Case No. 21184/01/16

State Attorney of Israel v. Breaking the Silence

Brief of Amici Curiae

Prof. Eva Brems
Anthony Lester, QC
Gilbert Marcus, SC
Prof. Monroe Price
Prof. Andrey Rikhter
Prof. Herman Schwartz
Prof. Yuval Shany
Prof. Dirk Voorhoof

Prepared with the assistance of the
Open Society Justice Initiative

1. As experts in the field of international law on freedom of expression and comparative media law, we provide this submission to assist the Petah Tikva Magistrates' Court in its deliberations on the State Attorney's request for a warrant for the production of documentation held by Breaking the Silence (BtS). The submission provides an overview of international law and standards relevant to the issue, as well as legal precedents established at the domestic level in other democracies.

2. This brief was drafted by the Open Society Justice Initiative. We have requested Michael Sfard, attorney for BtS, to file the brief with the Court.

3. This submission addresses two issues:

   - *A. The right to protect sources extends to non-governmental organizations such as BtS.* It is well-established in international law that media workers and outlets enjoy a right to protect their sources of information, subject only to narrow exceptions. This right derives from the right to freedom of expression. The practice of international courts and mechanisms, although limited, indicates that the right to protect sources is not limited to traditional journalists and media, and can also be invoked by other social communicators, notably non-governmental organizations (NGOs) that gather and publish information of public interest. A number of precedents established at the domestic level in other democracies lend further support to this view. Granting source protection to NGOs is also in line with policy underlying this right, which is to safeguard the free flow of information.

   - *B. Exceptions to source protection should be exceptional.* The right to protect sources, like the underlying right to freedom of expression, is not absolute. However, given that disclosure orders can have a widespread and long-term deterrent effect on the willingness of sources to report wrongdoing, such orders should be exceptional. International and national courts have set a high bar of justification for an order to disclose a source.

I. BACKGROUND

4. BtS is an NGO that collects testimonies of IDF soldiers who have served in the West Bank, Gaza, and East Jerusalem, often in anonymized form. It aims to "expose the Israeli public to the reality of everyday life in the Occupied Territories," to "stimulate public debate" and "to bring an end to the occupation."[1] BtS maintains a website where it publishes testimonies, as well as thematic reports based on them.[2] The State Attorney seeks a warrant for the disclosure of documents concerning a soldier who is allegedly the source of anonymized testimony published by BtS relating to certain events during Operation Protective Edge in the Gaza Strip in 2014. The State Attorney maintains that disclosure is necessary as part of an investigation into possible criminal offences committed during that operation. The nature of these offences has not been made public; according to BtS, the documents sought relate to relatively minor incidents that are not known to have caused civilian casualties. It opposes the warrant, arguing that its work, which involves the collection and dissemination of information to the public, is inherently of a journalistic nature, and that it is, accordingly, entitled to invoke the right to protect sources. BtS contends that a disclosure order would effectively make it impossible to continue informing the public and the authorities through the publication of anonymized testimony, thus harming the public interest.

II. LEGAL STANDARDS PROTECTING SOURCES

5. International law guarantees the right to protect sources, and authoritative courts and other bodies support the ability of NGOs to invoke this right. National jurisdictions have also upheld the right of a range of social communicators to protect their sources.

6. The right to protect sources is not expressly mentioned in any treaty, but it has been widely recognized as part and parcel of the right to freedom of expression by human rights mechanisms within the United Nations (UN), as well as within the African, European, and Inter-American regional systems for the protection of human rights. As of 2007, approximately 100 countries had enacted source protection laws.[3]

7. Because reporting based on confidential sources has traditionally been the preserve of the news media, source protection is often referred to as a right of journalists. There is no generally agreed definition of journalism, however, and the imposition of formal requirements for entry to the profession, such as licensing or registration, is considered incompatible with international law.[4] Mindful of the changing media landscape, international courts and mechanisms have either adopted a broad understanding of journalism that includes persons and groups engaged in publication outside of the

---

[1] See Breaking the Silence website, at http://www.breakingthesilence.org.il/about/organization.
[2] *Ibid.*, at http://www.breakingthesilence.org.il .
[3] David Banisar, "Silencing Sources: An International Survey of Protections and Threats to Journalists' Sources", *SSRN Electronic Journal*, November 2007, p. 4.
[4] U.N. Human Rights Committee, *General Comment 34: Article 19 (Freedoms of expression and opinion)*, U.N. Doc. CCPR/C/GC/34 (2011), para. 44; Inter-American Court of Human Rights, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights)*, Advisory Opinion OC-5/85, November 13, 1985; African Commission on Human and Peoples' Rights, *Scanlen & Holderness / Zimbabwe*, Decision of 3 April 2009, para. 97.

traditional media, or have extended rights traditionally associated with the media to other actors, including NGOs.

A. Global law and standards

8. The International Covenant on Civil and Political Rights (ICCPR),[5] to which Israel is a party,[6] guarantees freedom of opinion and expression under Article 19. In 2011, the UN Human Rights Committee, the body of independent experts that monitors implementation of the ICCPR, adopted a General Comment on Article 19, stating that "States parties should recognize and respect that element of the right of freedom of expression that embraces the limited journalistic privilege not to disclose information sources."[7] The Committee underlines the need for States to take account of the fact that, as a consequence of new technologies, "exchanging ideas and opinions … does not necessarily rely on the traditional mass media intermediaries."[8] Journalism is now "a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere."[9] General Comments adopted by the UN Human Rights Committee are considered authoritative interpretations of provisions of the ICCPR.[10]

9. In a 2015 report on protection of sources and whistleblowers,[11] the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (the UNSR) specifically examined the position of NGOs. Echoing the UN Human Rights Committee, he observed that "[h]istorically, States have enabled a professional class of journalists to invoke the right, but the revolution in the media and in information over the past 20 years demands reconsideration of such limitations."[12] In the UNSR's view, "[t]he protection available to sources should be based on the function of collection and dissemination and not merely the specific profession of 'journalist',"[13] such that "any person or entity involved in collecting or gathering information with the intent to publish or otherwise disseminate it publicly should be permitted to claim the right to protect a source's confidentiality."[14] As an example, he mentions members of civil society organizations, noting that "[m]any non-governmental organizations are themselves publishers of well-sourced content that, in form and substance, is virtually identical to the work of the press".[15] The UNSR is an independent expert appointed by the UN Human Rights Council, whose mandate includes making recommendations on "ways and means to

[5] *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* March 23, 1976.
[6] Israel ratified the ICCPR on October 3, 1991.
[7] U.N. Human Rights Committee, *General Comment 34: Article 19 (Freedoms of expression and opinion)*, U.N. Doc. CCPR/C/GC/34 (2011), para. 45.
[8] *Ibid.*, para. 15.
[9] *Ibid.*, para. 44.
[10] International Law Association, Committee on International Human Rights Law and Practice, *Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies*, 2004, paras. 8-16.
[11] Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, *Report submitted to the General Assembly*, UN Doc. A/70/361, September 8, 2015.
[12] *Ibid.*, para. 17.
[13] *Ibid.*
[14] *Ibid.*, para. 18.
[15] *Ibid.*, para. 19.

better promote and protect the right to freedom of opinion and expression in all its manifestations".[16]

10. Questions relating to source protection have also been addressed by international criminal tribunals. In *Prosecutor v. Radoslav Brdjanin and Momir Talic*, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) subpoenaed a correspondent for the *Washington Post* to answer questions about an interview he had conducted with Brdjanin, one of the accused. It considered that no issue regarding the protection of sources arose, since Brdjanin was named in the resulting article. The Appeals Chamber set the subpoena aside.[17] It held that "in order to do their jobs effectively, war correspondents must be perceived as independent observers rather than as potential witnesses for the Prosecution. Otherwise, they may face more frequent and grievous threats to their safety and to the safety of their sources. These problems remain … even if the testimony of war correspondents does not relate to confidential sources."[18] In *Prosecutor v. Simić et al.*, the ICTY held that an employee of the International Committee of the Red Cross (ICRC) could not be compelled to testify. It noted the "prejudicial impact that a breach of confidentiality would have on the ICRC's activities."[19]

11. The Special Court for Sierra Leone (SCSL) has similarly recognized the existence of a right to protect sources. In *Prosecutor v. Taylor*, the Appeals Chamber allowed a journalist to refuse to answer questions about the identity of members of the Economic Community of West African States Monitoring Group (ECOMOG) intervention force who had facilitated a trip he had undertaken to Sierra Leone.[20] The Appeals Chamber held that facilitators and sources of journalists may run similar risks of reprisals and that no distinction can be drawn on this account.[21] In *Prosecutor v. Alex Tamba Brima et al*, the Appeals Chamber upheld the Prosecutor's request for assurances that one of its witnesses would not be compelled to answer any questions relating to the names of confidential sources on whom he had relied while serving as a UN human rights officer.[22] In a separate and concurring opinion appended to the decision, Justice Geoffrey Robertson, a distinguished media lawyer,[23] reflected on the question whether the "presumptive privilege

---

[16] Commission on Human Rights, Resolution 1993/45, *Right to freedom of opinion and expression*, UN Doc. E/CN.4/1993/122, March 5, 1993, para. 18. The mandate of the UNSR has been extended a number of times, most recently by Human Rights Council Resolution 16/4, *Freedom of opinion and expression: mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UN Doc. A/HRC/RES/16/4, April 8, 2011.

[17] *Prosecutor v. Radoslav Brdjanin and Momir Talic* (IT-99-36-AR73.9), AC, Decision on Interlocutory Appeal, 11 December 2002.

[18] *Ibid.*, para. 42.

[19] *Prosecutor v. Simić et al.* (IT-95-9-PT), TC, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999, para. 70.

[20] *Prosecutor v. Taylor* (SCSL-03-1-T), AC, Decision on the Defence Motion for the Disclosure of the Identity of a Confidential 'Source' Raised During Cross-Examination of TF1-355, 6 March 2009.

[21] *Ibid.*, para. 25.

[22] *Alex Tamba Brima et al*. (SCSL-2004-16-AR73), AC, Decision on Prosecution Appeal Against Decision on Application for Witness TF1-150 to Testify Without Being Compelled to Answer Questions on Grounds of Confidentiality, 26 May 2006.

[23] Robertson is co-author of the standard work *Robertson & Nicol on Media Law*, published by Sweet & Maxwell.

recognised in international law for journalists to protect their sources" might also apply to a researchers and investigators employed by NGOs.[24] He wrote:

> "The reasoning behind the protection of journalistic sources can, it seems to me, be applied in principle to … reports issued to the public by NGOs like Amnesty and Human Rights Watch. There is in my judgement little meaningful difference in this respect between an investigative journalist tracking a story in a war-torn country, a war correspondent reporting on the ebb and flow of the conflict, and a researcher for a human rights organisation filing information for an "in depth" report … All are exercising a right to freedom of expression, (and, more importantly, assisting their source's right of free speech) by extracting information for publication from people who would not give it without an assurance that their names will remain anonymous."[25]

B. Regional law and standards

12. Regional treaties for the protection of human rights derive, like the ICCPR, from the Universal Declaration of Human Rights, and therefore guarantee many rights, including freedom of expression, in similar terms. The case-law and standards developed in regional systems can therefore be an aid in the construction of Article 19 ICCPR, and are often cited by national courts, including in Israel, as guidance in helping to interpret domestic law.[26] In all three regional systems – in Africa, the Americas and Europe – the existence of a right to protect sources has been recognized. The European Court of Human Rights has rejected distinctions between the legal protections enjoyed by NGOs and the press.

<u>European regional standards</u>

13. Article 10 of the European Convention on Human Rights[27] (ECHR) guarantees the right to freedom of expression. In *Goodwin v. UK*,[28] and in a substantial number of subsequent cases,[29] the European Court of Human Rights (ECtHR) has held that Article 10 entails a

---

[24] *Ibid.*, Separate and Concurring Opinion of Hon. Justice Geoffrey Robertson, QC, para. 2.
[25] *Ibid*., para. 28.
[26] In H.C.J 7052/03, *Adalah, et al. v. Minister of Interior, et al*, 14 May 2006, the Israel Supreme Court quoted seven separate rulings of the European Court of Human Rights in examining the constitutionality of the Citizenship and Entry into Israel Law.
[27] Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953.
[28] *Goodwin v. UK*, ECtHR, Grand Chamber Judgment of 27 March 1996.
[29] *Roemen and Schmit v. Luxembourg*, ECtHR, Judgment of 25 February 2003, para. 46; *Ernst and Others v. Belgium*, ECtHR, Judgment of 15 July 2003, para. 91; *Katamadze v. Georgia*, ECtHR, Decision of 14 February 2006; *Weber and Saravia v. Germany*, ECtHR, Decision of 29 June 2006, para. 143; *Voskuil v. the Netherlands*, ECtHR, Judgment of 22 November 2007, para. 65*; Tillack v. Belgium*, ECtHR, Judgment of 27 November 2007, para. 53; *Nordisk Film & TV A/S v. Denmark*, ECtHR, Decision of 22 January 2008; *Financial Times Ltd and Others v. the United Kingdom*, ECtHR, Judgment of 15 December 2009, para. 59; *Sanoma Uitgevers B.V. v. the Netherlands*, ECtHR, Grand Chamber Judgment of 14 September 2010, para. 50; *Solanelles Mollar v. Andorra*, ECtHR, Decision of 20 March 2012, para. 45; *Martin and Others v. France*, ECtHR, Judgment of 12 April 2012, para. 59; *Ressiot and Others v. France*, ECtHR, Judgment of 28 June 2012, para. 99; *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands*, ECtHR, Judgment of 22 November 2012, para. 102; *Saint-Paul Luxembourg S.A. v. Luxembourg*, ECtHR, Judgment of 18 April 2013, para. 49; *Nagla v. Latvia*, ECtHR, Judgment of 16 July 2013, para. 80; *Stichting Ostade Blade v. the Netherlands*, ECtHR, Decision of 27 May 2014, para. 60-61; *Görmüş and Others v. Turkey*, ECtHR, Judgment of 19 January 2016, para. 44.

right to protect sources. The ECtHR describes protection of sources as "one of the basic conditions for press freedom", [30] and cautions that "[w]ithout 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."[31]

14. The ECtHR has not yet had an opportunity directly to address the question as to whether NGOs may invoke the right to protect sources. But it has consistently held, in a range of contexts, that NGOs perform a social function analogous to the media and are entitled to similar protections of their freedom of expression.

15. In *Steel and Morris v. UK*,[32] sometimes referred to as the "McLibel case", the applicants were members of a small campaign group who had endured the longest trial in English history after distributing a leaflet entitled "What's wrong with McDonald's?" The ECtHR found that the libel damages awarded against them by the English courts were excessive and thus violated Article 10 of the ECHR. In doing so, it rejected the distinction drawn by the UK Government between the rights of journalists and those of members of NGOs:

> "The Government have pointed out that the applicants were not journalists, and should not therefore attract the high level of protection afforded to the press under Article 10. The Court considers, however, that in a democratic society even small and informal campaign groups … must be able to carry on their activities effectively and that there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment."[33]

16. In *Vides Aizsardzības Klubs v.* Latvia, the ECtHR characterized an environmental NGO as a "watchdog" of democracy,[34] a term it had previously used to describe the role of the press. In subsequent cases it has continued to draw this analogy.[35] In *Társaság a Szabadságjogokért v. Hungary*,[36] the applicant NGO challenged a refusal by the Hungarian Constitutional Court to grant it access to a pending constitutional complaint. The ECtHR found that the refusal constituted a violation of freedom of expression, and held:

> "The function of the press includes the creation of forums for public debate. However, the realisation of this function is not limited to the media or professional journalists. In the present case, the preparation of the forum of public debate was conducted by a non-governmental organisation. … The Court has repeatedly recognised civil society's important contribution to the discussion of public affairs …. The applicant is an association involved in human rights litigation with various objectives, including the

[30] *Goodwin v. UK*, ECtHR, 27 March 1996, para. 39.
[31] *Ibid.*
[32] *Steel and Morris v. UK*, ECtHR, Judgment of 15 February 2005.
[33] *Ibid.*, para. 89.
[34] *Vides Aizsardzības Klubs v. Latvia*, ECtHR, Judgment of 27 May 2004, para. 42.
[35] *Társaság a Szabadságjogokért v. Hungary*, ECtHR, Judgment of 14 April 2009, para. 27; *Animal Defenders International v. the United Kingdom*, ECtHR, Grand Chamber Judgment of 22 April 2013, para. 103; *Youth Initiative for Human Rights v. Serbia*, ECtHR, Judgment of 25 June 2013, para. 20; *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria*, ECtHR, Judgment of 28 November 2013, para. 34; *Weber v. Germany*, ECtHR, Decision of 6 January 2015, para. 22.
[36] *Társaság a Szabadságjogokért v. Hungary*, ECtHR, Judgment of 14 April 2009.

> protection of freedom of information. It may therefore be characterised, like the press, as a social "watchdog" …. In these circumstances, the Court is satisfied that its activities warrant similar Convention protection to that afforded to the press."[37]

17. *Animal Defenders International v. the United Kingdom* concerned a ban on a TV ad against the keeping and exhibition of primates, imposed under a UK law that prohibited the broadcasting of political advertising. The ECtHR's Grand Chamber found that there had been no violation of Article 10, but in doing so recognized that "when an NGO draws attention to matters of public interest, it is exercising a public watchdog role of similar importance to that of the press."[38]

18. The ECtHR is part of the Council of Europe (CoE), an international organization with 47 Member States dedicated to the promotion of human rights, democracy, and the rule of law. In the wake of the *Goodwin v. UK* judgment discussed above, the Committee of Ministers, the statutory decision-making body of the CoE, adopted a Recommendation to Member States (the CoE Recommendation) that elaborates further on the right to protect sources.[39] While the Recommendation describes source protection as a right of journalists, it defines a journalist broadly as "any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication". The Explanatory Memorandum to the Recommendation emphasizes that, to be considered a journalist, "[p]rofessional accreditation or membership is not necessary", and that while "protection was originally intended for journalists working for the traditional mass media … there is no argument to limit such protection to these persons and to apply a different regime to those working professionally in the collection and dissemination of information via new means of communication".[40]

19. In a later Recommendation "on a new notion of media", the Committee of Ministers noted that "the functioning and existence of traditional media actors … are being complemented or replaced by other actors."[41] In this new environment, "protection of sources should extend to the identity of users who make content of public interest available on collective online shared spaces".[42] The Committee of Ministers has also emphasized the importance of respecting the confidentiality of the identity of whistleblowers,[43] which it defines as "any person who reports on or discloses information on a threat or harm to the public interest in the context of their work-based relationship, whether it be in public or private sector."[44]

---

[37] *Ibid.*, para. 27.
[38] *Animal Defenders International v. the United Kingdom*, ECtHR, Grand Chamber Judgment of 22 April 2013, para. 103.
[39] Committee of Ministers of the Council of Europe, *Recommendation No. R (2000) 7 on the right of journalists not to disclose their sources of information*, 8 March 2000.
[40] *Ibid.*, Explanatory Memorandum, para. 13.
[41] Committee of Ministers of the Council of Europe, *Recommendation CM/Rec (2011) 7 on a new notion of media*, 21 September 2011, para. 6.
[42] *Ibid.*, Appendix, para. 73.
[43] Committee of Ministers of the Council of Europe, *Recommendation CM/Rec (2014) 7 on the protection of whistleblowers*, 30 April 2014, para. 18.
[44] *Ibid.*, Definitions.

African regional standards

20. The East African Court of Justice has recognized the right to protect sources, citing the ECtHR ruling in *Goodwin v. UK* with approval.[45] Principle XV of the Declaration of Principles on Freedom of Expression in Africa[46] (the African Principles), issued by the African Commission on Human and Peoples' Rights in 2002, states that "media practitioners" shall not be required to reveal confidential sources of information or to disclose other material held for "journalistic purposes". No further definition of these terms is provided.

Inter-American regional standards

21. In 2000, the Inter-American Commission on Human Rights (IACHR) adopted a Declaration of Principles on Freedom of Expression.[47] Principle 8 states that "[e]very social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential." The term 'social communicator' suggests a broader category than traditional journalists.[48]

C. Domestic Courts

22. The question whether NGOs have a right to protect their sources has arisen in at least two cases before domestic judicial bodies. Both cases relate to Global Witness (GW), a UK-based organization that investigates, reports and campaigns on environmental and human rights abuses driven by the exploitation of natural resources and corruption.[49]

23. In 2005, GW director Patrick Alley was summoned as a witness in the trial of Guus Kouwenhoven, a businessman accused of illegally supplying arms to Liberia, whose activities had first come to the attention of the Dutch judicial authorities as a result of a GW report. Alley sought assurances that he would not have to reveal the identity of sources cited in the report. In a letter to Alley's legal counsel, the examining magistrate stated:

> "In its ruling in Chauvy v. France, the ECtHR has held that the publication of books or other works may contribute to the essential role which the press plays in a democratic society (ECtHR, 29 June 2004, §68). On these grounds I am of the view that Mr. Patrick Alley, too, in principle is entitled to journalistic testimonial privilege. … [T]he actual application of this right will need to be assessed per question. If a question gives rise to the need referred … to assess whether an exception is justified in light of Article 10(2) ECHR, I will indeed need to balance the interests."[50]

---

[45] *Burundi Journalists Union v. Attorney General of the Republic of Burundi*, EACJ, Judgment of 15 May 2015, paras. 107 – 111.
[46] African Commission on Human and Peoples' Rights, *Declaration of Principles on Freedom of Expression in Africa*, 17 - 23 October, 2002.
[47] Inter-American Commission on Human Rights, *Inter-American Declaration of Principles on Freedom of Expression*, 2 – 20 October, 2000.
[48] An interpretation of the Declaration, published by the Office of the IACHR's Special Rapporteur for Freedom of Expression, sheds no light on the issue. It is available online at http://www.oas.org/en/iachr/expression/showarticle.asp?artID=132.
[49] See Global Witness website, at https://www.globalwitness.org/en/about-us/.
[50] Letter of K. Schaffels, Examining Magistrate, 21 October 2005, unpublished, in the possession of the Open Society Justice Initiative.

24. A source protection bill currently under consideration by the Dutch Parliament[51] would apply to a "journalist or commentator" called as a witness in a criminal case. The Minister of Justice has explained that the latter term seeks to protect sources "who, for the purposes of public debate, make information available to representatives of an NGO and academics, who cannot be said to practicing journalism professionally."[52]

25. The second case arose from a demand by Israeli businessman Beny Steinmetz and three executives of his company that GW hand over any documents mentioning them or the company, on the grounds that these constituted "personal data" in the terms of the UK Data Protection Act (DPA). GW had been investigating the company's involvement in a corruption scandal in Guinea. It refused to turn over any documents, citing Section 32 of the DPA, which exempts data processed "only for journalism, art or literature" from disclosure. Steinmetz and his associates applied to the High Court in London,[53] which stayed the proceedings to allow the Information Commissioner's Office (ICO) to make a determination on GW's defense. The ICO considered that "non-media organisations" which publish information, ideas or opinions have a "journalistic purpose even if they are not professional journalists and the publication forms part of a wider campaign to promote a particular cause."[54] It added that GW's concerns about the impact that complying with the disclosure request would have on its journalistic activities and sources were not unreasonable.[55]

26. The Belgian Court of Arbitration (now known as the Constitutional Court) upheld a complaint against the country's source protection law brought by a local politician who published occasional newspaper articles and blogs, sometimes relying on confidential sources. The Court found that, by limiting source protection to journalists working in a regular and professional manner, the law violated constitutional guarantees of freedom of expression and of the press, whether read on their own or in conjunction with Article 19 of the ICCPR and Article 10 of the ECHR.[56] Under the present, revised wording of the law, source protection may be invoked by "any person who contributes directly to the collection, editing, production or dissemination of information for the public via a medium".[57] Domestic courts in Ireland[58] and New Zealand[59] have also upheld source protection for bloggers, while the Superior Court of Quebec granted journalistic privilege to academic researchers who were conducting a large-scale study on sex work,[60] lending further support to the view that source protection is not the exclusive preserve of traditional

---

[51] Bill no. 34032, *Codification of the Right to Protect Sources In Free Newsgathering*, tabled September 22, 2014.
[52] Note in response to parliamentary report (*Nota naar aanleiding van het verslag*), number KST340328, August 31, 2015.
[53] *Steinmetz v. Global Witness* [2014] EWHC 1186 (Ch).
[54] Information Commissioner's Officer, Letter of 15 December 2014, available online at https://www.globalwitness.org/documents/17891/Letter_from_ICO_to_GW.pdf .
[55] *Ibid.*
[56] Belgian Court of Arbitration, Case No. 3796, Judgment No. 91/2006 (7 June 2006), para. B.14.1.
[57] Law on the Protection of Journalistic Sources (as amended by the Court of Arbitration), 7 April 2005, Article 2.
[58] *Cornec v. Morrice* (and ors.) [2012] IEHC 376.
[59] *Slater v. Blomfield* [2014] NZHC 2221 (12 September 2014).
[60] *Parent c. R.*, 2014 QCCS 132 (21 January 2014).

media and journalists.

III. GRANTING SOURCE PROTECTION TO NGOS IS CONSISTENT WITH THE PURPOSE OF THIS RIGHT

27. The primary goal of source protection is to ensure the free flow of information to the public. The ECtHR has frequently warned that, without an effective guarantee of anonymity, "sources may be deterred from assisting the press in informing the public on matters of public interest".[61] Thus, the aim of source protection is not merely to protect journalism as a profession, but also to ensure that the public is well-informed and that instances of wrongdoing or dysfunction do not go unreported.

28. As BtS' work illustrates, it is not only traditional media that may act as a conduit of information from sources to the public. Increasingly, sources turn to NGOs to alert the public to wrongdoing and problematic practices. The objective of a well-informed public supports extension of source protection to NGOs.

29. Arguments for limiting this right to traditional media are usually based on assumptions that they offer greater safeguards of professionalism, impartiality or ethical conduct. Justice Geoffrey Robertson, in his opinion appended to *Prosecutor v. Alex Tamba Brima et al*, acknowledged the "proliferation" of NGOs whose staff is "of varying calibre and experience", the fact that some had been "accused of sensationalising reports in order to gain support" and that others "might have a bias derived from political connections". Yet, observing that similar problems exist in the media, he found that no "meaningful distinction can be made"[62] on these grounds.

30. Since established democracies generally do not impose educational or licensing requirements for the practice of journalism and, as noted previously, such requirements would not comport with international law, it is difficult to sustain that media workers employed in traditional outlets are more professional than their counterparts in NGOs. International courts do not treat a journalist's experience or education as a relevant factor. In *Goodwin v. UK*, the case in which the ECtHR first recognized a right to protect sources, the applicant was a 23-year old trainee,[63] a fact that played no part in the Court's reasoning.

31. The subject matter and impartiality of the media outlet in question are also immaterial; source protection cases before the ECtHR have concerned well-known newspapers such as the *Financial Times*,[64] but also a "protest magazine, published for an activist and politically engaged audience",[65] as well as publications devoted to cars[66] and sports.[67]

---

[61] See e. *Goodwin v. UK*, ECtHR, Grand Chamber Judgment of 27 March 1996, para. 39; *Roemen and Schmit v. Luxembourg*, ECtHR, Judgment of 25 February 2003, para. 46; *Saint-Paul Luxembourg S.A. v. Luxembourg*, ECtHR, Judgment of 18 April 2013, para. 49.

[62] *Alex Tamba Brima et al*. (SCSL [Special Court for Sierra Leone]-2004-16-AR73), AC, Decision on Prosecution Appeal Against Decision on Application for Witness TF1-150 to Testify Without Being Compelled to Answer Questions on Grounds of Confidentiality, 26 May 2006, Separate and Concurring Opinion of Hon. Justice Geoffrey Robertson, QC, para. 34.

[63] See Patricia Wynn Davies, "European court backs journalist who hid source", *The Independent*, March 27, 1996, available at http://www.independent.co.uk/news/european-court-backs-journalist-who-hid-source-1344436.html.

[64] *Financial Times Ltd and Others v. the United Kingdom*, ECtHR, Judgment of 15 December 2009.

[65] *Stichting Ostade Blade v. the Netherlands*, ECtHR, Decision of 27 May 2014, para. 55.

32. The ECtHR has often held that journalists "must act in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism,"[68] which does not preclude "recourse to a degree of exaggeration, or even provocation."[69] It is true that self-regulation schemes for the maintenance of professional ethics are more advanced among traditional media than NGOs, but participation in such schemes is generally neither mandatory nor universal, and the Court has never suggested that it is a precondition for reliance on source protection. In *Steel and Morris v. UK*, the ECtHR accepted that the requirement to adhere to the ethics of journalism "must apply to others who engage in public debate", but rejected the Government's argument that campaigners should enjoy a lower level of protection than "professional journalists".[70]

IV. EXCEPTIONS TO SOURCE PROTECTION SHOULD BE EXCEPTIONAL

33. The right to protect sources, like the underlying right to freedom of expression, is not absolute. However, because a disclosure order can have a widespread and long-term deterrent effect on the willingness of sources to report wrongdoing, such orders ought, in the words of the UNSR, to be "genuinely exceptional and subject to the highest standards."[71]

34. A number of international courts and mechanisms have articulated criteria for exceptions to the right to protect sources. These tests generally require the presence of a number of elements:

    a) *The decision must be taken by a judge or other independent body.* The African Principles state that disclosure may only be "ordered by a court, after a full hearing".[72] The ECtHR considers "review by a judge or other independent and impartial decision-making body" as "[f]irst and foremost" amongst the necessary "safeguards commensurate with the importance of the principle at stake."[73]

    b) *The exception must serve a legitimate purpose.* The drafters of the CoE Recommendation considered that three interests might justify a disclosure order: "the protection of human life", "the defence … of a person who is accused or convicted of having committed a serious crime", or "the prevention of major crime".[74] "Major crimes" include "murder, manslaughter, severe bodily injury, crimes against national

---

[66] See *Sanoma Uitgevers B.V. v. the Netherlands*, ECtHR, Grand Chamber Judgment of 14 September 2010 (concerning the magazine 'Autoweek');
[67] See *Ressiot and Others v. France*, ECtHR, Judgment of 28 June 2012 (concerning sporting daily *l'Equipe* and the newspaper *Le Point*).
[68] See, for example, *Bladet Tromsø and Stensaas v. Norway*, ECtHR, Grand Chamber Judgment of 20 May 1999, para. 65.
[69] *Ibid.*, para. 59.
[70] *Steel and Morris v. UK*, ECtHR, Judgment of 15 February 2005, para. 90.
[71] Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, *Report submitted to the General Assembly*, UN Doc. A/70/361, September 8, 2015, para. 21.
[72] Principle 3(b)(i); African Commission on Human and Peoples' Rights, *Declaration of Principles on Freedom of Expression in Africa*, 17 - 23 October, 2002, Principle XV.
[73] *Sanoma Uitgevers B.V. v. the Netherlands*, ECtHR, Grand Chamber Judgment of 14 September 2010, paras. 88-90.
[74] Committee of Ministers of the Council of Europe, *Recommendation No. R (2000) 7 on the right of journalists not to disclose their sources of information*, 8 March 2000, Explanatory Memorandum, para. 38.

security, or serious organised crime."[75] The African Principles similarly refer to "investigation or prosecution of a serious crime, or the defence of a person accused of a criminal offence" as possible grounds for disclosure.[76]

c) *There must be a pressing need for disclosure.* The information of which disclosure is sought must not only be related to a legitimate purpose; it must be of key importance to it. The ECtHR requires demonstration of "an overriding requirement in the public interest".[77] The CoE Recommendation adds that the circumstances must be "of a sufficiently vital and serious nature,"[78] while the ICTY and SCSL require the petitioning party to "demonstrate that the evidence sought is of direct and important value".[79]

d) *The public interest in disclosure outweighs the public interest in non-disclosure.* The existence of a pressing need for disclosure is not sufficient, as there is a countervailing "vital public interest"[80] in protection of sources. Thus, the CoE Recommendation and African Principles both require a determination that the public interest in disclosure outweighs the harm to freedom of expression.[81]

e) *There is no reasonable alternative to disclosure*. The Grand Chamber of the ECtHR has held that before ordering disclosure, a judge or other review body should assess "whether a less intrusive measure can suffice to serve the overriding public interests established."[82] Where the source is a public servant, the ECtHR has suggested an internal investigation by the public body should precede any heavier measures such as a search of journalistic premises.[83] A petitioning party before the ICTY or SCSL must similarly demonstrate that "the evidence sought cannot reasonably be obtained

[75] *Ibid.*, para. 40.
[76] African Commission on Human and Peoples' Rights, *Declaration of Principles on Freedom of Expression in Africa*, 17 - 23 October, 2002, Principle XV.
[77] *Goodwin v. UK*, ECtHR, Grand Chamber Judgment of 27 March 1996, para. 39.
[78] Committee of Ministers of the Council of Europe, *Recommendation No. R (2000) 7 on the right of journalists not to disclose their sources of information*, 8 March 2000, Principle 3(b)(ii).
[79] *Prosecutor v. Radoslav Brdjanin and Momir Talic* (IT-99-36-AR73.9), AC, Decision on Interlocutory Appeal, 11 December 2002, para. 50; *Prosecutor v. Taylor* (SCSL-03-1-T), AC, Decision on the Defence Motion for the Disclosure of the Identity of a Confidential 'Source' Raised During Cross-Examination of TF1-355, 6 March 2009, para. 30.
[80] *Goodwin v. UK*, ECtHR, Grand Chamber Judgment of 27 March 1996, para. 45.
[81] Committee of Ministers of the Council of Europe, *Recommendation No. R (2000) 7 on the right of journalists not to disclose their sources of information*, 8 March 2000, Principle 3(a); African Commission on Human and Peoples' Rights, *Declaration of Principles on Freedom of Expression in Africa*, 17 - 23 October, 2002, Principle XV.
[82] *Sanoma Uitgevers B.V. v. the Netherlands*, ECtHR, Grand Chamber Judgment of 14 September 2010, para. 92.
[83] *Ernst and Others v. Belgium*, ECtHR, Judgment of 15 July 2003, para. 102.

elsewhere."[84] The CoE Recommendation and African Declaration are to the same effect.[85]

35. A recent ruling of the Norwegian Supreme Court[86] exemplifies the application of a number of these principles. In the course of an investigation of a terror suspect, the Police Security Service of Norway came to believe that he had participated as an anonymous interviewee in a documentary about Islamist extremism, and decided to seize raw footage held by the filmmaker. Judge Ringnes, delivering the Supreme Court's unanimous opinion, acknowledged the "important public interests that the prosecuting authority should have access to the material,"[87] and the fact that terrorism qualifies as a "major crime".[88] But he questioned whether the material's expected usefulness rose to the level of "vital significance".[89] In weighing the interests, he noted that the film gave the public insight into the Islamic State, that its realization depended on effective protection of sources, and that such a film project "is at the heart of investigative journalism",[90] leading to the conclusion that the seizure should be set aside.[91]

36. The US Department of Justice has published a policy on obtaining information from, or records of, members of the news media, which echoes several of the principles established at the international level. According to the policy, information may only be sought if it "is essential to a successful investigation, prosecution, or litigation" and "after all reasonable alternative attempts have been made to obtain the information from alternative sources". In every case, the approach "must be to strike the proper balance among several vital interests", in particular those served by law enforcement and "the essential role of the free press".[92] Similarly, the Russian Supreme Court has held that a demand to disclose a confidential source should only be granted if "all other means to establish the circumstances relevant to the proper examination and adjudication of the case have been exhausted and the public interest in disclosure … clearly overrides the public interest in keeping it secret."[93]

---

[84] *Prosecutor v. Radoslav Brdjanin and Momir Talic* (IT-99-36-AR73.9), AC, Decision on Interlocutory Appeal, 11 December 2002, para. 50; *Prosecutor v. Taylor* (SCSL-03-1-T), AC, Decision on the Defence Motion for the Disclosure of the Identity of a Confidential 'Source' Raised During Cross-Examination of TF1-355, 6 March 2009, para. 30.

[85] Committee of Ministers of the Council of Europe, *Recommendation No. R (2000) 7 on the right of journalists not to disclose their sources of information*, 8 March 2000, Principle 3(b)(i); African Commission on Human and Peoples' Rights, *Declaration of Principles on Freedom of Expression in Africa*, 17 - 23 October, 2002, Principle XV.

[86] Supreme Court of Norway, Case No. 2015/1462, Judgment No. HR-2015-02308-A (20 November 2015). Available in English at www.osce.org/fom/207201?download=true.

[87] *Ibid.*, para. 61.

[88] *Ibid.*, para. 68.

[89] *Ibid.*, paras. 62-66.

[90] *Ibid.*, paras. 69-70.

[91] *Ibid.*, para. 82.

[92] Department of Justice, *Policy regarding obtaining information from, or records of, members of the news media; and regarding questioning, arresting, or charging members of the news media*, 28 C.F.R. § 50.10, Jan. 21, 2015.

[93] Plenum of the Supreme Court of the Russian Federation, *Resolution No. 16 on the Application by Courts of the Law of the Russian Federation "On Mass Media",* June 15, 2010, para. 26.

V. CONCLUSIONS

37. For all of the above reasons, we respectfully urge the Magistrates' Court to:

a) Recognize that BtS is entitled to invoke the right to protect sources. The testimonies and reports published by BtS contribute to public debate on a matter that is of significant public interest, and as such BtS plays a public watchdog role comparable to that of the traditional media. A decision to this effect would be in line with international and domestic precedent and practice, and with the rationale underlying the protection of sources.

b) Examine in a rigorous manner whether the conditions for an exception to source protection have been met, bearing in mind that only the prevention of "major" crimes may justify a disclosure order, that the material sought must be vital to the investigation, and that the State Attorney must demonstrate that it cannot achieve its aims in another manner. Most importantly, the Magistrates' Court should assess whether the interest in disclosure, even if substantial, justifies the very real risk that future sources may be deterred from informing the Israeli public and the State Prosecutor about other instances of wrongdoing.

DATED: August 17, 2016

EVA BREMS

DATED: August 22, 2016

ANTHONY LESTER

DATED: August 11, 2016

GILBERT MARCUS

DATED: August 22, 2016

MONROE PRICE

DATED: August 19, 2016

ANDREY RIKHTER

DATED: August 22, 2016

HERMAN SCHWARTZ

DATED: August 20, 2016

YUVAL SHANY

DATED: August 19, 2016

DIRK VOORHOOF

Background information about amici and supporters

Eva Brems joined the Ghent University Law Faculty in September 2000 as the first holder of the then newly created chair of Human Rights Law. Before that, she studied law at the University of Namur (Bachelor, 1989), the University of Leuven (Master, 1992) and Harvard University (LL.M., 1995). She was a PhD Researcher at the University of Leuven (1995 – 1999) and a Lecturer at Maastricht University (1999 – 2000). At Ghent University, she founded the Human Rights Centre in 2002. Brems' research interests cover most areas of human rights law in European and international law as well as in Belgian and comparative law, with a particular emphasis on the protection of the rights of non-dominant groups and individuals. She has a keen interest in multi- and interdisciplinary research. Brems has been a member of the board of several Belgian human rights NGOs, including as the Chair of the Flemish section of Amnesty International (2006 – 2010), and she was briefly active in politics as a Member of the Belgian Federal Chamber of Representatives (2010 – 2014).

Anthony Lester (Lord Lester of Herne Hill QC) is a British Parliamentarian and barrister specializing in public law, and one of the world's foremost authorities on the international law of freedom of expression and information. He has argued many leading cases on free expression in Europe, England, and elsewhere, and has been instrumental in the abolition of a number of antiquated speech offences. Lord Lester's 2010 private member's Bill on defamation became a model for the Government's Bill which entered into force in 2014, initiating sweeping reforms. He sat as a Recorder at the Crown Court and a Deputy High Court Judge before becoming a Liberal Democrat Peer in 1993. Also in 1993, Lord Lester was Lionel Cohen lecturer at the Hebrew University of Jerusalem. He has participated in the British-Israeli Legal Exchange on several occasions, and organized numerous international judicial exchanges that included Israeli judges. He campaigned for thirty years to make the European Human Rights Convention directly enforceable in British courts and introduced Private Members' Bills on the subject which became models for the Human Rights Act 1998. In 2007, he received the LIBERTY and JUSTICE Judges Award for lifetime achievement, and has received honorary degrees from the Open University, and the universities of Durham, Ulster, the South Bank, Stirling and University College London. He has chaired, and served on, boards of several NGOs, including the Open Society Justice Initiative and INTERIGHTS (the International Centre for the Legal Protection of Human Rights). He has written many books and articles on freedom of expression, human rights and constitutional law. He was a founding member of the Joint Parliamentary Committee on Human Rights, was a member of the House of Lords Constitution Committee, and served as an independent Advisor to the Justice Secretary on constitutional reform (2007-08). In May 2016 he published a book entitled *Five Ideas to Fight For*, which includes a chapter on Free Speech.

Gilbert Marcus, Senior Counsel with Thulamela Chambers, was admitted to the Johannesburg Society of Advocates in July 1983 and took silk in 1996. His areas of specialization include media and telecommunications, constitutional and administrative law, public regulation, and international law. He has appeared in the Constitutional Court and Supreme Court of Appeal and has acted as judge at the High Court and Labor Court. He has also been admitted to the bar in Lesotho, Swaziland, England and Wales (as non-practicing solicitor) and is an associate tenant at Doughty Street Chambers in London. He is an Honorary Professor of Law at the University of the Witwatersrand and has written numerous articles on a wide range of subjects. He holds BA, LLB, and LLM qualifications.

Monroe E. Price is the Joseph and Sadie Danciger Professor of Law and Director of the Howard M. Squadron Program in Law, Media and Society at the Cardozo School of Law where he served as Dean from 1982 to 1991. He also directs the Stanhope Centre for Communications Policy Research in London. He was the founding director of the Center for Global Communication Studies at the Annenberg School for Communication at the University of Pennsylvania; co-founder and former Chair of the Center for Media, Data and Society at the Central European University (founded by George Soros); and founding director of Oxford's Programme in Comparative Media Law and Policy (PCMLP). In honor of his role in its founding, PCMLP created the annual Monroe E. Price International Media Law Moot Court competition at Oxford. He graduated magna cum laude from Yale, where he was executive editor of the Yale Law Journal, and then clerked for Associate Justice Potter Stewart of the U.S. Supreme Court. Among his many books are *Free Expression, Globalism and the New Strategic Communication* (Cambridge University Press, 2015), *Media and Sovereignty* (MIT Press, 2002); *Television, The Public Sphere and National Identity* (Oxford University Press, 1996); and A Memoir of American Opportunities and Viennese Dreams (CEU Press, 2007).

Andrei Richter (Andrey Georgievich Rikhter) has authored more than 200 publications on media law in Russian, English, Armenian, Azeri, Bosnian, Croat, German, French, Serbian, Slovak, Tajik and Ukrainian, including the only standard media law textbook for journalism students in the Russian Federation (2002, 2009, 2016), a textbook on international standards of media regulation (2011), a textbook on online media law (2014), and a book on censorship and freedom of the media in post-Soviet countries, published by UNESCO (2007). Prof. Richter holds university degrees in law and foreign languages, and a doctorate and professorship in journalism studies. He was a commissioner at the International Commission of Jurists and the Chair of the Law Section of the International Association for Media and Communication Research.

Herman Schwartz has served on the faculty of the Washington College of Law at American University, Washington, DC, for nearly 35 years, specializing in constitutional and free speech law. He has worked with numerous organizations, including Helsinki Watch, the U.S./Israel Civil Liberties Law Program (which he founded), the ACLU Prison Project (which he founded), and Washington College of Law's Human Rights Center. He has received several awards including from the Alliance for Justice (2006); the American Jewish Congress - Washington Capital area; and the ACLU. He has served as an adviser to numerous Central and Eastern European governments on constitutional and human rights reform, and in recent years has advised on constitutional reform in Afghanistan, Iraq and several African countries. He has written extensively on constitutional law, including free expression issues. He served on the Advisory Board of the Open Society Justice Initiative (2004-2014), and received his Juris Doctor degree from Harvard Law School.

Yuval Shany is the Dean and Hersch Lauterpacht Chair in International Law at the Law Faculty of the Hebrew University of Jerusalem. He also serves as a senior research fellow at the Israel Democracy Institute. In September 2012, he was elected to serve on the UN Human Rights Committee - a body of independent experts responsible for monitoring the implementation of the International Covenant on Civil and Political Rights - and in 2016 he was re-elected by the States parties to the Covenant for another four-year term of service on the Committee. He is only the second expert from Israel to serve on this Committee, which was established in 1976. Prof. Shany has degrees in law from the Hebrew University (LL.B, 1995 cum laude), New York University (LL.M., 1997) and the University of London (Ph.D., 2001). He has published books and articles on international courts and arbitration tribunals and other international law issues such as

international human rights and international humanitarian law. He is the recipient of the 2004 American Society of International Law book award (creative legal scholarship) and a 2008 recipient of a European Research Council grant awarded to pioneering research leaders. Prof. Shany has taught in a number of law schools in Israel, and has been in recent years a research fellow at Harvard and Amsterdam Universities and a visiting professor at the Georgetown University Law Center, Michigan University Law School, Columbia University Law School and the Faculty of Law of the University of Sydney.

Dirk Voorhoof is one of Europe's leading free expression legal experts. He has served on the faculties of Ghent and Copenhagen universities, and the Media Law Advocates Programme at the University of Oxford. He is a member of the Committee of Experts on Internet Intermediaries (MSI-NET) of the Council of Europe; the Global FOE&I @Columbia University experts network; the Executive Board of the European Centre for Press and Media Freedom (ECPMF), Leipzig; and the CMPF Scientific Committee, European University Institute, Florence. He practiced law at the Brussels Bar, and previously served on the Federal Commission for Access to Administrative Documents (1994-2005), the Flemish Media Council (2005-2012), and the Flemish Regulator for the Media (2006-2016). He has written extensively on freedom of expression, media, journalism and access to information in Europe, including in Iris, legal newsletter of the European Audiovisual Observatory, Auteurs & Media and Mediaforum.

The Open Society Justice Initiative, an operational program of the Open Society Foundations (OSF), uses law to protect and empower people around the world. Through litigation, advocacy, research, and technical assistance, the Justice Initiative promotes human rights and builds legal capacity for open societies. Its work has included the submission of numerous *amicus curiae* briefs in landmark freedom of expression cases in international and national courts, and it takes an interest in advancing the rights NGOs require in order to be able to play their role of watchdog in a democratic society, including protection of sources of information. The Justice Initiative wishes to note that Breaking the Silence has received grants from the Middle East and North Africa Program of OSF, and its attorney, Michael Sfard, is currently an OSF Fellow.