

# Challenges to Freedom of Information in the Digital Age

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We live in an age marked by massive contradictions. It should be the age of transparency, a time during which our access to information globally is unparalleled in history, both a byproduct and objective of the digital age. And yet, it is also an age of secrecy in which governments restrict access to information using a wide range of tools, from over-classification of security information, to a failure to devote resources to freedom of information processes and requests, to the punishment of sources and whistleblowers.

I want to discuss one part of this issue, using the framework of international human rights law to address the serious pressures on, and major contributions made by, sources and whistleblowers.

## THE SPECIAL RAPPORTEUR MANDATE

I will start by explaining my mandate as Special Rapporteur. The United Nations Human Rights Council operates as the central human rights body of the UN. It aims to develop human rights norms and ensure implementation of the rules of human rights law. The Human Rights Council has adopted over fifty mandates relating to human rights law, most typically relating to rights guaranteed under the UN Covenant for Civil and Political Rights and, the Covenant on Economic, Social and Cultural Rights (known collectively as “Special Procedures”).<sup>1</sup> A UN mandate is typically used to refer to a long-

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\* David Kaye, U.N. Special Rapporteur on the Promotion and Practice of the Right to Freedom of Opinion and Expression, gave this keynote speech at Southwestern Law School’s symposium commemorating “Freedom of Information Laws on the Global Stage: Past, Present and Future” (November 4, 2016).

1. *International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION, December 16, 1996 ([https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg\\_no=IV-4&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-4&chapter=4&clang=_en)); *International Covenant on Economic, Social and Cultural Rights*, UNITED NATIONS TREATY COLLECTION, December 16, 1996 ([https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg\\_no=IV-3&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-3&chapter=4&lang=en)).

term international mission which has been authorized by the United Nations General Assembly or the UN Security Council. The mandate on freedom of opinion and expression was established in 1993, and I am the fourth rapporteur to enjoy this particular mandate.<sup>2</sup>

Special rapporteurs typically have three mandated functions:

1. Report annually to the Council and General Assembly. The annual reporting has given the Human Rights Council a way to generate normative reports on matters of concern to States. While the Council may indicate substantive areas of interest, mandate-holders have significant discretion to identify the major areas deserving of normative development.<sup>3</sup>

2. Communicate with governments. While governments, academics, and activists often pay close attention to the normative reports of Special Procedures, rapporteurs also communicate directly with governments about matters of immediate concern. The Office of the High Commissioner for Human Rights collects all of these communications and reports them to the Council before each Human Rights Council session, and they are available publicly thereafter (including the government responses).<sup>4</sup>

3. Conduct country visits. In order to do a close evaluation of a country's compliance with specific human rights norms, mandate-holders will conduct fact-finding missions that enable conversations with government officials, judges, lawyers, activists, journalists, and others. These include reports to the Human Rights Council which often feed into the Council's overall review of a State's human rights behavior in the Universal Periodic Review.<sup>5</sup>

I would characterize these functions as typically involving normative development and protection, functions that often merge in the day-to-day work.

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2. See *Special Rapporteur on the promotion and protection of the right to opinion and expression*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/OpinionIndex.aspx> (last visited December 5, 2017).

3. *Freedom of Opinion and Expression – Annual Reports*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/Annual.aspx> (last visited December 5, 2017).

4. *Communications reports of special procedures*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, <http://www.ohchr.org/EN/HRBodies/SP/Pages/CommunicationsreportsSP.aspx> (last visited December 5, 2017).

5. *Freedom of Opinion and Expression – Country Visits*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/Visits.aspx> (last visited December 5, 2017).

## SOURCES, WHISTLEBLOWERS AND ACCESS TO INFORMATION

The following offers some substantive thoughts related to these topics. As is well known, the similar versions of Article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights guarantee everyone's right to seek, receive, and impart information and ideas of all kinds, and provides the foundation for the international right of access to information held by public authorities.<sup>6</sup> This right was developed for specific and valuable reasons to: enable everyone to participate in public life on an equal basis, to enable individuals to challenge public policy, develop fully their opinions and ideas, and hold accountable those responsible for wrongdoing.

Of course, governments may legitimately keep certain information secret on the grounds provided in Article 19(3) of the Covenant. Article 19(3) is strict, however. Mere assertions of a governmental interest in protecting rights or reputations of others, national security, public order, public health, or morals, are insufficient. To be lawful under the Covenant, any restriction must actually be necessary to achieve a specified interest, and it must be proportionate to that goal.

Secrecy cannot be a shield to prohibit public discussion on matters of public interest in democratic societies that value the rule of law, or at least those that lay claim to that status, and it must never be an obstacle to justice. This is where sources and whistleblowers play a crucial role. Many States protect source confidentiality and whistleblowers as a matter of their domestic law. International instruments, such as the Convention Against Corruption, specify these protections.<sup>7</sup> Nonetheless, it remains all too common for governments to restrict access to information beyond what is necessary to protect a legitimate interest under the Covenant. It typically falls to ordinary citizens, reporters, civil society organizations, sources, and whistleblowers to step up in the public interest and disclose that information.

Not all disclosures are comfortable for governments, political leaders, and even societies. Of course, there are also times when disclosure may indeed harm a legitimate state interest. Yet, while many States may see that effective protections for sources and whistleblowers are crucial to public

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6. UNITED NATIONS GENERAL ASSEMBLY, *The Universal Declaration of Human Rights*, adopted by the UN General Assembly on December 10, 1948, by resolution 217A, at Art. 19 (<http://www.un.org/en/universal-declaration-human-rights/>); *International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION, December 16, 1996 ([https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV4&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV4&chapter=4&clang=_en)).

7. UNITED NATIONS GENERAL ASSEMBLY, *The United Nations Convention against Corruption*, adopted by the UN General Assembly on October 13, 2003, by resolution 58/4 ([https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf)).

debate and accountability in democratic societies, they too often resist protections and call for penalties for disclosures, even those in the public interest.

I have pleaded with governments, and want to emphasize here as well, that we not demonize the whistleblower or the confidential source, who often takes great personal risks – to family, career, and livelihood – in the good faith hope of bringing to light that which should not be hidden from public view. Will some deserve some form of accountability, and face the music for unauthorized disclosures? Perhaps. But in the interest of democratic debate and rule of law, governments ought to weigh in the balance these foundational interests, even when considering specific cases.

Last year, in my report to the UN General Assembly, I drew upon a review of national and international norms and practices, benefiting from twenty-eight State submissions and nearly a dozen from civil society.<sup>8</sup> I drew a number of conclusions, including the following:

- First, despite improving legal and policy frameworks, Governments and international organizations, including the UN, are failing to ensure adequate protections to whistleblowers and sources of information. Countless sources and whistleblowers around the world are intimidated by officials, co-workers, and others, depriving everyone of information that may be critical to public debate and accountability.
- Second, the problem of source protection extends beyond traditional journalists to bloggers, citizen reporters, NGO researchers, authors, academics, and many others. They often struggle to carry out investigative work when they cannot extend the basic assurances of confidentiality to their sources.
- Third, the problem of whistleblowers' harassment extends beyond States. The UN and most international organizations have adopted rules for enabling whistleblowing and prohibiting retaliation. Yet, allegations of wrongdoing and retaliation are rarely protected effectively.
- Fourth, as noted above, States may restrict access to information in specific areas and narrow circumstances, yet the disclosure of

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8. DAVID KAYE, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UNITED NATIONS GENERAL ASSEMBLY, Seventy-First Session, September 6, 2016 ([https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf)).

information relating to human rights or humanitarian law violations should never be the basis of penalties of any kind.

#### DIGITAL AGE RISKS

The digital age poses additional questions and risks, among them are surveillance practices and mass releases of documents.

*Surveillance:* State practices related to bulk collection of individual data and targeted surveillance are undermining the security of the reporting process. In the United States, the ability to identify one government whistleblower depended in large part on metadata analysis which led to journalists directly. Just yesterday, the Federal Court of Canada issued a scathing judgment, taking the national spy agency to task for its collection and use of individual data on journalists outside the scope of warrants, and beyond the notification of the judiciary. And today, Quebec launched a commission of inquiry to look into spying on reporters.

*Mass releases of documents:* Even as surveillance allows for easier identification of sources and whistleblowers, the digital age enables secure sharing of documentation. This is to be celebrated, but it also encourages, to a certain extent, releases that fail to protect the rights and security of others – whether we are talking about the private data of public officials, in which no public interest is furthered by disclosure, or the engagement of activists and others. My main fear about such releases is that, when done without proper protection or curation, they undermine the broader respect for the role of sources and whistleblowers. It is critical to find solutions that advance such releases while protecting other human rights equities, but I am afraid that this genie is out of the bottle and will be exceptionally difficult to put back in.

#### RECOMMENDATIONS

I urged States and international organizations to adopt or improve laws and practices – and to foster the necessary political and social environments – that provide genuine protection to sources and whistleblowers. Such protections should be adopted not only by governments but also international organizations, such as the United Nations.

These recommendations included the following eight items:

*Ensure national legal frameworks provide for the right of access to information in accordance with international standards:* National legal frameworks establishing the right to access information held by public bodies should be aligned with international human rights norms. Exceptions to disclosure should be narrowly defined, clearly provided by law, and

necessary and proportionate to achieve one or more of the above mentioned legitimate objectives.

*Adopt, or revise, and implement national laws protecting the confidentiality of sources:* Laws guaranteeing confidentiality must reach beyond professional journalists, and include those who may be performing a vital role in providing access to information of public interest, such as bloggers, “citizen journalists,” members of non-governmental organizations, authors, and academics, all of whom may conduct research and disclose information in the public interest. Protection should be based on function, not a formal title.

*Adopt, or revise, and implement national legal frameworks protecting whistleblowers:* State laws should protect any person who discloses information that he or she reasonably believes, at the time of disclosure, to be true and to constitute a threat or harm to a specified public interest, such as a violation of domestic or international law, abuse of authority, waste, fraud, or harm to the environment, public health or public safety.

*Internal institutional and external oversight mechanisms should provide effective and protective channels for whistleblowers to motivate remedial action:* In the absence of channels that provide protection and effective remediation, or that fail to do so in a timely manner, public disclosures should be permitted. Disclosure of human rights or humanitarian law violations should never be the basis of penalties of any kind.

*Protections against retaliation should apply in all public institutions, including those connected to national security:* Because prosecutions generally deter whistleblowing, penalties should take into account the intent of the whistleblower to disclose information of public interest and meet international standards of legality, due process, and proportionality.

*Establish personal liability for those who retaliate against sources and whistleblowers:* Acts of reprisals and other attacks against whistleblowers, and the disclosure of confidential sources, must be thoroughly investigated and those responsible for these acts must be held accountable. When these attacks are condoned or perpetrated by authorities in leadership positions they consolidate a culture of silence, secrecy, and fear within institutions and beyond, deterring future disclosures. Leaders at all levels in institutions should promote whistleblowing and be seen to support whistleblowers. Particular attention should be paid to the ways in which authorities in leadership positions encourage retaliation, tacitly or expressly, against whistleblowers.

*Actively promote respect for the right of access to information:* Law enforcement and justice officials must be trained to ensure the adequate implementation of standards establishing protection of the right to access information, and the consequent protections of confidentiality of sources and whistleblowers. Authorities in leadership positions should publicly recognize

the contribution of sources and whistleblowers sharing information of public relevance and condemn attacks against them.

*All of these principles apply to the United Nations and other international organizations:* The UN and international organizations should adopt effective norms and policies of transparency to enable the public greater access to information. Specific norms protecting whistleblowers should follow similar criteria provided in the recommendations for States: wide scope of application, promotion of disclosure of information in the public interest, and clarity in the mechanisms for reporting and requesting protection. Particular attention must be paid to the effectiveness and independence of existing reporting and justice mechanisms, given the lack of access of whistleblowers to any other formal justice system.

## CONCLUSION

The Human Rights Council is getting in on the act and is moving towards strong statements of protection. In its 33rd session held this fall, it made two points that are worth quoting in full (this is resolution 33/2):

12. ... calls upon States to protect in law and in practice the confidentiality of journalists' sources, in acknowledgement of the essential role of journalists in fostering government accountability and an inclusive and peaceful society, subject only to limited and clearly defined exceptions provided in national legal frameworks, including judicial authorization, in compliance with States' obligations under international human rights law;

13. *Emphasizes* that, in the digital age, encryption and anonymity tools have become vital for many journalists to exercise freely their work and their enjoyment of human rights, in particular their rights to freedom of expression and to privacy, including to secure their communications and to protect the confidentiality of their sources, and calls upon States not to interfere with the use of such technologies, with any restrictions thereon complying with States' obligations under international human rights law;<sup>9</sup>

These are both helpful, as they move beyond the mantra and establish offline rights that apply online as well. This is substantive. But now, the work must focus on national implementation of these norms.

In conclusion, all of these standards are critical to develop at the international level, but they will mean nothing – and indeed breed cynicism about international processes – if they cannot be converted to real protections for people in their local and national environments. Attaining real protection will continue to be the most important work.

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9. Human Rights Council, *Thirty-Third Session, The Safety of Journalists*, UNITED NATIONS GENERAL ASSEMBLY (September 26, 2016), [http://www.adidem.org/images/4/44/UN\\_resolution\\_A-HRC-33L.6\\_Safety\\_of\\_Journalists.pdf](http://www.adidem.org/images/4/44/UN_resolution_A-HRC-33L.6_Safety_of_Journalists.pdf).