



July 2015

## ARTICLE 19 Response to the Special Rapporteur Consultation on Protection of Journalists' Sources and Whistleblowers

### I. Introduction

This submission is made on behalf of ARTICLE 19, the global campaign for freedom of expression and information. ARTICLE 19 is a human rights charity established in 1987. Its mission is "to promote, protect, develop and fulfil freedom of expression and the free flow of information and ideas in order to strengthen global social justice and empower people to make autonomous choices." Its global headquarters is in London, UK, and it has regional offices in Bangladesh, Brazil, Kenya, Mexico, Myanmar, Senegal and Tunisia.

ARTICLE 19 welcomes the opportunity to provide comments to this consultation. Both of the issues are extensive, so this response is limited to key areas where ARTICLE 19 believes that there is a need for more consideration. For both issues, ARTICLE 19 believes that the most fundamental element is the importance of ensuring that the public has access to information that is of public interest.

### II. The Importance of Protection of Journalists' Sources

ARTICLE 19 believes that the protection of journalists' sources is an essential element of freedom of expression. The media routinely depend on contacts for the supply of information on issues of public interest. Individuals sometimes come forward with secret or sensitive information, relying upon the reporter to convey it to a wide audience in order to stimulate public debate. In many instances, anonymity is the precondition upon which the information is conveyed from the source to the journalist; this may be motivated by fear of repercussions which might adversely affect the source's physical safety or job security. Journalists would never be able to gain access to places and situations where they can report on matters of general concern if they cannot give a strong and genuine undertaking of confidentiality. If they cannot promise sources anonymity, then they often cannot report at all. When sources are unsure whether they will be protected, they keep silent and the public loses its access to critical information.

The reasons have been well articulated by UK Justice Denning, who stated that:

[I]f [newspapers] were compelled to disclose their sources, they would soon be bereft of information which they ought to have. Their sources would dry up. Wrongdoing would not be disclosed. Charlatans could not be exposed. Unfairness would go unremedied. Misdeeds in the corridors of power, in companies or in government departments would never be known.<sup>1</sup>

The principle has also been repeatedly recognised by the European Court of Human Rights ('ECtHR').<sup>2</sup> The Grand Chamber of the ECtHR reiterated in the *Sanoma* case that:

<sup>1</sup> *British Steel Corp v Granada Television Ltd*, [1981] 1 All ER 417. (Lord Denning).

<sup>2</sup> For a complete list, see ECHR, Factsheet - Protection of journalistic sources.

[http://www.echr.coe.int/Documents/FS\\_Journalistic\\_sources\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Journalistic_sources_ENG.pdf)

The right of journalists to protect their sources is part of the freedom to “receive and impart information and ideas without interference by public authorities” protected by Article 10 of the [European Convention on Human Rights] and serves as one of its important safeguards. It is a cornerstone of freedom of the press, without which sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information to the public may be adversely affected.<sup>3</sup>

A clear indicator of the recognition of the importance of this right is that over 100 countries around the world have adopted laws on source protection.<sup>4</sup> However, these vary widely in the scope and strength of their protections, thus there is a need to better elaborate international standards which countries should meet in their obligations under the International Covenant on Civil and Political Rights (ICCPR).

Below, ARTICLE 19 sets out a few of the key issues which we believe should be considered when developing these standards, followed by a summary of principles which should be adopted.

## **1. Defining Journalism in the Modern World**

The starting point for the discussion of the protection of journalistic sources is to determine whom should be protected. As stated in our opening section, ARTICLE 19 believes that the fundamental issue is ensuring that information of public interest is widely available. Thus, the definition of who is a journalist needs to be considered in this context. We believe that in the modern world, defining journalism in the context of protecting sources must include the broad array of individuals and organisations who are providing information to the public.

The definition of what constitutes is a journalist is not a new issue. In the past, laws on protection of journalists’ sources were drafted so that they only protected journalists in contemporary media forms, and did not apply to journalists using media which emerged later. In the US, over the past 100 years, at the state level, wire reporters were not considered press and protected in the same way as newspaper reporters; later, television journalists did not receive protections given to radio reporters.

This problem continues to the current day where digital media is currently not protected by laws in many jurisdictions. The courts in many of these jurisdictions have either found that the protections do not apply or have been forced to read beyond the text of legislation or constitutional provisions to find the protections.

For example, the Irish High Court recently recognized that bloggers have the right to protect their sources.<sup>5</sup> The court considered that ‘A person who blogs on an internet site can just as readily constitute an “organ of public opinion” as those which were more familiar in 1937’. The court found that there was a high constitutional value in ensuring the blogger’s right to contribute to public discourse, and that being compelled to reveal his sources would compromise the ‘right to educate (and influence) public opinion, [which] is at the very heart of the rightful liberty of expression.’

Other journalists who should clearly be protected have, however, been deemed *not* to be covered by the laws granting this right. In New Zealand in 2014, writer David Fisher, a regular reporter for the *New Zealand Herald*, was ordered by a judge to provide the interview notes and recordings for his book, *The Secret Life of Kim Dotcom: Spies, Lies and the War for the Internet*, after the High Court ruled that the writing of his book was not a news activity and that the independent publishing company which was publishing the book did not constitute a news medium.<sup>6</sup>

In another case, investigative journalist Nicky Hagar’s house was searched and materials seized to identify the source who had provided him with allegedly hacked emails for his book *Dirty Politics*. In the affidavit

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<sup>3</sup>See *Sanoma v Uitgevers B.V. v the Netherlands*, [GC], no. 38224/03, para. 50, 14 September 2010, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100448>

<sup>4</sup> See Banisar, David, *Silencing Sources: An International Survey of Protections and Threats to Journalists’ Sources* (November 8, 2007). Privacy International Global Survey Series. Available at SSRN: <http://ssrn.com/abstract=1706688>

<sup>5</sup>*Cornec v Morrice&Ors* [2012] IEHC 376 (18 September 2012), available at: <http://www.bailii.org/ie/cases/IEHC/2012/H376.html>

<sup>6</sup> *DOTCOM v ATTORNEY-GENERAL* [2014] NZHC 1343 [16 June 2014], pp 60-70. <https://zen.nzherald.co.nz/media/webcontent/document/pdf/201425/CIV2013-404-2168%2016-06-2014.pdf>

requesting the search, police had identified him as a “political writer” and underplayed the importance of protecting his sources.

The protections should also extend to non-traditional organisations such as civil society organisations. Often they produce material which is in some form journalistic, without being explicitly described as such. Recently, the UK Information Commissioner’s office ruled that the NGO Global Witness qualified for the journalistic exemption to the Data Protection Act, and thus they did not have to provide their research materials and sources. In determining this case, the ICO set out a four part test:

1. Whether the personal data is processed only for journalism, art or literature,
2. Whether that processing is taking place with a view to publication of some material,
3. Whether the data controller has a reasonable belief that publication is in the public interest, and
4. Whether the data controller has a reasonable belief that compliance is incompatible with journalism.<sup>7</sup>

#### *Current International Standards for Defining Journalists*

At the international level, there is currently no consensus around a definition of 'journalism' or what constitutes 'media' in the digital age. Nonetheless, the UN Human Rights Committee in General Comment 34 and the Council of Europe have provided tentative responses to these questions. In particular, they recognise the important role that citizen journalists and social media users play in the gathering and dissemination of information. Most significantly, they have proposed a *functional* definition of journalism, which encompasses these new media actors, provided they fulfil certain criteria.

The Committee of Ministers of the Council of Europe (COE) has adopted a broad definition of the term 'journalist'. In Recommendation No. R (2000)7, the Committee said:

The term “journalist” means any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication.<sup>8</sup>

The Committee of Ministers confirmed this approach in its Recommendation CM/Rec (2011)7 on a new notion of 'media'. In that Recommendation, the Committee of Ministers called on member states to:<sup>9</sup>

- 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 (for example information, analysis, comment, opinion, education, culture, art and entertainment in text, audio, visual, audiovisual or other form) and applications which are designed to facilitate interactive mass communication (for example social networks) or other content-based large-scale interactive experiences (for example online games), while retaining (in all these cases) editorial control or oversight of the contents;
- review regulatory needs in respect of all actors delivering services or products in the media ecosystem so as to guarantee people’s right to seek, receive and impart information in accordance with Article 10 of the European Convention on Human Rights, and to extend to those actors relevant safeguards against interference that might otherwise have an adverse effect on Article 10 rights, including as regards situations which risk leading to undue self-restraint or self-censorship

The Committee of Ministers also set out a number of criteria that should be taken into account when trying to determine whether a particular activity or actors should be considered as media, namely: (i) intent to act as media; (ii) purpose and underlying objectives of media; (iii) editorial control; (iv) professional standards; (v) outreach and dissemination; and (vi) public expectation.

In addition, the Committee provided a set of indicators for determining whether a particular criterion is fulfilled. For example, a particular organisation or individual engaged in the dissemination of information will fully meet the public expectation criterion if it is available, reliable, provides content that is diverse

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<sup>7</sup> Letter from ICO to Global Witness, 15 December 2014. Available at [https://www.globalwitness.org/sites/default/files/141215%20letter%20from%20ICO%20to%20GW%20\(2\)%20\(1\).pdf](https://www.globalwitness.org/sites/default/files/141215%20letter%20from%20ICO%20to%20GW%20(2)%20(1).pdf)

<sup>8</sup> Recommendation No. R (2000)7 of the Committee of Ministers to Member States on the right of journalists not to disclose their sources of information, adopted 8 March 2000.

<sup>9</sup> The Recommendation is available here: <https://wcd.coe.int/ViewDoc.jsp?id=1835645&Site=COE>

and respects the value of pluralism, respects professional and ethical standards, and is accountable and transparent. At the same time, the Council of Ministers highlighted that each of the criterion should be applied flexibly.

The Committee also said that social media publishers such as bloggers should only be considered media if they meet certain professional standards criteria to a sufficient degree.<sup>10</sup> In ARTICLE 19's view, this criterion is both unhelpful and unnecessary: while professed adherence to a set of professional standards may be a helpful indicator of whether an individual is engaged in media activity, it should not be regarded as a necessary condition. Disseminating information in the public interest is not something that should require membership of a professional body, or adherence to an established code of conduct.

## **2. Defining Interests to be Protected in Laws**

There are three distinct interests which have been classified as relating to the information to be protected in source legislation, in various laws and court cases: (a) materials relating to the source of information or that could identify them; (b) unpublished journalistic material; and (c) the obligation of journalists to testify or give evidence relating to their professional activities. The latter two interests have traditionally received less attention and less protection than the first. ARTICLE 19 believes that all three should be recognised in any system of source protection.

### **a. Identification of sources**

The primary, and most common issue, is the disclosure of the identity of a source of information. The protection applies both against being forced to identify the person, and against being compelled to provide information or materials which could lead to their identification. This should be considered broadly, and as applicable to any person who has given over information and reasonably believes that their identity should be protected.

The protection of identity should also be considered broadly to include those who have assisted the journalist. In 2009, the Special Court for Sierra Leone, set up jointly by the United Nations and the government of Sierra Leone, ruled that the right protected all persons who help the journalist in the news gathering capacities. The Chamber cited decisions of the ECtHR in finding that the failure of protect sources would have the result that "sources may be deterred from assisting the press and informing the public on matters of interest":

The extension of privilege to journalistic sources stems from the right to freedom of expression and serves to protect the freedom of the press and the public interest in the free flow of information. [...] Further, both a "facilitator" and a "source" may run similar risks to personal safety and/or face other reprisals as a result of their willingness to assist a journalist in his or her reporting. This is especially true in situations of conflict, where tensions are heightened, where the threat of violence may be imminent and where "accurate information is often difficult to obtain and may be difficult to distribute or disseminate as well." Similarly, a journalist reporting from a conflict zone who is forced to testify as to his or her sources may put his or her own life at risk by shifting from the role of an observer of those committing human rights violations to being their target.[...] The Trial Chamber therefore finds that the unnamed persons are journalistic "sources" as they are persons who provided assistance or the conditions for a newsgathering function to be carried out and that the Witness has journalist privilege in relation to their names.

The Trial Chamber is of the view that no less restrictive measures would properly satisfy journalistic privilege protection. As outlined above, the underlying rationale behind the journalistic privilege is to ensure freedom of expression and the public interest in the free flow of information. The question, therefore, is not only a matter of whether the persons the Witness refuses to name would be exposed to any real danger by being named in Court, which, as argued by the Defence, might adequately be compensated for by eliciting the information in closed or private session." Rather, the anonymity of the Witness's sources is essential to ensure that the newsgathering function of journalists, especially in situations of conflict, is not threatened. This necessarily requires that, in

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<sup>10</sup>The Committee said 'As regards in particular new media, codes of conduct or ethical standards for bloggers have already been accepted by at least part of the online journalism community. Nonetheless, bloggers should only be considered media if they fulfill the criteria to a sufficient degree' in Recommendation CM/Rec (2011)7 on a new notion of 'media' cited above at n 21, para. 41.

the absence of an overriding interest to the contrary, journalistic sources remain confidential to all other parties except the journalist.<sup>11</sup>

## **b. Provision of materials**

Another area which is typically found under the typology of source protection is the protection of journalists from having to hand over their research and investigative materials, which are as yet unpublished, to authorities and law enforcement. The need to protect this information relates to the core value of free expression and the media: the need to be free from interference when investigating and developing content and stories to be published in the future. If this information is made available to authorities or others before the journalist has time to develop, finalise, or publish, the subject of the media item can take measures to hide or obfuscate their actions cover up, by hiding or destroying evidence, moving possible sources and witnesses to remote locations, or developing new materials.

As noted by the ECtHR in the *Nagla v Latvia* case, “the compulsory handover of his research material that was susceptible of having a chilling effect on the exercise of journalistic freedom of expression.”<sup>12</sup>

For this content to be handed over, it would be necessary to show that it was necessary and proportionate under the traditional three part test in international law.

## **c. Requiring journalists to testify about their observations**

A third area of interest under source protection is authorities or other bodies requiring journalists to testify before a court as to what they personally saw or did. This is to protect the journalist from becoming a tool of the investigative arm of the state or other powerful entity which will result in fewer people being willing to speak forthrightly to journalists, or in some cases may even place sources or journalists in danger.

In 2007, the OSCE Representative on Freedom of the Media released a study of States’ recognition of sources protection: the survey found that the protection of sources was generally recognized in OSCE countries.<sup>13</sup> The study recommended that national laws should ensure that:

Journalists should not be required to testify in criminal or civil trials or provide information as a witness unless the need is absolutely essential, the information is not available from any other means and there is no likelihood that doing so would endanger future health or well being of the journalist or restrict their or others ability to obtain information from similar sources in the future.<sup>14</sup>

This is especially important in conflict situations. The United Nations International Criminal Tribunal for Yugoslavia (ICTY) ruled in 2004 that war correspondents have a qualified privilege to not testify because of the potential threats to physical safety if they are perceived to be future witnesses in war crimes trials:

[I]n order to do their jobs effectively, war correspondents must be perceived as independent observers rather than as potential witnesses for the Prosecution. Otherwise, they may face more frequent and grievous threats to their safety and to the safety of their sources [...] What really matters is the perception that war correspondents can be forced to become witnesses against their interviewees. Indeed, the legal differences between confidential sources and other forms of evidence are likely to be lost on the average person in a war zone who must decide whether to trust a war correspondent with information. [...] If war correspondents were to be perceived as potential witnesses for the Prosecution [...] war correspondents may shift from being observers of those committing human rights violations to being their targets, thereby putting their own lives at risk.<sup>15</sup>

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<sup>11</sup> Prosecutor v. Taylor, Case No. SCSL-03-1-T, Decision on the Defence Motion for the Disclosure of the Identity of a Confidential ‘Source’ Raised During Cross-Examination of TF1-355 (Mar. 6, 2009).

<sup>12</sup> *Nagla v Latvia*, Application no. 73469/10, 16 July 2013.

<sup>13</sup> Organization for Security and Co-operation in Europe, The Representative on Freedom of the Media, Access to information by the media in the OSCE region: trends and recommendations, Summary of preliminary results of the survey, 30 April 2007.

<sup>14</sup> See Organization for Security and Co-operation in Europe, Representative on Freedom of the Media, Access to information by the media in the OSCE region: trends and recommendations. Summary of preliminary results of the survey, 30 April 2007.

<sup>15</sup> Prosecutor v Radoslav Brdjanin and Momir Talic, Case IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 Dec 2002.

The Council of Europe, Committee of Ministers issued “Guidelines on protecting freedom of expression and information in times of crisis” in 2007, which recommended that:

With a view, *inter alia*, to ensuring their safety, media professionals should not be required by law-enforcement agencies to hand over information or material (for example, notes, photographs, audio and video recordings) gathered in the context of covering crisis situations nor should such material be liable to seizure for use in legal proceedings.<sup>16</sup>

### **3. Techniques to bypass Protection of Sources**

Another area which needs additional clarification relates to measures often taken by governments to bypass traditional protections afforded to journalistic sources. Instead of directly demanding that journalists identify their sources, criminal or national security measures are employed, including secret surveillance and searches of homes and offices, often to bypass likely controversial or embarrassing public court hearings.

ARTICLE 19 believes that these measures should be prohibited, except in the most extraordinary circumstances.

#### **a. Surveillance**

The use of surveillance to identify sources is of particular concern given the rapid adoption of modern communication technologies in the past 10 years. Each person now leaves an extensive digital footprint through mobile phone and internet use which reveals important information about the persons transactions.

The use of communications surveillance to bypass normal safeguards when information is sought from the media is particularly problematic. The secretive nature of the measures do not allow for legal challenges prior to the actions and delayed notice at best. These measures are typically authorised by criminal or national security laws which do not adequately consider freedom of expression. Further, as described below, they are frequently used by authorities to identify sources of routine stories of public interest, rather than in the limited and extraordinary circumstances that might justify them under international standards.

The Committee of Ministers of the COE in 2014 reiterated the need to prevent surveillance of journalists:

Surveillance of journalists and other media actors, and the tracking of their online activities, can endanger the legitimate exercise of freedom of expression if carried out without the necessary safeguards and can even threaten the safety of the persons concerned. It can also undermine the protection of journalists’ sources.<sup>17</sup>

In the recent *Telegraaf Media Nederland* case of the ECtHR, the Court ruled that there need to be adequate safeguards, and that *post facto* review is not sufficient. The Court noted:

Especially where, as here, a power of the executive is exercised in secret, the risks of arbitrariness are evident. Since the implementation in practice of measures of secret surveillance is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.<sup>18</sup>

This has also been recognized in many national laws and court decisions.

In Italy, the Supreme High Court ruled in 2004 that the protection of sources should be evaluated broadly, and should include telephone logs of journalists:

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<sup>16</sup> Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis. Adopted by the Committee of Ministers on 26 September 2007 at the 1005th meeting of the Ministers’ Deputies.

<sup>17</sup> Declaration of the Committee of Ministers on the protection of journalism and safety of journalists and other media actors, Adopted by the Committee of Ministers on 30 April 2014 at the 1198th meeting of the Ministers’ Deputies

<sup>18</sup> *Telegraaf v Netherlands*, Application no. 39315/06, 22 November 2012.

“the protection is to be interpreted as necessarily extended to all the information that may lead to the identification of those who have provided the confidential information. Therefore, the disclosure of the telephone numbers held by the journalist at the time he received the confidential information is also covered by the professional secret, because it is openly instrumental to the identification of those who have provided the above information...”<sup>19</sup>

In Slovenia, the Supreme Court ruled in 2007 that access to journalist's phone records violated their fundamental right:

Keeping the journalist's source of information confidential is one of the foundations of free journalism and of the press. Their ability to provide important and reliable information to the public would be diminished due to the “chilling effect”, if no regard would be paid to the need to keep the source of information confidential. Journalism's role of being the watch dog of democracy would be jeopardized. Only if the public interest in the media freedom is outweighed by other public interests can an interference be justified. However, any restrictions on the right of a journalist to keep his source of information confidential must be subjected to strict and precise judicial control. Identification of source of information, with the use of external and internal calls, has without doubt blocked the prosecutor's as well as the journalist's future research. With the probability or even the possibility that the source of information will be identified, no one will wish to deliver any information over the phone. This represents a threat to journalist's professional integrity and effectiveness. Investigative journalism covering politics would be especially affected.<sup>20</sup>

In the UK, it has been revealed that police used the Regulation of Investigatory Powers Act 2001 (RIPA) to obtain the phone records of reporters to identify sources in dozens of cases. In many cases, the demands were not linked to criminal cases but merely used to identify who had given information to the journalists. At the end of 2014, the UK Interception of Communications Commissioner's Office launched an inquiry in response to serious concerns being raised in the media about the protection of journalistic sources, and the allegations that the police had misused their powers under the RIPA to acquire communications data.<sup>21</sup>

The Interception Commissioner found that in the 3 year period covered by the inquiry 19 police forces reported undertaking 34 investigations which sought communications data in relation to suspected illicit relationships between public officials (sources) and journalists.<sup>22</sup> The 34 investigations concerned relationships between 105 journalists and 242 sources. 608 applications were authorised to seek this communications data.<sup>23</sup> While the Interception Commissioner concluded that police forces had not circumvented other legislation by relying on RIPA, he found that the legal framework and practice lacked sufficient procedural safeguards.<sup>24</sup> Accordingly, he recommended that access to communications data for the purpose of identifying journalistic sources should be authorised by a judge and that more specific guidance be issued.<sup>25</sup> In March 2015, the UK government adopted the Interception Commissioners' recommendations in the Acquisition and Disclosure of Communications Data Code of Practice 2015, pending new legislation in this area.<sup>26</sup> However, in July 2015, the UK Interception Commissioner revealed that two police forces had bypassed judicial review to obtain phone records.<sup>27</sup>

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<sup>19</sup> Moretti Paolo v. Sentence of Court of Como of 22 November 2002, No. 2054; Decision of the Supreme High Court (“Corte Suprema di Cassazione”) – Sixth Criminal Chamber, 21 January 2004, No. 85.

<sup>20</sup> Ranc v. Ministry of Internal Affairs, Sklep in sodba II Ips 473/2005 in II Ips 474/2005, 10.10.2007

<sup>21</sup> <http://www.iocco-uk.info/docs/IOCCO%20Communications%20Data%20Journalist%20Inquiry%20Report%20Feb15.pdf>

<sup>22</sup> Ibid. See also <http://www.iocco-uk.info/docs/IOCCO%20Report%20March%202015%20%28Web%29.pdf>

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/426248/Acquisition\\_and\\_Disclosure\\_of\\_Communications\\_Data\\_Code\\_of\\_Practice\\_March\\_2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/426248/Acquisition_and_Disclosure_of_Communications_Data_Code_of_Practice_March_2015.pdf)

<sup>27</sup> Two police forces breached code on protection of journalists' sources, The Guardian, 16 July 2015.

## b. Searches of Media Organisations and Private Homes of Journalists

In many jurisdictions, the courts have found a right against searches to be inherent in the protection of freedom of expression. The most significant of these are two decisions of the ECtHR. The ECtHR has been extremely concerned about the effect of searches on the right to freedom of expression. In a 2003 case regarding Luxembourg, the Court stated:

The Court considers that, even if unproductive, a search conducted with a view to uncover a journalist's source is a more drastic measure than an order to divulge the source's identity. This is because investigators who raid a journalist's workplace unannounced and armed with search warrants have very wide investigative powers, as, by definition, they have access to all the documentation held by the journalist. The Court reiterates that "limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court" [...] It thus considers that the searches of the first applicant's home and workplace undermined the protection of sources to an even greater extent than the measures in issue in *Goodwin*.<sup>28</sup>

More recently, the ECtHR found that a search of a journalist's house, and seizure of electronic materials was a serious violation of Article 10 ECHR:

The Court considers that any search involving the seizure of data storage devices such as laptops, external hard drives, memory cards and flash drives belonging to a journalist raises a question of the journalist's freedom of expression including source protection and that the access to the information contained therein must be protected by sufficient and adequate safeguards against abuse.

In Canada, the Supreme Court has set out nine criteria which must be followed in authorising the search of a newspaper office or other media organisation.<sup>29</sup> Factors which must be considered include "ensur[ing] that a delicate balance is struck between the competing interests of the state in the investigation and prosecution of crimes and the right to privacy of the media in the course of their news gathering and news dissemination"; whether alternative sources have been considered; whether the materials have already been published; and limits on searches and post-search determination on whether the material was found and if the search was conducted reasonably.

In Germany in 2007, the Constitutional Court ruled that searches of newsrooms in investigations of state secrets cases impaired the right of freedom of the press under the Basic Law (constitution) and were "constitutionally inadmissible" in preliminary investigations.<sup>30</sup>

Surprisingly, there remain problems in many countries regarding searches of journalists and newsrooms, and the identification of sources. Renowned New Zealand investigative journalist Nicky Hagar is currently taking legal action against the police, after his house was raided, and vast amounts of his research materials seized to identify the sources to his book *Dirty Politics*. The police also confiscated a large amount of his research material *not* related to the book, with identified sources for other investigations. In addition, it was revealed in the court hearing that police had obtained personal information about Mr Hagar from various companies including airlines and other service providers.

### *Border Searches*

In addition, there is a growing concern about journalists being stopped arbitrarily at borders in order to seize their materials. Many countries consider borders to be zones where traditional constitutional and human rights do not apply, and use this to justify actions that they could not justify elsewhere.

In the UK, David Miranda, the partner of journalist Glen Greenwald, was detained at Heathrow Airport under the Terrorism Act 2000 while in transit from Berlin to Brazil. He was carrying material from journalist Laura Poitras to Greenwald for *the Guardian* which was seized. The High Court ruled in 2014 that the detention and seizure were legal as there was a pressing need and that the materials were not journalistic but merely stolen "raw" materials from whistleblower Edward Snowden not subject to freedom

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<sup>28</sup> *Roemen and Schmit v. Luxembourg* (51772/99) [2003] ECHR 102 (25 February 2003).

<sup>29</sup> *Canadian Broadcasting Corp. v. Lessard*, [1991] 3 S.C.R. 000; *Canadian Broadcasting Corp. v New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459, 1991.

<sup>30</sup> 1 BvR 538/06; 1 BvR 2045/06 – *Cicero*, 27 February 2007.



of expression protections.<sup>31</sup> The case is now being appealed to the Court of Appeal. More recently, Poitras has filed suit against the US Department of Homeland Security to obtain files under the Freedom of Information Act related to the numerous times she has been searched and questioned when entering the US. Many other reporters and activists involved with Wikileaks, or supporters of Chelsea Manning, have reported similar problems.<sup>32</sup> The ECtHR is currently considering a case against Russia for the seizure of materials from a photojournalist.<sup>33</sup>

#### **4. Recommendations for Guidelines on Source Protection**

ARTICLE 19 believes each nation should adopt an explicit and comprehensive law on protection of journalists' sources to ensure these rights are recognized and adequately protected. The following principles, which are based on international law and best practices should be the basis for these laws:

- The protections should apply to all persons involved in a process carried out with the intent of providing information to the public, including editors, commentators, freelance, part-time and new authors. It should apply regardless of the format or medium including print, broadcast, electronic, Internet, and books. The protections should also apply to all those with a professional relationship to journalists including media companies and organizations, editors, printers, distributors, couriers, and telecommunications providers.
- Journalists should not be required to disclose the identity of sources, unpublished materials, notes, documents or other materials that might reveal information about their sources or journalistic processes.
- Any demand to obtain protected information should be strictly limited to the most serious criminal cases. A request to obtain the information should only be approved by an independent judge in an open hearing and subject to appeal to an impartial judicial body. Disclosure should only be allowed if the government proves to the court's satisfaction that the following criteria are met:
  - o The information is necessary to prevent imminent serious bodily harm, or to prove the innocence of a party. The investigation should never regard merely the disclosure of information to the journalist;
  - o The information is absolutely necessary for a central issue in the case, relating to guilt or innocence, and the request for such information is limited in scope;
  - o The information is unavailable by other means, where gaining access has already been tried by the relevant authorities, and they must prove that they have exhausted all other possible means of obtaining the information;
  - o The request is made by the primary party to the case; and
  - o The judge finds that public interest in the disclosure of the source far outweighs the public interest in the free flow of information.
- Searches of a journalist's office or home should not be used to bypass protection of sources rules. Such searches should be presumed to be invalid.
- Wiretapping, or other types of surveillance or data-collection from third parties, should not be used to bypass source protections. Governments should refrain from enacting laws, and/or repeal existing ones, that require routine collection or bulk monitoring of telecommunications information that might infringe journalists' right to protect sources.
- In cases involving libel or defamation, refusal to disclose a source should not limit the right of the defence to introduce evidence or affect presumptions of liability.

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<sup>31</sup> David Miranda v. Secretary of State for the Home Department & Others, [2014] EWHC 255. <http://www.bailii.org/ew/cases/EWHC/Admin/2014/255.html>

<sup>32</sup> *New York Times reporters sue DHS*, Politico, December 9, 2013; See also *The Border Is a Back Door for U.S. Device Searches*, NYT, Sept. 9, 2013.

<sup>33</sup> Ivashchenko against Russia, Application no. 61064/10

- Journalists should not be required to testify or provide information as a witness in any proceeding unless a court find that the criteria above have been met and there is no likelihood that doing so would endanger the health or well-being of the journalist or restrict their ability, or that of others, to obtain information from similar sources in the future.
- Sanctions and damages should be available in any case where the protection of journalistic sources has been violated. Any materials or testimony obtained in violation of these principles should not be admissible as evidence in any proceeding.
- Criminal and Civil Code prohibitions on disclosure of secret or confidential information should only apply to officials and others who have a specific legal duty to maintain confidentiality. Those outside government, including the media and civil society organizations, who receive or publish secret or confidential information should not be subject to criminal or civil sanctions. Criminal cases should not be instigated as a pretext to discover sources.

### **III. Protection of Whistleblowers**

As a human rights organisation with a mandate to protect freedom of expression, ARTICLE 19 believes that whistleblowing is an essential element of free expression and right to information. We are frequently asked to comment on new draft laws, especially those relating to the right to information, where there are protections included for whistleblowers. We have included whistleblowing in a number of our longstanding standard setting documents on the right to information, including the Johannesburg Principles on National Security, Freedom of Expression and Access to Information (1995) and The Public's Right to Know: Principles on Freedom of Information Legislation (1999).

To date, few countries have adopted comprehensive whistleblower protections. More countries have sectoral laws relating to anti-corruption, public and private employment, and the environment, but these only provide patchwork protections. There is a compelling need for international standards which countries can use as a framework for adopting protections.

#### **1. Definitions**

In ARTICLE 19's view, a whistleblower is an individual who has inside knowledge about the activities of an organisation and makes a conscious and voluntary decision to reveal the existence of an activity which is unlawful, unethical, dangerous, improper, incompetent, or otherwise in the public interest to know.

The categories of persons to be protected should be considered broadly, including the following: employee, contractor, consultant, intern, student, volunteer, and job applicant. It should also include those with a close relationship to the relevant individual, such as family members and those in a relationship with them, so that they are not sanctioned by proxy.

The disclosure can be to someone superior to them in the organisation (their direct boss, a higher-up superior, a member of the board), to an external oversight body or others tasked with overseeing the body (a regulatory body, a parliamentary committee, the police or a prosecutor) or publicly either directly or to a watchdog organisation or the media.

It is important to underscore that there are significant distinctions between those who can be identified as whistleblowers, journalists' sources and further witnesses. Often, these categories are mistakenly conflated by both policy makers and the media. This can lead to serious consequences for the protections that each of them receive, as well as for the public recognition that further protections are needed. This is especially problematic where witness protection is confused with protection of whistleblowers. In some cases, there can be overlap, where a person is in two of the categories, but in practice it is usually a case of being mistakenly identified as a whistleblower.

We do not believe that a new term needs to be created to identify the process. We note that the term whistleblower itself was popularized by US consumer activist Ralph Nader in 1971 to avoid the negative connotations in already existing terms like "informer".

## **2. Sanctions Against those reprimanding Whistleblowers**

In addition to protections afforded the whistleblower, it is necessary to ensure that there is a system of sanctions against those who punish or cause detriment to whistleblowers. This is important both as a deterrent and as an enforcement measure. The sanctions should be sufficiently severe to set a deterrent.

We believe that they sanctions should be based on the presumption that imposing any negative consequences of any form against a whistleblower, should be considered a *per se* violations, in the absence of compelling evidence to the contrary.

## **3. Problems with “Good Faith”**

ARTICLE 19 believes that the focus of a consideration of whistleblowing protections should be on the importance of the information for the public interest rather than on the reasons that the information. We believe that showing “good faith” should not be a requirement for protection. This is a negative and dangerous concept which in many cases deters whistleblowers from revealing important information. The motivations for becoming a whistleblower are often complex, and if concerns have been ignored, can easily be mistaken for personal, rather than public interest. As noted by the ECtHR in the *Telegraaf Media Nederland* case relating to sources:

While it may be true that the public perception of the principle of non-disclosure of sources would suffer no real damage where it was overridden in circumstances where a source was clearly acting in bad faith with a harmful purpose (for example, by intentionally fabricating false information), courts should be slow to assume, in the absence of compelling evidence, that these factors are present in any particular case. In any event, given the multiple interests in play, the Court emphasises that the conduct of the source can never be decisive in determining whether a disclosure order ought to be made but will merely operate as one, albeit important, factor to be taken into consideration in carrying out the balancing exercise required under Article 10 § 2.<sup>34</sup>

## **4. National Security**

A difficult area which has not been well addressed is the issue of whistleblowing relating to national security. The Manning and Snowden releases are illustrative of the serious challenges both in the information about abuses which are withheld from the public as well as the problems that whistleblowers face when they release the information. As the ECtHR in the *Guja* and *Burcur* cases found, even in national security cases, the public interest in the information must be considered.

Unfortunately, most laws regarding whistleblowers fail to adequately deal with this area, by ignoring it or by setting special, weaker procedures. As noted in an earlier section, many countries have laws on official secrets that provide a significant barrier to whistleblowing and its protection.

Bodies involved in protecting national security are often complicit in abuses associated with excessive secrecy and lack of external oversight. Former Kenyan Anti-Corruption Commissioner John Githongo noted, “The most serious corruption taking place in many African countries is taking place under the shroud of what they call national security [...] As corruption has slowly been removed from public procurement processes - for example roads and large infrastructure projects - the last little hole where corruption is hiding is in the area of so called “national security”, which means that any whistle blower who causes malfeasance in that area can be very easily charged with treason.”<sup>35</sup>

In the UK, the Public Interest Disclosures Act (PIDA) does not apply to disclosures that violate the Official Secrets Act (OSA). In 2002, the House of Lords ruled that there is no public interest test in the OSA;<sup>36</sup> the Act has been used in a number of recent cases against whistleblowers who disclosed material of public interest to the media. The UN Human Rights Commission has called on the UK to allow for whistleblowers to release information of “genuine public concern.”<sup>37</sup>

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<sup>34</sup> *Telegraaf v Netherlands*, Application no. 39315/06, 22 November 2012.

<sup>35</sup> Interview of the Month - Kenya's anti-corruption tsar, Transparency Watch, April 2006.

<sup>36</sup> *Regina v Shayler*. [2002] UKHL 11. 21 March 2002. <http://www.parliament.the-stationery-office.co.uk/pa/ld200102/ldjudgmt/jd020321/shayle-1.htm>

<sup>37</sup> Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland. 05/11/2001. CCPR/CO/73/UK,CCPR/CO/73/UKOT.

Some countries' whistleblower laws override these types of act. In New Zealand, the Protected Disclosures Act overrides other laws (note that the OSA was repealed in 1981 with the adoption of the Official Information Act). However, in cases of national security, reporting is more limited. Disclosures can be made to only the Ombudsman or the Inspector-General of Intelligence and Security.

ARTICLE 19 believes that whistleblowers in national security situations must have the same protections and mechanisms of those in other cases. An additional concern for whistleblowers in these cases is to ensure that their security clearances are not arbitrarily removed, which can result in the complete loss of employment in their field.

## **5. Disclosure to the Media and Public**

Many national laws and the case law of the ECtHR focusses extensively on creating and implementing a mechanism or process that whistleblowers must go through before they can make disclosures to the public or the media directly. They may have to raise the issue internally or go to a specialised oversight body first. Some countries do not provide any protections at all for these types of public disclosures.

We believe that it is essential that whistleblowers are able to go to the press or make information directly available and still are protected if they meet the criteria of a being a whistleblower. This is important as a recognition of their free expression rights. A duty of confidentiality or obligation to their employer should not override the public right to know about crucial information of public importance. In many countries, internal disclosures are still met with repercussions; in others, the oversight bodies are extremely weak or not truly independent from the bodies they are tasked to oversee. Or in others, as was highlighted in the *Guja* case, they are functionally part of the problem that the whistleblower is trying to reveal and would be of no use.

## **6. Recommendations for Whistleblower Laws**

ARTICLE 19 believes that whistleblower protection need to be established in law. We believe that in most cases, a comprehensive approach should be taken so that all persons are protected and that gaps are not exploited by those who wish to harm them. However, the situation needs to be tailored to each individual country so a model law approach such as that which has been more successfully adopted in the field of freedom of information is not necessarily the most useful in this case, due to the wide variety of laws which can affect their rights and enforcement mechanisms available.

A list of elements should include:

- Wide application: the law should have a wide application and should cover a wide variety of information in the public interest, including violations of laws, rules and ethical norms, abuses, mismanagement and misspending, failures to act, and threats to public health and safety.
- Broad Protections: it should apply to public and private sector employees, and also those who may face retribution outside the employer-employee relationship e.g. consultants, former employees, temporary workers, volunteers, students, benefit seekers, family members and others. It should also apply to national security cases.
- Protection of free speech: the law should recognise the importance of whistleblowing as an exercise of free expression, with any limits being subject to international law. Public interest and harm tests should be applied to each disclosure, and for public bodies it should be expressly stated that the unauthorised release of any information that could have been disclosed under freedom of information laws cannot be sanctioned.
- No requirements of "good faith" or sanctions for misguided disclosures: the employee should not have to prove that they were acting in good faith to receive protections.
- Disclosures procedures: the law should set up reasonable requirements to encourage and facilitate internal procedures for the disclosure and reporting of wrongdoing. However, the procedures should be straightforward and easily allow for disclosure to external organisations, such as higher bodies, legislators and the media in cases where it is likely that the internal procedure would be ineffective. There should be easy access to legal advice to facilitate disclosures and minimise instances of misunderstanding.

- Independent oversight: the law should create or appoint an independent body to receive reports of violations of law, misadministration and other issues, advise whistleblowers, and investigate and rule on cases of discrimination. However, this body should not have exclusive jurisdiction over the subject. The whistleblower should be able to also appeal cases to existing tribunals or courts. Legal advice and aid should be available.
- Confidentiality: the law should allow for whistleblowers to request that their identity remain confidential as far as possible. However, the body should make the person aware of the problems with maintaining confidentiality, and make clear that the protection is not absolute.
- Protection against retribution. The law should have a broad definition of retribution that covers all types of employment sanctions, harassment, loss of status or benefits, and other detriments. Employees should also be to seek interim relief, i.e. a return to the job while the case is pending or being allowed to seek transfers to other equivalent jobs within the organisation if return to the existing one is not advisable due to possible retribution. Strong sanctions should be imposed on those that take actions against whistleblowers as a deterrent measure.
- Waiver of liability: any disclosure which is protected under the whistleblower law should ensure that the person is also immune from liability under other laws such as Official Secrets Acts, commercial law and libel/slander laws..
- Compensation: compensation should be broadly defined to cover all losses, and to put the individual back to their prior situation. This should include any loss of earnings and future earnings. This loss should not be capped. There should also be provisions to pay for the pain and suffering incurred because of the release of such information and any subsequent retribution.
- Information requirements: the law should protect whistleblowers who make a disclosure even if the information was not to the level of a protected disclosure. The law should not allow for the threat of criminal sanctions against whistleblowers who make incorrect disclosures. In cases of deliberate falsehoods, normal employment mechanisms are best placed to deal with this type of sanction. .
- Extensive training and resources: governments and private bodies should be required to adopt management policies to facilitate whistleblowing and train employees on its provisions. A high level manager should supervise this effort and work towards developing an internal culture which facilitates disclosures as non-confrontational processes.
- Reviews and disclosures: government and large corporate bodies should be required to annually publish a review of disclosures and outcomes, reports on discrimination and outcomes including compensation and recoveries.
- Evaluation: the law should require a regular review of the legislation to ensure that it is working as anticipated.

## IV. Conclusions

ARTICLE 19 believes that the current legal recognition in international law on both the protection of sources and whistleblowing is in need of further normative elaboration. While both have received international recognition as rights, there has been limited development of standards and, in whistleblowing, they has been mostly limited to its function as an anti-corruption measure, rather than as an element of the right to freedom of expression. Protection of sources has had significant recognition at the regional level, especially in Europe, but only summary recognition by UN bodies.

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