

Guy Berger, 7 December, 2023

Keynote address: *Regional Conference “Rising above the headlines: protecting press freedom and strengthening the judiciary in the Western Balkans”*. Jahorina (Bosnia and Herzegovina).

## **Why the judiciary and journalists need to talk - unpacking their mutual relevance**

### **Introduction:**

This input brings an outsider’s view to the region that is based on international experience. I spent 11 years leading UNESCO’s role in the UN Plan of Action on Safety of Journalists and the Issue of Impunity. This included addressing judges and journalists in Europe, Latin America and Africa. I also have the dubious distinction of being jailed for two years by a magistrate in the then-apartheid South Africa, found guilty of possession and distribution of banned publications, including some by Nelson Mandela. Repression of expression back then was intended to dictate what the public could say and know. The regime’s message to journalists was: best hold your tongue, because after we’ve taken care of journalists, we can as easily come for you.

Today, I have the pleasure of seeing my country’s post-apartheid judiciary enforce new and human-rights compliant laws on freedom of expression. Indeed, they interpret these laws as positively as possible, given the historical background of coercion, censorship and intimidation of both journalists and citizens. South Africa today is at peace and way better than the past. Yet, no country – including my own - is free from the scourge of attacks on journalists – on their psychological wellbeing, their digital security, their financial stability and independence, their legal rights, and even their physical safety. You know this in your region.

What to do? Here’s what I have learned from my time working internationally on these problems. The first thing is for each role actor for a solution to be able to understand the other – so let’s unpack this.

### **What does journalism and the judicial system have in common?**

- In English, they both begin with a “j” 😊
- Looking around you, it is also evident that you are also all, indistinguishably, people. And though you have various national identities, different individual identities, diverse gender identities and so on, you all share this: each of you is a person with human rights and related obligations.
- There’s more in common too when we look at your professional identities. You, the practitioners in both realms, each seek to be professional – i.e. to work according to codes that you interpret and apply in your work, and according to human rights ethics. You each take high pride in being respected for doing your work well, and in knowing that your role is of value to society.
- To do your jobs, you also both need to be independent. When there is external interference by political or commercial interests with your professional practice, this threatens the integrity of the roles that each of you performs. Almost invariably, independence has to be defended. It is always under pressure to one degree or another. But a culture of public trust in the press and the judicial system can help you push back. And those like you - in the judicial system and in the media - have a major part to play in earning such public trust for your respective institutions.

In short, you have key features common!

### **What differentiates your sectors?**

- Judges, prosecutors and police are – as should be – constrained by compulsory obligations related to their civil service status, as well as tight codes and legal precedents.

- Journalists – and those who pay their salaries – have greater leeway in regard to how they interpret public interest. This is not to say that journalists operate without real boundaries. But it is to recognise that while public media must be neutral, private media are entitled to take different political stances – although their journalism is still supposed to be factual and in the public interest. It is mainly a voluntary issue (within the law) as to how well journalists live up to their professional standards, with self-regulatory mechanisms like press councils and critical appreciation by audiences serving as guardrails.

### **Complementarities between your sectors:**

Key for this engagement here in Jahorina is that you in both realms – when living up to your roles - are absolutely indispensable pillars for a society that operates via the rule of law. One pillar cannot function properly if the other pillar is weak or compromised. When one collapses, the roof falls in. So there is an interdependence that can be recognised.

Each side has a part to play in helping to protect the other against interference whether covert or overt, through hidden pressure or open intimidation. Unfortunately, in both cases, interference can even escalate to take the form of assassinations. Neither of you should ignore what happens in the other sector, because experience shows that the practice in one will spread to the other.

Each side has a role to celebrate best professional practice in the other. But this is not a love affair, so equally, and remaining fully independent, each should retain a critical distance, and to be prepared to distance itself from shortfalls on the other side.

However, you also need to call out those in your own camp, when they step out of line. Here is an example. UNESCO recently studied 80 elections, finding on average there were 7 attacks on journalists in each one. Three of these seven were by police and security agents. I do hope that prosecutors and judges in these cases are acting against such abuses by state actors. There should not be blunt “tribal” loyalty – judicial system closing ranks and covering for criminal actions; or journalists showing solidarity with each other no matter what. Journalists have to speak out when their peers fall below professional standards of truth-telling, verification and public interest. Professionalism means that your principles have to be above any blanket separation into “us” and “them”.

What this means are mirror obligations on each side to stand up for professionalism. This is what gives depth to your sectors being complementary realms.

Of course, between the two sides, there will still be different views and even conflicts. But a mutual blame game is not a solution: constructive critique and co-operation are needed. As I have seen elsewhere, in order to maximise benefit, you need recognise both your symmetries and differences, and to build on your complementarities through respectful relationships.

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### **Obligations, duties, responsibilities**

The primary responsibility to protect citizens – and including journalists - is that of the State. This is not an exclusive responsibility. Media owners, social media platform owners, journalists themselves have to step up. State officials, nevertheless, are the main duty-bearers.

Yet a number of state actors are too often falling short of their duties to ensure that journalists really have press freedom and safety. Some are even implicated in acts of commission, not only omission. In a growing number of situations, doing journalism is accompanied by being manhandled, assaulted, kidnapped, abused or even killed. And by receiving online death threats, rape threats and threats to family. Some attacks come through abuse of legal process – through legal cases known as SLAPPs (Strategic Law Suits Against Public Participation), aimed not at justice but at tying up the accused in lengthy and costly proceedings.

There are political leaders and even some officials who argue that journalists under such forms of attack are themselves to blame. No. Even where journalists fail the professional standards of their profession – still this is not justification for illegal attacks on them.

If they have indeed fabricated content and thereby harmed, for example, reputations, without any public interest defence, they should be subjected to (civic) legal sanctions. If they have incited violence, likewise they have exceeded the limits of legitimate expression – and should be condemned by peers and prosecuted in the courts. If they have falsified stories for political purposes, their colleagues should condemn them, and the press councils penalise them.

But flaws and failures do not justify violent attacks. Criticism yes, but attacks on freedom of expression – even when it is not up to journalistic standards? Definitely not.

In principle, it is our shared obligation to resist all attacks aimed at silencing expression – especially that done according to the standards of professional journalism.

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### **The fundamental problem of impunity**

The worst form of violence – unfortunately not too rare – is the killing of a journalist. This is not, contrary to assumptions, only in cases of armed conflict. And even there, in terms of international law, journalists are to be regarded as civilians – not combatants. Until the recent war in Ukraine and occupied Gaza, the majority of killings of journalists were by criminals and kingpins linked to corruption, drug dealing and ideological score-settling.

As ultimate as killings of journalists are, the shocking reality is that almost nine out of ten cases of murders of journalists are never resolved. This unacceptably low rate of conviction feeds into a vicious cycle of impunity where perpetrators are emboldened to commit the same or a range of lesser crimes.

The central constituency in the fight to end impunity, for killings but also other illegal attacks on journalists, is composed of the people who work in and for the justice system. Why should you, this broad group, care about impunity in the cases of journalists in particular?

Here is one motivation that I have used when talking with people around the world: It is about the UN's agreed Sustainable Development Goals – agreed by all our governments. These goals wisely point out that for sustainable development, we need to significantly reduce all forms of violence and related death rates everywhere, to promote the rule of law, and to strengthen relevant national institutions to help prevent violence and combat crime. They also explicitly call for public access to information and fundamental freedoms. Add all this together: justice for journalists is not only a human rights issue; it is also a factor in societal development.

In short, the world must tackle impunity for crimes. And why not begin with those who bring us the information needed for decision-making, and whose public role also makes them highly prominent actors? Indeed, when the rule of law applies to those who attack journalists, the rest of society gets the very visible message that a line is being drawn in favour of the rule of law.

When online thugs are penalised by the overly laissez-faire social media platforms and - where justified - also by the judicial system, then society at large can rejoice that the online space is becoming a safe space. A victory to end impunity for an attack on a journalist is a public victory for the rule of law more broadly.

### **What needs attention: what works, what can we learn from success elsewhere?**

There are severe gaps in the justice system in general in terms of acting against impunity. How to identify and mobilize the resources to address these? Here are seven steps, based on international experience:

1. Political will:

When leaders are silent in the face of attacks on journalists, and the judicial system is half-hearted in investigating them, this can be taken as consent by those committing such atrocities. That simply reinforces the perpetrator's objective of creating oblivion. This is why Human Rights Council resolutions regularly call on governments to "publicly, unequivocally and systematically condemning violence, intimidation, threats and attacks against journalists and media workers". What is clear, is that if States fail to send the signal that attackers are indeed being tracked down and punished, then the situation will go on to worsen. It is a suggestion of no effective rule of law, when attacks on journalists keep on going unpunished. Thus, impunity for these attacks means there is no security or predictability for anyone, including investors. By pointing all this out, journalists can successfully strengthen political will in the authorities to take serious action.

2. Awareness:

Again, the press has to raise the issue to the public, explaining that attacks on the media affect more than journalists. This insight helped pave the way for the 2013 U.N. General Assembly resolution on safety of journalists and impunity, which I was instrumental in helping to develop. This resolution created the International Day to End Impunity for Crimes Against Journalists – observed every 2 November. Its point is to call for justice for journalists, but it is also more widely to show that violent censorship diminishes public access to information.

It is a day to underline the common interest across political and other divides, that when journalists are attacked, everyone loses. In particular, we lose information that is vital to have accountable democracy and corruption-free development. Attacks on the press, whether physical, psychological or digital, create a national spiral of silence. When there is a vacuum in verifiable facts and evidence-based argument as a result of silencing and intimidation of journalists, what happens? The answer: lies, cover-ups, rumours and propaganda rush in with nothing to stop them. The garden of information becomes overwhelmed with the weeds of disinformation, a flood of diversionary content and a normalisation of hate speech. Creating awareness and understanding about the public's right to know, and its dependence on journalists and the judicial system, is key to building public trust in truth and facts.

3. Grasp the magnitude of the problem:

Killings of journalists are, of course, the worst kind of crime against media workers. But we should always keep in mind the many other crimes against them, including online violence – which also often is a prelude to offline attacks. In many countries – including in Europe – although most journalists are not actually murdered, very many are subjected to all kinds of illegal attacks – ranging from assault through to emotional terror. Women journalists are especially the subjects of hate-filled harassment that is intended to bully them into self-censorship. And which can have serious offline consequences – leading to resignations, and to incurring actual harm and even death. A recent UNESCO funded study called *The Chilling*, nearly three quarters (73%) of 714 international female journalists surveyed in 2020 said that they had experienced online violence in the course of their work. And a fifth of them indicated that they had experienced offline attacks and abuse that they believed had been seeded online. This scope and magnitude of attacks calls for a zero-tolerance approach across the spectrum. Online violence is different to offline. But it is very real for those targeted, and it must be stopped.

4. Keep track:

Societies that do not monitor or understand crimes against journalists, will find that they lack the means to stop these attacks. This why we need to keep alive the project and the memory of assassinated or intimidated reporters. To be able to prevent the development of cold cases. And this is why judicial systems also need to keep up-to-date records – and to analyse them in terms of understanding where there is progress, and what learning can be gleaned from different kinds of protection, probing and prosecutory measures. In my work, I have seen that journalists who keep memory alive, even doing their own investigations into the perpetrators, have made a huge contribution to justice and the rule of law in many, many countries.

#### 5. Mechanisms and systems:

Strengthen or create and adequately fund dedicated institutional mechanisms to counter both threats and actual attacks. UNESCO records 50 such mechanisms around the world. This Western Balkans region has some mechanisms; they look good on paper. Yet this is not about what looks good; it cannot be about political theatre. It is about the seriousness of proposals that the judicial system, politicians and the public put forward for budgets to resource and support these mechanisms. Further, if the mechanisms are not working as they should, then there is also likely an original design flaw. Because, evidently, they were not designed with an eye to actual implementation – and the substantive obstacles to this. Obstacles like political and vested interests, inadequate human resources, work overloads, intractable complexity. In many cases, the mechanisms need to be assessed, reviewed, re-designed and re-budgeted and restaffed in order to be realistic and get results – such as identifying cases for “quick wins” with prioritised cases.

#### 6. Increase capacity-building efforts:

This is needed for judicial actors, including judges, prosecutors, and law enforcement in the full field of freedom of expression. It should cover new issues like social media’s obligations on online attacks on journalists, and access to their data holdings related to this. It should include the role of generative Artificial Intelligence in production of attack content, and recommender-system AI in amplifying the distribution of this content.

Here, let me let flag something that began under my watch at UNESCO and has grown and grown. It is training with groups like yourselves, and in providing such knowledge for your training colleges. More than 35 000 of your counterparts in 160 countries around the world have taken part in capacity building co-operatively developed with UNESCO. There are 11 Memoranda of Understanding with national and regional courts and UNESCO, and there have been 11 online courses provided by UNESCO for your community, one of which covers Artificial Intelligence and the Rule of Law, which has reached over 4,400 judicial actors from over 138 countries.

I’m also pleased to tell you of UNESCO publications for judges and for prosecutors. And here is a news flash: the UNESCO office in Sarajevo is now translating several these into three of the languages in the region. One such resource is a “Global toolkit for judicial actors: international legal standards on freedom of expression, access to information and safety of journalists”. A second is “Guidelines for prosecutors on cases of crimes against journalists”, and another is: “Guidelines for judicial actors on privacy and data protection”. Of additional interest will be: “The ‘misuse’ of the judicial system to attack freedom of expression: trends, challenges and responses” and (for those fluent in Spanish), “Best practices for guiding dialogue between the judiciary and the press: a guide for judges and journalists”. I do commend these authoritative texts to you, which represent experiences internationally that can be adapted to your conditions in this region. Another resource, produced by Columbia University in the USA, is “Global Database of Freedom of Expression Case Law”. You can find links to all these by searching online for “UNESCO” and “Judges’ Initiative”.

## 7. Train journalists:

Finally, let us not ignore the potential and importance of the judicial system to offer training to journalists! A case of potential interest is that, with the support of UNESCO, the Inter-American Court has developed five editions of the Diploma in Human Rights for Journalists since 2010. Today, because many newsrooms can no longer afford specialized reporters, so the judicial system has a greater educational role to play. Both formal and informal training, it is much needed.

### **Conclusion**

This discourse has highlighted several arguments why the judicial system should give particular attention to helping to prevent attacks on journalists, protecting those under threat, and prosecuting the perpetrators:

- Though there are exceptions, journalists generally are, like judicial service actors, professionals who follow norms focused on serving the public interest.
- Given the visibility of journalists, what happens to them when under attack bears upon whether there is public trust in the judicial system and the rule of law.
- It is a matter of giving support to for human rights, sustainable development, and society's access to verified and accountable information in the face of disinformation.

Journalists too have their part to play in fostering respect and standards in the judicial system.

As has been outlined, journalism is endangered when criminals – in order to cover up their crimes, or prepare a climate for new crimes, attack media practitioners. Journalism is doubly endangered when these crimes are committed with impunity. Society then is endangered. No society can afford to let this pass.

You, members of the judicial service and the journalism community, each have key roles to tackle this problematic spiral. The means talking to each other regularly, in a cordial and consistent relationship.

I wish you all the success possible as, in your different roles, you work towards this common objective.