2017-10

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Original Publication Citation

Edward L. Carter (2017) “Not to Disclose Information Sources”: Journalistic Privilege Under Article 19 of ICCPR, Communication Law and Policy, 22:4, 399-426, DOI: 10.1080/10811680.2017.1364912

"NOT TO DISCLOSE INFORMATION SOURCES": JOURNALISTIC PRIVILEGE UNDER ARTICLE 19 OF ICCPR

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International law took a significant step in recent years toward protection of journalists' sources and newsgathering processes. The international law journalistic privilege previously had been upheld by international tribunals, but it was not until 2011 that the United Nations Human Rights Committee adopted an interpretation of freedom of expression that included journalistic privilege. The presence of the privilege within freedom of expression, as recognized in Article 19 of the International Covenant on Civil and Political Rights, is important for several reasons. As part of freedom of expression, the privilege may not be overcome without a showing of necessity and proportionality, is not subject to a margin of appreciation, and is entitled to full realization by the 168 nations that have signed and ratified ICCPR.

Following years of efforts by government prosecutors and private litigants to obtain journalists' evidence in a variety of international and foreign legal proceedings, the United Nations Human Rights Committee formally endorsed a journalistic privilege in 2011.[1] As parties to the International Covenant on Civil and Political Rights (known as ICCPR), the Human Rights Committee said, that nations "should recognize and respect that element of the right of freedom of expression that embraces the limited journalistic privilege not to disclose information sources."[2] In establishing the standard, the committee did not reference journalistic privilege cases — discussed below — that

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[1] UN Human Rights Committee, General Comment 34, CCPR/C/GC/34, ¶ 45 (2011) [hereinafter GC 34].

[2] *Id.*

were previously decided in regional human-rights tribunals. Instead, the committee referred to its own commentary, in July 2000, on the human-rights record of Kuwait.[3]

That country, the committee wrote, had failed to protect journalists from being compelled to "reveal their sources" in legal proceedings, which the committee said could be in violation of Kuwait's obligations under Article 19 of ICCPR.[4] The committee tied its concern for protection of journalists' sources in Kuwait to other restrictions on journalists in that country, including the government closing a newspaper, banning books, and prosecuting and imprisoning authors and journalists in legal proceedings that placed the burden on them to prove good faith or innocence. These actions, the committee said, did not appear to be compatible with Article 19's requirement that any restrictions on freedom of expression be justified as both necessary to accomplish a legitimate government objective and proportional to societal need.[5]

Since 1966, 168 nations around the world, including the United States, have signed and ratified ICCPR, thus binding themselves to an international law standard that now clearly protects reporter's privilege within the freedom of expression. Article 19 allows restrictions on this right only in case of conflict with the rights or reputations of others, need for protection of national security or public order, or to preserve public health or morals.[6] Even if one of those rights is asserted, national officials bear the burden to demonstrate the restriction on reporter's privilege is provided by law, necessary and proportional. Given the committee's endorsement of journalistic privilege, any of the

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[3] *See* UN Human Rights Committee, Concluding Observations: Kuwait, CCPR/CO/69/KWT (2000), *available at* http://www.refworld.org/docid/3df36be44.html (last visited May 15, 2017).

[4] *Id.*

[5] *Id.*

[6] International Covenant on Civil and Political Rights, Article 19, adopted Dec. 19, 1966, entered into force Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR].

168 nations that lack a reporter's privilege protection, or that fail to ensure its enforcement in line with the standard above, could be in violation of international law.

This article examines the state of the privilege as described by the Human Rights Committee in its formal interpretation of ICCPR's Article 19. That interpretation came in a document called "General Comment 34." This article argues that General Comment 34 is critically important to development of the international law journalistic privilege, and this importance has yet to be fully recognized in scholarship and jurisprudence. Although it is so-called soft law,[7] General Comment 34 represents an important step in the continuing development of the international law journalistic privilege. First, the article reviews previous scholarly work and judicial treatment of the international law privilege. Second, the article assesses the state of protections for newsgathering within the U.N. Human Rights Committee, and the U.N. generally, prior to the committee's adoption of General Comment 34. Next, the article discusses General Comment 34's conception of the privilege in the context of its discussion about journalism. An important part of this discussion involves the international-law ramifications of defining the journalistic privilege as a human right. Three of these ramifications deal with the necessity and proportionality test of ICCPR Article 19(3), the margin of appreciation and the state responsibility to protect, respect and fulfill the right. Then this article examines some likely future issues about the privilege in the international law context, and among

[7] One author describes soft law as "a doctrine of international law that describes the legal status of certain human rights related declarations, resolutions, guidelines, and basic principles." H. VICTOR CONDÉ, HANDBOOK OF INTERNATIONAL HUMAN RIGHTS TERMINOLOGY 242 (2004). Although non-binding, soft law standards are nonetheless important because they are "highly recommended standards of state conduct that should be followed" and because they "serve as a guideline or road map to how to comply with 'hard law' human rights norms, such as those found in ICCPR." *Id*.

the issues are challenges presented by anti-terrorism legislation, increased government surveillance and advances in technology. Finally, the article offers a brief conclusion.

SCHOLARLY AND JUDICIAL VIEWS OF INTERNATIONAL LAW JOURNALISTIC PRIVILEGE

The reporter's privilege in the United States has been the subject of extensive scholarship ever since the Supreme Court of the United States decided *Branzburg v. Hayes*[8] more than four decades ago.[9] Although *Branzburg*'s meaning has been the subject of much debate, one thing appears clear: A right for journalists to maintain the confidentiality of their sources in case of a grand jury's criminal investigation does not exist in the United States. That much was placed beyond dispute when the former *New York Times* reporter Judith Miller spent eighty-five days in jail in 2005 and the U.S. Court of Appeals for the D.C. Circuit rejected her claim of journalistic privilege.[10] That is not to say the journalist's privilege in the United States is non-existing, given the presence of approximately forty state shield laws, the common law, and Department of Justice regulatory guidelines.[11] Any extended analysis of U.S. law is beyond the scope of this article, but examination of the international law privilege is relevant to U.S. legal scholars, legal practitioners and journalists because the United States is a party to ICCPR and thus bound to apply the journalistic privilege in its Article 19.

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[8] 408 U.S. 665 (1972).

[9] The scholarship is too varied and deep to discuss in a meaningful way here, but some representative articles that reference many others are RonNell Andersen Jones, *Rethinking Reporter's Privilege*, 111 MICH. L. REV. 1221 (2013); Paul Marcus, *The Reporter's Privilege: An Analysis of the Common Law*, Branzburg v. Hayes, *and Recent Statutory Developments*, 25 ARIZ. L. REV. 815 (1984); Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515 (2007); Geoffrey R. Stone, *Why We Need a Federal Reporter's Privilege*, 34 HOFSTRA L. REV. 39 (2005).

[10] In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1141 (D.C. Cir. 2006).

[11] *See* sources cited at *supra* note 9.

The journalistic privilege also has been discussed in the context of various other countries as well.[12] This article, however, focuses only on journalistic privilege in international law, not U.S., foreign or comparative law. The discussion begins with several cases that are, by now, well known in international law literature about journalistic privilege and others that are less prominent.

Goodwin v. United Kingdom *and Other European Court of Human Rights Cases*

The European Court of Human Rights held in 1996 that the government of Great Britain had violated the free-expression rights of a journalist by compelling him to disclose the identity of a confidential source that had leaked a private company's financial documents.[13] The journalist, William Goodwin, worked for a business publication named *The Engineer* and received an internal company document indicating that a software company called Tetra was in financial difficulty. After Goodwin asked the company to comment for publication, Tetra obtained a British court injunction against publication. The court also ordered Goodwin to disclose the identity of his source so Tetra could pursue action against whomever took one of eight numbered copies of the confidential document from an accountants' meeting room.[14] The disclosure order was

[12] *See, e.g.*, Noah Goldstein, *An International Assessment of Journalist Privileges and Source Confidentiality*, 14 NEW ENG. J. INT'L & COMP. L. 103 (2007) (discussing Canada, New Zealand, Nicaragua, Zimbabwe, Norway, Sweden, Finland, Australia and various European countries); Kyu Ho Youm, *International and Comparative Law on the Journalist's Privilege: The* Randal *Case as a Lesson for the American Press*, 1 J. INT'L MEDIA & ENTERTAINMENT L. 1 (2006) (discussing Argentina, Australia, Canada, El Salvador, Germany, Japan, Norway, Russia, Sweden and the United Kingdom). For a discussion of the privilege in the context of international reporting by American reporters under U.S. law, *see* Lisa Kloppenberg, *Disclosure of Confidential Sources in International Reporting*, 60 S.CAL. L. REV. 1631 (1987).

[13] Goodwin v. United Kingdom, 22 Eur. Ct. H.R. 123 (1996).

[14] *Id*. at ¶ 11.

eventually upheld by an intermediate appellate court and the House of Lords. Goodwin appealed to the European Court of Human Rights on the basis that the order violated his freedom of expression under Article 10 of the European Convention on Human Rights.

The European Court concluded that the order of disclosure was not necessary in a democratic society because the injunction against publication already sufficiently protected the company's interests.[15] In reaching this conclusion, the court acknowledged the value to society of protecting journalists from compelled disclosure:

> Protection of journalistic sources is one of the basic conditions for press freedom. . . . Without such protection, 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 may be adversely affected.[16]

The European Court of Human Rights subsequently continued to protect journalists' sources in various ways. For example, in 2007 the court held that Belgium had violated the free-expression right of a journalist when the police confiscated the journalist's files and newsgathering materials in an attempt to discover his sources for reporting on activities of European Union officials.[17] In another case, the court articulated the high bar that must be met by those seeking to discover journalists' confidential sources. Several newspapers in the U.K. published the details of a

[15] *Id*. at ¶ 42.
[16] *Id*. at ¶ 39.
[17] *See* Tillack v. Belgium, No. 20477/05 (2007), *available at* http://hudoc.echr.coe.int/eng?i=001-83527 (last visited May 17, 2017).

confidential document relating to a proposed merger between competitors in the brewing industry. Ultimately, the court rejected an attempt by one of the companies to force disclosure of the source's identity because, the court held, the company's interest in obtaining damages from the source and in deterring future leaks did not outweigh the public interest in journalistic privilege.[18]

The European Court of Human Rights' Grand Chamber gave a strong endorsement of journalistic privilege in 2010 along with a detailed explanation of the rationale behind the privilege.[19] The case stemmed from police confiscation of a magazine's digital copies of photographs of an illegal street race, whose organizers had been promised anonymity by the journalists taking the photos. The Grand Chamber wrote strongly in favor of the "public watchdog" role of the press and the importance of protecting journalistic sources as part of the freedom of expression, specifically gathering and publishing news.[20] The court clearly articulated the harms that follow forced disclosure of journalistic sources and newsgathering materials:

> The Court notes that orders to disclose sources potentially have a detrimental impact, not only on the source, whose identity may be revealed, but also on the newspaper or other publication against which the order is directed, whose reputation may be negatively affected in the eyes of future potential sources by

[18] Financial Times Ltd. & Others v. United Kingdom, No. 821/03 (2009), *available at* http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-96157&filename=001-96157.pdf (last visited May 17, 2017).

[19] Sanoma Uitgevers B.V. v. The Netherlands, No. 38224/03 (2010), *available at* http://www.onebrickcourt.com/files/cases/echr_76144.pdf (last visited May 17, 2017).

[20] *Id*. at ¶ 50.

the disclosure, and on members of the public, who have an interest in receiving information imparted through anonymous sources.[21]

The Grand Chamber concluded there had been a human-rights violation and ordered the Netherlands to pay the journalists' legal fees and costs. The European Court of Human Rights later concluded the Netherlands had violated the free-expression rights of another set of journalists when the country's surveillance apparatus was used to surreptitiously seek to uncover the journalists' sources — government leakers — for articles about covert investigations.[22] The court noted especially the need for prior review of the appropriateness of government surveillance of journalists because the government "cannot restore the confidentiality of journalistic sources once it is destroyed."[23]

Randal Case

Six years after the European Court of Human Rights decision in *Goodwin v. United Kingdom*, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (known as ICTY) referenced *Goodwin* in addressing the novel issue of whether a war correspondent could invoke the journalistic privilege even though the correspondent did not claim to have a confidential source.[24] The *Washington Post* journalist Jonathan Randal received a subpoena to testify in the ICTY prosecution of

[21] *Id.*

[22] Telegraaf Media Nederland and Landelijke Media B.V. and Others v. The Netherlands, No. 39315/06 (2012), *available at* http://hudoc.echr.coe.int/eng?i=001-114439 (last visited May 17, 2017).

[23] *Id.* at ¶ 101.

[24] Prosecutor v. Radoslav Brdjanin & Momir Talic, Case No. IT-99-36-AR73.9 (Decision of the Appeals Chamber on Interlocutory Appeal) (2002), *available at* http://www.icty.org/x/cases/brdanin/acdec/en/randall021211.htm (last visited October 24, 2016).

Radoslav Brdjanin, a Serb nationalist and housing administrator who was charged with crimes against humanity. Randal had interviewed Brdjanin and reported in the *Post* that Brdjanin advocated the forced removal of Muslims and Croats. Prosecutors sought to introduce Randal's article as evidence against Brdjanin, but Brdjanin claimed the article was inaccurately reported. The prosecution obtained a subpoena to compel Randal's testimony, and the Trial Chamber of ICTY granted the subpoena against Randal's protest.[25]

However, the appeals chamber concluded that war correspondents such as Randal were entitled to journalistic privilege even when they did not claim to have confidential sources. The journalists, the court held, served the public interest because "vigorous investigation and reporting by war correspondents enables citizens of the international community to receive vital information from war zones."[26] While the court cited Article 19 of ICCPR as a basis for the privilege, this was done in context of the public's right to receive information, and the journalist's newsgathering and free expression considerations were somewhat de-emphasized.[27] Further, the court concluded that war correspondents' effectiveness could be hampered by compelled testimony even if there were no confidential sources: "[W]ar 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."[28]

[25] *Id*. at ¶¶ 3-4.
[26] *Id*. at ¶ 38.
[27] *Id*. at ¶ 37.
[28] *Id*. at ¶ 42.

In the unique context of war reporting, then, the distinction between confidential and non-confidential sources matters little. While acknowledging the importance of obtaining relevant evidence, the ICTY concluded that a war correspondent can be compelled to testify in a prosecution only if the journalist's testimony is "direct and important to the core issues of the case" and there are no other reasonable alternatives to obtain the information.[29] Subsequent to the Randal case, this test has been used by other international law tribunals, including the Special Court for Sierra Leone and the International Criminal Tribunal for Rwanda.[30] International law scholars have suggested the same privilege could apply in the International Criminal Court, although the ICC actually declined an invitation to include journalistic privilege in its Rules of Procedure and Evidence.[31]

Scholarly Reaction to the* Goodwin *and Randal Cases

Several scholars have discussed the *Goodwin* and Randal cases. Kyu Ho Youm, for example, concluded that while American constitutional law provided the basis for the decisions' rationale, American courts had actually been reluctant to go as far as the European Court and the ICTY in protecting journalistic privilege.[32] American courts, Youm suggested, would do well to follow the developing international law of journalistic

[29] *Id*. at ¶¶ 48-50.

[30] *See* Karim A.A. Khan & Gissou Azarnia, *Evidential Privileges*, *in* KARIM A.A. KHAN, CAROLINE BUISMAN & CHRISTOPHER GOSNELL, PRINCIPLES OF EVIDENCE IN INTERNATIONAL CRIMINAL JUSTICE 555-67 (2010).

[31] *See id*. *See also* Kelly Buchanan, *Freedom of Expression and International Criminal Law: An Analysis of the Decision to Create a Testimonial Privilege for Journalists*, 35 VICTORIA U. WELLINGTON L. REV. 609, 650-53 (2004); Anastasia Heeger, *Securing a Journalist's Testimonial Privilege in the International Criminal Court*, 6 SAN DIEGO INT'L L.J. 209 (2005). *But see* Megan A. Fairlie, *Evidentiary Privilege of Journalist Reporting in Area of Armed Conflict*, 98 AM. J. INT'L L. 805 (2004) (criticizing the Randal decision and expressing hope that ICC will not follow the ICTY approach to journalistic privilege).

[32] Youm, *supra* note 12, at 53.

privilege in terms of its regard for the right of the public to receive information gathered by a watchdog press.[33] That press, Youm wrote, relies in part for its effectiveness on sources' willingness to share information without fear of having their relationship with journalists become the subject of compelled testimony.[34] Acknowledging the irony, Youm argued for the exceptional aspects of the Randal case, in particular, to be imported back into U.S. jurisprudence on reporter's privilege.[35]

Meanwhile, other academic discussion of the Randal case has focused on the rationale given for the journalistic privilege. One writer suggested that ICTY would have provided a stronger foundation for the journalistic privilege by drawing on the freedom of expression provisions in the Universal Declaration of Human Rights, which is not binding, and ICCPR, which is binding on states that are parties to the treaty.[36] The ICTY did mention Article 19 but it was in the context of the public's right to receive information.[37] The scholarship on international journalistic privilege has yet to discuss in an extensive way the recent developments, particularly the U.N. Human Rights Committee's endorsement of the privilege in General Comment 34, but also ongoing applications of the privilege in *ad hoc* war crimes tribunals.[38]

Prosecutor v. Taylor

[33] *Id*. at 53-54.
[34] *Id*.
[35] *Id*. at 55-56.
[36] Nina Kraut, *A Critical Analysis of One Aspect of Randal In Light of International, European, and American Human Rights Conventions and Case Law*, 35 COLUM. HUM. RTS. L. REV. 337, 354-57 (2004).
[37] *See supra* note 27 and accompanying text.
[38] Khan & Azarnia, *supra* note 30, at 551-98, discuss some recent journalistic privilege cases in international tribunals but not General Comment 34.

The Special Court for Sierra Leone, sitting at The Hague, relied heavily on *Goodwin* and the Randal case in deciding to protect journalistic privilege in 2009.[39] The case presented the novel question of whether a journalist could refuse to identify individuals who had assisted in gathering news even though they themselves did not provide information. The journalist, designated for purposes of the case as TF1-355, traveled from Liberia to Sierra Leone in his capacity as managing editor of a newspaper in Monrovia. His passage into Sierra Leone was enabled by members of the Economic Community of West African States Monitoring Group, a joint military force made up of soldiers primarily from Nigeria but also other West African nations.[40]

The journalist, who had gone to Sierra Leone to report on the involvement of the government of Liberia in Sierra Leone's civil war, was called to testify before the Special Court for Sierra Leone in the prosecution of former Liberian president Charles Ghankay Taylor for war crimes and crimes against humanity. In his testimony, TF1-355 refused to disclose the identity of the soldiers in the monitoring group who had facilitated his entry to Sierra Leone because, he said, doing so could subject them to danger.[41] The Trial Chamber of the SCSL first concluded that TF1-355's testimony would be relevant to Taylor's defense because Taylor contended that TF1-355 may have been a spy or may have had connections to arms smuggling by one of the paramilitary groups fighting in Sierra Leone.[42]

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[39] Prosecutor v. Taylor, Decision on the Defence Motion for the Disclosure of the Identity of a Confidential 'Source' Raised During Cross-Examination of TF1-355, SCSL-03-1-T (Mar. 6, 2009), *available at* http://www.worldcourts.com/scsl/eng/decisions/2009.03.06_Prosecutor_v_Taylor.pdf (last visited Oct. 25, 2016).

[40] *Id*. at ¶ 1.

[41] *Id.*

[42] *Id*. at ¶ 23.

Notwithstanding the relevance of TF1-355's requested testimony, the Sierra Leone court concluded that journalistic privilege applied because TF1-355 made promises to the soldiers, in his capacity as a journalist, in order to enter Sierra Leone and pursue journalistic activities.[43] Thus, the court interpreted journalistic sources broadly to include not only those who provide information but also those who otherwise facilitate journalistic activities. The Trial Chamber relied on language from *Goodwin*, which stated that, without a journalistic privilege, "[S]ources may be deterred from assisting the press and informing the public on matters of interest."[44] The court drew particular attention to the word "assisting" and said that both sources and facilitators of journalism should be entitled to be covered by the journalistic privilege, especially in conflict zones. On this point, the court cited the Randal court and stated that journalists in conflict zones deal with heightened tensions, threat of violence and difficulty in not only gathering news but also disseminating it.[45]

Having concluded that the soldiers who helped TF1-355 cross the border into Sierra Leone were indeed journalistic sources, the court then considered the question of whether the identity of those soldiers was sufficiently critical evidence in the prosecution of Taylor to merit overriding the journalistic privilege. The court concluded that it was not of "direct and important value in determining a core issue in the case."[46] The court described this requirement as requiring a compelling reason and a showing that the evidence was "really significant."[47] The Sierra Leone court added another formulation

[43] *Id*. at ¶ 24.
[44] *Id*. at 25 (quoting *Goodwin*).
[45] *Id*. (quoting Prosecutor v. Brdjanin, Case No. IT-99-36-AR73.9).
[46] *Id*. at ¶ 32.
[47] *Id*. at ¶ 32-33.

that was drawn from a concurring opinion by one of its own members, Justice Geoffrey Robertson, in a previous case: "[J]ournalistic privilege must yield in cases where the identification of the source is necessary either to prove guilt, or to prove a reasonable doubt about guilt."[48] The court then held it did not need to proceed to the second prong, the question of reasonable alternatives, because the first prong of the test was not met.

One of the most significant passages of the court's decision deals with the basis for the journalistic privilege: "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."[49] For this proposition, the Sierra Leone court cited *Goodwin*, the Randal case and language in a earlier concurring opinion by SCSL Justice Geoffrey Robertson. These authorities suggested freedom of expression as the basis for journalistic privilege, but each had limitations in terms of endorsing Article 19 strongly. *Goodwin*, for example, was decided based on Article 10 of the European Convention for Human Rights. The ICTY in the Randal case cited Article 19 of ICCPR but that was in the context of a public's right to receive information rather than the journalist's right to gather and convey it. And Justice Robertson's language in a concurring opinion was *dicta* because the case was not about journalistic privilege.[50] The language in *Prosecutor v. Taylor* directly invokes free expression but does not specifically name Article 19 as the basis.

[48] *Id*. at ¶ 29 (quoting Prosecutor v. Brima et al., SCSL 04-16-AR73, Decision on Prosecution Appeal (May 26, 2006) (separate and concurring opinion of Robertson, J.)). It is worth noting that Robertson served as counsel to Randal in the *Brdjanin* case. Robertson's language in *Brima* about journalistic privilege was *dicta* because that case did not involve a journalist but rather a human-rights worker. *See* Khan & Azarnia, *supra* note 30, at 559 n.29.

[49] Prosecutor v. Taylor, SCSL-03-1-T at ¶ 25.

[50] *See supra* note 48.

As a result, the developing journalistic privilege in international law, as of 2011, was still only loosely grounded in Article 19 of ICCPR. The journalistic privilege would be more robust if it were considered part of the fundamental human right of freedom of expression rather than if classified as a mere evidentiary rule. Certain obligations may accompany fundamental human rights in the international law system, and among these are a showing of necessity and proportionality, lack of margin of appreciation and requirements to respect, protect and fulfill human rights to achieve full realization and not merely a minimum protection. Some of these obligations are relevant to the journalistic privilege as a component of free expression in Article 19. These are discussed in greater detail below with the argument that the obligations are what make the inclusion of journalistic privilege in General Comment 34 so significant. First, however, a review of the state of newsgathering protections in the U.N. Human Rights Committee prior to the Committee's adoption of General Comment 34 is required.

NEWSGATHERING PROTECTIONS IN UNITED NATIONS ENTITIES

The Human Rights Committee's Concluding Observations on Kuwait in 2000 demonstrated a high degree of concern over violations of protections for newsgathering.[51] Close examination of the Human Rights Committee processes leading to the 2000 Concluding Observations reveals that the specific issue in Kuwait had to do with a requirement in the country's press code for journalists facing accusations of defamation.[52]

[51] Human Rights Committee, *supra* note 3.

[52] *See* UN Human Rights Committee, Summary Record of the First Part (Public) of the 1854th Meeting, CCPR/C/SR.1854 (2000), *available at* http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsm0BTKouDPNIMXWAuPwondEEm6Yi5F0QSIzfPqOPHyqTdSigLh5AGN622UKg6bZJQ2ubTlGIwLeXCNydb3iaAaqYLpjOFXkAuXUZVFPYCfHp (last visited May 15, 2017).

According to a representative of Kuwait, "[J]ournalists would be liable for prosecution unless they could prove that they had acted in good faith on the basis of information from reliable sources."[53]

Kuwait's own submission to the Human Rights Committee demonstrated how potentially broad this requirement to reveal sources could be. The country's report admitted there was a broad exception to freedom of expression for communication that "attack[ed] the honour of others."[54] Further, free speech did not protect statements against God, the head of state of Kuwait, or the heads of other states.[55] Kuwait's law further required newspapers to obtain licenses and to appoint an owner and editor who were Kuwaiti citizens living in Kuwait and who would be accountable for the newspapers' content — and, by implication, liable for defamation if they could not produce sources sufficient to prove good faith in case of libel claims.

It was against this backdrop that the Human Rights Committee, in its Concluding Observations in 2000, raised concerns about Kuwait's possible violations of ICCPR Article 19. The committee concluded that the requirement to reveal sources proving good faith behind a publication could violate not only Article 19's protection of free speech but also other provisions of ICCPR with respect to presumption of innocence.[56] The committee further urged Kuwait to bring its law in harmony with ICCPR Article 19 so that "every person can enjoy his or her rights . . . without fear of being subjected to

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[53] *Id*. at ¶ 12.

[54] UN Human Rights Committee, Initial Report of Kuwait, CCPR/C/120/Add.1 ¶ 237 (1999), *aavailable at* http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f120%2fAdd.1&Lang=en (last visited May 15, 2017).

[55] *Id*. at ¶ 240.

[56] Human Rights Committee, *supra* note 3 at ¶ 20.

harassment."[57] Finally, the Human Rights Committee said, any exception to free speech as guaranteed by Article 19 must meet the necessity and proportionality test, a topic discussed later.

Human Rights Committee Jurisprudence

Other than its Concluding Observations on Kuwait in 2000, the Human Rights Committee had expounded little if at all on journalistic privilege prior to adoption of General Comment 34 in 2011. Still, the committee's jurisprudence evidences a degree of protection of newsgathering generally. Michael O'Flaherty, a former member of the committee and the principal drafter of General Comment 34, reviewed many of these cases in a 2012 article in which he also discusses the drafting history of General Comment 34.[58] In 2007, the committee concluded that Cameroon had violated the free-expression rights of a journalist under ICCPR Article 19 when the country's security forces threatened and physically attacked the journalist for, among other things, failing to disclose his sources.[59]

The journalist, Philip Afuson Njaru, was threatened with arrest and torture and then beaten into unconsciousness by police whom he had accused in news articles of corruption. When Njaru refused to disclose his sources for articles about police bribery and torture, a police constable "slapped his face several times, threatened to detain him for an indefinite time, to parade him naked in front of women and female children, and to

[57] *Id*.

[58] Michael O'Flaherty, *Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment 34*, 124 HUM. RIGHTS L. REV. 627 (2012).

[59] Philip Afuson Njaru v. Cameroon, No. 1353/2005, UN Doc. CCPR/C/89/D/1353/2005 (2007), *available at* http://hrlibrary.umn.edu/undocs/1353-2005.html (last visited May 16, 2017).

kill him."[60] After he wrote about allegations that members of the navy had mistreated women and girls, Njaru was again asked for his sources and again he refused. At that point, "Soldiers told him they would shoot him," and armed military guards surrounded his house.[61] The committee ordered Cameroon to investigate and prosecute Njaru's attackers, protect him from further threats and violence, compensate him, and ensure similar violations would not occur in the future.[62]

In another case, the Human Rights Committee concluded that a newspaper reader's right to receive information was violated when the government of Uzbekistan refused to grant a license to the newspaper in question.[63] Two members of the committee disagreed that all news consumers could claim free-expression violations when news outlets were restricted, evoking the concept of *actio popularis*.[64] That concept, which holds that an individual member of the public may not represent the entire public in asserting a claim, would seem to be problematic for newsgathering because journalists frequently claim to be acting not in their own interests but rather in the public interest when they seek information. The committee, however, seemed to back away from *actio popularis* in a subsequent case.[65]

U.N. Resolutions and Reports

[60] *Id*. at ¶ 2.7.
[61] *Id*. at ¶ 2.9.
[62] *Id*. at ¶ 8.
[63] Mavlonov and Sa'di v. Uabekistan, No. 1334/2004, UN Doc. CCPR/C/95/D/1334/2004 (2009), *available at* http://www.worldcourts.com/hrc/eng/decisions/2009.03.19_Mavlonov_v_Uzbekistan.htm (last visited May 16, 2017).
[64] *Id*. at Appendix (separate opinion of committee members Sir Nigel Rodley and Mr. Rafael Rivas Posada).
[65] Toktakunov v. Krgystan, No. 1470/2006, UN Doc. CCPR/C/101/D/1470 (2006).

Beyond Human Rights Committee materials, the journalistic privilege has appeared in several United Nations resolutions, reports and documents. One of those is a comprehensive 2017 research study and policy paper by the U.N. Education, Scientific and Cultural Organization titled, "Protecting Journalism Sources in the Digital Age."[66] That report compiles references to the journalistic privilege and statements by U.N. actors that could support the privilege. The UNESCO study noted that the U.N. Human Rights Council called for greater protection for journalists and their sources in a 2012 resolution, and that the council in 2014 decried the government practice of surveillance of journalists and interceptions of their communications.[67] UNESCO also pointed to two U.N. General Assembly resolutions that did not directly mention the privilege but that discussed, under the guise of a right to privacy, the importance of protecting newsgathering from government surveillance.[68]

Media law scholars in the United States may not consider journalistic privilege part of the right to privacy, but that argument was made in 2013 by Frank La Rue, then serving as U.N. Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression:

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[66] Julie Posetti, *Protecting Journalism Sources in the Digital Age*, UNESCO SERIES ON INTERNET FREEDOM, 2007, at http://unesdoc.unesco.org/images/0024/002480/248054E.pdf (last visited May 16, 2017).

[67] *Id*. at 31-32 (citing UN HUMAN RIGHTS COUNCIL, RESOLUTION 21-22, THE SAFETY OF JOURNALISTS, A/HRC/Res/21/L.6, Sept. 27, 2012; UN HUMAN RIGHTS COUNCIL, RESOLUTION 27-5, THE SAFETY OF JOURNALISTS, A/HRC/Res/27/5, Sept. 25, 2014).

[68] *Id*. at 32-33 (UN GENERAL ASSEMBLY, RESOLUTION 68-163, THE SAFETY OF JOURNALISTS AND THE ISSUE OF IMPUNITY, A/RES/68/163, Feb. 21, 2014, *available at* https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/449/23/PDF/N1344923.pdf?OpenElement and UN GENERAL ASSEMBLY, RESOLUTION 68-167, THE RIGHT TO PRIVACY IN THE DIGITAL AGE, A/RES/68/167, Jan. 21, 2014, *AVAILABLE AT* https://ccdcoe.org/sites/default/files/documents/UN-131218-RightToPrivacy.pdf).

> An environment where surveillance is widespread, and unlimited by due process or judicial oversight, cannot sustain the presumption of protection of sources. . . . States cannot ensure that individuals are able to freely seek and receive information or express themselves without respecting, protecting and promoting their right to privacy.[69]

La Rue's advocacy of the right to privacy as partial basis—along with freedom of expression — for the journalistic privilege was seconded by UNESCO. In pressing this case in its 2017 report, UNESCO pointed to statements by the U.N. High Commissioner for Human Rights and various other experts.[70]

GENERAL COMMENT 34'S ADOPTION OF THE PRIVILEGE

International human rights law has always faced a fundamental challenge to balance what the United Nations Charter calls "universal respect for, and observance of, human rights" with state sovereignty.[71] In its effort to do this, the United Nations counts on its General Assembly and Security Council, as well as individual office-holders such as the Secretary-General and the High Commissioner for Human Rights.[72] As a charter-based body, the Human Rights Council is charged with responsibility "to promote awareness, to foster respect and to respond to violations" of human rights.[73] The council

[69] *Id*. at 34 (quoting Frank La Rue, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, A/HRC/23/40, April 17, 2013, at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf) (last visited May 16, 2017).

[70] *Id*. at 33-40.

[71] PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS 685-86 (2013) (quoting UN Charter, Article 55(c); citing UN Charter, Article 2(7)).

[72] *See id*. at 685.

[73] *Id*. at 693.

is made up of forty-seven rotating state members elected to three-year terms, though the United States and USSR/Russia have been long-standing members. The council is a political entity whose enforcement of human rights is evident not through punitive legal measure so much as standards set in international treaties that the council helps develop. Other ways the council exercises its influence are through publication of country reports that name bad actors and thematic reports of expert special rapporteurs on specific human-rights topics. Further, the council implemented in 2006 a system of Universal Periodic Review, in which all U.N. member states must report to the council about their records on human rights on approximately five-year cycles.[74]

To counter the political influences on charter-based bodies such as the Security Council and Human Rights Council, the international human rights law system also includes expert monitoring of implementation of nine major treaties. The focus of this research is on the International Covenant on Civil and Political Rights,[75] particularly the freedom of expression provision in Article 19:

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless

[74] *Id*. at 701-41.

[75] The other treaties are the International Covenant on Economic, Social and Cultural Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child; the International Convention on the Protection of All Rights of Migrant Workers and Members of Their Families; the International Convention for Protection of All Persons From Enforced Disappearance; and the Convention on the Rights of Persons With Disabilities.

of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.[76]

The expert treaty body that monitors compliance with ICCPR is the Human Rights Committee. Not to be confused with the Human Rights Council and its Charter-based, political role, the committee has eighteen individual expert members who are to be "persons of high moral character and recognized competence in the field of human rights."[77] Committee members serve without significant compensation and are generally drawn from scholars and legal professionals. They meet three times per year for three weeks at a time to consider state reports and conduct other business. Each country that has signed and ratified ICCPR, 168 in all, reports approximately every five years to the Human Rights Committee. This treaty body reporting requirement is distinct from Universal Periodic Review discussed above.[78]

The committee makes Concluding Observations about the state reports, and those Concluding Observations provide guidance about the meaning of the provisions of

[76] ICCPR, *supra* note 6, at Article 19.
[77] *Id.* at Article 28(2).
[78] *See* ALSTON & GOODMAN, *supra* note 71, at 762-71.

ICCPR. Another function of the Human Rights Committee is to adjudicate claims by individuals that member states of ICCPR have violated human rights protected by the treaty.[79] The results of those adjudications are published, similar to judicial opinions, and also provide guidance about the scope of human rights under ICCPR. The committee has authority to compile summaries of its Concluding Observations and its adjudications into General Comments.[80] General Comments also may include other Committee guidance on the procedures and substance relating to the provisions of ICCPR.

The effectiveness of the Human Rights Committee's work is subject to some debate. The committee itself has pointed to about two dozen incidents in which nations have changed their own legislation in order to comply with committee recommendations.[81] Still, it is well-documented that some nations do not comply with committee guidance, and this has been attributed to misunderstanding, lack of capacity to do so, insufficient follow-up, lack of political support, lack of enforcement teeth and simple unwillingness.[82] This effectiveness, or enforcement question, is tied to the legal status of the committee's work, including General Comments. If General Comments and other committee statements are not legally binding, then perhaps lack of compliance is not so alarming.[83] But if General Comments are binding, then the committee's continued legitimacy depends in part on compliance with their normative statements.

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[79] These adjudications are not formal continuations of appeals from national courts but function similarly to a legal appeal. The committee's decisions are sometimes ignored by the countries in question, though that is relatively rare. In committee year 2010-11, only five of 151 cases involved nations that refused to cooperate at all, and those were Belarus, Kyrgyzstan, Libya, South African and Tajikistan. *See id*. at 810. Another assessment, over multiple years, concluded that there were fifty-four unsatisfactory responses by nations out of 474 findings of violations by the Committee. *See id*. at 831.

[80] *Id*. at 791-803.

[81] *Id*. at 832.

[82] *Id.*

[83] *Id*. at 834.

Commentators disagree about the extent to which General Comments have legal force. General Comments have been described as mere "secondary soft law instruments," but other observers argue that General Comments are "authoritative interpretations" of treaties such as ICCPR.[84] The committee itself describes a General Comment as a "very useful guide to the normative substance of international human rights obligations."[85] In practice, General Comments are frequently cited by human-rights advocates in popular media and by legal advocates as persuasive authority in national and international legal proceedings. Scholars have argued that a General Comment is "an autonomous and distinct juridical instrument."[86]

From 1981 to 2012, the Human Rights Committee published thirty-four General Comments on ICCPR. One of those, General Comment 10 in 1983, dealt with freedom of expression and other provisions of Article 19.[87] The comment does not mention journalistic privilege. In fact, it is only one page long and is more procedural than substantive. For example, states that were parties to ICCPR were asked to provide clear descriptions in their treaty body reports about the scope of freedom of expression in their jurisdictions but were not given meaningful substantive guidance.[88] By 2009, the committee determined that it needed to publish a new General Comment on Article 19's protections for freedom of expression.

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[84] *Id*. at 802.

[85] UN Office of the High Commissioner for Human Rights, Civil and Political Rights: The Human Rights Committee (May 2005) at 24, http://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf (last visited October 28, 2016).

[86] Alfred de Zayas & Áurea Roldán Martín, *Freedom of Opinion and Freedom of Expression: Some Reflections on General Comment 34 of the UN Human Rights Committee*, 59 NETHERLANDS INTL. L. REV. 425, 427 (2012).

[87] General Comment No. 10: Free Expression (Art. 19), June 29, 1983, *available at* http://www.ohchr.org/Documents/Issues/Opinion/CCPRGeneralCommentNo10.pdf (last visited Oct. 28, 2016).

[88] *Id*. at ¶¶ 3-4.

General Comment 34

Ultimately adopted by the committee in July 2011, General Comment 34 is thirteen pages long and divided into several categories: freedom of opinion, freedom of expression, freedom of expression and the media, right of access to information, freedom of expression and political rights, the application of Article 19(3), limitative scope on freedom of expression in certain specific areas, and the relationship between Articles 19 and 20.[89] At the outset, the document states that freedom of expression accomplishes three key purposes: it allows self-fulfillment, facilitates democracy, and enables the enjoyment of other human rights.[90] General Comment 34 also gives examples of freedom of expression that could implicate the journalistic privilege, including political discourse, commentary on public affairs, discussion of human rights, and journalism.[91]

The General Comment pays particular attention to the role of news media in promoting free expression and other human rights.[92] Within that focus on the role of news media, General Comment 34 perceptively identifies several aspects of newsgathering that merit protection. One of those aspects is access to government meetings and places.[93] Another is access to published or public sources of political commentary.[94] The committee took a strong stand in General Comment 34 against licensing of journalists and emphasized that journalism is a function that is carried out by

[89] GC 34, *supra* note 1.
[90] *Id*. at ¶¶ 2-4.
[91] *Id*. at ¶ 11.
[92] *Id*. at ¶ 13.
[93] *Id*. (citing a Human Rights Committee decision in 1999 holding that Canada violated Article 19 by denying a journalist membership in the Parliamentary Press Gallery, which was necessary to gain access to areas of Parliament necessary to gather news).
[94] *Id*. at ¶ 37.

a variety of individuals and organizations, not just a narrow category of traditional mass media entities.[95]

The statement on journalistic privilege came in the context of a discussion about journalists not being restricted in their movements, "including to conflict-afflicted locations, the sites of natural disasters and locations where there are allegations of human-rights abuses."[96] General Comment 34 clearly denotes that the journalistic privilege, while limited and not absolute, is part of freedom of expression rather than merely an evidentiary rule. It also merits repeating that, while the privilege is labeled journalistic, the committee's definition of a journalist in General Comment 34 is broad enough to include "bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere."[97]

The actual provision on the privilege says nations that have joined ICCPR "should recognize and respect that element of the right of freedom of expression that embraces the limited journalistic privilege not to disclose information sources."[98] The General Comment does not define in what way the journalistic privilege is limited, and thus the only conclusion that can be drawn from the text is that the privilege exists but is not absolute. Its application in a given situation is subject to interpretation of relevant context. It is significant that the privilege, as defined by the Human Rights Committee, applies to the function of journalism rather than a formalistic definition of journalists or journalism organizations. Further, the privilege potentially applies to both confidential and non-confidential sources of information. The inclusion of the word "limited"

[95] *Id*. at ¶ 44.
[96] *Id*. at ¶ 45.
[97] *Id*. at ¶ 44.
[98] *Id*. at ¶ 45.

suggests some kind of balancing test, a topic discussed later in relation to Article 19(3)'s necessity and proportionality test.

The principal drafter of General Comment 34 was Michael O'Flaherty, an Irish scholar and former Human Rights Committee member. O'Flaherty wrote later that he considered General Comment 34 to be a "legal interpretation of Article 19 rather than a recommendatory or policy-level instrument."[99] He documented the multiple changes to the text of General Comment 34 through the process of multiple drafts and the input of non-governmental organizations and various ICCPR member states. Although O'Flaherty's article does not discuss the journalistic privilege provision in detail, he revealed that the freedom of information discussion in General Comment 34 was substantially strengthened during the drafting process.[100] He also wrote that the committee consciously avoided connecting the freedom of information with the right to receive information, and the committee consciously rejected the idea of *actio popularis*,[101] thus making it easier for journalists to assert they are acting in the public interest when gathering news.

Advantages of an Approach Based on International Human Rights Law

The Human Rights Committee's decision to include journalistic privilege within the ambit of Article 19's protection of free expression is significant. The committee has yet to develop jurisprudence of its own on the journalistic privilege in disputed claims

[99] O'Flaherty, *supra* note 58, at 646.
[100] *Id*. at 651.
[101] *Id*.

under ICCPR Article 19.[102] Although general comments often reiterate previous statements of the committee in its jurisprudence or Concluding Observations on State Reports, the fact that the journalistic privilege was included in a General Comment without such previous development shows that the committee concluded the privilege merited special emphasis in General Comment 34. As a result, the international law journalistic privilege is now imbued with "strong moral and political force because of the expertise of the members of the [Human Rights Committee], and states parties should follow [the Committee's guidance]."[103]

There are three important results of the committee's decision to include the journalistic privilege within the free-expression protections of Article 19. First, any exception to the journalistic privilege would have to meet the strict test of necessity and proportionality that the Human Rights Committee applies under Article 19(3). Second, the journalistic privilege is not subject to a margin of appreciation, meaning that nations may not apply their own cultural and societal standards but rather must follow a single international standard. Third, the journalistic privilege is subject to the requirement that nations subject to ICCPR must respect, protect and fulfill the right.

General Comment 34 makes clear that, as a human right under ICCPR, the journalistic privilege is not subject to being easily restricted. Here it should be recalled that General Comment 34's formulation of the privilege is not absolute. Rather, the privilege is said to be limited. Yet, the General Comment gives no specific indication in what ways those limits might apply, so one must resort to the text of Article 19 itself. In

[102] *See* G. Acquaviva, N. Combs, M. Hikkilä, S. Linton, Y. McDermott & S. Vasiliev, *Trial Process*, *in* INTERNATIONAL CRIMINAL PROCEDURE: PRINCIPLES AND RULES 920 (Göran Sluiter, Håkan Friman, Suzannah Linton, Sergey Vasiliev & Salvatore Zappalà eds., 2013).

[103] CONDÉ, *supra* note 7, at 97.

the case of free expression, any restriction must comply with Article 19(3) in that it must be clearly stated by law, necessary and proportional to the need to protect the rights and reputations of others or the public order, health or morals.[104]

O'Flaherty emphasized that any nation attempting to restrict the right to freedom of expression must demonstrate "a direct and immediate connection between the expression and the threat."[105] This nexus requirement "sets a high bar for restrictions."[106] It should also be recalled that the only permissible purposes in Article 19(3) to restrict freedom of expression are "[f]or respect of the rights or reputations of others" and "[f]or the protection of national security or of public order (ordre public), or of public health or morals."[107] This is a narrower category of exceptions than some regional human-rights provisions for free speech, such as in the European Convention on Human Rights.[108]

The Human Rights Committee applied the necessity and proportionality test in two cases involving restrictions on journalists. Although the cases did not implicate journalistic privilege directly, they are nonetheless illustrative of the high bar that would have to be met for a state party to ICCPR to permissibly restrict the journalistic privilege. In one of the cases, a Yugoslav journalist was convicted of criminal insult for accusing a factory manager and Socialist Party leader of squandering his company's money on personal and political causes before insincerely styling himself a reformer.[109] Although Serbia and Montenegro contended that the conviction was necessary to protect the rights and reputation of the official in question, the Human Rights Committee ultimately

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[104] ICCPR, *supra* note 6, at Article 19(3).
[105] O'Flaherty, *supra* note 58, at 649.
[106] *Id*.
[107] ICCPR, *supra* note 6, at Article 19(3).
[108] O'Flaherty, *supra* note 58, at 640.
[109] Bodrožić v. Serbia and Montenegro, No. 1180/2003, UN Doc. CCPR/C/85/D/1180/2003 (2006), at http://hrlibrary.umn.edu/undocs/1180-2003.html (last visited May 16, 2017).

concluded that this was not the case because the subject of the journalist's reportage was a "prominent public and political figure."[110] The committee further stated "that in circumstances of public debate in a democratic society, especially in the media, concerning figures in the public domain, the value placed by the Covenant upon uninhibited expression is particularly high."[111]

In the 2006 case *Bodrožić v. Serbia and Montenegro*, the committee made clear that the asserted justification — protecting the rights or reputation of a public figure — was not necessary in accordance with the requirement of Article 19(3). But even if it had been a necessary purpose, the criminal punishment was not proportional to the interest asserted, according to the Committee.[112] In a similar case from Angola, the Human Rights committee also found a violation of Article 19 when a journalist was jailed for criticizing the country's president and accusing him of corruption.[113] In that case, the committee gave a detailed explanation of the necessity and proportionality test:

> The Committee observes that the requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect. Given the paramount importance, in a democratic society, of the right to freedom of expression and of a free and uncensored press or other media, the severity of the sanctions imposed on the author cannot be considered as a

[110] *Id*. at ¶ 7.2.
[111] *Id*.
[112] *Id*.
[113] Rafael Marques de Morais v. Angola, No. 1128/2002, UN Doc. CCPR/C/83/D/1128/2002 (2005), at http://hrlibrary.umn.edu/undocs/1128-2002.html (last visited May 16, 2017).

> proportionate measure to protect public order or the honour and the reputation of the President, a public figure who, as such, is subject to criticism and opposition.[114]

Article 19's journalistic privilege also is not subject to a "margin of appreciation" that would allow a nation some leeway in determining when limitations on human rights are necessary.[115] The margin of appreciation, or margin of discretion, could in the context of Article 19(3) give a member state of ICCPR some deference in determining what is necessary to protect the rights of others or public order.[116] But General Comment 34 emphasizes there is no margin of appreciation for free expression, and thus all member states must treat journalistic privilege in an equally protective manner. The inclusion of journalistic privilege as an element of free expression rather than a mere evidentiary rule is thus important because nations could not invoke the margin of appreciation as an excuse to limit the privilege in an unjustified way.

O'Flaherty noted that in a 1982 case, the Human Rights Committee granted Finland a margin of appreciation to determine what constituted "public morals."[117] Later, however, the Human Rights Committee backed away from the margin of appreciation and, even more clearly, completely rejected it in General Comment 34. In that document, the committee stated that "the scope of this freedom is not to be assessed by reference to a 'margin of appreciation.'"[118] That discussion came in the context of the state

[114] *Id*. at ¶ 6.8 (citation omitted).
[115] GC 34, *supra* note 1, at ¶ 36.
[116] *See* CONDÉ, *supra* note 7, at 156-57.
[117] O'Flaherty, *supra* note 58, at 641.
[118] GC 34, *supra* note 1, at ¶ 36.

requirement to demonstrate necessity when restricting freedom of expression, and therefore General Comment 34 definitively clarifies that states may not resort to their own interpretations of the meaning of public morals, public order, public health, national security or rights and reputations of others. Instead, those phrases must be given their international-law meaning even though individual nations might have their own internal understandings.[119]

As a part of free expression under Article 19, the journalistic privilege also enjoys the benefit of state obligations to respect, protect, ensure and fulfill the right. The responsibility to respect means that a state recognizes the right, conducts itself in accordance with the recognition by refraining from violating the right and encourages other states to respect the right as well.[120] Meanwhile, the responsibility to protect means states must take affirmative steps to prevent third parties from violating human rights.[121] General Comment 34 emphasizes that, to meet their obligations under ICCPR, states must act to stop private persons and entities from infringing on freedom of expression.[122] That is the meaning behind the responsibility to ensure. Finally, the responsibility to fulfill means states must take actions within their power to achieve the full realization of human rights, rather than just to meet a minimum threshold.[123]

The full realization of human rights is a lofty — some say unachievable — goal. But others argue that any goal short of full realization is not sufficient. Full realization of human rights also involves economic, social and cultural rights, which are embodied in

[119] *See* O'Flaherty, *supra* note 58, at 641.
[120] *See* CONDÉ, *supra* note 7, at 228.
[121] *See id*. at 210.
[122] GC 34, *supra* note 1, at ¶ 7.
[123] *See* CONDÉ, *supra* note 7, at 94.

an international convention separate from the ICCPR called the International Covenant on Economic, Social and Cultural Rights. Full realization also means international assistance and cooperation.[124] For purposes of the journalistic privilege, perhaps the most important point here is that working toward full realization means that states must afford the right to everyone within their borders and not just citizens. Further, states must do what they can to promote the right within the borders of other states. While the journalistic privilege in international law has advanced significantly in the last few years, some unanswered questions remain. Some of those questions are treated in the next section.

FUTURE OF JOURNALISTIC PRIVILEGE

The journalistic privilege in international law is still developing. In late 2016, the U.N. Human Rights Council built on previous work by the Human Rights Committee with respect to the journalistic privilege. In a resolution on the safety of journalists, the council stated that nations should "protect in law and in practice the confidentiality of journalists' sources."[125] The privilege, according to the council, is an important part of journalists' role to promote "government accountability and an inclusive and peaceful society."[126] As such, the council urged nations not to impose limitations on the journalistic privilege unless they were clearly spelled out in national law and were necessary to accomplish an overriding state objective.

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[124] *See* Mark Gibney, *Establishing a Social and International Order for the Realization of Human Rights, in* THE STATE OF ECONOMIC AND SOCIAL HUMAN RIGHTS: A GLOBAL OVERVIEW 251-70 (Lanse Minkler ed., 2013).

[125] UN HUMAN RIGHTS COUNCIL, RESOLUTION 33-2, THE SAFETY OF JOURNALISTS, A/HRC/Res/33/2 ¶ 12, Oct. 6, 2016.

[126] *Id*.

Even with this important recognition by the Human Rights Council, the journalistic privilege in international law has yet to be fully defined. As it is, several issues are likely to be addressed. Paramount among these is the definition of a journalist or how to determine who is entitled to the privilege. Two scholars distinguished between an "information-based" journalistic privilege and a "profession-based" privilege.[127] These authors describe the Randal case as having made an information-based argument for a profession-based privilege,[128] but the reality is the journalistic privilege includes both information and profession aspects. The key is not whether the privilege protects information given to journalists or the journalists themselves. It must protect both. The key to defining when the privilege is present, however, is process-oriented. In other words, the journalistic privilege is necessary when a source gives information to someone doing journalism, or a source facilitates the obtaining of information by someone doing journalism, and the receiver intends to use the information in gathering or presenting news.

This functional definition of the privilege does not emphasize information over the identity of the journalist. Nor does it emphasize the journalist's employment status over the information communicated from a source to a journalist. Instead, it emphasizes the function or process of journalism, which includes both information and a person who communicates news. In reality, this is what the international law cases discussed herein have recognized. In *Goodwin*, the European Court of Human Rights did not rely solely on the fact that the journalist worked for a news organization nor the fact that he obtained company financial documents from a confidential source. The journalistic privilege was

[127] *See* Khan & Azarnia, *supra* note 30, at 557.
[128] *Id*. at 560.

upheld because both of those factors were present along with the intent of the journalist to publish information about the financial woes of the company Tetra.

In the Randal case, the situation was slightly different because the source, Brdjanin, was also the subpoena proponent. Thus, granting the privilege to Randal did not protect the source but rather the journalist and the information the journalist could obtain in the future from sources. But the journalist might not be able to obtain that information if sources assumed the journalist would be subject to testifying in court. The key consideration was to protect the journalistic function in the future. In the Special Court for Sierra Leone case *Prosecutor v. Taylor*, the sources being protected did not themselves provide information but rather facilitated the journalist to enter Sierra Leone to gather information. Yet, if the journalist had been forced to disclose the identities of the soldiers of the Economic Community of west African States monitoring Group, future would-be helpers to journalists could be deterred. Again, the key was that the journalist intended to publish the information obtained. Future courts considering the international law journalistic privilege should focus on the function or process, not only the information or the professional status of the journalist.

Another issue likely needing resolution is what to do about voluntary journalistic testimony.[129] Some scholars contend that journalists who volunteer to testify undermine the journalistic privilege because voluntary testimony poses the same risk to journalistic functions as involuntary testimony would.[130] This may be true unless the source actually releases the journalist from any promise of confidentiality. Future sources should recognize they have a choice to allow the journalist to give testimony, and thus they

[129] *See id*. at 562.
[130] *See id*.

would not be deterred in the same way as if the testimony were forced against a journalist's wishes. The Council of Europe implicitly recognized this in 2016.[131]

Still, journalists should be careful. Even answering questions about their published work could constitute a waiver of the privilege.[132] The journalist in the *Taylor* case voluntarily testified against the former Liberian president in his war-crimes prosecution but did not want to reveal the identity of the monitoring group soldiers. Although the Special Court for Sierra Leone upheld the privilege in that circumstance, other courts could determine that a journalist waives any claim to privilege by agreeing to testify at all. Journalists are sometimes asked just to confirm the accuracy of statements contained in a published or broadcast news account, but that could open the door to waiver of the privilege.

One of the most important issues for the international law journalistic privilege's well-being is that courts continue to recognize its proper origin. As a part of the fundamental human right of free expression, journalistic privilege enjoys the important status granted to provisions of ICCPR. As a human right, journalistic privilege is not subject to a margin of appreciation. It benefits from state responsibility to respect, protect, ensure and fulfill. The privilege may be overridden only if the necessity and proportionality test is met. These benefits will continue to accrue as long as future courts follow the lead of the Human Rights Committee in General Comment 34 to plant the journalistic privilege firmly in the core of free expression under Article 19.

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[131] Committee of Ministers, *Recommendation to Member States on the Protection of Journalism and Safety of Journalists and Other Media Actors* (Apr. 13, 2016), *available at* https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016806415d9 (last visited October 29, 2016).

[132] Khan & Azarnia, *supra* note 30, at 565-66.

In recent years, regional human rights tribunals, such as the European Court of Human Rights, have shown strong inclinations to protect journalists' sources. This was made clear in several recent cases in the Netherlands, including when the Grand Chamber articulated the rationale behind journalistic privilege and made clear that the effects of breaching journalistic privilege threaten to harm the free flow of information. There is some evidence of growing respect for the privilege in regional legal bodies in Africa, the Americas and Asia as well.[133] Meanwhile, even the U.N. Human Rights Committee, while lacking substantial jurisprudence on the privilege, encapsulated the privilege in a legal interpretation of Article 19, in the form of General Comment 34, and protected newsgathering zealously in cases such as *Bodrožić* and *Rafael Marques de Morais v. Angola*.

While all of this bodes well for the future of the international-law journalistic privilege, world events and the advances of technology pose significant challenges just as the privilege is becoming established firmly in international human rights law. A major UNESCO report in 2017 warned that anti-terrorism and national security legislation, government surveillance, and data retention and disclosure requirements all could undermine journalistic privilege.[134] The concerns about the impact of surveillance on the privilege also have been voiced by the U.N.'s Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression and Opinion.[135] The UNESCO report noted the particularly acute impact on women journalists and sources when the privilege

[133] *See* Posetti, *supra* note 66, at 52-56. *See also* David Kaye, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, A/70/361, Sept. 8, 2015, at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/361 (last visited May 17, 2017).

[134] *Id*. at 7.

[135] Kaye, *supra* note 133.

is undermined, due to gender factors involved in face-to-face meetings when online communication is compromised by surveillance as well as the gender-specific factors in online harassment.[136] Finally, the UNESCO study proposed a comprehensive eleven-part legal framework for development and review of national journalistic privilege standards.[137]

CONCLUSION

The justice system relies for its success on the ability of litigants to obtain as much relevant evidence as possible even against the wishes, sometimes, of those who possess it. Yet the law recognizes that the function in some relationships — lawyer-client, doctor-patient, priest-penitent, to name a few — are so important that not even a legal proceeding should interfere by forcing compelled testimony about privileged communications. Although a journalist-source relationship may not rise to the level of lawyers and their clients or doctors and their patients, the function of journalism is nonetheless critical to the success of a democratic society and, thus, journalist-source communications should enjoy a qualified privilege. International law has recognized this. The journalistic privilege in international law is still developing but, thus far, it provides qualified yet robust protection for both confidential and non-confidential communications.

This article has reviewed recent and important cases in international law proceedings in which journalistic privilege has been upheld. These cases – in regional tribunals, war crimes tribunals, and in the U.N. Human Rights Committee – form a basis

[136] Posetti, *supra* note 66, at 134-35.
[137] *Id*. at 132-33.

on which the international law privilege may continue to develop even as national security concerns, surveillance and data-gathering and retention policies pose challenges. The Human Rights Committee's Concluding Observations on Kuwait, as well as its judgment against Cameroon in the *Njaru* case, demonstrate the frequent link between journalistic privilege and broader free-press protections. In those cases, journalists were threatened or attacked for refusing to disclose their sources on reporting about matters of public interest, including possible government wrongdoing. The public watchdog role of journalists is more critical than ever, and journalists' sources need to know legal protections exist if they are to continue ensuring the free flow of information.

The article also has identified that the journalistic privilege took a significant step forward in international law when the Human Rights Committee included the privilege in is General Comment 34 on Article 19 of ICCPR. General Comment 34 makes clear that journalistic privilege is not a mere evidentiary rule but rather lies at the heart of freedom of expression. This endorsement allows the journalistic privilege to more likely survive any state attempts to undermine it. The privilege is not absolute but will give journalists and their sources assurance that ultimately benefits the public interest in the free flow of vital information.