

BBC/CFOM Symposium: ‘Making the protection of Journalists a Reality: Time to End Impunity’

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Ladies and Gentlemen of the 4th Estate, Distinguished guests,

I would like to begin by thanking the organizers and the host of this symposium for their kind invitation.

On the occasion of this symposium which takes place on the premises of one of the most prestigious media houses in the world, I would like to express my deep gratitude, on a personal as well as a professional level, to the journalists and all of you here present.

On a personal level, the work of journalists over the past decades has allowed me to be connected to the world, to feel concerned about it, and consequently to become a proper global citizen. In my other life I was a great friend and supporter of the media in my home country, Botswana, and indeed throughout the Southern African region. I was a member and vice chairperson of the Media Institute of Southern Africa (MISA), the Botswana Chapter, which was a member of the sub-regional Institute. This of course allowed me to be part and parcel of the 4th Estate in my own right.

This also meant that I became and am still very much part of the Estate, albeit in a different way. I know for a fact that without you the world would not be the wiser. I know the sacrifices – of your families, friends and most importantly your own. I have seen the bad, the evil and the good through your eyes and nothing makes me more proud. I salute you, ladies and gentlemen.

I should say that I became a human rights practitioner and expert primarily as a result of the many reports of human rights violations in the world which you expose. I worked as a Commissioner and Chairperson of the African Commission of Human and Peoples' Rights, the African Union premier body that is mandated to protect and promote human and peoples' rights on the African continent.

This has brought me to where I am today.

Within the context of the International Criminal Court (ICC), the media plays and can play a crucial role in demonstrating the impact the ICC can have in the world. The media can both garner support for the Court and criticize it; it can encourage frank, sober and insightful debates about its work and its mandate. By reporting on the Court's activities, the media helps the Court to bridge the gap between it and those who need its legal protection i.e. victims and survivors of the world's most reprehensible crimes: genocide, war crimes and crimes against humanity.

Because these atrocious crimes shock our collective conscience, the ICC's judicial proceedings should not be restricted to the legal arena; its story is not just of judges and lawyers. It is and has to be a matter of discussion in and ownership by communities affected by these crimes and

the international society as a whole. In the words of Kofi Annan upon the creation and establishment of the Court, “This cause ... is the cause of all humanity” and this is where you individually and collectively have played and continue playing a crucial role.

Naturally, the ICC has, within its limited resources, developed its own outreach and public information programmes. While these programmes endeavor to inform the world about the Court, I am the first to recognize that the ICC cannot do its job without you. Our programmes need to cooperate and/or coordinate with local and international media, which inform millions of people daily. Without your support and the important role you play, it would be almost impossible to explain to the concerned and affected communities what the Court is doing, and also what their rights before it are. This is of course particularly important due to the mandate of the Court in respect of victims, both to allow them to participate in the proceedings and to seek reparations for the harm suffered. In this regard, I note that rules 92(8) and 96 of the Court’s Rules of Procedure and Evidence require the Registrar to give adequate publicity to proceedings before the Court in order to allow victims to apply to participate in the proceedings before the Court or to request reparations. It would not be possible for the Court to accomplish such a task without the crucial assistance provided by the media. It would also be difficult to build public support, which is almost a pre-condition for ensuring that States cooperate with the Court. As you are well aware, if States do not cooperate with the Court, there will be no arrest of suspects as the Court has no police force of its own. Therefore, nobody will appear in Court, and consequently there will be no trials. I am accompanied today by the spokesperson of the ICC, Mr. Fadi El Abdallah, who will be

able to say more about this and any possible collaboration between you and the Court.

The Court's first President, Judge Philippe Kirsh, once stated, "I have always been convinced that ignorance is the worst enemy of the Court". It all comes down to knowledge and awareness, and only when people truly understand what the Court does can they support us, and this is where you come in.

Other International Tribunals have also stressed the importance of the media. The ICTY's Appeals Chamber declared in its decision on *The Prosecutor v. Radoslav Brdjanin & Momir Talic*, on 11 December 2002, that the media "play(s) a vital role in bringing to the attention of the international community the horrors and reality of conflict, and in awakening the international community to the seriousness of the human rights situation during armed conflicts". The same Chamber also highlighted that "The information uncovered by war correspondents has on more than one occasion provided important leads for the investigators".

The media's role in justice is thus, for me, indisputable. But it is also this specific role -- of an independent and strong voice-- that leads to journalists being targeted during armed conflicts. Journalists have a higher risk of being killed than other civilians, because their work requires them to be close to where the fighting is. Journalists are also specifically targeted, whether during popular uprisings, internal conflicts or simply when trying to oppose dictatorships. But what protection, legally speaking, is offered to these journalists? What can International

Criminal Law offer to dissuade the commission of such crimes against media practitioners?

Several rules are enshrined in International Humanitarian Law and international instruments.¹ These rules are, by now, classical and well known, with their distinction between war correspondents and other journalists, but also with

- their conditions (especially interruption of immunity if the journalist participates in any hostilities; media becoming a legitimate target if they are inciting serious violations of international law, such as genocide, and the principle of proportionality as a precaution when attacking media houses);
- and their consequences (protection of journalists and war correspondents like any other ‘civilians’, status of war prisoners for war correspondents accredited to accompany the military forces, if captured).

However, these rules lack an enforcement mechanism to make the protection of journalists a reality. It is indeed time to end impunity, especially for persons who order the targeting and killing of journalists. But ending impunity cannot be achieved without justice. Over the years, it has been suggested that an enforceable justice system could help prevent unlawful attacks against Journalists and also protect them. The question is: can the ICC play such a role?

As the question has not yet been presented before this Court, I am not able to present an institutional answer to you, so the following remarks

¹ Geneva Convention III, Article 4 A, para. 4; Additional Protocol to the Geneva Conventions, 8 June 1977, article 79;; see also UN Security Council Resolution n°1738 (2006); UN General Assembly’s [Resolution 68/163](#) on the “Safety of Journalists and the Issue of Impunity,” 18 December 2013.

will only reflect my personal view and should not be regarded as an official position of the ICC.

Can the ICC offer its legal protection to targeted journalists? While we all want the answer to be a resounding “Yes”, I must step back, put my legal cap on, and offer an honest, thoroughly considered, answer, which is “Perhaps sometimes”. I should say that the answer can only be complex and nuanced. I am aware that you prefer more direct answers.

The question is really one of the Court’s jurisdiction, and the conditions under which the Court can act. Thus, I would like to briefly take you through the restrictions and powers of the Court, based on its jurisdiction.

What is the International Criminal Court?

On the 17 July 1998, 120 States adopted a treaty in Rome – known as the *Rome Statute of the International Criminal Court* (“the Rome Statute”) – which establishes the International Criminal Court. For the first time in the history of humankind, States decided to accept the jurisdiction of a permanent international criminal court, which would prosecute individuals who are most responsible for the world’s most serious crimes. This jurisdiction took effect on 1 July 2002, when the Rome Statute entered into force, after ratification by sixty States. Today 122 countries are State Parties to the Rome Statute, representing the following regions: Africa, Asia-Pacific, Eastern Europe, Latin America and the Caribbean, as well as Western Europe and North America.

The primary mission of the International Criminal Court is to help put an end to impunity for the perpetrators of the most serious crimes of concern

to the international community as a whole-- i.e. genocide, war crimes and crimes against humanity-- thus contributing to the prevention of such crimes. It is hoped that the crime of aggression will be added to the present crimes, once the crime is ratified by the requisite number of States (at least 30), which is expected no sooner than the year 2017.

Please note however, that the International Criminal Court is not a substitute for national courts. According to the Rome Statute, it is the duty and prerogative of every State to exercise its criminal jurisdiction over those responsible for such international crimes. The International Criminal Court can and should only intervene where a State is unable or unwilling genuinely to carry out the investigation and prosecution of the perpetrators.

When a State becomes a party to the Rome Statute, it agrees to submit itself to the jurisdiction of the ICC with respect to the crimes enumerated in the Statute. The Court may exercise its jurisdiction in situations where the alleged perpetrator is a national of a State Party or where the crime was committed in the territory of a State Party. In addition a State which is not party to the Statute may decide to accept the jurisdiction of the ICC, on an ad hoc basis, for it to take advantage of the services and expertise of the Court. Furthermore, the Court can also exercise jurisdiction (in such a case without any territorial or personal restriction) when the United Nations Security Council, acting under Chapter VII of the United Nations Charter, refers a situation to the Office of the Prosecutor.

Opening an investigation

Before seeking to open an investigation, the Prosecutor must ensure several criteria are met: jurisdiction, complementarity, gravity, and the interests of justice and of victims.

I have to stress that the primary responsibility to investigate and prosecute lies with the States, both according to the Rome Statute under the principle of complementarity between the ICC and national tribunals and Courts as enshrined in articles 17 to 20 of the Rome Statute, and to international instruments². The criterion of complementarity, like the criteria of justice and victims' interests, is related to the circumstances of each situation and must be established on a case-by-case basis. Thus, I will focus on the other two elements, the conditions regarding jurisdiction and the gravity of crimes, which are conditions applicable with regard to the opening of investigations and prosecutions.

For the jurisdiction *rationae loci* (meaning the jurisdiction criterion of the location of the crimes), *personae* (meaning the jurisdiction criterion of the perpetrator's nationality) and *temporis* (i.e. the time of the commission of crimes), it is noted that unless the ICC jurisdiction is triggered by a UNSC referral, the jurisdiction would be limited to the crimes committed by nationals of or in the territory of a State Party, or a State who accepted the ICC jurisdiction, after the entry into force of the Rome Statute. Over and above these States, however, the Court is involved in two countries or situations that were referred to the ICC by

² See in particular the four Geneva Conventions in this regard; see also UN Security Council Resolution 1738(2006) as well as UN General Assembly's [Resolution 68/163](#) on the "Safety of Journalists and the Issue of Impunity," 18 December 2013 urging States to ensure accountability and justice.

the UNSC: Darfur (Sudan) and Libya. Ivory Coast, which was not at the time of opening the investigation a member of the Statute, but which had accepted the jurisdiction of the Court on an ad hoc basis, is also under the Court's jurisdiction. This also means that cases against Syrians in Syria, for example, are not currently within the Court's jurisdiction because Syria is not a State Party to the Statute, and that particular situation has not been referred to the Court by the Security Council. Syria has also not accepted the jurisdiction of the Court on an "ad hoc" basis.

Jurisdiction *rationae materiae*

The jurisdiction *rationae materiae*, or the nature of the crimes, requires a longer explanation: The mandate of the Court is to try individuals (rather than States), and to hold such persons accountable for the crimes as articulated above.

With regard to prosecuting the targeting of journalists solely because of their work, I can exclude the crime of aggression, as it relates to the use of a State apparatus to violate the sovereignty of another State. Here I can also exclude the crime of genocide, which requires a specific intent, which is the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, essentially because of its difference. This is clearly not applicable to attacks against journalists solely because of their work.

Can the attacks against journalists be qualified as war crimes or crimes against humanity?

"Crimes against humanity": include acts, such as murder, torture, enslavement, deportation...etc., when committed as part of a widespread

or systematic attack directed against any civilian population, the perpetrator having knowledge of the attack’.

Since journalists and war correspondents have the same legal protection as “civilians” under international law, it would be possible to qualify crimes against them as crimes against humanity, but only if these crimes (murder, torture or other incriminating acts such as imprisonment, disappearances and sexual attacks) are part of a widespread or systematic attack against any civilian population³. However, such crimes, on their own and unconnected to this wider attack, would probably not amount to crimes against humanity.

War crimes: I would possibly use similar logic with regard to the definition of war crimes. “War crimes” include grave breaches of the Geneva Conventions (which afford protection to journalists and war correspondents, as civilians), and other serious violations of the laws and customs applicable in international armed conflict, and in conflicts “not of an international character” as listed in the Rome Statute. These prohibited acts include acts such as killing, torture and cruel treatment, rape and sexual violence, the use of children under the age of 15 in military hostilities, intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historical monuments or hospitals, etc.

Wilful killing or violence to the life of journalists and war correspondents, who are afforded the same protection as ‘civilians’,

³ Professor r Nicholas Tsagourias, (from the School of Law, University of Sheffield) reached the same conclusion in his report “Violence against journalists and crimes against humanity” (paragraph 19): <http://www.cfom.org.uk/wp-content/uploads/2014/02/CAH-and-journalists-February-2014.pdf>

might be categorised as war crimes. This protection would also be afforded to the media's equipment, tools and buildings (as "civilian objects"), unless they became a legitimate war target because of direct participation in military activities, or within the limits of the principle of proportionality of the strike with military gain.

Thus, attacks against journalists (in the broad sense) and war correspondents, may be considered as war crimes or crimes against humanity, but only if the overall conditions of such definitions are met. For war crimes, this means that the crime took place in the context of and was associated with an armed conflict of either (depending on the crime) an international or non-international character. For crimes against humanity, this means that the crime took place as part of a widespread or systematic attack directed against a civilian population.

However, the eventual sporadic or limited crimes against journalists in specific zones of armed conflicts might preclude one from considering such unlawful acts as crimes against humanity if they are not connected to a wider attack against any civilian population, although they could be seen as war crimes. However, the ICC may not be in a position to prosecute such crimes as it can only prosecute criminal acts with a sufficient level of gravity. This is another legal discussion, and I ask you to bear with me, since I will again only express my personal views that do not necessarily represent the views of the ICC as an institution.

The issue of gravity

The ICC was created to address the most serious crimes of concern to the international community. Cases brought before the Court must be of

“sufficient gravity to justify further action” of the Court, to quote article 17 of the Rome Statute.

In general terms, according to the Rome Statute, this gravity threshold must be applied at two different stages: (i) to start investigating a situation, the situation itself must be sufficiently grave and (ii) once a case arises from the investigation, the alleged crimes involved in that case must also be sufficiently grave.

The ICC Prosecutor, in her policy paper on preliminary examinations, in November 2013, indicates that:

“Gravity includes an assessment of the scale, nature, and manner of commission of the crimes, and their impact...” “The scale of the crimes may be assessed in light of, inter alia, the number of direct and indirect victims, the extent of the damage caused by the crimes..” while “[t]he impact of crimes may be assessed in light of, inter alia, the sufferings endured by the victims and their increased vulnerability; the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities”.

The Court’s jurisprudence allows for an assessment of gravity that would include both quantitative considerations (such as the number of persons injured or killed) and qualitative considerations (such as the impact of the crimes on the local population’s lives, the particular horrific nature of how the crimes were committed).

An important example is the attack on the African Union peace-keeping Mission in Sudan (AMIS). The attack took place in Haskanita, Darfur, on

29 September 2007, and led to the death of 12 AMIS peacekeeping personnel and the injury of another eight members of the force. It is important to highlight here that peacekeeping personnel are afforded the same legal protection that is afforded to civilians under the International Law of armed conflict. In this regard, their position is similar to that of journalists', who are also afforded legal protection as civilians, which may justify why I am using this example to think about the protection for journalists.

In its decision on the confirmation of charges in the case against Bahar Idriss Abu Garda, who was charged for the attack on Haskanita (a war crime under article 8 (2) (e) iii) of the Rome Statute), Pre-Trial Chamber I, of which I was a member, highlighted that the gravity of a given case “should not be assessed only from a quantitative perspective, i.e. by considering the number of victims: rather the dimension of the crime should also be taken into consideration”. Thus the Chamber upheld the argument of the Prosecutor and concluded that “the consequences of the attack were grave for the direct victims of the attack, that is, the AMIS personnel, and for their families. In addition, the initial suspension and ultimate reduction of AMIS activities in the area, as a result of the attack, had a grave impact on the local population.” (Pre-Trial Chamber I, decision on the confirmation of charges, 8 February 2010, Abu Garda case). This demonstrates that assessing the gravity of a case was based on complex criteria - assessing the direct, indirect and long term impact of such crimes'; this was not done in a quasi-automatic manner based solely on the number of victims. The same reasoning was used by Pre-Trial Chamber I in its decision confirming the charges against Messrs Abdallah Banda and Saleh Jerbo in the same case.

Having said the above, one wonders if attacks against journalists would meet these requirements? First, the conflict itself has to be of a grave nature, sufficient for the Prosecutor to open an investigation; and secondly, the criminal acts against journalists should qualify as war crimes or crimes against humanity (as discussed earlier), to be of sufficient gravity to justify further action from the Court.

I must state that it is extremely rare to witness attacks against journalists resulting in hundreds of them being killed or injured in one conflict. Thus, the quantitative approach would probably not lead to the admissibility of the cases, unless journalists were killed alongside a number of non-journalist civilians, but then the Prosecutor will not be considering specific attacks against journalists because of their work; the crime under consideration in such a case would be the general attack which, among other civilians, included journalists as targets. In comparison with the abovementioned attack against the peacekeepers, one would need to establish that the attacks against journalists would have a grave impact on the local population, eventually by preventing them from alerting the international community on the seriousness of the human rights abuses and the gravity of the humanitarian situation in a given country. It could be argued that the crimes committed against journalists had severe consequences for the population as they allowed the regime in place to conceal the crimes committed against the civilian population and therefore to go on with their perpetration.

There cannot be an absolute answer here. Even with an approach that avoids rigidity, in order to allow greater protection, the decision on the qualification of specific attacks against journalists and on the admissibility before the ICC, of cases prosecuting the perpetrators of such

attacks, would largely depend on the circumstances of each case, including, *inter alia*, the existence of a widespread or systematic attack or crimes committed on a large scale, and on the possible grave indirect impact of the attack against journalists, on the humanitarian situation of the local population.

Conclusion

In conclusion, I wish to note that journalists are afforded protection under international law during armed conflict. This protection also extends to peace time when crimes against humanity are committed. However, this protection is of the same nature as that accorded to civilians. However, it is also to be noted that the ICC does not have any crimes which explicitly provide protection to journalists on account of their work.

It is true that all States are encouraged and urged, under international law, to prosecute the perpetrators of such criminal acts, and the primary responsibility rests with the national tribunals and Courts. The ICC can only complement them, and can do so only within the limits of its own rules, namely with regard to the conditions of jurisdiction and nature of crimes, and also with regard to the gravity of the impact resulting from such crimes. It is a complex matter that must be decided on a case-by-case basis.

Journalists, but also new categories of media intermediaries providing information on situations where professional journalists are not welcomed, play an important role and must be protected. So must civilians. We cannot stress enough the importance of protecting ALL civilians in times of armed conflicts. Unfortunately, statistics of modern

wars show a very alarming rise in civilian casualties, accounting for up to 80% of casualties in some wars. These facts alone justify the need for strengthened national jurisdictions and for an International Criminal Court that complements their efforts to fight the impunity of whoever commits, incites or contributes to the commission of genocide, war crimes or crimes against humanity.

With humanity possessing more powerful weapons of mass destruction and conflicts becoming more complicated and fiercely hard on civilians, the answer of law is in greater demand. Only with justice can we strive for true, lasting peace, built on the recognition of victims' suffering, and on universal consensus that impunity is no longer an option; not for anyone. Only then can we hope that humanity will rise above its shameful tendency of destruction, to witness a new day where we are all contributing to human progress, on both an individual and collective level, and where natural and cultural resources would be preserved for the benefit of all who are joined in this noble word that is "humanity".