

The Media World

AFTER WIKILEAKS AND NEWS OF THE WORLD

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Panel 3: International law after WikiLeaks and *News of the World*

Richard Winfield, Chairman, World Press Freedom Committee: *A legal can of worms*

Some seemingly real and immediate legal threats confront the media in this post-WikiLeaks environment. These threats include, for instance, imprisonment, fines, damages and censorship. The word “seemingly” is deliberate. Each country whose trove of secrets has been disclosed without authorization possesses an armory of laws and courts that were designed decades ago to censor or punish the leakers and their enablers. But have these laws lived up to their promise ?

Are national laws at present incapable of censoring or punishing the WikiLeaks phenomenon ? Is this as it should be ? Consider this brief history of futility:

- A Swiss bank attempted to get an American federal court in California to disable WikiLeaks from posting reams of its highly confidential bank customer account documents, revealing purposeful tax evasion. The bank ultimately failed in its lawsuit, and the embarrassing bank documents remained online.
- The Obama administration did not even attempt to get an injunction to disable or censor the disclosures of WikiLeaks.
- The Obama Administration has not, to date, charged WikiLeaks or any of its principals with any crime. It has, however, begun court martial proceedings against an enlisted man who allegedly leaked classified documents and videotapes to WikiLeaks.

What are the gaps in the law that this history reveals ? What accounts for this anemic response ?

First, can courts obtain jurisdiction in these cases ? How can governments or injured parties track down and hail into court an amorphous, remote, will-o'-the-wisp-like WikiLeaks and its offspring, particularly if WikiLeaks is organized in a country like Iceland or Sweden with highly protective media laws ?

Second, if a court issues a take-down order, can the court make it stick ? Does redundancy and sophisticated circumvention technology -- the use of mirror sites, for instance -- render court orders futile and ineffective ?

Third, consider criminal laws that punish the unauthorized possession or publication of classified national defense information. Can these laws be effectively deployed abroad against transient web masters ?

Fourth, how effective are extradition treaties to bring these web masters into the dock ?

Is this anemic state of affairs a healthy one ? How should the answer be framed ? Either this legal vacuum encourages transparency by governments and corporations; the laissez-faire status quo is better than legal countermeasures, including those by authoritarian regimes. Or, on the other hand, no, the status quo invites and rewards wholesale theft and indiscriminate disclosure of some information that needs to be guarded. The status quo gives insufficient weight to protection of legitimate secrets, however that is defined, and guarantees collateral damage.

If new laws are needed, what should they provide ? How can laws be worded to avoid being overbroad and vague ? Can they be drawn so that the cure is not worse than the disease ? How are legitimate secrets to be defined ? Should journalists be punished, as they have been in Asia, for instance, for publishing such classified information as the number of casualties following a natural disaster ? Isn't the history of governmental efforts to protect their secrets the history of overreaching, over-classification, and excess ?

We may be seeing some of that excess in the actions, or overreactions, by some governments, post WikiLeaks. Consider the risks and prosecutions by the US military and the US Department of Justice of alleged whistleblowers. Consider the progress of the new secrets legislation in the Parliament of South Africa, the Protection of State Information Bill.

We should recognize that the seeming legal powerlessness is only temporary and is by no means limited to the American government and its courts. Among the countries whose confidential documents were released before the American trove are Britain, Somalia, Kenya, Switzerland, Peru and Iceland. Each has displayed similar anemic reactions to address this new kind of challenge to its sovereignty and ability to keep secrets.

There is now stalemate in legal actions against WikiLeaks and its brethren. It is not likely to last for long. The rules of engagement are only now being drafted. Some court, somewhere, will censor or punish one of these entities or their principals.

That will confront the media and the media bar with some sobering choices: First, do we assist in the defense ? Second, do we intervene or file *amicus curiae* briefs in these cases and argue that defendants like WikiLeaks are entitled to the full protections for freedom of expression guaranteed by the relevant constitutions or international conventions ?

It is one thing for traditional journalists to proclaim that agents of a WikiLeaks-type organization are not really journalists. It is quite another thing, however, for the traditional press and its lawyers to deny to those new agents the legal protections for freedom of expression that traditional media enjoy. Should we, by our silence, become complicit in judgment and legislation that strip these new agents of the constitutional protections they deserve ?

Then, there is the issue of the newspapers, like *The New York Times* or *The Guardian*, that republished contents originally posted on one of the sites. Here, the courts have little or no difficulty in asserting jurisdiction over the newspaper and its journalists, unlike the jurisdictional near-immunity of the web sites. Do the national laws allow the Executive or the courts to censor or punish the newspaper and its staff ? To those traditional defendants, how protective and effective are the guarantees of press freedom in a constitution or international conventions ?

The United States presents the converse of this situation. It is true that the Obama Administration convened a Grand Jury to investigate and could conceivably indict WikiLeaks and its principals. No indictment has been issued, so far. But how could the government indict WikiLeaks without also indicting *The New York Times* ? *The Times* republished much of the same classified information as did WikiLeaks.

Let us assume that no conspiracy exists between WikiLeaks and its source or sources, no aiding or abetting, no criminal solicitation. Without such proof, is it likely WikiLeaks will be indicted ? No. Why ? Because to indict WikiLeaks, the US government would also have to indict *The New York Times*. And no American journalist or news organization has ever been indicted or convicted of violating the Espionage Act or any other criminal law affecting the national security. The First Amendment of the US Constitution, to conclude on a note of irony, is the protective shield. That is to say, it is quite possible that *The New York Times*, in all its immunity, will be the WikiLeaks insurance policy against being indicted in the United States.

Geoffrey Robertson, UK media lawyer: *Great Australians*

We are here to discuss News Corp. and WikiLeaks, Rupert Murdoch and Julian Assange -- two great Australians. I happen to be a less great Australian. Rupert Murdoch is a great Australian in the sense that Attila was a great Hun and Julian Assange is certainly a great Australian in the sense that Ned Kelly was a great outlaw.

One is 80, one is 40. They both have produced issues of ethics and law that we are discussing at this conference. One, News Ltd. -- news limited by Rupert's right-wing political views, which he propagates through what he calls Fox News. And Assange, news unlimited -- news without borders (*sans frontières*).

So let us begin with what I consider to be an enormously important issue in this general area of how you protect your sources.

News-limiting News Corp. has committed, it would seem, an ongoing conspiracy to tap people's phones. A big inquiry is going on at the moment into what to do about it. The simple thing to have done about it was to prosecute, but News Ltd. was close to the police at the top, and no prosecution was made. In other words, we need not new law but new enforcement of the law.

However, this is causing great concern, and Mr. Murdoch's operation in America, which is far more lucrative now than his operation in Britain, has sent lawyers -- commercial lawyers, not human rights lawyers -- to Britain. They have set up a management committee of commercial lawyers who have been going through the journalists' e-mails to find out evidence and to hand it over to the police, whom they have invited onto the premises.

Would you believe there are actually 171 policemen investigating News Ltd. Criminality, with 20 or 30 of them actually in the offices of *The Sun* newspaper in Wapping (East London), where these commercial lawyers, as soon as they find an e-mail that someone has taken a policeman to lunch (or it may be a Ministry of Defense official or any kind of government official that they have had dealings with) simply hand it over to the police.

This is extraordinary because it breaches the most fundamental duty of the journalist, namely to protect those to whom he or she has promised anonymity. It is absolutely basic, isn't it ? Without it, you cannot go on covering news.

This is the one area where we in Europe have better protection for our journalists than they do in America, because the First Amendment doesn't stretch to protecting journalists' sources. In Europe we have the great case of Goodwin against the United Kingdom before the European Court of Human Rights in 1996.

Goodwin was a young member of the National Union of Journalists who fought to the end and achieved that in Europe we have qualified privilege, which has been upheld ever since. What the court said is "Protection of journalistic sources is one of the basic conditions of 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."

What the commercial American lawyers who now seem to be running News Ltd. in Wapping don't understand is that the cultivation of sources is professionally essential not only for journalists but for the public they serve. It is a basic tool of their trade. It is the means by which newsworthy information is extracted from powerful corporations and government departments that want to keep wrongdoing secret or give it a particular spin.

Without the ability of journalists to promise anonymity to sources that may fear reprisals and to keep that solemn promise, there would be a lot less news and what there is would be less reliable. So, it is, it seems to me, a serious issue today.

Once upon a time, journalists could simply write the name of their source in a little black book. You could actually keep your source's name secret. Now, they have to type in all their sources into their computer, which turns out to be the office computer, which turns out to be the property of the management.

What the Murdoch lawyers call "draining the swamp" -- but I call throwing out the baby with the bathwater -- may be to protect Rupert from the Foreign Corrupt Practices Act in the United States. Well, that may be a reason for the company to reveal its journalists' sources to the police. I don't think it's actually tactically sensible. But there it is. You as journalist are subject to your employer's determination, which the employer makes in its interest. The media organization will make you hand over your sources to the police. This, it seems to me, is a breach of the breakthrough that we won in the Goodwin case. to have protection of a journalist's sources seen as part of the freedom of expression guaranteed in Article 10 in the European Convention of Human Rights.

On the other hand, a media organization that discovers or thinks that a journalist has had a police officer or public servant on the payroll, creates an ethical dilemma. The corporation has a duty to investigate, to give the journalist an opportunity to explain to the editor or the executive who signed off on the payment. Journalists must be given an opportunity to explain, and this is what the committee of commercial lawyers in Wapping is not doing at all. It is just handing over raw material to the police.

Only if a corporation is satisfied on expert advice -- criminal law advice -- that it has been put in a situation of bribery should it consider handing over journalists and their sources to the police. We

need to ensure that media organizations protect the whistleblowers that have come to their journalists and not hand them over to the police unless criminality is clearly proven.

Let's move on from that particular dilemma to the issue of WikiLeaks and news unlimited. The great American democrat James Madison argued for the First Amendment to create "a nation where knowledge will forever govern ignorance and people will arm themselves with the power that knowledge brings." Theodore Roosevelt called upon muckrakers to destroy what he called the invisible government, the corrupt links between business and politics. The US Supreme Court refused to injunct publication of the Pentagon Papers, saying that the only protection against abuse of power by the Executive is an enlightened citizenry.

Well, Julian Assange, a young man from Magnetic Island in Queensland, took seriously the philosophy that sunlight is the best disinfectant. He devised what is in effect an electronic dead letter box, where sources could send him secret documents in complete confidence that even he couldn't find out who they were. They could waterboard him for weeks, and he wouldn't say because all he could do was check the authenticity of the documents, not the sources. WikiLeaks as far as I know has never published an inauthentic document.

So, Assange became a kind of latter-day Johnny Appleseed of information, scattering it far and wide, watching it inspire revolutions, expose politicians and provoke policy debates. And, of course, it made us more knowledgeable about modern history and its context. You can hardly read a piece on the public background to a news story without the comment, "as a WikiLeaks cable revealed."

So, he began in fact long before Bradley Manning came along -- publishing stories about the massive corruption of Daniel Arap Moi's government in Kenya, then stuff about the Church of Scientology, in the news today for beating up some of its adherents, and tax evasion in the Cayman Islands. He exposed banking fraud in Iceland, the dangers of a nuclear accident in Iran, price-gouging by defense contractors in Iraq -- all stories of massive public interest that would not have seen the light of day otherwise.

People say that WikiLeaks is some sort of crazy left-wing organization. In fact, a lot of stories that discredited some of those climate change scientists in Essex came from WikiLeaks; so, it is not always on the side of what some people would see as progressive. It has published what it thinks people should know, and it was right that they should know that climate information was being subject to some jiggery-pokery. So, it is to that extent an honest organization.

Then, the alleged Bradley Manning stuff arrived. First of all, the "collateral murder" video recording of the Reuters journalist being killed by reckless American pilots in Iraq. As a lawyer I object to the collateral murders title -- it should be collateral manslaughter -- manslaughter by gross negligence, aerial manslaughter. But whatever you call it, it is obvious that it should come out, and that it wouldn't have come out, we would never know about it without WikiLeaks.

Next, came the Afghan war logs showing that the casualties were higher than anyone was admitting. Then Iraqgate -- 400,000 field reports, really an amazing historical treasure trove of reality on the ground of the Iraq war. We had no protest at this time from the United States, but there were a number of countries who threatened to jail any citizen caught sending material to

WikiLeaks. What were those countries ? China, Syria, North Korea, Russia, Thailand and Zimbabwe.

In December 2010, came the first bursts of hysteria from the United States over the release of diplomatic cables mediated by leading newspapers. Assange was accused of being a techno-terrorist by Joseph Biden. Rush Limbaugh said he yearned “for him to die of lead poisoning from a bullet in the brain.” Sarah Palin, shooting from the lip as usual, said he should be hunted down like Bin Laden, which I suppose would give him nine more years of freedom.

When I go to see him in Norfolk, where he is under a sort of house arrest, although it’s really mansion or manor house arrest, he warns that you have to keep a wary eye open for the US Navy Seals. He gets a lot of death threats from middle America.

There are cooler voices, of course. Defense Secretary Robert Gates said it had been an embarrassment but there had been no long-term damage. Hillary Clinton, told of *The New York Times* release, contacted foreign governments to warn them there would some unpleasant comments about them, and they said, “Don’t worry, you should see what we say about you.”

So, the people in Tunisia and Egypt discovered facts about corruption that fueled their revolt and by now people in 90 countries have received information from WikiLeaks about misfeasance in public life.

We heard about US plans to bug diplomats at the United Nations in breach of the Vienna Convention and about begging by Saudi Arabia and the Gulf States that the US should bomb Iran to stop its nuclear weapons program.

One of the greatest surprises, one of the really shocking things about these cables was just how pragmatic and principled the US diplomats were and how insightful -- so much so that the Russian leader Vladimir Putin reacted by saying that Assange must be a CIA agent.

And what of course was propagated were the views from the State Department, sometimes correct, always in some ways insightful.

But America was upset. Its pride was injured by this pesky Australian. It couldn’t, because of the First Amendment, attack *The New York Times*. But it did other things that betrayed its principles of freedom of speech. Bradley Manning was locked up for eight months in solitary confinement without blankets or even a pillow and woken every few minutes, charged would you believe it, with a capital offense. In other words, they charged him with something that would involve his execution in order to put pressure on him to squeal on Assange -- to say that Assange had groomed him.

When that didn’t work, they put frighteners on Amazon, WikiLeaks’ domain name server in the United States, And Amazon, in a quite unconscionably cowardly fashion, gave in and refused to host the site. So, WikiLeaks simply moved the site to Iceland and Sweden, and that was no problem. But continuing is the pressure the United States is putting on PayPal, Master Card and Visa to stop receiving donations [to WikiLeaks], and that is one reason WikiLeaks needs *pro*

bono lawyers. You can buy Nazi uniforms or your Ku Klux Klan outfits on Master Card, but you can't donate to WikiLeaks.

On what basis ? It was at first said that lives were at stake; Assange had blood on his hands. Well, there has not been one single reprisal, either from the first outburst of cables or the downloading of the lot, which wasn't initially WikiLeaks' decision but came about in some other way.

So, all this time has passed without a single casualty other than a few ambassadors withdrawn, and, of course, the point that none of the WikiLeaks critics see is that the cables were not classified "Top Secret" like the Pentagon Papers.

"Top Secret" is where you do expect reprisals. The authors of these cables didn't expect reprisals. They were available under classification laws to 2.5 million people in the United States, including a 22-year-old discombobulated soldier. The whole allegation of lives at stake and blood on your hands was bogus.

There is a point of principle here. It is surely the responsibility of governments who put sources at risk to protect them.

I would suggest four principles in approaching this debate:

- Firstly, citizens everywhere have a democratic right to know what the government does in their name.
- Secondly, governments and their public servants bear sole responsibility for protecting properly classified information
- Thirdly, outsiders who receive or communicate confidential information should not be prosecuted unless they have obtained it by fraud, bribery, or duress.
- Fourthly, national security exceptions should be precisely defined, should protect the identity of sources at risk of reprisals, but should not stop whistleblowers from revealing human rights violations.

Bradley Manning has been committed for trial in an army court martial. Georges Clemenceau once said that military justice is to justice as military music is to music -- and I think we are going to see how far you can expect a fair trial when all the judges are signed up to the department that's bringing the action.

In the course of having Manning committed to trial there were suggestions from the prosecutor of the Justice Department that there was contact between him and Assange, and that raises the issue of what the situation is under the Espionage Act, if there was contact electronically.

There are three situations that may apply. The first is that there is no proven contact; the document that is classified "Secret" is simply sent to a dead letter box. There seems to be absolutely no difference between receiving a document in a dead-letter box to the old position of the journalist who gets a secret document in a plain envelope through the post.

The second position is that there is contact, which seems to be what the Justice Department is alleging against Assange. The source says: "I've got information of great public importance; how can I get it to you ?" And the publisher says: "Do this, press this button or that button, and get it to me this way." This seems to be similar to the Watergate Deep Throat situation, which is a completely traditional and appropriate way and should not involve any criminal responsibility under the Espionage Act.

It is only in a third situation -- where the journalist contacts the source, persuades him to breach a duty of confidentiality, offers him money, solicits or grooms him -- that there should be any question of prosecution of a publisher.

Now, the Americans have this Grand Jury sitting in Virginia in a place where most of the jurors are related to defense contractors or work for them. There is no judge in a Grand Jury procedure. We used to have it in Britain four centuries ago and we abolished it because it was unfair. But in America they still have it and the prosecutor, only the prosecutor, calls in these people from the street and tells them to indict.

American prosecutors say a Grand Jury would indict even a ham sandwich because not only is there no judge, but there is no defense counsel in the room. So it seems to me that it may well be that there will be an indictment and that is a matter that will have to be fought.

But many newspapers now are setting up their own WikiLeaks-style sites. Imitation is the sincerest form of flattery. Even the (Murdoch-owned) *Wall Street Journal* has something they call "Safe House" that guarantees anonymity if you send them your secret documents. Don't send them to Wapping by the way or other parts of the Murdoch operation, where they are certainly not safe.

We are in a new environment where information will not only leak, it will go viral. We are moving into an age where electronic communication can give ordinary people -- which is a condescending phrase used by lawyers about people who are not lawyers -- the right to digital suffrage. It is what Vaclav Havel called "the power of the powerless" and that is why I suspect Google is still blocked in 25 countries in the world. You can't get YouTube in Turkey these days because someone put up a suggestion that Ataturk was gay and it's been blanket banned.

There are situations where leaks would be wrong, for example, lists of police informants or the draft of a budget speech or so on. The custodians of these genuine secrets have a duty to keep them, and if they are negligent, they should be sued. At the same time, there should be a proper classification policy identifying and safeguarding that limited class of material where lives really are or may be at stake.

There was a wonderful TV show in Britain called "Yes, Minister" in which the civil servant would always get around the minister. When the minister suggested they have an open government campaign, the civil servant said, "Oh, but, Minister, that is a contradiction in terms. You can be open or you can have government." And that's how many bureaucrats think.

But I think that we are now in the position of giving some power to the powerless. We must live with this fact of modern electronic life and hope it makes life a little more difficult for the

bastards of the world. We should never forget that the most virulent attack on WikiLeaks was made on Jan. 14 last year, accusing it of leading all the protesters in Tunis astray by false claims and false stories about the incorruptible President Ben Ali. And that was in a speech made in Tripoli by Col. Qaddafi.

Agnes Callamard, Executive Director, Article 19: *Difficulties of the case against WikiLeaks*

Right from the beginning, Article 19 took a strong stand in defense of WikiLeaks and our position has not changed one inch. We do not believe that WikiLeaks has raised a new legal issue in any fundamental or direct fashion. But it has tested our democratic governments' commitment to openness.

Immediately after the WikiLeaks publications, there were numerous kneejerk reactions, some of them pretty nasty and slightly reminiscent of the McCarthy era and all of them have been quite disproportionate. I suspect many people who reacted at the time will feel slightly ashamed now

There have been threats of new laws, but little has actually happened in legal terms. Reactions are based on so-called national security arsenal -- whether it's called anti-terrorism, sedition, or espionage. It's an old, a very old, arsenal that governments around the world -- even those from which we had been expecting better -- have relied on to curtail free speech and freedom of information. But nobody to date and to the best of my knowledge has succeeded in building a case against WikiLeaks.

While there have been calls for criminalization and possible use of the US Espionage Act against WikiLeaks, the fact that some two years later nothing of that kind has happened highlights that even the best legal brains are finding it difficult to build a strong case against WikiLeaks.

But we have witnessed corporate censorship with political pressure, such as the denial of services to WikiLeaks by PayPal and a few others. That, again, is not new. It is not a recent phenomenon linked to WikiLeaks. It is unfortunately quite a common feature of the censorship framework. I will say that is being put in place without a real strong legal justification behind it. What WikiLeaks has highlighted is the real arbitrariness and danger of what has become fairly common place. Without court order and completely in an extralegal and extrajudicial way, these corporations are preventing access to information and in essence acting as censors.

In our opinion, Internet intermediaries should not be liable for WikiLeaks activities.

A number of governments have simply relied on the traditional blocking of information to prevent their people from accessing WikiLeaks and many of those countries have been mentioned already, including China, the United Arab Emirates and Pakistan.

Another dimension, also an old one, is the imprisonment, the mistreatment and now the military trial of that fragile young man, Bradley Manning. Those who study censorship and human rights violations will find a lot of Bradley Mannings around the world. It is sad that he should be lingering in an American jail in 2012, at a time when we certainly were expecting far more from the US Administration in terms of defending civil rights and freedom of expression.

Bradley Manning has been the focus and the target and the primary victim of the inability of governments to do anything else, basically, but pick on the weakest link.

WikiLeaks demonstrates weakness of the legal arsenal that we thought was in place to protect freedom of expression and the right to information. This arsenal has proved to be quite weak in the face of what Article 19 sees as the disproportionate reaction to the WikiLeaks release.

First, whistleblowing laws and practices. There is clear evidence that these laws are misunderstood and flouted. The rights of whistleblowers are clearly being violated. WikiLeaks is not the only case. There are plenty of examples around the world demonstrating that the protection of whistleblowers is very much a weak link in our freedom of expression work and that maybe, for free speech activists, we need to do more on that front and link up with people who work on that issue.

Secondly, WikiLeaks has shown that we can handle far greater public disclosure than has been traditionally assumed. Governments still have to make the case that the release of information actually creates national security problems.

The third issue which has legal implications for us and for WikiLeaks, I think, and is definitely the weakest aspect of WikiLeaks is the question of redaction and the disclosure of information about individuals. The do-no-harm principle may have been flouted on a number of occasions -- although in how many cases remains to be highlighted,

I think that is a particularly important issue as well for us. It may not be a legal issue so much as an ethical one. We could conceive of some individuals having suffered from the release of WikiLeaks bringing their cases to court. That could be quite interesting, and I think will be a challenge for all of us, certainly including WikiLeaks.

A fourth legal issue that is raised by WikiLeaks is the legal status of such enterprises. Article 19 from the start has treated it as a publication, thus having the rights and responsibilities associated with a publication. I think there is a discussion and debate to be had as to whether there is a need for a different kind of legal status for WikiLeaks. It is a whistleblowing web site, but it is not really a whistleblower. I think there are some interesting legal discussions here.

For Article 19, the real legal challenge at the moment for freedom of expression — not directly related to WikiLeaks -- is the question of balancing freedom of expression with intellectual property rights.

Michael Camilleri, media law advisor, Organization of American States: *Countering desacato*

The present discussion, of course, is about international law after WikiLeaks, and some of the questions the panel was asked to address relate specifically to the territorial and other complex legal questions raised by the WikiLeaks case. I'd like to take a slightly different approach by speaking more broadly about the role of international law and international institutions in upholding freedom of expression, and then thinking a bit about the particular challenges that may arise from the WikiLeaks episode.

In doing so, I will speak specifically about the experience of the Inter-American human rights system and its Office of the Special Rapporteur for Freedom of Expression in historical and contemporary perspective. It is a particular type of role, one that struggles less with the question of how democracy and a free, vigorous press can peacefully coexist after WikiLeaks and *News of the World*, but instead assumes that they must coexist and seeks to develop and ensure basic rules of the game that allow such a coexistence to flourish.

Indeed, it is hard to imagine a truly democratic government without the freedom to scrutinize and criticize it. Perhaps this notion was best expressed by a former ambassador to France, Thomas Jefferson, who said, "If I had to choose between government without newspapers, and newspapers without government, I wouldn't hesitate to choose the latter."

So, if we all agree that a vigorous press with the freedom to investigate and criticize the government is a prerequisite for democracy, what can be done to ensure this happens, especially in a post Wiki-Leaks world in which governments may be tempted to exercise tighter control over information ?

There are surely a number of answers to this question, but I will focus on one, admittedly limited, piece of the puzzle: the role of international human rights bodies, and, again, the particular experience of the Inter-American human rights system. It is an experience marked by past and present challenges but ultimately by a sense of progress in promoting domestic legal frameworks in the Americas that provide adequate guarantees for freedom of expression.

Three decades ago in the Americas, those who criticized their governments -- journalists, students, human rights defenders, religious leaders, and others -- risked being swept off the streets, disappearing into clandestine prisons and being thrown out of airplanes. Fortunately, this is no longer the case. With the exception of Cuba, the countries of the Americas are today democratic nations that enshrine freedom of expression in their laws and constitutions, and, by and large, do not engage in prior censorship. This does not mean, however, that challenges do not remain. As current events in the Arab world remind us, the end of a dictatorship does not necessarily or automatically translate into a freer press, and genuine transitions to democracy must also tear down the vestiges of authoritarianism that often survive the fall of a tyrant.

In the Americas, the Inter-American human rights system has played a fundamental supporting role in identifying and removing such remnants of authoritarianism. I will use the remainder of my time to discuss two key areas in which this work has achieved important results, but where challenges remain if we are to create the preconditions for a genuinely free press and an uninhibited marketplace of ideas.

The first area is the legal protection of speech about public interest. If a free press is to exist, laws must protect not only speech that is favorably received by public figures, but also that which shocks or offends them. In fact, speech about matters of public interest should receive heightened protection under the law. Many legal codes in Latin America traditionally did the opposite. Nefarious and antiquated *desacato* (contempt) laws not only made offensive speech a criminal offense, but established aggravated penalties for offending the honor of a public official. Needless to say, such laws have a deep chilling effect on freedom of expression that is incompatible with the existence of a free and vigorous press.

Beginning in 1994, the Inter-American Commission on Human Rights declared that these laws per se violate the freedom of expression guarantees of the American Convention on Human Rights. Since then, the Inter-American Court of Human Rights has ruled in a series of cases that the application of criminal sanctions to speech about matters of public interest is a disproportionate infringement on freedom of expression. In turn, many countries in Latin America have repealed their *desacato* laws, and in some cases they have decriminalized speech about matters of public interest altogether.

Criminal defamation laws remain in effect in a number of countries in Latin America and the Caribbean, however, and, to this day, some of these laws provide special protection to the reputations of public officials.

For example, in Ecuador, President Rafael Correa recently brought suit against a columnist and three executives of the *El Universo* newspaper under a law that criminalizes defamation of a public authority. The columnist and the three executives were convicted and sentenced to three years in prison, and, together with the newspaper itself, to the payment of a total of \$40 million in damages.

This conviction was upheld by Ecuador's highest court. Many journalists, human rights defenders and ordinary citizens in Ecuador now rightly question whether a free press can truly exist in their country so long as the legal system permits those in power to punish their critics in this way.

As the Ecuador case highlights, government-media relations in some countries in the Americas still occur in the context of a legal framework that does not provide adequate protection for speech about public interest. There is a continuing need to examine and reform these frameworks so that such speech is not subject to criminal sanctions or disproportionate civil damages. Only then, will journalists, whether citizen or professional, online or offline, feel free to do the investigative and critical reporting necessary for a vibrant democratic society to flourish.

The second issue I'd like to discuss is the right to access to public information. Like the protection of speech about public interest, access to information is a basic prerequisite for a truly democratic relationship between the government and media. The principle that all government information should be public, subject to a limited regime of exceptions, is a fundamental requirement for scrutiny of government activities by the press and society at large.

Here again, significant progress has been made. More than half the countries in the Americas now have access to information laws, with El Salvador and Brazil adopting such laws just last year, and countries such as Mexico have become global models for the implementation of access to information policies.

Challenges remain, however, and I will focus here on one such challenge that relates directly to the WikiLeaks case: the need to provide access to government information while protecting national security.

The American Convention on Human Rights provides that the right to information can be limited in order to protect national security. Few would argue that this is sometimes necessary, but striking the correct balance is often quite challenging. The Inter-American human rights system

has developed a growing body of jurisprudence that aims to ensure that the national security exception does not swallow citizens' right to know what their governments are doing in their name.

This body of jurisprudence holds, for example, that national security must be defined from a democratic, perspective. Echoing the European Court of Human Rights, the Inter-American Commission has held that national security must refer to continuing, current threats to the national security of a democratic state. This will almost never be the case, for example, when the information refers to the secrets of a prior, authoritarian regime.

In addition, national security can never be invoked to deny information to judicial authorities about gross human rights violations. In Guatemala and Brazil, for example, prosecutors were denied information for decades about forced disappearances committed by the military governments of the 1970s and 1980s. The Inter-American system found that this constituted an impermissible abuse of the national security exception.

Finally, government whistleblowers who release information on violations of the law, serious threats to health, safety or the environment, or breaches of human rights or humanitarian law should be protected if they act in good faith. Public authorities and their staff should bear sole responsibility for protecting the confidentiality of legitimately classified information under their control. Other individuals, such as journalists and civil society representatives, who receive and disseminate information because they believe it is in the public interest, should not be subject to liability unless they committed fraud or another crime to obtain the information.

Of course, these general principles leave a lot of questions unresolved, including many of the interesting questions that have been raised here today. Is Bradley Manning a whistleblower? Should the law treat WikiLeaks as a press organization? What ethical principles should guide media organizations and how should they be enforced?

International law and international institutions must be aware of these questions and evolve with them in mind, but ultimately many of the questions are better resolved by the media themselves or democratic societies at the domestic level. The distinct role of international organizations will continue, I believe, to be that of setting the broad legal parameters that are necessary for the press to be a watchdog and citizens to be informed, and serving as an institutional check when these parameters are breached.

Jane Kirtley, Director, Media Ethics & Law Center, Minnesota: *The First's "indeterminacy"*

We've heard a lot today about the First Amendment -- how protective it is of freedom of the press and free expression. Some have suggested that it is a virtually absolute bar to any kind of legal action against news organizations that publish classified information. I am not so sanguine.

That's an awful lot of power to give to a mere 45 words, which is the length of the text of the First Amendment. In its pertinent part, it reads: "Congress shall make no law abridging . . . the freedom of speech, or of the press."

What has been critical, of course, is how those 45 words have been interpreted by the courts.

Consider this: The great US Supreme Court Justice Hugo Black, a First Amendment “absolutist” who said that “ ‘no law’ means no law,” wrote, in his concurring opinion in the “Pentagon Papers” case, that: “The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic. The Framers of the First Amendment ... sought to give [the new nation] strength and security by providing that freedom of ... [the] press should not be abridged.”

By contrast, 22 years earlier, another Justice, Robert Jackson, wrote that: “The choice is not between order and liberty. It is between liberty with order and anarchy without either. If the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the ... Bill of Rights into a suicide pact.”

Justice Black’s absolute approach has never commanded a majority of the Court. There has always been tension between freedom of information, freedom of the press, and national security.

In a new book by Gary Ross -- a volume in the intriguingly titled “Foreign Denial and Deception Series” published by the US National Intelligence University -- “Who Watches the Watchmen ? The Conflict Between National Security and Freedom of the Press,” the author suggests that the leaking of information is complicated, as are the motives that inspire it. For example, he says, the motives may be political or strategic; the leaker may be inspired by the need for whistleblowing, or to counter overclassification.

By the same token, organizations that publish leaks have a variety of motivations, too. They might include altruistic desires to inform the public, or to disclose problems in the system, or they may be inspired by competitive pressures, or driven by an ideological agenda.

In any event, a critical factor in all this is public opinion. How are the leakers, and the publishers of leaks, regarded ? The answer to that question will have a tremendous influence on the actions of all three branches of government: executive, legislative, and judicial.

There have always been perceptions that there are media “bad actors.” In 1917, when the Espionage Act was first considered by the US Congress, part of the impetus for the law was the actions of “disloyal papers” that had sympathies with Germany.

The Espionage Act is only one statute in the arsenal that the US government can draw upon to deal with those who gain unauthorized access to or who publish classified information. 18 USC. § 793, 794, 798 all deal with the unauthorized access and distribution of classified information. Some of those provisions require intent to harm, some do not. Other statutes prohibit the theft of government property and identification of covert agents.

Since 1946, there have been about 18 unsuccessful attempts to amend the Espionage Act to grant greater authority to the government to prosecute leakers and those who publish leaks. Perhaps the most infamous was the attempt in 2000 to enact the US equivalent of the British Official Secrets Act, which was vetoed by then-President Clinton. In 2010, the Shield Bill was an effort to

include, in Section 798, penalties for disclosure of the identities of informants and intelligence sources.

At a recent conference of media lawyers in Florida, a US attorney stated, “If you break the law, I will prosecute you” -- or rather, the attorneys’ media clients. But the reality is that prosecutors have chosen to focus on leakers, not those who receive and publish the leaks.

Before President Obama’s Administration, there were three such prosecutions. Since President Obama took office, there have been six.

I believe that the decision is a strategic one. Should the government attempt to prosecute a leak at all ? After all, there are risks that, in a public trial, even more classified information will be disclosed.

If the government elects to go forward, it is best to go after those with unambiguous obligations to maintain confidentiality, by virtue of a secrecy agreement or contract, for example. The Whistleblower Protection Act actually does little to protect the rights of leakers to provide classified information to the press. Instead, it requires leakers to go through prescribed channels within their agencies or departments, or to Congress.

Earlier cases have supported this approach. The Pentagon Papers case involved prior restraint/censorship. Although the government also pursued the leaker (in a prosecution that was thrown out due to prosecutorial misconduct), it did not try to prosecute *The New York Times* or *The Washington Post*.

The case itself, of course, established the principle that a prior restraint on the press was presumed to violate the First Amendment and that only a showing that national security would be irreparably harmed would justify it.

Although the Court left open the possibility that the press could be prosecuted, it noted that a constitutional statute would be necessary to do it.

So, the government continued to focus on leakers. The 1988 case of *US v. Morrison* involved a Naval Intelligence analyst who, eager to get a job, provided classified photographs to *Jane’s Defence Weekly*, a British publication. He was prosecuted for theft of government property (this was long before digital photographs), as well as espionage. It was the first instance of an individual being successfully prosecuted for espionage, and not for giving classified information to an enemy (the US wasn’t at war with Britain), but to the press. And the government was able to avoid the tricky issue of what to do about the news organization, since *Jane’s* was based in the United Kingdom, not the United States, so that jurisdiction could not be established.

In 2006, in the case of *US. v. Rosen*, the government attempted to prosecute two lobbyists working for AIPAC, the American Israel Public Affairs Committee, under the espionage laws, essentially for asking questions that led to the oral disclosure of classified information. As the many media “friends of the court” argued in *amicus curiae* briefs, this is precisely what

journalists do. The case collapsed when the presiding judge declined to allow the government to present its evidence in secret.

There have been only a few cases, in other words. But I believe that this is a slow but steady strategy by the Department of Justice to establish legal authority to prosecute the press for publishing classified information. The Department is in no hurry, and it does not want to risk another Pentagon Papers debacle. It will move deliberately and utilize only the best facts to make the best law, from its perspective.

Meanwhile, it has used subpoenas to try to compel journalists to reveal their confidential sources. Judith Miller of *The New York Times* was one example, and served many weeks in jail before her source released her from her promise of confidentiality. The US government has taken the position in an ongoing espionage case (Sterling) that journalists (in this case, *The Times* reporter and author, James Risen) have no constitutional privilege to refuse to disclose their sources in an espionage/leak case -- even though some 36 States have statutory reporters' "shield laws" recognizing such a privilege. There is no such federal shield law.

Remember, though, that these issues don't just arise in the national security context.

Yes, there is a presumption against prior restraints, presuming that the information was obtained legally. Similarly, there is a presumption against post-publication sanctions, provided the information was obtained legally and is a matter of public importance. (*Bartnicki v. Vopper*).

But what about the first WikiLeaks case in the US -- involving the publication of documents from the Swiss bank, Julius Baer ? In that instance, where the issue was personal privacy [not a "fundamental right" in the United States], a trial judge granted an order to force Dynadot, the web host, to block the WikiLeaks site (which then had a US domain registration). The domain registration was subsequently dropped, and the court lost jurisdiction; the order was rescinded.

What about intellectual property ? The Megaupload case in New Zealand, in which the web site's domain name was seized at the behest of the US government on the basis of criminal conspiracy to commit a variety of copyright violations, was based on 18 USC. § 1831-2, criminal statutes designed to protect competitive interests.

And the proposed laws SOPA and PIPA (Stop Online Piracy Act and Protect Intellectual Property Act) have rightfully raised concerns about freedom of expression and extraterritorial impacts that could arise from their enforcement.

To move on to the other topic of the conference -- the fallout from the UK *News of the World* phone hacking scandal -- some claim the UK law was ambiguous, but I think we all recognize that hacking phones is, and was, illegal in both the United Kingdom and the United States. I don't anticipate a similar scandal or a US Leveson-like inquiry, because the law on hacking is unambiguous there, and also because the infamous case in 1998 involving a Cincinnati, Ohio, newspaper reporter who hacked into the voice mails of the corporate offices of Chiquita Banana not only firmly established the illegality of the conduct, but led his newspaper to "repudiate" his truthful news story because of how it was obtained.

Are American journalists just “more ethical” than their British counterparts ?

On the other hand, we also have the Bartnicki case (Supreme Court 2001), which established that journalists could legally “receive” illegally recorded phone conversations, provided that they took no part in the interception and that the conversation recorded contained matters of public interest.

Would a news organization that sets up a digital “drop box” for leaked information be protected from prosecution under the Bartnicki standard ? Is this the same as the proverbial “brown envelope dropped over the transom” ? Or is the news organization aiding and abetting a criminal act ? We don’t know.

Looking ahead -- what we were asked to do -- I have a few questions and observations.

What is the future of the delicate balance between freedom of the press and national security ?

Is government dialogue with media the answer ? Many news organizations in the United States have vetted their stories with the government prior to publication in the past. But is it ethical for journalists to do so ? And would the government engage with “rogue” organizations like WikiLeaks ?

Subpoenas may not be needed in the future. The *Columbia Journalism Review* recently reported that an intelligence agent told a press freedom advocate, “We don’t need you guys any more”-- in other words, covert surveillance was making it possible to uncover source identity without confronting the journalist directly.

Can “prior restraints” be accomplished in other ways ? For example, pressure on PayPal and credit card companies to refuse to process donations to a WikiLeaks could cut off vital funding sources and destroy an organization.

Indeed, the press itself might engage in forms of self-censorship, such as using geo-location to block access to its material by those in certain countries.

I worry about proposals for laws that would create a “right to be forgotten” that might allow both government and private actors to regulate the collection of personal information and to purge it from data bases -- even if it was legally obtained and accurate.

Is the answer to make change in existing legislation ? Some have called for greater clarity in the Espionage Act, arguing that it is vague and too broad -- characteristics that typically would make a law ripe for challenge under the First Amendment.

But I disagree. I believe that ambiguity can be a good thing. The lack of precision and clarity in the Espionage Act has protected the press for nearly 100 years. This is what some call “benign indeterminacy” -- much like the First Amendment itself.

Discussion:

Heather Brooke: Part of the initial advertisement of WikiLeaks was that it would guarantee sources' anonymity. I found that actually it isn't true. I interviewed quite a few cryptographers and security experts to find out if it possible to remain anonymous on the Internet, because being identified is the biggest danger if you are a whistleblower.

Ben Laurie a cryptographer was on the advisory board of WikiLeaks when it was first set up. He oversaw the architecture of the technology that was being used. I asked him what he thought about WikiLeaks' promises to protect sources' anonymity. He said that submitting documents is not entirely secure. His advice to anyone wanting to leak would be to first be aware that secret documents are often watermarked. WikiLeaks, he said, can make a strong guarantee about anonymity, but to a large extent it is not the recipient's problem. It is the sender who identifies him or herself not the recipient.

Jane Kirtley: I am a staunch defender of journalists, but they are parochial in their world view. They think, what does it mean for us specifically ? And they think, not much, because the reality is we got the information, we subjected it to our normal procedures, we put it up and there have been no legal consequences for us, so everything is great and we carry on business as usual.

Those of us who lawyers and are dealing with this in a broader arena recognize that there is a variety of things that are going on not just in the United States but in other countries as well that suggests that governments are not as sanguine about all this as their quiet appears. I truly think it is the calm before the storm. I don't like to be raising red flags and being hysterical. I would also say that on the national security versus freedom of press issues, the US government moves very slowly and very deliberately. There may be no prosecution coming directly out of WikiLeaks, but I would argue that the groundwork is being laid for when a better case comes along that is less ambiguous, particularly in terms of jurisdiction. So, I am not as confident as everybody else is.

Geoffrey Robertson: The Obama administration has gone after more whistleblowers than all the previous administrations since World War II combined. They include the guy who exposed the CIA torturers. The guys who did the waterboarding haven't been prosecuted, but he has. You should be aware of the fact that governments are finding new technical ways of collaring journalists and their sources. I don't know to what extent the electronic dead-letter boxes work or how effective are their guarantees. But Bradley Manning was picked up because he was squealed on by one of his friends. I don't think that in this technical world there is any reason for complacency especially when you see not only what is happening in America to whistleblowers, or for that matter what is happening in Wapping as sources are turned over to the police.

Panel 4: Government-media Relations after WikiLeaks and *News of the World*

Rohan Jayasekera, Associate Editor, *Index on Censorship*: ***Unfulfilled promise***

Relations between journalists and government officials have changed, but not in the way perhaps that we would all have hoped, indeed even expected.