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Ukrainian Helsinki Human Rights Union's  
Submission to the Committee of Ministers of the Council of Europe  
**GONGADZE V. UKRAINE**  
(application № 34056/02, judgment of 8 November 2005)

This briefing is submitted in accordance with Rule 9(2) of the Rules of the Committee of Ministers for the supervision of the execution of judgments.

**Introduction**

1. The Ukrainian Helsinki Human Rights Union (UHHRU) is the largest All-Ukrainian association of human rights organisations. Among the UHHRU efforts to protect human rights are ongoing monitoring of human rights situation in Ukraine and informing the public about facts of their violation, provision of legal assistance to victims of human rights violations, including supporting strategically important cases, protection of human rights and fundamental freedoms in courts, the authorities and bodies of local self-government, human rights research and analysis, including regular monitoring of draft laws and legal acts, as well as preparing and advocating own legislative initiatives, conducting awareness-raising campaigns, educational seminars, trainings on human rights.

**Case summary**

2. The case concerns the authorities' failure, in 2000, to protect the life of the applicant's husband. The latter, a journalist known for his criticism of those in power, had been threatened by unknown persons, before being abducted and found dead, and their subsequent failure to carry out an effective investigation. It also concerns the degrading treatment of the journalist's widow on account of the attitude of the investigating authorities and the lack of an effective remedy in respect of the inefficiency of the investigation and unavailability of compensation.

## **Description of the situation on the ground**

3. The problem of protection of journalists is relevant in Ukraine. Since 1992, 12 journalists have been killed in Ukraine, 4 with total impunity<sup>1</sup>. In 2017 alone, journalists were assaulted 29 times and received 37 open threats<sup>2</sup>. According to The Institute of Mass Information, during the first quarter of 2018, 37 attacks on journalists were committed<sup>3</sup>.

4. According to the information provided by the Government, while in 2017 there were 255 registered proceedings concerning crimes against journalists, only 17 of these cases were brought to court (which is less than 7 %).

## **The measures taken by the authorities**

### **Individual measures**

5. The investigation identified four direct perpetrators of Mr Gongadze – high officials of the Ministry of Interior. Three of them, Mr. Kostenko, Mr. Popovych, and Mr. Protasov have been sentenced to 12 and 13 years of imprisonment for murder. One of the perpetrators, Mr. Kostenko, having spent more than 3 years in pre-trial detention, was entitled to re-counting of this period at the rate of one day of pre-trial detention for two days of imprisonment. Therefore, Mr. Kostenko has presumably been released from prison a long time ago.

6. In 2013, the fourth perpetrator, Mr. Pukach, was sentenced to life imprisonment. He unsuccessfully appealed against this sentence. Currently the case of Mr. Pukach is under consideration of the Supreme Court.

7. While the direct perpetrators have undergone criminal punishment, the matters of organization and contracting of this murder have not been successfully investigated in 17 years. The perpetrators' judgments contain references to another classified offender who is under investigation for ordering Mr. Pukach to murder Mr. Gongadze. However, so far the investigators' efforts to identify and punish the organizers of this crime have been unsuccessful. Although in their Action Plan the Government states that the investigation is ongoing, even if the organizers are identified, they may not be subject to criminal punishment due to the statute of limitations for bringing to responsibility.

### **General measures**

#### **1. Criminal legislation**

##### *Positive achievements*

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<sup>1</sup> According to the Committee to Protect Journalists, available at: <https://cpj.org/europe/ukraine/>

<sup>2</sup> According to the Ombudsperson of Ukraine, available at: <http://www.ombudsman.gov.ua/ua/all-news/pr/30518-ac-suspilstvo-chekaye-efektivnix-dij-vid-vladi-schodo-rozsliduvannya-vbiv/>

<sup>3</sup> According to the Detector Media, available at: <https://detector.media/community/article/137291/2018-05-07-tochka-bifurkatsii-shcho-vidbuvaetsya-z-pravami-zhurnalistiv-v-ukraini/>



8. We must welcome the positive legislative amendments to the Criminal Code made in 2015, which introduce four new *corpus delicti* against journalists and, importantly, their families and close relatives. These Articles impose more severe punishments for crimes against journalists as compared to the same crimes committed without a motive to obstruct a journalist's lawful activities. For instance, the newly introduced Article 348<sup>1</sup> includes life imprisonment among the possible punishments for killing a journalist because of his/her professional activity.

9. Another positive achievement is the elaboration of the Practical guidance in criminal cases regarding obstruction of journalists' lawful professional activities, threatening and violence against journalists, premeditated destruction or damage to journalists' property, infringement of a journalist's life and taking them as hostages, mentioned by the Government. At the same time, it must be pointed out that this document is not available to the public, so it is impossible for the civil society to evaluate its quality and comprehensiveness.

#### *Shortcomings of the legislation*

10. The Ukrainian Criminal Code, including the newly introduced *corpus delicti*, protect only those journalists who can in writing prove them belonging to a certain mass media or a journalist association. Therefore, bloggers, non-professional reporters, other public watchdog actors, photographers, and operators are beyond the legal protection of the State<sup>4</sup>. It is recommended to adopt a new, broad notion of media which encompasses all actors involved in the production and dissemination, to potentially large numbers of people, of content designed to facilitate interactive mass communication (for example social networks), while retaining editorial control or oversight of the contents. It is also desirable to amend the Note to Article 345<sup>1</sup> of the Criminal Code (threat or violence against a journalist), where there is a clear link to the existence of a press card, and law enforcers interpret this as a mandatory demonstration of a press card during the attack.

11. Article 171 of the Criminal Code (obstruction to journalistic lawful activities), among other offences against journalists, stipulates criminal responsibility for the illegal denial of access to information by a journalist. Such offense must be removed from the Criminal Code and transferred to the Code of Administrative Offense (for example, an illegal refusal to provide information to a lawyer's request constitutes an administrative offense in Ukraine).

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<sup>4</sup> 'Journalists' refers to everyone who observes, describes, documents and analyses events, statements, policies, and any propositions that can affect society, with the purpose of systematizing such information and gathering of facts and analyses to inform sectors of society or society as a whole, and others who share these journalistic functions, including all media workers and support staff, as well as community media workers and so-called "citizen journalists" when they momentarily play that role (A/HRC/20/17, para 4), 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 (Human Rights Committee, General Comment 34, para 44).



12. Experts point out that the victim's activity is one of the most important factors in the effectiveness of the investigation<sup>5</sup>. In order to ensure the completeness of investigations of crimes against the legitimate journalistic activity, victims of such crimes must be included in the list of persons entitled to primary and secondary free legal aid.

13. Ukraine should adopt the principle that there should be no statute of limitations for crimes against persons when these are perpetrated to prevent the exercise of freedom of information and expression or when their purpose is the obstruction of justice<sup>6</sup>.

## **2. Investigative practice**

14. The investigation of crimes against journalists has the same general shortcomings as the investigation of other offenses:

1) Reports of a crime (must be imperatively entered into the register within 24 hours) are considered as citizens' complaints (that is, within 30 or 45 days and with the possibility of refusing to enter the register).

2) An appeal against the failure to enter information about the crime into the register to an investigating judge delays the initiation of an investigation, which results in the loss of the ability to investigate the crime in hot pursuit. Complaints to the investigating judge, which must be considered within 72 hours, in practice are considered in weeks or months.

3) The general inactivity of investigators during the investigation, especially with regard to complex crimes (for example, email scraping or cyber attacks), non-execution of investigative actions (even interrogations of victims), neglect of the motive for committing crimes against journalists and consider them as ordinary offences, putting the burden of proof on victims, premature closure of criminal proceedings, and neglect of the duty to inform victims about that.

4) Poor coordination between district police departments. Different departments simultaneously investigate the same crimes, rather than merge these proceedings into one case.

15. To overcome these problems, it is necessary to continue reforming the law-enforcement system by creating special investigative units with specialized expertise, including specially trained officers in each police department, or ensuring that the General Prosecutor's Office exercises control over each investigation of a crime against journalists. We also consider that the law should provide for additional or aggravated penalties to be applicable to public officials who, by neglect, complicity or design, act in a way that prevents or obstructs the

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<sup>5</sup> According to the Detector Media, available at: <https://detector.media/community/article/137329/2018-05-08-yaki-zakonodavchi-zmini-potribni-ukraini-dlya-efektivnogo-zakhistu-prav-zhurnalistiv-dumka-ekspertiv/>

<sup>6</sup> According to the UNESCO Resolution 29 "Condemnation of violence against journalists", available at: [http://www.unesco.org/new/fileadmin/MULTIMEDIA/FIELD/Brussels/pdf/ipdc\\_resolution\\_29.pdf](http://www.unesco.org/new/fileadmin/MULTIMEDIA/FIELD/Brussels/pdf/ipdc_resolution_29.pdf)



investigation, prosecution or punishment of those responsible for crimes against journalists or other media actors on account of their work or contribution to public debate<sup>7</sup>.

16. Although the Government in their Action Plan state that the specific investigative recommendations have been developed, it must be noted that these recommendations only concern prosecutors. Specific protocols and methods of investigation must be developed for police officers<sup>8</sup> as the crimes against journalists are within their investigative jurisdiction. If such units were created, their special training on journalistic safety would be more meaningful rather than existing of the selective training system for a small number of law enforcers throughout Ukraine.

17. Particular emphasis should be placed on the lack of unequivocal political commitment to ensuring that journalists can carry out their work safely. In Ukraine, there are a number of websites that seem to carry out an information fight against terrorism. On 10 May 2016, "Peacemaker" website (founded by the Deputy Minister for Temporary Occupied Territories and Internally Displaced Persons in Ukraine Georgiy Tuka<sup>9</sup> and Advisor to the Minister of Internal Affairs of Ukraine, People's Deputy Anton Gerashchenko<sup>10</sup>) published the "List of Journalists Accredited by the "DPR" terrorist organization<sup>11</sup>". This list indicated the names, telephones, e-mails and the workplace of more than 4,000 journalists who had worked in uncontrolled territories in Donbas. On 7 December 2016, this web site has published an article "Once again on journawhores or what is the price of Homeland, media sluts?<sup>12</sup>", bringing out photos of the passports of three journalists who worked in uncontrolled territories, calling them terrorist accomplices, "media sluts", "journawhores", "trifling bodies and rotten souls".

18. The investigation in the case did not produce any results.

#### *Victim and public access to investigation*

19. In Ukraine, there is no system of informing the relatives of the deceased about the progress of the investigation<sup>13</sup>. The victim has access to the case files directly related to the criminal offense committed against him/her only after the completion of the pre-trial

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<sup>7</sup> See § 24 of the Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors, available at:

[https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016806415d9#\\_ftn1](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016806415d9#_ftn1)

<sup>8</sup> See § 12 of the Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors, cited above

<sup>9</sup> According to Georgiy Tuka's Facebook page and official web site, available at:

<https://www.facebook.com/george.tuka/posts/683067715140968?pnref=story>, <http://www.tuka.com.ua/proekt-mirotvoret/>

<sup>10</sup> According to Anton Gerashchenko's Facebook page, available at:

<https://www.facebook.com/anton.gerashchenko.7/posts/791235500963299>

<sup>11</sup> Available at <https://myrotvoretts.center/579804-spisok-zhurnalistov-akkreditovannyx-terroristicheskoy-organizacii-dnr/>

<sup>12</sup> Available at <https://psb-news.org/eshhe-raz-o-zhurnashlyuhah-ily-pochem-rodyna-medya-lyady/>

<sup>13</sup> An effective investigation requires that the deceased person's next-of-kin must be able to take an active part in it, not least by being granted prompt access to relevant evidential material and decisions (*Sergey Shevchenko v. Ukraine*, no. 32478/02, §§ 74-75, 4 April 2006)



investigation. Without seeing the materials during the investigation, victims are deprived of the opportunity to participate effectively in the investigation. It is necessary to amend the CPC in order to ensure the right of victims to familiarize themselves with the case materials prior to the completion of the investigation, except when such access is restricted by the investigator because of the secrecy of prosecution (with the possibility of appealing such decision of the investigator to the investigating judge).

20. In addition, there is no system of informing the public about the progress of the investigation. Even concerning the most resonant crimes, this information is closed due to the secrecy of prosecution. Information-gathering mechanisms, such as databases, should be established to inform the public of the main points of the investigation. Digital, physical and psychological safety of victims must be ensured in the course of monitoring and reporting process.

#### *Investigation of crimes against journalists committed in uncontrolled territories of Ukraine*

21. Ukrainian law enforcement agencies also are not showing initiative in investigating the crimes against journalists committed in uncontrolled areas. Investigations begin only after the victims' reports, although information about the offenses against them is in the media<sup>14</sup>. The same applies to "citizen journalists" who were released during the exchange of prisoners in the DPR for pro-Ukrainian publications on Twitter.

22. Even when the investigation is opened pursuant to the initiative of the victims, Ukraine does not cooperate with the law enforcement agencies of the Russian Federation within international cooperation for the detection of these crimes<sup>15</sup>.

### **3. Immediate protection remedies**

#### *Protection of journalists*

23. Ukraine is currently taking no steps to create an 'early warning and rapid response mechanism' at least for those who report on sensitive issues such as corruption and organized crime. This mechanism must be created in Ukraine to give journalists, other media actors, and victims immediate access to the authorities, and to protective measures. Such a mechanism should be able to provide protection, including emergency evacuations, safe havens, or relocation to safe parts of the country or other countries, and material measures of protection, including mobile telephones and bulletproof vests. It is also recommended to create hotlines or 24-hour emergency contact points for immediate assistance for individuals at risk and their families<sup>16</sup>. Information-gathering mechanisms, such as databases, should be established to permit the gathering of verified information about threats and attacks against journalists.

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<sup>14</sup> See the case of *Y.P.R. versus Ukraine and Russia* (20067/14), communicated to the Respondent Governments

<sup>15</sup> See the case of *Güzelyurtlu and Others v. Cyprus and Turkey*, no. 36925/07, § 291, 4 April 2017

<sup>16</sup> See §§ 8, 9 of the Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors, cited above



24. Ukrainian legislation on security measures does not operate on a rapid response basis. It only applies in cases where criminal proceedings are already open if the journalist is a victim, the applicant or another party to the proceedings. The process is quite lengthy and bureaucratic: 3 days to consider the application for protection (although it may also be immediate), then some time to prepare the decision on the application of security measures, the transmission of this decision to the body that directly applies these measures, and the organization of the protection activities themselves.

25. Where attacks have been committed, Ukrainian authorities should take steps to mitigate their impact, including by providing free medical care, psychological support and legal services<sup>17</sup>. Families of journalists who have been killed must receive financial support, education grants, and medical and psychological treatment. Currently in Ukraine such measures are not in place.

#### *Protection of whistle-blowers*

26. Also, there is no legislation that would protect whistle-blowers who inform the media and the public about serious abuses of power, criminality or wrongdoing from prosecution, loss of employment or other reprisals. The Law of Ukraine "On Access to Public Information" protects only state officials, but not ordinary citizens. But even these norms are declarative. An example is the criminal prosecution of the former official of the General Prosecutor's Office of Ukraine, Dmytro Sus, after his public and detailed claims about corruption in the Prosecutor's Office<sup>18</sup>.

27. In 2016, a large-scale bill 4038a, which protected whistle-blowers, reporting about corruption, was developed, but its consideration was not completed with adoption. In Ukraine, journalistic investigations, methods for obtaining information and opportunities for its coverage, and the safety of journalists in connection with such activities are also not regulated.

28. The solution of the problem could be the creation of a separate independent state institution - the Information Commissioner, who will deal with the implementation of the rights to access to public information, the protection of personal data and provide the pre-trial protection of the whistle-blowers.

#### **4. Teaching and awareness campaigns**

29. Insufficient attention is paid to initiatives dealing with issues of freedom of expression and the safety of journalists. It is necessary to intensify efforts to raise public awareness, to

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<sup>17</sup> See § 23 of the Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors, cited above

<sup>18</sup> According to Slovo i Dilo mass media, available at

<https://www.slovoidilo.ua/2018/07/18/novyna/polityka/sap-zachytala-obvynuvalnyj-akt-shhodo-eks-slidchoho-hpu-susa>

hold awareness-raising activities so that citizens understand the importance of the right to freedom of expression and access to information.

30. The state also does not pay attention to training journalists on their own and online security, as well as their access to physical protection means.

31. Instead of conducting isolated trainings of law-enforcement officers, it is recommended to carry out systematic training of judiciary, prosecutors and investigators regarding their obligations under international human rights law and international humanitarian law, with a focus on the safety of journalists.

### Recommendations

1. Adopt a broad notion of media which encompasses all actors involved in the production and dissemination, to potentially large numbers of people, of content designed to facilitate interactive mass communication (for example social networks).

2. Abolish statute of limitations for crimes committed to prevent the exercise of freedom of information and expression.

3. Create special investigative units with specialized expertise/include specially trained officers in each police department/ensure that the General Prosecutor's Office exercises control over each investigation of a crime against journalists. Develop specific protocols and methods of investigation for police officers who investigate crimes against journalists.

4. Ensure the right of victims to familiarize themselves with the case materials prior to the completion of the investigation, except when such access is restricted by the investigator because of the secrecy of prosecution (with the possibility of appealing such decision of the investigator to the investigating judge).

5. Create emergency protection remedies, including emergency evacuations, safe havens or relocation or victims, hotlines or 24-hour emergency contact points for immediate assistance for individuals at risk and their families.

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