

**MEDIA LAW ASPECTS OF THE NEWS-GATHERING FUNCTION OF
JOURNALISTS IN A CONFLICT ZONE**

by

ANTON CHRISTO WELGEMOED

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SUMMARY

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Anton C Welgemoed

The function of a journalist is not only to inform but also to investigate. Since the public has a right to information, jurists need to protect journalists that report from dangerous war-torn regions in order to keep the world informed. As the primary reliable source and often eyewitness to humanitarian atrocities a journalist has a duty to report such atrocities. There has for several decades now been uncertainty regarding the fact whether journalists should be granted special protection or not. On the one hand it is argued that journalists should be protected in terms of humanitarian law due to their humanitarian function, the service that they render in facilitating the free flow of information to the world and the role that journalists play in society. On the other hand, some argue that the protection of journalists is not the responsibility of the international community but rather their individual national governments or local news organisations.

Key terms:

Journalist; protection; war on terror; international conventions; conflict zones; war correspondents; war reporting; newsgathering

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CHAPTER 1

INTRODUCTION

1.1 Introduction

“Journalists are exposed to danger not only covering armed conflicts, but everywhere. Since the development of acts of terrorism and violence throughout the world, the journalist invariably runs the same risks in exercising his profession, no matter where he may be. He is threatened, arrested, harassed, tortured, maltreated, beaten, and kidnapped imprisoned and even murdered. The entire world has become one huge area of conflict. The journalist is not free to work in peace and security anywhere and often has no protection whatsoever. Everyone, his readers, listeners and television audiences expect him to write, speak and show the honest and unadulterated truth.”¹

However, the question needs to be asked — at what price?

The news-gathering function of journalists is not only to inform, but also to investigate. The public has a right to information, not only to “press-releases”, but also to in-depth and undercover investigative journalism. The world public has a right to know – and we as jurists need to protect those that report and keep us and the world informed. The rights of journalists are most endangered in those war-torn regions where the journalists’ services are most valuable. It is their duty to report as the primary reliable source of information regarding humanitarian

¹ Protection of journalists, UNESCO Report (Documents on the New Communication Order, No 4: Unipup photo reprint, 1982) at 5. 1 UNESCO, New Communication Order No.4: Protection of Journalists at 5.

atrocities which often occur. For several decades now, there has been uncertainty regarding the fact whether journalists should be granted special protection or not. On the one hand it is argued that journalists should be protected in terms of humanitarian law due to their international function, the service that they render in facilitating the free flow of information to the world and the role that journalists play in society; on the other hand, there are those that argue that the protection of journalists is not the responsibility of the international community but rather their individual national governments or local news organizations.

Various international organizations and (non-governmental organizations) (NGOs) have in the past attempted to create a set of standards and basic rules for the protection of journalists. The problem with the creation of such fundamental ground rules to protect journalists have, however, always been hampered by the politics associated with such regulatory measures. The war on terror has brought further uncertainty regarding the protection of journalists. Since this war does not fall within the conventional definition of the international term of “war” or “conflict” the question is posed – which international instruments or conventions will protect journalists covering the war on terror? Several international news organizations like the BBC², Sky News Network and CNN³ have all started implementing practical measures in an attempt to ensure the safety of journalists by, for example, enforcing a policy whereby embeds participating in the reporting of war or conflict situations must first go on a compulsory training course aiding them to deal with potentially hazardous situations.

This matter will be discussed in more detail in this dissertation where a historical outline of attempts that have been made to protect not only journalists in dangerous zones, but also war correspondents, will be given. The political as

² British Broadcasting Corporation.

³ Central News Network.

well as the inter-organizational feuds that have left journalists as vulnerable as they are today will be clear from this discussion.

Reforming an international community's perception of the function of journalists and war correspondents has proven to be a very difficult task, since protection of journalists will have to be based on a system of wilful, cooperation and coherence to the principles of international law and humanitarian law; all of which are instruments that are based on good-will and free will (becoming members of a protocol or an international organization) that has the will and the power to punish violators of these instruments.

1.2 Problem Statement

This dissertation deals with the uncertainties regarding the protection of journalists reporting from "conflict zones". The United States of America and their united allies have once more brought most of these uncertainties to light after the attacks on the World Trade Centre in New York, as well as the ensuing attacks on Afghanistan and Iraq. With the current situation of uncertainty within the international law as well as the humanitarian law, the question of the rights and protection of journalists and war-correspondents reporting from potentially dangerous or even lethal locations have come to the attention of the world community at large. This study will examine the current situation pertaining to the rights of and protection offered to journalists reporting from war or conflict zones.

Media law aspects such as journalistic privilege and the obligation of journalists to testify in courts or tribunals will fall outside the scope of this dissertation.

1.3 Research Methodology

The following research methodologies have been used in this dissertation:

The historical and comparative methods of research have been chosen as the main methods for the purposes of this dissertation. The aim is to sketch the backdrop of war correspondence and journalism in conflict zones and the protection that can be offered to journalists in the modern era of war. In order to achieve the required effects when using this methodology, facts and their relation to the modern situation have been compared, using documentary sources that form the basis of this type of research. The current legal situation is discussed against the backdrop of the historical development of the protection of journalists and war correspondents reporting from war or conflict zones.

Furthermore, a comparative study of the different approaches, including that of the US and UK, to the protection of journalists that existed prior to the World Trade Centre attacks of September 11, 2001 and the protective measures that have since been implemented internationally with regards to the protection of journalists reporting from conflict or hostile environments, has been undertaken. Both national and international endeavours and trends have been examined in order to clarify the position regarding the protection of South African and other journalists reporting from war or conflict zones. Problems are highlighted and recommendations are made as possible solutions to these problems.

Chapter two analyses certain aspects that form the basis of the discussion in the rest of the dissertation. The concepts include the “news-gathering function” of journalists reporting from “conflict zones”, the relevant “journalists” involved, the concept “conflict zones”, the modern day concept of “war” and the newly proclaimed “war on terror”. The conventional terms of *jus in bello* and *jus ad bellum* will be compared to the current and newly formulated terms of “war on terror”. These are new concepts that have not yet found a firm legal definition nor

any legal meaning within the international, nor humanitarian law. The question is posed — what is the international concept of “war”? An analysis is made of the several terms: those that have been firmly established in international law, as well as others that create more uncertainty rather than creating a basis for regulating intra and inter national conflict. It is imperative to analyse these terms in order to determine whether certain laws pertaining to the protection of journalists can be categorised in these situations of “war”. Due to the deviation from the traditional concept of war to the new “war on terror” a detailed analysis must be done in determining the effect of these new developments in the law on war, with regards to the protection of journalists.

Chapter three comprises a historical background regarding the protection of journalists and war correspondents and the question of censorship that can be traced back to the Civil War in the United States. It becomes clear from this discussion how this form of reporting has developed into the embedded war with which we, the viewer of today’s CNN and BBC, became familiar. Reference is made to the impact that the advances in technology has had on war reporting, as we know it today. Reference is furthermore made to several “armed conflicts” to which the United States was a conflicting party. The aspects of political and social views that have influenced not only the content of the reporting but also the manner of reporting and the rules of war reporting as they evolved, are dealt with in this chapter. The basis of this type of correspondence has also evolved – from a way of communication with loved ones at home during the American Civil War (when members of a town, when doing their duty as soldiers, would print their perceptual observations of a battle in the local town’s newspaper) to the super modern computerized satellite driven news production machine that we have today. Reference is also made to the use of the media by the opposing forces, namely for propaganda purposes and demotivation of the aggressor’s troops.

Chapter four deals with the international attempts made during the past three decades to address the problem, regarding the protection of journalists reporting not only from “war” or “conflict zone”, but in general. These efforts include several commissions led by NGOs and sub-commissions of the UN’s investigations;⁴ all of which have failed to render the required remedies and protection sought by journalists.

Chapter five comprises a discussion of the current international legal position regulating war correspondence and journalists reporting from conflict zones and the treatment of these persons when captured or injured in a conflict situation. The applicable and governing international legal instruments that regulate the position of journalists reporting from conflict and war zones are primarily regulated by the Geneva Convention.⁵ This Convention also states the protocol in the event when such a journalist is captured or taken hostage as well as the treatment that should be rendered to such a journalist. The Convention furthermore states the circumstances under which a journalist will lose their civilian status and protection as determined by the Convention. It is, however, of cardinal importance to investigate whether the principles of this Convention have become rules of *jus cogens* and *usus*. Furthermore, it must be determined whether these principles are still applicable to the current and modern day “war” and “war on terror” as well as the application of the principles on these new defined types of “war”.

Chapter six deals with practical steps taken by modern national and international broadcasters, news organizations and international journalist representative groups. These groups have all instituted several basic training and survival courses that are considered as pre-requisites for journalists covering, or who are about to cover, conflict situations. This chapter also features the practical steps taken by journalists to protect themselves, as well as the steps of the military to

⁴ Eg those by United Nations’ UNESCO (United Nations Educational Scientific Cultural Organization).

⁵ See full text available at <http://www.unhchr.ch/html/menu3/b/91.htm>.

protect journalists that form part of an embed program. A comparison will be drawn between the US and UK regarding programs and steps taken by each country and each news organization to protect journalists reporting from the trenches of war.

Chapter seven is the concluding chapter in which conclusions will be drawn in respect of the past, present and future situation regarding the protection of journalists reporting from war or conflict zones. Some suggestions will be made regarding the protection of journalists — these measures are applicable not only to those reporting for South Africa, but also to those reporting on an international scale.

CHAPTER 2

THE FUNDAMENTAL PRINCIPLES UNDERLYING THE NEWS-GATHERING FUNCTION OF JOURNALISTS REPORTING FROM WAR OR CONFLICT ZONES

2.3 Introduction

Certain terms are used in the discussion of this research topic. In order to understand some of the complexities of the research topic, it is imperative that some of these terms and the underlying principles be further clarified. The terms that need more clarification include: the “news-gathering function” of journalists, the terms “journalist”, “war” and “conflict zones”. This chapter furthermore deals with the conventional and internationally established terms of *jus in bello* and *jus ad bellum* as well as several other terms that define “war”, “war on terror” and the impact of this modern day term on views regarding conventional international and intra-national warfare. While the terms *jus ad bellum* and *jus in bello* are two terms that are well established within the international law the second term, namely, the “war on terror”, has not yet been defined nor has it obtained any legal meaning. Defining this term is crucial in order for international law to apply while such war is being conducted. This chapter furthermore explores the difference between certain types of terrorism and why the international community differentiates between certain types of terrorists.

2.4 The “news-gathering function” of journalists

Journalists reporting within the borders of South Africa have a constitutional right to freedom of expression and freedom of the media.⁶ This right to the free flow of information implies the right to obtain information and the right to report it to the public. However, when such journalists are sent abroad to report on war and conflict zones at an international level, they can also rely on the *right to freedom of expression* and the *right of access* in order to report on the war or on the conflict situation.⁷ In the international communications regime, the free flow of information doctrine is the reigning orthodoxy.⁸ Major international legal documents such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights (American Convention), the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) and the African Charter on Human and Peoples’ Rights (Banjul Charter), all profess to freedom of information and to unfettered channels of communication.⁹

⁶ In terms of s 16 of the Constitution of South Africa of 1996 the right to freedom of expression includes “freedom of the press and other media...freedom to receive or impart information and ideas...”.

⁷ South Africa is a signatory to The Banjul Charter on Human and People’s Rights adopted June 27, 1981, O.A.U. Doc.CAB/LEG/67/3/Rev.5, 21 I.L.M. 59 (originally drafted as African Charter on Human and Peoples’ Rights (to avoid confusion with the Charter of the Organization of the African Unity, the Heads of State and Government replaced “African” with “Banjul,” the site of the document’s drafting). [Hereinafter Banjul Charter]; see also The American Convention on Human Rights, done Nov. 22, 1969, O.A.S. OR, OEA/Ser.K/XVI.1.1, 9 I.L.M. 673 [hereinafter American Convention]; The International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, G.A. Res. 2200, U.N. GOAR, 21st Sess., Supp. No. 16 at 52, U.N. Doc. A/6316, 999 U.N.T.S. 171 [hereinafter ICCPR]; The European Convention for the Protection of Human Rights and Fundamental Freedoms, done Nov. 4, 1950, Europ. T.S. No.5, 213 U.N.T.S. 221 [hereinafter European Convention]; The Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810 (1948). Therefore South African journalists that are sent abroad to do international war reporting can rely on the rights in terms of these documents.

⁸ Mukherjee “International protection of journalists: Problem, practice and prospects” 1994 *Arizona Journal of International and Comparative Law* 339.

⁹ These same legal documents contain derogation clauses that qualify the right to freedom of information, giving national authorities the right to curtail freedom of information under certain circumstances. While in general, rules belonging to a particular treaty are binding on the signatory states to that treaty only. It seems logical that any rule which is common

The rationale behind the *right of access* doctrine, which implies special protection of access to information, is often traced back to the notion that a “popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.”¹⁰ However, this doctrine found support only fairly recently and the starting point is usually considered to be the judgement given in America by the Supreme Court in *Branzburg v Hayes*,¹¹ where Justice Stewart wrote that:

“[a] corollary of the right to publish must be the right to gather news. The full flow of information to the public protected by the free-speech guarantee would be severely curtailed if no protection whatever were afforded to the process by which news is assembled and disseminated.”¹²

2.3 The term “journalist”/ “war correspondent”

The Geneva Convention originally made specific provision for war-correspondents. This term has through *usus* in the international community become synonymous with the terms journalist, and war-correspondent that at present include the concepts of both journalists and embeds. For purposes of this discussion the term “journalist” means “(a) a person who on a regular or on a temporary basis creates media news coverage i.e., a correspondent, a photographer, a cameraperson, or a media technician, whose job consists of working with words, images, or sound destined for the printed press, radio, film, television; or (b) a person whose regular occupation is the professional assistance of persons belonging to category (a) above.”¹³

to these four instruments has a significant universal application as customary international law. *Ibid* 354-355.

¹⁰ *Ibid*.

¹¹ 408 US 665 (1972).

¹² *Ibid* 727.

¹³ Mukherjee 1994 *Arizona Journal for International and Comparative Law* 339. See the further discussion of these terms in context in par 3.4 *et seq*.

2.4 The conventional meaning of “war” and the modern day term of “war on terror”

Historically, the term “war” was divided into two separate and identifiable rights in terms of the international law, but within modern day conflicts, new terms are used to define conflicts and warlike situations. Terms such as “the war on terror” have resulted in it being of cardinal importance to distinguish between these terms in order to determine whether not only the Geneva Convention,¹⁴ but also the Hague Convention¹⁵ will apply and the extent of the application of these Conventions to these types of traditional and less traditional conflicts. Furthermore the question is posed: if the Convention applies, what protection will it render the journalists while covering a story in a conflict zone?

It is clear from the problem statement that it is imperative to analyse the term “war” not only on an international front, but also on a national and intra-national level, since international humanitarian law generally only applies to armed conflicts regardless of the conflict being of intra- or international nature. Guerrilla warfare and general civil unrest will resort under the discussion of the term intra- or national warfare. The differentiation between these two types of warfare is due to the fact that the Geneva Convention¹⁶ until recently has only dealt with international armed conflict and not with national disputes. The United Nations was reluctant to intervene where a country was in a state of civil unrest or intra-national conflict. The implication of this distinction between the two different types of conflict leads to different applications of the Geneva Convention¹⁷ and consequently to the protection that the Geneva Convention¹⁸ rendered. The international law that regulates the treatment of civilians, journalists and

¹⁴ See the full text available at <http://www.unhchr.ch/html/menu3/b/91.htm>.

¹⁵ See the full text available at <http://www.icomos.org/hague/hague.convention.html>.

¹⁶ See the full text available at <http://www.unhchr.ch/html/menu3/b/91.htm>.

¹⁷ See full text available at <http://www.unhchr.ch/html/menu3/b/91.htm>.

¹⁸ *Ibid.*

prisoners of war can be found in the Geneva Convention,¹⁹ The Hague Convention²⁰ and respective international laws and international customs on war.

However, as mentioned in the introduction to this dissertation, a new type of war has erupted — a war undefined and ungoverned by general rules of the Geneva Convention;²¹ a war that does not fall within the conventional definition of war.

This war is the so-called “war on terror”. This is essentially a new term for the world-renowned phenomenon, namely, terrorism. Terrorism can sometimes manifest in an armed conflict, but in other circumstances it may constitute deadly acts aimed at governments or innocent civilians. The questions that now arise are: what is the meaning of these internationally used terms and would the same rules of engagement apply to this newly defined “war on terror”, or can this “war” be classified as a *sui generis* “war”. Should the rules pertaining to warfare that have regulated hostilities and have applied for over a century be discarded to provide for this new form of warfare? All these questions need to be answered before one can ascertain whether it will be possible to provide special protection for journalists.

2.5 The conventional definitions of the terms of “international armed conflict” and the term “war”

2.5.1 General: Laws relating to “war” and “conflict”

The law of “war” (also referred to as international humanitarian law applicable in armed conflict) is embodied in a variety of sources.²² Despite the fact that several

¹⁹ See the full text available at <http://www.unhchr.ch/html/menu3/b/91.htm>.

²⁰ See the full text available at <http://www.icomos.org/hague/hague.convention.html>.

²¹ See the full text available at <http://www.unhchr.ch/html/menu3/b/91.htm>.

²² [T]reaties, customary law, judicial decisions, writings of legal specialists, military manuals and resolutions of international organizations. Roberts “Counter-terrorism, armed forces and the law of war” 2002 *Survival* 8.

of these governing treaties and Conventions²³ are very complex and detailed, there are however, several common denominators found in all of these regulating documents that are very simple in principle and in their application.²⁴

The laws that apply to waging war and engaging conflict are a product of centuries of negotiations between states, reflecting on both a state's national interest and its national security. These laws were even enforced by allied states to secure coherence in combat – a coherence that was adhered to long before the institution of the Geneva Convention and its four Protocols in 1949.²⁵

However, it is important to remember these laws, due to the fact that terrorist acts and terrorism violate the rules of “war” and humanitarian law when conducted either nationally or even internationally. Due to the frequency with which these acts of terrorism occur in times widely viewed as times of peace, the legitimacy of such acts must first and foremost be determined, since these acts have the effect that laws of “war” that are usually only applicable during times of “conflict” or “war”, might be applicable during times of peace.²⁶

2.5.2 Terms “war” and “armed conflict”

The terms “war”²⁷ and “armed conflict”²⁸ are often used as synonyms. “War” can be defined as the extreme form of “armed conflict” and usually takes place between two states. The British Defence Doctrine defines war as the following:

²³ See full text available at <http://www.unhchr.ch/html/menu3/b/91.htm> and see also <http://www.icomos.org/hague/hague.convention.html> for full text.

²⁴ “[T]he wounded and sick, POWs [Prisoners of War] are to be protected; military targets must be attacked in such a manner as to keep civilian casualties and damage to a minimum; humanitarian and peacekeeping personnel must be respected; neutral or non-belligerent states have certain rights and duties; and the use of certain weapons (including chemical weapons) is prohibited, as also are other means and methods of warfare that cause unnecessary suffering.” Roberts 2002 *Survival* 8. See also in general Bennett *The Geneva Convention: Hidden origins of the red cross* (2005) for a historical overview of the Geneva Convention and the Red Cross.

²⁵ *Ibid.*

²⁶ See in general Higgins & Flory (eds) *Terrorism and international law* (1997); *Ibid.*

²⁷ “War [or armed conflict] is a state of widespread conflict between states, organisations, or

“When differences between states reach a point at which both parties resort to force, or one of them does acts of violence, which the other chooses to look on as a breach of the peace, the relation of war is set up in which the other chooses to look on as a breach of peace, the relation of war is set up in which the combatants may use regulated violence against each other until one of the two has been brought to such terms as his enemy is willing to grant.”²⁹

South African writers define the term “war” as a contention between two or more States through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases.³⁰

The Red Cross furthermore has its own definition of the terms “war” and “conflict” and define these terms as:

“[A]ny difference arising between two States and leading to the intervention of armed forces... is an armed conflict within the meaning of Article 2, even if one of the Parties denies the

relatively large groups of people, which is characterised by the use of violent, physical force between combatants or upon civilians. Other terms for war, which often serve as euphemisms, include armed conflict, hostilities, and police action (see limitations on war below). War is contrasted with peace, which is usually defined as the absence of war.” Available at http://en.wikipedia.org/wiki/Armed_conflict.

²⁸ For the purpose of this dissertation the term “conflict zone” will include all types of armed conflict, guerrilla warfare, intra and international conflicts as well as civil unrests, thus any situation that might the journalists or correspondents’ in any danger. See also in general the following “any difference between two states leading to the intervention of the members of armed forces is an armed conflict. Although the international community consists of sovereign states, in the contemporary strategic environment armed conflict may occur between sub-state groups attempting to impose their will on another group or faction.” Frederick II, King Of Prussia 1712-1786 *Frederick the Great on the art of war* (1966) 1. See also www.raf.mod.uk/downloads/doctrines/ol/pdf.

²⁹ The nature of war and armed conflict. See also www.raf.mod.uk/downloads/doctrines/ol/pdf.

³⁰ Oppenheim *International Law: A treatise* (1974) 202.

existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place.”³¹

“An international armed conflict is one in which two or more states are parties to the conflict. Armed conflicts that fall outside of this category are those in which a state is engaged in conflict with a transnational-armed group whose actions cannot be attributed to a state. To avoid confusion with a term whose use contends state action, it would be better to speak of this type of armed conflict as ‘interstate’ or ‘transnational’ rather than ‘international conflict’.”³²

In every war, even in the “war against terror”,³³ the distinction must be made between the following two concepts. The first is *jus in bello* and the second is *jus ad bellum*.

The term *jus ad bellum*³⁴ is the right or entitlement of a party to engage in hostilities or the undertaking of such a party not to participate in any hostilities.

³¹ Committee of the Red Cross (ICRC) Commentary to CA 2 2003 *The Fletcher Forum of World Affairs* 58.

³² “The rules of humanitarian law applicable to international armed conflict are contained in the four Geneva Conventions (GCs I-IV) of 1949 and their Additional Protocol I (AP1) of 1977. The scope of application of these rules is found in Common Article 2 (CA 2) of the four GCs, the international Committee of the Red Cross (ICRC) Commentary to CA 2.” See also in this regard, Rona “Interesting times for international humanitarian law, Challenges from the war on terror” 2003 *The Fletcher Forum of World Affairs* 58.

³³ “The war on terrorism or war on terror (abbreviated in U.S. policy circles as GWOT for Global War on Terror) is an effort by the governments of the United States and its principal allies to destroy groups deemed to be ‘terrorist’ (primarily radical Islamist organizations such as Al-Qaeda) and to ensure that what the U.S. administration terms ‘rogue states’ no longer support terrorist activities.” Text available at http://en.wikipedia.org/wiki/War_on_Terror. “Neither all terrorist activities, nor all anti-terrorist military operations, even when they have some international dimension, necessarily constitute armed conflict between states. Terrorist movements themselves generally have a non-state character. Military operations between a state and such a movement, even if they invoke the state’s armed forces acting outside its own territory, are not necessarily such as to bring them within the scope of the application of the full range of the provisions regarding international armed conflicts. In ratifying 1977 Geneva Protocol I in 1998, the United Kingdom made a statement that the term ‘armed conflict’ denotes ‘a situation which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation.’” – Roberts 2002 *Survival* 11.

³⁴ “*Jus ad bellum* is: ‘[A] Just cause. This is clearly the most important rule; it sets the tone

The *jus in bello*³⁵ is concerned with the rights and/or conduct of hostilities and the treatment of persons concerned or involved in the hostilities.³⁶

Despite the fact that there is a lack of any formal connection between *jus in bello* and *jus ad bellum* there are, however, three ways these two rights interact with each other in practice.³⁷ Another question can be posed: Does a major act of

for everything, which follows. A state may launch a war only for the right reason. The just causes most frequently mentioned include: self-defence from external attack; the defence of others from such; the protection of innocents from brutal, aggressive regimes; and punishment for a grievous wrongdoing, which remains uncorrected. Victoria suggested that all the just causes be subsumed under the one category of 'a wrong received'. Walzer, and most modern just war theorists speak of the one just cause for resorting to war being the resistance of aggression. Aggression is the use of armed force in violation of someone else's basic rights. The basic rights of two kinds of entities are involved here: those of states; and those of their individual citizens." See in general Orend *The morality of war* (2006). "However, the *jus ad bellum* rationale that armed hostilities have been initiated in response to major terrorist acts can raise issues relating to the application of certain *jus in bello* principles. Two such issues are explored here: first, whether there is scope for neutrality in relation to an anti-terrorist war; and second, whether those responsible for terrorist campaigns can be viewed as exclusively responsible for all the death and destruction of an ensuing war." – *ibid* 9. See also "[*Jus ad bellum*, referring to the rules governing the resort to armed conflict. Together with *jus in bello*, they make up the law of armed conflict, or the laws of war." Sulmasy "The law of armed conflict in the global war on terror: International lawyers fighting the last war" 2005 *Notre Dame Journal of Law, Ethics & Public Policy* 309.

³⁵ "*Jus in bello* refers to justice in war, or right conduct in the midst of battle. Responsibility for state adherence to *jus in bello* norms falls primarily on the shoulders of those military commanders, officers and soldiers who formulate and execute the war policy of a particular state. They are to be held responsible for any breach of the principles, which follow. Such accountability may involve being put on trial for war crimes, whether by one's own national military justice system or perhaps by the newly-formed International Criminal Court (created by the 1998 Treaty of Rome)". Orend (2006). See also the following regarding the term "*Jus in bello*" – "*Jus in bello* may contribute to perceptions of the justice of a cause in three main respects. First, in all military operations, whether or not against terrorists, a perception that a state or coalition of states is observing basic international standards may contribute to public support within the state or coalition; support, or at least tacit consent, from other states; and avoidance of disputes within and between coalition member states. Second, if the coalition were to violate *jus in bello* in a major way, for example by committing atrocities, that would help the cause of the adversary forces and even provide them with a justification for their resort to force under *jus ad bellum*. Third, in anti-terrorist campaigns in particular, a basis for engaging in military operations is often a perception that there is a definite moral distinction between the types of actions engaged in by terrorists and those engaged in by their adversaries. Observance of *jus in bello* can form a part of that moral distinction." – *ibid* 9. See also the following "*jus in bello* refers to the laws of war applied during actual armed conflict." – Sulmasy *ibid*.

³⁶ It is important to note that these are two separate rights. See in general Roberts 2002 *Survival* 9.

³⁷ "Despite the lack of a formal connection between *jus ad bellum* and *jus in bello*, there are

terrorism constitute the right for certain principles of *jus in bello* to be raised and applied since these principles have exclusively been reserved for waging war between states?³⁸

From this it is clear that in both cases there is a need for a common denominator namely a party³⁹ or parties to interact in a war or conflict situation. This suggests that the “party” should at least at some level embody a minimum level of organization to enable it to carry out the obligations of military law. There can hence be no assessment of rights and responsibilities in law where the war is fought with no identifiable parties, such as terrorist groups.⁴⁰

The general stance caused by a terrorist attack can sometimes also affect the implementation of the *jus in bello* when fighting terrorism as well as the implementation of *jus ad bellum*. Since it can be argued that a terrorist attack may start a war, it is sometimes held that these terrorists are responsible for the death and destruction that ensue from such an attack. Such a view, implying that the peculiar circumstances involved in the *jus ad bellum* might override certain considerations of the *jus in bello* in the war that follows, has no legal basis.⁴¹ It is

certain ways in which they interact in practice... Firstly, in all military operations, whether or not against terrorists, a perception that a state or a coalition of states is observing basic international standards may contribute to public support within the state or coalition; support or at least tacit consent, from other states; and avoidance or disputes within and between the coalition member states. Second, if the coalition were to violate *jus in bello* in a major way, for example by committing atrocities, that would help the cause of the adversary forces and even provide them with a justification for their resort to force under *jus ad bellum*. Third, in anti-terrorist campaigns in particular, a basis for engaging in military operations is often a perception that there is a definite moral distinction between the types of actions engaged in by terrorists and those engaged in by their adversaries. Observance of *jus in bello* can form a part of such moral distinction.” *Ibid* 9.

³⁸ *Ibid*.

³⁹ “[T]he concept ‘party’ suggests a minimum level of organization required to enable the entity to carry out the obligations of law” — Draper “The Geneva Convention of 1949 Rec de Course” 1965 *The Fletcher Forum of World Affairs* 60 63 90.

⁴⁰ “There was evidence of such thinking in some statements made in the US in connection with Afghanistan. In early December, discussing civilian casualties, US secretary of Defence Donald Rumsfeld said: ‘We did not start this war. So understand, responsibility for every single casualty in this war, whether they’re innocent Afghans or innocent Americans, rest at the feet of the Al-Qaeda and the Taliban.’ Rumsfeld at the end of his opening statement at a news briefing at the Pentagon on 4 December 2001, US

⁴¹ See in general Roberts 2002.

thus clear that the concepts of war, peace, international and intra-national conflicts and terrorism are terribly blurred; leading not only to insecurity amongst warring factions, but also amongst peace keeping forces and human rights organizations. It can also be argued that the connection between *jus ad bellum* and *jus in bello* can be related to the principle of proportionality.

2.6 Proportionality

The principle of “proportionality” is a long-established principle that sets out criteria for limiting the use of excessive force and has a two folded application.⁴² In each instance a complex balance of considerations needs to be taken into account.

The first application of this principle implies that force should be used to such an extent that it does not become a tit-for-tat retaliation. It would thus be incorrect to use an approach where killing the same number of people as the number killed by terrorists applied. It was, however, clear from the start of this “war on terror”, that it was never the intention of the coalition forces⁴³ to apply such a tit-for-tat-approach and that the rules of engagement would be followed.⁴⁴

The second application of the proportionality principle relates to the actual conduct of continuous hostilities. The US Army manual states and interprets the proportionality principle as the loss of life and damage to property incidental to attacks that must not be excessive in relation to the concrete and direct military advantage expected to be gained.⁴⁵ This meaning of proportionality is an important underlying principle of *jus in bello*, and is not directly linked to *jus ad bellum*.⁴⁶

Survival 9.

⁴² “It involves a complex balance of considerations, and it would be incorrect to interpret this principle to imply a right of tit-for tat retaliation.” *Ibid* 10.

⁴³ Examples of the members of the coalition forcercs are – the US, UK, Australia and Italy.

⁴⁴ *Ibid*.

⁴⁵ US Army, The Law of Land Warfare, FM 27-10, Department of Army Field Manual,

This has the effect that the principle of proportionality is not always applied with ease in a conflict situation. It furthermore implies, but does not necessitate or limit, the use of force to the same level or amount of force that is employed by an adversary.

The abovementioned principle of proportionality and the principle of military necessity go hand in hand and cannot be separated in principle.⁴⁷ The principle of proportionality is regularly applied in tension situations by the US military, but not always applied in a situation of conflict. The current US military doctrine favours the use of force in order to achieve victory, in a quick and effective way with the minimum cost and casualties to the US military.⁴⁸

2.7 The term “non-international conflict”

It is only over the past two decades that international peace keeping organizations such as the United Nations⁴⁹ have actively taken part in peacekeeping missions that were by definition national or internal matters of violence or civil unrest. Non-international armed conflict was historically thought of as involving rebels within a state against the state or against other rebels.⁵⁰

⁴⁶ Washington DC, July 1956 revised 15 July 1976 par 41. Roberts *ibid* 9.
⁴⁷ Roberts *ibid* 11.

⁴⁷ “Military necessity, which is defined in the US Army manual as one that ‘justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible.’” A subsequent official US exposition of the principle states: “Only that degree of and kind of force, not otherwise prohibited by the law of armed conflict, required for the partial or complete submission of the enemy with a minimum expenditure of time, life and physical resources may be applied.” US Army, The law of Land Warfare, FM 27-10, Department of the Army Field manual Washington DC, July 1956, revised 15 July 1976 par 41 and US Navy, The Commander’s handbook of the Law of Naval Operations, NWP 1-14 M, Department of the Navy, 1995, par 5.2. See also in this regard Roberts *ibid*..

⁴⁸ Roberts *ibid*.

⁴⁹ Henceforth referred to as the UN.

⁵⁰ Gabor 2003 *The Fletcher Forum of World Affairs* 59 60. Also see Daper 1965 *The Fletcher Forum of World Affairs* 63 90.

The rules applicable to non-international armed conflict are found in Common Article 3 of the Geneva Convention. This article states that:

“[I]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions...”⁵¹

Specific criteria regarding non-international armed conflict.

There are specific criteria that will determine whether a conflict is classified as an international or non-international armed conflict. The parties to the conflict carry out the cardinal function of humanitarian law.⁵²

The following specific criteria are set for a conflict to qualify as a non-international armed conflict:

- Identifiable parties (*ratione personae*)⁵³
- Identifiable territory (*ratione loci*)⁵⁴
- Related events to an identified conflict (*ratione materiae*)⁵⁵

⁵¹ See the full text available at <http://www.unhchr.ch/html/menu3/b/91.htm>.

⁵² Gabor 2003 *The Fletcher Forum of World Affairs* 62.

⁵³ “There can be no humanitarian law conflict without identifiable parties... There can be no assessment of rights and responsibilities without identifiable parties.” *Ibid* 62.

⁵⁴ “While CA 3 does not require territorial control by the non-state party the conflict must still occur ‘in the territory’ of a High Contracting Party. Some analysts construe this requirement to mean that the conflict must be limited to the territory of a High Contracting Party. Moir *The law of international armed conflict* (2002). “For this element alone, terrorist attacks on civilian targets in New York may suffice, but retaliation against alleged terrorists in Yemen, for example, may not.” For an analysis of legal consequences of the killing in Yemen, see Dworkin *The war on terrorism goes global* (2002); *Crimes of War project* available at <http://crimesofwar.org/onnews/news-yemen.html>. “This is not because Yemen is not a party to the GCs. Rather, it is because CA 3 is of questionable application to an isolated, targeted killing of persons outside the US territory.” – *Ibid* 62.

⁵⁵ “The strike in Yemen on November 4, 2002 highlights another element. ‘Acts of war’ is an understandable, perhaps inevitable, description of the September 11, 2001 attacks. However, this rhetorical reaction does not answer the question whether or not those attacks and the response to them are part of an armed conflict, i.e., that they have

- Identifiable beginning and end of an armed conflict (*ratione temporis*)⁵⁶

It is common cause amongst military law writers that war and conflicts have certain common or essential elements. These characteristics form the basis of the fundamental success of military operations in pursuit of political objectives. Despite advances in almost all fields of military technology, war remains a bloody and violent act with far reaching economic, social and inter-structural effects. In an attempt to answer the question of what constitutes an armed conflict, as opposed to a conflict of international character, the following was suggested – that the term, conflict, should be defined or, which would amount to the same idea, that a certain number of conditions of the applications of the Convention should be enumerated.⁵⁷

The following is a list of differences between an intra-national conflict or hostility and a mere civil unrest or hostility as contained in various amended documents:

sufficient nexus to an armed conflict. For example, there should be no doubt that the military confrontation in Afghanistan following the September 11 attacks was (and perhaps remains) an armed conflict. And a case can be made that the September 11 attacks are part thereof. But it does not necessarily follow that the targeted killing of terrorist suspects by US authorities in Yemen a year after the September 11 attacks falls within the conflict and, therefore, is an event to which humanitarian law applies.” *Ibid.*

⁵⁶ “According to the jurisprudence of the International Criminal Tribunals for the former Yugoslavia (The *Prosecutor v Dusko Tadic*, par 70, p. 37 (1995) and Rwanda (The *Prosecutor v Jean Paul Akayesu*, ICTR-96-4-T, par 619 (1998), as well as under the definitions of the newly established permanent International Criminal Court (The Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 dated 17 July 1998, 37 ILM (1998-1019, Art 8.2(f)), hostile acts must be ‘protracted’ in the order for the situation to qualify as an ‘armed conflict’. In fact, the Yugoslavia Tribunal has specifically stated that the reason for this requirement is to exclude the application of humanitarian law to acts of terrorism.” *The Prosecutor v Zejnir Delali* (Celebici camp case), Judgement, IT-96-21 par at 184 (1984). “On the other hand, the Inter-American Commission on Human Rights says that intense violence of brief duration will suffice.” See *Abella Case*, Inter-American Commission on Human Rights, Report No. 55/97, Case No. 11.137, November 18, 1997, pars 155-156. “Likewise, it remains to be seen whether the mere gravity of damage resulting from the September 11 attacks will, in retrospect, become a ‘decisive point of reference for the shift from the mechanisms of criminal justice to the instruments of the use of force.’” Stahn “International law at a crossroads? The impact of September 11” 2002 *Heidelberg Journal of International Law* 62. Whether or not the conflict needs be protracted, and whether or not intensity can take the place of duration, the beginning and end must be identifiable to know when humanitarian law is triggered, and when it ceases to apply. Gabor *ibid.*

⁵⁷ *Ibid.*

1. “That the Party in revolt against the *de jure* Government possesses an organized military force, an authority responsible for its acts, action within a determinate territory and has the means of respecting and ensuring respect for the Convention.
2. That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.
3.
 - 3.1. That the *de Jure* Government has recognized the insurgents as belligerents; or
 - 3.2. that it has claimed for itself the rights of a belligerent;
 - 3.3. that it has accorded the insurgents recognition as belligerents for the purpose only of the present Convention; or
 - 3.4. that the dispute has been admitted to the agenda that the dispute has been admitted to the agenda of the Security Council of the General Assembly of the United Nations as being a threat to international peace, a breach of the peace or an act of aggression a of the Security Council of the General Assembly of the United Nations as being a threat to international peace, a breach of the peace or an act of aggression.
4.
 - 4.1. That the insurgents have an organization purporting to have the characteristics of a State;
 - 4.2. that the insurgent civil authority exercises *de facto* authority over persons within determinate territory;
 - 4.3. that the armed forces are under the direction of the organized civil authority and are prepared to observe the ordinary laws of war;

4.4. that the insurgent civil authority agrees to be bound by the provisions of the Conventions.”

The above criteria are useful as a means of distinguishing a genuine armed conflict from a mere act of banditry or an unorganized and short lived insurrection,⁵⁸ in which cases Article 3 of the Geneva Convention⁵⁹ does not apply.

2.8 “War on terror”

While defining the terms “intra-national” and “international conflicts” and “war” it is also of cardinal importance to deal with the term “terrorism” in this chapter. Since the “war on terror”⁶⁰ is largely based on the principles of an attacking force other than that of a national force one should analyse the definition of terrorism precariously.

The Human Rights Watch Organization states that international law does not provide for a clear definition of terrorism.⁶¹

⁵⁸ *Ibid.*

⁵⁹ See full text available at <http://www.unhchr.ch/html/menu3/b/91.htm>.

⁶⁰ Full text available at http://en.wikipedia.org/wiki/War_on_Terror. See also in general Roberts 2002 *Survival* 11.

⁶¹ “[Terrorist is] one who utilizes the systematic use of violence and intimidation to achieve political objectives, while disguised as a civilian non-combatant. The use of a civilian disguise while on operations exempts the perpetrator from protection under the Geneva Convention, and consequently if captured they are liable for prosecution as common criminals.” The full text available at www.aeroflight.co.uk/definitions.htm. See also in general the definition of terrorism which is notoriously difficult to define. See in general Scharf’s Press Release “United States Advisor to the Forty-Sixth General Assembly, in the Sixth Committee, on item 125, Terrorism” (21 Oct 1991). “Terrorism can occur during armed conflict or during peacetime (defined as the non-existence of armed conflict). When terrorism is committed in an international or internal armed conflict (including a guerrilla war), it is covered by the detailed provisions of the four 1949 Geneva Convention and their additional Protocols of 1977.” Sharf “Defining terrorism as the peacetime equivalent of war crimes: A case of too much convergence between humanitarian law and international criminal law” 2001 *ILSA Journal of International and Comparative Law* 392. See also in this regard Etzaioni & Marsh (eds) *Rights v public safety after 9/11– America in the age of terrorism* (2003). This book gives a good overview of the rights versus restrictions placed on civilians since the attacks of 9/11, with personal contributions by several writers.

Furthermore it is stated in their report that in terms of international humanitarian law, the suicide attacks by Iraqi non-commissioned officers, who reportedly posed as taxi drivers, would be considered as perfidy rather than terrorism.⁶² The question, however remains: what is the definition of the “war on terror”,⁶³ does this war categorize as a *conventional* international armed conflict or an intra-national armed conflict and if so, can the attacks on civilian targets on 9 September 2001 be categorized as an “armed conflict” or a “terror attack”?

In order to determine whether the “war on terror” forms part of the conventional definition of “armed conflict” (or war) one must not only analyse the concept of war but also the concept of terrorism.⁶⁴

The general opinion of legal scholars is that the attack on the United States of America⁶⁵ does not constitute as an act of war but rather constitutes as an act of terror or terrorism.⁶⁶

It can be argued that the term “war on terror” is an incorrectly labelled term and that this term or name is used to describe what is in essence not a “war” against a nation but rather against a group of undefined individuals. It is furthermore argued that “terrorism” cannot be an enemy that can be fought through war. It is, rather, a method used by an enemy to cause destruction. The enemy dealt with in this case is usually a “a tyrant dictator”, or a “religious fanatic whom the tyrant protects.”⁶⁷

⁶² See in general www.hrw.org.

⁶³ Full text available at http://en.wikipedia.org/wiki/War_on_Terror. See also in general Roberts 2002 *Survival* 11.

⁶⁴ The full text available at www.aeroflight.co.uk/definitions.htm. See also in general Scharf Press Release (21 Oct 1991). Sharf 2001 *ILSA Journal of International and Comparative Law* 392.

⁶⁵ Henceforth refers to as the attacks of 9/11.

⁶⁶ The full text available at www.aeroflight.co.uk/definitions.htm. See also in general Scharf Press Release (21 Oct 1991). Sharf 2001 *ILSA Journal of International and Comparative Law* 392.

⁶⁷ Scruton *The west and the rest: Globalization and the terrorist threat* (2000).

It is quite feasible to act against the first, but to act against the second requires a credible alternative to the absolutes on which he, the tyrant dictator, acts.⁶⁸ In other words, war cannot be waged against the principles on which the fanatic acts. It is also argued by scholars that “terror” or “terrorism” cannot be a party to any conflict. A war waged against a proper noun (eg Germany or France) has the advantage over a war being fought against a common noun (eg poverty or terrorism) since a war fought against a proper noun has the protection of the humanitarian law whereas a war fought against a common noun cannot be awarded the protection of the humanitarian law.⁶⁹ Terrorism *per se* is not a legal term nor legal notion⁷⁰ – this very fact indicates the difficulty with which the world as a whole is faced in defining this term legally.⁷¹

A further example of how problematic it has always been to define “terror” and “terrorism” is illustrated by the negotiations to establish a permanent International Criminal Court in Rome. The US, who was still part of the negotiations, took a position against the inclusion of terrorism in the statutes of the Court on the basis that consensus could not be reached regarding the term and definition of the concept of “terrorism”.⁷²

⁶⁸ *Ibid.*

⁶⁹ “Humanitarian law is not concerned with the entitlement to engage in hostilities or the promise not to do so again (*jus ad bellum*). Rather, it concerns the conduct of hostilities and the treatment of persons in the power of the enemy (*jus in bello*). But there is still a strong connection to humanitarian law in this observation. The concept of a ‘party’ suggests a minimum level of organization required to enable the entity to carry out the obligations of law.” Chairman of the Joint Chiefs of Staff Instructions, Standing Rules of Engagement for IS Forces, Ref. CJCSI3121.01 A 15 January 2000, p A-9. See also in general Gabor 2003 *The Fletcher Forum of World Affairs* 60.

⁷⁰ “It [terrorism] is much more a combination of policy goals, propoganda and violence acts – an amalgam or measures to achieve an objective” Gasser “Acts of terror, ‘terrorism’ and international humanitarian law” 2002 *International Review of the Red Cross* 547 553-554. See also in this regard *ibid* 61.

⁷¹ Gabor *ibid.*

⁷² “Without international consensus on these questions, how can one determine, for purposes of assigning legal consequences, who are the parties to the War on Terror and which branch, if either, of humanitarian law should apply?” “The problem is that terrorism as a concept remains so ill-defined that the idea of attacking it systematically transforms the use of violence – in international and domestic law the prerogative of States – into an open ended project of endless war. And that, surely, is inconceivable, unless the American government now means to prosecute a series of wars to end all violence in the world.” Mallat “September 11 and the Middle East: Footnote or watershed in world

2.9 Humanitarian law and the “war on terror”

In view of the new concept of “war on terror”, it is important to take into consideration the application of humanitarian law and its interaction with conventional war in general before evaluating the effect of the “war on terror”. There seems to be no evidence for any *lex specialis*⁷³ as far as the “war on terror” is concerned, nor does the humanitarian law make any provision for a *lex specialis* when dealing with the war on terror.⁷⁴

2.10 “War on terror” in the United States

The same question was raised in the US. How should the US army or armed forces know that they are being attacked, if the attacker is not dressed in or wearing some form of formal identification? It was clear that the attacks on the US were not done by way of conventional or formal declaration of war, but still the attackers claimed that the attacks on a sovereign country, and in effect an attack on a civilian interest and civilian aircraft, were legitimate. This, however,

73 history? Crimes of war project.” 2002. Full text available at <http://www.crimesofwar.org/sept-mag/sept-home.html>. See also in this regard *Ibid*. “Humanitarian law is a *lex specialis* – a term used to indicate any special branch of law that is triggered by special circumstances. *Lex specialis* prevails over conflicting *lex generalis*, or generally applicable law. Humanitarian law is a *lex specialis* applicable in times of armed conflict. Some analysts assert that as a *lex specialis*, humanitarian law, when applicable, displaces legal regimes that apply in peacetime. This is clearly wrong as to international criminal law, a significant part of which is devoted to war crimes, covering a broader scope of prohibitions than humanitarian law. It is equally wrong with regard to domestic criminal law, which is also capable of covering war crimes and an even broader scope of other prohibitions that are covered by international criminal law. It is also wrong as to human rights law, as enunciated in the International Covenant on Civil and Political Rights (ICCPR), UN general Assembly Resolution 2200A (XXI) adopted 16 December 1966, UN General Assembly OR, Twenty-first Session, Supplement 16 at 52, United Nations Document A/6316 (1967). The ICCPR recognises that some rights may be subject to derogation ‘in time of public emergency which threatens the life of the nation,’ but identifies a ‘hard core’ group of rights from which there may be no derogation in any circumstances, including armed conflict.” See in general ICCPR art 4 and Gabor *ibid* 58.

74 “The Humanitarian law applies, as a general matter when the Geneva Convention and their Additional protocols say it applies, namely, in the event of armed conflict.” Gabor *ibid*.

did not only breach the Geneva Convention but also the fundamental principles of the Convention against terrorism and acts of terror.⁷⁵

In the US the Bush administration has attempted to enhance and consolidate its executive powers to combat terrorism in their fight against terror.⁷⁶ Several statutes were promulgated in the US to enhance the enforcement of both civilian and military law, for example the US Patriots Act of 2000.⁷⁷ Another statutory measure taken to enhance the executive investigative powers and to consolidate the function of intelligence gathering in the US was the Intelligence Act.⁷⁸ Both these statutes were attempts to move away from a decentralised government to a more centralized and consolidated federal government.

Scholars argue that the failure of the federal government adequately to articulate their fears for safety has led to a situation where the quest for security has led to the jeopardy of civil rights and liberties.⁷⁹

2.11 Application of the “war on terror”

In this fight against terror, a tendency to consolidate power has emerged in the US.⁸⁰ The UN and the rest of the world took a more tacit approach in respect of the “war on terror” waged by the US and its allies.⁸¹ To determine whether the

⁷⁵ International Convention for the suppression of terrorist bombing (1997). See in general the full text available at http://www.unodc.org/unodc/terrorism_conventions.html. See also in addition the International Convention against the taking of hostages ("Hostages Convention", 1979) and the International Convention for the suppression of the financing of terrorism (1999). Full text available at http://www.unodc.org/unodc/terrorism_conventions.html.

⁷⁶ Baker "Competing paradigms of constitutional power in 'the war on terrorism'" 2005 *Notre Dame Journal of Law, Ethics & Public Policy* 5.

⁷⁷ USA Patriots Act 2001, 18 U.S.C. at 1960.

⁷⁸ Intelligence Reform and Terrorist Prevention Act 2004, Pub. L. No 108-458, 118 Stat 3638.

⁷⁹ Baker 2005 *Notre Dame Journal of Law, Ethics & Public Policy* 5.

⁸⁰ *Ibid.*

⁸¹ "In respect of Afghanistan, the sanctions initiated by the UN Security Council against the Taliban regime in 1999, on account of its support of terrorism and its refusal to hand over Osama Bin Laden, had already required all states to take action against the Taliban..."; "[B]oth of which, in addressing the ongoing conflict in Afghanistan, referring to the

attacks of 11 September 2001 constitute an “act of war” one should consider whether a government was involved or not.⁸²

It has become increasingly difficult for a distinction to be drawn between internal matters of law enforcement and external matters of defence. It is said that a strong Commander in Chief is needed to guide a nation, yet no leader is free of judicial scrutiny, which will always be applicable when dealing with military matters outside of the sovereign territory of the US. It is argued by scholars that the policies adopted by the President regarding the separation of powers between the military, acting outside the US, and law enforcement, inside the US, were not clear. As mentioned before – on both national and international level the federal government used the power it deemed necessary to combat the terrorist threat against the US.⁸³

The problem with the current situation in the US is, however, that the government has blurred the lines between the powers of law enforcement and the powers awarded to it by the US Constitution to deal with war or foreign powers⁸⁴ – since most power is currently centralized in the hands of the federal government, it creates a potential for the abuse of these once separate powers.⁸⁵

problem of terrorism there, and called upon states to take specific action, most notably to end the supply of arms and ammunition to all parties to the conflict.” – U.N. Security Council Resolution 1267 of 15 Oct 1999. See also Security Council Resolution 1076 of 22 October 1996 and 1193 of 28 August 1998. See also “Following the attacks of 11 September, the UN Security Council promptly adopted resolutions stating that states were to take a wide range of action against terrorists.” – UN Security Council Resolution 1368 of 12 September 2001 and 1373 of 28 September 2001.

⁸² Gabor 2003 *The Fletcher Forum of World Affairs* 61.

⁸³ See in general *Youngstown, Sheet & Tube Co v Sawyer*, 343 U.S. 579 (1952); *United States v Curtiss-Wright Export Co.*, 299 U.S. 304 (1936). See also in this regard *The Prize Cases*, 67 U.S. (2 Black) 635 (1862), “in which a majority of the Supreme Court upheld President Lincoln’s naval blockage of the Confederate States and the seizure of ships bound to and from them. The Court distinguished between Congress’s power to declare war, which could be exercised only against a foreign power, not against a state and Acts of Congress (1795 and 1807) which duly authorized the President to suppress insurrections.” – Baker 2005 *Notre Dame Journal of Law, Ethics & Public Policy* 5.

⁸⁴ Sacks “Chasing terrorists or fears?” *L.A. Times* (24 Oct 2004).

⁸⁵ Baker 2005 *Notre Dame Journal of Law, Ethics & Public Policy* 5.

When dealing with anti-terrorist military operations one needs to bear in mind that such military operations can have fundamental characteristics that are far removed from those of inter-state armed conflicts as primarily envisaged in the law of war. This is due to five factors relating to the nature of the opposition:⁸⁶

- Neither all terrorists activities, nor all anti-terrorist military operations, even when they have some international dimension, necessarily constitute armed conflicts between states. Terrorist movements themselves generally have a non-state character. Military operations between a state and such a movement, even if they involve the state's armed forces acting outside its own territory, are not necessary to bring them within the scope of application of the full range of provisions regarding international armed conflict in the 1949 Geneva Convention and the 1977 Geneva Protocol I.⁸⁷
- Anti-terrorist operations may assume the form of action by a government against forces operating within its own territory, or more rarely, may be actions by opposition forces against a government perceived to be supporting or even committing terrorist acts. In both these cases, the conflict may have more the character of a non-international armed conflict — in other words, a civil war as opposed to the characteristics of an international war. Generally less formal rules have been applied to civil war than to international war, although this situation is fast changing.⁸⁸
- Common Article 3 of the 1949 Geneva Convention stands at the heart of these rules regulating non-international armed conflict, and most often the attributes and actions of terrorist movements do not fall within the field of application of the Convention. This protocol expressly does not apply to

⁸⁶ Roberts 2002 *Survival* 11.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

situations of international disturbance and tension, such as riots and isolated and sporadic acts of violence.⁸⁹

- In general, terrorists have little regard for internationally agreed rules of restraint, and international law and humanitarian law – this leaves the opposing force or country with the same weakened observation for the application of international law and humanitarian law. This attitude of the terrorist forces is due to their low expectation of reciprocity and the tendency of some part of the public under attack to overlook any breaches by their own forces.⁹⁰
- A basic principle of the laws of war is that attacks should be directed at the adversary's military forces rather than against civilians. This principle, violated in terrorist attacks specifically aimed at targeting civilians, can be difficult to apply in anti terrorist operations, since these terrorist movements may not be composed of defined military forces that are clearly distinguished from civilians.⁹¹

These five factors reflect the underlying problem that governments have in applying the laws of war to civil wars, namely, that the opponent tends to be viewed, not as a military adversary, but rather as a common criminal and is dealt with according to a State's interior criminal legal system. This factor explains why many governments are hesitant in applying the full range of rights and rules available in international armed conflict to operations against rebels and terrorists.⁹²

Several countries, including the US, have been reluctant to apply a full range of rules and rights available in international armed conflict. They have expressed

⁸⁹ This includes riots, sporadic acts of violence and even isolated acts of violence in a country. See also in this regard *ibid* 12.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Ibid.*

their concerns about the whole principle of thinking about terrorism in a law-of-war framework. To refer to such a framework, which recognises rights and duties, might seem to imply a moral acceptance of the right of any particular group to resort to acts of violence, at least against military targets.⁹³

Successive US administrations have been reluctant and have objected to revising laws of war that might actually favour guerrilla fighters and terrorists. The Joint Chiefs of Staff have concluded that the number of provisions protecting terrorist and guerrilla fighters under Protocol I of the 1977 Geneva Convention was militarily unacceptable and unfeasible to the US. It is said by the US that their refusal to accept such favourable terms, proposed by supporters of these groups and such organisations were only attempts to legitimize acts that are basically criminal in nature.⁹⁴

2.12 Conclusion

It is clear from the above discussion that the war on terror has left a leaping hole in the military law. It is argued by many that the current humanitarian law is neither broad enough nor does it cover the new forms of conflicts adequately. This, in theory, calls for the expansion of the concept of armed conflict, or the expansion of the scope of the application of humanitarian law beyond that of armed conflict.⁹⁵

Many scholars claim that the current humanitarian and international military law does not encompass the War on Terror in its current rhetorical sense.⁹⁶

⁹³ For a further discussion and evidence that about the hazards of coping with terrorism in a laws-of-war framework is not new, see in general Freedman, Lawrence et al (eds) *Terrorism and international order* (1986) 14-15. See also in this regard *ibid*.

⁹⁴ Presidents Regan's letter of transmittal of the 1977 Geneva Additional Protocol II to the US Senate. Treaty Doc. No. 2, 100th Congress, 1st Session, at III (1987), reprinted in 1987 *American Journal of International Law* 911-912. See also in this regard *ibid* 13.

⁹⁵ Gabor 2003 *The Fletcher Forum of World Affairs* 63.

⁹⁶ "Recall the compromise nature of humanitarian law: a license to kill enemy combatants, and to detain without charges or trail anyone who poses a security risk, is the price paid

The principle of *lex specialis* of humanitarian law is as prominent an element as ever. However, the prohibitions are more narrowed and humanity is denied some cardinal fundamental rights provided by this and other legal regimes.⁹⁷

Yet, with all of the above taken into consideration, the limits and boundaries of the humanitarian and military law are well drawn up and set out. It is argued that there is no reason that the war on terror should be dealt with in any other manner than the regular conventional way of intra and international conflicts. The provisions made by these regimes are adequate to deal with the war on terror within its provisions.⁹⁸

The Geneva Convention and its Protocols did not anticipate the war on terror, yet a balance can be struck between humanitarian law, military law and national legal regimes. Not only does civil, human rights and the rule of law independently protect a country's legal citizens but it also makes provision for the protection of its civilians and journalists caught in a "conflict" or "war zones".⁹⁹

With several types of conflict and the "war on terror" still raging in the Middle East it is important to analyse the attempts made to protect journalists reporting from conflict zones. It is imperative to analyse the history of war correspondents to fully understand the current problems that journalists are experiencing at present. The next chapter contains a historical overview of war reporting and journalists right of access to report on various wars and the extent of censorship applied on such reports.

for rules designed to minimize human suffering, In peacetime, domestic and international criminal and human rights law prohibit and punishes homicide" *Ibid.*

⁹⁷ *Ibid* 70.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

CHAPTER 3

A HISTORICAL OVERVIEW OF WAR REPORTING AND CENSORSHIP

3.1 Introduction

Since the 1994 election South Africa has, as a member of the AU and the UN, become increasingly more involved in not only the reporting on conflict and hostile situations in Africa, but also at an international level.¹⁰⁰ This has resulted in more awareness regarding the often precarious situation of South African and other journalists who are left with little or no protection while working around the globe in an effort to bring in-depth stories of what is happening in these hostile or conflict zones. This contentious issue is discussed in this chapter, which deals with the historical development of war reporting and the various levels of censorship that have taken place.

3.2 The concepts of war reporting and censorship

Journalists reporting within the borders of South Africa have a constitutional right to freedom of expression and freedom of the media.¹⁰¹ This right to the free flow of information implies the right to obtain information and the right to report it to the public. However, when such journalists are sent abroad to report on war and conflict zones at an international level, they can also rely on the *right to freedom of expression* and the *right of access* in order to report on the war or on the conflict situation.¹⁰² In the international communications regime, the free flow of

¹⁰⁰ See for instance South African journalists covering stories for CNN from hostile environments.

¹⁰¹ In terms of s 16 of the Constitution of South Africa of 1996 the right to freedom of expression includes “freedom of the press and other media...freedom to receive or impart information and ideas...”.

¹⁰² South Africa is a signatory to The Banjul Charter on Human and Peoples’ Rights adopted June 27, 1981, O.A.U. Doc.CAB/LEG/67/3/Rev.5, 21 I.L.M. 59 (originally drafted as African Charter on Human and Peoples’ Rights (to avoid confusion with the Charter of the Organization of the African Unity, the Heads of State and Government replaced “African” with “Banjul,” the site of the document’s drafting). [Hereinafter Banjul Charter]; see also

information doctrine is the reigning orthodoxy.¹⁰³ Major international legal documents such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights (American Convention), the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) and the African Charter on Human and Peoples' Rights (Banjul Charter), all profess to freedom of information and to unfettered channels of communication.¹⁰⁴

The rationale behind the *right of access* doctrine, which implies special protection of access to information, is often traced back to the notion that a “popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.”¹⁰⁵ However, this doctrine found support only fairly recently and the starting point is usually considered to be the judgement given in America by the Supreme Court in *Branzburg v Hayes*,¹⁰⁶ where Justice Stewart wrote that:

The American Convention on Human Rights, done Nov. 22, 1969, O.A.S. OR, OEA/Ser.K/XVI.1.1, 9 I.L.M. 673 [hereinafter American Convention]; The International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, G.A. Res. 2200, U.N. GOAR, 21st Sess., Supp. No. 16 at 52, U.N. Doc. A/6316, 999 U.N.T.S. 171 [hereinafter ICCPR]; The European Convention for the Protection of Human Rights and Fundamental Freedoms, done Nov. 4, 1950, Europ. T.S. No.5, 213 U.N.T.S. 221 [hereinafter European Convention]; The Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810 (1948). Therefore South African journalists that are sent abroad to do international war reporting can rely on the rights in terms of these documents.

¹⁰³ Mukherjee 1994 *Arizona Journal of International and Comparative Law* 339.

¹⁰⁴ These same legal documents contain derogation clauses that qualify the right to freedom of information, giving national authorities the right to curtail freedom of information under certain circumstances. While in general, rules belonging to a particular treaty are binding on the signatory states to that treaty only. It seems logical that any rule which is common to these four instruments has a significant universal application as customary international law. *Ibid* 354-355.

¹⁰⁵ *Ibid.*

¹⁰⁶ 408 US 665 (1972).

“[a] corollary of the right to publish must be the right to gather news. The full flow of information to the public protected by the free-speech guarantee would be severely curtailed if no protection whatever were afforded to the process by which news is assembled and disseminated.”¹⁰⁷

The regulation of the press in wartimes is not a recent development, and the military has often claimed that security interests which are protected by censorship outweigh the cost in press freedom. To better understand the position of journalists and the free flow of information in the military or conflict context, one needs to look at the development thereof and the history of wartime press restrictions in the form of prepublication review and access control.

3.3 The first traces of war correspondence and the first application of media law principles during times of war or conflict

“Since the Revolutionary War in America,¹⁰⁸ American journalists traditionally have been allowed to accompany American troops on military operations, even when those actions depended upon the element of surprise. Such access has furthered the vital interest of the public in having independent accounts of the action of our uniformed men and women in combat, beyond those reports issued by Government officials.”¹⁰⁹

War correspondence was not only applied during the Civil War in South Africa but can be traced back to the Civil War between the north and south of the United States of America. Several advances in technology used by military forces

¹⁰⁷ *Ibid* 727.

¹⁰⁸ *Ibid*.

¹⁰⁹ “The Journalists’ Joint Statement” *NY Times* (11 Jan 1984).

(from the Civil War period to the present with modern sophisticated communication systems) have, however, led to the change of not only the function of war correspondents, but of this entire form of journalism.

This chapter deals with the historical development of war reporting and censorship on the basis of the following main subdivisions:

- Historical background of war correspondence including the period of the American Civil war;
- War correspondence of the late twentieth century;
- Modern war correspondence and the law regulating it with special reference to the influence of technology on such war correspondence.

In each section, special reference will be made to the particular technological advances and the legal implications they had on war correspondence and censorship in this context.

3.4 Historical background of war correspondence including the period of the American Civil War

The first reference made to war-correspondence and war corresponding can be traced back as far as the Revolutionary American War,¹¹⁰ despite the fact that these persons would not in modern law be categorised or classified under the strict conventional term of “journalists”¹¹¹ or more specifically “war correspondents.”¹¹²

Technically, the first type of “war correspondents” did not train as journalists. These correspondents were merely members of the armed forces, sending

¹¹⁰ This war was presumably from 1812 until 1814.

¹¹¹ See Mukherjee 1994 *Arizona Journal for International and Comparative Law* 339 par 2.2.

¹¹² *Ibid.*

communications, mostly in the form of letters, describing circumstances and giving accounts of battles they were part of, to loved ones back home. These eyewitness accounts usually arrived several weeks or even months after the actual battle had taken place. These personal letters or eyewitness accounts were published in the local paper serving as the first form of war correspondence. Mott explains that “[n]ewspapers had no organized means of covering the Revolutionary War, but relied almost wholly on the chance arrival of a private letter and of the semi-official messages.”¹¹³

Due to the limited technology available, these eyewitness accounts were very important and contained much strategic information. However, the delay between the sending of the reports and the printing of such reports had the effect that the news and events contained in these letters were usually only of interest to the town’s people and locals of the district.

Little censorship was applied regarding the screening of these letters or reports, and reporters were given much leeway in what they published, with the exclusion of material pertaining to when the next strike would take place and where, or how many men would participate in a particular battle. Although censorship laws did exist, these were merely to protect information from being intercepted.¹¹⁴ During the American War journalists would focus mainly on events of greater importance and national interest, which led to a situation where reporting would only be done from main cities and would deal with the capturing and burning down of the national capital.¹¹⁵

¹¹³ Mott *American journalism – A history: 1660-1960* (1962) 99. See also Stuart & Zelizer (eds) *Reporting war –journalism in wartime* (2004). This book gives an overall view of war in the twenty-first century as well as reports from journalists baring witness from the Iraq war.

¹¹⁴ A May 13, 1725 Massachusetts Order-In-Council required that “[t]he printers of the newspapers in Boston be ordered upon their peril not to insert in their prints anything of the public affairs of this province relating to war without the order of the government” Gottschalk “Consistent with security: A history of American military censorship” 1983 *Communications & The Law* 35.

¹¹⁵ *200 Year tradition broken* (1984) *News Media & Law* 4.

The evidence from historical documents is an indication that the press did not have any special access to any military operations. However, the lack of special correspondents during these times does not mean that war correspondents did not exist at all. The first reference to war correspondents can be found during the reporting that took place between the Civil War and the Mexican War. However, at this stage there was no clear distinction between the reports from “fighting men” on the one hand, and “correspondents” on the other.¹¹⁶

During the Civil War it was difficult to report on all battles due to the vast territories that had to be travelled by journalists. It was also the first war in America where the press was banished from camps, and the coverage of certain battles was prohibited.¹¹⁷ Censorship was becoming more and more problematic and crucial, due to the invention of the telegraph which resulted in information being sent much faster – this in turn led to a situation of security breaches. Several accounts were reported where strategic information was leaked to the press¹¹⁸ before the battle or attack. In 1862 President Lincoln placed all telegraph lines under military supervision, this being the first formal state-led information censorship in the history of war correspondence in the US.¹¹⁹

From these early times the Government and the military used the press and media not only as tools of propaganda, but also as tools to misinform the enemy. It was clear from this relationship that both the media and the fighting forces benefited from this symbiotic cohabitation. With little restriction, the media was used to promote either side’s agenda while demoralising the opponent, by stating incorrect facts about battles, fatalities and victories.¹²⁰ This relationship between

¹¹⁶ Cassell “Restrictions on the press coverage of military operations: The rights of access, Grenada and ‘off-the-record wars’” 1984 *Georgetown Law Journal* 934: [b]oth Northern- and Southern generals banished correspondents from camps.” Matthews *Reporting the wars* (1957) 80-81. See also Weisberger *Reporters for the Union* (1953) 105-106.

¹¹⁷ Cassell *ibid*

¹¹⁸ In 1861 General Sherman found that his operations in Kentucky had been exposed by reporters and he therefore banished all reporters from his regiments. Cassell *ibid* 935.

¹¹⁹ Cassell *ibid* 934.

¹²⁰ *Ibid*.

the media and the military has continued to exist and is as powerful a tool as ever, utilized by western and non-western governments alike.¹²¹

3.5 War correspondence of the late twentieth century – the First and Second World War

When America entered World War I, it was met by already stringent press censorship regimes imposed by both its allies, namely the United Kingdom and France. At first America tried to apply the stringent censorship regime that was enforced by its allies. However, the geographical and logistical problems associated with reporting from Europe were not as restrictive as the US government had hoped for to limit reporting of news from the battlefield, and soon the US was left with no other choice than to enforce ever more stringent censorship policies. Three steps of censorship were imposed by the US government. Firstly, all journalists wishing to report on the war or go to Europe had to be accredited and a maximum of 31 accredited journalists were allowed.

This method of censorship was, however, extremely inefficient since many journalists went to Europe as independent correspondents. Secondly, rigorous censorship was applied by the military, navy and government in Washington DC. These strict censorship measures were applied in an attempt to keep negative sentiment from oppressing national sentiment. Journalists who broke the rules of accreditation granted, were suspended from reporting. The national government furthermore withheld and edited stories to such an extent that the truth was totally construed to fit nationalist propaganda. Finally, a state of going “over the

¹²¹ Rona 2003 *The Fletcher Forum of World Affairs* 55. A modern day example is CNN and Al Jazeera, both being news agencies of opposite spectra reporting on the same issue but with a propaganda type of onslaught. See also in this regard Thussu & Freedman (eds) *War and the media: Reporting conflict 24/7* (2003). This book gives a good overview of the 24/7 war reporting and how the media is used as a means of propaganda by warring factions after the 9/11 attacks. It contains contributions by several journalists.

top” was reached when journalists were allowed to join the military on the battlefield.¹²²

World War II started on 1 September 1939. Censorship almost immediately followed the declaration of war by the United States of America. The censorship that resulted from the declaration of war after the attack on Pearl Harbor was one that was general and wide in its application. The creation of the Office of Censorship saw to the publication of a Code of Conduct to which all war correspondents had to adhere. The Code furthermore enforced censorship through the strict rules of registration as a war correspondent. No journalist was allowed access to information or to any military reports if he or she was not registered with a pool of journalists. This pool-system included, as one of its conditions to operate as a war correspondent, a clause that compelled all journalists to submit their reports to the central Office of Censorship.¹²³ Knightly explains the situation as follows:

“Correspondents were not allowed in the theatres of war unless they were accredited, and one of the conditions of accreditation was that the correspondent must sign an agreement to submit all his copies to military or naval censorship.”¹²⁴

Furthermore, “total censorship prevailed...Anything that did not meet the high command’s considerations of security was deleted.”¹²⁵

General MacArthur was notoriously strict with regard to the reporting on his unit and so-called “theaters of war” under his command. Reporters covering his progress were “not permitted to find fault with anything – strategy, tactics,

¹²² Cassell 1984 *Georgetown Law Journal* 938.

¹²³ Knightly *The first casualty – from Crimea to Vietnam: The war correspondent as hero, propagandist and myth maker* (2000).

¹²⁴ Cassell 1984 *Georgetown Law Journal* 937.

¹²⁵ *Ibid.*

morale, food, supplies, or above all, the theater's commander in chief".¹²⁶ It is said that he personally checked and censored most of the reports covering him and his command – this type of censoring led to great inaccuracies in the reports on his units and his command.¹²⁷

During World War II the press was, in exchange for the strict censorship imposed on it, awarded relatively free access to battlefields in general. Correspondents even accompanied the forces on sniping missions, bombing and several other missions that pertained to sensitive information. However, only a few members of the press were allowed to be on the beach where the landing in Normandy on D-day, one of the most memorable days in the history of World War II, took place. No members of the press were allowed to accompany the fighting coup on their attack and subsequent landing.¹²⁸

3.6 Post World War II reporting – from Vietnam to the Gulf War

The Vietnam War was marked as controversial not only in respect of the military conduct but also with regard to the media coverage during this particular war. Some critics still maintain that the press "lost" the Vietnam War by turning the American public against the war with biased reporting.¹²⁹ This was the first war during which the American military paid for correspondents' flights to the country where the war was in process and more specifically aided correspondents in their travel and access to battlefields. Media broadcasts served as a propaganda tool, that should have united a nation (bringing Vietnam to the world and taking the story of each battalion across the world back to a nation that should have united by backing its fighting forces) but, due to media perceptions, had the complete opposite effect. It was under military and governmental initiative that the media

¹²⁶ Cassell *ibid* 938.

¹²⁷ On February 6 1945 MacArthur released a communiqué stating that Manila was captured. However, this was incorrect and Manila only fell one month later after heavy fighting. MacArthur personally saw to the censoring of all reports stating the contrary to his report. *Ibid*.

¹²⁸ *Ibid* 937.

¹²⁹ *Ibid* 941.

and more specifically correspondents were given broader access to report on the war and its effects. These steps were taken to allow for the reporters to have a firsthand account of the war in Vietnam.¹³⁰ However, Cable 1006 from the State Department warned against providing transport for correspondents on military missions that might result in the correspondents producing undesirable stories.¹³¹

The problem with granting the press free access to battlefields and the war as such was that the government could neither regulate nor censor any of the reports sent back to the nation. At first the media was supportive of the military and the US forces, but soon the sentiment started to change and the reports started to reflect negatively on the US activities of the military and the US government in Vietnam. The high death toll and the images of American soldiers being killed and maimed by the Vietnamese soon divided the once supportive American nation.

The lack of military control with regard to the reports from Vietnam soon led to the peace movements that characterized the 60's and 70's in the United States. The nation as a whole gathered at mass rallies protesting from Washington DC to San Francisco with one mutual aim: To end the war and to bring fellow countrymen back. The nation was divided and neither the government nor the military had the support of the once supportive nation. As the frequency of these rallies increased and the reports of deaths of American soldiers reached the nation, the number of protesters increased.

The perception that censorship existed during this war is false, although admittedly several block-outs of information did occur.¹³² Other examples of

¹³⁰ Knightly (2000) 940.

¹³¹ *Ibid* 942.

¹³² Burch Declaration. Second declaration of Assistant Secretary of Defence Michael Burch, Flynt, Weinberger, 588F Supp 87 (D.D.C 1984) [hereafter cited as the 1984 Burch Declaration]. Burch stated that "[r]eporters were not allowed to go with the battle fleet because we had broken the Japanese navy code and knew of the Japanese plans to attack Midway. It would have become obvious to the newsmen that we had 'inside'

ensorship by the military occurred in 1970 during the six days of the Dewey Canon II operation, when “a news embargo was maintained, no US correspondents were permitted in the operational area and no reports were permitted on this operation.”¹³³

Due to the vastness of the war and the geographical restrictions on access to remote areas of Vietnam it is said that almost 700 reporters¹³⁴ witnessed the interactive battles throughout the duration of the Vietnam War – this includes all battles on any level. No formal censorship was imposed on reports from Vietnam, but only information that was already common knowledge with the Viet Cong could be published. Generally, correspondents voluntarily complied with the restrictions and only a few journalists’ accreditation was revoked.¹³⁵

With a divided nation and low morale the United States had no alternative but to withdraw their forces from Vietnam and accept defeat – this was a very high price to pay for the privilege to have press coverage.

133 knowledge of Japanese plans.” Breastup *The modern era: World War II through Vietnam* as referred to in *ibid* 940.

134 *Ibid.*

134 Breastup *Big story: How the American press and television reported and interpreted the crisis of Tet 1968 in Vietnam and Washington* (1977) 24. Discrepancy in the number of journalists that actually witnessed battles and combats have been found in the different texts consulted as reference. Other texts revealed that only 40 people visited battlefields and war sights. Knightly *ibid* 941. See also in this regard Iyengar & Reeves *Do the media govern? Politicians, voters and reporters in America* (1997). This book deals with a compendium of journalists’ politicians’, academics’ and policy makers’ perspective of the influence of the media and journalism in political campaigns. It also gives a broad view of the effect of the public opinion that is formed due to media influence.

135 Knightly *ibid* 19-20. See also in general Karnow *Vietnam – A history: The first complete account of the Vietnam war* (1983). This book gives a chronological historical account of the Vietnam war. It is filled with photos and factual accounts of “the war that nobody won.”

The task of the press was to boost the nation's morale,¹³⁶ but the free access and lack of censorship caused one of the greatest propaganda backlashes ever in the history of military reporting. "As the war began to turn sour, however, so did the military-press relationship."¹³⁷ Never before had the press been granted such wide access and support by the military in any military operation or war, and never before had the press through its reporting caused such a great division between the military and the press. After the events in Vietnam the press was regarded as a hostile entity that threatened not only the military, but also its interests, the national security and image of the United States armed forces.¹³⁸

3.7 Post Vietnam correspondence – from Grenada to the Gulf War

After the political spectacle of the Vietnam War, animosity existed between the military and the press. During the Grenada invasion the press was excluded from accompanying the military on their mission. No reporters were allowed on the island beforehand and strict regulations were introduced to govern the media and their access. The Department of Defence issued a statement that no correspondents would be allowed on the island until the situation had been stabilized and conditions were safe.¹³⁹ Correspondents were banned from going to Grenada preceding the landing and subsequent attack of the US army on this island nation. The first reports however, came from two American ham radio operators living on the island. They provided detailed accounts of the US lead

¹³⁶ Belknap *The CNN effect: Strategic enabler or operational risk?* (2002) 100-103; see also in this regard Lubow "Read some about it" *New Republic* (18 Mar 1991) 23-25. The Department of Defence acknowledged its dependence on the media in the ground rules issued to embeds in the War in Iraq, stating: "Media coverage of any future operation will, to a large extent, shape public perception of the national security environment now and in the years ahead. This holds true for the U.S. public: the public in allied countries whose opinion can affect the durability of our coalition; and publics in countries where we conduct operations, whose perceptions of us can affect the cost and duration of our involvement." (Citing Department of Public Affairs guidance on Embedding Media during Possible Future Operations/Deployments in the U.S. Central Commands Area of Responsibility par 2.A (2003)), available at <http://www.dod.mil/news/feb2003/d20030228par.pdf> (hereinafter "PAG").

¹³⁷ Belknap *ibid*.

¹³⁸ Knightly *ibid* 942.

¹³⁹ "US bars coverage of Grenada action: News groups protest" *NY Times* (15 Oct 1983).

attack.¹⁴⁰ Soon the Federal Communications Commission (FCC)¹⁴¹ started monitoring all unauthorized frequencies by the hams.¹⁴²

Four journalists, attempting to get to the island by private boat, were intercepted by the US navy and taken to the aircraft carrier Guam.¹⁴³ Several columnists criticised the government for their reinstatement of the pool system and the restrictions imposed on journalists reporting on the war. The next day, after the American forces conducted a session that seemed to be a mop-up session, the press was allowed to visit the island. After the mop-up sessions the media was granted a five day “all access” media tour of the island. Only members of the Pentagon correspondence team were taken to Grenada escorted by the military. Many questions were raised – some similar to that posed by Lewis in his article in the *New York Times*: “What feared knowledge was President Regan trying to keep from the American public on Grenada?”¹⁴⁴ Once again, the American army returned to its policy of press pools and restricted press access similar to the Vietnam War.

¹⁴⁰ “Under fire ham radio operators describe invasion” *NY Times* (26 Oct 1983). “The hams also assisted in diverting American helicopters from the medical school and directing information to the Department of State. (Ham radio operators are also known as amateur radio operators.)”

¹⁴¹ Federal Communications Commission, which regulates US, broadcast media and communications markets. See <http://www.fcc.gov/aboutus.html>.

¹⁴² “TV: Reports and debates on crises” *NY Times* (27 Oct 1983). See also Friendly “Reporting the news in a communiqué war” *NY Times* (26 Oct 1983).

¹⁴³ “TV: Reports and debates on crises” *NY Times* (27 Oct 1983). See also Friendly *NY Times* (26 Oct 1983). The reporters were held for 48 hours and then released. At the same time the Senate tried to resolve the question of the press access in Grenada when it passed an amendment providing: “Since a free press is an essential feature of our democratic system of government and since currently in Lebanon, and traditionally in the past, the United States has allowed the press to cover conflicts involving United States armed forces, restrictions imposed upon the press in Grenada shall cease. For the purpose of this section, ‘restrictions’ shall include:

- preventing the press from free accessing news sources of its choice;
- unreasonably limiting the number or representation of the press permitting to enter Grenada; and
- unreasonably limiting freedom of unsupervised movement of the press in Grenada.

Provided, however that nothing in their [sic] resolution shall be construed to require any action which jeopardizes the safety of U.S. or allied forces or citizen[sic] in Grenada.”
¹⁴⁴ Lewis “What was he hiding?” *NY Times* (31 Oct 1983).

According to the Pentagon reports, the reason for the restrictions imposed on journalists was primarily to secure the safety of the journalists, but soon reports started to surface that the military was busy with a cover up – the delay in transporting journalists to the site led to a general belief that the military had a big mop-up operation before allowing the press free access to Grenada. The *New York Times* soon criticised the administration for its supposed bombing of mental institutions on the island as well as the misrepresentation of the true number of Cuban fighters that were on the island.¹⁴⁵ However, apparently the public opinion seemed to support the press exclusion.¹⁴⁶ This opinion poll furthermore led to some introspection by the media regarding their war correspondence.¹⁴⁷

After the Grenada exclusion of the media, the community of reporters as a whole requested the Department of Defence to review their position regarding the military's access and ability to report on conflict zones – special reference was made to the right of freedom of speech and the right of the American nation to be informed. It was argued that it was of cardinal importance to report on conflict situations in as much depth as possible. Eight specific recommendations were made by the military, in what became known as the Sidle Panel Report, to assure free and accessible press in wartime.¹⁴⁸ These recommendations would be applied in the future to any conflict situation where the United States was a party

¹⁴⁵ Taylor "In the wake of invasion: Much official misinformation by US comes to light" *NY Times* (6 Nov 1983).

¹⁴⁶ A nationwide poll by the Los Angeles Times in the middle of November found that 51% of those polled favoured the denial of access while 41% disapproved. The same respondents, however, opposed by a two to one margin the proposition that the blackout should serve as a precedent for future wars. Nelson "Bare majority backs Grenada news blackout" *LA Times* (20 Nov 1983). A Louis Harris poll taken in December however, found that 65% to 32% majority backed the statement that "a small pool of reporters should have been allowed to accompany the troops in Granada in order to report it to the American people." Harris "Does the public really hate the press?" 1983 *Journalism Review* 18.

¹⁴⁷ "Journalism under fire: A growing perception of arrogance threatens the American press" *Time* (12 Dec 1983) 76.

¹⁴⁸ *Chairman of the Joint Chiefs of Staff Media-Military Relations Panel (The Sidle Panel) Report 3* (1984) [hereafter cited as the 1983 *Sidle Panel Report*].

to the conflict. The eight recommendations made by the Department of State were as follows:

- Public affairs planning for military operations had to be conducted concurrently with operational planning.
- If pooling of reporters was necessary to ensure early access to an operation, plans had to be made for the largest possible pooling procedure to be in place for the minimum time possible.
- The Secretary of Defence had to study whether to create a pre-established list of accredited correspondents in case of a military operation for which a pool was required.
- The basic tenet governing media access to military operations had to be voluntary compliance by the media with security guidelines of ground rules established and issued by the military.
- Public affairs planning for military operations had to include sufficient equipment and qualified military personnel to help correspondents cover the operation.
- Communication facilities had to be made available to the media as soon as this was feasible, but these communications were not to interfere with combat and combat support operations.
- Intra- and inter-theatre transportation had to be made available to the media.
- Media-military understanding had to be promoted by meetings and educational programs.¹⁴⁹

¹⁴⁹ Cassell 1984 *Georgetown Law Journal* 946.

Initial reports on the recommendations were positive¹⁵⁰ but soon reports highlighting the problems and shortcomings of the proposal by the military featured in all major papers across the US. Whether reporters were to be allowed on the “first wave” of attack would be decided by the military on a case-by-case basis. Somewhat pessimistic regarding its effective implementation, *The Washington Post* concluded that “[t]he military, on its own, will be able to change the rules at will.”¹⁵¹

The constitutionality of denying press access to military operations may be analysed under the

- prior restraint doctrine or
- public forum doctrine.

3.7.1 The prior restraint doctrine: Prepublication review

During the Persian Gulf War the Bush Administration applied a system of prepublication review of news stories and asserted for itself a power analogous to that exercised in the paradigm case of a prior restraint.¹⁵² Prior restraints are highly disfavoured in the First Amendment jurisprudence and as a rule not upheld by the Supreme Court.¹⁵³ In fact, the closest the court has come to doing so is

¹⁵⁰ 1984 *Sidle Panel Report* par 4-6.

¹⁵¹ “Covering the next war” *Washington Post* (31 Aug 1984) 20. See also Zorthian “Now how will unfettered media cover combat?” *NY Times* (12 Sep 1984) 31. “There is no guarantee of course that a future administration of Pentagon will not set aside the Sidle guidelines and revert to more traditional control and restriction. Nevertheless, for the moment at least, the Pentagon has promised to run only open wars.”

¹⁵² A paradigmatic example of a prior restraint involves the government securing an injunction in advance of publication to prevent a newspaper from printing an offensive story – Jacobs “Assessing the constitutionality of press restrictions in the Persian Gulf War” *1992 Stanford Law Review* 675 695.

¹⁵³ Prior restraint analysis generally concerns governmental actions preventing publication of previously obtained information. However, when the press is denied access to military operations, this does not forbid the publication of any information – it rather prevents the press and the public from obtaining the information. In similar situations, the court has

the suggestion in judgments that prior restraints might be permitted if the threat to national security from publication was sufficiently extreme.¹⁵⁴ However, the Bush Administration sought to pass judgment on news stories before the public could review them; the government became, in effect, a ubiquitous copy editor for all the publications subject to review. Jacobs¹⁵⁵ explains that there are two differences between what might be thought of as a traditional prior restraint and the Pentagon's system of prepublication review in the Gulf. Firstly, prepublication review was aimed at *all* stories written from the war zone, rather than one particular article thought to reveal sensitive information. Therefore, Persian Gulf prepublication review cast a much wider net than would the traditional prior restraint. Secondly, although the Gulf regulations were ambiguous on this point, the Pentagon did not make unilateral decisions to prevent the publication of stories, but rather sought to persuade the offending organ to voluntarily scuttle publication. Although the Gulf War censorship was "voluntary", it does not remove prepublication from the odious category of prior restraints. Despite the fact that prepublication review never caused the direct suppression of a story, the process resulted in delays (while the censors viewed the stories) to the point that editors judged them no longer relevant enough to print, which according to Tribe, is just as obnoxious as outright prohibition because they deprive stories of their news value.¹⁵⁶ Even though the formal publication of a story could not be prevented, censors who possess the power to review news in advance of its release are effectively in a position to coerce journalists. The most pressing reason for considering prepublication review to be a prior restraint, is that readers are unable to distinguish between reports which the government has altered and those which it has not.¹⁵⁷

been unwilling to invoke the prior restraint doctrine. Cassell 1984 *Georgetown Law Journal* 950.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ Tribe *American Constitutional Law* § 12-36 (1988) 1050. See also *New York Times Co* 403 US at 715 "Every moment's continuance of the injunctions against these newspaper amounts to a flagrant, indefensible and continuing violation of the First Amendment."

¹⁵⁷ Jacobs 1992 *Stanford Law Review* 675 696.

Prior restraints are the most serious and least tolerable infringement on First Amendment rights because, unlike post-publication punishment, they have an “immediate and irreversible sanction”.¹⁵⁸ If the threat of criminal or civil sanctions after publication chills speech, a prior restraint freezes it.¹⁵⁹ In the case of *Near v Minnesota*¹⁶⁰ the Supreme Court adopted a very restrictive approach to prior restraints. Although the Court held that prior restraints were invalid, they were not invalid in every circumstance. It held that the protection of the First Amendment does not shield materials in a small category of situations where their publication would be to the detriment of national security.¹⁶¹ The Court in *Near v Minnesota*¹⁶² relied on the majority opinion in *Schenck v United States*¹⁶³ which held that

“[w]hen a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right.”

However, the Court in *Near v Minnesota* was more specific when Chief Justice Hughes said in his dictum that:

¹⁵⁸ *Nebraska Press Ass'n v Stuart* 427 US 539 (1976). Prior restraints carry a heavy presumption of invalidity in the law – *Austin v Keefe* 402 US 415 419 (1971).
¹⁵⁹ Jacobs 1992 *Stanford Law Review* 675 698.
¹⁶⁰ 283 US at 697 (1931). The *Near* Court struck down a Minnesota statute that provided for temporary injunctions against “obscene, lewd...lascivious...malicious, scandalous and defamatory” periodicals. For a more detailed discussion on this case see Friendly *Minnesota Rag: The dramatic story of the landmark supreme court case that gave new meaning to freedom of the press* (1981). See discussion of this case in Logan & Green “The protection of personality rights against invasions by mass media in the United States of America” in Koziol & Warzile (eds) *The protection of personality rights against invasion by mass media* (2005) 385.
¹⁶¹ *Ibid* 716.
¹⁶² 283 US at 697 (1931).
¹⁶³ 249 US at 47 52 (1919), referred to in *Near v Minnesota* on 716.

“[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.”¹⁶⁴

It is therefore clear that the Court in *Near v Minnesota* carved out a critical exception to prior restraint protection that the Court has since reaffirmed.¹⁶⁵ In *New York Times Co v United States*¹⁶⁶ the Court referred to the judgement of the court in *Near v Minnesota* and although it acknowledged the narrow national security exception, it stated that the government must produce proof that publication would “inevitably, directly and immediately cause the occurrence of an event kindred to imperilling the safety of a transport already at sea...In no event may mere conclusions be sufficient...”¹⁶⁷ The exact scope of the wartime national security exception in the prior restraint doctrine remains unclear with only these two cases that offer guidelines. The first guideline, from the case of *New York Times*,¹⁶⁸ is that the suppressed story must “inevitably, directly and immediately” cause harm, and the second, from the case of *Near v Minnesota*, that “sailing dates of transports or the number and location of troops” cannot be divulged.¹⁶⁹

3.7.2 The public forum doctrine

The *public forum* doctrine of the Supreme Court is another possible constitutional approach to protecting freedom of expression of the press.¹⁷⁰ It is obviously somewhat problematic in applying a doctrine designed to protect expressive

¹⁶⁴ 283 US 697 (1931) 716.

¹⁶⁵ See also *Landmark Communications Inc v Virginia* 435 US 829 (1978); Jacobs 1992 *Stanford Law Review* 675 699 *et seq* .

¹⁶⁶ 403 US 713 (1971).

¹⁶⁷ *Ibid* 726-727.

¹⁶⁸ 403 US 713 (1971)

¹⁶⁹ Jacobs 1992 *Stanford Law Review* 675 699 *et seq*. See also Cassell 1984 *Georgetown Law Journal* 931 949 *et seq*.

¹⁷⁰ See Note “A unitary approach to claims of First Amendment access to publicly owned property” 1982 *Stanford Law Review* 121.

activities to activities that involve the gathering of information.¹⁷¹ The first step in analysing the public forum doctrine is to determine whether a place should be characterised as a public forum. Despite the fact that the court has never clearly spelled out how it determines whether a place is a public forum, the court has indicated in *Perry Education Association v Perry Local Educators Association*¹⁷² that it considers two categories of property to be public fora. The first category includes “places which by long tradition or by government fiat have been devoted to assembly and debate”.¹⁷³ The second category consists of “public property, which the state has opened for use by the public as a place for expressive activity.”¹⁷⁴ Against this backdrop neither military bases nor battlefields fall into these categories nor does it form part of any public fora.¹⁷⁵ The Court has stated that in areas that are not public fora, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation of speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.¹⁷⁶

Despite the eight points of association between the media and the military contained in the *Sidle Report* discussed above, the military once more denied the press access to the initial launch and attack by the US on Panama. The military delayed the access of the press pool in Panama until well after the fighting had ceased.¹⁷⁷

¹⁷¹ Cassell 1984 *Georgetown Law Journal* 931 949 *et seq.*

¹⁷² 460 US at 37 (1983).

¹⁷³ 460 US at 37 (1983) 952.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Greer v Spock* 424 US at 828 838 (1976).

¹⁷⁶ *Members of City Council of Los Angeles v Vincent* 104 S Ct 2118 2134 (1984) (quoting *Perry Education Association v Perry Local Educators Association* 460 US 37 46 (1983)); Cassell 1984 *Georgetown Law Journal* 931 952.

¹⁷⁷ Frenznick “The First Amendment on the battlefield: A constitutional analysis of press access to military operations in Grenada, Panama and the Persian Gulf” 1992 *Pacific American Law Journal* 325. In this text the writer explains that by the time the military allowed non pool reporters to land their aircraft late in the evening on December 21, President Bush had already declared the operation “pretty well wrapped-up”; see also Sloyan in this matter “The war you won’t see: Why the Bush administration plans to restrict coverage of Gulf combat” *Washington Post* (13 Jan 1991) 2.

The relationship between the press and the military deteriorated even more during Operation Desert Storm.¹⁷⁸ Smith explains:

“President George W. Bush stated in 1990 that media coverage of the war would ‘not be a new Vietnam,’ which some journalists interpreted to mean that they would not have the opportunity to broadcast negative reports from the field.”¹⁷⁹

This is confirmed in Browne where he quotes the Security of Defence D. Chaney:

“Emblematic of the administration’s option of the press during Desert Storm was Security of Defence Dick Cheney’s comments, ‘I do not look on the press as an asset. Frankly, I looked on it to be a problem to be managed, I am not a great fan of the press, and I want you to know where we stand’ with each other. I suppose the Press has its purpose. But one thing is certain: you can’t do me any good, and you sure as hell can do me harm.”¹⁸⁰

The resulting press restriction led to some of the most stringent censoring in the history of American war correspondence. During the first two days of the attack the military refused to take any correspondents with them to any battle or hostile interaction. The media representatives urged the government to lift the strict ban on movement and access to cover stories. Pools were created to govern journalists’ reports. Even seemingly harmless reports were altered and edited. An appeals commission was created, but the process from censoring to the appeal

¹⁷⁸ Grossman “War and balance sheet” 2003 *Columbia Journalism Review* 6: “The Los Angeles Times published an extra 200,000 copies a day during Operation Desert Storm.” But war increases the Pentagon’s need for security. See Porch “No bad stories” 2002 *Naval War Review* 85 86, “[T]he military, like most bureaucracies, prefers to do its business behind closed doors – all the more so because the nature of its business is so often shocking to the sensitivities of the public, on whose support it must rely”.

¹⁷⁹ Smith “The media at the tip of the spear” 2004 *Michigan Law Review* 1336; see in addition Ewers “Is the new news good news?” *US News & World Report* (7 Apr 2003) 48.

¹⁸⁰ Browne “The Military vs the Press” *NY Times* (3 Mar 1991) 27.

phase took such a long time that it rendered most of the reports, due to the time sensitivity of the reports, of little to no value.¹⁸¹ Reporters were forced to register with the military – hence contractually binding all reporters to the military code of conduct. This furthermore resulted in a press pool system and all journalists were compelled to travel under military escort.¹⁸² Restrictions were placed on soldiers when interviewed by reporters who accompanied a battalion or aircraft carrier. These restrictions were imposed on soldiers by their commanding officers. Even Vietnam War veterans were critical of the strict censorship imposed on the media during Operation Desert Storm.¹⁸³

3.8 Modern war correspondence and freedom of expression

Despite the restrictions placed on journalists reporting from a conflict zone, as discussed above, the question arises, what do the free speech rights of journalists reporting during times of war and conflict entail – in other words, what is the scope of their right to freedom of expression and the free flow of information?

Certain rights that are protected by means of legislative provision are inherently limited by the rights of other people or particular circumstances. After close analysis of the four main international human rights instruments,¹⁸⁴ it becomes clear that there are three categories of rights and that the right to freedom of

¹⁸¹ Smith 2004 *Michigan Law Review* 1336 n 173; see in addition Ewers “Is the new news good news?” *US News & World Report* (7 Apr 2003) 48.

¹⁸² According to Gannett Foundation *The media at war* (1991) 14 to 15 only six journalists committed violations of the guidelines so severe in the military’s view “as to warrant revoking their credentials”; see in this regard Terry “Press access to combatant operations in the post peacekeeping era” 1997 *Military Law Review* 41.

¹⁸³ Miracle “The army and embedded media” 2003 *Military Law Review* 41. See also Thumber & Palmer *Media at war - the Iraq crisis* (2004) for a review of how journalists covered the Iraq– and first Gulf war.

¹⁸⁴ The Banjul Charter on Human and People’s Rights; American Convention on Human Rights; International Covenant on Civil and Political Rights; the ICCPR; European Convention for the Protection of Human Rights and Fundamental Freedoms; Universal Declaration of Human Rights.

expression falls into the category which may be restricted even when there is no state of emergency. The three categories of rights are as follows:

- (i) “rights from which no derogation may be made under any circumstances whatsoever, including a state of emergency;”¹⁸⁵
- (ii) rights on which restrictions may be imposed only during a state of emergency. The right not to submit to forced and compulsory labor, codified in the ICCPR;¹⁸⁶ and in the European Convention,¹⁸⁷ and
- (iii) rights on which restrictions may be imposed, even when the situation is not an emergency situation. The right to freedom of expression is the right in this category in all the four international instruments.”¹⁸⁸

It is thus clear from the abovementioned instruments that a journalist’s right to freedom of expression is not an absolute¹⁸⁹ right, but that it may be restricted by social factors or restrictions placed on journalists by governments and society.¹⁹⁰ In terms of the relevant international instruments three criteria are used to determine whether a restriction on a particular right is permissible, namely (i) legality, (ii) legitimacy and (iii) democratic necessity.¹⁹¹ Several other restrictive conditions are also mentioned in the four most prominent instruments.¹⁹²

¹⁸⁵ Examples of rights in this category, common to all four instruments, are the prohibition of slavery and the retroactivity of criminal law Banjul Charter on Human and People’s Rights arts 4 5; American Convention on Human Rights arts 27; International Covenant on Civil and Political Rights art 4; The European Convention for the Protection of Human Rights and Fundamental Freedoms art 15.

¹⁸⁶ International Covenant on Civil and Political Rights art 4 8(c).

¹⁸⁷ The European Convention for the Protection of Human Rights and Fundamental Freedoms art 4 15(2).

¹⁸⁸ See Banjul Charter on Human and People’s Rights arts 9 27-29; American Convention on Human Rights art 13. International Covenant on Civil and Political Rights art 19; The European Convention for the Protection of Human Rights and Fundamental Freedoms art 10.

¹⁸⁹ “Restriction on freedom of expression are authorized because the exercise of the right carries with it (a) ‘special duties and responsibilities’ (b) ‘duties and responsibilities’” Mukherjee 1994 *Arizona Journal for International and Comparative Law* 358.

¹⁹⁰ *Ibid.*

¹⁹¹ “The rapporteurs often mention four criteria: legitimacy, legality, proportionality, and

It is clear from the above discussion that the media and the military have through the ages maintained a very close and quasi-symbiotic relationship. Despite an internationally accepted right to “freedom of expression” this right is not, and has never been, an absolute right – in other words, it may be restricted. However, the right of journalists to exercise their right to freedom of expression and to report on what is happening during wartimes or from conflict zones cannot merely be restricted on a whim – sound and legitimate reasons are required for such

democratic necessity.” See also in this regard as representative, statement by Turk on 21 August 1992 in “Summary Record on the 27th Meeting,” U.N. Doc. E/CN.4/Sub.2/1992/SR.27 (1992).

¹⁹² “According to the criterion of legitimacy, a restriction has to have in view one of the objects expressly enumerated in the international instruments. The list of objectives is exhaustive; i.e., no additional grounds for restrictions beyond those expressly enumerated in the treaty are permissible. The following four objectives are common on the four international instruments: respect for the rights or the reputations of others, national security, public order or safety, and the protection of public health or morals.” Banjul Charter on Human and People’s Rights 59; The American Convention on Human Rights 1; International Covenant on Civil and Political Rights art 19(3); The European Convention for the Protection of Human Rights and Fundamental Freedoms art 10(2).

“In addition, propaganda for war and advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostilities, or violence are valid grounds of restriction according to the ICCPR and the American Convention.” International Covenant on Civil and Political Rights art 20; The American Convention on Human Rights art 13(5). An example of such a restriction on freedom of expression can be found in the Bill of Rights of South Africa contained in the Constitution 108 of 1996 section 16(2).

“According to the European Convention, additional grounds of restrictions are the interest of territorial integrity, prevention of disorder or crime, prevention of the disclosure of information received in confidence, and the maintenance of the authority and impartiality of the judiciary” The European Convention for the Protection of Human Rights and Fundamental Freedoms art 10(2).

“Derogation clauses in the African Charter are less precisely defined .It affirms that rights of an individual shall be exercised with due regard to common interest and that individuals have a duty to preserve and strengthen social and national solidarity, territorial integrity, positive African values, and to contribute to the promotion and achievement of African unity.” The Banjul Charter on Human and People’s Rights arts 27(2) 29(4) 29(5) 29(7) 29(8).

“In addition to the requirements of legality and legitimacy, the European Convention requires that a restriction must satisfy the criterion of democratic necessity.” The European Convention for the Protection of Human Rights and Fundamental Freedoms, art 10(2). “Although the Convention document does not elaborate on the meaning of this term, the European Court of Human Rights has interpreted this crucial phrase in its case law.”

restriction.

Despite several policy changes through the ages we are now, in the modern era, faced with a new war – the so-called ‘war on terror’. Despite the uneven application of cooperation and hostilities in the past, the military has realized the cardinal importance of the media and its function to not only inform the nation, but also to act as propaganda tool, promoting the causes and objectives of the military.

To regulate modern war and war correspondence the Pentagon issued and promulgated a directive called *Public Affairs Guidance on Embedded Media During Possible Future Operations/Deployments in the U.S. Central Command* (hereafter referred to as the *PAG*). Smith emphasizes that: “The *PAG* aspired to achieve largely what the press had been demanding for decades: Access without security review.”¹⁹³

The main function of the *PAG* was to synchronize the symbiotic interaction between the media and the military as well as to create a basis for cooperation between the press and the military. The *PAG* furthermore envisioned access to battlefields and other military operations. It also placed a responsibility on the military to provide adequate transport for journalists and in addition, allowed the military to impose press polls when deemed of vital importance to both the success of the unit or national security and/or safety. Several hundred journalists are at present embeds in Iraq and Afghanistan.¹⁹⁴ The *PAG* has been deemed a great success in the current anti-terror operations: For the first time in decades, journalists’ responses to military press controls were positive. Bernhard described the embedding as a “win-win policy”.¹⁹⁵

¹⁹³ Smith 2004 *Michigan Law Review* 1350 n 173; see in addition Ewers *US News & World Report* (7 Apr 2003) 48 173.

¹⁹⁴ See in general Katovsky and Carlson *Embedded: The media at war in Iraq an oral history* (2004).

¹⁹⁵ Bernhard “Embedding Reports on the Frontline” 2003 *Nieman Reports* 87. Several

With the introduction of satellite phones and super fast email, web and mobile connectivity between the journalist and its headquarters millions of miles away, reporting is often even done via visual-satellite phone; making censoring of these reports virtually impossible. The Code of Conduct enforced by the *PAG* has led to the bridging of the gap between free reporting and censoring of sensitive military information.

3.9 Conclusion

From the historical analysis it is clear that the press and the military have struggled to reconcile their divergent interests. During the Gulf War the military gained the upper hand in the struggle by implementing two regulatory schemes: prepublication review of news stories, and the pool system. The Pentagon's strategy of applying prepublication review, was clearly contrary to the free flow of information as encapsulated in the First Amendment and yet, there has been an absence of lawsuits challenging the constitutionality of this type of prior restraint. There has, however, been a lawsuit regarding the Gulf Press regulations that challenged the pool system, which resulted in part from the exclusion of small or non-mainstream publications from the pools.¹⁹⁶ When comparing these two regulatory schemes, it is clear that the pool system was a greater hindrance to effective reporting than prepublication review since the pool system placed a definitive cap on the supply of news while prepublication review tended mainly to delay publication.¹⁹⁷ The facts of each military engagement differ and it is therefore impossible for a court to fashion a remedy describing the press's participation in future conflicts. Courts may be reluctant to declare rights of access to the press in military scenarios beyond those of the general public.

other journalists agreed with this statement. Koopman of the *San Francisco Chronicle* wrote: "It's the way wars should always have been covered and probably it's the wave of the future." As quoted in Smith 2004 *Michigan Law Review* 1352; see in addition Ewers *US News & World Report* (7 Apr 2003) 48.

¹⁹⁶ *The Nation Magazine v US Department of Defense* 762 F Supp 1558 (SDNY 1991);

Jacobs 1992 *Stanford Law Review* 724.

¹⁹⁷ *Ibid.*

Unless an access restriction is patently unreasonable, it would seem that a constitutional challenge would be unsuccessful.¹⁹⁸ Instead of relying on legal protection, the media should attempt to negotiate a favourable agreement.

In this sense the *PAG* and the effects thereof have led to a more structured and reliable relationship between the media and the military. It remains to be seen how the effects of current media and military relations will be upheld during the course of the anti-terror operations. There is, however, no doubt that the media and military are in a symbiotic relationship and that the regulatory measures of the *PAG* can only bring forth a situation of more trust and better interaction between these two organisations, which in turn will lead to greater freedom of access to battlefields and combat zones for reporters, as well as less censoring of journalists' articles. While access to battlefields can be useful for informing the public, it also creates the risk of manipulation of news through censorship. It might be argued that, even if censorship is a possible consequence of the demand for access, access with censorship is always preferable to no access at all since it creates the opportunity to obtain more information than would otherwise have been available. The greater the free flow of information, the better informed the world will be – a win-win situation for all.

It is imperative to analyse not only the development of war reporting, but also the protection of war correspondents in the past to fully understand the history of war correspondents to fully understand the problems that journalists are experiencing at present. With the various types of conflict and the “war on terror” still raging in the Middle East, it is important to analyse the attempts made to protect journalists reporting from conflict zones. In chapter four an analysis is made of the Conventions and commissions that have been held during the past few decades attempting to find solutions for the protection of journalists reporting from conflict zones.

¹⁹⁸ *Ibid* 726.

CHAPTER 4

HISTORICAL ATTEMPTS TO PROTECT JOURNALISTS IN THEIR NEWS-GATHERING FUNCTION WHILE REPORTING FROM WAR OR CONFLICT ZONES ON AN INTERNATIONAL LEVEL.

4.1 Introduction

The contentious issue of the protection of journalists reporting from “war” or “conflict zones” is discussed in this chapter. The historical development of war reporting, has been dealt with in chapter three of this dissertation. This chapter deals with international attempts made during the past three decades to address the problem of the protection of journalists reporting from not only war or conflict zones, but reporting in general. These attempts include several commissions led by non governmental organizations¹⁹⁹ and sub-commissions of the UN²⁰⁰ – all of these investigations have failed to render the required remedies and protection sought by journalists.

Instruments protecting journalists and war correspondents reporting from conflict zones have been late in development. The first large scale attempts to protect journalists occurred in the late nineteenth century.²⁰¹ These attempts were made by neither governments nor by collateral groups of governments but rather by “professional organizations of journalists”.²⁰² The most important meetings held were those of the International Congress of the Press in 1893 and the meeting in Brussels. During these meetings the issue was discussed in terms of “the improvement of working and safety conditions for journalists” and the “freedom of

¹⁹⁹ NGOs such as the International Organization of Journalists, the International Federation of Journalists and the Latin American Federation of Journalists.

²⁰⁰ United Nations.

²⁰¹ See Mukherjee 1994 *Arizona Journal for International and Comparative Law* 339.

²⁰² *Ibid.*

the press.” However important these meetings were, they had little effect or international standing.²⁰³

The aim of this chapter is to examine this problem by focusing on a historical analysis of the development of international efforts to remedy and prevent the killing and abuse of human rights with specific reference to journalists reporting from war or combat zones. Reference will not only be made to the physical protection of these journalists and war correspondents but also to the protection offered to them under various international humanitarian instruments.

4.2 World War II and the signing of the Geneva Convention

During the course of World War II the Geneva Convention and several other treaties were created and designed to differentiate between different types of persons participating in a combat.²⁰⁴

War correspondents, and therefore journalists in general, were ultimately classified as civilians in terms of the Geneva Convention.²⁰⁵ This implied that journalists, including war correspondents, fell into the category of people who were not “active participants” in the conflict nor had taken up any form of weapon during the armed conflict that they covered. This category of persons was provided with a great deal of protection under the terms of the Geneva Convention.

²⁰³

Ibid.

²⁰⁴

See the Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field of Aug. 12, 1949, 75 U.N.T.S. 970; the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of Aug. 12, 1949, 75 U.N.T.S. 971; the Geneva Convention Relative to the Treatment of Prisoners of War of Aug. 12, 1949, 75 U.N.T.S. 972; the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of Aug. 12, 1949 U.N.T.S. 973.

²⁰⁵

See in the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of Aug 12, 1949, 75 U.N.T.S. 973.

The Convention specifies that:

“[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause shall in all circumstances be treated humanely.”²⁰⁶

Treatment such as torture and other acts of violence against a neutral person was condemned and specific prohibitions were placed to prevent any act that would cause harm to this class of persons.

The fact that this Convention did not make special provision for the protection of journalists was a great opportunity lost to provide for the additional and much needed protection of such journalists.²⁰⁷

4.3 The United Nations

The creation of the United Nations was a direct result of World War II.²⁰⁸ During the drafting of the UN Charter several proposals for the specific protection of journalists were made. Proposed Article 2(a) of the draft “sought the issuance of special identity cards issued by national authorities”²⁰⁹

²⁰⁶ *Ibid* art 3.

²⁰⁷ Howard 2002 “Remaking the pen mightier than the sword: An evaluation of the growing need for the international protection of journalists” *Georgia Journal of International and Comparative Law* 513.

²⁰⁸ A thorough description of the United Nations is beyond the scope of this article. However a few brief facts are important to note. The UN Charter was signed in San Francisco on June 26, 1945 and entered into force on October 24, 1945. Organized largely in response to public outcry at the incredible human rights violations perpetrated by the Nazis during WWII, the UN was founded with humanitarian principles in mind. See in general Sohn & Buergenthal *Basic documents on international protection of human rights* (1973). “In fact, the charter makes it an explicit purpose of the organization to ‘achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms.’ See UN Charter art 1.

²⁰⁹ See Odulanmi “Journalists the laws do not protect war reporters” *The News*

In an attempt to provide for further protection, the proposed Article 10 of the Convention mandated that parties to a conflict should do everything in their power to protect journalists.²¹⁰ The article mandated that parties grant journalists a reasonable amount of protection against the dangers inherent in the conflict, that parties warn journalists to keep away from dangerous zones and that parties grant identical treatment to journalists held in internment.²¹¹

Soon the new humanitarian world was swept by a new international regime, and other initiatives were undertaken not only by governmental organizations but also by NGO's. One of the first attempts made by an NGO regarding the protection of journalists was undertaken in 1957 by the International Federation of Editors-in-Chief.²¹² They performed an investigation into the safety and protection of journalists,²¹³ but were ultimately unsuccessful in reaching a definite conclusion and referred the matter to the International Commission of Jurists (ICJ) in 1967.²¹⁴

²¹⁰ (13 Mar 2000). Also available at <http://allafrica.com/stories/200003130001.html>.
Ibid.

²¹¹ *Howard 2002 Georgia Journal of International and Comparative Law* 515.

²¹² Discussions of the protection of journalists began in the 1950's with the disappearance of war correspondents in Korea, Vietnam, Africa and Latin-America. Preliminary Draft Convention for the Protection of Journalists on Dangerous Missions, reprinted in UNESCO, Protection of Journalists 1, 30 (Documents on the New Communication Order, No. 4, Unipub photo. reprint 1982) [hereinafter cited as 1982 UNESCO, Protection of Journalists]. "At its 1957 congress in Lisbon, the International Federation of Editors-in-Chief discussed the question of the protection of journalists on dangerous missions. Following a detailed investigation, the Federation concluded that only by referring this problem to leading international authorities could practical results be achieved; it therefore submitted the matter to the International Commission of Jurists." See MacBride The Protection of Journalists, International Communication for the Study of Communication Problems, UNESCO, Many Voices, One World (1980) 234-235, 264 (1980) [hereinafter cited as 1980 MacBride Commission Report]. See Young "Journalists precariously covering the globe: International attempts to provide protection" 1982 Virginia Journal of International Law 141.

²¹³ "The International Federation of Editors-in-Chief largely concluded that it did not have the power to make pragmatic progress in this area and that any such progress could only be achieved by international governmental authorities." *Howard 2002 Georgia Journal of International and Comparative Law* 515.

²¹⁴ *Ibid.*

4.4 The Montecatini Draft²¹⁵

Sean MacBride, the Secretary General of the ICJ led an investigation into the protection of the press.²¹⁶ Under the leadership of MacBride the ICJ prepared a draft international convention for the protection of journalists.²¹⁷

Comments on his draft proposal were provided by members of the journalistic profession as well as members of other international organizations such as the International Committee of the Red Cross (ICRC). The draft was examined and amended at a seminar held in Geneva in April 1968.²¹⁸ This draft noted the inadequacies of the existing Geneva Convention's article that affords protection to journalists and called a commission to be created to investigate the situation.

In May 1968 another meeting was held by the Congress of the International Federation of Editors-in-Chief, in Montecatini, France. During this meeting the Preliminary Draft Convention for the Protection of Journalists on Dangerous Missions²¹⁹ was adopted.²²⁰ The draft proposed the formation of an International Committee for the Protection of Journalists on Dangerous Missions.²²¹ The committee would be independent and under the supervision of the United Nations.

The committee would consist of five to seven members chosen by the Secretary-General of the United Nations from a list composed and submitted by designated press organizations. The committee had several functions but its primary function was to issue official identification cards to journalists reporting from conflict or

²¹⁵ 1982 UNESCO, Protection of Journalists.

²¹⁶ Howard 2002 *Georgia Journal of International and Comparative Law* 513.

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*

²¹⁹ The Geneva Convention Relative to the Protection of Civilians in Times of War of Aug. 12, 1949, 75 U.N.T.S. 973 art 99.

²²⁰ *Ibid* 31-37.

²²¹ *Ibid* 34.

hazardous areas. By implication, this meant that such journalists would have to be registered journalists.²²²

The card had a dual function; its first purpose was to identify the journalist.

“The card would show the journalist’s photograph and state his age, nationality, occupation and the press organization for which he worked. Independent journalists were also entitled to receive these cards after applying to the committee and demonstrating their professional qualifications.”²²³

Secondly, the card would serve as recognizable emblem distinguishing journalists who are working in a hazardous environment.²²⁴

“As for the enforcement, the convention mandated that the committee itself would intercede and approach the *de facto* authorities in the region where a journalist’s rights had been violated. It also mandated that parties to the convention adopt any legislative or regulatory measures which proved necessary for establishing appropriate penalties for such behaviour.”²²⁵

The final draft of the Preliminary Draft Convention for the Protection of Journalists on Dangerous Missions²²⁶ included several changes to the original document. Firstly, the definition of journalist was expanded and the definition of armed conflict was widened and hence included those conflicts not only of an “international character.”²²⁷ Identity cards were issued for twelve months and

²²²

Ibid.

²²³

Ibid.

²²⁴

Ibid.

²²⁵

Ibid. See also Howard 2002 *Georgia Journal of International and Comparative Law* 515.

²²⁶

The Geneva Convention Relative to the Protection of Civilians in Times of War of Aug. 12, 1949, 75 U.N.T.S. at 33. See also *ibid* 514.

²²⁷

“Article 2 provides in part: for the purpose of the application of this Convention, the word

could be revoked at any time; these cards also had to be renewed after the twelve-month expiration date.²²⁸ In order to receive a card initially, a journalist would have to submit a signed document promising to conduct himself or herself while on the mission in a manner consistent with the highest standards of journalistic integrity and not to engage in any political or military activities in the area in which the safe-conduct card was valid or in any activities which might have involved a direct or indirect participation in the conduct or hostilities.²²⁹

The most crucial change was the terms of Article 6 that stated that Signatories, thus individual States, to the Convention would be responsible for the renewal and revoking of the identity cards. This would be done on a national basis and on a State's own accord.²³⁰

This was a strong move away from the centralized Commission previously proposed. The Convention did, however, provide that the journalists in more restrictive countries could apply to a more neutral Professional Committee.²³¹

'journalist' shall mean any correspondent, reporter, photographer, film cameraman, or press technician who is ordinarily engaged in any of these activities as his principal occupation and who, in any of these activities are assigned their particular status by virtue of laws or regulations, have that status (by virtue of the said laws or regulations)" U.N. Doc. E/CN.4/L.1198/Rev.1, reprinted in the Commission on Human Rights, (Commission on Human Rights, Report on the Twenty-Eighth Session, 52 U.N. ESCOR Supp. (No.7) at 22, U.N. Doc. E/5113 (1972)) at 56 (Annex Resolution 6), and in Human Rights in Armed Conflicts, Protection of Journalists Engaged in Dangerous Missions in Areas of Armed Conflicts: Report of the Secretary-General, U.N. Doc. A/8777, Annex 1, at 1 [hereinafter cited as 1972 Draft Articles].

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Ibid art 5.
"The United States proposed draft articles at this time that omitted any provision for an international committee; instead each country was to be responsible for issuing and withdrawing the cards." U.N. Doc. E/CN.4/L1199 and Corr. 1 (1972). See also the proposals for the structure of a professional committee and for the issuance of safe-conduct cards to be drawn up by seven members of the committee including a vice-president of the New York Times, appointed by the Secretary-General – Respect for Human Rights in Armed Conflicts: Protection of Journalists Engaged in Dangerous Missions in Areas of Armed Conflicts, U.N. Doc. A/8438 at 6 (1971). See also (Supp.) U.N. Doc. A/8589, Annex, at 1 (1971) reprinted in 26 U.N. GAOR Annexes (Agenda Item 49) at 2, U.N. Doc. A/8589 [hereinafter cited as 1971 Draft Protocol].

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"Cards may be issued only to a journalist who is a national of the State party to this Convention that issued the card or who is under its jurisdiction." Young 1982 *Virginia Journal of International Law* 150. "Thus a journalist arbitrarily denied a card by state

Despite all the time and effort that went into the drafting of this document, the Montecatini draft was never forwarded to the United Nations for approval.²³²

4.5 Differences between the Montecatini Draft and the United Nations Preliminary Draft

There were several differences between the UN Preliminary Draft and the Montecatini Draft. The most prevalent of these were the following. The first difference pertains to the definition of the term “press”.

The Montecatini Draft stated that “journalist means all correspondents, reporters photographers, cameramen, or technicians of the Press who have been duly accredited, in accordance with the provisions of the Conventions.”²³³

The UN Preliminary Draft, however, added that a journalist’s status must: “[be held] by virtue of his country’s laws or practices”.²³⁴

The UN definition imposed more restrictive measures and suggested an arbitrary and possibly discriminatory issuance of security cards for journalists because the committee proposed by the UN could be arbitrary in the issuance of the security cards.²³⁵

Another difference between these two Draft documents was the fact that in terms of the UN Preliminary Draft the identity cards would only be issued to *bona fide* journalists while the Montecatini Draft provided for the issuing of cards only to

232 authorities – perhaps because of critical reporting – could not immediately turn to a friendly State willing to issue him a card.” 1972 Draft Article art 6.
233 *Ibid.*
234 Preliminary Draft Convention for the Protection of Journalists on Dangerous Missions [hereinafter cited as 1982 Montecatini Draft].
235 *Ibid.*
236 Young 1982 *Virginia Journal of International Law* 152.

bona fide news organizations.²³⁶ In this lastmentioned category a journalist would only have to give a written declaration that his main source of income was generated from journalism.²³⁷

A further difference between these two Draft documents was the degree of protection rendered by each. On the one hand the UN Preliminary draft

“only required States to extend to foreign journalists the same protection of their persons as [they provide] to their own journalists.²³⁸ Given the divergent national treatment of journalists,²³⁹ this standard has little objective meaning, and would depend solely on how well journalists are treated in a given country.²⁴⁰ Furthermore, the Montecatini Draft prescribed enforcement provisions to provide penalties for violations of the Convention²⁴¹ as well as monetary compensation for victimized journalists – provisions the U.N. Preliminary Draft omitted completely.”

Finally, the UN Preliminary draft required all journalists to adhere to a Code of Ethics. This was a pre-requisite for journalists to obtain an identity card and left the door wide open for a discriminatory system. The Montecatini Draft had no

²³⁶ 1971 Draft Protocol. This group prepared a protocol supplementing the terms of the U.N. Preliminary Draft, U.N. Doc. Annex, at 1 (1971), reprinted in 26 U.N. GAOR Annexes (Agenda Item 49) at 2 U.N. Doc. A/8589 art 5.

²³⁷ 1971 Draft Protocol.

²³⁸ *Ibid* art 7.

²³⁹ *Ibid*.

²⁴⁰ “States that offer domestic journalists fair treatment probably also offer it to foreign ones. On the other hand, if the rights of local journalists are limited, it is more than likely that foreign correspondents will be in similar jeopardy.” See “Living with ghosts” *Time* (20 Jul 1981) 38. “In Argentina, members of the domestic press run a risk of ‘disappearing’ as a result of critical news reports; the international press assumes a similar risk.” Young 1982 *Virginia Journal of International Law* 146.

²⁴¹ “Article 13 reads: The Parties undertake to adopt any legislative or regulatory measures which shall provide to be necessary for establishing penalties which should be applied to persons having acted or given orders to act in violation of this Convention.” 1982 Montecatini Draft art 13.

Code of Conduct that served as pre-requisite in the obtaining of an identity card.²⁴²

4.6 The Safety Committee

In response to the disappearance of seventeen journalists in Cambodia, a new major attempt was started by NGO's to address the safety of journalists. The International Press Institute (IPI) convened two meetings during the course of 1970. Represented at the meetings were not only a variety of press organizations, but also representatives from the International Association of Democratic Lawyers, UNESCO, and the International Institute of Human Rights.²⁴³ These meetings resulted in the creation of an International Professional Committee for the Safety of Journalists.²⁴⁴

The Primary goal of the Safety Committee was to issue all journalists on dangerous missions with identity cards. This was in line with the principles set forth by the Montecatini draft. The cards issued by the Safety Committee were, however, limited by time and location, since the identity cards were only meant to be issued to journalists working in Southeast Asia. The Safety committee also initialized a file containing all the particulars of all the journalists stationed at dangerous missions, or who frequently visited dangerous missions by member organizations.²⁴⁵

A pre-requisite for journalists to use the identification card was that all persons using this card had to sign a declaration, declaring that the card would only be

²⁴² Young 1982 *Virginia Journal of International Law* 147.

²⁴³ "Press organizations in attendance at these meetings were the International Federation of Journalists, the International Organization of Journalists, the International Federation of Newspaper Publishers, the Federation of Editors-in-Chief and the International Press Institute." Howard 2002 *Georgia Journal of International and Comparative Law* 517.

²⁴⁴ "The Safety Committee, headquartered at the 'Palais de Nations' in Geneva, was comprised of one delegate and a deputy from each of the founding organizations" *Ibid* 515.

²⁴⁵ 1982 UNESCO, Protection of Journalists.

used for professional assignments and that the bearer of such a card would never dress in military uniform nor take up arms of any sort.²⁴⁶

The plan was to broaden the use of the identification card to all regions in the world but the daunting, impractical task of interacting with all the regions in the world soon led to the suspension of the use of these identification cards and in 1975 the card system was abolished *in toto* due to a lack of consensus among the various countries.²⁴⁷

4.7 Further considerations under the United Nations

After the disappearance of the seventeen journalists in Cambodia the safety of journalists were brought to the attention of the UN. In December 1970 the United Nations General Assembly (UNGA) adopted a resolution on the protection of journalists engaged in dangerous missions. In essence the resolution acknowledged the journalists' position as being dire and that further study had to be done to enhance the security of journalists.²⁴⁸

It noted the extant section of the Geneva Convention that could be interpreted to grant physical protection to the press²⁴⁹ and urged all states to respect those sections.²⁵⁰ Subsequently, the resolution requested that the Human Rights Commission consider the possibility of preparing a draft international agreement on the protection of journalists.²⁵¹

The professional journalists' organization submitted a draft convention for the protection of journalists to the Human Rights Commission,²⁵² who suggested to

²⁴⁶ Howard 2002 *Georgia Journal of International and Comparative Law* 516.

²⁴⁷ Protection of Journalists Engaged in Dangerous Missions in Areas of Armed Conflict, Report of the Secretary-General, U.N. Doc A/8371 (1971).

²⁴⁸ *Ibid.*, U.N. Doc. A/8371 (1971).

²⁴⁹ *Ibid.* Howard 2002 *Georgia Journal of International and Comparative Law* 516.

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.*

²⁵² *Ibid.*

have the document forwarded to the UNGA for further investigation. In 1973 the UNGA expressed the desire to adopt a convention on this question and requested the Secretary-General to transmit the draft convention to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts for consideration.²⁵³

The Diplomatic Conference considered the draft and, though not changing the status of journalists from civilians as stated in Protocol I of the Geneva Convention, a mandate was placed on the implementation of an identity card program, that would have ensured that journalists were recognizable as journalists and treated as civilians.²⁵⁴

The great aspirations to reform and improve the position of journalists came to an end at the conclusion of the twenty-ninth and thirtieth sessions of the United Nations.²⁵⁵

4.8 Attempted protection of journalists under UNESCO

Despite the initiatives taken by the UNGA, UNESCO also undertook efforts physically to protect the press and journalists.²⁵⁶ In the 1970's the Third World was discontent with specific areas addressed by several of the commissions investigating the protection of journalists.²⁵⁷ UNESCO started to focus more on the free flow of information.²⁵⁸ The first colloquium was held in Florence in 1977.²⁵⁹ The document in particular stated that "protection should be ensured for journalists on dangerous missions in zones of armed conflict."²⁶⁰

²⁵³ 1982 UNESCO, Protection of Journalists at 3.

²⁵⁴ *Ibid* 14.

²⁵⁵ *Ibid*.

²⁵⁶ Brown *International Communications Glossary* (1984) 69-70.

²⁵⁷ Young 1982 *Virginia Journal of International Law* 153.

²⁵⁸ *Ibid*.

²⁵⁹ The Status and Responsibilities of Information Personnel and the Protection of Journalists in the Exercise of their Profession (OPI-77/WS/3, Paris Apr. 1977).

²⁶⁰ Young 1982 *Virginia Journal of International Law* 153.

UNESCO next dealt with the matter at the twentieth session of its General Assembly held in 1978.²⁶¹ At the 1978 meeting the Assembly adopted the Declaration on Fundamental Principles concerning the Contribution of the Mass Media.²⁶² Article II paragraph 4 of the document stated that: “[i]t is essential that journalists and other agents of the mass media, in their own country or abroad, be assured of protection guaranteeing them the best conditions for the exercise of their profession.”²⁶³ The Assembly concluded that such a goal was primarily the responsibility of the international community and that UNESCO itself was uniquely placed to contribute toward this goal.²⁶⁴

Prior to the Paris meeting in 1980 attended by both representatives of the International Organization of Journalists and the International Federation of Journalists,²⁶⁵ a consultative meeting was held to examine the problems of the press around the world.²⁶⁶

As a result of the comparison of the studies done by the two organizations, a single document was drafted by the two groups working together. The draft document dealt with two separate issues:

²⁶¹ *Declaration on the fundamental principles concerning the mass media* (1978) located in UNESCO’s Standard-Setting Instruments, IV.C. (1994). Declaration on Fundamental Principles concerning the Contribution of the Mass Media to Strengthen Peace and International Understanding, to the Promotion of Human Rights and to Countering Racialism, Apartheid and Incitement to War, UNESCO, Res 4/9/3/2/2, UNESCO, 20th Sess., at Ari. 1 UNESCORES. 4/93/2, 20 UNESCO Res 4/9.3/2/20, UNESCO Gen. Conf Res., UNESCO Doc. 20 c/ Resolution at 100-04 (1978).

²⁶²

Ibid.

²⁶³

Ibid.

²⁶⁴

Ibid.

²⁶⁵

“The IFJ is currently the world’s largest organization of journalists representing 450,000 journalists in more than 100 countries.” See in general International Federation of Journalists, <http://www.ifj.org>. “The IFJ works for both the culture and political freedom of the press and for the physical protection of journalists. Toward that end, the IFJ has drafted an International Code of Practice for the Safe Conduct of Journalists working in dangerous regions. Also toward that end, the IFJ has established an International Safety Fund.” Howard 2002 *Georgia Journal of International and Comparative Law* 520.

²⁶⁶

Protection of Journalists Engaged in Dangerous Missions in Armed Conflict, Report of the Secretary-General, U.N. Doc. A/8371 (1971) at 10.

- (a) the problem of the protection of the press working in dangerous regions; and
- (b) suggestions toward dealing with this important issue. These issues included the establishment of a World Press Institute to provide a forum for further investigation, periodic international conferences to evaluate the position of journalists in foreign countries, and the future drawing of international instruments to more effectively address the issue.²⁶⁷

The document, however, failed to list any suggestions for the form or content of any such instruments as were required.²⁶⁸ Following the Paris meeting, another meeting of journalists' organizations was held in April 1980 in Mexico. The participants urged the United Nations General Assembly to determine why earlier attempts to address the issue by that organization had failed so that new, updated and corrected attempts could be made. The participants²⁶⁹ called for an immediate establishment of an international professional commission for the Protection of Journalists under the guard of UNESCO.²⁷⁰

4.9 MacBride Commission

The international Commission for Study of Communication Problems, frequently referred to as the MacBride Commission, was established by the Director-General of UNESCO, Amadou Mahtar M'Bow, in December 1977.²⁷¹ Composed

²⁶⁷ *Ibid* 11-19.

²⁶⁸ *Ibid* 18.

²⁶⁹ This meeting was organized by the Latin American Federation of Journalists (FELAP) and attended by the International Organisation of Journalists, the International Federation of Journalists and the Confederation of ASEAN Journalists (CAJ). *Ibid* 19-20.

²⁷⁰ *Ibid*.

²⁷¹ "The MacBride Commission, remembered as one of the most important documents ever drafted under UNESCO authority, was also one of the most controversial. Although the report drafted by the Commission did praise the idea of press freedom, it also contained a variety of recommendations that seemingly supported the communications goals of the communist and developing nations of the time. These included the subordination of the press to the immediate goals of the governments and opposition to private ownership of news media." Brown (1984) 69-70; see also in this regard Harley (1993).

of sixteen experts, the stated purpose of the commission was to “study the totality of communications problems in the modern world” and draft a report that would remedy the problems.²⁷²

The issue of press protection was given a great deal of attention by the Commission at its meeting in New Delhi, India in 1979. Mr MacBride convened two meetings without the knowledge of the Commission in Paris; both of these meetings were funded outside the Commission’s budget.²⁷³

Prior to these meetings, Mr MacBride drafted an international instrument addressing the issue of press protection. The instrument cited the dangers frequently faced by journalists working in dangerous regions and confirmed the need for further protection, but contained few concrete, effective suggestions for the implementation of such protection.²⁷⁴ One of the few concrete suggestions made was for the establishment of a round table for the further discussion of these issues.²⁷⁵

Several controversial issues were contained in the document compiled by MacBride. Two of these controversial issues were statements contained in the document referring to the responsibility of journalists for accurate reporting and an international code of journalistic ethics that mandated the licensing of all journalists.²⁷⁶ Both the code of ethics and the licensing schemes were distrusted as attempts to develop governmental control over the press. These aspects added to Western suspicion and people’s doubts intensified with the release of the Masmoudi proposal²⁷⁷ in a position paper prepared for the MacBride

²⁷² *Ibid* 1.

²⁷³ *Ibid* 116.

²⁷⁴ The Protection of Journalists; document published by the International Commission for the Study of Communication Problems, No.90, Annex II 129-136.

²⁷⁵ Sean MacBride, United Nations Educational, Scientific and Cultural Organization, *Many Voices, One World: Communication’s Society, Today & Tomorrow* Report by the International Commission for the study of Communication Problems (1980) at 265 [hereafter referred to as 1980 MacBride Commission Report].

²⁷⁶ 1982 UNESCO, Protection of Journalists at 129-136.

²⁷⁷ Mustapha Masmoudi, Tunisian delegate to UNESCO and a Member of the MacBride

commission.²⁷⁸ It was argued that the licensing of journalists would not only provide protection for journalists, but would protect them from attacks and harassment by local authorities.

The MacBride Report provided little cause for alarm as far as press restrictions were concerned – apart from affirming the right of journalists to seek out information, transmit it safely and effectively, and freely to express opinions. The Report did not sanction licensing of journalists, according them special privileges or status,²⁷⁹ or adopting any professional codes, unless formulated by a professional organization alone without governmental interference.²⁸⁰ The only recommendation the United States found suspicious was a call for a series of round tables to review the problem of the protection of journalists.²⁸¹

Commission, was considered the leader of a group of the Third World nations in UNESCO closely tied to Director-General M'Bow and the UNESCO Secretariat. Power & Abel "Third world vs the media" *New York Times* (6 Sep 1980) 121. Masmoudi proposed that the NWIO should reflect such concerns as "regulation of the right to information by preventing abusive uses of the right of access to information", "definition of appropriate criteria to govern truly objective news selection" and "regulation of the collection, processing and transmission of news and data across national frontiers." The Masmoudi proposals were never officially endorsed by UNESCO and were not even accepted as a part of the final MacBride Report. The motives ascribed to UNESCO as a result of the suggestion of regulating – the press, coloured Western views of other UNESCO initiatives which led to Western scepticism and condemnation.

²⁷⁸ Masmoudi the New World Information Order 16 (UNESCO, Document of the International Commission for the Study of Communication Problems, No. 31, 1978. "There has been some speculation that the document was in fact authored by the media experts from the Communist countries." Power & Abel *New York Times* (6 Sep 1980) 121.

²⁷⁹ "Recommendation 50 of the Commission reads in pertinent part: '[T]he Commission does not propose special privileges [not accorded other citizens] to protect journalists in the performance of their duties... One exception [to this policy] is provided in the Additional Protocol to the Geneva Conventions of 12 August 1949, which applies only to journalists on perilous missions, such as in areas of armed conflict. To propose additional measures would invite the dangers entailed in a licensing system since it would require some body to stipulate who should be entitled to claim such protection." 1980 MacBride Commission Report at 233.

²⁸⁰ Recommendation 43 states: "Codes of professional ethics exist in all parts of the world, adopted voluntarily in many countries by professional groups. The adoption of codes of ethics at national and, in some cases, at the regional level is desirable, provided that such codes are prepared and adopted by the profession itself – without governmental interference." – *Ibid.* Young 1982 *Virginia Journal of International Law* 158.

²⁸¹ See Harley *Policy analysis and critique of the MacBride Commission Report* (1980) (Interim Working Paper, Sept. 1980) 20-21. See 1980 MacBride Commission Report (recommendation 51) 265.

In addition to this, it was also argued that journalists would be treated as professionals and would not be arrested when operating in their *bona fide* official capacities. It was also believed that wearing the identification card and the implementation of an ethics committee regulating journalists would lead to the speedy release and return of journalists to the country of their choice.²⁸²

The controversial document led to great criticism under developing nations²⁸³ who feared that the institution of such mandated licensing would lead to the regulation of the free flow of information and the regulation of the press.²⁸⁴

The world was divided by the document²⁸⁵— several nations felt that the function of the commission was to focus on the protection of journalists and that it had failed to do so, while other nations were of the opinion that the protection of journalists and the responsibilities of journalists went hand in hand.²⁸⁶

At the conclusion of the meetings the MacBride Commission drafted a final report. It was a comprehensive document which declared that:

²⁸² In addition to these protective measures, article 14 provides that signatory States promulgate legislation or regulatory measures to allow journalists and their beneficiaries adequate compensation for injury, confinement and loss of life resulting from a violation of the Montecatini Draft – 1982 Montecatini Draft art 14.

²⁸³ “Western spokesmen charged that UNESCO’s efforts sprung not from a desire to promote reporters’ safety, with slight restrictions on press freedom as an inevitable side effect, but rather from a bad-faith desire to use the goal of safety as a smokescreen for measures designed to restrict press freedom.” Therberge 1981 *American Bar Association Journal* 714–717.

²⁸⁴ Harley (1993).

²⁸⁵ “The free flow of information doctrine was vehemently opposed by the Soviet bloc countries and many of the then existing developing countries. They criticized the perceived Western monopoly on communication, alleged that Western journalists were biased against the communist and the third world, and called for journalistic responsibility and restraints on the media.” Mukherjee 1994 *Arizona Journal of International Comparative Law* 348. See also in general Daes *Freedom of information and the Press: The experiment that failed, in human rights and the media* (1988). See also in this regard Humphrey *Human rights and the United Nations: A great adventure* (1984) 50-57.

²⁸⁶ Harley (1993).

“communication is a basic individual right as well as a collective one, but further stressed that the diversity of societies around the world necessitates a variety of solutions, each adapted to the social, economic and cultural life of each individual country.”²⁸⁷

The Commission did not take a strong and effective stance regarding the physical protection of journalists, one of the goals towards which MacBride worked continuously. The Commission, wary of putting journalists, already in a difficult and little protected position at an even greater disadvantage, concluded that special protection might result in journalists being shepherded by members of the local government. UNESCO also gradually suspended its involvement in the support and financing of the commissions.²⁸⁸ The Commission concluded that only when all the individual rights of journalists were fully recognized, journalists would be protected.²⁸⁹

4.10 The Sadi Resolution

For almost two decades the United Nations made no further attempts at addressing the issue of journalist protection. A Sub-Commission on Prevention of Discrimination and Protection on the Minorities addressed this issue again in 1989 and 1990.²⁹⁰ The name of the draft resolution derives from one of the members of the commission, Waleed Sadi, who introduced the draft resolution

²⁸⁷ 1980 MacBride Commission Report at 253.

²⁸⁸ Under UNESCO it was felt that the cause of finding additional protection for journalists was an ideological and politicised problem. See Interview with Sussman, Senior Scholar and former executive Director of Freedom, in New York (14 Oct 1992). See also Stevenson *Communication, development and the third world: The global politics of information* (1988) 49-54.

²⁸⁹ 1980 MacBride Commission Report at 236.

²⁹⁰ Draft Resolution on Protection of Journalists, Sub-Commissions on Prevention of Discrimination and Protection of Minorities, 41st Sess., U.N. Doc.E/CN.4/Sub.2/1989/SR.36 (1989). See also Review of Further Developments in Fields With Which the Sub-Commission Has Been Concerned, U.N. ESCOR, Sub-Commissions on Prevention of Discrimination and Protection of Minorities, 42nd Sess., Agenda Item 4, U.N. Doc.E/CN.Y/Sub.2/1990/17 (1990).

addressing the protection of journalists and the press.²⁹¹ The resolution addressed several aspects and supported the movement of additional protection for journalists working in war-torn regions. The main function of the Sadi commission was to draft a report regarding the feasibility of ways additionally to protect journalists.²⁹² The Sadi report also requested the international community and more specifically, the governments of the world, to go to greater lengths to protect journalists. It stated that journalists were all too frequently the targets of attacks and that journalists were entitled to additional international protection.²⁹³ A further resolution urged journalists to continue their work despite difficult and dangerous circumstances and to stay neutral and objective at all times.²⁹⁴

The most important resolution in the Sadi commission's draft was the recommendation for a

“special study to be done on the subject of press protection to examine the possibility of extending additional protection and assistance to journalists in their endeavor to expose gross human rights violations with objectivity and fairness.”²⁹⁵

The Sadi Resolution was approved by the sub-commission's thirty-sixth meeting.²⁹⁶ The final report focused on the importance of the press to human rights in general and noted that attacks on journalists had become an all too frequent phenomenon. In conclusion it declared itself “duty bound to accord them [journalists] special attention and protection in a form that has yet to be

²⁹¹ 1989 Draft Resolution on Protection of Journalists, Sub-Commissions on Prevention of Discrimination and Protection of Minorities.

²⁹² 1990 Review of Further Developments in Fields with which the Sub-Commission has been concerned, U.N. ESCOR, Sub-Communication on Protection of Discrimination and Protection of Minorities.

²⁹³ *Ibid* 5.

²⁹⁴ 1989 Draft Resolution on Protection of Journalists, Sub-Commissions on Prevention of Discrimination and Protection of Minorities.

²⁹⁵ *Ibid*.

²⁹⁶ Summary Record of the 36th Meeting, U.N. ESCOR, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 41st Sess., U.N. Doc.E/CN.4/Sub.2/1989/SR.36 (1989).

articulated and formulated.” The final Sadi resolution was weekend from the original by merely requesting that Sadi examine the feasibility of performing an additional study on potential means that would provide for additional international press protection.²⁹⁷

After addressing the feasibility of the proposals made by the Sadi Commission, the sub commission requested specifically that Sadi address a few particular issues:

“First, the resolution requested Sadi analyze the types of violations most frequently made against journalists.²⁹⁸ Second, it directed Sadi to draft specific guarantees necessary for the protection of journalists.²⁹⁹ Third, the resolution recommened measures that the United Nations could take to protect the well-being of journalists working in dangerous and war-torn regions.”³⁰⁰

Unfortunately, the sub-committee never enacted the draft resolution. It was decided to defer the consideration thereof to the next meeting of the sub-commission. This deferral was the last time that the United Nations addressed the issue of the added protection of journalists.³⁰¹

²⁹⁷ Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, 42nd Sess., Provisional Agenda Item 4, U.N. Doc. E/CN.Y./Sub.2/1990/17 (1990). Howard 2002 Georgia Journal of International and Comparative Law 518.

²⁹⁸ Mukherjee 1995 “The internationalization of journalists ‘rights’: An historical analysis” *Journal of International Law and Practice* 87.

²⁹⁹ *Ibid.*

³⁰⁰ *Ibid.*

³⁰¹ Decision 1990/166 in Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities in its Forty-Second Session. U.N. Doc.E/CN.4/Sub.2/1990/59.

4.11 Conclusion regarding the historical analysis

The historical analysis above leads one to conclude that despite the dire need for the protection of journalists and the many attempts to address the issue, little has been achieved over the years. In fact, the approach of the various international organizations seems disjointed and there is a lack of clarity in respect of the definition of the problem.

It is clear from this chapter that the attempts made throughout the past few decades have not been sufficient to protect journalists reporting from conflict zones. Chapter five discusses the additional conventions that have been introduced in modern times to protect journalists reporting from a conflict or hostile zone.

CHAPTER 5

ASSESSMENT OF THE CURRENT LEGAL SITUATION WITH SPECIAL REFERENCE TO CURRENT CONVENTIONS

5.1 Introduction

The position of “journalists”³⁰² reporting from “conflict”³⁰³ and “war zones”³⁰⁴ is primarily regulated by the Geneva Convention.³⁰⁵ This Convention also states the protocol in the event when such a “journalist” is captured or taken hostage as well as the treatment that should be rendered to such a “journalist”.³⁰⁶ The Convention furthermore lists the events which would result in a journalist losing his or her civilian status and protection as offered by the Convention. It is, however, of cardinal importance to investigate whether the principles of this Convention have become rules of *jus cogens*³⁰⁷ and *usus*.³⁰⁸ Secondly, it must be determined whether these principles are still applicable to the current and modern day “war” and “war on terror” as well as the application of the principles to these newly defined types of “war”.

It is clear that a situation of uncertainty has been created after the 9/11 attacks on the US. It is therefore necessary to examine the current position of international law as set out in the Geneva Convention³⁰⁹ and the protective provisions this Convention provides for journalists³¹⁰ reporting from conflict zones.³¹¹

³⁰² See Mukherjee 1994 *Arizona Journal for International and Comparative Law* 339.

³⁰³ Frederick II, King of Prussia 1712-1786 (1966).

³⁰⁴ Frederick II, King of Prussia 1712-1786 (1966).

³⁰⁵ See full text available at <http://www.unhchr.ch/html/menu3/b/91.htm>.

³⁰⁶ Mukherjee 1994 *Arizona Journal for International and Comparative Law* 339.

³⁰⁷ See discussion of *jus cogens* in par 2.5.

³⁰⁸ See discussion of *usus* in par 2.5.

³⁰⁹ See in general full text available at <http://www.unhchr.ch/html/menu3/b/91.htm>.

³¹⁰ Mukherjee 1994 *Arizona Journal for International and Comparative Law* 339.

³¹¹ Frederick II, King of Prussia 1712-1786 (1966).

The question has however arisen, if the US can abolish the principles of the Geneva Convention³¹² to benefit their own national interests; if international law with specific reference to the Geneva Convention³¹³ and the protection it offers journalists³¹⁴ in “conflict zones”³¹⁵ can still be called on when a journalist³¹⁶ is captured in a hostile action? Since the “war on terror”³¹⁷ has commenced, it has become clear that journalists reporting from these hostile areas are unsure of their position since governments are reverting back to national terror legislation. Journalists question whether they can still rely on the protection afforded by international instruments. What can be done in a semi-hostile situation and what protection can be rendered to journalists?

The main instruments protecting journalists are the following: UDHR (Universal Declaration of Human Rights), the ICCPR (International Covenant on Civil and Political Rights), the American Convention on Human Rights, the European Convention for the Protection of Human Rights and Fundamental Rights and the African Convention on Human Rights.³¹⁸ All of the abovementioned proclaim freedom of information and “unfettered channels of communication”.³¹⁹

Despite the proclamation of the free flow of information, several of these instruments contain restricting clauses, qualifying either the right to freedom of information or awarding national or local governments the freedom to impose restrictions on these rights by statutory means under certain circumstances.³²⁰ A

³¹² See <http://www.unhchr.ch/html/menu3/b/91.htm>.

³¹³ *Ibid.*

³¹⁴ Mukherjee 1994 *Arizona Journal for International and Comparative Law* 339.

³¹⁵ Frederick II, King of Prussia 1712-1786 (1966).

³¹⁶ Mukherjee 1994 *Arizona Journal for International and Comparative Law* 339.

³¹⁷ The war on terrorism or war on terror (abbreviated in U.S. policy circles as GWOT for Global War on Terror) see discussion in par 2.4.

³¹⁸ See discussion in par 2.3.

³¹⁹ Mukherjee 1994 *Arizona Journal for International and Comparative Law* 354.

³²⁰ Banjul Charter on Human and Peoples' Rights adopted June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev. 5, 21 I.L.M. 59 arts 9 27, 21 I.L.M. at 60, 63; American Convention on Human Rights, done Nov 22, 1969, O.A.S. OR, OEA/SER.K/XVI.1.1 art 13, 9 I.L.M. at 679-680; International Covenant on Civil and Political Rights adopted Dec 16 1966 G.A. Res. 2200, U.N. GOAR, 21st Sess., Supp No.16 at 52, UN Doc. A/6316, 999 U.N.T.S. arts 19 20, 999 U.N.T.S. at 178; European Convention for the Protection of Human

journalist's right to freedom of expression will not be infringed when a restriction is imposed in the terms as set out in the treaties' limitations clauses.³²¹

It is argued by writers that since the UDHR is not a treaty, but forms part of the international law and thus binds all nations to its regulations, that the same rule will apply in respect of treaties. Since treaties are signed by Signatory Countries and hence bind these countries, the same principle should apply to the treaties as with the UDHR. It is said that despite the fact that a country only becomes party to a treaty once it has signed the treaty, these treaties dealing with the basic protection of human rights should also be considered to be international law — applicable to all countries, whether they are signatories to the treaty or not. It is furthermore argued that the ICCPR embodies most of the principles set out in the UDHR and despite the diverse legal systems of the hundred and fifteen parties to the treaty, this treaty should be considered to be international law.³²² Furthermore, it is said that a common denominator exists in all the regional treaties and this should be enough to embody the common aspects of the treaties as applicable and enforceable international law.³²³

5.2 Distinction between physical protection and the right to professional participation

The right to freedom of expression has been discussed within chapter two of this dissertation.³²⁴

³²¹ Rights and Fundamental Freedoms, done Nov 4 1950, Europ. T.S. No. 5, art 10, 213 U.N.T.S. at 230; Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810 arts 19 29 (1948) at 74-77.

³²² “The UDHR, although not a treaty, [it] is often regarded as expressing general principles of international law binding on all states.” Mukherjee 1994 *Arizona Journal for International and Comparative Law* 354.

³²³ As of 31 Dec 1992, 115 states were parties to the convention.

³²⁴ Mukherjee 1994 *Arizona Journal for International and Comparative Law* 354.

According to Mukherjee an analytical framework of journalists' rights consists of four distinct situations: “(1) right to physical protection, (2) right to freedom of expression, (3) right to freedom of movement, and (4) all of the above rights in a foreign country.” See cross reference par 2.2.

Mukherjee 1994 *Arizona Journal for International and Comparative Law* 355.

5.3 The right to physical protection under treaties

All of the mentioned treaties and international instruments have as basis the protection of the right to life.³²⁵ These instruments and treaties also prohibit the use of any cruel, inhumane, torturous or degrading treatment towards any human within their sovereign territories, and any such treatment is punishable by law and these rights regarded as inalienable rights.³²⁶

Both of these rights are protected in the sense that they cannot even “in a time of public emergency which threatens the life of a nation, be revoked or suspended.”³²⁷ Despite the fact that these rights are international law, these rights may be deprived by a state on an “arbitrary” basis if the national legislation provides for this deprivation, as long as it is not done on *an priori* basis, hence this action by a member state will not constitute a violation of any instrument.³²⁸ This means that the torture or inhumane treatment of a journalist by any government agent or agency will constitute a violation of the instruments as mentioned above, yet a death sentence issued by a state’s competent court or tribunal (*a priori* action) will not constitute a contravention of any legal instrument or treaty.³²⁹ Physical violence against journalists is often orchestrated by those

³²⁵ Banjul Charter on Human and People’s Rights art 4; American Convention on Human Rights n 122 arts 4 9; European Convention for the Protection of Human Rights and Fundamental Freedoms art 2.

³²⁶ Banjul Charter on Human and People’s Rights art 5. American Convention on Human Rights art 5. The European Convention does not include the term “cruel” – European Convention for the Protection of Human Rights and Fundamental Freedoms art 3. International Covenant on Civil and Political Rights art 7.

³²⁷ Banjul Charter on Human and People’s Rights arts 4 5; American Convention on Human Rights arts 27(1) 27(2); European Convention for the Protection of Human Rights and Fundamental Freedoms art 15(2); International Covenant on Civil and Political Rights art 4(1).

³²⁸ “Arbitrary” is the term used by the Banjul Charter on Human and People’s Rights art 4; American Convention on Human Rights art 4(1); International Covenant on Civil and Political Rights art 6(1); The European Convention for the Protection of Human Rights and Fundamental Freedoms art 2(1) is more specific. “No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.” Mukherjee 1994 *Arizona Journal for International and Comparative Law* 356.

³²⁹ Mukherjee *ibid*.

who neither form part of the national government nor are bound to the treaties or signatories of the conventions and treaties protecting human rights. Frequently attacks on journalists are conveniently done with tacit approval of a state.³³⁰

“International law has not yet developed to the point where states have a positive obligation to investigate any allegations of gross violations of human rights said to have occurred under their jurisdiction. However, international human rights law is evolving toward a norm of definite requirement that states investigate all gross human rights violations within their jurisdiction and bring the offenders to justice.”³³¹

The United Nations Convention Against Torture³³² does not in particular protect journalists against torture or other form of physical abuse that is committed by a government official or instigated by such a government official, nor can terms and

³³⁰ *Ibid* 356. For assessment of press freedom around the world, see the annual Attacks on the Press reports by CPJ; the Reports by the Freedom House, Freedom in the World: The Annual Survey of Political Rights and Civil Liberties – 1992-1993 (1993) and the report by Article 19, Information, Freedom and Censorship: World Report 1991(1991). See also Committee to Protect Journalists, Attacks on the Press 1987-1993.

³³¹ In 1988 the Inter-American Court of Human Rights ruled in Velasquez Rodriguez that “An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention. [par 172]. Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane. [par 177].” (Velasquez Rodriques Case, Inter-Am. C.H.R., OEA/Ser.L/V/ii/79, doc. 12, rev. 1 (1991).

³³² Convention Against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment, adopted Dec.10, 1984, G.A. Res. 39/46, U.N. GOAR, 39th Sess., Supp. No 51, at 197, U.N. Doc A/39/51 [hereafter 1984 Convention Against Torture], gives a broad definition of “torture”. According to the Convention, “torture” means “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, intimidating or coercing him or a third person...” *Ibid* art 1. “By this definition, the criminal laws of many of the signatory states to the above four international instruments do not consider certain acts of “torture” as punishable offences, and thus, are in violation of international law.” Mukherjee 1994 *Arizona Journal for International and Comparative Law* 356.

regulations of the Convention be enforced against persons who commit such atrocities but are not under the effective control of the state.

The United Nations Convention Against Torture³³³ obliges each member nation “to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”³³⁴

It furthermore requires of each signatory state to have in place criminal legislation against attempts by any person who is related to the government, to inflict any type of torture³³⁵ to be punished according to the country’s criminal law system – “such actions must be punishable by appropriate penalties which take into account their grave nature.”³³⁶

5.4 Conclusion

From the historical analysis it has become clear that despite good intentions and various attempts by governments, NGOs and several commissions over a number of decades, no consensus could be reached on the creation of special measures to protect journalists reporting from war or conflict zones. Many people with good intentions have been promoting the protection of journalists but since no consensus could be reached it can be compared to a thunderstorm in a dry spell – a lot of thunder, wind and dust, rumbling but no rain – in effect, all the efforts have to a great extent been in vain.

It is suggested that more stringent measures should be taken by all countries for the basic enforcement of the current protocols discussed in this article –

³³³ 1984 Convention Against Torture.

³³⁴ *Ibid* art 2(1).

³³⁵ “However, according to the terms of the Convention, to be considered as ‘torture’, the act has to be inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person in an official capacity.” 1984 Convention Against Torture art 1(2).

³³⁶ *Ibid* art 4.

protocols that have been established for the protection of not only civilians but also journalists acting from these hostile environments.

Lastly, it is clear that for the enforcement of international human rights a permanent international tribunal should be created to deal with these ever present atrocities being committed against journalists. Furthermore signatories to Conventions should be held liable to enforce local criminal law proceedings to protect journalists acting within their national borders.

From the abovementioned chapters it is clear that journalists reporting from war zones need more protection than is currently offered to them. Chapter six discusses the actions taken by journalists' organisations and press freedom organizations to protect journalists reporting from these areas.

CHAPTER 6

JOURNALISTS AND NEWS ORGANIZATIONS TAKING THE PROTECTION OF JOURNALISTS INTO THEIR OWN HANDS

6.1 Introduction

This chapter deals with modern day television, radio and printed media news reporters who report from war and conflict zones. It is clear that since the Vietnam War through to modern day warfare and the “war on terror” several aspects of the news-gathering function of journalists and war correspondents have changed. Some of these aspects are the access of journalists to war or conflict zones, freedom of speech as well as freedom of movement and the right to human protection against cruel or inhumane torture. All of these aspects have changed the face of modern day war reporting – yet several obstacles still remain for both the military and the media to have an effective and conducive partnership.

With the “war on terror” and the first reports that were televised from New York on September 11th 2001, a new era of televised war reporting dawned. Both the military as well as the media had to create a situation where journalists, reporting from these war or conflict areas could be regulated and protected. More journalists rushed to areas where they were in constant danger, reporting on the newly started war between the Allied Forces³³⁷ and the so-called “terrorist”.

Several international news organisations are participating in the reporting of the ever continuing “war on terror” – embed programs are currently run by several news agencies such as Central News Network (CNN), British Broadcasting Corporation (BBC), Fox News Network, NBC, and CBS.

³³⁷ Examples of the Allied forces are the US, UK, Italy and Australia.

Since the beginning of the “war on terror”, an estimated 366 journalists have lost their lives in combat while reporting as embeds or freelance journalists from these conflict zones. The world as a whole should be united in protecting journalists who bring the truth to us, the viewers – sometimes paying the highest price – with their lives for a liberty that we so often take for granted.

6.2 Journalists protecting their own

The Committee to Protect Journalists (CPJ) was founded more than twenty years ago, primarily to fight for the rights and protection of these journalists. This organization documents individual press freedom abuses, produces daily news alerts and sends formal protest letters. They also publish a biannual magazine, *Dangerous Assignments* and an Annual survey called *Attacks on the Press*.³³⁸

Ten years ago the CPJ published a *Survival Guide* for all journalists covering the war in Yugoslavia, but much has changed in the world of war correspondence since then. Technology such as satellite telephone and other technology have greatly increased the number of journalists covering conflict situations. This has lead to an intensified competitive pressure amongst these journalists to take unwarranted risks to get the best story even if it means endangering their lives.

The report by the CPJ also includes information to help news gatherers obtain training, equipment and insurance policies. Additional information on safety principles and practices is being developed by a new International News Safety Institute, whose members include CPJ and other press freedom organizations, as well as media companies.³³⁹

It must, however, be said that no set of rules or training and no textbook will ever be able to guarantee any journalist’s safety. As press freedom organizations

³³⁸ Committee to Protect Journalists “On Assignment: covering the conflicts safely”. Test available at <http://www.cpj.org>.

³³⁹ *Ibid.*

worked with editors and others to compile a guide it was a frequent concern that some journalists might gain a false sense of security from the training courses or safety manual. It must hence be reiterated that these guidelines published by press freedom organizations can only attempt to minimize the risks, but never fully protect a journalist.³⁴⁰

The guideline lists the following as prerequisites with which all journalists must comply:

- Training – several companies offer “hostile-environment training” tailored for journalists;
- Biochemical Course – journalists covering conflicts with the possibility of biological, chemical or nuclear weapons should obtain proper training and gear to cope with such hazards;
- Protective gear – body armour and bulletproof vests. Journalists should however, remember body armour may not always stop all projectiles and serious bodily harm can still be incurred.
- Armoured vehicles – journalists working in a conflict zone should be provided with armoured vehicles by their employers.
- Health and life insurance – employers should provide for both life and health insurance in instances where journalists are reporting from a conflict zone.
- Vaccinations and first-aid kits – journalists should be advised about and provided with vaccinations before leaving to report from a conflict zone. First-aid kits should contain all basic sterilized products. A list of the most basic necessities is available from websites of press freedom organizations.
- Medical information – CPJ recommends journalists carrying blood-type identification as well as information of other medical conditions on their bodies.

³⁴⁰

Ibid.

- Medevac – this is an organization that provides for journalists in emergency situations. There are several Medevac operators but only three have an international service that can provide for an international evacuation.
- Staying in touch – it is advised that at least one person knows where a journalist is — preferably his supervising editor. Contact should also be made at least once every 24 hours if possible.
- Journalists covering a conflict zone should never carry any arms, or travel with someone carrying arms, since this could jeopardize a journalist’s status as being a neutral observer.³⁴¹

6.3 The *PAG* document – regulating the media and the military

Due to the amount of journalists already serving as embeds in these programs the US Secretary of Defence has released a document referred to as the *PAG*.³⁴² The cause and basis of the *PAG* document were to regulate the military – media symbiosis. The basis of the *PAG* document is to act as a guideline for journalists’ conduct while being part of the military battalion. The safety and other precautions set out in this document also serve as guidelines for military personnel.

The institution of this document regulating all journalists who participate in embed programs is to help both journalists and the military commanders in regulating every aspect pertaining to the news-gathering function of journalists while they are serving as embeds or while they are reporting from a war or conflict zone under the command of the military.

This document’s function is to create a safe environment for both journalists as well as military personnel with which these embed journalists would be stationed

³⁴¹

Ibid.

³⁴²

See par 3.8 of this dissertation for a discussion of the *PAG* document.

and to set out a basic set of rules for both camps that must be obeyed while serving under military command.

An embed program has the effect that a journalist who forms part of such an embed program will be pre-screened by the military before being accepted for such a program. Furthermore, all journalists participating in such programs are deemed to be members of the military or battalion and command under which they serve. Journalists are thus bound to the same commanding rules as soldiers. Every embed who does not comply to commands given to him by a commander or a superior will be evicted from the program and will not be allowed to return to such an embed program. It is argued that these measures are in place to protect not only the lives of the soldiers but also that of embeds themselves.

6.4 Freedom of movement

Though journalists' rights are protected by several modern day conventions as mentioned in chapter five, journalists' rights are not absolute.³⁴³ A journalist's right to movement and access to conflict and war zones can be restricted by both a government's refusal to access into the country or by the military unit of which it forms part.³⁴⁴

A government may also legally refuse a journalist's entry into its sovereign territory if such an alien legally admitted to the territory of a state is subject to the same legal regime governing the rights to freedom of movement as a citizen. The freedom of movement of journalists might be restricted and subject to the regulations provided by law, which are necessary to protect national security,

³⁴³ See freedom of expression, chapter three, right to physical protection, chapter five and freedom of movement chapter six.

³⁴⁴ The *PAG* document clearly states that if a journalist's life is in danger, or if the unit cannot accommodate a journalist on a mission or if the presence of a journalist might endanger the life or security of a unit of a military operation then the military commander may refuse to have the journalist accompany the unit on a mission.

public health or morals or the rights of freedom. There are no rules of law which preclude differential treatment of a foreign journalist on the ground that one of the valid derogation clauses requires.³⁴⁵

6.5 Denial of entry and the expulsion of journalists

6.5.1 Denial of entry

International legal norms do not in any way place a restriction on states in exercising their sovereign rights to deny an alien entry.³⁴⁶ This has the effect that any state may at any time expel any journalist from its sovereign territory if a national or international convention or law were to be broken.³⁴⁷

6.5.2 Expulsion of journalists

The African Charter, the American Convention, the ICCPR, and the European Convention,³⁴⁸ required that an alien legally admitted to the territory of the state only be expelled by virtue taken in accordance with the rule of law as provided by the abovementioned conventions.³⁴⁹

³⁴⁵ “The European Convention legitimizes restrictions on political activity of aliens by nothing that the Article 10, Article 11 and Article 14 shall not prevent signatory state from imposing restrictions on such activities.” European Convention for the Protection of Human Rights and Fundamental Freedoms, done Nov 4 1950, Europ. T.S. No. 5, art 16, 213 U.N.T.S. at 234. Mukherjee 1994 *Arizona Journal for International and Comparative Law* 361.

³⁴⁶ Under certain circumstances, refugees are the only exception, a fact not pertinent to journalists.

³⁴⁷ It is, however, not always the case that any law has to be broken as prerequisite for a journalist to be expelled from a country, negative commentary towards the government or negative reports regarding a country may also result in expulsion. An example of this type of expulsion can be found in Zimbabwe.

³⁴⁸ Banjul Charter on Human and People’s Rights; American Convention on Human Rights; International Covenant on Civil and Political Rights. The European Convention does not recognize the rights of an alien in the main document. The rights of an alien are contained in the optional Protocol 7 Extending the List of Civil and Political Rights, Europ. T.S. No. 117, 24 I.L.M. 435 [hereinafter referred to as Protocol 7].

³⁴⁹ See *ibid* art 1(1); Banjul Charter on Human and People’s Rights arts 12, 21 I.L.M. at 61; American Convention on Human Rights art 22(6), 9 I.L.M at 682; International Covenant on Civil and Political Rights 51, U.N.T.S. at 176. American Convention on Human Rights

6.6 Journalists protecting themselves

6.6.1 Charter for the safety of journalists in war zones

Despite the conventions and the *PAG*, several hundreds of journalists reporting from war or conflict zones are still killed each year. The statistics published annually by the Committee to Protect Journalists (CPJ) report that fifty-six journalists were murdered or disappeared during 2006 alone.³⁵⁰ Large press organisations have taken their own steps to protect journalists reporting from conflict zones, and before they can partake in the embed process. There is a published eight principle safety charter for journalists reporting from war or conflict zones.

The principles are:

- “Principle 1 – Commitment

The media, public authorities and journalists themselves shall systematically seek ways to assess and reduce the risk in war zones or dangerous areas by consulting each other and exchanging all useful information. Risks to be taken by staff or freelance journalists, their assistants, local employees and support personnel require adequate preparation, information, insurance and equipment.

art 22(6), 9 I.L.M. at 682; ICCPR art 13, 999 U.N.T.S. at 176; European Convention allow an alien, except where compelling reasons of national security otherwise require, to submit reasons against his or her expulsion and have the case reviewed by a competent authority. ‘National security’ and the interest of public order’ according to Protocol 7, European Convention for the Protection of Human Rights and Fundamental Freedoms art 1(2), 24 I.L.M at 435.

³⁵⁰ Take into account the number of journalists that have died or disappeared since the start of the “war on terror” campaign.

- Principle 2 – Free will

Covering wars involves an acceptance by media workers of the risks attached and also a personal commitment which means they go on strictly voluntary basis. Because of risks, they should have the right to refuse such assignments without explanation and without there being any finding of unprofessional conduct. In the field, the assignment can be terminated at the request of the reporter or the editors after each side has consulted the other and taken into account their mutual responsibilities. Editors should beware of exerting any kind of pressure on special correspondents to take additional risks.

- Principle 3 – Experience

War reporting requires special skills and experience, so editors should choose staff or freelance journalists who are mature and used to crisis situations. Journalists covering a war for the first time should not be sent there alone, but be accompanied by a more experienced reporter. Teamwork in the field should be encouraged. Editors should systematically debrief staff when they return so as to learn from their experiences.

- Principle 4 – Preparation

Regular training in how to cope in war zones or dangerous areas will help reduce the risk to journalists. Editors should inform staff and freelance journalists of any special training offered by nationally or internationally qualified bodies and give them access to it. All journalists called upon to work in a hostile environment

should have first-aid training. Every accredited journalism school should familiarise its students with these issues.

- Principle 5 – Equipment

Editors should provide special correspondents working in dangerous areas with reliable safety equipment (bullet-proof jackets, helmets and if possible, armoured vehicles), communication equipment (locator beacons) and survival and first-aid kits.

- Principle 6 – Insurance

Journalists and their assistants working in war zones or dangerous areas should have insurance to cover illness, repatriation, disability and loss of life. Media management should take all necessary steps to provide this before sending or employing personnel on dangerous assignments. They should strictly comply with all applicable professional conventions and agreements.

- Principle 7 – Psychological counselling

Media management should ensure that journalists and their assistants who so desire have access to psychological counselling after returning from dangerous areas or reporting on shocking events.

- Principle 8 – Legal protection

Journalists on dangerous assignments are considered civilians under Article 79 of Additional Protocol I of the Geneva Convention, provided they do not do anything or behave in any way that might

compromise this status, such as directly helping a war, bearing arms or spying. Any deliberate attack on a journalist that causes death or serious physical injury is a major breach of this Protocol and deemed a war crime.”³⁵¹

6.6.2 Insurance

Special insurance policies are provided for all journalists including freelance journalists during their coverage of war or conflict situations.³⁵² These policies vary in liability, claim and amount claimed for damage or loss of life during a journalist’s period of reporting in a conflict zone that may be claimed from the insurer.³⁵³

6.6.3 Preparing to report from the battlefield

The Institute on Political Journalism (IPJ) has offered a handbook entitled *On assignment: A guide to reporting in dangerous situations*. The organization recommends that it is not only read by those journalists in the field who cover dangerous assignments. This manual should also be read by managers of media corporations who send journalists on these assignments. It is said that the safety of the journalist should be paramount to all managers of news organizations, even if it means the discouraging of unwanted risk-taking by journalists. The acceptance of assignments to war-zones or other hostile environments should also be made voluntary and proper training should be provided. The need for security training is stressed as well as adequate insurance.³⁵⁴

³⁵¹ Published by Reporters Without Borderers. Available at http://www.reseaudamocles.org/rubrique.php3?id_rubrique=402.

³⁵² Specific provisions are also made for special insurance policies in association with the French insurance company Bellini Prévoyance, in partnership with ACE insurance group. These insurers are offering cut-price covering to freelance journalists and photographers on assignment anywhere in the world. Policy available at http://www.reseaudamocles.org/rubrique.php3?id_rubrique=402.

³⁵³ *Ibid.*

³⁵⁴ Miller “LA Times goes to war” *LA Times* (16 March 2004).

Three major news broadcasters and two major TV news agencies have joined together to establish common guidelines for their journalists working in war zones.

CNN, BBC, ITN, Reuters and APTN, have published their joint code of practice at the News World Conference in Barcelona.³⁵⁵

Not only did these press organizations agree on a code of practice to protect journalists in the field but they also agreed regularly to share safety information and to work with other organisations, including international agencies, to safeguard journalists in war zones and other dangerous environments.³⁵⁶

The speaker on behalf of the group was Richard Sambrook, Deputy Director of BBC News. The agreement between the news agencies represented an unprecedented co-operation between competitors in the broadcast news industry to try and protect all journalists, staff and freelance journalists working in dangerous conditions. Their aim was to limit the risk and to take responsibility for anyone working on their behalves in war zones or hostile environments. All of the parties signed up to these principles and agreed that safety could never be a competitive issue.

Several guidelines were set during this meeting. They were:

- “The protection of human life and safety is paramount. Staff and freelances should be made aware that unwarranted risks in pursuit of a story are unacceptable and such risks must be strongly discouraged. Assignments to war zones or hostile environments must be voluntary and should only involve experienced newsgatherers and those under

³⁵⁵ This conference was at the Fira Palace Hotel, 16th November, Frontline Session and Journalists in Peril. See The Freedom Forum, available online at www.freedomforum.org.
³⁵⁶ *Ibid.*

their direct supervision.

- All staff and freelance journalists asked to work in hostile environments must have access to appropriate safety training. Employers are encouraged to make this mandatory.
- Employers must provide efficient safety equipment to all staff and freelance journalists assigned to hazardous locations, including personal issue kevlar vests/jackets, protective headgear and properly protected vehicles if necessary.
- All staff and freelance journalists should be afforded personal insurance while working in hostile areas, including cover against death and personal injury.
- Employers are to provide and encourage the use of voluntary and confidential counselling for staff and freelance journalists' returning from hostile areas or after the coverage of distressing events. (This is likely to require some training of managers in recognition of the symptoms of post traumatic stress disorder).
- Media companies and their representatives are neutral observers. No members of the media should carry a firearm in the course of their work."

The organisations agreed to work together to establish a databank of information, including the exchange of up to date safety assessments of hostile and dangerous areas. Their aim as broadcasters would be to safeguard journalists in the field.³⁵⁷

³⁵⁷

Ibid.

6.7 Conclusion

It is clear from the abovementioned that journalists' lives are in great danger when reporting from a war or conflict zone. It is furthermore clear that the right of journalists to enter a country is not an absolute right and that journalists are often at the mercy of a national government.

The press freedom organizations, press organizations and journalists have to continue their efforts to protect the interest of journalists. These organisations have set a standard for journalists to follow – with the aim to protect and guide journalists while reporting from a war or conflict zone. These guidelines can, however, only be deemed helpful as long as journalists follow the rules of engagement and try to secure their own safety.

CHAPTER 7

CONCLUSION: SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

It is clear from the abovementioned discussion that the “war on terror” has left a leaping hole in the military law. It is argued by many that the current humanitarian law is neither broad enough nor does it cover the new forms of conflicts adequately. This in theory calls for the expansion of the concept of “armed conflict”, or the expansion of the scope of the application of humanitarian law beyond that of “armed conflict”.³⁵⁸ However tranquil the symbiosis between the media and the press might seem this has not always been the situation as is clear from the discussion in chapter three dealing with the development of war reporting.³⁵⁹

The conventional term of “war” and “armed conflict” and the application of the Geneva Convention, regarding the protection of journalists reporting from “war” or “conflict zones” have been altered by the terror attacks of September 11, 2001. These attacks have led to a debate whether the terms “war” and “conflict” were still applicable and whether the Geneva Convention rendered sufficient protection for journalists reporting from these “conflict zones”. It was found in chapter two that many scholars claim that the current humanitarian and international military law does not encompass the war on terror in its current rhetorical sense.³⁶⁰

³⁵⁸ Gabor 2003 *The Fletcher Forum of World Affairs* 63. See in general the discussion of this topic in chapter two.

³⁵⁹ See chapter three in general.

³⁶⁰ See in general chapter two.

The principle of *lex specialis* of humanitarian law is as prominent an element as ever, however the prohibitions are more narrowed and humanity is denied some cardinal fundamental rights provided by this and other legal regimes.³⁶¹

Yet with all of the above taken into consideration the limits and boundaries of the humanitarian and military law are well drawn up and set out. It is argued that there is no reason why the “war on terror” should be dealt with in any other manor than the regular conventional way of “intra” and “international conflicts”. The provisions made by these regimes are adequate to deal with the “war on terror” within its provisions.³⁶²

From the historical analysis in chapter three³⁶³ it is clear that the press and the military have struggled to reconcile their diverse interests. During the Gulf War the military gained the upper hand in the struggle by implementing two regulatory schemes; the first being prepublication review of news stories, and the second, pool system. The Pentagon’s strategy of applying prepublication review, was clearly contrary to the free flow of information as encapsuled in the First Amendment and yet, there has been an absence of lawsuits challenging the constitutionality of this type of prior restraint. There has, however, been a lawsuit regarding the Gulf War’s Press regulations³⁶⁴ that challenged the pool system, which resulted in part from the exclusion of small or non-mainstream publications from the pools.³⁶⁵ When comparing these two regulatory schemes, it is clear that the pool system was a greater hindrance to effective reporting than prepublication review since the pool system placed a definitive cap on the supply of news while prepublication review tended mainly to delay publication.³⁶⁶ The facts of each military engagement differs and it is therefore impossible for a court to fashion a remedy describing the press’s participation in future conflicts. Courts

³⁶¹ See chapter two par 2.5.

³⁶² See chapter two par 2.6.

³⁶³ See chapter three in general.

³⁶⁴ See chapter three par 3.8.

³⁶⁵ *The Nation Magazine v US Department of Defence* 762 F Supp 1558 (SDNY 1991); Jacobs 1992 *Stanford Law Review* 724. See also in general chapter three par 3.10.

³⁶⁶ *Ibid.*

may be reluctant to declare rights of access to the press in military scenarios beyond those of the general public. Unless an access restriction is patently unreasonable, it would seem that a constitutional challenge would be unsuccessful.³⁶⁷ Instead of relying on legal protection, the media should attempt to negotiate a favourable agreement.

The institution of the *PAG* document³⁶⁸ and the effects thereof have led to a more structured and reliable relationship between the media and the military. It remains to be seen how the effects of current media and military relations will be upheld during the course of the anti-terror operations. There is however, no doubt, that the media and military are in a symbiotic relationship and that the regulatory measures of the *PAG* can only bring forth a situation of more trust and better interaction between these two organisations, which in turn will lead to greater freedom of access to battlefields and “combat zones” for reporters, as well as less censoring of journalists’ articles. While access to battlefields can be useful for informing the public, it also creates the risk of manipulation of news through censorship. It might be argued that, even if censorship is a possible consequence of the demand for access, access with censorship is always preferable to no access at all since it creates the opportunity to obtain more information than would otherwise have been available. The greater the free flow of information, the better informed the world will be – a win-win situation for all.³⁶⁹

The Geneva Convention and its Protocols as discussed in chapter four did not anticipate the “war on terror” yet a balance can be struck between humanitarian law, military law and national legal regimes.³⁷⁰ Not only does civil, human rights and the rule of law independently protect a country’s legal citizens but also does

³⁶⁷ *Ibid* 726.

³⁶⁸ See chapter three par 3.9 and par 3.10.

³⁶⁹ *Ibid*.

³⁷⁰ See chapter four in general.

it make provision for the protection of its civilians and journalists caught in a “conflict” or “war zone”.³⁷¹

With the several types of conflict and the “war on terror” still raging in the Middle East it is important to analyse the attempts made to protect journalists reporting from “conflict zones”. In chapter four an analysis was made of Conventions and commissions that have been held during the past few decades to protect journalists reporting from “conflict zones”.³⁷²

It is argued by the author hereof that a *sui generis* category should be instituted to fully deal with the “war on terror” and the effects thereof, for example, trials and tribunals should be established to deal specifically with acts of “terror” and the contravention of any of the Conventions mention in chapters four and five.³⁷³

The historical analysis discussed in chapter four leads one to conclude that despite the dire need for the protection of “journalists” and the many attempts to address the issue of protecting newsgatherers covering war or conflict zones, little has been achieved over the years, with regards to their protection. In fact, the approach of the various international organizations seems disjointed and there is a lack of clarity in respect of the definition of the problem.³⁷⁴

It is clear from chapter four that the attempts made throughout the past few decades have not been sufficient to protect journalists reporting from conflict zones. Chapter five discusses the additional conventions that have been introduced to protect journalists reporting from a conflict or hostile zone.³⁷⁵

From the historical analysis it has become clear that despite good intentions and various attempts by both governments, NGOs and several commissions over a

³⁷¹ See chapter two par 2.8.

³⁷² See chapter four in general.

³⁷³ Chapter two par 2.8.

³⁷⁴ See chapter four in general.

³⁷⁵ See chapter five in general.

number of decades, no consensus could be reached on the creation of special measures to protect journalists reporting from “war” or “conflict zones”. Many people with good intentions have been promoting the protection of journalists, but since no consensus could be reached their efforts have to a great extent been in vain.

It is suggested by the author hereof that more stringent measures should be taken by all countries for the basic enforcement of the current protocols discussed in this dissertation – protocols that have been established for the protection of not only civilians but also journalists acting from these hostile environments.³⁷⁶

Lastly it is clear that for the enforcement of the international human rights a permanent international tribunal should be created to specifically deal with these ever present atrocities being committed against journalists. Furthermore it is suggested by the author hereof that the principles of *usus* and *ius cogens* should be enforced as well as conventions on all states whether they are signatories or not to enforce the protection of journalists reporting from a conflict zone.³⁷⁷ States should be held liable to enforce local criminal law proceedings to protect journalists acting within their national borders.³⁷⁸

It is furthermore clear from the abovementioned chapters³⁷⁹ that journalists reporting from “war zones” need more protection than is currently offered to them. Chapter six discusses the actions taken by journalists’ organisations and press freedom organizations to protect journalists reporting from these areas.³⁸⁰

The press freedom organizations, press organizations, NGOs, governments and journalists have to work together to protect the interest of journalists as

³⁷⁶ See chapter five par 5.3.

³⁷⁷ See chapter five par 5.1 and par 5.3.

³⁷⁸ See chapter five par 5.3.

³⁷⁹ See chapters two, four and five.

³⁸⁰ See chapter five.

mentioned in chapter six. These organisations have set a standard for journalists to follow – with the aim to protect and guide journalists while reporting from a “war” or “conflict zone”. These guidelines can however only be deemed helpful as long as journalists follow the rules of engagement and try to secure their own safety.³⁸¹

We as jurists have through the past decades relied on journalists to bring us the most important news from every corner of the world, sometimes these journalists are working in life threatening situations as they bring the truth from the “war” or “conflict zone”, yet we as jurists have failed our reliable news sources — the journalists, in providing them with adequate protection when reporting from these hostile or “conflict zones”. It is clear that the attempts made were not sufficient to protect journalists reporting from “conflict zones”. It is therefore our duty to protect this asset – newsgatherers/journalists.

It is submitted by the author that there is a need for the creation of a convention to protect journalists reporting from “war” or “conflict zones” and to provide for adequate and sufficient powers to punish those that do not adhere to the convention within the criminal system of the international humanitarian law. The hands of the ICC³⁸² are only as strong as the legislation and conventions through which it may act.

As a member of the AU and the UN, South Africa has become increasingly more involved in not only the reporting on conflict and hostile situations in Africa, but also at an international level.³⁸³ This has resulted in more awareness regarding the often precarious situation of South African and other journalists who are left with little or no protection while working around the globe in an effort to bring in-depth stories of what is happening in these hostile or conflict zones. This contentious issue is discussed in the chapter, which deals with the historical

³⁸¹ See chapter six.

³⁸² International Criminal Court.

³⁸³ See par 3.1.

development of war reporting and the various levels of censorship that have taken place. These protective measures discussed above are also applicable to South African journalists reporting in war times or from “conflict zones”. These protective measures and recommendations regarding acts of human rights abuses will henceforth also apply to and be to the advantage of South African journalists reporting from “conflict zones”.

“The principles of reporting are put to a severe test when your nation goes to war. To whom are you true? To the principles of abstract truth, or to those running the war machine; to a frightened or perhaps belligerent population, to the decision of the elected representatives in a democracy, to the exclusion of the dissenting minorities, to the young men and women who have agreed to put their lives at risk? Let me put the question with stark simplicity: when does a reporter sacrifice the principle of the whole truth to the need to win the war?”³⁸⁴

³⁸⁴ Adie K, BBC war correspondent, Allan & Zelizer *Reporting war – journalisms in wartime* (2004).

LIST OF ABBREVIATIONS

AP	Additional Protocol
APTN	Associated Press Television News
AU	African Union
ASEAN	Association of South East Asian Nations
BBC	British Broadcasting Corporation
CA	Common Article
CAJ	Confederation of Journalists
CBS	Columbia Broadcasting System
CNN	Central News Agency
CPJ	Committee to Protect Journalists
<i>et seq</i>	<i>et sequitur</i>
FCC	Federal Communications Commission
FELAP	Latin American Federation of Journalists
GC	Geneva Convention
GWOT	Global War on Terror
<i>Ibid</i>	<i>Ibidem</i>
ICC	International Criminal Court
ICJ	International Commission of Jurists
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
IFJ	International Federation of Journalists
IPI	International Press Institute
ITN	International Television News
NBS	National Broadcasting Society
NGO	Non Governmental Organization
PAG	Public Affairs Guidance
POWs	Prisoners of War

UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UN	United Nations
US	United States of America

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