

WIPO: Criminal complaint against journalist

Non-paper and questions for WIPO and Member States

In filing a criminal complaint against a journalist, WIPO is violating the UN's own inter-agency policy on decriminalizing defamation. This undermines the UN's integrity and credibility.

The UN's policy is set out in the 'UN Plan of Action on the Safety of Journalists and the Issue of Impunity', which was adopted by the UN Chief Executives Board (CEB) on 12 April 2012 and has been "welcomed" by the Member States of the UN General Assembly.

The 'UN Plan of Action on the Safety of Journalists and the Issue of Impunity' states:

5.9. Encourage Member States to comply fully with UNESCO General Conference Resolution 296, entitled 'Condemnation of Violence against Journalists,' which calls upon Member States to adopt the principle that there should be no statute of limitations on persons guilty of crimes against freedom of expression; to refine and promote legislation in this field and to ensure that defamation becomes a civil, not a criminal action;

According to the UN website, the CEB "brings together the executive heads of 31 specialized organizations to deliver as one at the global, regional and country levels." The CEB includes WIPO's Director General, Francis Gurry.

Other parts of the UN system have also called for the decriminalization of defamation. In his 2016 report to the General Assembly (A/71/373), UN Special Rapporteur on Freedom of Expression David Kaye, states:

Paragraph 34 (page 14):

*"I share the concern of the Human Rights Council with respect to the "abuse of legal provisions on defamation and criminal libel" (see Council resolution 12/16) and believe that **any criminal penalties or excessive civil penalties for defamation are generally inconsistent with article 19 and should be repealed...***

*The joint declaration on freedom of expression of 2000 by the Special Rapporteur, the Representative on Freedom of the Media of the Organization for Security and Cooperation in Europe and the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights **cautioned against sanctioning defamation such that it chills the exercise of freedom of expression itself.**"*

(International Mechanisms for Promoting Freedom of Expression, Current Challenges to Media Freedom: Joint Declaration, London, 2000).

UN Human Rights Committee, General Comment 34, (CCPR/C/GC/34)

"47. Defamation laws must be crafted with care to ensure that they comply with paragraph 3, and that they do not serve, in practice, to stifle freedom of expression. All such laws, in particular penal defamation laws, should include such defences as the defence of truth and they should not be applied with regard to those forms of expression that are not, of their nature, subject to verification. At least

*with regard to comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice. In any event, a public interest in the subject matter of the criticism should be recognized as a defence. Care should be taken by States parties to avoid excessively punitive measures and penalties. Where relevant, States parties should place reasonable limits on the requirement for a defendant to reimburse the expenses of the successful party. **States parties should consider the decriminalization of defamation** and, in any case, **the application of the criminal law should only be countenanced in the most serious of cases** and imprisonment is never an appropriate penalty. It is impermissible for a State party to indict a person for criminal defamation but then not to proceed to trial expeditiously – such a practice has a chilling effect that may unduly restrict the exercise of freedom of expression of the person concerned and others.”*

UNESCO has been holding workshops around the world on the safety of journalists and issue of impunity. This has included UNESCO and the African Court on Human and Peoples’ Rights partnering in organising a workshop on 10 September 2016, which considered ways to ending impunity and the need to decriminalize defamation (see http://www.unesco.org/new/en/media-services/single-view/news/unesco_and_the_african_court_on_human_and_peoples_rights/)

Further UNESCO considers that defamation does not apply to an organisation, but only to individuals:

“...it has to be noted that human rights are the rights of persons, and so **defamatory expression is generally considered only in cases applying to individuals, and not to a business**, a religion, an ideology or a social group.” Freedom of expression, privacy and defamation on the Internet Guy Berger Director: Freedom of Expression & Media Development 26 February 2016 (see https://ipi.media/wp-content/uploads/2015/06/FoE-MediaLaw-Defamation_ENG_WEB.pdf)

As such, according to UNESCO (the lead agency on the protection of journalists and the issue of impunity), the journalist could not have defamed WIPO, but only its Director General.

General Questions

- 1) WIPO, along with all other UN organisations has endorsed, through the Central Executives Board, the 'UN Plan of Action on the Safety of Journalists and the Issue of Impunity'. The Plan calls on Member States to decriminalize defamation. Given the UN's policy on decriminalizing defamation, why has WIPO filed a criminal complaint against a journalist? Does WIPO's filing of the criminal complaint not undermine the UN's integrity and credibility?
- 2) What is the regulatory framework that governs how the organization deals with media reports? Are these regulations and rules promulgated and/or codified through a set of administrative instructions?
- 3) For example, who is the custodian or 'business process owner' in relation this aspect of the organization's work? Who is she/he required to consult?
- 4) Which is the authority vested with the competence to decide on proceeding legally against a media organization/publication/television channel/social media/others?
- 5) What is the procedure laid down for selecting and engaging a legal firm or a lawyer or a team of lawyers? How is the reasonableness of the legal fees determined – what are the criteria, yardsticks or benchmarks applied in this regard?
- 6) What policies are in place at WIPO for determining whether WIPO pursues a journalist through legal channels, and whether WIPO resources are used for such a purpose?
- 7) Based on their national laws, there is no agreement among the Member States of WIPO, on whether defamation constitutes a crime. Many Member States have decriminalized defamation or have committed to do so. As such, why did WIPO proceed with filing a criminal complaint against the World Radio Switzerland (WRS) journalist?
- 8) Did WIPO consult Member States or seek their agreement before filing the criminal complaint against the WRS journalist? If so, whom among them were consulted, and what was their response? If the Member States were not consulted, does the filing of the criminal complaint constitute an abuse of authority and misuse of the organisation's resources (noting there is no agreement among the Member States on criminal defamation)?
- 9) How is a decision made in WIPO as to whether a particular case involving defamation should be left to be fought by the individual concerned, or should be fought by the organization? Furthermore, who is the responsible official to decide that the organization will defray all the legal expenses for filing and fighting the case? What is the legal basis on which the competent authority considers the various factors involved and makes a decision?
- 10) Was consideration given that the filing of the criminal complaint may have operated to lift WIPO's immunity and opened it to the possibility of a countersuit? Did the Member States agree to this?
- 11) What policies and measures are in place at WIPO to ensure there is no unequal treatment of journalists? Why was the WRS journalist pursued, but not others who have been far more critical of WIPO and its Director General?

12) In terms of its policy towards the media, would it not be preferable for WIPO to:

a) contact the journalist and demand a retraction or right of response;

b) issue an article on the WIPO website correcting the journalist's assertions

13) Under the Swiss law, the journalist could face a jail sentence for defamation. There will be no agreement among the Member States on whether this is acceptable. If the journalist is fined, what will happen to the monies that are transmitted to WIPO? Given that the criminal complaint was filed by WIPO's Legal Counsel on behalf of WIPO and its Director General, will the Director General himself benefit personally from monies from any fine? Are there regulations in WIPO governing such situations, in particular, on enjoining the organization to be the beneficiary of any compensation awarded by the Court as damages, considering that WIPO funds are being utilized to file and fight the case?

Questions specific to WIPO's criminal complaint against the World Radio Switzerland journalist

1. It has been reported that a letter was sent on WIPO notepaper, signed by the WIPO legal counsel, on 26 January 2017: the day after the date of the alleged defamatory article appeared on the WRS website. Who was that letter from WIPO addressed to? Was it addressed to Olivier Jornot, the Chief Prosecutor for Geneva?
2. Did that letter intend to be a criminal complaint? If it didn't, then what was the point of addressing it to the Chief Prosecutor?
3. The Legal Counsel to WIPO, Frits Bontekoe, is not a Swiss registered lawyer. Nevertheless he signed a letter to the General Prosecutor, which appears to have been treated as a criminal complaint. Did Mr Bontekoe commit a criminal offence under Swiss law, in acting as a Swiss lawyer without being authorised, in violation of Article 51.b) Loi sur la Profession d'Avocat?
4. The article in question was critical of Mr Gurry but was not critical of WIPO. Nevertheless Mr Gurry instructed Mr Bontekoe to file a criminal complaint. In doing this, Mr Gurry used WIPO resources to pursue a grievance that was really personal to him rather than a complaint genuinely made on behalf of WIPO. Was this a legitimate use of WIPO resources?
5. Should a UN agency really be using its resources to protect the personal reputation of its Director-General? Would it not have been more appropriate for Mr Gurry personally to hire Swiss criminal lawyers to represent him in this matter, rather than instructing WIPO personnel (who are not Swiss lawyers) to make a complaint on his behalf?
6. How did the Swiss Ambassador to the UN (protocol) get involved? It has been reported that he wrote to Olivier Jornot as well, enclosing a copy of the criminal complaint. But why did he do this, and who in WIPO asked him to do this?
7. Why did the Swiss Ambassador do what he was asked to do? Has he ever forwarded a criminal complaint from a UN official to the Prosecutor's Office before? What independent review of the criminal complaint did he undertake before doing this? Who did he ask to undertake a legal review of the criminal complaint before he did this? Did he satisfy himself that the criminal complaint was well-grounded? If he did, then did he ask for a copy of the decision of the Member States to close the investigation, before he took this decision? (This would be important: the ground for the criminal complaint was that the Member States had decided that the reported allegations of corruption were ostensibly unfounded. Therefore review of the decision of the Member States in question would be essential to assessing the legitimacy of the criminal complaint. As the Member States will be aware, they did not actually absolve Mr Gurry of the findings of corruption; they simply declined to pursue the matter further.)
8. Did the Swiss Ambassador know of the grounds for the Member States' decision (which was widely reported, and which rationale is publicly available and was expressed in the context of a WIPO Assemblies meeting to which the Helvetic Confederation was privy) but nonetheless decided to forward the criminal complaint to the General Prosecutor anyway? If that is right, then how can

the decision to forward the criminal complaint have been made in good faith?

10. Do the Member States consider that before Mr Gurry had instructed his legal advisor to file a criminal complaint; and before he had engaged with the Swiss Ambassador to achieve facilitation of prompt reception and action upon that criminal complaint, he might have been well-advised to seek the opinions and/or approval of the Coordination Committee and/or the WIPO General Assemblies, something which obviously he did not do in light of the fact that barely 24 hours past between the publication of the article in question and the date of the criminal complaint filed on his behalf?

11. Did Mr Gurry consider in any detail whether, in instructing his Legal Advisor to file a criminal complaint under Article 30 Swiss Criminal Code, he may have exposed WIPO to waiver of one or more of its legal immunities from suit in respect of an action such as filing an improper criminal complaint?

12. Is Mr Gurry aware of the convention in Swiss law, breached in this instance, that the person filing a criminal complaint should always sign it themselves? Why did Mr Gurry not sign the criminal complaint himself?

13. Do the Member States consider that Mr Gurry ought to withdraw the criminal complaint, as is conceived by the provisions of Article 33 Swiss Criminal Code?