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Terror in the Press: How the U.K.'S Threatened Criminalization of The Guardian Under The Terrorism Act 2000 Would Violate Article 10 of the European Convention on Human Rights

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COMMENTS

TERROR IN THE PRESS: HOW THE U.K.’S THREATENED CRIMINALIZATION OF THE GUARDIAN UNDER THE TERRORISM ACT 2000 WOULD VIOLATE ARTICLE 10 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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I. INTRODUCTION

In November 2013, Liam Fox, a British parliamentarian and former United Kingdom (“U.K.”) Defense Secretary, asked Alison Saunders, the Director of Public Prosecutions, to begin researching whether The Guardian newspaper could be prosecuted under the U.K.’s Terrorism Act 2000 (“TA 2000”) for its publication of classified documents leaked by former National Security Agency (“N.S.A.”) contractor Edward Snowden.¹ Based on the theory that publication of Snowden’s leaked documents undermined British national security, The Guardian could face prosecution for both sharing the documents with foreign journalists and failing to redact physical documents it sent to the New York Times.²

1. See Conor Friedersdorf, *In Britain, an Ominous Move to Conflate Journalism with Terrorism*, ATLANTIC, Nov. 11, 2013, <http://www.theatlantic.com/international/archive/2013/11/in-britain-an-ominous-move-to-conflate-journalism-with-terrorism/281331/> (clarifying that The Guardian published only some of Snowden’s documents while its international partners published others); see also David Barrett, *Edward Snowden Spy Leaks: Liam Fox in Push for Guardian Newspaper to be Prosecuted*, TELEGRAPH, Nov. 9, 2013, <http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/10438200/Edward-Snowden-spy-leaks-Liam-Fox-in-push-for-Guardian-newspaper-to-be-prosecuted.html> [hereinafter Barrett, *Spy Leaks*].

2. See Friedersdorf, *supra* note 1; see also David Barrett, Publishing Edward Snowden Security Secrets a ‘Criminal’ Act, Says Former Terrorism Watchdog, TELEGRAPH, Oct. 24, 2013, <http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/10401711/Publishing-Edward-Snowden-security-secrets-a-criminal-act-says-former-terrorism-watchdog.html> (citing Lord Carlile of Berriew as stating that the disclosures have “given away how we catch terrorists” and Andrew Parker, the General Director of MI5, as warning that “the Guardian had handed a ‘gift’ to terrorists and a ‘guide book’ on the best way to avoid detection when plotting mass murder”); Julie Hyland, *British MP Presses for Criminal Charges Against The Guardian Newspaper*, WORLD SOCIALIST WEB SITE (Nov. 13, 2013), <http://www.wsws.org/en/articles/2013/11/13/snow-n13.html>

The first threat of prosecution came only months after officials took David Miranda, husband of former Guardian employee Glenn Greenwald, into custody at London Heathrow Airport pursuant to schedule 7 of the TA 2000.³ On February 18, 2014, the U.K. High Court of Justice found the stop permissible under British law because Miranda acted on behalf of The Guardian as a courier of the N.S.A. documents Snowden leaked.⁴ Now, Scotland Yard, London's police force, has announced that it may prosecute The Guardian under section 58A of the TA 2000, a provision that prohibits communicating information about British intelligence agents.⁵

This comment argues that if the U.K. functionally criminalizes forms of investigative journalism under the TA 2000, it will fail to uphold its obligations under article 10 of the European Convention on Human Rights ("ECHR"),⁶ codified within the U.K. Human

(referencing appearances before the Intelligence and Security Committee by the heads of the Government Communication Headquarters, the internal security service for MI5, and foreign intelligence department MI6 in which they claimed the actions of Snowden and The Guardian jeopardized British national security); Geoffrey Ingersoll, *One Major Screwup Could Get The Guardian in Trouble Over Snowden Leaks*, BUS. INSIDER AUSTL., Dec. 5, 2013, <http://www.businessinsider.com.au/guardian-screwed-itself-on-snowden-leaks-2013-12> (stating that The Guardian made a major mistake in FedExing leaked documents that contained unredacted names to the New York Times).

3. See Friedersdorf, *supra* note 1; see also Alan Travis, *UK Police: Terrorism Offenses 'May Have Been Committed' by Glenn Greenwald's Partner*, BUS. INSIDER, Dec. 3, 2013, <http://www.businessinsider.com/uk-police-terrorism-offenses-may-have-been-committed-by-glenn-greenwalds-partner-2013-12> (discussing the detention of Miranda and potential prosecution of The Guardian).

4. See *Miranda v. Sec'y of State for the Home Dep't*, [2014] EWHC 255, [8], [89] (Eng.) (holding that the detention powers allotted under schedule 7 of the TA 2000 do not infringe upon the freedom of expression protected in the European Convention on Human Rights).

5. See Travis, *supra* note 3 (noting that the head of counter-terrorism for Scotland Yard told MPs that it may be "possible that some people have committed offenses" under the TA 2000 in relation to The Guardian's activities); see also David Barrett, *Guardian Journalists Could Face Criminal Charges over Edward Snowden Leaks*, TELEGRAPH, Dec. 3, 2013, <http://www.telegraph.co.uk/news/uknews/crime/10492749/Guardian-journalists-could-face-criminal-charges-over-Edward-Snowden-leaks.html>

[hereinafter Barrett, *Guardian Journalists*] (confirming that detectives at Scotland Yard are looking at whether The Guardian committed a crime under the TA 2000).

6. Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]; *Convention for the Protection of Human Rights and Fundamental Freedoms CETS No. 005*,

Rights Act 1998 (“HRA”).⁷ The U.K. must ensure it honors its international obligations outlined within the ECHR and HRA by clarifying that the TA 2000 will not be used to criminalize protected acts of journalism, investigative or otherwise.⁸

Next, this comment establishes that The Guardian’s activities fall within the definition of investigative journalism and that the TA 2000 contains an overbroad definition of terrorism.⁹ This comment further demonstrates that limiting The Guardian’s freedom of expression as a journalistic entity is inappropriate and that the U.K. has a positive obligation to protect The Guardian’s article 10 right to freedom of expression.¹⁰

Finally, this comment recommends that the U.K. ensure its actions comply with the article 10 protections of freedom of expression required by both the ECHR and HRA. If the British government chooses to pursue criminal charges against The Guardian under the TA 2000, courts should enforce the U.K.’s obligations under the HRA by interpreting the TA 2000 in accordance with the U.K.’s ECHR obligations.¹¹ Furthermore, the U.K. should strengthen the protections afforded to investigative journalists by narrowing the definition of terrorism in the TA 2000 and codifying the International

COUNCIL OF EUROPE, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG> (last updated March 9, 2014).

7. Human Rights Act, 1998, c. 42, § 10, sch. 1 (Eng.). *See generally* discussion *infra* Section III.A-D (explaining that the HRA codifies the ECHR protections of freedom of expression and thereby protects investigative journalism).

8. *See generally* discussion *infra* Section IV.B-D (recommending ways in which the U.K. can strengthen its commitment to article 10 freedom of expression).

9. *See* discussion *infra* Section III.A (demonstrating that The Guardian’s “watchdog” role in disseminating the leaked documents to the public qualifies its actions as investigative journalism according to the UNESCO definition).

10. *See* discussion *infra* Section III.C (showing that although national security is a legitimate aim of the limitation of freedom of expression, the concerns are misapplied based on the facts of The Guardian’s actions and that criminalization of The Guardian’s actions under the TA 2000 represents a disproportionate limitation of article 10 freedom of expression).

11. *See* discussion *infra* Section IV.A-B (calling on the U.K. to refrain from continuing its pursuit of prosecution against The Guardian under the TA 2000 and advising that, if it does not refrain from doing so, the courts must interpret the TA 2000 in line with the U.K.’s treaty obligations).

Covenant on Civil and Political Rights (“ICCPR”)¹² into its domestic legislation, thus strengthening the State’s commitment to protecting freedom of expression.¹³

II. BACKGROUND

The U.K.’s first terrorism legislation was a temporary fix aimed at preventing terrorism and combating violence in Northern Ireland in the 1970s.¹⁴ Recognizing the need for more permanent legislation, Parliament drafted the Terrorism Act 2000 in the aftermath of the 1997 Irish Republican Army ceasefire.¹⁵ Since the first stages of the drafting process and throughout its passage and implementation, the TA 2000’s broad definition of terrorism has sparked concern and controversy.¹⁶

This concern came to fruition when officials detained David Miranda, the husband of former Guardian journalist Glenn

12. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess. Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR].

13. See discussion *infra* Section IV.C-D (providing concrete steps the U.K. could take to fully respect article 10 freedom of expression rights and repair its reputation as a world leader in respect to these rights).

14. See *Terrorism Act 2000*, GUARDIAN, Jan. 19, 2009, <http://www.theguardian.com/commentisfree/libertycentral/2009/jan/19/terrorism-act> (passing the Prevention of Terrorism (Temporary Provisions) Act 1989, the Northern Ireland (Emergency Provisions) Act 1996, and portions of the Criminal Justice (Terrorism and Conspiracy) Act 1998); *The Troubles 1968-1998*, BBC, <http://www.bbc.co.uk/history/troubles> (last visited Oct. 8, 2014) (“The conflict in Northern Ireland during the late 20th century is known as the Troubles. Over 3,600 people were killed and thousands more injured. Over the course of three decades, violence on the streets of Northern Ireland was commonplace and spilled over into mainland Britain, the Republic of Ireland and as far afield as Gibraltar. Several attempts to find a political solution failed until the Good Friday Agreement, which restored self-government to Northern Ireland and brought an end to the Troubles.”).

15. See *Terrorism Act 2000*, *supra* note 15 (explaining that the Act stems from Lord Lloyd of Berwick’s recommendations following an inquiry in 1996 into the need for permanent terrorist legislation following the IRA ceasefire).

16. See *id.* (noting that, although the Labour government followed Lloyd’s recommendation that the definition of terrorism should include the term “violence,” the government also chose to broaden the definition to include “serious violence against persons or property”); *id.* (emphasizing that many MPs were concerned that the TA 2000 gave the government power and ability to chill political protest).

Greenwald, under schedule 7 of the TA 2000, which gives “examining officers” permission to detain a person “at a port or in the border area” if it is believed that his presence is connected to “entering or leaving Great Britain.”¹⁷ Miranda, a Brazilian citizen, was traveling to Brazil with 58,000 highly classified documents obtained from former N.S.A. contractor Edward Snowden.¹⁸ British border authorities held Miranda for nine hours, during which examining officers denied him access to a lawyer,¹⁹ confiscated his phone, computers, and USB drives, and did not return them upon his release.²⁰ On February 19, 2014, the U.K. High Court of Justice determined that Miranda’s detention under schedule 7 was proportionate to the national security risk the State claimed he created by transporting the leaked documents and thus did not violate his article 10 right to freedom of expression.²¹ Furthermore, the

17. See Terrorism Act, 2000, c. 11, § 53, sch. 7 (U.K.); see also David Barrett, *Spy Leaks*, *supra* note 1 (discussing why Scotland Yard launched a criminal inquiry against The Guardian).

18. David Barrett, *Spy Leaks*, *supra* note 1.

19. See *Miranda v. Sec’y of State for the Home Dep’t*, [2014] EWHC 255, [8], [89] (Eng.); see also Trevor Timm, *Investigating Acts of Journalism under “Terrorism” Laws Is a Hallmark of Authoritarian Regimes*, FREEDOM OF THE PRESS FOUND. (Aug. 18, 2013), <https://pressfreedomfoundation.org/blog/2013/08/investigating-acts-journalism-under-terrorism-laws-hallmark-authoritarian-regimes> [hereinafter Timm, *Investigating Acts of Journalism*] (arguing that under the TA 2000, authorities do not need any suspicion of terrorist activity to effectuate a legitimate stop).

20. See David Barrett, *Scotland Yard Launch Criminal Investigation Over David Miranda Data*, TELEGRAPH, Aug. 22, 2013, <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/10259658/Scotland-Yard-launch-criminal-investigation-over-David-Miranda-data.html> [hereinafter Barrett, *Scotland Yard*] (stating that Miranda carried these documents for his partner, Glenn Greenwald, who was, at the time, a journalist employed by The Guardian); *id.* (noting the officers detained Miranda for nine hours); see also Barrett, *Spy Leaks*, *supra* note 1 (revealing that The Guardian paid for Miranda’s flight to Brazil); Timm, *Investigating Acts of Journalism*, *supra* note 19 (specifying the time of detention as eight hours and fifty-five minutes).

21. See *Miranda*, [2014] EWHC at [27], [89] (determining that the actual purpose of the stop was to deduce the nature of the documents Miranda carried, a legitimate objective under schedule 7 of the TA 2000); see also Jamie Doward, *Metropolitan Police Detained David Miranda for Promoting “Political” Causes*, GUARDIAN, Nov. 2, 2013, <http://www.theguardian.com/world/2013/nov/02/david-miranda-detained-political-causes> (describing how officers detained Miranda for promoting “political” causes); Trevor Timm, *Will the US Condemn UK’s Attempt to Use “Terrorism” Laws to Suppress Journalism?*, OPEN DEMOCRACY (Nov. 6, 2013), <http://www.opendemocracy.net/ourkingdom/trevor-timm/will-us-condemn->

Court stated that journalistic activities represent a “sub-class” of freedom of expression that is secondary to the freedom of expression afforded to individuals.²² Based on the Court’s interpretation, article 10 freedom of expression serves the public at large as opposed to attaching to an individual journalist.²³ An appellate court is expected to hear *Miranda*’s case in 2015.²⁴

On December 3, 2013, in the midst of *Miranda*’s trial, Parliament’s Home Affairs Select Committee forced Alan Rusbridger, Editor-in-Chief of *The Guardian*, to defend the release of the leaked documents.²⁵ On the same day, Cressida Dick, an Assistant Commissioner at Scotland Yard, announced a potential prosecution under the TA 2000 of *The Guardian* for publishing and disseminating information obtained from Snowden.²⁶ The *Miranda*²⁷

uks-attempt-to-use-terrorism-laws-to-suppress-journalism [hereinafter Timm, *Will the US Condemn UK’s Attempt*] (referencing the accompanying court filing during the week of November 6, 2013). *But see* discussion *infra* III.D (discussing that the U.K. has a positive obligation to protect freedom of expression and that creating a chilling effect is not in accord with this obligation).

22. *See Miranda*, [2014] EWHC at [46] (stating that the freedom of expression for journalists is a classification below the freedom of expression of individuals).

23. *See id.* (“The contrast is not between private right and public interest. The journalist enjoys no heightened protection for his own sake, but only for the sake of his readers or his audience. If there is a balance to be struck, it is between two aspects of the public interest.”). *But see* *Turkington v. Times Newspapers Ltd.*, [2001] 2 A.C. 277 [1] (appeal taken from N. Ir.) (expressing that any limitation of freedom of expression of the press must be strictly proportionate to the legitimate expressed concerns); *Regina v. Sec’y of State for the Home Dep’t.*, [2000] 2 A.C. 115 (H.L.) [6]-[7] (Eng.) (“Freedom of speech is the lifeblood of democracy.”); *Att’y Gen. v. Observer Ltd.*, [1990] 1 A.C. 109 (H.L.) [30] (Eng.) (stating that the U.K. proceeds on an assumption in favor of free speech and then must look to law for valid exceptions).

24. *See* Joshua Rozenberg, *How UK’s Terrorism Law Targets Words, Not Just Guns and Bombs*, *GUARDIAN*, July 22, 2014, <http://www.theguardian.com/law/2014/jul/22/terrorism-law-targets-words-guns-bombs>.

25. *See* Nick Hopkins & Matthew Taylor, *Guardian Will Not Be Intimidated over NSA Leaks, Alan Rusbridger Tells MPs*, *GUARDIAN*, Dec. 3, 2013, <http://www.theguardian.com/world/2013/dec/03/guardian-not-intimidated-nsa-leaks-alan-rusbridger-surveillance> (including inquiries that called into question his patriotism and love of his country).

26. *See* Barrett, *Guardian Journalists*, *supra* note 5 (indicating that Scotland Yard is looking at whether the staff of *The Guardian* committed an offense under the TA 2000); *see also* Ian Dunt, *Revenge for Werritty? Liam Fox Takes First Step in Prosecuting The Guardian*, *POLITICS.CO.UK* (Nov. 10, 2013), <http://www.politics.co.uk/news/2013/11/10/revenge-for-werritty-liam-fox-takes-first-step-in-prosecuting> (detailing Liam Fox’s statement that “[t]o actually divulge

decision makes this threat even more credible.²⁸

The Guardian, a U.K.-based newspaper, along with the U.S.-based Washington Post were the first to publish revelations based on information received from Snowden.²⁹ These publications revealed that authorities in both the U.K. and U.S. acted outside the law by using blanket surveillance techniques on their citizens' electronic communication as part of anti-terrorism programs.³⁰ Extensive documentation shows that The Guardian took great care to act responsibly by only publishing one percent of the documents obtained from Snowden;³¹ the publication maintained constant communication with Downing Street, the DA Notice Secretariat, the White House, and all intelligence agencies to ensure understanding of the risks posed by disseminating the leaked documents.³² Even so,

the details of named individual agents to overseas sources is likely to constitute a crime.”).

27. *Miranda v. Sec’y of State for the Home Dep’t*, [2014] EWHC 255, [8], [89] (Eng.).

28. See Travis, *supra*, note 3 (indicating that Scotland Yard would wait for the outcome of the *Miranda* case to determine whether to pursue criminal action against The Guardian).

29. See Anthony Faiola, *Q & A with Alan Rusbridger, Editor of the Guardian*, WASH. POST, Nov. 30, 2013, http://www.washingtonpost.com/world/q-and-a-with-alan-rusbridger-editor-of-the-guardian/2013/11/29/11b36798-5821-11e3-bdbf-097ab2a3dc2b_story.html [hereinafter Faiola, *Q & A*].

30. See Dunt, *supra* note 27; see also Anthony Faiola, *Britain Targets Guardian Newspaper over Intelligence Leaks Related to Edward Snowden*, WASH. POST, Nov. 30, 2013, http://www.washingtonpost.com/world/wurope/britain-targets-guardian-newspaper-over-intelligence-leaks-related-to-edward-snowden/2013/11/29/1ec3d9c0-581e-11e3-bdbf-097ab2a3dc2b_story.html [hereinafter Faiola, *Britain Targets Guardian*] (exposing the joint operation of the U.K. and U.S. surveillance programs).

31. See Faiola, *Q & A*, *supra* note 30 (stating that The Guardian has not published or lost control of any names, has redacted all names and sensitive information before document publication, and has regularly consulted with the DA Notice Secretariat, Downing Street, the White House, and the applicable intelligence agencies); see also Jill Lawless, *Guardian: We have published 1% of Snowden Leak*, LEAF CHRONICLE, Dec. 3, 2013, <http://www.theleafchronicle.com/usatoday/article/3856423> (indicating that Rusbridger, The Guardian’s editor, does not expect to publish much more than the one percent of information already released). *But see* Barrett, *Guardian Journalists*, *supra* note 5 (revealing that The Guardian sent unredacted copies of information, some via FedEx to other news organizations because, in Rusbridger’s view, there were too many documents to thoroughly go through alone).

32. See Faiola, *Q & A*, *supra* note 30 (noting that, as a result of these conversations, The Guardian ensured redaction of certain names).

Prime Minister David Cameron and others have threatened to take various legal actions against the publication, which could have a chilling effect on the media.³³ These threats include enforced use of the “D-notice system,” a system that warns journalists to refrain from publishing any intelligence that might threaten national security.³⁴ As a result of these threats, and in conjunction with the court ruling against Miranda, many journalists are now wary of traveling through U.K. ports, choosing instead to seek alternate routes when they travel for work.³⁵

A. DEFINITION OF INVESTIGATIVE JOURNALISM

Investigative journalism is defined as “the unveiling of matters that are concealed either deliberately by someone in a position of

33. See DAVID ANDERSON, THE TERRORISM ACTS IN 2013: REPORT OF THE INDEPENDENT REVIEWER ON THE OPERATION OF THE TERRORISM ACT 2000 AND PART 1 OF THE TERRORISM ACT 2006 30-31(2014), *available at* <https://terrorismlegislationreviewer.independent.gov.uk/wpcontent/uploads/2014/07/Independent-Review-of-Terrorism-Report-2014-print2.pdf> (finding that the expansive powers provided to authorities charged with enforcing the TA 2000 magnifies the chilling effect already created by the overbroad definition of terrorism); see, e.g., Faiola, *Q & A*, *supra* note 30 (listing chilling behavior experienced by The Guardian in the last five months as “the threat of prior restraint; the state telling a newspaper there’s been ‘enough’ debate; the forced destruction of journalistic material; the use of terror laws to detain someone who was plainly not a terrorist; MPs calling for the prosecution of an editor and accusing a paper of treason; and the prime minister backing calls for an editor to be called before Parliament.”).

34. See Rowena Mason, *D-Notice System to Be Reviewed in Wake of Edward Snowden Revelations*, GUARDIAN, Jan. 26, 2014, <http://www.theguardian.com/uk-news/2014/jan/26/d-notice-system-reviewed-edward-snowden/print> (indicating the current non-compulsory nature of the D-notice system, but noting that Jon Thompson, the Permanent Secretary of the Ministry of Defense, is looking at reorganizing the committee in charge of the D-notice system, raising fears that the system may become compulsory).

35. See UN Envoy “Shocked” by UK’s “Unacceptable” Persecution of The Guardian over Snowden Leaks, RT NEWS (Nov. 18, 2013), <http://rt.com/news/un-snowden-uk-press-freedom-838/> [hereinafter UN Envoy “Shocked”] (threatening to take “tougher measures” including issuing “D notices” that would ban The Guardian from reporting on certain material if the publication does not show what Prime Minister David Cameron refers to as increased social responsibility); see also Gwendolen Morgan, *Miranda Ruling Conflates Journalism with Terrorism*, IRISH TIMES, Mar. 1, 2014, at 13, <http://www.irishtimes.com/news/world/uk/miranda-ruling-conflates-journalism-with-terrorism-1.1708635> (noting that anecdotal evidence indicates that, in addition to avoiding ports of entry into the U.K., journalists are working to further safeguard their journalistic materials).

power, or accidentally, behind a chaotic mass of facts and circumstances – and the analysis and exposure of all relevant facts to the public.”³⁶ This type of journalism directly contributes to freedom of expression, media development, and facilitation of the media’s watchdog role, a feature that the United Nations describes as indispensable for a functioning democracy.³⁷

The importance of investigative journalism is demonstrated extensively through the U.K.’s domestic case law.³⁸ In *Miranda*, the court emphasized that when journalists are investigating potentially “corrupt or reprehensible activities by a public authority . . . [,] compelling evidence is normally needed to demonstrate that the public interest would be served” by criminal proceedings against journalists.³⁹ The modern idea of democratic government, by the people for the people, depends on an informed citizenry to ensure appropriate government functionality, and it is through journalistic activity that citizens become and remain informed.⁴⁰

However, investigative journalism that deals with sensitive or classified material carries a heightened degree of professional responsibility.⁴¹ In a witness statement quoted in the *Miranda* decision, Glenn Greenwald provided a non-exhaustive list of

36. *Investigative Journalism*, UNESCO, <http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/investigative-journalism/> (last visited Oct. 6, 2014).

37. *Id.*

38. See *Regina v. Sec’y of State for the Home Dep’t.*, [2000] 2 A.C. 115 (H.L.) (Eng.) (“[F]reedom of speech is the lifeblood of democracy.”).

39. *Miranda v. Sec’y of State for the Home Dep’t.*, [2014] EWHC 255, [42] (Eng.) (“Inconvenient or embarrassing revelations, whether for the Security Services, or for public authorities, should not be suppressed.”) (quoting *R v. Central Criminal Court* [2001] 2 All ER 244 (Divisional Court)); *R. v. The Central Criminal Court ex p. The Guardian, The Observer and Bright* [2001] 1 WLR 662.

40. See *Regina v. Shayler*, [2003] 1 A.C. 247 (H.L.) [21] (appeal taken from Eng.) (“[T]here can be no assurance that government is carried out for the people unless the facts are made known, the issues publicly ventilated.”); *Turkington v. Times Newspapers Ltd.*, [2001] 2 A.C. 277 [1] (appeal taken from N. Ir.) (“It is . . . largely through the . . . press that [the citizenry] will be so alerted and informed. The proper functioning of a modern participatory democracy requires that the media be free, active, professional, and enquiring.”).

41. See discussion *supra* Section II.A (providing the additional steps The Guardian holds itself to through Glenn Greenwald’s testimony).

precautionary measures that investigative journalists take:⁴² 1) consultation with experienced journalists and subject matter experts to fully analyze potential dangers of publication and to determine what and how much information should be disclosed to the public; 2) utilization of skills that experienced editors and reporters garnered from years in the field to determine whether materials can be published without endangering lives; and 3) formal and informal communication between experienced investigative journalists and government officials to determine whether publication of certain materials will create a real danger to the public.⁴³

B. INTERNATIONAL VS. DOMESTIC DEFINITIONS OF TERRORISM

There is no single accepted international definition of terrorism, which results in a definitional gap that contributes to inconsistencies at the state, regional, and international levels.⁴⁴ Although some academics have attempted to show that an international definition of terrorism can be extrapolated from modern law, this view has not gained any legal traction.⁴⁵ Further complicating the issue, there is no comprehensive international convention on combating terrorism that could help unify definitional approaches.⁴⁶

The U.K. codified its definition of terrorism in Part 1, 1(1) of the TA 2000, defining terrorism as the “use or threat of action . . . [that] is designed to influence the government or intimidate the public or a section of the public, and the use or threat is made for the purpose of advancing a political, religious or ideological cause.”⁴⁷ Part 1(2) further provides that an “[a]ction falls within this subsection if it

42. *Miranda*, [2014] EWHC at [55] (illustrating the ways in which The Guardian takes precautions with sensitive material).

43. *Id.* (acknowledging that the court described Greenwald’s statement as didactic and unhelpful).

44. See Reuven Young, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation*, 29 B.C. INT’L & COMP. L. REV. 23, 24 (2006) (“[I]t is most often said that no universally (or even widely) accepted definition of terrorism exists at international law.”).

45. See generally *id.* (arguing a definition is discernable from U.N. General Assembly and Security Council resolutions).

46. See *Regina v. Gull*, [2013] UKSC 64, [44]-[51] (appeal taken from Eng.) (noting the absence of a comprehensive international convention binding states to take action against terrorism).

47. Terrorism Act, 2000, c. 11, § 53, sch. 7 (U.K.).

involves serious violence against a person, involves serious damage to property, endangers a person's life, other than that of the person committing the action, creates a serious risk to the health or safety of the public or a section of the public, or is designed seriously to interfere with or seriously disrupt an electronic system."⁴⁸ Consequently, this definition extends not only to harm or potential harm against people, but also to harm or potential harm against property.⁴⁹

The definition of terrorism in the TA 2000 has faced harsh criticism since its drafting by those concerned by both its overall breadth and its application to property damage.⁵⁰ These criticisms appear to be well founded, given that many believe the criminalization of The Guardian's activities would result in a culture in which newspapers, and their staff, would be criminally liable for publishing any material that does not comport with official government opinions.⁵¹

48. *Id.* § 53, sch. 7-1, 1(2) (continuing to inform the definition of terrorism within the TA 2000 in 1(3)-(5): "(3) the use or threat of action falling within subsection (2) which involves the use of firearms or explosives in terrorism whether or not subsection (1)(b) is satisfied. (4) In this section—(a) 'action' includes action outside the United Kingdom, (b) a reference to any person or to property is a reference to any person, or to property, wherever situated, (c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and (d) 'the government' means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom. (5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.").

49. *See id.*; *see also Terrorism Act 2000*, *supra* note 15 (describing the recommendations of the drafters to ensure that the definition remains within the breadth of criminal law and does not extend to property, recommendations that Parliament ignored).

50. *See Gull*, [2013] UKSC at [23], [26] (holding the definition of terrorism in the TA 2000 is, on its face, intended to be very wide, and unless a suitable argument based on international law is raised that counters this, the breadth of the drafters should be respected); *see also Terrorism Act 2000*, *supra* note 15 (citing the drafting process concerns of many MPs at the inclusion of violence against property in the definition and that the definition would give the government power to curb political protest and would allow the home secretary to outlaw certain groups viewed as terrorists).

51. *See Friedersdorf*, *supra* note 1 (quoting Trevor Timm: "If publishing or threatening to publish information for the purpose of 'promoting a political or ideological cause' is 'terrorism,' then the UK government can lock up every major newspaper editorial board that dares write any opinion that strays from the official government line.").

The *Miranda* case reinforced this fear, as it now appears that by upholding charges for transportation of journalistic material, the British court system may have moved one step closer to using the TA 2000 to criminalize journalistic behavior.⁵² The Eminent Jurists Panel on Terrorism specifically cautioned against this potential consequence of overbroad domestic terrorism definitions, particularly as these definitions impact journalists' freedom of expression in a criminal context.⁵³ In July 2014, David Anderson, the U.K.'s Independent Reviewer of Terrorism Legislation, echoed these concerns and noted that the mere potential of these consequences, even if unlikely, were unacceptable.⁵⁴

C. U.K. TERRORISM ACT 2000

If the U.K. government chooses to pursue criminal charges against The Guardian under the TA 2000 for its publication of Snowden's leaked documents, the State will likely do so under section 58 of the Act, which provides that "[a] person commits an offense [of information collection] if he collects or makes record of information of a kind likely to be useful to a person committing or preparing an act of terrorism, or he possesses document or record containing information of that kind."⁵⁵ Section 58 also "covers the offence of eliciting, publishing or communicating information about members of the armed forces, intelligence services or police where the information is, by its very nature, designed to provide practical assistance to a person committing or preparing an act of terrorism."⁵⁶

52. See also ANDERSON, *supra* note 34, at 30 (analyzing *Miranda* as revealing "that the publication (or threatened publication) of words may equally constitute terrorist action."). See generally *Miranda*, [2014] EWHC at [45]-[46] (Eng.) (downgrading the protection of freedom of expression afforded to the press as a right to a lower level than that afforded to individuals).

53. See Eminent Jurists Panel on Terrorism, Counter-Terrorism & Human Rights, *Assessing Damage, Urging Action*, INT'L COMM'N JURISTS (2009), <http://www.ifj.org/assets/docs/028/207/3e83flc-fbfc2cf.pdf>.

54. See ANDERSON, *supra* note 34, at 79 (emphasizing that these consequences have not happened because those in power have, up until now, exercised discretion).

55. Terrorism Act, 2000, c. 11, § 53, sch. 7 (U.K.) (defining record as including photographs and electronic records).

56. *Photography Advice*, METROPOLITAN POLICE, <http://content.met.police.uk/Site/photographyadvice> (last visited Oct. 8, 2014) (providing guidance for how the metropolitan police should use section 58 of TA 2000).

D. FREEDOM OF EXPRESSION IN THE U.K.: HUMAN RIGHTS ACT
1998

The U.K. has no constitutional free press protections. However, it is bound by the free press guarantees provided in article 10 of the European Convention on Human Rights through its signature and ratification of the treaty and its subsequent codification in the Human Rights Act 1998.⁵⁷

The HRA adopts a “dialogue model” in which British courts may tell Parliament if legislation violates human rights obligations while leaving Parliament with the discretion to determine an appropriate final action.⁵⁸ The HRA also provides guidance for Parliament to ensure that new laws comply with the U.K.’s ECHR and applicable Protocol obligations in three ways:

All U.K. law must be interpreted, so far as it is possible to do so, in a way that is compatible with Convention rights.

If an Act of Parliament breaches these rights the courts can declare the legislation to be incompatible with Convention rights. This does not affect the validity of the law—the HRA maintains parliamentary sovereignty, as it remains up to Parliament to decide whether or not to amend the law.

It is unlawful for any public authority to act incompatibly with human rights (unless under a statutory duty to act in that way), and anyone whose rights have been violated can bring court proceedings against the public authority.⁵⁹

57. See ECHR, *supra* note 6, art. 10. (signing the ECHR on April 11, 1950 and ratifying it on August 3, 1951); see also *A Journalist’s Guide to the Human Rights Act*, LIBERTY 9-10 (Jan. 2011), <https://www.liberty-human-rights.org.uk/sites/default/files/journalist-s-guide-to-the-human-rights-act-january-2011.pdf> [hereinafter *Journalist’s Guide*] (detailing that the U.K. has been bound by the ECHR since it came into force in 1953 and that people in the U.K. have had the right to bring cases to the European Court of Human Rights since then); *id.* (mentioning that an October 1997 government White Paper (policy initiative) proposed incorporating the ECHR protections into U.K. legislation which was subsequently introduced as a Human Rights Bill in Parliament on October 23, 1997, received royal assent on November 9, 1998, and fully entered into force on October 2, 2000); *UN Envoy “Shocked”*, *supra* note 36 (comparing the U.K.’s press freedom guarantees against those of the United States).

58. See *Journalist’s Guide*, *supra* note 57, at 11 (acknowledging that Parliament is not bound to comply with the court’s recommendations).

59. *Id.* at 64 (“The HRA was never intended to encapsulate all of the rights to

As the only place within U.K. law that provides protections for freedom of expression, article 10 protects journalists from being forced to reveal their confidential sources and also protects investigative journalism.⁶⁰ According to article 10:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions, or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.⁶¹

Under article 10, political, artistic, and commercial expressions are all protected.⁶² However, in the context of the HRA, freedom of expression constitutes a “qualified right” that can be limited in certain situations.⁶³ Consequently, the necessary test to determine whether a limitation on the article 10 right to freedom of expression is valid is whether: 1) the limitation is prescribed by law; 2) it pursues a legitimate aim; and 3) it is necessary and proportionate.⁶⁴

be enjoyed in the UK or to act as a constitutional document that could prevent other laws being passed. It is up to Parliament to ensure that all new laws respect fundamental rights and freedoms, with the HRA acting as a check on executive and legislative power after its exercise.”).

60. *See id.* at 67.

61. Human Rights Act, 1998, c. 42, § 10, sch. 1 (Eng.); ECHR, *supra* note 6, art. 10.

62. *See Journalist’s Guide*, *supra* note 58, at 46 (including “comment on matters of general public interest” within the category of political expression).

63. *See id.* at 22 (emphasizing that there must typically be a legitimate legal basis for limiting the right and that this limitation must be both proportionate and trying to achieve an aim that is legitimate and necessary for a democratic society).

64. *Id.* (providing that national security and public safety are both legitimate aims).

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This test is further bolstered by a strict, fact driven, four-part proportionality test:

- 1) Whether [the limitation's] objective is sufficiently important to justify the limitation of a fundamental right;
- 2) [W]hether [the limitation] is rationally connected to that objective;
- 3) [W]hether a less intrusive measure could have been used; and
- 4) [W]hether, having regard to these measures and the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.⁶⁵

In pursuing possible criminal action against The Guardian, the U.K. raised national security concerns as its primary motive for limiting The Guardian's freedom of expression.⁶⁶ Several leading spy chiefs in the U.K. stated that intelligence reports indicate Al Qaeda is attempting to exploit the leaked information to get around British security.⁶⁷ Moreover, if the names of intelligence operatives listed in the documents are accidentally revealed, those individuals could be in great personal danger.⁶⁸ Generally, at international law, courts follow the margin of appreciation doctrine and defer to democratic governments' claims that a limitation of a qualified right pursues a legitimate aim, and thus the analysis is largely focused on whether

65. See *Miranda v. Sec'y of State for the Home Dep't*, [2014] EWHC 255, [39] (Eng.) (quoting *Bank Mellat v. Her Majesty's Treasury (No.1)*, [2013] UKSC 38, [49] (appeal taken from Eng.)) (providing the history of the four-part test. Although the test had historically been articulated as only the first three elements, the fourth was added as a further safeguard for situations that passed numbers one through three in order to decide whether a restriction is still offensive in some way. This gives ultimate authority to the court to decide where the balance between the interests should lie).

66. See Andrew Sparrow, *Guardian Faces Fresh Criticism over Edward Snowden Revelations*, GUARDIAN, Nov. 10, 2013, <http://www.theguardian.com/media/2013/nov/10/guardian-nsa-revelations-edward-snowden/print> (citing William Hague, the Foreign Secretary overseeing the work of MI6, and Philip Hammond, the Defense Secretary, claiming that The Guardian's publication of the N.S.A. documents Snowden leaked jeopardized national security).

67. See Barrett, *Spy Leaks*, *supra* note 1 (illustrating that Al Qaeda is using the leaked information to bypass British security).

68. *Id.* (stating what three "leading spy chiefs" told Parliament in November 2013).

the limitation is necessary and proportionate.⁶⁹

Additionally, the limitations that may be placed on article 10 rights are weighed against whether the government has a positive obligation to protect a particular type of expression.⁷⁰ When making these determinations, courts consider the following factors: “the kind of expression rights at stake; their capability to contribute to public debates; the nature and scope of restrictions on expression rights; the ability of alternative venues for expression; and the weight of countervailing rights of others or the public.”⁷¹ The European Court of Human Rights (“ECtHR”) has held that States have a positive obligation to protect the article 10 right to freedom of expression in order to establish an environment favorable to public debate, thereby qualifying the right for a heightened level of analysis.⁷²

E. EUROPEAN COURT OF HUMAN RIGHTS

In determining whether a limitation on freedom of expression violates U.K. human rights obligations, British courts must take into account any applicable ECtHR decisions.⁷³ In *Miranda*, however, the High Court of Justice chose not to look to ECtHR jurisprudence because it felt that the U.K. court system provided sufficient

69. See *The Margin of Appreciation*, COUNCIL OF EUROPE, http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp (last visited Oct. 10, 2014) (“[Margin of Appreciation] refers to the space for manoeuvre that the Strasbourg organs are willing to grant national authorities, in fulfilling their obligations under the [ECHR].”).

70. See EUROPEAN COURT OF HUMAN RIGHTS, RESEARCH REPORT: POSITIVE OBLIGATIONS ON MEMBER STATES UNDER ARTICLE 10 TO PROTECT JOURNALISTS AND PREVENT IMPUNITY 4-5 (2011) [hereinafter ECHR RESEARCH REPORT] (discussing positive obligations under article 10).

71. *Id.*

72. Press Release, European Court of Human Rights Registrar, The Authorities Failed in Their Duty to Protect the Life and Freedom of Expression of the Journalists Firat (Hrant) Dink (Sept. 14, 2010), *available at*, <http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-3262169-3640194> (emphasizing in its holding in *Dink v. Turkey* that article 10 places a “positive obligation” on the state to protect individual’s freedom of expression from attack and not just an obligation to refrain from direct interference themselves); accord Stephan Polsdofer, Comment, *Pride and Prejudiced: Russia’s Anti-Gay Propaganda Law Violates the European Convention on Human Rights*, 29 AM. U. INT’L L. REV. 1069, 1078 (discussing international case law that supports the positive obligation placed on states to protect ECHR rights).

73. See *Journalist’s Guide*, *supra* note 58, at 11.

guidance to allow the Court to make an informed decision.⁷⁴

The ECtHR has emphasized the fundamental role of freedom of expression within democratic societies in which the press imparts ideas and general information of public interest.⁷⁵ The ECtHR in *Dink* established that States have a positive obligation both to protect the article 10 right to freedom of expression and to create a “favourable environment for participation in public debate by all persons concerned.”⁷⁶ In *Observer and Guardian v. United Kingdom*, the ECtHR clarified that States may limit freedom of expression on the basis of national security concerns.⁷⁷ To determine whether such a limitation to the right is “necessary” however, there must be a “pressing social need” for this limitation.⁷⁸ Finally, in *Informationsverein v. Austria*, the Court noted that, although States determine whether to impose a limitation, this discretion must be interpreted strictly under article 10 because this right is, as the ECtHR noted, particularly important.⁷⁹

74. See *Miranda v. Sec’y of State for the Home Dep’t*, [2014] EWHC 255, [41] (Eng.) (concluding the court did not need to consider ECtHR decisions after citing a wide array of U.K. case law).

75. See ECHR RESEARCH REPORT, *supra* note 71, at 4-5 (citing *Observer & Guardian v. United Kingdom*, App. No. 13585/88, para. 59 (Eur. Ct. H.R. Nov. 26, 1991) (HUDOC), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57705> and *Informationsverein Lentia v. Austria*, Apps. Nos. 13914/88, 15041/89; 15717/89; 15779/89; 17207/90, para. 35 (Eur. Ct. H.R. Nov. 24, 1993) (HUDOC), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57854>).

76. Press Release, European Court of Human Rights Registrar, *supra* note 73 (establishing this positive obligation through an analysis of the balancing of factors enumerated by the Court in its Research Report from 2011: “[T]he kind of expression rights at stake; their capability to contribute to public debates; the nature and scope of restrictions on expression rights; the ability of alternative venues for expression; and the weight of countervailing rights of others or the public.”); see ECHR RESEARCH REPORT, *supra* note 71, at 4-5 (citing *Observer & Guardian*, App. No. 13585/88, para. 59 and *Informationsverein Lentia*, Apps. Nos. 13914/88, 15041/89; 15717/89; 15779/89; 17207/90, para. 38).

77. *Observer & Guardian*, App. No. 13585/88, para. 59.

78. See *id.* (finding no pressing social need in preventing publication of the “Spycatcher” materials once they had already been published in the U.S., and the U.K. had not attempted to prevent the import of the information to the U.K.).

79. See *Informationsverein Lentia*, Apps. Nos. 13914/88, 15041/89; 15717/89; 15779/89; 17207/90, para. 35 (stating that the margin of appreciation enjoyed by the individual States “goes hand in hand with European supervision, whose extent will vary according to the circumstances”).

Both the extensive jurisprudence on the international level providing detailed analysis of the limited situations in which the article 10 rights may be constrained and the concerns raised by U.K. parliamentarians about the potential over-reach of the definition in the TA 2000 suggest that the U.K.'s overbroad definition of terrorism is contributing to the State's attempts to circumvent its obligations to protect investigative journalists' right to freedom of expression.⁸⁰ The limitations the U.K. has attempted to place on The Guardian's investigative journalism are neither necessary nor proportionate and are therefore impermissible under article 10. Furthermore, the U.K. has a heightened positive obligation to protect The Guardian's right to freedom of expression. Should the U.K. choose to pursue criminal action against The Guardian under the TA 2000's overbroad definition of terrorism, it will breach its international obligations to protect freedom of expression under the ECHR.⁸¹

III. ANALYSIS

The U.K. is legally bound to protect the ECHR article 10 right to freedom of expression through its codification of the ECHR in its domestic legislation, the HRA.⁸² Although freedom of expression is a qualified right, the limitations the U.K. seeks to impose on The Guardian's ability to conduct certain forms of investigative journalism are illegitimate, thus failing to comport with the U.K.'s obligations laid out in the above mentioned legally binding documents.⁸³

Because The Guardian's analysis and distribution of the Snowden documents qualify as investigative journalism, the potential criminalization of the newspaper's journalistic activity under the TA

80. See discussion *infra* Section III.B-C (discussing the incompatibility of the definition of terrorism in the TA 2000 with ECtHR jurisprudence).

81. See generally discussion *infra* Section III.A-D (discussing how prosecution of The Guardian for engaging in investigative journalism does not comply with the U.K.'s international obligations).

82. See discussion *supra* Section II.D (revealing how the HRA interacts with the ECHR to influence the U.K.'s positive obligations to enforce the right to article 10 freedom of expression).

83. See discussion *infra* Section III.C (arguing that the *Miranda* court's decision to hold the press' freedom of the press guarantee as a lower right than that afforded to individual persons is an incorrect reading of the law).

2000's definition of terrorism signals that the statutory definition is overbroad.⁸⁴ Furthermore, potentially criminalizing The Guardian's activity under the TA 2000 is not an appropriate limitation of freedom of expression under the HRA, and pursuing criminal sanctions against The Guardian under this Act would breach the U.K.'s international treaty obligations to protect freedom of expression.⁸⁵ Finally, the U.K.'s positive obligation to protect The Guardian's freedom of expression under article 10 of the ECHR extends beyond simply refraining from criminally sanctioning the newspaper's behavior; the obligation extends to taking proactive measures that protect The Guardian's article 10 rights.⁸⁶

A. THE GUARDIAN'S ACTIVITY COMPORTS WITH THE DEFINITION OF INVESTIGATIVE JOURNALISM.

The Guardian's public release of N.S.A. documents that Snowden leaked falls squarely within the definition of investigative journalism promoted by the United Nations Educational, Scientific, and Cultural Organization ("UNESCO").⁸⁷ By publishing the documents, The Guardian and its employees publicly unveiled the before unknown existence of the U.S. spying programs undertaken with U.K. cooperation. Thus, The Guardian, in revealing the U.S.'s and U.K.'s actions, undertook the "watchdog" function inherent in investigative journalism.⁸⁸

84. See discussion *infra* Section III.A-B (finding that The Guardian's activities comport with the definition of investigative journalism put forth by UNESCO and that this qualifies The Guardian for heightened protection based on the importance of freedom of the press in a democratic society).

85. See discussion *infra* Section III.C (finding that the applicable case law mandates that the heightened protection afforded to investigative journalists does not allow for journalistic activity of this kind to be criminalized under the TA 2000 or similar laws).

86. See discussion *infra* Section III.D (showing that applicable case law from the ECtHR explicitly qualifies article 10 freedom of expression as a positive right that States must take a proactive role in protecting).

87. See *Investigative Journalism*, *supra* note 37 (defining investigative journalism as "the unveiling of matters that are concealed either deliberately by someone in a position of power, or accidentally, behind a chaotic mass of facts and circumstances - and the analysis and exposure of all relevant facts to the public.").

88. See *id.* (specifying the "watchdog" role of the media as one that is important to the furthering of democratic society); see also *Observer & Guardian v. United Kingdom*, App. No. 13585/88, para. 59 (Eur. Ct. H.R. Nov. 26, 1991) (HUDOC), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=>

By vigilantly censoring sensitive documents and carefully choosing which documents to release to the public, The Guardian ensured that it did not act outside of its role as a news source engaging in investigative journalism.⁸⁹ This comports with Greenwald's three factors to ensure responsible journalism set forth in the *Miranda* decision.⁹⁰ Alan Rusbridger, editor of The Guardian, is a highly experienced editor who used his expert judgment in consultation with others, to mitigate any potential danger to the public that could result from publishing the leaked N.S.A. documents.⁹¹ On several occasions, Rusbridger stated that The Guardian revealed only one percent of the total documents to which it had access and that the newspaper carefully redacted all names and information that might compromise both ongoing government operations and agents who remain in the field.⁹² As a result of the extensive individual and collective efforts of The Guardian's editors and journalists, the newspaper possessed sufficient knowledge to determine if its publication decisions ensured public and individual safety.⁹³ Furthermore, extensive documentation indicates that The

001-57705 (holding that the press has a "vital role of public watchdog").

89. See generally Barrett, *Guardian Journalists*, *supra* note 5 (discussing steps taken to responsibly report on the leaked documents); Faiola, *Q & A*, *supra* note 30; Lawless, *supra* note 32.

90. See Barrett, *Guardian Journalists*, *supra* note 5 (noting that the release of facts to the public should be confined to those facts relevant to exposing the activities); Faiola, *Q & A*, *supra* note 30; Lawless, *supra* note 32; see also discussion *supra* Section II.A (listing three of the additional precautions taken by investigative journalists when dealing with sensitive material, including working with others to reduce the risk of releasing harmful information).

91. See *About Alan Rusbridger*, ALAN RUSBRIDGER, <http://alanrusbridger.com/about> (last visited Oct. 5, 2014) (noting that Alan Rusbridger has been the editor of The Guardian since 1995); Faiola, *Q & A*, *supra* note 30 (discussing the numerous offices and individuals who had a hand in ensuring proper redaction of the documents).

92. See Lawless, *supra* note 32 (indicating that The Guardian does not intend to publish much more than the one percent already released); see also Hyland, *supra* note 2 (reiterating that The Guardian worked closely with other journalists and the applicable state agencies in order to make an informed decision as to what it should publish). *But see* Barrett, *Guardian Journalists*, *supra* note 5 (revealing that The Guardian did send some unredacted documents to the New York Times via FedEx, a lapse in its otherwise good judgment).

93. See *About Alan Rusbridger*, *supra* note 92 (disclosing Alan Rusbridger's lengthy tenure as editor of The Guardian); see also discussion *supra* Section II.A (detailing the lengths to which investigative journalists, including those at The

Guardian consistently communicated with Downing Street, the DA Notice Secretariat, the White House, and intelligence agencies to understand all the risks posed by disseminating the leaked documents.⁹⁴

The Guardian's release of the leaked documents has sparked public debate about government spying programs.⁹⁵ This public discourse serves to foster government accountability by ensuring public awareness of government spying programs and thus preventing governments from hiding behind a shroud of secrecy.⁹⁶ This creation of and contribution to public discourse is a central tenet of the watchdog function attributable to The Guardian's investigative journalism and must endure to maintain a functioning democracy.⁹⁷

B. THE TERRORISM ACT 2000 CONTAINS AN OVERBROAD
DEFINITION OF TERRORISM THAT WAS NEVER INTENDED TO
INCLUDE THE POTENTIAL FOR PROSECUTION OF INVESTIGATIVE
JOURNALISM.

In a 2009 U.N. Human Rights Council Report, the Comments by the Special Rapporteur on Counter-Terrorism allow for extrapolation of a two-part test to determine a terrorism definition's validity: 1) is the definition precise enough for citizens to reasonably foresee that they might face criminal sanctions for their actions; and 2) is the definition overbroad, allowing unintended activities to fall within the definition's purview.⁹⁸ According to *Home Dep't v. E.*,⁹⁹ the

Guardian, go to ensure they responsibly deal with sensitive subject matters).

94. See Faiola, *Q & A*, *supra* note 30 (noting that, as a result of these conversations, The Guardian ensured redaction of certain names).

95. See *Investigative Journalism*, *supra* note 37.

96. See *Miranda v. Sec'y of State for the Home Dep't*, [2014] EWHC 255, [42], [44] (Eng.) (citing *R. v. Shayler* [2002] UKHL 11, [21]) (explaining that the press is responsible for disseminating information that contributes to public discourse of government issues); *id.* (citing *R v. Central Criminal Court*, [2001] 2 All ER 244 (Divisional Court)) ("Inconvenient or embarrassing revelations, whether for the Security Services, or for public authorities, should not be suppressed.")

97. See *Investigative Journalism*, *supra* note 37 (calling the watchdog function of investigative journalism indispensable for democracy).

98. See U.N. Secretary-General, *Protection of Human Rights and Fundamental Freedom While Countering Terrorism*, ¶¶ 27-29, 53, U.N. Doc. A/64/211 (Aug. 3, 2009) (stating, in the context of gender discrimination as a result of overbroad terrorism laws, that any law that interferes with family life as a

definition of terrorism within the TA 2000 is sufficiently precise to pass the first part of this test, but because it is overbroad, it must fail the second.¹⁰⁰

The TA 2000 definition of terrorism is overbroad because it exceeds the drafters' intended purpose to simply consolidate already existing laws and extend these laws to include domestic, in addition to international, application.¹⁰¹ However, the inclusion of violence against property in the TA 2000's definition of terrorism, which could potentially work to inappropriately curb political protest, has raised consistent concerns regarding the definition's breadth.¹⁰² In 2005, citing these concerns, the U.K. Parliament's Joint Committee on Human Rights expressed that the definition should be amended, cautioning that failure to do so could breach the U.K.'s obligations to protect freedom of expression.¹⁰³ David Anderson reiterated this sentiment in July 2014 in his "Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the

result of association with terrorism must comply with the principle of legality and additionally noting that the extreme breadth of terrorism definitions is a major contributing factor to gender discrimination in relation to terrorism); *see also* Keiran Hardy & George Williams, *What Is "Terrorism"?: Assessing Domestic Legal Definitions*, 16 UCLA J. INT'L L. & FOREIGN AFF. 77, 88-92 (2011).

99. [2007] UKHL 47.

100. *See* Hardy & Williams, *supra* note 99, at 79 (interpreting *Home Dep't v. E.* as evidence that British courts find the definition to contain enough precision to give citizens warning that their actions could be criminally sanctioned). *But see* Regina v. Gull, [2013] UKSC 64, [29] (appeal taken from Eng.) (acknowledging that the drafters intended the definition in the TA 2000 to be far reaching); ANDERSON, *supra* note 34, at 32 (finding that the application of the definition subjects persons to terrorism laws whom "no sensible persons would define as terrorists").

101. *See Terrorism Act 2000*, *supra* note 15 (noting critics' concerns that the law would permit the U.K. government to permanently disallow political protest); *The Troubles 1968-1998*, *supra* note 15.

102. *See* Gull, [2013] UKSC at [62] (discussing the concerns voiced by MPs at the Act's inception that the broad definition would allow the government to curb political protests and for the Home Secretary to outlaw specific terrorist groups); *The Troubles 1968-1998*, *supra* note 15. *See generally* ANDERSON, *supra* note 34, at 25-32, 74-98 (discussing several definitions of terrorism to highlight the term's broad scope).

103. *See* Hardy & Williams, *supra* note 99, at 118 ("The United Kingdom Parliament's Joint Committee on Human Rights has advised in no uncertain terms that the broad definition of the Terrorism Act 2000 needs to be amended or there will remain a 'high risk' of breaching key human rights principles, such as the freedom of expression found in Article 10 of the [ECHR].").

Terrorism Act 2006” in which he specifically called for a restriction of the definition’s breadth.¹⁰⁴

The concerns expressed during the drafting of the TA 2000 and by both the Joint Committee on Human Rights and David Anderson show that the intended purpose of the definition of terrorism within the TA 2000 is far more restricted than the wording and subsequent case law suggests.¹⁰⁵ Specifically, these concerns indicate that the drafters did not intend for the definition to encompass acts of investigative journalism (akin to political protests).¹⁰⁶ The U.K.’s potential criminalization of *The Guardian* thus directly contravenes the drafters’ intentions. Consequently, the definition of terrorism in the Act is overbroad and necessarily fails the test’s second prong.

C. THE U.K.’S POTENTIAL CRIMINALIZATION OF THE GUARDIAN UNDER THE TA 2000 IS NOT AN APPROPRIATE LIMITATION OF ARTICLE 10 UNDER THE HRA AND THE PURSUIT OF CRIMINAL SANCTIONS AGAINST THE GUARDIAN UNDER THE ACT WOULD CAUSE THE U.K. TO BREACH ITS TREATY OBLIGATIONS TO PROTECT FREEDOM OF EXPRESSION.

Although the right to freedom of expression is not absolute, it may only be limited in very restricted situations when the limitation is based on concerns for national security.¹⁰⁷ In order for the limitation to be legitimate, it must pass a three part conjunctive test: 1) the limitation must be prescribed by law; 2) it must pursue a legitimate aim; and 3) it must be necessary and proportionate.¹⁰⁸ Although the

104. See ANDERSON, *supra* note 34, at 85, 88 (suggesting that the U.K. change the second portion of the definition of terrorism from a finding of sufficiency if an action “influence[s] a government or international organization” to a more stringent test that requires an action be “designed to compel, coerce or undermine the government or an international organization.”).

105. Compare *Terrorism Act 2000*, *supra* note 15 (discussing the concerns of the drafters of the TA 2000), with *Gull*, [2013] UKSC at [38] (interpreting the definition of terrorism in the TA 2000 as being intentionally broad).

106. See ANDERSON, *supra* note 34, at 32 (noting that the journalism would fall within the ambit of a terrorist act); see also *Terrorism Act 2000*, *supra* note 15 (describing the criticisms of the TA 2000).

107. See ECHR RESEARCH REPORT, *supra* note 71, at 4 (reminding the European Union states of the positive obligations each has to protect the freedom of expression of journalists); see also discussion *supra* Section II.C (discussing the text of article 10).

108. See generally discussion *supra* Section II.D (covering requirements of

potential government action limiting The Guardian's freedom of expression is prescribed by law under the TA 2000, it fails the final two parts of the test because the stated aim of protecting national security is inapplicable and the limitation is neither necessary nor proportionate based on the circumstances.

1. Although National Security Concerns are Legitimate Reasons to Limit Freedom of Expression, this Concern is Misapplied Based on the Specific Facts of The Guardian's Actions.

For a court to determine liability based on a stated national security risk, it must find that someone took an action with the knowledge that it could result in damage to the U.K.'s national security interests.¹⁰⁹

The Guardian did not knowingly act against the U.K.'s national security interests.¹¹⁰ Experienced in dealing with national security issues, The Guardian took many precautions and consulted with both U.K. and U.S. governments and their respective intelligence agencies to ensure it sufficiently redacted the published documents so as not to place any intelligence operatives in personal danger.¹¹¹ As a result,

limitations to freedom of expression).

109. See Friedersdorf, *supra* note 1 (detailing that the Ports Circulation Sheet in the case of David Miranda states that “[i]ntelligence indicates that Miranda is likely to be involved in espionage activity which has the potential to act against the interest of UK national security. We assess that Miranda is knowingly carrying material the release of which would endanger peoples’ lives. Additionally the disclosure, or threat of disclosure, is designed to influence a government and is made for the purpose of promoting a political or ideological cause. This therefore falls within the definition of terrorism.”).

110. See Lawless, *supra* note 32 (remarking that The Guardian has only published one percent of all leaked documents it received); see also Hyland, *supra* note 2 (emphasizing that The Guardian has been in constant contact with government and intelligence agencies to ensure its publication of the leaked information does not result in undue harm).

111. See Hyland, *supra* note 2 (discussing the government consults The Guardian engaged in before publishing its material); see also Hopkins & Taylor, *supra* note 26 (quoting Rusbridger, editor for The Guardian, stating that “[The Guardian] is not a rogue newspaper . . . [i]t is a serious newspaper that has long experience of dealing with national security.”). But see Ingersoll, *supra* note 2 (describing the error made by The Guardian when it FedExed unredacted documents to the New York Times, leaving an opening for the government to claim that the publication acted carelessly and put named individuals in danger); Nicholas Watt, *Threat from NSA Leaks May Have Been Overstated by UK, Says Lord Falconer*, GUARDIAN, Nov. 17, 2013, <http://www.theguardian.com/world/>

very few critics of The Guardian's actions have pointed to any specific way in which the newspaper compromised U.K. national security, forcing those who make such contentions to speak in generalities.¹¹² In contrast, in *Observer and Guardian v. United Kingdom*, the ECtHR demanded that courts conduct a highly fact-specific inquiry into whether the publication created a credible national security risk.¹¹³ The ECtHR held that, if the information was available through other means, the national security threat is no longer a legitimate rationale to infringe on article 10 freedom of expression.¹¹⁴

Furthermore, according to U.N. Special Rapporteur Frank Larue, “[n]ational security cannot be used as an argument against newspapers for publishing information that is in the public interest, even if doing so is embarrassing for those in office.”¹¹⁵ The U.K.’s attempt to do so is “damaging Britain’s reputation for press freedom and investigative journalism.”¹¹⁶ U.K. case law also echoes this sentiment.¹¹⁷ Furthermore, criminalizing The Guardian’s

2013/nov/17/threat-nsa-leaks-snowden-files (quoting Lord Falconer: “From all that I can see the Guardian and the New York Times have taken immense trouble to avoid any individual operative or operation being endangered” and pointing out that at least 850,000 people had access to Snowden’s documents before being stolen and subsequently published).

112. See *Miranda v. Sec’y of State for the Home Dep’t*, [2014] EWHC 255, [37] (Eng.) (indicating an inability to provide concrete information as to how the leaked documents could or would compromise national security through D/Supt Stokley’s witness statement in which he stated “it would be used to endanger life and cause harm to members of the public . . . [and that he believed] that the information in the claimant’s possession could potentially compromise the U.K.’s ability to monitor terrorist networks, posing a threat to the safety of the public.”).

113. See *Observer & Guardian v. United Kingdom*, App. No. 13585/88, paras. 69-71 (Eur. Ct. H.R. Nov. 26, 1991) (HUDOC), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57705>.

114. See *id.* (holding that, once the information at issue had been published in the U.S. and the U.K. had not taken any steps to prohibit its import, the U.K.’s continued limitation of The Observer and The Guardian’s freedom of expression amounted to a violation of article 10).

115. *UN Envoy “Shocked”*, *supra* note 36 (indicating his alarm at the actions of the British government against The Guardian).

116. *Id.*

117. See, e.g., *Miranda*, [2014] EWHC at [42] (citing *R v. Central Criminal Court*, [2001] 2 All ER 244 (Divisional Court)) (“Inconvenient or embarrassing revelations, whether for the Security Services, or for public authorities, should not be suppressed. Legal proceedings directed towards the seizure of the working papers of an individual journalist, or the premises of the newspaper or television

investigative journalism would result in less controlled dissemination of sensitive information.¹¹⁸ Criminalization would encourage whistleblowers to take their information to less regulated publication sources that may not carefully parse through the documents and could choose to release them *en masse*.¹¹⁹ Regardless, it is likely that any potential national security concerns from the released documents have been vastly overstated; over 850,000 people had access to the documents leaked by Snowden prior to their publication by The Guardian.¹²⁰

Nonetheless, investigative journalism plays a watchdog role by looking into security agencies' practices to prevent abuse of power and is an essential element of combating terrorism.¹²¹ The Guardian's actions do not constitute a security risk, and its acts of investigative journalism are protected under the HRA and ECHR.¹²² According to Ben Emmerson, U.N. Special Rapporteur on Counter-Terrorism, the government's actions are an attempt to distract from its own wrongdoing, and "[t]he astonishing suggestions that this sort of journalism can be equated with aiding and abetting terrorism needs

programme publishing his or her reports, or the threat of such proceedings, tends to inhibit discussion."); *Turkington v. Times Newspapers Ltd.*, [2001] 2 A.C. 277 [1] (appeal taken from N. Ir.) (stating that, the courts in the U.K. and elsewhere, "have recognized the cardinal importance of press freedom and the need for any restriction on that freedom to be proportionate and no more than is necessary to promote the legitimate object of the restriction.").

118. See Deborah Snow, *The Guardian's Alan Rusbridger the Scourge of Spies – and One of Media's Showmen*, STOCK & LAND (Nov. 16, 2013), <http://www.stockandland.com.au/news/world/world/general/the-guardians-alan-rusbridger-the-scourge-of-spies-and-one-of-medias-showmen/2678636.aspx?storypage=2> (arguing that journalists are an effective medium for filtering leaked information).

119. See *id.* ("If newspapers were criminalised for their role, [Rusbridger] said, then critics 'miss the point that we were the people acting as the filter . . . carefully working through and releasing less than 1 per cent of what we have seen – [and] you are inviting a new world in which future Snowdens won't go to newspapers, they will be more tempted to go to other kinds of players.'").

120. See Watt, *supra* note 112.

121. See *The Vienna Declaration On Terrorism, Media and the Law*, INT'L PRESS INST., http://ipi.freemedia.at/uploads/media/Vienna_Declaration_including_signatories_list.pdf (last visited Nov. 16, 2013) (emphasizing that "the free flow of information and ideas is an important antidote to terrorist ideologies and that a free media is indispensable to achieving this.").

122. See generally discussion *supra* Section III.A (establishing The Guardian's actions as investigative journalism).

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to be scotched decisively.”¹²³

2. *Criminalizing The Guardian’s Actions under the TA 2000 does not Represent a Necessary and Proportionate Limitation of Article 10 Freedom of Expression.*

Even if potentially limiting The Guardian’s journalistic activity pursued a legitimate aim, the U.K.’s criminalization of investigative journalism is neither necessary nor proportionate to the potential national security risk. While preserving national security can be sufficiently important to merit limiting a fundamental right when less intrusive options are not available, normally courts employ the four-part test outlined in *Bank Mellat v. Her Majesty’s Treasury (No.1)*.¹²⁴ Furthermore, a court would likely find that, as a result of possible reports of Al Qaeda benefiting from the leaked documents, punishing The Guardian for its publication was rationally connected to that aim.¹²⁵ However, criminalizing The Guardian’s actions fails the third and fourth elements: a less intrusive measure could have been used and the government did not strike a fair balance between the rights of the individual (in this case The Guardian) and the interests of the community.¹²⁶

a) *The U.K. could Protect its Stated National Security Concerns in a Less Intrusive Manner that does not Involve Criminalizing the Guardian’s Actions under the TA 2000.*

The U.K. currently employs the use of “D-notices,” a system that warns the media not to publish intelligence that might risk damage to

123. Ben Emmerson, *It’s Outrageous to Accuse The Guardian of Aiding Terrorism by Publishing Snowden’s Revelations*, GUARDIAN, Dec. 2, 2013, <http://www.theguardian.com/commentisfree/2013/dec/02/guardian-terrorism-snowden-alan-rusbridger-free-press> (revealing that Ben Emmerson launched an investigation into the U.K.’s actions, culminating in recommendations to the U.N. General Assembly).

124. [2013] UKSC 38, [140] (appeal taken from Eng.) (finding that national security concerns ultimately merited the court’s conducting secret proceedings).

125. See, e.g., *Miranda v. Sec’y of State for the Home Dep’t*, [2014] EWHC 255, [89] (Eng.) (upholding an action based on national security concerns); *Observer & Guardian v. United Kingdom*, App. No. 13585/88, paras. 69-71 (Eur. Ct. H.R. Nov. 26, 1991) (HUDOC), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57705> (upholding part of an action based on national security concerns).

126. See discussion *infra* Section III.C.2-3.

the State's national security. This strictly voluntary system allows journalists and news organizations to consult a committee composed of both civil servants and media representatives to determine how to appropriately handle sensitive information.¹²⁷

The Guardian voluntarily chose to use the D-notice system, consulting not only with the committee, but also with all other applicable security services in both the U.K. and U.S. to ensure that publishing the leaked documents posed minimal national security risks.¹²⁸ The existence of this system, and the fact The Guardian used it to ensure the newspaper responsibly published leaked materials, shows that the U.K had no legitimate need to bring criminal charges against The Guardian under the TA 2000 based on risks to national security. The D-notice system, clearly less intrusive than criminal action, not only exists, but successfully prevented the release of dangerous materials.

b) Criminalizing The Guardian's Actions under the TA 2000 does not Strike a Fair Balance Between the Rights of the Individual and the Interests of the Community.

The criminalization of The Guardian's journalistic activities would have a chilling effect on all investigative journalism by severely infringing on the press' freedom of expression.¹²⁹ It would send a message to newspapers and other journalistic sources that if they expose an illegal government operation, they will be subject to criminal prosecution that carries significant jail time. The chilling effect on investigative journalism is completely disproportionate to the minimal national security risk that The Guardian already mitigated by taking precautions in publishing the leaked documents.¹³⁰

127. *See id.*

128. *See* Faiola, *Q & A*, *supra* note 30.

129. ECHR RESEARCH REPORT, *supra* note 71, at 4-5; *The Vienna Declaration On Terrorism, Media and the Law*, *supra* note 122.

130. *But see* Barrett, *Guardian Journalists*, *supra* note 5 (reminding that The Guardian sent some sensitive documents unredacted via FedEx to the New York Times).

D. THE U.K. HAS A POSITIVE OBLIGATION TO PROTECT THE
GUARDIAN'S RIGHT TO FREEDOM OF EXPRESSION UNDER ARTICLE
10.

The right to the protection of freedom of expression within the ECHR and its implementing legislation, the HRA, extends to all forms of expression, including investigative journalism.¹³¹ The U.K. has a positive obligation to ensure that The Guardian is protected under article 10.¹³² The ECtHR explicitly established this positive obligation in *Dink v. Turkey* by balancing the following factors enumerated by the Court in its Research Report from 2011: “the kind of expression rights at stake; their capability to contribute to public debates; the nature and scope of restrictions on expression rights; the ability of alternative venues for expression; and the weight of countervailing rights of others or the public.”¹³³

The type of expression at stake in this case, freedom of the press to engage in investigative journalism, is integral to maintaining a functioning democracy.¹³⁴ The Guardian's investigative journalism contributes to widespread and informed public debate about secret government spying programs.¹³⁵ In addition, prosecuting The Guardian under the TA 2000 would severely limit the protections afforded to journalists working in the U.K. by subjecting them to constant suspicion through threatened categorization as violent

131. See *Journalist's Guide*, *supra* note 58, at 46 (explaining that the right to freedom of expression would have no meaning if the U.K. protected only certain types of expression and stating that “[w]ithout the protections of Article 10, investigative newspaper campaigns, undercover documentaries and exposure of matters of public interest could be vulnerable to censorship and suppression of independent reporting.”).

132. See ECHR RESEARCH REPORT, *supra* note 71, at 4-5 (discussing the appropriate test to determine whether a positive obligation to protect exists).

133. Press Release, European Court of Human Rights Registrar, *supra* note 73.

134. See *Investigative Journalism*, *supra* note 37; see also ECHR RESEARCH REPORT, *supra* note 71 (stressing the “fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive.”).

135. See, e.g., Barrett, *Guardian Journalists*, *supra* note 5; Friedersdorf, *supra* note 1; Matthew Weaver, *NSA Files: New York Times Defends The Guardian's Snowden Leaks*, GUARDIAN, Nov. 15, 2013, <http://www.theguardian.com/world/2013/nov/15/nsa-files-new-york-times-defends-the-guardian-over-snowden-leaks-live-updates>; see also Timm, *Investigating Acts of Journalism*, *supra* note 21; Timm, *Will the US Condemn UK's Attempt*, *supra* note 22.

terrorists.¹³⁶ This threat would have an extreme chilling effect on investigative journalism and must be avoided to ensure the continued functioning of this service, which is essential to the U.K.'s democratic government.¹³⁷

These potential restrictions on investigative journalism would provide functional impunity for the British government by impinging The Guardian's ability to act as a government watchdog and impeding the newspaper's ability to impact public discourse. This would remove a major check on the British government's power, as investigative journalists would be unable to question the legality of government programs without worrying that they might be labeled as terrorists.¹³⁸

Furthermore, the precautionary measures taken by investigative journalists and those working in the field make The Guardian and other news sources like it the most appropriate venue for this particular type of freedom of expression.¹³⁹ If Snowden did not leak documents through the traditional press, alternative publication sources may have published and distributed them *en masse* without redacting or responsibly considering both the relevance and appropriateness of the documents for public viewing.¹⁴⁰

Finally, the information revealed to British citizens about secret government surveillance programs outweighs the individual rights of those seeking to maintain the secrecy of the documents. Although individuals do have a right to security in their persons, The Guardian carefully redacted any information that might compromise the security of individual agents working in the field.¹⁴¹ Because The

136. See discussion *supra* Section II.B (showing through the plain language of the definition in the TA 2000 that The Guardian would face similar charges as a violent terrorist if the U.K. chose to criminalize The Guardian's investigative journalism).

137. See *Investigative Journalism*, *supra* note 37.

138. See *id.*

139. See *Miranda v. Sec'y of State for the Home Dep't*, [2014] EWHC 255, [55] (Eng.) (showing the extensive steps investigative journalists take not just to ensure that their material is accurate, but also that no one is disproportionately hurt by the publication of the material).

140. See Snow, *supra* note 119 (expressing concern that if future whistleblowers could not go to newspapers that use filters when disseminating information, they may instead go to less discerning sources for publication).

141. See Faiola, *Q & A*, *supra* note 30 (emphasizing that The Guardian has not

Guardian compromised no individual agents and the revelations positively impacted public discourse, the balancing test falls in the publication's favor. Taking these five factors into account, the government does have a positive obligation to ensure protection for The Guardian's article 10 right to freedom of expression.

The HRA states that all article 10 issues must be interpreted in accord with the ECHR.¹⁴² Because the ECtHR is the primary interpreter of this treaty, U.K. courts must, by extension, take applicable ECtHR case law into account when deciding cases that address issues under the HRA.¹⁴³ Thus, U.K. courts must not, as they have in *Miranda*, discount ECtHR holdings that discuss the importance of freedom of the press to a functioning democracy.¹⁴⁴ The U.K. must acknowledge that journalistic expression is protected as a fundamental aspect of article 10 freedom of expression and that the State has a positive obligation to protect that right and ensure that The Guardian and all other investigative journalists may disseminate information to the public without impediments.¹⁴⁵

published or lost control of any names, has redacted all names and sensitive operational details before publication, and consulted regularly with the DA Notice Secretariat, Downing Street, the White House, and all intelligence agencies); *see also* Lawless, *supra* note 32 (noting that The Guardian only published one percent of the information it obtained and that it does not expect to publish much more).

142. *See Journalist's Guide*, *supra* note 58, at 64 ("The HRA was never intended to encapsulate all of the rights to be enjoyed in the UK or to act as a constitutional document that could prevent other laws being passed. It is up to Parliament to ensure that all new laws respect fundamental rights and freedoms, with the HRA acting as a check on executive and legislative power after its exercise.").

143. *See generally* discussion *supra* Sections II.D, III.C.

144. *See Miranda*, [2014] EWHC at [45]-[46] (rejecting the premise that journalistic freedom of expression is as compelling as individual freedom of expression); *see also* *Turkington v. Times Newspapers Ltd.*, [2001] 2 A.C. 277 [1] (appeal taken from N. Ir.) (reminding the U.K. that, due to the importance of press freedom, any restriction on investigative or other journalism must be "proportionate and no more than necessary to promote the legitimate aim of restriction."). *But see* *R v. Central Criminal Crown Court*, [2006] EWCA (Crim.) 04, [8] (Eng.) (requiring compelling evidence of necessity before infringing on journalistic freedom of expression).

145. *See* Press Release, European Court of Human Rights Registrar, *supra* note 73 (holding that journalistic freedom of expression is a positive right, and thus, the U.K. has a higher threshold of protection it is obligated to provide).

IV. RECOMMENDATIONS

The Guardian engaged in investigative journalism when it published the N.S.A. documents Snowden leaked.¹⁴⁶ Thus, the possibility that the publication could be criminally charged with terrorism under the TA 2000 indicates that the Act contains an overbroad definition of terrorism.¹⁴⁷ Furthermore, limiting investigative journalists' freedom of expression is not an appropriate limitation of this right under article 10 of the HRA and the U.K. has a positive obligation to protect this right.¹⁴⁸ Consequently, the U.K. must ensure that its actions comply with article 10 of both the HRA and ECHR by abstaining from prosecuting The Guardian for investigative journalism under the TA 2000.¹⁴⁹ Should the U.K. proceed with this threatened prosecution, the British courts must enforce the U.K.'s obligations under the HRA by interpreting the TA 2000 in accordance with the State's international obligations.¹⁵⁰ To ensure that investigative journalism is not criminalized in the future, the U.K. should strengthen the protections afforded to investigative and other journalists by narrowing the definition of terrorism in the TA 2000. The U.K. should also further commit to protecting its citizens' rights to freedom of expression by codifying the International Covenant on Civil and Political Rights into its domestic legislation.

A. THE U.K. SHOULD ENSURE THAT ITS ACTIONS COMPLY WITH ARTICLE 10 OF THE ECHR AND HRA.

To ensure that its actions comply with article 10 of the ECHR, it is essential that the U.K. refrain from pursuing any criminal prosecution against The Guardian under the TA 2000 unless a

146. See discussion *supra* Section III.A (establishing The Guardian as participating in investigative journalism through the definition used by UNESCO).

147. See discussion *supra* Section III.A-B (noting the extensive case law and analysis precluding pulling investigative journalism under the blanket of terrorism).

148. See generally discussion *supra* Section III.C-D (explaining the U.K.'s obligation to protect freedom of expression).

149. See discussion *supra* Section III.C (finding that allowing for criminal convictions of terrorism for journalistic activities is a violation of the U.K.'s obligations under the ECHR).

150. See discussion *supra* Section III.C.

genuine national security threat exists.¹⁵¹ To date, no viable argument has been presented that this is the case.¹⁵² If Scotland Yard continues to pursue criminal charges, the U.K. will breach its obligations under the ECHR and the HRA.

B. IF THE U.K. CONTINUES TO PURSUE CRIMINAL CHARGES AGAINST THE GUARDIAN UNDER THE TERRORISM ACT 2000, THE BRITISH COURTS SHOULD ENFORCE THE U.K.'S OBLIGATIONS UNDER THE HRA BY INTERPRETING THE TERRORISM ACT 2000 IN ACCORDANCE WITH THE U.K.'S CONVENTION OBLIGATIONS.

Although the HRA could not have prevented the passage of the TA 2000, the HRA should, through its intended purpose to act as a check that U.K. legislation complies with the protection of fundamental rights, prevent the criminalization of investigative journalism under the TA 2000.¹⁵³ The HRA mandates that ECHR rights form part of U.K. law in three ways: 1) all U.K. law must be interpreted, to the best of the country's ability, compatibly with the rights laid out in the ECHR; 2) if an Act of Parliament works against the rights outlined in the ECHR, a court can "declare the legislation incompatible with Convention rights," but the law remains valid until Parliament decides whether to amend the law; and 3) a public authority may not act in contravention to the rights outlined in the ECHR.¹⁵⁴ Thus, anyone whose rights are violated in accordance with any of these three elements may bring action against the responsible public authority.¹⁵⁵

151. See discussion *supra* Section III.C (finding that the U.K. has not articulated a factually credible national security threat based on The Guardian's actions).

152. See Watt, *supra* note 112 (emphasizing that 850,000 people had access to the files before The Guardian released them). *But see* Sparrow, *supra* note 67 (stating that both William Hague, the Foreign Defense Secretary, and Philip Hammond, the Defense Secretary, claimed the leaked documents jeopardized national security).

153. See *Journalist's Guide*, *supra* note 58, at 64 ("The HRA was never intended to encapsulate all of the rights to be enjoyed in the UK or to act as a constitutional document that could prevent other laws being passed. It is up to Parliament to ensure that new laws respect fundamental rights and freedoms, with the HRA acting as a check on executive and legislative power after its exercise.").

154. *Id.* at 11.

155. See *id.*

As already established, the overbroad definition of terrorism in the TA 2000 should not allow for the criminalization of investigative journalism as a terrorist act.¹⁵⁶ The courts should find that any criminal suit brought against The Guardian under the TA 2000 is meritless because the State's interpretation would necessarily contravene the ECHR.

U.K. courts do not have the power to invalidate the TA 2000.¹⁵⁷ However, the government should remember that if public authorities act against ECHR rights, including those in article 10, those whose rights have been infringed may bring action against the public entity.¹⁵⁸ If the government insists upon infringing The Guardian's article 10 right to freedom of expression, the newspaper may bring a valid claim against the public authorities under the HRA.¹⁵⁹

In assessing claims under the HRA, U.K. courts must account for relevant jurisprudence of the ECtHR.¹⁶⁰ This includes *Dink v. Turkey*, which establishes article 10 freedom of expression as a positive right and *Observer and Guardian v. United Kingdom*, which held that the "watchdog" role of the press is fundamentally important to freedom of expression.¹⁶¹ British courts must look to these cases instead of the recent *Miranda* decision, which incorrectly held that the courts could disregard the ECtHR jurisprudence.

156. See discussion *supra* Section III.B (finding that the applicable case law qualifies the right to freedom of expression as a fundamental right that should not be so limited as to be allowed to fall under the definition of terrorism).

157. See *Journalist's Guide*, *supra* note 58, at 11.

158. See *id.*

159. See *id.*

160. See *id.* (noting that, although British court must consider the ECtHR cases to the extent to which the courts deem them relevant, the ECtHR judgments are not binding on the U.K. courts; "rather it requires the courts to take into account relevant judgments, much like they do under common law rules of statutory interpretation.").

161. See *supra* note 73; *Observer & Guardian*, App. No. 13585/88, para. 59; see also *Informationsverein Lentia v. Austria*, Apps. Nos. 13914/88, 15041/89; 15717/89; 15779/89; 17207/90, para. 35 (Eur. Ct. H.R. Nov. 24, 1993) (HUDOC), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57854> (stressing the fundamental role of freedom of expression in democratic society and the importance that it is guaranteed in order to ensure an informed citizenry).

C. THE U.K. SHOULD STRENGTHEN THE PROTECTIONS AFFORDED TO INVESTIGATIVE JOURNALISTS BY NARROWING THE DEFINITION OF TERRORISM IN THE TA 2000.

To ensure that investigative journalism is not criminalized under the TA 2000, the U.K. must narrow its definition of terrorism.¹⁶² When adopting criminal laws on terrorism, the Eminent Jurists Panel on Terrorism cautioned States against overbroad and vague definitions, especially when criminal legislation might impact the freedom of expression of journalists.¹⁶³ David Anderson has proposed several steps the U.K. should take to narrow the TA 2000's existing definition, including changing the phrase "designed to influence the government or an international organization" in section 1(1)(b) to "designed to compel, coerce or undermine the government or an international organization."¹⁶⁴

To maintain a functioning democracy, expressions of dissent must not be criminalized.¹⁶⁵ Narrowing the definition of terrorism within the TA 2000 will bring the U.K. closer to achieving this goal.

162. See *Assessing Damage, Urging Action*, *supra* note 54, at 53 ("Some of these laws have extended well beyond the ordinary intention of targeting terrorists, and now are being used against 'ordinary' criminals, political opponents, dissenters, and members of the minority community."); see also ANDERSON, *supra* note 34, at 80 (noting that the "free expression of political opinion" is the "lifeblood of a free society").

163. See *id.* at 54 ("The Panel accordingly recommends: (1) States should adopt new criminal laws on terrorism only if there is a demonstrable need, and should conduct a review of all current counter-terrorism legislation to ensure that measures aimed at countering terrorists, are precise and ensure the principle of legal certainty. It is particularly important to avoid over-broad and vague definitions. (2) In particular, States should exercise caution about legal provisions that could restrict rights to freedom of expression. Independent media is an important safeguard for the rule of law and measures must ensure that journalists are not penalised for reporting on contentious issues.").

164. ANDERSON, *supra* note 34, at 88.

165. See *id.* at 126 ("Over-broad or ambiguous definitions of terrorism can all too easily be used in a discriminatory way against minorities, be applied arbitrarily, and/or limit legitimate expressions of dissent.").

D. THE U.K. SHOULD CODIFY THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS INTO ITS DOMESTIC LEGISLATION TO FURTHER THE COUNTRY'S COMMITMENT TO PROTECTING FREEDOM OF EXPRESSION.

Although the U.K. ratified the ICCPR on May 20, 1976, it has not codified the treaty into its national legislation.¹⁶⁶ To bolster the country's commitment to protecting freedom of expression, the U.K. should codify article 19 of the ICCPR, the provision addressing freedom of expression.¹⁶⁷

Because the U.K. has no explicit freedom of the press guarantees and the HRA is the only codification of freedom of expression in U.K. law, this symbolic step will help repair the damage to the U.K.'s international reputation following its threats to criminalize The Guardian's investigative journalism.¹⁶⁸

166. ICCPR, *supra* note 12.

167. *See id.* art. 19 (“(1) Everyone shall have the right to hold opinions without interference. (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. (3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (ordre public), or of public health or morals.”).

168. *See* Faiola, *Britain Targets Guardian*, *supra* note 31 (highlighting that, in the U.K., freedom of the press is viewed through the lens of the public good and privacy laws rather than simply as a right to open expression); *see also* *Journalist's Guide*, *supra* note 58, at 67; *UN Envoy "Shocked"*, *supra* note 36 (noting that the U.K., unlike the U.S., has no constitutional press freedom guarantee and remarking that U.N. Special Rapporteur Frank La Rue argues that the U.K.'s handling of The Guardian's release of documents has damaged the U.K.'s reputation for press freedom and investigative journalism).

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V. CONCLUSION

“When a free media is under attack anywhere, all human rights are under attack everywhere.”¹⁶⁹ The U.K.’s potential criminalization of investigative journalism under the TA 2000 is not just an issue of freedom of expression but one that implicates all facets of democratic life. Therefore, the U.K. must refrain from both continued threats against and actual prosecution of *The Guardian* while further conforming to its positive obligations under the HRA and ECHR in order to protect its journalists’ article 10 right to freedom of expression.

If the U.K. continues to allow *The Guardian*’s investigative journalism to qualify as a criminal offense through the overbroad definition of terrorism codified within the TA 2000, the U.K. will breach its international obligations under the ECHR. Criminally limiting a publication’s freedom of expression is a completely inappropriate limitation of the article 10 right, and the U.K. must continue to work to conform its legislation and jurisprudence to its obligations under the ECHR. If the U.K. does not try to reestablish itself as a proponent of freedom of expression, it risks both violating its treaty obligations and tarnishing its reputation as a defender of freedom of expression.

169. *The Criminalization of Independent Journalism: Truth in Media Categorized as Terrorism*, GLOBAL RES. (Nov. 3, 2013), <http://www.globalresearch.ca/the-criminalization-of-independent-journalism-truth-in-media-categorized-as-terrorism/5356626> (quoting U.S. Secretary of State Hillary Clinton).