

## European Court of Human Rights judgments on the right to freedom of expression

### Bulletin XVII: FOCUS ON VIOLENCE AGAINST JOURNALISTS

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The European Court of Human Rights has considered a number of cases in which violence had been used against journalists, or journalists had been murdered, because of their journalistic work. These are serious cases that raise issues under the right to life, as protected under Article 2 of the European Convention on Human Rights, as well as other rights. The Court has ruled that States must take steps to investigate the incidents and also minimise the risk of future attacks taking place. The Court has ruled that States are under a duty to ensure that an environment exists in the country – regulatory and otherwise – that allows the media to exercise their right to freedom of expression. Every State is under two general duties in this regard:

- if the State is aware that a journalist is in danger, it is under a duty to put in place protective measures
- when violence against a journalist has occurred, or a journalist has been murdered, the State is under a duty to conduct an independent and effective investigation

The following cases and recommendations illustrate how these standards should be implemented.

#### 1. European Court of Human Rights judgments concerning violence against journalists

##### Duty to protect and safeguard life

The European Court has ruled in several cases that States are under a duty to protect and safeguard the right to life, and to take effective steps to this end when there are indications that a journalist may be threatened. The following cases illustrate how this principle is applied in practice.

- *Özgür Gündem v. Turkey*, No. 23144/93, 16 March 2000 (State must protect journalists when there are indications that they may be under threat)

The Court found that over a two year period there had been numerous incidents of violence, including killings, assaults and arson attacks, involving the *Özgür Gündem* newspaper and journalists, distributors and others associated with it (including newsagents). It had taken no steps to protect

the newspaper, which the Court held to be in violation of the right to freedom of expression. The Court held that if the State is aware of threats or intimidation perpetrated against journalists or media organisations, it may be under a duty to take protective measures and to carry out an effective investigation into such allegations.

- *Gongadze v Ukraine*, No. 34056/02, 8 November 2011 (State had failed to act when a journalist had complained that there was a threat to his safety)

This concerned the disappearance and murder of a journalist. The Court held that in certain circumstances, there is a positive obligation on the authorities to take preventive operational measures to protect an individual or individuals whose lives are at risk from the criminal acts of another individual. The Court summarised the applicable principle as follows:

“Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party, and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk” (para. 165)

Applying this general principle to the case, the Court found that there had been a violation. First, prior to his disappearance the journalist had written to the Prosecutor General, requesting the investigation of harassment by police of his family and surveillance by unknown persons. Second, the Court noted that prosecutors ought to have been aware of the vulnerable position in which a journalist who covered politically sensitive topics placed himself/herself vis-à-vis those in power. Third, the Court noted that the office of the general prosecutor was under a duty to supervise the activities of the police and investigate the lawfulness of any actions taken by them. Two weeks after the journalist had written to the prosecutor, no action had been taken to investigate the police and the journalist disappeared.

- *Dink v Turkey*, Nos. 2668/07, 6102/08, 30079/08, 7072/09 & 7124/09, 14 September 2010 (State had been aware of threat against journalist, and had exacerbated the situation by encouraging hostility against him)

This concerned the murder of the journalist Hrant Dink, who had been the subject of hostility from nationalists as a result of his newspaper articles on Turkish-Armenian relations. The Court found that the security forces could reasonably be considered to have been informed of the hostility towards Mr Dink, that the law enforcement bodies were informed of a real and imminent threat of assassination, and that they failed to take reasonable measures to protect his life. The Court summarised the general principle as follows:

“...the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts

of a third party, and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk... (Judgment available in French only, which states: *Pour qu'il y ait obligation positive, il doit être établi que les autorités savaient ou auraient dû savoir sur le moment qu'un individu donné était menacé de manière réelle et immédiate dans sa vie du fait des actes criminels d'un tiers et qu'elles n'ont pas pris, dans le cadre de leurs pouvoirs, les mesures qui, d'un point de vue raisonnable, auraient sans doute pallié ce risque*, para. 65.)

The Court furthermore took into account the hostile criminal law environment of the country, under which Dink's writings had been considered to be a threat to "Turkishness". This contributed to the hostile environment towards the writer and had been a contributing factor in the attack on him.

#### Duty to investigate violence and fatalities

State authorities are under a duty to investigate violence and murder of journalists, whether the alleged perpetrators are state agents or non-state actors. There are two elements to this. First, the State must act independently and of their own motion – it should not wait for relatives or others to start an investigation. Second, the investigation should be conducted independently from those who have been alleged to have been involved in the incident. Furthermore, the investigation must be effective. The authorities must have collected relevant evidence and the investigation must have been prompt and thorough. Finally, there has to be some transparency as well as public scrutiny of the investigation or of its results, so as to secure accountability and maintain public confidence. Finally, when there are indications that a murder or violence against a journalist was related to their journalistic activities, the authorities must take adequate steps to investigate this. The following decisions illustrate how these principles are applied in practice.

- *Yaşa v Turkey*, No. 63/1997/847/1054, 2 September 1998 (State had failed to conduct an effective investigation into violence against journalists)

This concerned an application by a Turkish journalist and his uncle who complained that they had been victims of armed attacks because they sold the newspaper *Özgür Gündem*. The attacks were part of a campaign orchestrated against that and other pro-Kurdish newspapers with the connivance or even the direct participation of State agents. The Court summarised the applicable principle as follows:

“...the obligation is not confined to cases where it has been established that the killing was caused by an agent of the State. Nor is the issue of whether members of the deceased's family or others have lodged a formal complaint about the killing with the competent investigatory authorities decisive. In the case under consideration, the mere fact that the authorities were informed of the murder of the applicant's uncle gave rise ipso facto to an obligation under Article 2 to carry out an effective investigation ... The same applies to the attack on the applicant which, because eight shots were fired at him, amounted to attempted murder ...” (par. 100)

Applying this principle to the case, the Court considered that five years after an investigation had been opened, there had been no tangible results. The only explanation given by the Government for this was that the investigations were taking place in the context of the fight against terrorism and

that in such circumstances the police and judicial authorities had to proceed with caution. While the Court held that this might be a constraining factor, it could not “relieve the authorities of their obligations ... to carry out an investigation, as otherwise that would exacerbate still further the climate of impunity and insecurity in the region and thus create a vicious circle.” The Court furthermore held that the authorities had excluded from the outset the possibility that State agents might have been implicated in the attacks, despite the fact that there had been numerous attacks against journalists in the region in which State agents had been implicated. IT therefore found that the authorities had failed to fulfil their duty to investigate effectively.

- *Najafli v Azerbaijan*, No. 2594/07, 2 October 2012 (State had failed to conduct effective investigation into beating of a journalist)

This concerned a journalist who alleged that he had been beaten up by the police during the dispersal of a demonstration and that the domestic authorities had failed to investigate this incident effectively. The Court held that while an investigation had been opened, this had been carried out by the same police department whom he had accused. This could not be considered an effective investigation and was therefore in breach of his rights. The Court held:

“The Court has repeatedly stressed that ... an investigation [must] be independent and impartial, both in law and in practice .... The Court notes that the Sabail District Prosecutor’s Office, which was formally an independent investigating authority and which conducted the investigation in the present case, requested the Sabail District Police Department to carry out an inquiry with the aim of identifying those who had allegedly ill-treated the applicant. As such, the investigating authority delegated a major and essential part of the investigation – identification of the perpetrators of the alleged ill-treatment – to the same authority whose agents had allegedly committed the offence. In this respect, the Court finds it of no real significance that, while the alleged perpetrators were officers of the Riot Police Regiment of the Baku Police Department, it was another police department which was requested to carry out the investigation. What is important is that the investigation of alleged misconduct potentially engaging the responsibility of a public authority and its officers was carried out by those agents’ colleagues, employed by the same public authority. In the Court’s view, in such circumstances an investigation by the police force of an allegation of misconduct by its own officers could not be independent in the present case...” (para. 52)

- *Gongadze v Ukraine*, No. 34056/02, 8 November 2005 (State had failed to conduct effective investigation into disappearance and murder of journalist)

This concerned the disappearance and murder of a journalist. The Court held that the authorities had failed to conduct an effective investigation. It summarised the applicable principles as follows:

“The essential purpose of such an investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the

initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigatory procedure.

For an investigation into an alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events ... The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances ... This is not an obligation of result, but of means. The authorities must have taken all reasonable steps to secure the evidence concerning the incident. Any deficiency in the investigation which undermines its ability to establish the cause of death or the persons responsible, whether the direct offenders or those who ordered or organised the crime, will risk falling foul of this standard.

There is also a requirement of promptness and reasonable expedition implicit in this context ... It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating the use of lethal force or a disappearance may generally be regarded as essential in ensuring public confidence in their maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts... (paras 175-177)

## **2. Decisions and recommendations by other intergovernmental organisations**

The UN Human Rights Committee, the independent body of experts that supervises the implementation of the International Covenant on Civil and Political Rights, has endorsed standards very similar to those developed by the European Court of Human Rights. It has held that,

“States parties should put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression.

[There is no] justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights. Nor, under any circumstance, 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.

Journalists are frequently subjected to such threats, intimidation and attacks because of their activities. So too are persons who engage in the gathering and analysis of information on the human rights situation and who publish human rights-related reports, including judges and lawyers.

All such attacks should be vigorously investigated in a timely fashion, and the perpetrators prosecuted, and the victims, or, in the case of killings, their representatives, be in receipt of appropriate forms of redress.” (UN Human Rights Committee, General Comment 34, 12 September 2011, UN Doc. CCPR-C-GC-34)

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