legislation such as defamation criminal laws (Croatia), undue search and seizure operations by the military police (Czech Republic), denial of access into the territory for foreign journalists (Russia), the chilling effect of high rates of imprisoned journalists (Turkey). In this, the current rapporteur follows her predecessors in highlighting these problems.

(b) Americas

i. Inter–American Commission on Human Rights

The OAS institutions probably constitute the most evolved enforcement mechanism after the ECHR. The Inter–American Commission on Human Rights is a double monitoring organ (under the OAS Charter and under the Convention on Human Rights) composed of 7 members of high moral character and recognised competence in the field of human rights, appointed by the General Assembly of the OAS. Under the Convention, it examines inter-State and individual complaints (Art. 44). While it has optional competence for inter-State complaints (a State may declare to accept it indefinitely, for a specified period, or for any instant case), it has compulsory competence to receive individual complaints. According to Article 44 of the American Convention, any person, group of persons or any non-governmental entity may lodge a petition with the Commission, regardless of whether the applicant is a victim. The admissibility criteria are similar to ECHR: domestic remedies must have already been exhausted, petitions must be filed within six months of the final domestic decision, proceedings must not be already brought before another court, they cannot be anonymous, and must be substantiated by evidence. If attempts to secure a friendly settlement fail, a confidential report is transmitted to the responding State, containing the facts and recommendations to the State on how to solve the matter. The Commission can submit a case to the Court within 3 months from the report, if the Court has jurisdiction in respect of that State (the State concerned can also refer the matter to the Court). If the Court is not seized, the Commission may decide to publish the report after the prescribed time period for the adoption of remedial measures has elapsed.

ii. Inter–American Court of Human Rights

The Inter–American Court of Human Rights is made up of 7 judges elected by the OAS General Assembly in their individual capacity from jurists of high moral authority and recognized competence. The situation in respect of the contentious jurisdiction of the Court is akin to ECHR prior to Protocol 11: only the Commission and the States have *locus standi* to bring a case before the Court. Also, States may elect whether to accept the jurisdiction of the Court (upon ratification of the Convention or any time thereafter). When the Court is competent to hear a case and finds a violation, it can order reparation, including awards of compensation. The Court can also order States to take provisional

measures where an individual faces grave or imminent danger. The Court also has a remarkably wide advisory jurisdiction, extending beyond the interpretation of the Convention to any OAS treaty.

iii. Office of the Special Rapporteur for Freedom of Expression

The Inter–American Commission is also assisted by a Rapporteur for Freedom of Expression. The Office of the Special Rapporteur for Freedom of Expression collaborates with and receives information from (and gives information to) various organisations, civil society groups and journalists monitoring or reporting on issues regarding freedom of expression. It undertakes advisory studies, prepares thematic and annual reports, makes recommendations, issues press releases. It assists the Commission in its work (e.g. by analysing complaints, requesting information from the government, mediating to achieve friendly settlements).

(c) Africa

i. African Union

(ia) African Commission on Human and Peoples' Rights

Established in 1987 (one year after the entry into force of the African Charter), the African Commission promotes the protection of human rights through studies and research, cooperation with other human rights bodies, dissemination of information. It adopts resolutions and guiding principles to facilitate the interpretation of the Charter and of the reason supporting its decisions. The most significant competence of the Commission is the power to considers complaints for violation of the Charter's provisions, submitted by the victims of a human right violation, but also by a third party (e.g. NGO), a feature that distinguishes it from other complaint mechanisms. However, when a violation of a human right is found, the Commission's communication may only contain recommendations to the respondent State, including an award of compensation (although it does not specify the amount). However, the individual complaint procedure is not frequently used, and there is no follow up mechanism for the Commission's recommendations.

(ib) African Court on Human and People's Rights

The African Court on Human and People's Rights was established by a Protocol adopted in 1998, which entered into force in 2004. Under the provisions of the Protocol, the Court can: make an appropriate order to remedy the human rights violation (including payment), deliver advisory opinions, adopt provisional measures in circumstances of 'extreme gravity and urgency' when 'irreparable harm to persons' would otherwise ensue. However, less than half the member States of the AU have ratified the Protocol. Under Article 5 of Protocol, the African Commission is entitled to submit cases to the Court, so there is no individual right of petition directly to the Court. The African Court of Human Rights will be replaced by the African Court of Justice when the Protocol on the Statute of the African Court of Justice, adopted in 2008, enters into force. The new court, when it comes into operation, will not have a right of individual access (either directly or indirectly through a reference mechanism from the national court), which is a weakness. This is by contrast to the position for the ECOWAS court (see below).

(ic) The AU Special Rapporteur on the Freedom of Expression and Access to Information

The Special Rapporteur publishes press releases, sends letters to the governments, receives information about violations of the Charter's provisions, engages with NGOs, undertakes on–site visits and produces reports that include recommendations. The Special Rapporteur has recently reported incidents of attacks against journalists and formulated conclusions and recommendations in the *Activity Report Presented to the 46th Ordinary Session of the African Commission on Human and Peoples' Rights, 11 – 25 November 2009, Banjul*, in particular calling on States "to ensure that journalists and media practitioners are allowed to freely disseminate information on the elections without any form of harassment or intimidation". In the *Activity report Presented to the 48th Ordinary Session of the African Commission on Human and Peoples' Rights Banjul, the Gambia, 10 –24 November 2010*, the Special Rapporteur on the Freedom of Expression and Access to Information insisted that "States parties are under an obligation to take practical steps, including through

legislation to give effect to the right to freedom of information". There is also a Special Rapporteur on Human Rights Defenders, with comparable attributions.

(id) The Pan–African Parliament

The Protocol to the treaty establishing the African economic community relating to the pan–African parliament was adopted on 2 March 2001, and entered into force on 14 December 2003. Its objectives (Article 3) include "promot[ing] the principles of human rights and democracy in Africa". However, despite the name, this body only exercises a consultative and advisory role in limited areas: election observation, fact–finding missions.

(if) The AU Peace and Security Council

The African Union established the Peace and Security Council with the Protocol on the Peace and Security Council which was adopted in 2002 and entered into force in 2003. One of the PSC's objectives is to 'promote and encourage democratic practices, good governance and the rule of law, protect human rights and fundamental freedoms, respect for sanctity of human life and international humanitarian law, as part of efforts for preventing conflicts'. Its powers do not include binding decisions.

(ig) The African Peer Review Mechanism (APRM)

It is part of the New Partnership for Africa's Development (NEPAD) adopted in 2001 as the development framework for the AU. It publishes reports that address, amongst other things, human rights issues. It involves a political Forum that consists of the heads of participating States that aim to exercise political pressure in a conciliatory way. This explains also the fact that the APRM has not been in much cooperation with the African Commission on Human and Peoples' Rights. It adopted a *Declaration on Democracy, Political, Economic and Corporate Governance* in 2002 within the framework of NEPAD.

ii. The Economic Community of West African States (ECOWAS)

The Community Court of Justice became operative in 1996. It originally only had a limited field of access and no complaints were brought before it until 2004. The Authority of Heads of State and Government (the supreme ECOWAS institution, in charge of general direction and control) can seize the Court when a member State or an institution failed to comply with its obligations (Article 7.3(g)). The Court also provides advisory opinions on any legal issues upon request from the ECOWAS Authority (Article 7.3(h)) or Council of Ministers (Article 10.3(h)). Any disputes on the interpretation or application of the Treaty can be referred to the Court by either party or any other Member States or the Authority, whose decision is final (Article 76); this includes proceedings brought by a member State on behalf of aggrieved nationals, after attempts to solve the dispute amicably have failed. In this the jurisdiction of the court was essentially confined to the intergovernmental sphere.

A 2005 Supplementary Protocol expanded the jurisdiction significantly: not only did it confirm that national courts may make references to the ECOWAS court, but it also granted individual access to the Court for victims of human rights violations seeking relief. In addition to the expansion of its remit to include human rights, the peculiar feature of the Court's jurisdiction lies in the fact that there are only two admissibility criteria: the application must not be anonymous; and not made while the same matter is pending before another international adjudicating body. It is notable that there is no requirement of exhaustion of domestic remedies. The 2005 Protocol has increased the number of cases coming before the court, and these include a number of claims relating to human rights. While this shows the possibilities of the court's jurisdiction, a note of caution should be sounded about the level of acceptance and use of the new mechanisms, as the majority of the cases have emanated from one State, Nigeria. Further, the ECOWAS court is itself unusual in the context of the African sub-regional systems. The courts of the other communities are limited in terms of access or effectively exist on paper only.

Interestingly, in its 2010 *Saidkiian v. Gambia* judgment, the Court found the respondent State in breach of its human rights obligations in the case of a journalist detained and tortured on account of

his “disloyalty to the government”. The reliance of the Court on the case law of its European counterpart in deciding the issue of damages is a remarkable example of the dialogue between international adjudication bodies, who find support in the authority of precedents of different jurisdictions rather than operating in isolation. Also, this judicial trend possibly belies challenges to the universality of human rights.

(d) Arab countries

There is no effective enforcement mechanism in respect of the 2004 *Arab Charter*. A monitoring body is provided for, but its powers are rather limited. Article 45 of the Charter establishes an Arab Human Rights Committee, consisting of seven members elected by secret ballot by the States parties amongst nationals of the states parties (not more than one national of a State) highly experienced and competent in the field of human rights, and observing the rotation principle. The members of the Committee serve in their personal capacity and are expected to be fully independent and impartial. A Report produced by Cairo Institute for Human Rights Studies, *Bastion of Impunity, Mirage of Reform*, suggests, however, that the Committee established under the Charter has been weakened by the non-inclusion of NGOs in its work.

As with the previous version of the charter (adopted in 1994 but criticised for failing to meet international law standards), the expert Committee remains the only system of monitoring State compliance. It receives periodic reports from States parties, but there is no mechanism either for petitions from a State party or from an individual to the Committee for violations of the Charter. There is no other enforcement mechanism – the contracting States failed to establish an Arab Court on Human Rights.

(e) Asia

i. ASEAN Intergovernmental Commission on Human Rights

The AICHR is a consultative body with the aim of promoting and protecting human rights, and regional co-operation on human rights, in ASEAN member States, and it has now held 5 meetings. In terms of monitoring and implementation of human-rights norms, the AICHR acts as an advisory body whose role is promotion of rights, not their enforcement. Thus, in accordance with *AICHR Terms of Reference*, the AICHR has the following tasks:

> “4.10. To obtain information from ASEAN Member States on the promotion and protection of human rights;
> 4.11. To develop common approaches and positions on human rights matters of interest to ASEAN;
> 4.12. To prepare studies on thematic issues of human rights in ASEAN;
> 4.13. To submit an annual report on its activities, or other reports if deemed necessary, to the ASEAN Foreign Ministers Meeting”.

Further concerns are raised by designation of AICHR membership, an inter-governmental body on which each State has one Representative, nominated by and answerable to their government and serving a three-year term, renewable once. One significant weakness is that the Representative may be replaced at the appointing government's discretion, which may undermine their independence, despite the fact that the Representatives, according to the Terms of Reference, are under an obligation to act impartially. Decision-making is on the basis of consensus (see Art. 20 ASEAN Charter), which, given the wide ranging political and religious standpoints of the ASEAN members, may prove hard to reach, especially with regard to any measure that was effective or enforceable.

There have been criticisms and concerns. Some have noted the slow development of the AICHR from the original decision to introduce it, as well as the reluctance on the part of some Asian States to sign up to international human rights treaties suggesting there will be a lack of enthusiasm for implementing AICHR policies and that there are in any event great disparities between the ASEAN States. While it may be said that the ICHR lacks teeth, another assessment sees the very fact that all ten ASEAN

governments agreed to implement a human rights commission at all as 'remarkable' and 'an essential first step toward ASEAN's stated goal of respecting and protecting human rights'.

ii. The South Asian Association for Regional Cooperation (SAARC)

As noted, SAARC has no specific human rights organ. President Maumoon Abdul Gayoom of Maldives at the 13th SAARC Summit (2005) suggested that:

> "it is time that an autonomous SAARC Centre for Human Rights, based on civil society, is established. Such a Commission could promote international standards, facilitate co-operation among lawyers and jurist, and share expertise and resources in the advocacy of human rights and democracy in the region".

This is a long-way short of the sort of organisation envisaged under the Paris Principles. Even more generally, SAARC may seem to be weak (in terms of autonomy and independence) institutionally. SAARC is supported by a Secretariat, but the organisation seems fully intergovernmental in form and suffers from inter-regional tensions. Commentators have suggested that the focus of SAARC has been on the core areas, rather than on more sensitive matters and SAARC generally has avoided much involvement in its member States' internal matters. Indeed, at the 13th Summit, the states reiterated 'their commitment to the principles of sovereign equality, territorial integrity and national independence, non-use of force, non-intervention, and non-interference in the internal affairs of other Member States'.

5. Conclusions

The types of obstacles encountered by victims seeking a remedy internationally vary according to the mechanism considered. As we have seen, in some cases there is no individual right of access to a court whatsoever, in other cases the right is mediated by a non-judicial body (Inter-American and African systems), and in some other cases yet (ECHR) the right exists and it is practicable, but the actual benefit of the procedure can be seriously diminished by other factors, such as the excessive length of the proceedings (the backlog of cases before the ECHR has resulted in an average waiting time of 5-6 years). The ignorance of legal avenues available to seek remedy for violations, the costs, as well as the intimidation of lawyers may be additional factors. The fact that some of these procedures request status of victim, and do not admit *actio popularis* (e.g. NGO application on behalf of victims) might also be problematic, as single individuals may be deterred from applying.

We have noted a range of issues affecting the current system which on the whole relate to the structures and workings of the various international bodies and their remits. The other main point to note is that impunity takes place within the context of that national legal system. More work may be required to understand the different circumstances which allow impunity to flourish. This is not just a question of formal measures for the implementation of international norms or compliance with reports and rulings, but raises questions about more subtle points within each national legal system concerning the operation of the domestic legal system, the awareness of international norms within the judiciary and legal profession, journalists and other civil society activists. Focusing just on state-level compliance may omit part of the picture and mean opportunities for positive developments within the individual states are likewise missed. Nonetheless, it seems that the incremental approach has proven insufficient and that more direct and coordinated steps are needed. We consider a range of possible options in the next section.

Part 3 - Proposals

A. The Adoption of a Specific Instrument for the Protection of Journalists

While we appreciate the usefulness of positive measures of a non-legal nature, such as capacity-building initiatives aimed at preparing journalists for missions in dangerous zones, training journalists in countries in which intimidation and impunity may not currently be a problem to be aware of these possible problems, allocating resources to support training for lawyers etc., such measures arguably have an incremental effect and are insufficient in themselves to ensure proper safeguards and counter impunity. Our focus will therefore be on legal responses to the current situation of frequent violations of the fundamental rights of journalists.

We identify a number of proposals that range from the quite radical suggestion of a dedicated binding global instrument to less far-reaching initiatives aimed at enhancing the effectiveness of existing measures and organs. In discussing the possible solutions to the dangers facing journalists, a series of questions need to be considered: we need to determine, first of all, whether a specific, binding instrument for the protection of journalists is necessary against the background of the general human rights instruments and non-binding specific measures considered in the previous pages. Secondly, we need to inquire what new instrument may be appropriate, and whether it should be adopted in a UN or a regional context. In this, we look to the experience of existing systems. Thirdly, the possible contents of such an instrument, regardless of its binding or non-binding nature, deserve careful consideration.

1. The case for a specific instrument for the protection of journalists

As we argued above, the initiatives adopted up to date have failed to reduce or end violence against journalists, indeed it is the case that acts of intimidation against the pursuit of news are increasing. We consequently need to discuss whether a specific instrument for the protection of journalists is necessary when faced with the systemic failure of the above initiatives. If we accept, as many human-rights bodies have done, that journalists have a special role to play in society, as they enable public understanding of events, and forms of political contestation, as well as helping create the conditions for a vibrant public sphere, a case can be made for dealing with the problems journalists encounter separately.

In his *Statement on the Protection of Journalists in Armed Conflict*, the UN Special rapporteur stressed that the main problem with regard to the attacks on journalists was not the lack of legal standards, but the "lack of vigorous implementation of the existing rules" (14th session of the HRC, 4 June 2010). Our mapping of legal instruments has confirmed that the obligation to respect the life, personal security and professional activity of journalists can be derived from general human rights instruments, as applied by the monitoring bodies, both in terms of abstention from interference, deterrence of third party interference, and investigation and punishment when violations occur. The first question in addressing the issue of impunity is therefore whether a new legal instrument is necessary to that effect.

The question should arguably be answered in the affirmative, for two reasons. First, because of the politically-sensitive nature of their profession, journalists are much more likely to be (and indeed are) targeted than individuals occasionally exercising theright to freedom of expression. Journalists can be identified as a separate and particularly vulnerable category, justifying a specific instrument. As the Special Rapporteur stated in the *Addendum* to the 2010 *Report on freedom of expression*, attacks against journalists "represent not only an attack on the victim but also an attack on everyone's right to receive information and ideas". The ECHR has consistently pointed out the role of the media as the "watchdog of democracy", which makes the exercise of freedom of expression by journalists different from the general exercise under Article 10. Attacks against journalists have a special relevance insofar as they amount to a severe interference with the role of the media, an intrusion adversely affecting the right of the general public to have access to knowledge and understanding of public affairs, as underlined by the Human Rights Committee in its *Draft General Comment no. 34* on Article 19 ICCPR (2010).

Secondly, general human rights instruments are vague and replete with lacunae, and the actual scope of the obligations they impose can only be grasped by referring to the case law. The precedents of the creation of specific instruments for children, women, minorities, or the disabled – groups which previously relied on the protection of general instruments – support the view that systemizing and detailing existing obligations in one coherent instrument fosters the protection of the categories concerned.

In addition, the continuing casualties demonstrate that the existing legal framework was unable to ensure adequate protection. There have been different attempts to spell out States' obligations in respect of media workers, but such initiatives have failed to ensure the desired impact. It may be that the fragmented nature of these initiatives has contributed to the failure. One clear and comprehensive instrument would increase awareness and could thereby put additional pressure on defaulting States.

2. Options for a new instrument for the protection of journalists' rights

(a) Specific Convention

An international convention would be the most desirable solution. Though it would merely specify existing obligations to a large extent, it would constitute an important political lever in diplomatic fora. In the exercise of its function under Article 13 of the UN Charter to promote the codification and progressive development of international law, the General Assembly may entrust the study of the matter to the International Law Commission, which based on current provisions in the multiplicity of relevant instruments and the practice of (quasi)judicial bodies could provide one coherent instrument to be submitted to an inter-governmental conference. The merits of a specific Convention systematizing the various existing obligations in respect of treatment of media workers would lie in attaching particular stigma to breaches by a Member State. This phenomenon has already been witnessed in relation to the prohibition of torture: while the prohibition was present in every single human rights instrument adopted since the Universal Declaration of 1948, the adoption of a UN Convention on Torture as well as of a European Convention on Torture has given remarkable weight to the prohibition, which today is indeed considered to be a peremptory norm of international law (*ius cogens*).

An issue to be considered is whether the inter-governmental forum for negotiating such a convention with higher chances for a swift agreement on a text is the UNESCO General Conference or the UN General Assembly. In any event, as UNESCO has noted, there is need for inter-agency co-operation.

(b) Declaration of principles

If there is insufficient political will at the moment to negotiate a binding treaty, the alternative solution would be the adoption of a Declaration of Principles in a resolution of the UN General Assembly, promoted by a coalition of willing States. It would be highly authoritative as an expression of the *opinio juris* of the international community, and may set the bases for the subsequent adoption of a convention. There are many precedents at UN level for this progressive codification of a particular area of human rights law, starting from a technically non-binding instrument and subsequently proceeding to the adoption of a binding instrument of equivalent content (when the acceptance of the norms contained in the former instrument has become widespread). Thus, the aspirations expressed in the *Declaration of the Rights of the Child* (1959), the *Declaration on the Elimination of All Forms of Racial Discrimination* (1963) and the *Declaration on the Elimination of Discrimination against Women* (1967) have been transposed into legal obligations in the *UN Convention on the Rights of the Child* (1989), the *International Convention on the Elimination of All Forms of Racial Discrimination* (1969), and the *Convention on the Elimination of all Forms of Discrimination against Women* (1979), respectively. A declaration for the protection of journalists could be the precursor of a binding convention on the same matter.

(c) The quest for the appropriate forum: universal versus regional

Some commentators have argued that rights are not universally accepted and that whilst some prize civil and political rights as essential, other societies see them as a luxury once the basic requirements

necessary for existence have been met. Nonetheless, it would seem that the basic right to life must constitute some common ground (even if the precise scope of that right is disputed), and that the threat posed by impunity affects not only democracy but also the rule of law and stable and peaceful societies. This common ground might suggest an instrument at UN level as a possibility, though this would not exclude regional action. First, considering that there are areas with little regional inter-governmental cooperation in the field of human rights, elaborating regional norms, capable of reflecting local traditions and take on a greater degree of specificity is desirable, but perhaps less likely to be realized. Instead of attempting to fill the regional gap on the short term, focusing on enforcing the UN system based on the existing membership and competences of the UN organs might be more effective to reach those areas. Secondly, given the trans-border and indeed cross-regional dimension of the phenomenon of attacks against journalists (often working abroad, sometimes in quite distant areas), an instrument applying universally would be a better option to promote uniform standards.

3. The material scope of the new instrument

We would propose that the new instrument follow the broad approach to the definition identified in UN *Security Council Resolution 1738* (2006) and *Recommendation 4* (1996) of the Committee of Ministers of the Council of Europe.

As well as specifying the need to protect the life of journalists (including disappearances), the new instrument should address: protection from kidnapping (whether by state bodies or others); no arbitrary arrest; specific issues relating to the intimidation of women journalists; deportation/refusal of entry; confiscation of and damage to property. There is a question here about boundaries; at some point the difficulties encountered by journalists turn into 'normal' issues of freedom of expression, suggesting the instrument may be restricted to physical security of journalists. An alternative could be to consider whether there is evidence of systemic practices against journalists, whatever form those practices might take. The new instrument should arguably include provisions regarding both peacetime obligations and specific obligations arising under humanitarian law in conflict zones, the advantage of this being a comprehensive codification of all the rules applicable to the situation of journalists in a single instrument. This is all the more important considering the simultaneous application of human rights law (with any relevant derogations) and humanitarian law during conflict.

A useful starting point could be found in existing precedents for a similar codification, such as the *Draft proposal for an International Convention to strengthen the protection of journalists in armed conflicts and other situations* drafted by the Federation of Arab Journalists in 2011.

In respect of humanitarian law, the *Charter for the Safety of Journalists Working in War Zones or Dangerous Areas*, drawn up by Reporters Without Borders in March 2002, synthesizes in Principle 8 (Legal protection) the applicable rules: “Journalists on dangerous assignments are considered civilians under Article 79 of Additional Protocol I of the Geneva Conventions, provided they do not do anything or behave in any way that might compromise this status, such as directly helping a war, bearing arms or spying. Any deliberate attack on a journalist that causes death or serious physical injury is a major breach of this Protocol and deemed a war crime”.

B. Possible Institutional Solutions Addressing Enforcement Issues

1. An *Ad Hoc* Body and an Enhanced Role for Civil Society

(a) New body related to 'Convention on the Protection of Journalists'

An examination of the best practices at regional and UN level in terms of enforcement mechanisms shows that mechanisms based on individual access to international remedies (judicial and quasi-judicial systems) and the binding outcome of the procedures have, on the long run, fostered a culture of compliance. The European Convention on Human Rights is probably the most successful illustration of this result. A Committee for the Protection of Journalists may therefore be established by a Convention on the Protection of Journalists codifying existing human rights and humanitarian law norms applicable to the situation of media workers. The powers of this new monitoring body could include the mandatory competence to receive individual complaints, complaints by NGOs, and inter-

State complaints, pursuant to which it would issue binding reasoned reports similar to judicial decisions; the reports would be public, or become public unless the State follows the recommendation within a specified term (e.g. three months). The Committee may also be conferred a power of inquiry of his/ her own initiative in the presence of credible information of systematic practices of intimidation of journalists; a provision in the Convention may stipulate that the States becoming parties to the Convention accept in advance and *ipso facto* the competence of the Committee to undertake country visits and the obligation to cooperate with the Committee.

The composition and election of the new body ought to be conceived in such a way as to offer guarantees of independence and impartiality. Independent experts, with experience in human rights and media law and high moral authority in their countries could be a preferable option, as opposed to government representatives, inherently dependent upon the national authorities. Also, the appointing governments should not be able to revoke their nomination, and possibly their office should not be renewable, to remove any incentive to compromise in order to secure re-election.

In terms of many systems, victims are required to exhaust national remedies. Two main reasons are given: first, to give the State the opportunity to take steps to protect the right as the State is the natural forum for so doing; and, secondly, to create some form of docket control. As regards the latter point, the fact that the committee will be specialist and thereby have a narrower range of potential claimants than, for example, the Strasbourg court might mean there is less concern about workload management (subject to resources). As regards the former, while most systems require only the exhaustion of effective remedies, the nature of impunity is such that, arguably, the domestic system is unable to provide them at all. It is therefore proposed that in the case of killing or harassment of journalists such as to threaten their physical integrity or liberty, if an investigation has not successfully concluded within a stated period of time, a complaint may be made without further recourse to the domestic system. Of course, this proposal raises a number of questions: what is an appropriate length of time (note the Council of Europe *Guidelines* emphasis on the need for a speedy domestic process); what successful might mean; and what to do about breaches of the primary right – the right to life or liberty, for example.

While the creation of the committee may present the disadvantage of the allocation of new resources, its considerable advantages would be the speediness of the procedure, since general human rights courts face a notorious backlog, and more specialized membership. Improving access to international tribunals creates a virtuous circle of enforcement leading to greater compliance. In addition to increased access, the creation of a specific committee would also ensure greater visibility and counter institutional fragmentation by establishing one single, easy to identify, organ in charge of media rights. Through a coherent body of case law expressing the international community's disapproval of abuses against the media, the activity of this new body would in turn support the enforceability of the relevant rights.

(b) Creation of Specialist Sub-committee within the Human Rights Council

The creation of a specialist sub-Committee within the Human Rights Council (the Sub-Committee for the Protection of Journalists/ the Sub-committee for Media Rights) might be an alternative to a treaty-based monitoring body. Unlike the Council itself, this sub-Committee could have a composition similar to that of national delegations to the assembly of the International Labour Organisation, more specifically based on an equal share of governmental agents and representatives of media workers' NGOs. The sub-Committee could be entrusted with undertaking studies, issuing recommendations for the Human Rights Council in terms of areas and critical issues to focus its agenda on, but also with receiving communications from States, individuals and NGOs, and reporting back to the Council thereon. The advantages of this choice over the first one would be an easier approval within the General Assembly by way of amendment of the current statute of the Council, in contrast with an organ that could only be instituted after the minimum number of ratifications has been reached. Conversely, a treaty-based body could be legitimately entrusted with more far-reaching, binding powers, insofar as its authority would be directly grounded on State consent, which is central to international relations and international law.

2. Expand Prerogatives of Existing Bodies

(a) Human Rights Council

The General Assembly may consider amending the statute of the Human Rights Council to introduce more incisive powers. The power to undertake *in loco* visits in countries with a poor record of freedom of expression, where intimidation and forced disappearance of journalists have taken place, is already contemplated under the Special procedures, but may be reinforced, e.g. by removing the requirement of prior consent of the State concerned and by using it for less exceptional and large-scale cases. A system of regular visits, drawing its inspiration from the 2002 Optional Protocol to the Convention against Torture, could also be envisaged.

(b) UNESCO - IPDC

Another option would be to reinforce the IPDC action. Given the extremely wide membership of UNESCO (193 countries, comparable to UN membership), a body with a comprehensive mandate to monitor violations against journalists in peacetime and in time of conflict at global scale would be a beneficial development. The statute of the IPDC Council could be amended to introduce more frequent meetings on a regular basis (rather than every two years, as currently requested by the statute). In addition to gathering information and issuing reports, the amended mandate could include non-binding reports following individual and collective complaints or inter-State complaints, a power to undertake visits in problem areas and liaise with other offices dealing with the protection of journalists in UN specialized agencies and regional inter-governmental bodies. A permanent full-time office supporting the work of the Council as defined in the revised statute could also be envisaged. The main advantage of this option would be a relatively easier acceptance, giving the non-binding powers, and the autonomy of the Council as a focal point for media issues would lead to increased visibility of such issues in the UN system.

(c) Regional Courts

One possible approach to fostering accountability for violations of the rights of media workers may be the introduction of special, expedited procedures within the existing judicial mechanisms allowing for individual complaints. There are indeed precedents for a similar amendment of courts' regulations. Thus, the Lisbon Treaty has amended the preliminary rulings procedure before the Court of Justice of the European Union to introduce a widely-saluted speed procedure for persons deprived of liberty. Given the public implications of cases regarding media safety and freedom of expression, as well the adverse consequences for the rule of law posed by continued impunity, the adequacy of a new rule prioritizing applications concerning alleged abuses against journalists should not be dismissed without further analysis.

3. Enhance Effectiveness of Existing Organs within Current Competence

States members of international bodies could take a more pro-active role in addressing the problems faced by journalists and media staff when exercising their public informative function. Thus, for example, promoting Security Council action may benefit media workers covering international and non-international conflicts. The mandate of peace-keeping missions authorized by the Security Council in conflict zones could expressly include a provision on the prevention of breaches of humanitarian law with regards to journalists. The specific tasks potentially encompassed by the mandate of such missions to that effect are perhaps worth exploring.

4. Link with Economic Treaty Conditions

It is possible that some of the regional bodies may take action through linking trade agreements with compliance with human rights. One of the examples of human rights being linked to economic incentives occurs in the EU in two respects: 1) precondition for membership (Turkey; Croatia); and 2) in association and cooperation agreements. Interestingly, there was no explicit basis in the original treaties for this sort of action. Nonetheless, this has become accepted practice with the by-product that the ECJ may well have jurisdiction to hear cases. To take an example of the EU external relations

policy in action, the EU has signed five bilateral agreements with members of SAARC (Republic of India, the Democratic Socialist Republic of Sri Lanka, the Kingdom of Nepal, the People's Republic of Bangladesh and the Islamic Republic of Pakistan), the underlying principles of which are respect for human rights and democratic principles. The effectiveness of the monitoring may in some of these cases not be of the most rigorous standard. Clearly this is not a new suggestion, but perhaps a greater focus on the issue of journalistic safety and/or impunity could add emphasis to the importance of the issue, or add intensity to any review mechanisms; in this regard it may be that review mechanisms could be built in to those treaties. New review bodies should not be necessary; within the EU system for example, the existing human rights framework (e.g. Fundamental Rights Agency reports, or European Parliament Resolutions) could be utilised as benchmarks of progress.

While none of these solutions is immune from objections in terms of desirability or feasibility, the legal inertia of the international community is likely to perpetuate the *status quo*, despite the notional existence of rules prohibiting violence against journalists and unwarranted interference with freedom of expression.

The Initiative on Impunity and the Rule of Law

Towards an International Framework to Protect Journalists from Violence and to End Impunity

POLITICAL ASPECTS STUDY

By William Horsley, International Director, Centre for Freedom of the Media, University of Sheffield

Research presented at the Working Conference on 1st June 2011, updated on 21st June 2011

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Methodology of the Political Aspects Study

Methodology: Comparative Assessment and Self-Assessment by European institutions and representative non-governmental expert bodies

All respondents to interviews and requests for statements were requested to assess the effectiveness and impact of their own activities, or those of their institutions, with respect to the issues being examined, in addition to assessing the problems and the policy options which they regards as most likely to contribute to countering targeted violence and ending impunity.

Selection of sources: This Study and the resulting Draft Recommendations for international action are based on materials from many sources which were analysed and compared over a period of seven months from November 2010 to May 2011. The material exclusively provided for the Study consists of written statements delivered in response to specific requests, and structured interviews recorded with representatives of the major European institutions and agencies concerned with issues of violence against journalists, judicial impunity, the protection and safety of journalists, and safeguarding international standards on freedom of expression; as well as the UN Special Rapporteur on Freedom of Opinion and Expression. In addition, documented evidence from speeches and statements made at events and meetings in several countries during this timeframe has been used as further first-hand sources; and the author has sought additional and corroborative information through more than 20 interviews and meetings with experts and governmental or Inter-Governmental Organisation officials whose comments and opinions were not intended to be quoted publicly, but which have helped to inform the analysis and conclusions.

Geographical focus: The primary focus of this Study is on the wider European region[1] but the issues examined are not confined by borders, and the analysis takes account of developments in other regions and covers the activities of relevant United Nations agencies and bodies. Europe accounts for a relatively small proportion of all the recorded journalists' deaths worldwide[2], but it has an array of important regional inter-governmental-organisations with mandates to concern themselves actively with media freedom and the protection of journalists under threat, as well as other human rights norms and standards.

NOTE: In March 2011 it was confirmed that UNESCO would this year convene the first UN Inter-agency talks aimed at formulating "a comprehensive, coherent and action-oriented approach to the safety of journalists and the issue of impunity". Subsequently the task of drawing up options for new approaches and measures took on added urgency within the scope of this research.

These materials are published in full on the website of the Centre for the Freedom of the Media www.cfom.org.uk. The principal exclusive source materials used for this Study are:

Statements and written responses (7):

Bill Bowring, Chair of the European Human Rights Advocacy Centre and Professor of Law, Birkbeck, University of London

Committee to Protect Journalists, CPJ

Article 19, by Barbora Bukovska, Senior Director for Law and Programmes

European External Action Service (EU), by staff of the EEAS Human Rights and Democracy Department

International News Safety Institute, by INSI Director Rodney Pinder

Media Legal Defence Initiative, by Peter Noorlander with additional material from William Horsley

Russian Union of Journalists, by RUJ Secretary Nadezhda Azhgikhina

Interviews (6):

European Agency for Fundamental Rights, Mario Oetheimer, Programme Manager, Freedom and Justice Department

European Parliament, Heidi Hautala, Chair of Subcommittee on Human Rights

European Parliament, Sophie in't Veld, Vice-chair of Committee on Civil Liberties, Justice and Home Affairs

Miklos Haraszti, Adjunct Professor at the Columbia School of Public and International Affairs of Columbia Law School, New York, USA, and former OSCE Representative on Freedom of the Media (2004-2010)

OSCE Representative on Freedom of the Media, Dunja Mijatovic (since 2010)

United Nations Special Rapporteur on Freedom of Opinion and Expression, Frank La Rue

[1] Europe is defined here as the area of the 56 member states of the Organisation for Security and Cooperation in Europe. Of those, 47 states are members of the Council of Europe and 27 are members of the European Union.
[2] For a full account of killings of journalists and other severe violations of media freedom in Europe from 2007 to 2009 see *Respect for Media Freedom* Background Report to the PACE Committee on Culture, Science and Education by William Horsley, 24 September 2009 http://assembly.coe.int/CommitteeDocs/2009/20091026_HorsleyReport.pdf

Part 1 – Targeted violence and impunity: the political context and objectives for reforms

Recent events: A spur to international action

US President Barack Obama delivered an extraordinary tribute to journalists who have died because of their work at the annual White House Correspondents' Dinner in Washington DC on 30 April 2011. Addressing members of the American and international media, he spoke about "journalists threatened, arrested, beaten, attacked and some cases even killed simply for doing their best to bring us the story"; and he said of those who had been lost: "They help, too, to defend our freedoms and help democracy to flourish"[3].

President Obama made reference to the dangers to journalists who covered the recent devastating storm in Alabama and what he called "revolution in the Middle East", a region where at least fifteen journalists were reported to have been killed between the start of this year and April 25; most of them were reportedly shot dead by members of the security forces of various states or died in custody[4].

The public remarks of the US President, and the increased media attention given to events in the USA and around the world marking World Press Freedom Day on 3 May 2011, may be indications of a change in the climate of international opinion in favour of more effective mechanism and actions to secure the safety of journalists because of the recognition that in every society their work has value as a public good. However, the international debate regarding targeted attacks on journalists has in the past been characterised by a large number of declarations and resolutions by Inter-governmental bodies, but no really effective agreement on the safety of journalists has yet come into being[5].

Recent events could provide a spur to the resolve of governments, supported by concerned civil society organisations, to put in place meaningful safeguards for journalists everywhere who are at risk because their work brings them into confrontation with forces which are willing to use violence to silence them. That can only be achieved if UN agencies and bodies, and regional bodies with authority in these areas, establish and hold to more ambitious targets than in the past, and avoid becoming caught up for long periods in process without substantial results.

This Study, drawing on the considered assessments and specific proposals made by active or former international officials and representatives of leading non-governmental organisations, sets out a number of steps which could be taken by the United Nations family and by regional organisations to put such an agreement, or set of agreements, in place.

The events of the 2011 "Arab Spring" have focused world attention on popular demands for free expression and for an end to censorship and political repression, demands which are also echoed in many other parts of the world. In particular, the uprisings in the Middle East and North Africa, and the attempts by security forces and paramilitary groups to crush them, have demonstrated how in those situations journalists, Internet activists and bloggers were among the common targets of abuses by government agents, including arbitrary arrest and detention, and in some cases torture and a number of deaths in custody.

A clear lesson from those events was that in each of the countries where popular revolts occurred, the state's long-standing and rigid controls on the mainstream national media, especially television and radio, have represented one of the essential tools of political control, enforced by pressure and coercion. The issue of who owns and directs the main media outlets in those countries will be an important factor in determining their future political course. Independent journalists there have appealed for outside help to build up professional and plural media beyond the control of governments

[3] Text of President Obama's remarks at the White House Correspondents' Dinner on http://worldjournalism.wordpress.com/2011/05/01/obama-pays-tribute-to-journalists-at-whcd/

[4] Arab Spring 2011: Timeline on www.cfom.org.uk/impunity/research

[5] See also *Under Attack: Practicing Journalism in a Dangerous World* by Bill Rostow, Center for International Media Assistance, December 2009 http://cima.ned.org/publications/research-reports/under-attack-practicing-journalism-dangerous-world

or other political forces. Some concerned journalists and commentators in the region have warned of the danger of a "counter-revolution" which could perhaps reverse some of the gains made through the pro-democracy protests. It represents a critical test for the international community.

The demonstrations of "people power" in much of the region have shown the profound impact of relatively independent and critical media in the region, such as the Al Jazeera TV channels. Populations which had long been suppressed by authoritarian governments will seek continue to demand their rights to free expression and other political freedoms in future.

The widely-held view that instant social networking communications and the arrival of the 24-hour news cycle on satellite TV channels led to a breakdown of a "barrier of fear" among many demonstrators in Tunisia and Egypt is borne out by the size and behaviour of the very large crowds which forced dramatic political changes in both countries. It is indeed becoming harder for authoritarian governments to suppress dissent and to control "the media" in the way that those things were possible when the only mass media could be owned or controlled by state authorities or others under state patronage.

Yet unless real state controls on media are removed in the countries concerned, and a diverse media is provided with safeguards in law and in practice to perform the work of inquiring and reporting on matters of public interest freely, the attempts to build accountable and representative political systems will be severely handicapped and may fail. In many other parts of the world, too, governments and other powerful vested interests show a ruthless determination to exert control or decisive influence over important media; evidence collected by media monitoring and human rights organisations shows that in the new media age, too, journalists, bloggers and many others who exercise their rights to freedom of expression and opinion are frequently singled out for violent attacks, harassment or intimidation.

It seems clear that the events of recent months in the Middle East and North Africa represent a transformational change which may have geopolitical effects comparable with the sweeping changes on the Eurasian continent that followed the toppling of communist governments in Soviet-dominated Central and Eastern Europe and the fall of the Berlin Wall in 1989.

Violence against journalists: governmental responses and responsibilities

The political message of the dramatic events early this year was chastening for some Western governments, as they found themselves accused of having compromised too readily with dictators over many years – in effect, of being on the "wrong" side of history. The International Crisis Group judged that "Europe bowed before these dictators, it paid no heed to repression"[6].

European political leaders quickly acknowledged the need for new policies and programmes for the region, with a special focus on supporting democratic institutions. The European Union announced "a top-to-toe" revision of its Neighbourhood Policy[7], covering the northern Mediterranean region and the EU's eastern neighbours, linking aid and trade benefits to political and economic reform. And European Union's Commissioner for Enlargement, Štefan Füle, announced that in future standards of respect for free expression and independent media would be more strictly monitored as a condition for the accession of new member states to the Union[8].

The USA represents a powerful and leading voice pressing other states to end the use of violent means and arbitrary use of their laws to silence, harass or coerce journalists, but has also faced serious accusations itself of failing to live up to proper standards of behaviour and accountability, especially on the part of the American armed forces in Iraq, Afghanistan and elsewhere. Incidents including the killing in 2007 of two Reuters news staff among others on the ground in Baghdad who died in an attack by US military helicopters in 2007 (an incident about which details were publicly

[6] AFP report 25 May 2011 *EU offers more aid to shore up democracy in its backyard* http://news.yahoo.com/s/afp/20110525/wl_mideast_afp/eudiplomacyarabunrestaid_20110525134345
[7] Ibid
[8] Speak Up! Freedom of Expression and Media conference, 6 May 2011 http://ec.europa.eu/enlargement/speakup-conference/index_en.htm

revealed when a video recording of it was released by Wikileaks in April 2010) are seen to some degree to have weakened the US claim to moral leadership in this area. The independent Committee to Protect Journalists, CPJ, says American policies have not kept pace with US rhetoric; it assesses the US record of support for press freedom as mixed:

> The past three administrations --Obama, Bush and Clinton-- have each spoken out at different times in support of press freedom worldwide. In fact, each successive administration has made progressively stronger statements on support on occasions like World Press Freedom Day due in no small part to CPJ advocacy. However, policies have not kept up with official rhetoric. The Bush administration publicly promoted the notion of democratic reforms in many nations, at the same time that the Bush administration not only backed many regimes that violated press freedom, but also jailed more than dozen journalists for prolonged periods of time without charging them with crimes. The Obama administration has ended the U.S. military practice of detaining journalists without charge. But the record remains mixed as the administration has supported regimes like the one recently deposed in Tunisia. At the same time the administration has taken an avowedly pragmatic approach to bilateral relations with nations like China and Russia allowing security and other concerns to supersede issues about press freedom and human rights[9].

The persistently high numbers of targeted murders of journalists around the world[10], and the need to provide better means of protecting them, may in such ways have been recognised as a global political issue of practical importance, not only one of abstract principle. But it is uncertain what concrete outcomes are to be expected from the ideas and proposals that have been aired for creating an international regime in which governments would agree to hold themselves to agreed rules to protect the ability of journalists to do their work, and allow effective oversight with agreed mechanisms to remedy serious failings.

The murders of Georgiy Gongadze in Ukraine in 2000, of Anna Politkovskaya in Russia in 2006, of Hrant Dink in Turkey in 2007, and of Lasantha Wickramatunga in Sri Lanka in 2009, each caused extraordinary levels of international concern, and led to severe international criticism of the actions of the governments of the countries concerned. Another common feature of all those cases is that subsequent official investigations of suspects and judicial processes were also been found to be seriously flawed, raising acute concerns about the growth of patterns of impunity, especially, although not exclusively, with respect to killings in which the victims are journalists.

Dissatisfaction with the efficacy of existing UN procedures for monitoring and countering violence and impunity is widely shared institutionally by international officials as well as the large body of concerned NGOs and media organisations. An important task for those favouring some kind of international agreement on the safety and protection of journalists is to marshal active support from states in Africa, Asia, the Caribbean and Latin America as well as from Europe, North America and Australasia.

For this, there must be high expectations of those states whose influence is increasingly recognised, and which have expressed the ambition to become permanent members of the UN Security Council, such as India, South Africa and Brazil. That sentiment was expressed by Edward Mortimer, the chief speechwriter and director of communications to Kofi Annan during his years as UN Secretary-General in 1998-2006: he told an audience in London in 2010 that countries such as South Africa, India and Brazil, which had "come through their own struggles against dictatorship and repression", should pay heed to similar problems in other countries where journalists and others exercising free expression face censorship and violence[11].

A number of other states which have shown support for improved protections for journalists, among them the Philippines, South Korea, the Maldives, Ghana and Namibia, could if they so choose also

[9] See the CPJ assessment and others on www.cfom.org.uk/impunity/research/

[10] The International News Safety Institute reported that a total of 1,210 media workers were killed in the ten years from 2001 to 2010; 2009 was one of the worst years on record, with 133 deaths, including those of more than 30 journalists and media support staff in the Maguindanao massacre in the Philippines. http://www.newssafety.org/

[11] Frontline Club – Events, *Sri Lanka: could the West do more about human rights and press freedom?* 6 July 2010 http://www.frontlineclub.com

play an important part in constructing a credible and effective system of protection, showing a practical commitment to the UN principles of defending media freedom in order to secure the universal right of all people to a free flow of information across borders, and so enable them to make informed choices about their lives.

UNESCO's toll of targeted killings of journalists: the weakness of a voluntary reporting system

The geographical scale of the international political challenge is evident from UNESCO's figures[12] which show that in the four years between 2006 and 2009 a total of 247 journalists were killed in as many as 48 countries or territories. Leading non-governmental media and monitoring organisations consistently put the number of killings higher than UNESCO does.

The same set of figures also reveal that the targeted killings of journalists aimed at silencing them for their professional work no longer occur predominantly in war zones, as was once the case. In 2008 and 2009, out of a total of 125 targeted murders of journalists recorded by UNESCO globally, almost two-thirds (63%) took place in non-conflict areas.

In UNESCO's Director-General's 2010 Report on The Safety of Journalist and the Dangers of Impunity, the continuous killing of journalist is described as "a disturbing reality"[13]. UNESCO conducts a wide range of activities in support of media freedom and freedom of expression, including the practice by the agency's Director-General since 1997 of condemning and publicising each attested murder of a journalist and requesting information from the states concerned regarding the ensuing investigations. However the requirement for consensus has until now blocked all proposals for more robust approaches.

In reality, there are no penalties for governments which are seen to ignore, or fail to correct, persistent evidence of impunity, even if they refuse to provide meaningful information in response to requests from UNESCO as the leading UN agency for freedom of expression. The global record of such killings is closely documented by UNESCO as well as by a number of respected NGO; and those figures are well-known to national governments.

Those governments have sole control of law-enforcement and they must therefore be accountable themselves for ending patterns of targeted violence and impunity within their jurisdictions. Under present arrangements, under which the system of requesting information on investigations and judicial follow-ups is voluntary, many states continue to evade the embarrassment of close scrutiny by any international authority. This reality appears to be an affront to a fundamental principle of the Charter of the United Nations, that Member States commit themselves "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained."

The majority of the journalists whose deaths are recorded are thought to have been targeted because they were investigating wrongdoing, corruption or other matters of public interest, or simply because they represented a critical voice to certain people, who usually remain unidentified, in positions of position or power. In parts of Asia, Africa and Latin America, as well as of the former Soviet space, to be a journalist has come to mean accepting a real risk to life and limb.

The issue of safety and protection of journalists has been especially intractable, despite the disturbing casualty toll and strong pressures from civil society for stronger measures, because it touches directly on some of the most sensitive areas to governments: matters of security and the state's most basic responsibilities towards its citizens. The then British Foreign Secretary, David Miliband, speaking in 2010, described the problem of impunity in cases such as the unsolved murder in 2006 of the Russian journalist Anna Politkovskaya, as "a fundamental point"; while recognising that impunity represents a

[12] See Report by the Director-General to the Intergovernmental Council of the IPDC, The Safety of Journalists and the Danger of Impunity, 17 March 2010.http://portal.unesco.org/ci/en/files/29600/12690062213safety_of_journalists_27_session.pdf/safety_of_journalists_27_session.pdf

[13] Ibid; UNESCO reported that of 28 states asked for information about killings, only 15 responded with details of any criminal investigation

serious barrier to safeguarding a free and open press, he concluded that states are "jealous of their national, sovereignty" and adhere strongly to the principle of non-interference in internal affairs[14].

These realities make the task of fighting impunity formidable. The approach required to succeed must include honesty and plain speaking on the part of all those who sincerely wish to see the spread of open and accountable government everywhere.

Outline proposals by some experienced practitioners

The task of drawing up effective and practicable proposals for international cooperation for the safety and protection of journalists can benefit from the experience of figures who have grappled with the issues in depth.

Frank La Rue, **the UN Special Rapporteur on Freedom of Opinion and Expression**, argues that it is now necessary for all states publicly to acknowledge and accept a standing obligation to provide particular safeguards and protection for journalists as a matter of routine. UN Security Council resolution 1738, which was passed unanimously in 2006, reminds states of their obligations to give journalists protection as civilians in situations of conflict. But Frank La Rue proposed the idea of universal protections for journalists against targeted attacks in the UN General Assembly in 2010, and says he will do so again in 2011:

> "I agree, there is an obligation on all states to guarantee security to those civilians that have a special role in conflict, mainly the press and the emergency medical services…But I went beyond that, saying that states have the responsibility of protecting journalists all the time, because the press can also be in danger in countries where they are challenged by big corporate interests, or in mining regions. So I was trying to expand the idea that protecting journalists is a permanent necessity, not only in those moments of crisis."

Frank La Rue wants the United Nations to adopt ambitious reforms to its mechanisms and procedures, but does not consider it necessary for a new treaty or other legal instrument to be created for that purpose. For states where problems of lawlessness or what he terms "armed confrontation" involving -- or among -- criminal groups have taken root, he recommends that they should accept a mechanism similar to the one set up through the Inter-American Commission on Human Rights (IACHR) in Colombia to help journalists and Human Rights Defenders under grave threat.

He argues that the record can be improved with enlightened government action, and Colombia is held up as such as case, where a government agrees to cooperate closely with the IACHR to save the lives of journalists and other Human Rights Defenders who are threatened with violence:

> "…the experience of Colombia has been very good, because they have saved lives through such a mechanism. … They can have a red phone to call the highest authorities, whether it be the Ministry of the Interior or even the Presidency in cases of extreme necessity, to have the order sent to a certain region. And they have funds to fly people out, to hide them temporarily or even take them out of the country if necessary. So there is a record of such mechanisms working and actually saving the lives of specific journalists."[15]

Miklos Haraszti, a former representative on Freedom of the Media of the Organisation for Security and Cooperation in Europe(OSCE) and an outspoken advocate of stronger international actions against the many journalists' killings, believes that an international treaty is desirable so that countries can collectively adopt a set of radical new measures to afford credible protection to journalists. One of the principles to be set out in that binding agreement, he says, is a public recognition of the value of the work of journalists to a functioning democracy; such a formal statement would, he says, serve to counter the denigration or criminalisation of journalists and their professional work, which actually encourage impunity. He calls on political leaders to treat crimes against journalists with the same

[14] Rt Hon David Miliband MP at the launch of the FCO Annual Human Rights Report, 17 March 2010
[15] Transcripts of interview with Frank La Rue and others on www.cfom.org.uk/impunity/research/

severity as a crime directed against a politician, in recognition of the public role fulfilled by journalists reporting matters of public interest:

> "…it should be acknowledged that any crime against journalists for their profession, for what they have published or what they have planned to publish, is not just an ordinary crime. It is a crime against democracy, as serious as crime against politicians would be, because it is directed against a vital function of democracy. So it should be made clear that it is a censorship type of crime. It is censorship because not only was it aimed to silence a particular journalist, but it is done in order to send a message to the journalistic community to be cautious, to practise self censorship; and thirdly, because attempted censorship provokes impunity because it is complete only when it is accompanied by impunity[16]."

A treaty or convention dealing with the safety and protection of journalists would face predictable opposition, and it can be argued that those states where the need for it is greatest are also the ones which would be most reluctant to sign and ratify it. However, support for such a convention was expressed by Wijayananda Jayaweera, the then Director of UNESCO's Communication Development Division, speaking in an individual capacity before his retirement from the post earlier this year. Mr Jayaweera gave his assessment that a Convention should be the "ultimate goal". The principal argument for it is, he said, that journalists require special protection in law because through the nature of their work they take risks to provide information which enable investigations and judicial processes to succeed.

A crucial step for any effective system of monitoring and enforcement is the capacity to collect and assess reliable data. Miklos Haraszti, like some others, considers that a comprehensive, dedicated website is an essential tool for an effective and transparent international system to counter violence and impunity. He advocates the creation, with the help of civil society organisations, of a global and openly accessible website which would record the actual state of investigations following the targeted murder of a journalist anywhere. In recognition of the paramount responsibility of national governments, he also proposes that each state should agree to the establishment of an independent national commissioner, tasked with ensuring that investigations and prosecutions are carried out to internationally accepted standards. He argues that these reforms should be implemented through an international convention or treaty:

> "Ideally it would be another UN treaty, which would start by acknowledging that this category of public figures is under special threat. That is why I prefer to separate it from the issue of attacks on journalists in conflict zones. The treaty would recommend the setting up of this quite uniform [structure], just as it is today quite usual to have a Commissioner for Human Rights, for Data Protection and for Access to Public Information, or a Children's Rights Commissioner. It would be a personality who exemplifies the unity of civil society and government, which acknowledges that there are tasks here that go beyond governments that government cannot solve alone."

Miklos Haraszti's proposal foresees that such Commissioners would not only be appointed through an independent process with the participation of civil society, but that the Commissioners' mandates would also provide mandatory authority for investigative journalists to assist in the collection of evidence for criminal investigations in the event of the murder of other journalists, so making "a kind of cooperation between the official arm of the prosecution and the civil society of investigative journalists."

According to this proposal, the Commissioners would establish a common network, with support from the UN, pooling information on the database as proposed, and each carrying out their work on a modest budget, with a small staff of perhaps two lawyers and a secretary. Haraszti proposes that the forthcoming UNESCO-led discussions could address the question of whether such a system would be set up through regional security organisations such as the OSCE, or by UNESCO itself, perhaps in combination with the Human Rights Council.

[16] Transcript of interview with Miklos Haraszti *Ibid*

It may be objected that a number of states would be unwilling to contemplate setting up such an arrangement, or to cede any authority at all regarding matters of law-enforcement; yet the experience of various Ombudsman systems for human rights issues, as well as special provisions for protecting Human Rights Defenders in different parts of the world, suggest that some such mechanism may have value. Few states, if any, deny that it is their duty to up hold the principles of freedom of opinion and expression. Successful examples might help pave the way for wider acceptance of such national structures set up to end impunity, especially if UNESCO, as the UN agency responsible for freedom of expression issues, were to endorse the adoption of such mechanism as part of a consistent long-term strategy to give priority to stopping targeted violence and impunity through concrete measures at national as well as international level.

The UN Special Rapporteur Frank La Rue also proposes that dedicated national commissions should be set up in each state in order to implement the "permanent obligation" of states to protect journalists on account of their vulnerability and their indispensible role as fact-finders and investigators of matters in the public interest. His proposal foresees that such bodies would be composed jointly of state officials and non-government figures, on similar lines to arrangements that exist in some places for Human Rights Defenders:

> "The other point we made to the General Assembly was the idea of creating an emergency mechanism in every country of the world for protection of journalists. This exists in many countries for the protection of Human Rights Defenders, and I congratulate that and I believe it could be done specifically for journalists – where there could be a national commission for protection of journalists, a bilateral commission, of state authorities with representatives of the media, and NGOs working on Freedom of Expression, and I think this is essential, because the experience of Colombia has been very good because they have saved lives through such a mechanism."

Frank la Rue questions the effectiveness of the peer review system in the UN Human Rights Council, the Universal Periodic Review (UPR), through which the human rights record of each state is examined once every four years. The manner in which the review process is carried out has, he says, made the UPR into a "toothless lion":

> "For me the UPR is part of the weakness…The UPR is a good idea in itself, but the UPR is done through ambassadors, two Ambassador, the troika is three ambassadors of three other countries. So what you have is peers, and they may be constrained in criticising others, because it depends what the policies of their own country are. And Rapporteurs are not invited to the UPR. Rapporteurs should be invited to the UPR, to be able to put questions themselves to the state in question…So I think the UPR has become a toothless lion. It is important, because everyone goes through it, and there is an exchange of reports. But the international media hardly pay attention, because there are never tough questions. And it's not binding anyway."

Such a pointed expression of doubts from a UN Special Procedure mandate-holder under the system of Special Procedures invites very serious questions about whether the system is "fit for purpose" as one of the principal tools for the United Nations to hold Member States to their obligations. Such doubts should be taken into account in the course of the UN's audit of its own practices in the forthcoming Inter-agency talks.

If the existing instruments and mechanisms are judged to be seriously inadequate to the task, then there must be an expectation that more robust methods are developed and adopted. Such a determination would seem to be very much in keeping with the UN's Millennium Development Goals. Article 19, which identifies its advocacy of freedom of expression with the protection of other rights, including in the world's poorer countries, says the widespread intimidation of journalists is causing severe damage to the overall development of the affected countries: The absence of a conducive and supportive environment combined with punitive pressures and physical intimidation leaves many journalists with little other options than to resort to self-censorship, abandon their profession or to flee their countries. As a consequence, the societies of which they are part are left with a vastly controlled media, one that lacks the credibility, protection and participation of the audiences it wants to reach, as it is unable to provide the public with independent and plural views on vital issues that determine their

development and future…The lack of public solidarity with media, as they are often perceived as partisan, or self-censored at best. Without public solidarity and trust, independent journalists become even more isolated.

Active policy discussions within international bodies

To a remarkable degree, international attention has already begun to be focused on these issues through the wide range of international initiatives and policy deliberations that have taken place in the recent past, and which are scheduled to gather pace in the coming months. Conspicuous among them are:

In December 2006 the UN Security Council unanimously passed Resolution 1738, a weighty political declaration reminding states of their obligations to give journalists the same protection as non-combatant civilians in conflict zones. Its positive impact has, however, been meagre, and has disappointed the coalition of NGOS which campaigned intensively at the time for it to be accepted, with strong support from France and Turkey, among others. The Director of the International News Safety Institute, Rodney Pinder[17], says he has had "no feedback about the positive effect of Resolution 1738". He and others want the regular annual reports to the Security Council by the Secretary-General to be more hard-hitting -- that is, they should provide more detail about journalists' deaths in conflict areas, and do more to hold the concerned authorities to account. In the most recent Report by the Seecretary-General, on 11 November 2010, just one paragraph out of a 30-page report was devoted to the reported deaths of journalists in conflict zones in a total of eleven countries or territories[18].

On 24 to 26 March 2010 the Intergovernmental Council of the IPDC (International Programme for the Development of Communication), meeting in Paris, adopted a Decision on the Safety of Journalists and the Issue of Impunity which included the proposal for a UN Inter-agency meeting of all relevant agencies with a view to formulating "a comprehensive, coherent and action-oriented approach to the safety of journalists and the issue of impunity".

On 4 June 2010 the Human Rights Council in Geneva held a special Panel Hearing, including representative journalists' organisations, NGOs and the International Committee of the Red Cross, on the Protection of Journalists in Conflict Zones. Various promising proposals were made to give NGOs a clear role in monitoring violations; for the Human Rights Council and the Security Council to work together to produce new guidelines to prevent impunity in cases involving the killing of journalists in non-conflict zones as well as in war zones; and for stronger means to hold violators to account, including a mechanism for sanctions to be imposed in case of a state's obstruction of attempts to probe cases of suspected impunity in a particular jurisdiction. The Hearing served a significant purpose as an opportunity to share knowledge and hear a range of proposals for more effective international responses, but it was deficient in the way that matters most: the means and commitment of states to follow up those requests and suggestions.

On 26 January 2011 UNESCO held a Symposium on Freedom of Expression in Paris, including NGOs. Delegates from China, Sri Lanka, Cuba and North Korea, among others, objected to the terms of the discussion and to recommendations to maintain UNESCO's focus on press freedom issues. Powerful presentations and appeals for more active and determined support from international bodies were made by leading journalists' and NGO representatives from every region of the world. Notably, the Chilean journalist and winner of the 2010 UNESCO/ El Cano World Press Freedom Prize, Mónica González Mujica, appealed for a global fund to be set up to assist investigative journalists from around the world to collaborate, share information and put pressure on governments in order to break up powerful drugs cartels and other organised crime groups.

In Europe, meanwhile, among other developments, the Committee of Ministers of the Council of Europe recently adopted *Guidelines on the eradication of impunity for serious human rights*

[17] Statement by INSI on www.cfom.org.uk/impunity/research/; see also the UN Special Rapporteur interview on the website
[18] Report of the UN Secretary-General on the protection of civilians in armed conflict http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/617/64/PDF/N1061764.pdf?OpenElement

violations"[19]. The announcement by the Council of Europe noted that cases of impunity are "unfortunately not uncommon in Council of Europe member states" particularly in cases involving violations committed by police and prison officers or directed against human rights defenders. The Guidelines represent "soft law" and as such are not legally enforceable, but importantly they put forward benchmarks regarding measures to prevent impunity, the duty to investigate, and the criteria for an effective investigation, including public scrutiny.

The common feature of each of these activities in various international forums is that they all represent expressions of concern, and point in the direction of giving a higher priority and more prominence to this set of issues. Yet civil society and media representatives who closely follow the statements made and texts issued remain uncertain whether they will have any significant impact on the continuing and disturbingly high levels of violence, including murders, targeting journalists in many countries around the world.

So the confirmation in March 2011 that UNESCO is indeed to convene a UN Inter-agency meeting of all concerned UN bodies in September, to consider ways of fighting impunity and of making the combined efforts of the UN family effective, is highly significant. There is a commitment to "strong collaboration" between UN agencies and programmes to ensure that existing conventions are respected.

Non-governmental organisations and the momentum for effective measures

The point has been made that international journalists' and human rights organisations have for some years made known their dissatisfaction and frustration with the lack of concrete action achieved within Inter-Governmental Organisations to turn the many fulsome declarations of principle and intention into reality.

NGOs are already accorded a significant role by many governments, advising and informing them regularly. They also provide important information to the various international bodies with authority in this area. However, a proper understanding of the political context of the debate regarding the safety and protection of journalists should take account of the reasons for the impatience of journalists themselves, and of other organisations which devote themselves to the cause of protecting fundamental human rights.

Evidence gathered for this Study suggests that as the toll of journalists' casualties shows no sign of falling, while conspicuously few killings of journalists result in credible convictions, some expert NGOs have begun to question the credibility of governmental commitments in this area.

The Committee to Protect Journalists says:

> CPJ has grown increasingly concerned about international institutions failure to defend press freedom. In CPJ's annual report our director published an essay calling into question the fact that "many international governmental organisations created to defend press freedom are consistently failing to fulfill their mission… human rights and press freedom groups are expending time, resources, and energy ensuring these institutions do not veer widely from their mandate.

CPJ convened an "Impunity Summit" of press freedom defenders from around the world in New York in April 2010, where it was agreed, among other things, to create an international database as a resource in the fight against impunity and to create a permanent mechanism to coordinate trial monitoring.

[19] *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations*, 30 March 2011 http://www.coe.int/t/dghl/standardsetting/hrpolicy/dh-i/CM_GuideLines_Impunity_March2011_en.pdf

The Media Legal Defence Initiative (MLDI) says plainly that existing political mechanisms to supervise the implementation of human rights law are "unsatisfactory". In particular:

> The international community [should] 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.

As to the European Court of Human Rights, which is considered to be a model for other regional courts in view of its authority to hand down binding legal judgements on states found in violation of the European Convention on Human Rights, MLDI says:

> 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…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[20].

And moreover:

> 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.

Article 19 is concerned that UN bodies and the relevant human rights courts should attend not only to violations of international law by states, but also to those committed by non-state actors:

> We believe that the current mechanisms insufficiently address the responsibility of non-state actors and focus extensively on the violations conducted by the state (and not on investigation into and the lack of responsiveness of non-state actors). A19 believes this is a great problem in many parts of Central America and in some African countries, where organised crime groups have emerged as main violators of the right to freedom of expression, including freedom of the media, through often extremely violent tactics. In addition, MNCs [multinational corporations] are also directly or indirectly perpetrators, either through their explicit or tacit support to authoritarian regimes or through their own activities.

Article 19 also urges that consideration should be given to granting civil society standing in court proceedings in certain circumstances:

> One concrete issue [for Article 19 is to] explore the possibility of giving civil society standing in the criminal proceedings – especially in cases when there are no relatives willing to engage in complaints for killings and intervene in the criminal proceedings.

[20] Protocol 14 of the European Convention on Human Rights, approved after a long delay by all members in 2010, provides for somewhat enhanced powers of enforcement for the Committee of Ministers, including that of a referral back to the Court concerning a state's failure to fulfil its obligations; see Statement by Prof Bill Bowring on www.cfom.org.uk/impunity/research/

It is important for the prospective reforms that the United Nations and other inter-governmental bodies should fully appreciate the extraordinary growth in the number, scope and professionalism of NGOs with global, regional or national scope which monitor murders and other physical attacks on journalists, and cases of arrest, imprisonment and other abuses at the hands of governmental authorities. This phenomenon attests both to the severity of the problems of violence, and the intimidation of journalists, and to a remarkable growth in the wider civic awareness about the fundamental threat which these patterns of targeted violence present to civilised life and the rule of law.[21]

Urgent public concerns over this and related human rights issues now find expression much faster than was ever possible before. The globalisation of news, especially through the growth of the Internet and satellite technology, has ensured that a number of cases of journalist's murders, and the political repercussions that followed them, have become major topics of news to a large global community of concerned people.

It has to be noted, however, that international public opinion, as measured in opinion polls, is far from solidly supportive of demands for media freedom, even in the face of repressive actions by states. In a poll conducted by the BBC World Service in 14 countries in 2007, 40% of respondents said it was more important to maintain social harmony and peace, even if it meant curbing the press's freedom to report news truthfully. In India, Singapore and Russia, around 48% of respondents are reported to have voiced support for controls on the press to ensure peace and stability[22].

Media professionals against targeted violence: a powerful but muffled voice

As for the role of leading organised media organisations, in view of the increase in patterns of violence against media professionals in scores of countries and the impact of the widely acknowledged "chilling effect" on freedom of expression and on whole political systems, it is perhaps surprising that there is not more sustained coverage and commentary on the theme, especially in many of the world's leading English-language titles.

Initiatives such as that of the World Association of Newspapers and News Publishers (WAN-IFRA) and the World Editors Forum (WEF) to produce editorial material and make them available to newspapers around the world to publicise World Press Freedom Day on 3 May 2011[23] have attracted a good measure of attention, but until now such coordinated campaigns have been the more remarkable for being relatively rare.

The UNESCO-inspired World Press Freedom Day has established itself as an annual focal point for protests and events in many countries, aided by the impressive work of many NGOs which routinely publish special annual reports and surveys detailing attacks on journalists and on press freedom at that time each year. However, awareness of UNESCO's appeal for media organisations worldwide to observe a Minute's Silence in newsrooms each year on World Press Freedom Day "to denounce the murder of journalists and to demand an end to impunity" for their killers, remains distinctly limited[24]. The appeal by UNESCO's Director-General was made for the first time in 2010, following a decision in the IPDC Council; and among major global news organisations, Thomson Reuters stands out for having decided to ask all its news offices and bureaus to observe the Minute's Silence for each of the first two years since the appeal was issued.

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[21] For details about NGOs actively monitoring media freedom issues, see the NGO Database of the Initiative on Impunity and the Rule of Law on http://www.cfom.org.uk/impunity/research/; also *Evaluating the Evaluators: Media Freedom Indexes and What They Measure*, National Endowment for Democracy http://cima.ned.org/sites/default/files/CIMA-Evaluating_the_Evaluators_Report.pdf and IFEX list of members on http://www.ifex.org/ifex_members/

[22] *World 'divided' on press freedom* by Torin Douglas, BBC News, 10 December 2007 http://news.bbc.co.uk/1/hi/7134918.stm

[23] WAN-IFRA, WEF Mark World Press Freedom Day 3 May 2011, http://www.wan-ifra.org/press-releases/2011/05/03/wan-ifra-wef-mark-world-press-freedom-day

[24] UNESCO website *About World Press Freedom Day* http://www.unesco.org/new/en/communication-and-information/flagship-project-activities/world-press-freedom-day/about-the-day/

The International Federation of Journalists and its constituent journalists' trade unions conduct many campaigns against violence and impunity, but severe economic pressures and sweeping technological changes have combined to restrict the power of representative journalists' organisations to make themselves heard with a clear and united voice. Those fundamental structural changes are clearly described, for example, in the 2010 publication by the Reuters Institute for the Study of Journalism, *The Changing Business of Journalism and its Implications for Democracy,* edited by David A.L. Levy and Rasmus Klein Nielsen.

It may legitimately be asked if the time is ripe for editors of major international titles to decide to carry more regular and searching coverage in their journals and programmes, to chronicle the alarming consequences of targeted violence and impunity directed at journalists and others, which in some regions deprives large numbers of people of the effective right to free expression and free access to information.

At a time when the various United Nations Agencies, Bodies and Funds concerned with freedom of expression and the protection of journalists from targeted attacks of all kinds, more coherent engagement is called for on the part of media owners, publishers, editors and journalists' unions and associations.

The question of defining who is or is not a journalist has become a matter or renewed debate, and the exponential growth of Internet use by billions of people has added a new dimension. However the definition adopted by the Committee of Ministers of the Council of Europe in 1996[25], "all representatives of the media, namely all those engaged in the collection, processing and dissemination of information including cameramen and photographers, as well as support staff such as drivers and interpreters" has been widely accepted. The European Court of Human Rights has also elaborated a very significant body of case law covering the rights, for example that related to the confidentiality of journalists' sources, that are relevant in cases involving journalists.

[25] http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec(1996)004_EN.asp

Part 2 - Europe's dilemmas and opportunities concerning measures to protect journalists and media freedoms

Disappointed expectations of Europe as a champion of necessary media freedoms

Europe was at the centre of world-changing events in 1989, when anti-communist revolutions led to the collapse of totalitarian governments across the eastern half of Europe, and soon afterwards to the breakup of the Soviet Union itself. Sweeping democratic change was achieved with relatively little bloodshed. A critical aspect of that transformation was the long-suppressed opportunity for free and independent media to flourish in the "new democracies".

Today Europe is again a political testing ground for the rest of the world in matters of human rights standards, especially the defence of free expression and independent media against targeted violence, unlawful arrest or detention and a range of other abuses. Europe's newly-evolved common political institutions face unexpected strains which arise not only from internal rivalries, but also from dilemmas about how far national governments are willing to go in ceding sovereignty in those politically sensitive areas, as any effective measures to counter gross abuses or negligence by state authorities and eradicate impunity necessarily involve forms of external scrutiny and mechanisms to hold states to account for their conduct.

In reality, the commitments entered into by states belonging to the OSCE, the Council of Europe and the EU all involve an acceptance to some degree that some internal affairs of one state – especially with respect to standards of respect for fundamental human rights -- are matters of legitimate concern to the others. There is provision for a wide range of available remedies and measures, of which the most drastic and final are rulings by the European Court of Human Rights (for member states of the Council of Europe). However, in practice, these commitments are often taken as unwelcome demands for the ceding of national sovereignty and sometimes more or less openly rebuffed.

At the time of writing, each of the multi-national European structures which grew up in the postwar period as would-be models to the world – the Council of Europe, the OSCE and the European Union – appears to be struggling to make choices about whether and how to provide better safeguards for the lives and work of journalists. Europe's course of action will greatly influence what happens elsewhere in the world.

For historical reasons European countries have a well-developed sense of responsibility -- even "ownership" -- of the concepts of human rights and freedom of expression. But that identification with universal principles has been challenged in recent years as Europe's own record of media freedom at home[26], and its claim to be spreading democracy abroad, have both been to some extent undermined by recent developments.

Nevertheless, European countries, both separately and together, possess a great wealth of resources, expertise and political commitment which could helpfully be deployed in the cause of journalists' safety and the fight against impunity. Among the most obvious of those strengths are the diplomatic reach of many EU member states, the attractiveness of Europe's model of open societies governed by the rule of law, the vigour of Europe's own media and civil society networks whose knowledge is much sought after in other parts of the world, and the long-standing priority accorded to supporting international work in these fields, in particular, by several governments in northern Europe, including those of Sweden and Norway.

[26] See Freedom House, *Freedom of the Press Survey 2011; A Global Survey of Media Independence* on http://freedomhouse.org/template.cfm?page=70&release=1405

Two causes of Europe's uncertainty

Two overarching factors bear on Europe's ability to live up to its claims in this area: they are backsliding over human rights commitments, especially in parts of the former Soviet space, especially during the past ten years, and a confusion of political authorities in the new Europe that has emerged in the early years of the 21st century.

Firstly, there has been a recrudescence of a serious challenge from within Russia and other parts of the former Soviet space over the past dozen years to the set of formal values that are enshrined in the European Convention on Human Rights and the human dimension "basket" of the OSCE, which comprises 56 participating states. That challenge has been closely chronicled by successive holders of the office of the OSCE's Representative on Freedom of the Media (RFOM).

In 2008 Miklos Haraszti, the then serving Representative on Freedom of the Media, wrote of what he called "a certain meltdown" of commitments to OSCE principles relating to human rights[27]. Haraszti deplored what he saw as the intention "to justify saying goodbye to international scrutiny of compliance with free elections, free expression, or free cooperation among members of civil society across border lines." Those sentences were written after a Russian leader, President Vladimir Putin, had publicly announced the novel concept of "sovereign democracy" for the country, and had espoused the ambition to create a "vertical of power" under his leadership. Russia has also become the most dangerous country in Europe for journalists.

A series of journalists' murders in Russia, including that of Anna Politkovskaya in 2006, have with few exceptions gone unsolved, although the conviction in April 2011 of two suspects in the murders in 2009 of the Novaya Gazeta journalist Anastasiya Baburova and the human rights lawyer Stanislav Markelov represent a welcome improvement in that dismal record. A comprehensive online database has been created under the aegis of the International Federation of Journalists, mainly using data provided by the Glasnost Defense Foundation and the Centre for Journalism in Extreme Situations. It records all cases of dead Russian journalists, how they died and the status of the investigation into their deaths[28].

Nadezhda Azhgikhina, the Secretary of the Russian Union of Journalists, says that after so many years of independent journalists being the targets of acts of violence, intimidation and marginalisation in Russia's new economic order, the climate of impunity there is pervasive and has deep roots.

Impunity protecting the killers of journalists is part of a much wider picture, reflecting a general absence of effective rule of law and widespread corruption. The climate of impunity is reinforced by systemic failures in the judicial system, which result in ineffective investigations; it also reflects the low level of understanding among the general public about the value of journalism as a public good, and the lack of solidarity among journalists themselves.

The current President of the Russian Federation, Dmitry Medvedev, has somewhat changed the climate by openly deploring the parlous state of the justice system in Russia, speaking of the growth of "legal nihilism".

However Dunja Mijatovic, the RFOM office-holder since 2010, interviewed for this Study shortly before the verdicts were announced in the two cases mentioned, said:

> "In the past two years the government has openly condemned those attacks, that's a new thing -- for example in the last horrifying case, the [Oleg] Kashin case, a journalist and blogger [who sustained life-threatening injuries in an attack]. But I say that is not enough, that's just a start. Nothing is changing in practice. We do not see that the people behind these horrible murders, or attacks, or harassment of journalists are prosecuted in a transparent way."

[27] *Ten Years for Media Freedom, An OSCE Anniversary* Vienna, 2008 www.osce.org/fom
[28] Deaths of Journalists in Russia, database http://www.journalists-in-russia.org/

Against the background of other major international events – the Iraq war, the controversial deal to build a gas pipeline from Russia to Europe bypassing Russia's immediate western neighbours, disputes over a US missile defence system in Europe, the enlargement of NATO and the Russia-Georgia war in 2008, among others – European leaders were seen to make a number of compromises in their dealings with Russia over human rights issues, despite protests by human rights organisations and representative journalists' bodies. The development in Germany of a policy of "economic inter-locking" with Russia, and the collective decision by European leaders to "reset" relations with Russia, resuming most usual forms of cooperation after its war with Georgia despite the unlawful change of borders within Europe by Russia's use of military force are among the policies which have been contested by human rights advocates.

Secondly, uncertainty concerning the locus and the purposes of political authority in Europe stems from the complexity of the cross-border European structures which co-exist and continue to develop, often with different priorities and sometimes leading to clashes of authority. The OSCE, the Council of Europe and the European Union all hold claims to authority with respect to the protection of freedom of expression, including the safety of journalists, and a wide range of human rights norms and standards.

Yet, as mentioned above, commitments to "European" values as well as universal principles often take second place to the demands of realpolitik among countries within the wider European region. The European Council on Foreign Relations identified the EU's efforts to defend the cause of media freedom in Russia in 2010 as among the "Least successful EU policies"[29] (those judged "most successful" included relations with the US on Iran and proliferation, and visa liberalisation with the Western Balkans). Heidi Hautala, a Finnish Member of the European Parliament who chairs its Human Rights Subcommittee, underlined the point about the EU's perceived priorities:

> "It discredits any work on human rights when there are geopolitical or military interests that somehow dominate and overrule the leverage that EU member states have on human rights."

At the same time, it is clear that in some ways and on some issues, concerted or united actions by all three European institutions – OSCE, Council of Europe and European Union – are seen to be mutually reinforcing and effective. The release from prison on 26 May 2011 of Eynulla Fatullayev, an Azeri journalist and newspaper editor imprisoned for four years on what the European Court of Human Rights ruled in 2010 were fabricated charges, is one such instance. All of Europe's inter-governmental organisations as well as leading NGOs had pressed the authorities in Azerbaijan over a long period for his release.

The assessments and self-assessments made by representatives of each of these organisations indicate the aspirations and likely limitations of Europe's approach to the task of securing better protection for journalists, within Europe and beyond it, from violence, arbitrary imprisonment and other serious abuses on account of their professional work.

Europe's three institutions engaged in the protection of journalists' rights and freedom of the media

1. The Organisation for Security and Cooperation in Europe (OSCE) Representative on Freedom of the Media

The OSCE's Representative on Freedom of the Media is described as the world's only inter-governmental media watchdog. Dunja Mijatovic, the current FROM, says this about the nature of her mandate:

> "I have no possibility to fine or to sanction, but the most powerful tool I have is the voice that is given to me. I can name and shame countries that are not fulfilling commitments. I see a great power in this office, because the power was given by participating states."

[29] Justin Vaisse and Hans Kundnani, *European Foreign Policy Scorecard 2010*, ECFR March 2011 p 11

The effectiveness of the work of the RFOM and the staff of that office in practice faces some important constraints – among them the fact that participating states are not infrequently unwilling to respond promptly or adequately to questions about failures to meet agreed standards for legitimate media freedom, but also a habitual unwillingness of the 27 EU member states to speak out as critically towards their fellow EU members, when warranted, as they do in cases involving others. Such patterns of behaviour can cause resentment and have negative consequences.

The consensus basis for all OSCE decisions has been a barrier until now to attempts to reach agreement on what would be a landmark declaration by all 56 states to acknowledge their special responsibility to protect the safety and the freedom to work of journalists. But Dunja Mijatovic regards the mandate of her office as an appropriate basis for its work, in view of the OSCE's character as a cooperative, consensus-based organisation; and she sees a real possibility that such an agreement can be reached by the end of the current year, helped by a clear political lead from the OSCE's current Chairman-in-Office, the Foreign Minister of Lithuania:

> "This year the Lithuanian chairmanship managed to put the freedom of the media and the safety of journalists as one of its main priorities. That also needs consensus from the other participating states…Everything in the OSCE is based on comprehensive, consensus-based principle, and in some issues you can see there is a lack of will, or of the possibility to punish [transgressors]. But I do not think something stronger [sic] would help the OSCE idea. Maybe some other organisations, but when it comes to the OSCE, adding more power to those commitments can always be done by a new decision by the Ministerial Council…And I hope, at the end of this year, with the priority on media freedom and safety of journalists, that participating states will come up with something that will lead to better results, and not just words on paper."

Areas which are the focus of attention among OSCE ministers include the need for participating states to maintain laws that enable and foster media freedom, safeguards to ensure swift and effective investigations and prosecution of those responsible for violence against journalists, and good practices among law-enforcement bodies to respect the legal rights of members of the media.

2. The Council of Europe and the European Court of Human Rights

The Council of Europe is the guardian of the European Convention on Human Rights; and the European Court of Human Rights (ECtHR) in Strasbourg is a regional body which is unique in the world by virtue of its authority to deliver legally binding rulings on violations by states, based on claims by individual citizens.

The Council of Europe administers a very large range of programmes to foster human rights in its 47 member states. The Council of Europe's Commissioner for Human Rights has a mandate to act independently on a wide variety of issues in contacts with member states; and his office has identified freedom of expression and the eradication of impunity as high priorities within his mandate.

In particular, in February 2011 the present Commissioner, Thomas Hammarberg, took a firm stance, at a time when other European institutions faced some criticism for a lack of resolve, in identifying five main kinds of provision in the recently-enacted package of media laws in EU member state Hungary which he said should be repealed or revised; they included the prescriptions on content on media outlets, a politically unbalanced regulatory system, and erosion of the protection of journalists' sources[30].

However the record of the Council of Europe's other branches in recent years regarding the defence of media freedom has been disappointing, principally because of resistance from some member states to proposals to institute a system of scrutiny of serious violations of media freedom across the Council of Europe region. In effect, states have asserted their sovereignty to block what is seen by some of them as an unwanted intrusion into their internal affairs.

[30] Commissioner Hammarberg *Opinion*, 25 February 2011: http://www.coe.int/t/commissioner/News/2011/110225MediaHungary_en.asp

The absence of any institutional form of oversight or means of enforcement of standards in the area of media freedom and freedom of expression thus appears to be an exception to the general rule in the Council of Europe that the protection of fundamental freedoms requires the use of compliance mechanisms, such as the organisation's formal monitoring procedures. Faced with proposals for something resembling a rudimentary form of monitoring, in the form of proposals for the collection and sharing of information covering serious media freedom violations, Member States have failed to act on their declared commitment with meaningful measures, and the initiative has failed to advance. The programme was due to have been based on a list of 27 Indicators of Media Freedom in a Democracy drawn up by the PACE, including the safety and protection of journalists from violence and abuses by state authorities[31].

At work in this process is a clash of authorities. The complex structure of the Council of Europe means that its Parliamentary Assembly – the Parliamentary Assembly of the Council of Europe or PACE -- made up of elected politicians from all the member states -- frequently takes the lead in pressing for firm action to counter serious human rights problems in member states; but decisions about implementation and priorities are in the hands of the member states' governments, in conjunction with the Council of Europe's Secretary-General.

Following a lead by the PACE, which passed a series of resolutions and recommendations on the safety of journalists and protection of media freedom in the wake of the killings of Anna Politkovskaya in Russia and Hrant Dink in Turkey, the Committee of Ministers decided in January 2010 to approve some additional measures for the protection of Article 10 of the Convention[32], which covers freedom of expression. More than a year later the issue is in abeyance, pending an overall "reset" of Council of Europe priorities which is due to take effect from 2012.

Rulings by the ECtHR, related to freedom of expression cases including those concerning violations committed against journalist, are the most potent weapon in the armoury of the Council of Europe. A barrier to the effectiveness of the Court's work is the retrospective character of the process of having claims heard – generally five years or more after the event. Prof Bill Bowring, a human rights lawyer and expert on the jurisprudence of the Strasbourg court, is among those pressing for the application of interim measures in cases involving media worker who are threatened with violence; until now the Court has shown itself reluctant to order such measures:

> "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."

Both Prof Bowring and the MLDI, whose statement was referenced above, are also interested in the question of a possible reform of the present system whereby state representatives – in the form of member states' ambassadors in Strasbourg -- have the exclusive role in administering the monitoring system for the Execution of Judgements of the Court. Some have argued that state involvement in this quasi-judicial function is not appropriate and leads to excessive delays and to political compromises, and that more transparency is needed.

3. The European Union and its institutions

The European Union has acquired new competences in the field of fundamental rights from the entry into force on 1 December 2009 of the Lisbon Treaty, which gave binding legal effect to the EU's Charter of Fundamental Rights. This was reflected in the creation of a new post of a European Commissioner for Justice, Fundamental Rights and Citizenship and to public pledges of a clearer and more prominent human rights element in the EU's common foreign and security policy in action.

[31] Parliamentary Assembly Resolution 1636 (2008), *Indicators for media in a democracy* http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta08/eres1636.htm

[32] *Declaration of the Committee of Ministers on measures to promote the respect of Article 10 of the European Convention on Human Rights*, 13 January 2011 https://wcd.coe.int/wcd/ViewDoc.jsp?id=1571879&Site=COE

In the case of the EU, as in those of the Council of Europe and the OSCE, there are lively arguments as to how far these competences should extend and how they should be exercised. The Commissioner for Justice, Fundamental Rights and Citizenship, Viviane Reding, and Neelie Kroes, the Commissioner for the Digital Agenda, have so far been careful not to claim significant authority to take action when EU member states have at various times faced accusations of breaching accepted standards with respect to media freedoms, except in the particular areas of competition and public broadcasting regulation. An alternative view is that the reluctance of EU member states and of the Commission to act in this field represents a kind of "sovereignty protectionism" on the part of governments.

Again, as in the case of the Council of Europe, European parliamentarians are far ahead of the Commission and member states in advocating bold moves at EU level to achieve compliance within EU states with the standard of protection for media freedom which derive from the European Convention on Human Rights. Sophie in 't Veld, Vice-chair of the European Parliament's Committee on Civil Liberties, is among those actively pressing for an EU directive which would seek to do that:

> "We are currently trying to get the Civil Liberties Committee to elaborate a proposal for a directive that would contain safeguards for media freedom, at European level rather then at national level. Member States have their own laws and some are better than others; clearly the Hungarian one was not adequate, and a couple of others are not adequate. What is important is to lay these principles down in a European directive so that the Commission can intervene if media freedom is under pressure in a member state. It is an anomaly that we almost set higher standards for candidate countries than we do for EU member states. So we need instruments to monitor and protect media freedom."

And Mario Oetheimer, Programme Manager for Legal Research in the EU's Fundamental Rights Agency, considers that to some extent at least, the EU's approach to assuming greater competence in this field can be seen as a matter of political choice:

> "First you would need a body at EU level that has the competence to act: it could be the Fundamental Rights Agency if it were given the competence, but that's a decision for the member states. Let's imagine a possibility to transfer a similar power as the European Ombudsman has, or the European Data Protection supervisor. If member states decided to enhance protection of Freedom of Expression within the Union, you would need to have a body which could supervise, and monitor and receive claims from journalists who feel their Freedom of Expression has been unduly restricted. For that you would need a dedicated body, given actual competence to receive claims to work in areas of freedom of expression."

And Jerzy Buzek, the President of the Parliament, speaking on 6 May 2011, called for the EU to act to fulfil a number of important goals:

> "We should do everything to protect journalists. Last year 44 journalists were killed and 90 percent of these were local journalists. We need to concentrate on giving tangible help to journalists: giving them consular assistance, communication network security, crisis response cell phones and follow-up in individual cases. This should be an explicit new mandate for the EEAS – European External Action Service"[33].

The EEAS is conducting a review of human rights policy which will set parameters for the way in which issues including freedom of expression and impunity related to violent crimes targeting journalists, are framed within the EU's foreign policy. However, the EEAS' authority in this area remain constrained by the fact that foreign policy rests in the competence of member states by treaty, and a viable consensus among states is not easy to obtain.

[33] Transcript of speech by Prof Jerzy Buzek, *Speak Up!* conference organised by the European Commission, Brussels, 6 May 2011 http://ec.europa.eu/enlargement/pdf/speak_up/transcript_speak_up_conference_buzek.pdf

A written reply from the EEAS for this Study on issues regarding journalists, impunity and the rule of law, referred to the frequent representations made by EU representatives, protesting against violations of journalists' rights and pressing for an end to unjustified restrictions in a long list of third countries. In view of the EU's undisputed authority to conduct bilateral dealings with many countries and regions, including the negotiation of association agreements and other framework agreements with the Union, its regular political dialogues with third party states are of critical importance. The EEAS statement says:

> The EU conducts regular political dialogue meetings, including human rights dialogues, with almost all third countries. The EU regularly raises the issue of freedom of expression and media, and individual cases of journalists suffering intimidation or persecution, in these dialogues. In urgent cases, the EU undertakes confidential demarches to third countries protesting either at negative developments (such as the introduction of new legal restrictions on the media) or at particular cases of harassment of journalists.

As a major economic and trade partner for countries all over the word, the EU can when it chooses exert significant leverage by threatening to withhold trade preferences. In the EU's dealings with Sri Lanka, it called on the government there to release a named journalist from prison and to end the harassment of other journalists, using the threat of limiting access to EU markets under the Generalised System of Preferences (GSP+).

If the political will to do so existed, EU member states might be considerably more persuasive than they have been so far in pressing governments accused of harassing or criminalising journalists to put an end to those practices by the strict application of good governance and anti-corruption clauses or conditions which exist in multinational institutions and programmes, including the World Trade Organisation, the World Bank, the OECD and the UN Development Programme[34].

As mentioned above, the European Commission is now committed to applying stricter criteria to candidate states wanting to become EU members. But Heidi Hautala, of the European Parliament's Subcommittee on Human Rights, argues that the EU should acknowledge that it has not practiced what it has preached, either with respect to upholding legitimate media freedom and investigative journalism within EU states, or in the Union's dealings with other countries where journalists are vulnerable to attacks:

> "I believe this is a good moment, amid the revolutions and turmoil in the Arab world, for the EU to take a very decisive step towards abolishing all kinds of double-standards. One double standard is that we have human rights violations towards journalists and freedom of expression within EU countries. The other one is that these so-called human rights instruments that the EU has put in place are not given a high importance. So I think the criticism is valid, and there are several reasons why this is good time to discuss how to improve the EU institutions' behaviour towards third countries in relation to human rights and freedom of expression."

And Heidi Hautala wants to see the EU's ongoing review of human rights' policy reflect the demand for such a serious change of priorities:

> "I mentioned the apologies by the EU for having neglected serious human rights violations in North African countries. I can see there is a real self-criticism in the European Commission already. But secondly, this is a very good moment to discuss these things because Madame Ashton [the EU's High Representative for Foreign Affairs] has said there will be a review of human rights policy, and we are actively talking to the 27 EU foreign ministers and their Human Rights attaches. We are preparing key issues for that review, and it is now up to Baroness Ashton to make it an inclusive, participatory process. The European Parliament and EU foreign ministers can participate in discussing what a new revised EU Human Rights policy should be."

[34] Reporters Without Borders *G8 Summit in Evian,* 28 May 2003 http://en.rsf.org/g8-summit-in-evian-28-05-2003,07004.html

Yet scrutiny and coverage of the European Union's policy-making process by international media has been significantly diminished in recent years, thanks both to a fall in the number of accredited journalists reporting on EU affairs from Brussels at a time of severe economic pressures, and to widely acknowledged difficulties, for media outlets, of reporting the complex machinery of the EU in ways that engage news consumers and international publics[35]. The MEP Sophie in 't Veld also sees the issue of the rival authorities represented by the various arms of the European Union as a source of confusion and uncertainty:

> "When it comes to [speaking out on] the killings of journalists and impunity for murder, I feel that the EU has a responsibility in this field, but it is part of our foreign policy, and foreign policy is still officially a member state competence. We have the High Representative for Foreign Affairs and Security policy, Lady Ashton, and [the President of the European Council Hermann] Von Rompuy, and there is [Commission President] Barroso, and the foreign ministers of the member states; so there are many people involved in this, and they all have their own staff and their own objectives and priorities in their foreign policies."

Conclusion: Europe should give priority to the protection of journalists' physical safety and rights as a foundation of European values

In the light of the disharmony and even discord among European states about issues of principle, as well as priority, with regard to protection and safety of journalists and broader freedom of expression issues, it is not likely to be easy to achieve strong and united positions in favour of more effective mechanisms at international level.

However, European institutions have clearly identified, condemned and drawn attention to the far-reaching dangers of the worldwide patterns of targeted violence against journalists, and of related climates of impunity; those institutions and European states have a wide range of means to tackle those abuses; and they have very significant political and diplomatic influence which can be brought to bear to address these issues as a matter of urgency.

The time is ripe for European states and their rule-of-law based institutions to take a lead in this way, in view of the lessons of recent history, the urgent necessity for moral and political firmness in the light of geo-political movements in the Mediterranean and Eurasian regions, and the opportunities presented by positive policy discussions under way in all three of Europe's principal inter-governmental institutions, and at the United Nations.

Resistance to setting such a priority is to be expected from a number of European states, so a test of political will lies ahead. But without a committed lead from Europe, it is hard to see the international community taking the bold steps, which many of those who took part in this policy research say are already overdue.

The imperative for action is well expressed in the words of the writer and philosopher A C Grayling, who wrote in his 2009 book *Liberty in the Age of Terror:* "Free speech is the fundamental freedom. Without it none of the others are possible, for none of the others can be claimed or defended without it."

[35] *Unmediated messages kill off the European media*, Lorenzo Consoli, President, Association de la Presse Internationale, Letter to European Voice.com, 11 March 2011 http://www.europeanvoice.com/article/imported/unmediated-messages-kill-off-the-european-media/67379.aspx

Part 3 – Recommendations for international responses

The following points have been put forward as an aid to discussion by the Directors of the Initiative on Impunity and the Rule of Law, and do not represent the position of any other person or organisation participating in the Working Conference.

Recommendations for elements to be included by State Parties in a Declaration or Action Plan on the Safety of Journalists and ending Impunity:

1. Declare the serious concern of States about documented patterns of violence against journalists and others seeking to exercise their right to freedom of expression, and about the growing pattern of impunity related to such crimes; and acknowledge the extraordinary threat which they represent to the lives and work of journalists, to the universal right to freedom of expression and opinion, and to the rule of law and democratic governance

2. Set out expected standards for States, including their positive obligations both for the protection of journalists against physical assault, intimidation, or wrongful detention and for swift, independent and effective investigations and judicial follow up in recognition of their public function; those standards are to include a common obligation to uphold existing safeguards and to develop additional safeguards to be enshrined in legislation, administrative and judicial practices and applied in all states, in order to combat targeted violence and impunity.

3. Acknowledge the pressing need for more effective measures with respect to protecting journalists on difficult or dangerous assignments in “non-conflict” zones, including regions of widespread lawlessness or organised armed confrontation, in the light of the evidence in reports by the Director-General of UNESCO that the majority of acts of violence and killings of journalist occur in places which are not “Conflict Zones” in the terms of UNSC Resolution 1738.

4. Recommend that all states establish a mechanism (a national Commission or similar office) with independent statutory authority, which should incorporate civil society organisations on a basis of complete independence and parity with state agencies, to monitor and ensure public transparency regarding the handling of investigations, prosecutions and judicial processes in cases of targeted violence or alleged abuses of law-enforcement processes where the alleged victim is a journalist.

5. Agree on the conduct of a general review of existing UN mandates and procedures, with the goal of strengthening them in response to needs identified by UNESCO in consultation with civil society; United Nations Agencies and bodies agree to consult with expert independent non-governmental organisations with a view to setting up international emergency procedures to protect the safety of journalists at high risk of assault, kidnap or other forms of violence; and to require Member States expeditiously to provide adequate and full information, in all cases of deaths or injuries to journalists, about the circumstances of the crime and the course of criminal investigations and judicial proceedings; and to comply with States’ obligations in terms of the proper international standards required for effective investigations to eliminate the risk of impunity.

6. Urge the United Nations to establish a permanent inter-Agency coordination mechanism to promote clear and consistent standards with regard to freedom of expression and the safety of journalists through the activities of all concerned UN Agencies and bodies, including UNESCO, the Office of the Human Rights Commissioner, the Human Rights Council, the Security Council and the Office of the Secretary-General, in recognition of the special importance of protecting journalists’ safety and their right to work without harassment or threats.

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