

CUSTOMARY INTERNATIONAL LAW AS A CHECK ON PRESS FREEDOM'S STRONGMEN

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ABSTRACT

In today's society, it is almost impossible to go about the day without consuming a single piece of news. We rely on the press to bring us information that informs our decisions, whether it be what to eat or who to vote for. But not everyone is appreciative of these so-called watchdogs. Authoritarian dictators and their regimes have historically presented a threat to the press, undercutting its basic rights in order to cover up human rights abuses and other serious crimes. The force of these anti-press "strongmen" is effective and, thus far, unmatched. If the right to free press is to be protected, violations must be met with opposing force. The only mechanism strong enough to combat the influence of these individual regimes is customary international law. This note proposes that states employ political and economic sanctions against one another to establish the *opinio juris* element of accountability, thereby further crystalizing a free press in customary international law.

I. INTRODUCTION

In 2017, the independent watchdog organization Freedom House released its annual report on the status of international press freedom.¹ The report found that global press freedom had declined to its lowest point in thirteen years in 2016.² Legal analysis of 199 countries and territories included criteria such as constitutional or legal guarantees for freedom of expression, penalties for libel and defamation, the existence and ability to use freedom of information legislation, the independence of judiciary and regulatory bodies, and the ability for media and journalism organizations to operate freely.³ Researchers also looked at the political environment of each country, evaluating the "degree of political

1. Michael J. Abramowitz, *Press Freedom's Dark Horizon*, FREEDOM HOUSE, available at <https://freedomhouse.org/report/freedom-press/2017/press-freedoms-dark-horizon> (last visited Mar. 7, 2019).

2. *Id.*

3. *Methodology, Freedom of the Press 2017*, FREEDOM HOUSE, available at <https://freedomhouse.org/report/freedom-press-2017-methodology> (last visited Mar. 7, 2019).

influence” current administrations have over news outlets.⁴ Collectively, the findings demonstrated that the decline is now occurring not only in authoritarian governments, but also in democracies.⁵ In the thirty-eight years that Freedom House has been monitoring the global press, the United States is more prominent in the global debate on the subject than ever before.⁶ President Donald Trump has used familiar political rhetoric to antagonize the media, resembling that of dictatorships like present-day Philippines, Adolph Hitler’s Nazi Germany, and Joseph Stalin’s Russia. Domestic lawsuits over American journalists’ accessibility to information have made international news.⁷ Recent attacks on journalists overseas, like the murder of *Washington Post* writer Jamal Khashoggi in Istanbul, have positioned the U.S. as complacent toward such offenses after leadership failed to condemn Saudi Arabia for its involvement.⁸

A. Issue: Absence Of Customary International Law Emboldens Anti-Press Strongmen

The biggest threat to press freedom, both today and historically, is the presence of anti-press “strongmen” who use nationalist rhetoric and delegitimization methods to strip the press of legal and social protection.⁹ A lack of binding international law has allowed such actors to go unchecked, empowering them to achieve serious undercuts to an otherwise widespread ideology that freedom of the press is a basic human right. Declarations and treaties have proven unsuccessful because of their lack of enforceability and failure to reach non-party states. The only force more powerful than these seemingly unstoppable individual dictatorships is customary international law. Without requiring any express consent or ratification by parties, customary international law

4. *Id.*

5. Jennifer Dunham, *Press Freedom’s Dark Horizon*, FREEDOM HOUSE, available at <https://freedomhouse.org/report/freedom-press/freedom-press-2017#overview-essay> (last visited Mar. 7, 2019).

6. Michael J. Abramowitz, *Hobbling a Champion of Press Freedom*, FREEDOM HOUSE, available at <https://freedomhouse.org/report/freedom-press/freedom-press-2017#overview-essay> (last visited Mar. 7, 2019).

7. *CNN v. Trump, Knight Foundation v. Trump*, 302 F.Supp.3d 541 (2018).

8. Grace Sparks, *CNN Poll: Majority say US response to Khashoggi’s murder hasn’t been tough enough*, CNN (Dec. 13, 2018), available at <https://www.cnn.com/2018/12/13/politics/poll-khashoggi-response/index.html> (last visited Mar. 7, 2019).

9. *The Global slump in press freedom*, THE ECONOMIST (July 23, 2018), available at <https://www.economist.com/graphic-detail/2018/07/23/the-global-slump-in-press-freedom> (last visited Mar. 7, 2019).

would bind any actor that violates the understood right. In order for the right to exercise free press to fully crystalize as customary international law, there must be a widespread state practice of an established right, and a subjective understanding by the states that they are bound by a duty to enforce the law in question (known as "*opinio juris*"). While widespread state practice of a free press already exists via declarations and treaties, the second element of *opinio juris* is not fulfilled due to current gaps in legal framework. Therefore, this note proposes that states employ political and economic sanctions against one another in response to violations of press freedom, in order to establish the element of *opinio juris* and crystalize customary international law of press freedom. Because of deteriorating state of press freedom on a global scale, many scholars feel that the right to a free press is now a luxury limited to the west. Therefore, with an urgent need for customary international law, the responsibility is heavily on western powerhouses like the United States to be a leader in solidifying the global right to a free press.¹⁰

Part I of this note has briefly outlined the context leading to a call for crystalized customary international law of free press. Part II of this note looks back at the historical development of the right to a free press and explores the current state of press freedom by region. Additionally, Part II reviews the extensive body of United States common law that demonstrates the country's long-lasting appreciation for the right to a free press. Part III takes an extensive look at press freedom's biggest offenders of past and present – Adolph Hitler, Joseph Stalin, Vladimir Lenin, Rodrigo Duterte, Mohammed Bin Salman, and Donald Trump. This note will analyze how these "strongmen" have used common tactics to chip away at press protections, given a lack of counterbalance from effective international protections for press freedom. Finally, Part IV of this note will propose that states employ political and economic sanctions in response to violations of press protections, thereby fulfilling the *opinio juris* requirement necessary to crystalize customary international law of a free press. This note will review the existence of the first element, widespread state practice, via declarations and treaties speaking to the desire for a free press. Further, this note will explain how gaps in current legal framework have left the second element unfulfilled, ultimately allowing anti-press regimes to be an unmatched force.

10. *Id.*

II. HISTORY OF A RIGHT TO A FREE PRESS

The struggle to establish and support free press internationally is not new. The United Nations has called journalism one of the most dangerous professions in the world.¹¹ But it was centuries ago that efforts first began to legislate and codify laws to establish a free press, amidst pressure to protect the free and independent dissemination and receipt of information.¹²

In 1644, British poet John Milton published his pamphlet *Areopagitica*, in response to a law that the parliament had passed requiring the government to approve of and license all books for publication.¹³ In the pamphlet, Milton advocated that the free circulation of ideas was essential to moral and intellectual development.¹⁴ The piece was one of the first to address the government's influence on people's dissemination of information.¹⁵

One hundred years later, in Sweden, parliament narrowly passed the Freedom of the Press Act, now recognized as the world's first law supporting press freedom.¹⁶ The law, passed in 1766, abolished the Swedish government's role as a censor of printed matter, and it allowed for the official activities of the government to be made public.¹⁷

Around that same time, in the United States, Massachusetts Chief Justice William Cushing felt the newly-established America needed legislation of its own to codify protections for the press.¹⁸ On February 18, 1789, Cushing wrote a detailed letter to John Adams concerning the "liberty of the press."¹⁹ At the time, Article XVI of the Massachusetts Declaration of Human Rights read that "the liberty of the press is essen-

11. Natalia Mazotte, *UN names journalism one of the most dangerous professions in the world*, KNIGHT CTR. FOR JOURNALISM IN THE AMERICAS, available at <https://knightcenter.utexas.edu/blog/un-names-journalism-one-most-dangerous-professions-world> (last visited Mar. 7, 2019).

12. Lennart Weibull, *Freedom of the Press Act of 1766*, ENCYCLOPEDIA BRITANNICA, available at <https://www.britannica.com/topic/Freedom-of-the-Press-Act-of-1766> (last visited Mar. 7, 2019).

13. Jay Black, *Areopagitica in the Information Age*, 9 J. MASS MEDIA ETHICS 131 (1994).

14. See generally JOHN MILTON, *AREOPAGITICA* (1644).

15. Kathleen Kuiper, *Areopagitica*, ENCYCLOPEDIA BRITANNICA, available at <https://www.britannica.com/topic/Areopagitica> (last visited Mar. 7, 2019).

16. Weibull, *supra* note 12.

17. *Id.*

18. Original draft of letter from William Cushing, Chief Justice, to John Adams (Feb. 18, 1789) in Mass. L.Q. (Oct. 1942) at 12 [hereinafter Cushing Letter].

19. *Id.*

tial to the security of freedom in a state: it ought not, therefore, to be restrained by this commonwealth."²⁰ Cushing wondered whether a libel directed against public officeholders could be punishable under the clause.²¹ He wrote, "suppressing this liberty by penal laws will it not more endanger freedom than do good to government?"²²

Adams' reply conveyed a larger constitutional purpose for the press.²³ The exchange as a whole illuminated that the founding generation approached liberty of the press as a crucial instrument to the success of the American public.²⁴

Sure enough, just two years later, the United States codified the concept in its First Amendment, asserting, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."²⁵

But protections under the First Amendment would not effectively vest until centuries later, with the development of common law. History has shown the tensions between these ideological protections and the reality of lacking security for journalists.

Global codification did not occur until 1948, when the United Nations attempted to establish an international standard of press freedom in Article 19 of the Universal Declaration of Human Rights.

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.²⁶

Many countries have adopted laws similar to the United States' First Amendment. But, even in countries where a free press is constitutionally protected, anti-media leadership threatens the legal security of today's journalists.

20. Mass. Const. art. XVI (annulled 1948).

21. Cushing Letter, *supra* note 18.

22. *Id.*

23. Patrick J. Charles and Kevin Francis O'Neill, *Saving the Press Clause from Ruin: The Customary Origins of a "Free Press" as Interface to the Present and Future*, UTAH L. REV. 1691, 1694 (2012).

24. *Id.* at 1695.

25. U.S. CONST. amend. I.

26. G.A. Res. 19, Universal Declaration of Human Rights (Dec. 10, 1948).

A. Freedom of Press by Country

According to Freedom House's 2017 report, only 13% of the world enjoys a free press.²⁷

1. Africa

Eritrea and Egypt have both landed on the Reporters Without Borders (RSF) list of worst offenders of press freedom.²⁸ Eritrea has not allowed any independent media since President Isaias Afwerki shut it down in 2001.²⁹ As of December 2018, there were sixteen journalists imprisoned in Eritrea – more than any other sub-Saharan country.³⁰ It is unclear whether some of the imprisoned journalists are even still alive.³¹ In Egypt, twenty-five journalists are currently imprisoned, with more than twenty of those cases occurring in the six months leading up to the country's presidential election in March 2018.³² Rights groups believe the surge in arrests was a part of a campaign to silence dissenting voices before elections.³³ President Abdel Fattah el-Sisi has suggested that speaking against the government or police is high treason, and he has opened up telephone lines for citizens to report "false news." The government has also increased online censorship, blocking over 496 websites between May 2017 and February 2018. In Tunisia, despite press freedom being enshrined in the 2014 constitution, the country's government uses much older penal codes against the press to target those in the media who criticize of the government.³⁴ Rights groups are concerned that the country's democracy is at risk considering the rollback

27. Abramowitz, *supra* note 1.

28. 2018 World Press Freedom Index, REPS. WITHOUT BORDERS, available at <https://rsf.org/en/ranking> (last visited Mar. 7, 2019) [hereinafter *2018 World Press Freedom Index*].

29. Elana Beiser, *Hundreds of Journalists jailed globally becomes the new normal*, COMMITTEE TO PROTECT JOURNALISTS (Dec. 13, 2018), available at <https://cpj.org/reports/2018/12/journalists-jailed-imprisoned-turkey-china-egypt-saudi-arabia.php> (last visited Mar. 7, 2019).

30. *Id.*

31. *Id.*

32. Egypt's jailed journalists: in numbers, ALJAZEERA (May 3, 2018), available at <https://www.aljazeera.com/news/2018/05/egypt-jailed-journalists-numbers-180502195324128.html> (last visited Mar. 7, 2019).

33. *Id.*

34. Dokhi Fassihian, *Democratic Backsliding in Tunisia: The Case of Renewed International Attention*, FREEDOM HOUSE, available at <https://freedomhouse.org/report/special-reports/democratic-backsliding-tunisia-case-renewed-international-attention> (last visited Mar. 7, 2019).

of press liberties as another election cycle approaches.³⁵ In Liberia, investigative journalist Rodney Sieh was sentenced to 5000 years in prison under an egregious libel charge in 2013.³⁶ At the intense trial before the Liberian Supreme Court, Sieh told the Justices that they were “behaving like dictators.”³⁷ Overall, the status of press freedom varies considerably by country across the African continent.³⁸ There are more African countries in the bottom half of RSF’s index than in the top, and Africa’s largest states by population are all ranked in the bottom half.³⁹

2. *Asia and the Middle East*

Many Asian countries have also adopted legislation formally guaranteeing freedom of speech, but enforcement appears lacking in many instances involving the press. In Burma, Cambodia, Vietnam, and Thailand, blogging journalists are censored for dissenting opinions.⁴⁰ In Singapore and Malaysia, libel and internal security laws are used against journalists.⁴¹ In the Philippines, under the regime of Rodrigo Duterte, journalists have been imprisoned and killed.⁴² In China, many media outlets are owned by the communist-party-led-government.⁴³ Despite the Constitution of the People’s Republic of China reading that its citizens “enjoy freedom...of the press,” many outlets are banned from using social media.⁴⁴ Chinese writer and activist Liu Xiaobo was

35. *Id.*

36. RODNEY SIEH, JOURNALIST ON TRIAL (2018).

37. *Id.*

38. John Campbell, *Press Freedom Varies Considerably Across Africa*, COUNCIL ON FOREIGN REL. (Apr. 26, 2018), available at <https://www.cfr.org/blog/press-freedom-varies-considerably-across-africa> (last visited Mar. 7, 2019).

39. *Id.*

40. Freedom Plummets in Cambodia, RADIO FREE ASIA (Jan. 13, 2011), available at <https://www.rfa.org/english/news/cambodia/freedom-01132011155053.html> (last visited Mar. 7, 2019); see also Mike Nizza, *Burmese Government Clamps Down on the Internet*, N.Y. TIMES (Sept. 28, 2007), available at <https://thelede.blogs.nytimes.com/2007/09/28/burmese-government-clamps-down-on-internet/> (last visited Mar. 7, 2019).

41. Ahmad Masum & Md Rejab Md Desa, *Media and the Libel Law: The Malaysian Experience*, INT’L CONF. ON COMM. & MEDIA (Oct. 18, 2014), available at <https://cyberleninka.org/article/n/211400> (last visited Mar. 7, 2019).

42. *Case Files: The 12 Journalists Killed under the Duterte Administration*, PHILIPPINE CTR. FOR INVESTIGATIVE JOURNALISM (Nov. 23, 2018), available at <https://pcij.org/stories/case-files-the-12-journalists-killed-under-the-duterte-administration/> (last visited Mar. 7, 2019).

43. Beina Xu and Eleanor Albert, *Media Censorship in China*, COUNCIL ON FOREIGN REL. (Feb. 17, 2017), available at <https://www.cfr.org/background/under/media-censorship-china> (last visited Mar. 7, 2019).

44. *Id.*

incarcerated repeatedly throughout his lifetime for his writing advocating for an end to the communist party.⁴⁵

Press freedom advocacy groups have repeatedly listed Myanmar as one of the worst countries in the world for journalists.⁴⁶ In 2018, the country made international news for its imprisonment of Reuters journalists Wa Lone and Kyaw Soe Oo.⁴⁷ Despite the country moving from a military dictatorship to an electoral democracy, the government in Myanmar still maintains vigilant control over the media via old and oppressive laws, which it shows no intention of amending.⁴⁸ Arrests have under a new telecommunications law that prosecutes peaceful speech.⁴⁹ The government's main premise for controlling the media has been to discourage coverage of the crisis in the Rakhine state, where hundreds of thousands of Rohingya Muslims have fled due to mass genocide.⁵⁰

South Korea's constitution also guarantees free press, but the country has strict laws that go into effect approaching an election.⁵¹ The law prohibits speech that supports or criticizes any candidate from either party in the upcoming election.⁵² The United Nations Human Rights Commission has expressed concern about the country's deterioration of free speech online.⁵³

The Middle East is by far one of the worst regions for journalists.⁵⁴ In Iran, an estimated 860 journalists have been imprisoned in the three

45. Chris Buckley, *Liu Xiaobo, Chinese Dissident Who Won Nobel While Jailed, Dies at 61*, N.Y. TIMES (July 13, 2017), available at <https://www.nytimes.com/2017/07/13/world/asia/liu-xiaobo-dead.html> (last visited Mar. 7, 2019).

46. *RSF Warns Myanmar about threat to world press freedom index ranking*, REPS. WITHOUT BORDERS (Oct. 1, 2018), available at <https://rsf.org/en/news/rsf-warns-myanmar-about-threat-world-press-freedom-index-ranking> (last visited Mar. 7, 2019).

47. John Chalmers, *Special Report: How Myanmar punished two reporters for uncovering an atrocity*, REUTERS (Sept. 3, 2018), available at <https://www.reuters.com/article/us-myanmar-journalists-trial-specialrepo/special-report-how-myanmar-punished-two-reporters-for-uncovering-an-atrocity-idUSKCN1LJ167> (last visited Mar. 7, 2019).

48. *Dashed Hopes: The Criminalization of Peaceful Expression in Myanmar*, HUM. RTS. WATCH (Jan. 31, 2019), available at <https://www.hrw.org/report/2019/01/31/dashed-hopes/criminalization-peaceful-expression-myanmar> (last visited Mar. 7, 2019).

49. *Id.*

50. Chalmers, *supra* note 47.

51. Stephan Haggard & You Jong-Sung, *Freedom of Expression in South Korea*, 45 J. CONTEMP. ASIA 167 (2014).

52. *Id.*

53. *Id.*

54. *Middle East most dangerous region for journalism*, MIDDLE EAST MONITOR (Apr. 26, 2018), available at <https://www.middleeastmonitor.com/20180426-middle-east-most-dangerous-region-for-journalism/> (last visited Mar. 7, 2019) [hereinafter MIDDLE EAST MONITOR].

decades since the 1979 Iranian Revolution.⁵⁵ At least four of those journalists were killed.⁵⁶ *Washington Post* reporter and former Tehran bureau chief Jason Rezaian is suing the country's government after being imprisoned for 544 days under charges of espionage.⁵⁷ In Turkey, most mainstream media is owned by relatives or allies of President Erdogan, which means negative news about the country almost never reaches its citizens.⁵⁸ Critical journalists are fined or jailed, and many have been forced into self-censorship.⁵⁹ On October 2, 2018, *Washington Post* writer Jamal Khashoggi was brutally tortured and killed inside the Saudi consulate in Istanbul.⁶⁰ Khashoggi, who once lived in Saudi Arabia, had published various criticisms of the new regime under Crown Prince Mohammed Bin Salman.⁶¹ Intelligence officials in the United States and Turkey later linked the murder directly to Bin Salman.⁶² In the kingdom, blasphemy is illegal and punishable by death.⁶³ Of the twenty worst-ranked countries for press freedom in 2018, all but four were in the Middle East, Asia, or North Africa.⁶⁴

3. Australia

Australia does not explicitly protect freedom of the press in its constitution, but the country's common law recognized freedom of

55. *Iran jailed hundreds of journalists after 1979 revolution: RSF*, AL JAZEERA (Feb. 7, 2019), available at <https://www.aljazeera.com/news/2019/02/iran-jailed-hundreds-journalists-1979-revolution-rsf-190207135401749.html> (last visited Mar. 7, 2019).

56. *Id.*

57. Rick Gladstone, *Jason Rezaian, Washington Post Reporter, Sues Iran over Imprisonment*, N.Y. TIMES (Oct. 3, 2016), available at <https://www.nytimes.com/2016/10/04/world/middleeast/iran-jason-rezaian.html> (last visited Mar. 7, 2019).

58. Zia Weise, *How Did Things Get So Bad for Turkey's Journalists?*, THE ATLANTIC (Aug. 23, 2018), available at <https://www.theatlantic.com/international/archive/2018/08/destroying-free-press-erdogan-turkey/568402/> (last visited Mar. 7, 2019).

59. *Id.*

60. *Jamal Khashoggi: all you need to know about the Saudi journalist's death*, BBC (Dec. 11, 2018), available at <https://www.bbc.com/news/world-europe-45812399> (last visited Mar. 7, 2019) [hereinafter *Khashoggi*].

61. *Id.*

62. *Jamal Khashoggi: CIA 'blames Saudi prince for murder'*, BBC (Nov. 17, 2018), available at <https://www.bbc.com/news/world-middle-east-46245167> (last visited Mar. 7, 2019).

63. *National Laws on Blasphemy: Saudi Arabia* (n.d.), GEO. U. BERKLEY CTR. FOR RELIGION, PEACE & WORLD AFF. (n.d.), available at <https://berkeleycenter.georgetown.edu/essays/national-laws-on-blasphemy-saudi-arabia> (last visited Mar. 7, 2019).

64. *2018 World Press Freedom Index*, *supra* note 28; see also MIDDLE EAST MONITOR, *supra* note 54.

speech in *Lange v. Australian Broadcasting Company*.⁶⁵ Yet the government has been known to issue gag orders on reporters for covering corruption cases involving Australian parties.⁶⁶ Most recently, the country has been at the center of controversy on metadata reform, after journalists' private sources were infiltrated and exposed as a result of lax metadata law.⁶⁷

4. Europe

In RSF's press freedom index, Europe had the most countries in the top half of rankings than any other region.⁶⁸ Of the top twenty best countries in the world for press freedom, thirteen are in Europe. The European Convention on Human Rights (in conjunction with the European Court of Human Rights) regulates many of the member countries on issues such as press freedom.⁶⁹ For example, recently the court found that extended prison sentences for criminal defamation are disproportionate and have a "chilling effect" on public discussion.⁷⁰

Despite Europe being the continent where press freedom is the safest, it is also the region where press freedom has declined the most in the past year.⁷¹ In democracies like Poland and Hungary, political leaders used influence over public broadcast to shape the media's coverage.⁷² In 2016, one of Hungary's most notable newspapers, *Népszabadság*,

65. *Lange v Australian Broad. Co.* (1997) 189 CLR 520 (Austl.).

66. In 2014 the Supreme Court of Victoria issued a blanket media gag order on the reporting of a high-profile international corruption case regarding bribes presented to high-ranking officials of Malaysia, Indonesia and Vietnam by senior executives of the Reserve Bank of Australia in order to secure the adoption of the Australian invented and produced polymer banknote technology. See Robert Booth & Rob Evans, *Australian court's gagging order condemned as 'abuse of legal process,'* THE GUARDIAN (July 30, 2014), available at <https://www.theguardian.com/world/2014/jul/30/australian-court-gagging-order-abuse-legal-process> (last visited Mar. 7, 2019).

67. Melissa Clarke, *Metadata laws under fire as 'authority creep' has more agencies accessing your information*, ABC (Oct. 19, 2018), available at <https://www.abc.net.au/news/2018-10-19/authority-creep-has-more-agencies-accessing-your-metadata/10398348> (last visited Mar. 7, 2019).

68. *2018 World Press Freedom Index*, *supra* note 28.

69. Abramowitz, *supra* note 1.

70. *Paraskevopoulos v. Greece*, COLUM. U. GLOBAL FREEDOM EXPRESSION (2018), available at <https://globalfreedomofexpression.columbia.edu/cases/paraskevopoulos-v-greece/> (last visited Mar. 7, 2019).

71. *2018 World Press Freedom Index*, *supra* note 28.

72. Bartosz T. Wielinski & *Gazeta Wyborcza*, *Polish government continues efforts to stifle free media*, EURACTIV (May 11, 2018), available at <https://www.euractiv.com/>

closed and was subsequently sold, along with many other outlets, in murky deals that were suspected to have government ties.⁷³ Four of the five biggest falls in RSF index were European countries: Malta, Czech Republic, Serbia, and Slovakia.⁷⁴

5. South America

In 2018, Mexico became the world's second deadliest country for journalists, second only to Syria.⁷⁵ Eleven journalists were killed, some for their coverage of local politicians' involvement in organized crime.⁷⁶ During a referendum vote on Cuba's constitution in February 2019, the Cuban government blocked citizen's access to multiple news websites.⁷⁷ The country currently employs a constitutional ban on private ownership of news outlets, thereby enabling total state ownership of media and earning the title of the Western Hemisphere's worst-ranked country for press freedom.⁷⁸ In Venezuela, authoritarian president Nicholas Maduro has caused press freedom in the country to significantly decline. Journalists are often targeted and arbitrarily arrested in attempts to minimize their reporting on the economic crisis. In Bolivia, the government prosecutes journalists under charges of "sedition" and "political violence," even driving some to exile. Jamaica is one of the best countries in the region, and even the world, for press freedom. But a proposed data protection act would broadly protect "personal data," including political opinions that are often the subject of reporting.⁷⁹

section/freedom-of-thought/news/polish-government-continues-efforts-to-stifle-free-media/ (last visited Mar. 7, 2019).

73. Abramowitz, *supra* note 1.

74. *RSF Index 2018: Hatred of Journalism threatens democracies*, REPS. WITHOUT BORDERS, available at <https://rsf.org/en/rsf-index-2018-hatred-journalism-threatens-democracies> (last visited Mar. 7, 2019).

75. *RSF Index 2018: Mixed performance in Latin America*, REPS. WITHOUT BORDERS, available at <https://rsf.org/en/rsf-index-2018-mixed-performance-latin-america> (last visited Mar. 7, 2019).

76. *Id.*

77. *Critical news cites blocked during referendum vote*, COMMITTEE TO PROTECT JOURNALISTS (Feb. 25, 2019), available at <https://cpj.org/2019/02/cuba-referendum-news-website-internet-blocked.php> (last visited Mar. 7, 2019).

78. *2018 World Press Freedom Index*, *supra* note 28.

79. *Jamaica - RSF concerned over proposed Data Protection Act's potentially 'chilling effect' on press freedom*, REPS. WITHOUT BORDERS (May 17, 2018), available at <https://rsf.org/en/news/jamaica-rsf-concerned-over-proposed-data-protection-acts-potentially-chilling-effect-press-freedom> (last visited Mar. 7, 2019).

Across the region, poor economic conditions, violent crime, and populist governments present serious threats to the press.⁸⁰

B. The United States as an Established Leader

Often regarded as “the country with the First Amendment,”⁸¹ the United States has historically been considered a leader in free speech legislation and promotion of free press. The press has been regarded as the fourth pillar of democracy, alongside the three branches of government.

1. A Rich Body of Common Law

Decades of common law have solidified support for a liberal press. The United States Supreme Court’s rulings on First Amendment issues have consistently recognized the press and its functions as a vital organ of the democracy.⁸² Three of the most important rulings came in *Near v. Minnesota*, *New York Times v. Sullivan* and *United States v. New York Times*.

In June 1931, the United States Supreme Court addressed a Minnesota gag law that had the effect of censoring local newspapers for content that might otherwise be out of reach under libel or defamation laws.⁸³ The statute provided that any person “engaged in the business” of regularly publishing or circulating an “obscene, lewd, and lascivious” or a “malicious, scandalous and defamatory” newspaper or periodical was guilty of a nuisance, and could be enjoined for continuing with the activity.⁸⁴ The court held that the chief purpose of the guaranty of a free press under the First Amendment was to prevent such restraints on upon publication. In a victory for the Minnesota newspaper, Chief Justice Hughes wrote that under the free press clause of the First Amendment, and with limited exception, government may not censor or prohibit a publication in advance. The liberty of a free press, essential to

80. *Americas*, FREEDOM HOUSE, available at <https://freedomhouse.org/regions/Americas> (last visited Mar. 7, 2019).

81. See Hadas Gold, *Annapolis Shooting: a day newsrooms have feared*, CNN BUS. (June 29, 2018), available at <https://money.cnn.com/2018/06/29/media/capital-gazette-newsroom-safety/index.html> (last visited Mar. 7, 2019).

82. *Neb. Press Ass’n v. Stewart*, 427 U.S. 539 (1976) (Chief Justice Burger noted the important role the press played in the system of checks against public officials, police officers, and courts during criminal trials. The court characterized the press as “the handmaiden of effective judicial administration ... in the criminal process.”).

83. *Near v. Minnesota*, 283 U.S. 697 (1931).

84. *Id.*

the nature of a free state, required protection from prior restraint rather than freedom from censure after publication.⁸⁵ Furthermore, the court made clear that the right of a free press was safe from invasion by state action under the due process clause of the fourteenth amendment. The *Near* decision has been called one of the court's first great press cases,⁸⁶ and served as a key precedent in the subsequent *Times v. Sullivan* ruling.⁸⁷

While *Near* prohibited proactive censorship of certain publications, citizens who found themselves at the center of a defamatory or libelous story still had a private cause of action after the story had been published. In 1964, the court established a standard that would filter such libel suits, requiring that a public official show that the information was published with actual malice.⁸⁸ The court said that the higher standard was employed in light of a "profound national commitment" to debate on public issues and transparency of public officials.⁸⁹ The actual malice standard still serves to protect the press from endless libel suits in their critical coverage of public officials. In 1966, the court agreed to extend the reach of the *Sullivan* ruling to public figures, business tycoons and celebrities.⁹⁰

One of the most crucial First Amendment questions that has come before the court has been the balance of protecting press freedom during times of national security. In 1971, in the midst of America's involvement in the Vietnam War, the *New York Times* obtained a copy of an internal Department of Defense report, detailing critical information about the war.⁹¹ These confidential papers would later become known as the "Pentagon Papers."⁹² The government sought a temporary injunction

85. *Id.* at 713.

86. ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 90 (1991).

87. *See* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

88. *Id.* During the heat of the Civil Rights movement, The *New York Times* ran a full-page ad for donations to defend Martin Luther King, Jr., on perjury charges. The ad, which contained several minor factual inaccuracies, was critical of the city's police force and their motivation to arrest King. Montgomery city police chief, L.B. Sullivan, brought libel charges against the *Times*, claiming that criticism of the police force reflected on him, personally. In a unanimous decision, Justice Brennan ruled that the target of an allegedly libelous statement must prove that it was made with knowledge or reckless disregard for its falsity.

89. *Id.* at 375.

90. *Curtis Publ'g v. Butts*, 388 U.S. 130 (1967).

91. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

92. *Id.*

ordering the *Times* not to publish the documents, claiming that the release of the information contained in the papers would endanger national security. But the Supreme Court held that the government had not overcome the “heavy presumption against” any form of prior restraint of the press. Justices Black and Douglas criticized the vague use of “security” in instances of attempts to infringe on the constitutional protections awarded to journalists via the First Amendment. Without an inevitable, direct, and immediate event imperiling the safety of American forces, prior restraint was not justified. The effect of this particular decision would appear to separate the United States from many other countries where journalists are regularly sanctioned, and even imprisoned, under the guise of “national security.”

With a rich body of common law in place, nevertheless the 2016 presidential election marked a shift in climate for the country’s media. In the Trump era, landmark press freedom legislation faces the possibility of repeal.⁹³ Justice Clarence Thomas has suggested revisiting *Sullivan* and opening up libel laws.⁹⁴ This new legal vulnerability is one of many results of decades of anti-press ploys by anti-watchdog authoritarian regimes.⁹⁵

III. PRESS FREEDOM’S BIGGEST OFFENDERS AND THEIR COMMONALITIES; NATIONALIST RHETORIC, DELEGIMIZATION, AND ANTI-WATCHDOG MOTIVATION

The world’s most notable anti-press strongmen have used two common methods to construct an enemy out of the press, all for one ultimately common goal.⁹⁶ First, leaders often use nationalist rhetoric to characterize the media as threat to the state, against which government action must be taken in order to protect the people.⁹⁷ Second, leaders use both rhetoric and law to delegitimize the media, usually coming in the form of denied access.⁹⁸ This delegitimization signals to the public

93. Hadas Gold, *Donald Trump: we’re going to ‘open up’ libel laws*, POLITICO (Feb. 26, 2016), available at <https://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866> (last visited Mar. 7, 2019).

94. Adam Liptak, *Justice Clarence Thomas Calls for Reconsideration of Landmark Libel Ruling*, N.Y. TIMES (Feb. 19, 2019), available at <https://www.nytimes.com/2019/02/19/us/politics/clarence-thomas-first-amendment-libel.html> (last visited Mar. 7, 2019).

95. Charles & O’Neill, *supra* note 24.

96. *Id.*

97. RonNell Andersen Jones & Lisa Grow Sun, *Enemy Construction and the Press*, 49 ARIZ. ST. L.J. 1301 (2017).

98. Charles & O’Neill, *supra* note 24.

that the media are “outsiders,” unworthy of constitutional protection.⁹⁹ These attempts to construct an enemy of the media and disable press freedom are ultimately motivated by the need to cover up crime or corruption, most often taking the form of actual human rights abuses.¹⁰⁰ With the press limited in their role as a “watchdog,” such evils are more likely to succeed.

Six notable leaders who have used these common tactics to undercut the press are Adolph Hitler, circa Nazi Germany; Joseph Stalin and Vladimir Putin, in the Soviet Union and modern-day Russia; Rodrigo Duterte in the Philippines; Mohammed Bin Salman in Saudi Arabia; and Donald Trump in the United States.¹⁰¹ The following portion of this note outlines how each of these leaders have used nationalist rhetoric and signaled delegitimization to infringe upon press freedom in their respective countries. Ultimately, as I will go on to explain, a lack of crystalized customary international law of free press has enabled them all to go unchecked.

A. Adolph Hitler, WWII Nazi Germany

Adolph Hitler and his Nazi regime used some of the most powerful political rhetoric in history, despite its horrific consequences.¹⁰² The press in Germany was a strategic target of such rhetoric. *Lügenpresse*, or “lying press,” was a term appropriated by Hitler and the Nazis to weaken opposition to the regime, mostly accusing Jews, communists, and the foreign press of disseminating false news. The Nazi party also tightly controlled interpretation and access to alternative sources.¹⁰³ The use of such propaganda was crucial in “defining the enemy,” and establishing the press as a threat to the security of the state.¹⁰⁴ This ideology that the press was the enemy of the people has led free press scholars to identify *lügenpresse* as the predecessor to Trump’s modern-day “fake news.”¹⁰⁵

99. *Id.*

100. *Id.*

101. *Id.*

102. KLAUS FISHER, NAZI GERMANY: A NEW HISTORY 141 (1995).

103. *The Press in the Third Reich*, U.S. HOLOCAUST MEMORIAL MUSEUM, available at <https://encyclopedia.ushmm.org/content/en/article/the-press-in-the-third-reich> (Mar. 7, 2019) [hereinafter *Third Reich Press*].

104. *Id.*

105. Alexander Griffing, *A Brief History of ‘Lügenpresse,’ the Nazi era predecessor to Trump’s ‘Fake News,’* HAARETZ (Oct. 8, 2017), available at <https://www.haaretz.com/us->

Hitler also used legal methods to delegitimize the press in Germany. Shortly after coming to power, he established the Propaganda Ministry, in an effort to consolidate control over all forms of mass media.¹⁰⁶ Via the new agency, censorship laws worked to diminish the publication of opposing viewpoints.¹⁰⁷ The Ministry took control of the Reich Association of German Press, which regulated entry into the profession.¹⁰⁸ The new Editor's Law of October 4, 1933, "Schriftleitergesetz," excluded "non-Aryans" from working as journalists.¹⁰⁹ The law also enforced a prior restraint on publication of anything "calculated to weaken the strength" of the regime.¹¹⁰ Journalists or editors who failed to follow detailed content regulations from the Propaganda Ministry could be seen as "acting with intent to harm the Nazi party," and consequently sent to concentration camps.¹¹¹

Hitler's control of the German press was inarguably a fundamental piece in his strategy to achieve the systematic mass murders of millions of Jews during the Holocaust.¹¹² For Hitler, the carrying out of a genocidal operation, especially of such magnitude, required the submission and obedience of all citizens of the state.¹¹³ With the press being a so-called watchdog over such atrocities, the media in Nazi Germany be-

news/the-ominous-nazi-era-precedent-to-trump-s-fake-news-attacks-1.5438960 (last visited Mar. 7, 2019).

106. *Third Reich Press*, *supra* note 103. When Adolph Hitler took power in Germany in 1933, the Nazi party controlled less than three percent of the country's 4700 newspapers. By 1944, only 1100 of those 4700 papers remained. Of those 1100, only half were still in the hands of private or institutional owners, who operated in strict compliance with German press regulations. The Propaganda Ministry subsidized the production of the "People's Radio," designed with few dial positions and a limited range so as not to allow certain censored broadcasts. This way, Hitler's speeches were broadcast over the air, rather than covered by independent newspapers. By 1941, an estimated fifteen million radios had been sold in Germany. *See also Propaganda*, U.S. HOLOCAUST MEMORIAL MUSEUM, available at <https://www.ushmm.org/propaganda/transcripts/people-radio.html> (last visited Mar. 7, 2019).

107. *Control and opposition in Nazi Germany*, BBC, available at <https://www.bbc.com/bitesize/guides/z2p3k2p/revision/4> (last visited Mar. 7, 2019).

108. *Third Reich Press*, *supra* note 103.

109. *Editor's Law*, U.S. HOLOCAUST MEMORIAL MUSEUM, available at <https://www.ushmm.org/learn/timeline-of-events/1933-1938/editors-law> (last visited Mar. 7, 2019).

110. *Third Reich Press*, *supra* note 103.

111. *Id.*

112. *See* RON ROSENBAUM, *EXPLAINING HITLER: THE SEARCH FOR THE ORIGINS OF HIS EVIL* (1998).

113. ALAN BULLOCK, *HITLER AND STALIN: PARALLEL LIVES* 325 (New York: Alfred A. Knopf, 1992).

came an obvious target in the effort to cover up one of the greatest human rights violations in world history.

*B. Joseph Stalin, Soviet Union; Vladimir Putin,
Modern-Day Russia*

Restrictions on free press in Russia date back to the beginning of the Soviet Union.¹¹⁴ Both Vladimir Lenin and Joseph Stalin employed nationalist rhetoric and legal delegitimization to undercut the press and coverage of the country's human rights issues.¹¹⁵ Under Vladimir Lenin in 1917, the Soviet Union passed the Decree on Press, which outlawed the publication of views that opposed the revolution.¹¹⁶ At the time, the Communist Party of the Soviet Union (CPSU) controlled appointment to media jobs, based on political and ideological considerations, not unlike the Nazi party in World War II Germany.¹¹⁷ Both leaders used the term *vrag naroda*, meaning "enemy of the people," to refer to anyone who disagreed with the ideology of the state, including the press.¹¹⁸ But Stalin took matters further by codifying such rhetoric into the country's penal code.¹¹⁹ Under Article 58.10, "anti-Soviet agitation and propaganda," the activity of spreading any anti-Soviet idea amongst the masses, was seen as a counter-revolutionary crime punishable by law.¹²⁰ Because of the broad definition of the crime, any opposition could be made to fall under its reach. Increased numbers of prosecutions under

114. *From Revolution to Glasnost: Soviet Press from 1917-1984*, MIAMI U. HAVIGHURST CTR. FOR RUSSIAN & POST-SOVIET STUD., available at <https://miamioh.edu/cas/academics/centers/havighurst/cultural-academic-resources/havighurst-special-programing/journalism-under-fire/journalism-history/index.html> (last visited Mar. 7, 2019) [hereinafter *From Revolution to Glasnost*].

115. See TIMOTHY SNYDER, *BLOODLANDS: EUROPE BETWEEN HITLER AND STALIN* (2010). Stalin has been condemned for allegations of genocide under his rule. Between widespread famine, ordered executions, and ethnic cleansing, one American historian credits Stalin as being ultimately responsible for nine million deaths in the Soviet Union. Nevertheless, and perhaps as a result of his control of the press during his rule, he is still revered by many Russian nationalists. See also ROBERT SERVICE, *STALIN: A BIOGRAPHY* (2004).

116. *Revolution to Glasnost*, *supra* note 114.

117. *Id.*

118. Veronika Bondarenko, *Trump keeps saying 'enemy of the people' – but the phrase has a very ugly history*, BUS. INSIDER (Feb. 22, 2017), available at <https://www.businessinsider.com/history-of-president-trumps-phrase-an-enemy-of-the-people-2017-2> (last visited Mar. 7, 2019).

119. Sarah Davies, *The Crime of "Anti-Soviet Agitation" in the Soviet Union in the 1930s*, 39 *CAHIERS DU MONDE RUSSE* 149 (1998).

120. *Id.*

the code correlated with periods of increased political and social repression in the country.

In modern-day Russia, nationalist rhetoric is regularly employed to stifle the press. Despite the Russian constitution providing for a free press, the country's current political climate has created a corrupt judicial system that enables authorities to harass journalists who expose abuses of power. Recently, officials have been using Russia's broad "anti-extremism" laws to suppress criticism of the country's involvement in Ukraine.¹²¹ Under the guise of concerns about "extremism," the government has blocked over 30,000 independent and opposition websites.¹²² On May 2, 2015, just a day before World Press Freedom Day, Vladimir Putin increased the maximum fine on Russian news organizations accused of inciting extremism.¹²³ With the same nationalist rhetoric, Putin passed a stringent law requiring non-governmental organizations to re-register with the government, subjecting themselves to stricter oversight.¹²⁴ The 2006 NGO law enabled authorities to deny registration to any organization whose activities "create a threat to the sovereignty, political independence, territorial integrity, national unity, unique character, cultural heritage, and national interests of the Russian Federation."¹²⁵ As a result, outside organizations like Human Rights Watch and Committee to Protect Journalists now have increased difficulty fighting for press rights within the country.¹²⁶

The Russian government has worked to delegitimize opposition media by monopolizing the country's major media outlets under state

121. *FSB Increasingly Involved in Misuse of 'Anti-Extremism' Laws, SOVA Says*, THE INTERPRETER (Mar. 29, 2015), available at <http://www.interpretermag.com/fsb-increasingly-involved-in-misuse-of-anti-extremism-laws-sova-says/> (last visited Mar. 7, 2019).

122. *Russia Profile*, FREEDOM HOUSE, available at <https://freedomhouse.org/report/freedom-press/2017/Russia> (last visited Mar. 7, 2019).

123. Howard Amos, *Putin Raises 'Extremism' Fines for Russian Media Tenfold*, THE MOSCOW TIMES (May 4, 2015), available at <https://themoscowtimes.com/articles/putin-raises-extremism-fines-for-russian-media-tenfold-46297> (last visited Mar. 7, 2019).

124. Saskia Brechenmacher, *Delegitimization and Division in Russia*, CARNEGIE ENDOWMENT FOR INT'L PEACE (May 18, 2017), available at <https://carnegieendowment.org/2017/05/18/delegitimization-and-division-in-russia-pub-69958> (last visited Mar. 7, 2019).

125. Katherin Machalek, *Factsheet: Russia's NGO Laws*, FREEDOM HOUSE (Feb. 6, 2013), available at https://freedomhouse.org/sites/default/files/2020-02/SR_Contending_with_Putins_Russia_PDF.pdf (last visited Aug. 2, 2019).

126. *History of Russian Journalism*, MIAMI U. HAVIGHURST CTR. FOR RUSSIAN & POST-SOVIET STUD., available at <https://miamioh.edu/cas/academics/centers/havighurst/cultural-academic-resources/havighurst-special-programing/journalism-under-fire/journalism-history/index.html> (last visited Aug. 1, 2019).

control and abusing defamation laws.¹²⁷ Difficult economic conditions have given the state a major financial advantage over small, privately-owned newspapers. The television networks with the largest audiences (NTV, First Channel, and RTR) are now under state control.¹²⁸ As a result of the high punitive damage awards and prison sentences associated with defamation laws, many journalists in the country have taken to self-censorship.

Putin's anti-watchdog motivation results from the country's involvement in a number of human right violations.¹²⁹ In 2014 the Russian military invaded Ukraine, and annexed Crimea. The UN believes that over 10,000 people have been killed in the Ukraine since the invasion.¹³⁰ Abroad, Putin has backed Bashar al-Assad's genocide in Syria.¹³¹ The Kremlin's regime has conducted tens of thousands of airstrikes targeting civilian populations in Syria and has been accused of committing war crimes in Aleppo.¹³² The Russian government has also persecuted its own citizens for religious beliefs and sexual orientation.¹³³ In Chechnya, security officials detained and tortured dozens of gay male citizens as a part of an anti-gay "purge."¹³⁴ And the press is arguably a targeted minority itself. Journalism is a dangerous trade in Russia.¹³⁵ It is estimated that more than thirty-four Russian journalists have been killed since 2000, with questionable causes of death such as falling out windows or allegations of suicide.¹³⁶ Putin's track record of human rights violations makes for an obvious agenda against the media who seek to hold his regime accountable.

127. *Id.*

128. *Id.*

129. *Helsinki Summit: A Review of Vladimir Putin's Record of Human Rights Violations and Attacks on Democratic Institutions*, HUM. RTS. FIRST, available at <https://www.humanrightsfirst.org/sites/default/files/factsheet-Putin-July-2018.pdf> (last visited Aug. 1, 2019).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Russia, Events of 2017*, HUM. RTS. WATCH, available at <https://www.hrw.org/world-report/2018/country-chapters/Russia> (last visited Aug. 1, 2017).

134. *Id.*

135. Scott Simon, *Why Do Russian Journalists Keep Falling?*, NPR (Apr. 21, 2018), available at <https://www.npr.org/2018/04/21/604497554/why-do-russian-journalists-keep-falling> (last visited Aug. 1, 2019).

136. *Id.*

C. Rodrigo Duterte, Philippines

In 2016, Rodrigo Duterte was elected as President of the Philippines after a promising campaign to end the country's rampant drug crimes.¹³⁷ During his two years in office, the country's media outlets have worked to document Duterte's brutal war on drugs as the government has released very little information about the number of killings, under the premise of national security.¹³⁸ In his own form of nationalist rhetoric, he has called opposition reporters "traitors," claiming that they are not "true Filipinos."¹³⁹ The environment has become so hostile that Duterte has said that "corrupt" journalists "are not exempt from assassination."¹⁴⁰ As a result of such rhetoric, violent attacks against journalists, including two murders in 2016, usually go unpunished.¹⁴¹

Since Duterte took power, the government has used a three predominant methods to delegitimize the media in the Philippines; verbal assaults, social media attacks, and threats to revoke groups' licenses or invade their commercial interests.¹⁴² While Duterte perpetuates accusations of "fake news," his own campaign reportedly spent \$200,000 on internet "trolls" to attack critics and spread pro-government propaganda that appears as legitimate news.¹⁴³ Police have been known to make unexpected stops into reporting bureaus, such as Reuters, to check reporters' credentials.¹⁴⁴ Duterte has also targeted certain outlets, such as Rappler, and banned its journalists from reporting at the presidential palace.¹⁴⁵

137. Austin Ramzy, *Philippines' New President, Rodrigo Duterte, Vows Tough Stance on Crime*, N.Y. TIMES (June 30, 2016), available at <https://www.nytimes.com/2016/07/01/world/asia/philippines-duterte.html?searchResultPosition=87> (last visited Aug. 1, 2019).

138. Shawn Crispin, *Mission Journal: Duterte leads tri-pronged attack on press amid condemnation of controversial policies*, COMMITTEE TO PROTECT JOURNALISTS (July 5, 2018), available at <https://cpj.org/blog/2018/07/mission-journal-duterte-leads-tri-pronged-attack-o.php> (last visited Aug. 1, 2019).

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. Nyshka Chandran, *'Fake news' can be very dangerous, and events this year in Asia proved it*, CNBC (Dec. 25, 2017), available at <https://www.cnbc.com/2017/12/25/fake-news-was-a-weapon-in-asia-in-2017.html> (last visited Aug. 1, 2019).

144. Crispin, *supra* note 138.

145. *Id.*

Rappler, an online news site, has become a prominent source of information for the readers in the Philippines.¹⁴⁶ The cite is known for its vigilant reporting on the death toll of Duterte's drug war, and so Duterte has gone to extreme legal lengths to silence the company.¹⁴⁷ In late 2018, Rappler CEO Maria Ressa was formally indicted on multiple counts of tax evasion.¹⁴⁸ Earlier in that same year, the Philippines Securities and Exchange commission revoked the outlet's registration on the basis that it had violated foreign-ownership rules.¹⁴⁹ Under the constitution, media companies in the Philippines cannot be owned by a foreign entity.¹⁵⁰ The charges against Rappler and Ressa appear to be politically motivated, in an attempt to send a message to the outlet to stop reporting on the war.

The International Criminal Court has begun a preliminary investigation into whether Duterte's drug war has resulted in crimes against humanity.¹⁵¹

D. Mohammed Bin Salman, Saudi Arabia

While the Kingdom of Saudi Arabia currently considers itself to be experiencing a modernizing revolution, press freedom has taken hits as new Crown Prince Mohammed Bin Salman cracks down on coverage that conflicts with the narrative of a new, less repressive state.¹⁵² The Kingdom is one of the most restrictive press environments in the world, landing at number 169 of 180 countries on the RSF press freedom in-

146. John Geddie & Martin Perry, *INSIGHT - The Philippine journalists taking the rap in Duterte's latest war*, REUTERS (Mar. 28, 2019), available at <https://www.reuters.com/article/philippines-media/insight-the-philippine-journalists-taking-the-rap-in-dutertes-latest-war-idUSL8N21607C> (last visited Aug. 1, 2019).

147. *Id.* See also Julia Webster, *Libel Trial Opens Of Maria Ressa, Philippine Journalist Critical of President Duterte*, TIME (July 23, 2019), available at <https://time.com/5632472/maria-ressa-duterte-philippines/> (last visited Aug. 1, 2019).

148. Joshua Berlinger, *Maria Ressa, Rappler formally indicted by the Philippines on tax evasion charges*, CNN (Nov. 29, 2018), available at <https://www.cnn.com/2018/11/29/asia/maria-ressa-rappler-intl/index.html> (last visited Aug. 1, 2019).

149. Darryl Coote, *Rappler CEO and Duterte critic arrested over foreign ownership charges*, UPI (Mar. 29, 2019), available at https://www.upi.com/Top_News/World-News/2019/03/29/Rappler-CEO-and-Duterte-critic-arrested-over-foreign-ownership-charges/6461553831214/ (last visited Aug. 1, 2019).

150. *Id.*

151. *Id.*

152. Editorial Board et. al., *Saudi Arabia's attacks on free press continue*, THE BLADE (Oct. 15, 2018), available at <https://www.toledoblade.com/opinion/editorials/2018/10/15/saudi-arabia-journalists-marwan-al-mureisi-prince-salman/stories/20181015011> (last visited Aug. 1, 2019).

dex.¹⁵³ Despite its already restrictive environment, arrests and disappearances of journalists have increased under Bin Salman.¹⁵⁴ In October 2018, the country made international headlines when ex-Saudi insider and contributing *Washington Post* columnist Jamal Khashoggi was murdered inside the Saudi consulate in Istanbul.¹⁵⁵ Khashoggi was notorious for his critical coverage of the new regime.¹⁵⁶ The United States' Central Intelligence Committee obtained phone calls in which Crown Prince Mohammed Bin Salman ordered to "silence the journalist as soon as possible."¹⁵⁷ Khashoggi had been critical of the new regime under Salman, making him an obvious target of the Crown Prince.¹⁵⁸

In common with other authoritarian leaders, Mohammed Bin Salman's crackdown on the media seems motivated by the pressure to cover up human rights violations. Human rights advocacy groups have accused the Crown Prince of violations of international law related to the country's involvement in the armed conflict in Yemen.¹⁵⁹ The Saudi-led coalition has launched numerous airstrikes on Yemeni civilians, hitting homes, schools, mosques, and markets, and amounting to possible war crimes.¹⁶⁰ Rights groups allege that Saudi authorities have also committed abuses against their own citizens, like detaining and torturing Saudi female activists. Since 2017, Saudi officials under Bin Salman have made a sweep of arrests targeting critics in an effort to shift control of the country's narrative and attract foreign investors.¹⁶¹

153. 2018 *World Press Freedom Index*, *supra* note 28.

154. *Id.*

155. *Khashoggi*, *supra* note 60.

156. *Id.*

157. *Saudi Prince 'ordered Jamal Khashoggi be silenced' in call heard by CIA*, NEWS CORP. AUSTL. NETWORK (Nov. 23, 2018), available at <https://www.news.com.au/world/europe/saudi-prince-ordered-jamal-khashoggi-be-silenced-in-call-heard-by-cia/news-story/23e4ca113604dac96f921420c52df183> (last visited Aug. 2, 2019).

158. *Id.*

159. *G20: Saudi Crown Prince Faces Legal Scrutiny*, HUM. RTS. WATCH (Nov. 26, 2018), available at <https://www.hrw.org/news/2018/11/26/g20-saudi-crown-prince-faces-legal-scrutiny> (last visited Aug. 2, 2019).

160. *Id.*

161. Ishaan Tharoor, *Don't be fooled by the comforting rhetoric coming from Saudi Arabia's Crown Prince*, WASH. POST (Nov. 8, 2017), available at https://www.washingtonpost.com/news/made-by-history/wp/2017/11/08/dont-be-fooled-by-the-comforting-rhetoric-coming-from-saudi-arabias-crown-prince/?utm_term=.d44d1f23360c (last visited Aug. 1, 2019).

F. Donald Trump, United States

Although Trump's offenses certainly do not rise to the level of human rights violations, the horizon of press freedom in America looks dark. In the aftermath of the election of Donald Trump in 2016, the United States slid from thirty-seven to forty-five on the list of 180 countries and their relative statuses of press freedom.¹⁶² Historians and free press advocates have expressed concerns that his attitudes toward the media, and strategies to delegitimize them, resemble those of infamous dictators such as Hitler and Stalin.¹⁶³

But the tumultuous relationship between the President and the media in the United States predates Trump. John F. Kennedy regularly pushed back at the press, stating that national security was his "primary obligation," and so warranted significant limitations on what the government shared with the press.¹⁶⁴ Lyndon B. Johnson was "obsessed" with the media's coverage of the Vietnam War, with three televisions in the oval office, one tuned to each of the major broadcast networks.¹⁶⁵ He took critical coverage of the war so personally that he once accused CBS anchor Walter Cronkite of being out to get him.¹⁶⁶ He worked tirelessly to "manipulate, punish, and seduce" the media for its coverage of Vietnam so that more Americans would have a positive outlook on the country's involvement.¹⁶⁷ Richard Nixon used war and enemy terminology to characterize the press, writing in his memoir that he "considered the influential majority of the news media to be part of my political opposition" and that he "was prepared to have to do combat with the media."¹⁶⁸ He regularly referred to the press as the "enemy," and

162. 2016 *World Press Freedom Index*, REPS. WITHOUT BORDERS, available at <https://rsf.org/en/ranking> (last visited Aug. 1, 2019).

163. Jones & Sun, *supra* note 97.

164. John F. Kennedy, Address to the American Association of Newspaper Editors (Apr. 20, 1961) (recording archived at the University of Virginia's Miller Center), available at <https://millercenter.org/the-presidency/presidential-speeches/april-20-1961-address-american-association-newspaper-editors> (last visited Aug. 2, 2019).

165. Chester Pach, *Lyndon Johnson's Living Room War*, N.Y. TIMES (May 30, 2017), available at <https://www.nytimes.com/2017/05/30/opinion/lyndon-johnson-vietnam-war.html> (last visited Aug. 3, 2019).

166. *Id.*

167. BRIGITTE LEBENS NACOS, THE PRESS, PRESIDENTS, AND CRISES 82 (1990); see also JOHN TEBBEL & SARAH MILES WATTS, THE PRESS AND THE PRESIDENCY 489 (1985) (noting that Johnson's behavior toward the press left "scarcely one redeeming feature to permit a charitable conclusion.").

168. Debra Gersh Hernandez, *Nixon and the Press*, 127 EDITOR & PUBLISHER 82, 86 (1994).

went so far as to remove reporters out of the west wing of the White House and into different quarters to impede their observations.¹⁶⁹ Gerald Ford restricted access to the media, opting only to answer certain questions of his choosing.¹⁷⁰ Jimmy Carter's administration was known for overtly lying to the press about the president's whereabouts.¹⁷¹ Ronald Reagan's staff imposed bans on certain questions and restricted press access to appearances, which were also explicitly limited.¹⁷² George W. Bush called the media an "unrepresentative, irresponsible interest group."¹⁷³ But it was Barack Obama who pursued more criminal charges against whistleblowers than all previous presidents combined. The Obama administration seized records of over twenty Associated Press phone lines and was highly critical of major outlets' use of confidential, anonymous sources.¹⁷⁴

Yet it is Donald Trump's relationship with the media that seems to have risen to a new extreme. Unlike the seemingly petty antics of past presidencies, Trump's tactics more closely resemble the two major themes anti-press dictators around the globe. First, Trump has used extreme nationalist rhetoric to demonize the media, repeatedly referring to journalists as the "enemy of the people." He has infamously coined the phrase "fake news," and incites animosity toward media coverage at his events, often pointing to reporters and calling them various insults. At rallies, his supporters have been heard yelling "*lugenpresse*," a derogatory anti-media phrase originally used by Hitler and the Nazis during World War II.¹⁷⁵ Trump has accused mainstream media outlets, such as

169. WILLIAM E. PORTER, *ASSAULT ON THE MEDIA: THE NIXON YEARS* 65 (1976).

170. JOSEPH C. SPEAR, *PRESIDENTS AND THE PRESS: THE NIXON LEGACY* 4 (1984).

171. *Id.* at 3 (describing how Carter's staff lied to the media by claiming Carter "was at the executive mansion when he was in fact at the opera" and how Carter had Secret Service lead the press "on wild goose chases in Carter's car while Carter sped off in the opposite direction in a different vehicle.").

172. *Id.* at 4-5, 10 (describing administration efforts to have "known friendlies" at news conferences and to drown out questions by starting the engine of the presidential helicopter before the President appeared).

173. Jon Marshall, *Nixon Is Gone, but His Media Strategy Lives On*, *THE ATLANTIC* (Aug. 4, 2014), available at <http://www.theatlantic.com/politics/archive/2014/08/nixons-revenge-his-media-strategy-triumphs-40-years-after-resignation/375274/> (last visited Aug. 1, 2019); see also Ken Auletta, *Fortress Bush*, *NEW YORKER* (Jan. 19, 2004), available at <https://www.newyorker.com/magazine/2004/01/19/fortress-bush> (last visited Aug. 1, 2019) (discussing the distance that the George W. Bush Administration maintained with the press because of Bush's view that the press was not on his side).

174. Marshall, *supra* note 173.

175. *Id.*

the *New York Times*, of working against the security of the nation.¹⁷⁶ In the wake of the September 11th attacks on the World Trade Center, “national security” was used as a mechanism to compromise other basic liberties, including but not limited to press access and release of government information. The courts have been willing to accept the argument that national security requires some exceptions to basic liberties. With the media at a historically weak point, it is increasingly likely that the courts would accept the argument when assessing freedom of the press. In further attempts to paint the enemy as a threat that needs to be held accountable, his administration has sent out a “Mainstream Media Accountability Survey,” which asked participants to answer loaded questions, such as whether the media reports “unfairly” or spreads “false stories.”¹⁷⁷ Efforts like this are more passive-aggressive, yet could pose a larger threat than mere use of anti-press rhetoric, because they ask the public to engage in the anti-press narrative.¹⁷⁸

Second, by branding the press as the enemy of the people, Donald Trump has positioned American society to accept the stripping of legal and constitutional protections that the press currently enjoys. Since being elected, he has made clear his intentions to open up libel laws, which would make it easier to sue journalists and publications.¹⁷⁹ This would require altering the court’s actual malice standard from *Sullivan*. Of course, the executive cannot do this unilaterally. But the threat exists, as Supreme Court Justice Clarence Thomas recently called for the Court to revisit the standard in *Sullivan*, claiming that it has no basis in the constitution as it was understood by the original framers of the document.¹⁸⁰ In a concurring opinion on appeal involving a libel claim against a public figure,¹⁸¹ Thomas wrote that discretion should be left to

176. See Peter Baker, *Trump Says He Has ‘Complete Power’ to Pardon*, N.Y. TIMES (July 22, 2017), available at <https://www.nytimes.com/2017/07/22/us/politics/donald-trump-jeff-sessions.html> (last visited Aug. 2, 2019) (In a tweet posted July 22, 2017, Trump accused the “failing *New York Times*” of foiling an attempt to capture wanted terrorist Al-Baghdadi, claiming that the paper had a “sick agenda over national security.”).

177. *Mainstream Media Accountability Survey*, GOP, available at <https://gop.com/mainstream-media-accountability-survey/> (last visited Jan. 31, 2019).

178. Jones & Sun, *supra* note 97.

179. Gold, *supra* note 93; see generally CHARLES J. GLASSER JR., INTERNATIONAL LIBEL AND PRIVACY HANDBOOK (Bloomberg Press, New York, 2009).

180. Liptak, *supra* note 94.

181. Patricia Montemurri, *Bill Cosby accuser from Detroit takes defamation suit to supreme court*, DETROIT FREE PRESS (May 4, 2018), available at <https://www.freep.com/story/news/2018/05/04/detroit-bill-cosby-accuser-kathy-mckee-supreme-court/577468002/> (last visited Mar. 7, 2019).

the states to decide an “acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm” – a suggestion that severely conflicts with the high standard currently employed via *Sullivan*.¹⁸² Trump himself has been more specific about his intentions for the standard. At a campaign rally in Fort Worth, Texas, he said: “I’m going to open up our libel laws so when they write purposely negative and horrible and false articles, we can sue them and win lots of money.”¹⁸³ Ironically, what the President describes as desirable would require no change to current law. Any publication involving a legitimate reckless disregard for the truth would be successfully sued under current defamation standards.¹⁸⁴ Trump has been a party in fourteen such defamation cases to date,¹⁸⁵ but he has never been able to successfully meet the actual malice standard in a public trial court.¹⁸⁶ His seemingly personal agenda to loosen libel and defamation laws has earned him a reputation as a “libel bully.”¹⁸⁷ Whether or not he will actually achieve change, his ideology is a signal of delegitimization in itself, suggesting that current laws are too lax and allow journalists to get away with more than they should.¹⁸⁸

While the loosening of libel standards remains hypothetical, the consequences of high damages in Trump-era defamation suits are all too real. In 2016, Terry Bollea, known by his wrestling alias “Hulk Hogan,” sued Gawker Media for defamation, seeking a whopping \$100 million in damages.¹⁸⁹ The Gawker team had suspicions about the mo-

182. *Id.*

183. Gold, *supra* note 93.

184. Jonathan Turley, *Trump’s not being defamed. If he was, he wouldn’t need to change the libel laws.*, USA TODAY (Jan. 11, 2018), available at <https://www.usatoday.com/story/opinion/2018/01/11/trumps-not-being-defamed-if-he-wouldnt-change-libel-laws-michael-wolff-jonathan-turley-column/1021999001/> (last visited Mar. 7, 2019).

185. Nick Penzenstadler et al., *Donald Trump: Three decades, 4,095 lawsuits*, USA TODAY, available at <https://www.usatoday.com/pages/interactives/trump-lawsuits/> (last visited Mar. 3, 2019).

186. Susan E. Seager, *Donald Trump Is A Libel Bully But Also A Libel Loser*, MEDIA L. RESOURCE CTR., available at <https://www.medialaw.org/component/k2/item/3470-donald-j-trump-is-a-libel-bully-but-also-a-libel-loser> (last visited Mar. 3, 2019).

187. *Id.*

188. Charlie Savage & Eileen Sullivan, *Leak Investigations Triple Under Trump, Sessions Say*, N.Y. TIMES (Aug. 4, 2017), available at <https://www.nytimes.com/2017/08/04/us/politics/jeff-sessions-trump-leaks-attorney-general.html> (last visited Mar. 3, 2019) (under President Trump, Department of Justice investigations into leaked information have tripled.).

189. Andrew Ross Sorkin, *Peter Thiel, Tech Billionaire, Reveals Secret War With Gawker*, N.Y. TIMES (May 25, 2016), available at <https://www.nytimes.com/2016/05/26/>

tives behind the suit, particularly after Bollea selectively dropped claims of Intentional Infliction of Emotional Distress, thereby preventing Gawker's insurance company from paying any of the damages.¹⁹⁰ It became clear that the lawsuit was a blatant attempt to bring down the media company and its executives – an agenda of Silicon Valley mogul Peter Thiel's ever since Gawker had published articles outing Thiel of being gay. It was later revealed that Thiel had paid all of Bollea's legal fees – and not for nothing. The jury sided with Bollea and the Florida State Court judge ordered Gawker and its executives to pay over \$140 million in damages.¹⁹¹ The outlet was forced to file for bankruptcy and was later bought by Univision Communications.

Many in the journalism community felt the judgement had a chilling effect on freedom of the press. First Amendment Attorney Floyd Abrams felt Gawker would be the first of many:

The reason to save Gawker is not because Gawker was worth saving. The reason to save it is that we don't pick and choose which sort of publications are permissible. Because once we do, it empowers the government to limit speech in a way that ought to be impermissible even the most disagreeable speech is, as a general matter, fully protected by the First Amendment.¹⁹²

Abrams' floodgate suggestion proved to be right, as defamation cases seeking egregiously high damages awards remain a popular tactic in silencing media outlets. In early 2019, Covington Catholic High School teen Nicholas Sandmann brought charges against the *Washington Post*, seeking \$250 million in damages.¹⁹³ Sandmann's legal team say the total is the same amount that Amazon founder Jeff Bezos paid for the paper in 2013. Although many such lawsuits are a longshot, the potential consequences for defendant media outlets are detrimental. And in a perfect storm, the current economic situation in the United States has further prevented journalists from pursuing First Amendment claims as they have in the past. A recent survey of editors at the na-

business/dealbook/peter-thiel-tech-billionaire-reveals-secret-war-with-gawker.html (last visited Mar. 3, 2019).

190. *Gawker Media, LLC v. Bollea*, 129 So. 3d 1196 (Fla. Dist. Ct. App. 2014); *Gawker Media, LLC v. Bollea*, 170 So. 3d 125 (Fla. Dist. Ct. App. 2015).

191. *Id.*

192. *NOBODY SPEAK: TRIALS OF A FREE PRESS* (Netflix & First Look Media 2017).

193. Sophia Barnes, *Nick Sandmann's Lawyers Sue Washington Post for \$250 Million*, NBC WASH. (Feb. 20, 2019), available at <https://www.nbcwashington.com/news/local/Nick-Sandmanns-Lawyers-Sue-Washington-Post-for-250M-506091181.html> (last visited Mar. 3, 2019).

tion's major news organization showed that more than half felt that news organizations are no longer prepared to go to court to preserve First Amendment freedoms.¹⁹⁴

Trump has also expressed opposition to current laws that prevent large media mergers. As have anti-press leaders of other regimes, Trump seems to idealize the possibility of consolidating networks, particularly conservative ones that are more likely to promote positive coverage of his administration.¹⁹⁵

During his presidency, Trump has limited individual reporters' access to White House press briefings, blacklisting multiple outlets including the *Washington Post*, *Des Moines Register*, *Buzzfeed*, and *Politico* from getting press credentials.¹⁹⁶ In November 2018, CNN finally sued the President after the White House revoked a reporter's press pass.¹⁹⁷ Several media companies filed amicus briefs, including Fox News, NBC, and the Associated Press.¹⁹⁸ Presiding Judge and Trump-appointed Jim Kelly avoided the substantive First Amendment question, ruling instead on due process in favor of CNN.¹⁹⁹ He did, however, make a point during arguments to suggest that subjectively banning certain reporters from the press room was not likely to survive the First

194. Eric Newton, *A News Industry 'Less Able' to Defend Freedom*, JOHN S. & JAMES L. KNIGHT FOUND. (Apr. 21, 2016), available at <https://www.knightfoundation.org/articles/news-industry-less-able-defend-freedom> (last visited Aug. 1, 2019).

195. Scott Nover, *The Sudden Demise of Sinclair's Merger with Tribune*, *The Atlantic* (July 25, 2018), available at <https://www.theatlantic.com/politics/archive/2018/07/the-sudden-demise-of-sinclairs-merger-with-tribune/566099/> (last visited Mar. 2, 2019) (Media giants like the conservative Sinclair Broadcasting group have expressed intent to buy out other, smaller networks like Tribune Media. The FCC was skeptical of a Sinclair deal, which involved plans for the company to control certain stations via sidecar agreements, in some instances, without even owning them. The deal was ultimately prevented by the Communication Act, a 1934 piece of legislation put in place to limit control of smaller affiliation stations by large broadcasting entities. The localism principle at the heart of the Act aimed to assure that small licensees would serve their local communities. President Trump expressed his disappointment when the deal fell through, tweeting that it would have been "a great and much needed conservative voice for and of the people.").

196. Paul Farhi, *CNN, New York Times, Other Media Barred from White House Briefing*, *WASH. POST* (Feb. 24, 2017), available at https://www.washingtonpost.com/lifestyle/style/cnn-new-york-times-other-media-barred-from-white-house-briefing/2017/02/24/4c22f542-fad5-11e6-be05-1a3817ac21a5_story.html?utm_term=.1df8da46c5fd (last visited Mar. 2, 2019).

197. *Cable News Network, Inc. v. Trump*, No. 1:18-cv-02610-TJK (D.C.C. Nov. 13, 2018).

198. *Id.*

199. *Id.*

Amendment.²⁰⁰ In response to the ruling, the Trump White House released a list of four rules for press room reporters;²⁰¹ (1) reporters will ask a single question and then will yield the floor to the other journalists, (2) follow-up questions will be permitted at the discretion of the president or other white house officials taking questions, (3) “yielding the floor” is defined as “physically surrendering” the microphone (4) failure to abide by any of the rules may result in suspension or revocation of the journalists’ hard pass.²⁰²

Unlike the presidents before him, Donald Trump has a unique and relatively new tool that has further helped him to perpetuate anti-press attitudes – social media. With access to Twitter, which he frequently uses, the President no longer has to rely on the media to speak to the people. There is no incentive to maintain a positive working relationship with the press, because the President can speak to the people directly and unfiltered; vice versa, because citizens no longer have to rely on the media to hear from the President and other leaders, the media is much more susceptible to enemy construction than in the past.²⁰³

While other anti-press totalitarian leaders have employed these strategies in an effort to cover up human rights violations, it appears that Trump’s motivations may be linked to his involvement in white collar crimes. The President has taken especially poorly to the media’s hunt for his tax returns, and interviews with ex-insiders such as former FBI Director James Comey. The media has broken controversial stories like child internment camps at the southern border, and even personal affairs such as Trump’s extramarital relationship with porn star Stormy Daniels.

These offenses are inarguably less serious than the human rights violations of leaders such as Hitler, Stalin, and Bin Salman. But many feel that Trump’s anti-media crusade is a test. If he can successfully construct an enemy of the media and strip constitutional protections from journalists without check, minorities like Muslims and Mexican immigrants, or even the American judiciary could be future targets. The tactic of delegitimization could be applied to a number of other crucial

200. *Id.*

201. Cheyenne Haslett, *White House drops effort to suspend press pass for CNN’s Jim Acosta; outlines rules to reporters*, ABC NEWS (Nov. 19, 2018), available at <https://abcnews.go.com/Politics/white-house-jim-acostas-press-pass-cnn-seeks/story?id=59291734> (last visited Mar. 2, 2019).

202. *Id.*

203. *Id.*

democratic mechanisms. Trump's attacks on the press ultimately interfere with the security of the democracy itself, which is dependent upon the strength of the media in providing citizens with information about their government.²⁰⁴ The decline of press freedom in the United States has shifted the country away from its position as a leader of press freedom, and magnified similarities to anti-media dictatorships. If the United States fails to safeguard its own democracy, the backsliding of democracy and press freedom on a global scale could only worsen.

IV. A CHECK TO POWER: CUSTOMARY INTERNATIONAL LAW AS A PILLAR OF PRESS FREEDOM

A. *A Human Rights Crisis*

As of 2018, 251 journalists remain imprisoned, internationally.²⁰⁵ Some of the highest numbers of incarcerations come from Turkey, China, Eritrea, Egypt, and North Korea.

In Malta, blogger Daphne Caruana Galizia was killed by a car bomb after her coverage of ties between government officials and big businesses amounting to corrupt concentrations of wealth.²⁰⁶ The investigation into the order of her killing is being done by the same officials that Galizia wrote about and criticized. In response to the murder, European Commission spokesman Margaritis Schinas called for journalists' rights to "ask uncomfortable questions and report effectively" to be "guaranteed at all times."²⁰⁷

Victoria Marinova, a Bulgarian journalist who had been reporting on corruption involving European union funds, was raped and murdered in the town of Ruse in early October.²⁰⁸ The European Federation of

204. See Emily Howie, *Protecting the human right to freedom of expression in international law*, 20 INT'L J. SPEECH-LANGUAGE PATHOLOGY 12, 12-15 (2018).

205. *Imprisoned 2018*, Committee to Protect Journalists (n.d.), available at https://cpj.org/data/imprisoned/2018/?status=Imprisoned&start_year=2018&end_year=2018&group_by=location (last visited Mar. 3, 2019).

206. Joanna Kakissis, *Who Ordered The Car Bomb That Killed Matlese Journalist Daphne Caruana Galizia?*, NPR (July 22, 2018), available at <https://www.npr.org/2018/07/22/630866527/mastermind-behind-malta-journalist-killing-remains-a-mystery> (last visited Mar. 2, 2019); see also INVICTA: THE LIFE AND WORK OF DAPHNE CARUANA GALIZIA (Joseph A. Debono & Caroline Muscat eds. 2017).

207. Kakissis, *supra* note 206.

208. *Bulgarian journalist Viktoria Marinova killed in Ruse*, BBC (Oct. 8, 2018), available at <https://www.bbc.com/news/world-europe-457779482> (last visited Mar. 2, 2019).

Journalists is now calling for increased protections for journalists, as they think the attack was an attempt to silence those in the profession.²⁰⁹

In Somalia, radio reporter Abdirizak Said Osman was stabbed to death after leaving his radio station on September 18.²¹⁰ Osman had recently done several reports for his radio show, *Voice of Peace*, about the decline in the security situation in the region, alluding to the terrorist methods used by the Islamist rebel group Al-Shabaab.²¹¹ UNESCO's Director-General condemned the attack and called for the perpetrators to be held accountable to assure that "others do not feel emboldened to attack the media."²¹²

After *Washington Post* writer Jamal Khashoggi was murdered in Istanbul, many countries did what they could to send a message to Saudi Arabia by pulling out of trade deals. Countries like Germany and Denmark banned weapon sales to Saudi Arabia in a statement against the murder.²¹³

As journalists around the globe are harassed, imprisoned, tortured, and even killed, it is clear that the current state of press freedom is violative of the basic ideology of human rights. The preamble of the Universal Declaration on Human Rights speaks to these ideals:

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law [...]

209. *Id.*

210. *Radio reporter stabbed to death in central Somalia*, REPORTERS WITHOUT BORDERS (Sept. 20, 2018), available at <https://rsf.org/en/news/radio-reporter-stabbed-death-central-somalia> (last visited Mar. 2, 2019).

211. *Id.*

212. *Director-General condemns attack on radio reporter Abdirizak Said Osman in Somalia*, UNESCO (Sept. 20, 2018), available at <https://en.unesco.org/news/director-general-condemns-attack-radio-reporter-abdirizak-said-osman-somalia> (last visited Mar. 2, 2019).

213. Darin Graham, *Denmark suspends arms sales to Saudi Arabia – but which European countries continue to supply it?*, EURONEWS (Nov. 23, 2018), available at <https://www.euronews.com/2018/11/22/denmark-suspends-arms-sales-to-saudi-arabia-but-which-european-countries-continue-to-suppl> (last visited Mar. 2, 2019).

[...] Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom [...]²¹⁴

B. Customary International Law as a Mechanism

Press freedom's biggest offenders, both past and present, have gone unchecked due to gaps in international law and lack of enforceability. If the international community wishes to protect a free press, there must be international law stronger than the force of individual anti-press strongmen. Current declarations are non-binding, and treaties fall short of implicating numerous offending countries. Therefore, we must turn to custom as a source of international law that would serve to protect press freedom.²¹⁵

1. UDHR and ICCPR as Widespread State Practice

The first element of any customary international law is widespread state practice. Some legal scholars would argue that widespread state practice of freedom of expression already exists, supported by recognition in the Universal Declaration on Human Rights, and implemented via the International Covenant on Civil and Political Rights.²¹⁶

Indeed, the UDHR does seemingly recognize the right to a free press in Article 19. But the declaration is exactly that – a declaration. The Declaration is not a legal instrument, and it would be a far cry to characterize some of its provisions as representative of legal rules. Alternatively, some of its provisions either constitute general legal principles or represent fundamental humanitarian considerations.²¹⁷

There is no force of law behind the protected rights outlined in the UDHR, and so it can hardly be said that those rights are protected at all.

214. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

215. Michael Akehurst, *Custom as a Source of International Law*, 47 BRITISH Y.B. INT'L L. 1, 1-53 (1976).

216. *Freedom of Expression as a Human Right*, CTR. FOR L. & DEMOCRACY (2015), available at <http://www.law-democracy.org/live/wp-content/uploads/2015/02/foe-briefing-notes-1.pdf> (last visited Mar. 1, 2019). See also Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195; Convention on the Rights of a Child, G.A. Res. 44/25, U.N. GAOR (1989); and Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, G.A. Res. 61/106, 76th plen. mtg., U.N. Doc A/RES/61/106, each of which outlines freedom of expression.

217. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 570 (1990).

Because the declaration is not a treaty, it does not imply any legal obligation. While member nations appear to recognize the right to a free press, the provisions are open to interpretation, which often allows offenders of press freedom to justify “necessary exceptions.” A common example of this is the use of “national security” concerns to justify censorship and imprisonment of journalists. And, under Article 2, any nation’s use of national security concerns as an instrument to infringe on journalists’ rights would be out of reach of a UN tribunal’s jurisdiction.²¹⁸ The UDHR, alone, does not serve as legitimate legislation protecting press freedom. However, the declaration of freedom of expression as a human right under Article 19 supports the idea that respect of a free press is a widespread state practice.

Slightly stronger than the UDHR is the International Covenant on Civil and Political Rights. Today, over 172 countries are party to the multilateral treaty, which outlines the right to a free press in Article 19, Section 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.²¹⁹

A treaty such as the ICCPR is stronger than a declaration with regard to enforceability.²²⁰ However, it is only binding on the countries that are a party to the resolution.²²¹ Two notable offenders of press freedom – Myanmar and Saudi Arabia – are not parties to the ICCPR.²²² Furthermore, under Article 2 of the resolution, the parties are ultimately responsible for assuring that any violation of the treaty receives an “effective” remedy, determined by “competent” judicial, administrative, or legislative authorities.²²³ It is safe to assume that, even where a country is a party, the treaty may fall short of its desired effect because of this

218. UDHR, *supra* note 214, at art. 2, § 7 (“Nothing contained in the present charter should authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state [. . .]”).

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

220. Kaiutan Venerando et al., *Enhancing access to justice through the concert between formal and informal justice*, JUSTICA ENQUANTO RESPONSABILIDADE (2014), available at <http://sinus.org.br/2014/wp-content/uploads/2013/11/AU.pdf> (last visited Mar. 2, 2019).

221. Malcolm Shaw, *Treaty*, ENCYCLOPEDIA BRITANNICA, available at <https://www.britannica.com/topic/treaty> (last visited Mar. 2, 2019).

222. ICCPR, *supra* note 219.

223. *Id.* at art. 2.

discretion. Nevertheless, Article 19 of the ICCPR supplements the UDHR in demonstrating a widespread acceptance of press freedom as a human right.²²⁴

2. *Opinio Juris in the Form of Political and Economic Influence*

The second element necessary to establish customary international law is *opinio juris*, or the subjective belief on behalf of a state that it is bound to the law in question.²²⁵

Under traditional theory, *opinio juris* would come in the form of a rule or a law. A state in violation would be subject to judicial decision by a court of law. In application, there are such legal avenues for persons charging states with violating the principles of press freedom. But as a whole, the international legal framework protecting the press presents noticeable gaps. For example, treaties allow plaintiffs to bring suit before a relative tribunal. But, as we have seen with the ICCPR, treaties may only reach the parties who ratify them. This is a problem for journalists like Wa Lone and Kyaw Soe Oo, the two Reuters journalists currently serving a 7-year prison sentence in Myanmar. As ideal plaintiffs, they cannot utilize the ICCPR's Article 19 or bring charges against Myanmar because the country is not a party to the treaty and has not consented to suit.²²⁶ As another legal avenue, many states fall under the jurisdiction of a regional human rights court. Plaintiffs may bring press freedom challenges to the appropriate court of their region. However, some countries and territories fall outside of any regional court jurisdiction. A glaring example of this is the lack of a human rights court or commission for the region of Asia.²²⁷ Lastly, even where a regional court may take the case and issue a decision, these courts are often lame in application of scrutiny and lack methods of enforceability. For example, the European Court on Human Rights actively handles defamation cases, including those coming out of Russia. But its failure to closely circumscribe "national security" exceptions has left gaping deference to the state.²²⁸ If any of the courts, international or domestic, with jurisdiction over libel, defamation, or other anti-press mechanism

224. See generally Howie, *supra* note 204.

225. Jo Lynn Slama, *Opinio Juris in Customary International Law*, 15 OKLA. CITY U. L. REV. 603, 606.

226. *Id.*

227. *Id.*

228. Convention for the Protection of Human Rights and Fundamental Freedoms, Apr. 11, 1950, E.T.S. No. 5, 213 U.N.T.S. 221, entered into force Mar. 9, 1953 [hereinafter European Convention on Human Rights].

cases accept vague “national security” exceptions with no standard to meet, the current dilution of press freedoms will continue to occur. Furthermore, Russia recently indicated that it was considering withdrawing from the ECHR, citing that many of the court’s decisions conflicted with the country’s interests.²²⁹ Recognizing these gaps, the current legal avenues for press freedom litigation are not sufficient to fulfill the *opinio juris* element, and so they have fallen short of establishing customary international law.

Because existing legal framework has failed to establish any real understanding of accountability among offenders, we should instead look to the states to exercise political and economic force in the wake of violations of press freedom. As we saw with the brutal murder of Jamal Khashoggi, dictatorships like Saudi Arabia are currently enabled to act with impunity without consequence from political or economic allies, like the U.S. In the Trump era, the U.S. has tilted away from holding other nations accountable, and instead remains silent or even seemingly endorses the behavior of anti-press regimes. The President refrained from commenting on Crown Prince Mohammed Bin Salman’s involvement in ordering the journalist’s killing. The Trump administration has also expressed strong support for Russia. The President has made it a priority to mend relations between the two countries, despite a series of disappearances of prominent critics of the Russian government, blatant attacks on its citizens, and alleged interference in the 2016 United States presidential election. In fall of 2018, Russia sued the *New York Times* for failing to disclose financial information under its “Foreign Agents” law.²³⁰ Trump has waged numerous Twitter wars with the *Times*,²³¹ but did not comment on the Russian suit. As the leader of the free world, the President’s failure to respond to these offenses sends the message to authoritarian governments that the U.S. does not value a global right to free press.²³²

229. Andrew Griffin, *Russia could withdraw from European Convention on Human Rights, state news agency RIA reports*, THE INDEP. (Mar. 1, 2018), available at <https://www.independent.co.uk/news/world/europe/russia-echr-human-rights-european-convention-putin-kremlin-eu-a8234086.html> (last visited Mar. 3, 2019).

230. *Russia uses ‘foreign agents’ law to hit independent outlet with massive fine*, COMMITTEE TO PROTECT JOURNALISTS (Oct. 29, 2018), available at <https://cpj.org/2018/10/russia-uses-foreign-agents-law-to-hit-independent-philip> (last visited Aug. 2, 2019).

231. Trump’s Twitter history with the *New York Times* is extensive.

232. John McCain, *Opinion, Mr. President, Stop Attacking the Press*, WASH. POST (Jan. 16, 2018), available at https://www.washingtonpost.com/opinions/mr-president-stop-attacking-the-press/2018/01/16/9438c0ac-faf0-11e7-a46b-a3614530bd87_story.html?utm_term=.ba6de8f0376f (last visited Aug. 2, 2019).

Therefore, it must be understood that the individual right to press freedom only exists as a counterpart and a product of the duties of the states.²³³ Where a state is in clear violation of the widespread state practice of a free press, powerhouse countries like the U.S. should retaliate with economic or political sanctions. This system would have a two-fold effect. First, the possibility of sanction would serve to deter offending countries from continuing to act with impunity. An offender like Saudi Arabia could anticipate economic backlash, such as the U.S. pulling out of the Mutual Defense Agreement.²³⁴ Second, the implementation of sanctions on the world stage would further support a common global understanding that states have a binding duty to respect a free press. Imminent sanction would force offending countries to weigh any motivation behind individual violations with the magnitude of retaliatory political and economic consequence. Countries that regularly violate journalists' rights would be forced to curb their offensive behaviors, or at least legitimize necessary charges against those journalists actually involved in criminal activity, to avoid the possibility of intervention by outside forces. The establishment of accountability would fulfil the *opinio juris* element, crystalizing customary international law of a free press and thereby creating a force stronger than offensive regimes.

V. CONCLUSION

In the United States, trust and confidence in the media peaked during the Watergate era, a pinnacle of investigative journalism.²³⁵ This correlation shows that confidence in the media, and a value for press freedom, are at their highest when the media is able to do its job to the fullest extent and produce illuminating results. This is true of journalism on a global scale. In America and many other countries, current press freedoms come from "non-legal safeguards," and a sort of abstract societal understanding that press freedom is important. Lack of a binding, counteractive force of law has allowed the world's anti-press strongmen to achieve major undercuts to the freedoms that the press need enjoy. It has long been understood that sovereign states are at lib-

233. *Id.*

234. Mutual Defense Agreement, Jan. 30 & Feb. 9, 1951, 2 U.S.T. 1499, T.I.A.S. No. 2293, 132 U.N.T.S. 273.

235. Art Swift, *Americans' Trust in Mass Media Sinks to New Low*, GALLUP (Sept. 14, 2016), available at <https://news.gallup.com/poll/195542/americans-trust-mass-media-sinks-new-low.aspx> (last visited May 1, 2020).

erty to employ “exceptions,” stripping legal and constitutional protections from an “enemy” at their discretion.²³⁶ A force stronger than state sovereignty is therefore necessary if we are ever to protect a globally recognized right to a free press from discretionary attacks by individual regimes. With the widespread state understanding of free press already in effect, the *opinio juris* element remains necessary to crystalize customary international law of a free press. And where traditional legal framework falls short, we must instead rely on political and economic diplomacy between states to deter offenders from continuing to act with impunity. As with any other blatant abuse of human rights, strongmen and their respective states that offend the universally understood principle of a necessarily free press, should expect consequences.

236. CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (2005).