

# The elusive rule of law to protect journalists

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## Speech for

### ***“Ending Impunity: Upholding the Rule of Law”***

A **High-Level Panel Discussion** co-sponsored by the Permanent Missions of Argentina, Austria, Costa Rica, France, Greece and Tunisia to the United Nations and UNESCO

*Monday, 3 November 2014, 1.15 – 2.45PM, ECOSOC Chamber, UNHQ, NY*  
**On the occasion of the 1st International Day to End Impunity for Crimes against Journalists (2 November)**

#### **Your Excellencies, esteemed colleagues and friends**

Last week, Mexican journalist Lydia Cacho, a dear friend and a member of the board of ARTICLE 19, the organization I had the great honor to run for close to 10 years, filed an individual petition with the Human Rights Committee of the UN. The Committee supervises compliance with the International Covenant on Civil and Political Rights (ratified by Mexico in 1981) and it has jurisdiction to hear and resolve individual cases of human rights violations. Lydia has gone to the HRC to seek justice, justice that her country did not deliver.

Her case concerns the fact that nine years ago - in December 2005 - Lydia Cacho was arbitrarily detained and then tortured by the Judicial Police of the state of Puebla. This crime was perpetrated with the complicity of the Attorney General of the state of Quintana Roo. This was but one in a long list of harassment and threats to which she had been subjected all because as a journalist she had diligently researched and exposed sex trafficking, pedophile rings and the associated abuse of political power<sup>2</sup>.

Cacho took the case of her arrest to the Mexico’s Supreme Court, becoming the first woman in history to testify there. In November 2007, the Court ruled 6 to 4 against Lydia Cacho, finding that the Quintana Roo Attorney General had no case to answer. The New York Times described the ruling as "a setback for journalistic freedom in Mexico".

One of the dissenting judges, Juan Silva Meza, recommended that the governor be stripped of his immunity from prosecution: “There was an agreement between authorities in Puebla and Quintana Roo to infringe on the rights of the journalist,” he found and he emphasized, **“I have the conviction that in a democratic state of laws**

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<sup>1</sup> [www.globalfreespeech.columbia.edu](http://www.globalfreespeech.columbia.edu)

<sup>2</sup> ARTICLE 19, <http://www.article19.org/resources.php/resource/37732/en/mexico:-article-19-takes-the-case-of-journalist-and-human-rights-defender-lydia-cacho-to-the-un-human-rights-committee>

**there is no place for impunity.<sup>3</sup>**

His reference to “*a democratic state of laws*” well exemplifies the gravity of crimes against journalists, including citizen journalists and bloggers<sup>4</sup>, and the complexity of the fight against impunity.

As the work by press freedom organizations highlight, impunity for crimes against journalists, including for their murders and disappearances, is not only a problem in so-called failed states.

Close to half of the 13 worse countries identified by CPJ in their latest impunity index, concern countries that are usually described as democratic,<sup>5</sup> countries whose legal systems possess, at least in theory, the characteristics of generality, equality, and certainty.

Still, impunity prevails and at grave cost to those who would wish the country to uphold the rule of law.

At its most basic level, “rule of law” means that “law has been applied through established procedures and administered in ways to prevent its arbitrary application against individuals<sup>6</sup>.” To be effective in practice, however, the rule of law must also be rooted in the basalt of principles upheld: principles such as transparency, impartiality and equality. These are the basics of the rule of law.

Nonetheless, as so many have argued, even these ideals – on their own - are not sufficient to deliver rule of law in practice, let alone to achieve the justice that is law’s ultimate purpose.

What then are the missing links?

During my 25 some years of work on human rights, including on freedom of expression and information, time and time again I have witnessed a singular and toxic absence in efforts to embed the rule of law, which is the failure to ensure a working police and security system.

So often we stumble at this very first step on a pathway to justice that must be paved with the rule of law: when police are unable or unwilling to conduct effective investigations into crimes of violence - whether against journalists or other actors - victims cannot register the attacks committed against them; their families cannot register the disappearance or killing of their loved ones and the perpetrators cannot be identified or the circumstances of the assaults detailed. This condition of toxic absence is a reality in many countries the world over.

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<sup>3</sup> [http://www.nytimes.com/2007/11/30/world/americas/30mexico.html?\\_r=3&ref=world&oref=slogin&](http://www.nytimes.com/2007/11/30/world/americas/30mexico.html?_r=3&ref=world&oref=slogin&)

<sup>4</sup> For instance, the Human Rights Committee has defined journalism in its General Comment 34 as “a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self- publication in print, on the internet or elsewhere ...”

<sup>5</sup> <http://cpj.org/reports/2014/04/impunity-index-getting-away-with-murder.php>

<sup>6</sup> Doreen Weisenhaus, *Hong Kong Media Law* (Hong Kong: Hong Kong University Press, 2014), p.14

I remember well reviewing the investigation file of the murder of a well-known journalist. 3 years after the fact, that file was slim like cigarette paper – witnesses to his killing had not even been identified let alone interviewed and the circumstances under which his murder took place were documented in the sparest of terms. The chances for the fullest application of the rule of law in his case were negligible long before any court would be involved.

*Your Excellencies, Ladies and Gentlemen*

Impunity also prevails in countries where, unlike Mexico, the law itself is, simply put, “wrong” placing journalists, including citizen journalists, at legal risk and vulnerability.

Think of the multiple laws around the world that criminalize in broad and unclear terms defamation, sedition (eg Malaysia), lese-majeste (eg Thailand), publication of false news, insult (eg Kenya), journalists determination to protect their sources: all of which are used regularly by politicians, businessmen, to place journalists in situations of legal risks and silence them.

This is not impunity, as we usually understand it. But such laws create a legal ecosystem, in which impunity is not only possible but flourishes; in which the use and abuse of law to silence, to censor, to detain, to harass, to imprison is made legitimate.

Rule “by” law does not trump the rule “of” law.

As the United Nations has highlighted the notion of the “rule of law” stems from many traditions and continents. It is embedded in the Charter of the United Nations whose Preamble states that one of the aims of the UN is “to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained”<sup>7</sup>.

In his 2004 report to the GA, the UN Secretary General defined the rule of law as requesting “*laws which are consistent with international human rights norms and standards*”<sup>8</sup>.

He did so because not all laws are good laws. Indeed, “*there is no equality amongst laws. There are laws that meet what the international community has determined to be good standards. And there are laws that don’t... History has shown us that systematic repression, mass scale suppression and grave human rights violations have often been formally justified, if not entrenched, in law – in bad law*”<sup>9</sup>.

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<sup>7</sup> [http://www.unrol.org/article.aspx?article\\_id=3](http://www.unrol.org/article.aspx?article_id=3)

<sup>8</sup> The UN Secretary General goes on to state that the rule of law also requires “*measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.*” See Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies” (2004)

<sup>9</sup> Agnes Callamard, *Burma: Role of freedom of expression in democratization processes*, Presentation to the Conference on Media Development in Myanmar, Organised by the Ministry of Information and UNESCO

As Martin Luther King said *“an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.”*<sup>10</sup>

The rule of law must serve the interests of justice.

*Ladies and Gentlemen,*

Columbia University President Lee Bollinger launched early this year a new initiative on global Freedom of Expression and Information (FoE&I). Global FoE @Columbia seeks to promote the integration of progressive legal rules and international standards regarding freedom of expression and information by national courts of justice around the world<sup>11</sup>.

We are in the process of putting together a web platform providing every year some 200 FoE&I case summaries, along with analyses of exemplary cases, decisions and jurisprudential trends in some 50 countries.

Our monthly monitoring of FoE/I cases at upper level courts shows that almost half of such cases<sup>12</sup> are in effect instances of rule “by” not “of” law.

But our work also shows that lawyers and judges can deliver justice for journalists, even under difficult conditions.

A mixture of opportunity, confidence and bravery can mean the difference between impunity and rule by law on one hand; and upholding of the rule of law on the other; the difference between law and justice.

And so, over the last three months we have seen:

- The **Zimbabwean** Constitutional Court declared that the criminal law prohibition on publishing so called "false statements" was unconstitutional.
- A **Kenyan** high court judge ordered the Non-Governmental Organisations (NGOs) coordination board to register an advocacy group for transgender people in a landmark ruling.
- The **Lesotho** Court of Appeal overturned a High Court ruling that had banned three journalists from practicing their profession and publishing their own newspapers.

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Rangoon, Myanmar, March 19-20, 2012: <http://www.article19.org/resources.php/resource/3006/en/burma:-role-of-freedom-of-expression-in-democratisation-processes#sthash.EBm07ZT9.dpuf>

<sup>10</sup> Martin Luther King, Jr., "Letter from Birmingham Jail" (1963)  
<http://coursesa.matrix.msu.edu/~hst306/documents/letter.html>

<sup>11</sup> [www.globalfreespeech.columbia.edu](http://www.globalfreespeech.columbia.edu)

<sup>12</sup> Global FoE @Columbia monitors on average 15 cases per month (without the US). 5 to 7 of them are what could be largely described as "rule by law" instances.

We have also seen Malaysian lawyers going to court to argue that the Sedition law is unconstitutional, Egyptian and Saud lawyers defending journalists and citizen journalists, sometimes at their own risk.

And so I remain optimistic and hopeful that judges will deliver justice for journalists who have been murdered, disappeared or unjustly imprisoned.

As we focus on and praise the work of individual journalists and other human rights defenders fighting for freedom of expression and the rule by law, we should also recall and affirm the role of those within the judicial and police systems who, against all odds, stand up for the rule of law and against impunity.

In this context, I am pleased to announce that Global Freedom of Expression @Columbia is launching the first annual award in recognition of those in the legal profession, anywhere in the world, who have made notable legal contributions to defending freedom of expression and information, including against crimes against journalists.

We will celebrate Judges and lawyers who stand firm in their commitment to uphold international standards on the protection of freedom of expression.

In a ceremony planned for 10 March 2015, the first Columbia University Global Freedom of Expression Prizes will be awarded for two categories:

- The **Significant Legal Ruling** award will go to a Judge in recognition of a significant legal ruling in the last 12 months that has upheld international standards and/or made a substantial legal contribution to freedom of expression or information.
- The **Excellence in Legal Services** award will go to lawyers, academics or NGOs that have contributed, over the last 12 months, an effective defense of freedom of expression in the form of a legal brief, legal amicus brief or academic article.

*Your Excellencies, Ladies and Gentlemen*

An inter-connected global community facing shared challenges needs a free flow of information and expression. The Justice sector must be encouraged to protect against the risks that censorship and impunity anywhere create for all of us everywhere.

Thank you very much