

INTERNATIONAL HUMANITARIAN LAW AND THE PROTECTION
OF MEDIA PERSONNEL

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I. INTRODUCTION

Journalism is a risky occupation. At home, a journalist may be subjected to legal proceedings for defamation, obscenity, blasphemy, sedition or breach of the obligation of confidence. A journalist may be required, against ethical rules, to disclose confidential sources of information.¹ Alternatively, a prosecution may be brought for contempt of court or criminal defamation.² As a result of such brushes with the law, a journalist may lose sleep at night, reputation, money, or (in extreme cases) liberty.

But these perils pale into comparative insignificance when contrasted with the risks journalists run in time of war or armed conflict. In such times, journalists may become targets, lose their lives or suffer serious bodily injury. They may do so simply because the occupation takes them to a dangerous place. Sometimes they may suffer because of ill considered or foolhardy conduct. All too frequently, and especially in times of civil unrest, journalists may become targets, by the very virtue of their profession. Those who bring bad news, or are seen as playing an adverse role in the propaganda battle so essential to modern warfare, sometimes become the enemy. In the case of journalists, they do not suffer attacks because of the clothes they wear or the

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1 See Australian Law Reform Commission, *Evidence*, Interim Report Vol. 1, 1985 523 *Cf P.G. Shurn and J.Y. Parker*, "Reporter's Privilege — Guardian of the People's Right to Know?" 11 *N Eng L Rev* 405 (1976).

2 See *eg Registrar of the Court of Appeal v. Willseer* [1985] 3 NSWLR 650.

appearance they present. Nor may their misfortunes be traced to things they see which combatants feel ought not to be seen. Their special vulnerability arises because of their occupational duty to investigate controversial matters and to communicate their findings quickly and to many persons. With the new technology of informatics, the ability to communicate news and information has increased enormously. The new technology has increased at once the influence and vulnerability of the journalist.

There are reported cases of journalists who have entered war and combat zones as armed mercenaries, regarding reporting as a minor sideline of their involvement. For the most part, however, journalists are noncombatant civilians. Their assertion of the privilege to see and report is not always appreciated by those who would prefer, for whatever reason, secrecy or control of information. Likewise, those societies indifferent or hostile to the notion of the independent reportage of information (or critical of what they see as the biased and orchestrated reportage of news) react unsympathetically to such journalistic assertions of right.

The purpose of this essay is to trace the developments for the protection by international law of journalists and reporters engaged in war and combat zones. Wider questions, such as the particular obligations of journalists in the special dangers of the nuclear age and the impact of journalism on the capacity of liberal democracies to engage in conflict, are beyond the scope of this review. Its purpose is principally historical and descriptive. Just as the new technology of communications has radically altered the function and influence of the journalist, technology has also altered the nature of war and conflict. As well, developments have been occurring in International Humanitarian and Human Rights Law which have relevance to the protection of journalists. It is intended first to sketch generally the relevant branches of International Humanitarian Law; then to outline developments critical for the protection of journalists. Finally, a few general conclusions will be drawn.

II. INTERNATIONAL HUMANITARIAN LAW

International humanitarian law has been defined as that considerable portion of international law which owes its inspiration to "a feeling for humanity" and which is "centred on the protection of the individual".³ Alternatively it has been described as "those rules of international law which aim to protect persons suffering from the evils of armed conflicts as well as, by extension, [from] objects not directly serving military purposes for them".⁴ Either definition will suffice for present purposes.

International humanitarian law may conveniently be seen as comprising, in distinct branches, the law of war and of human rights.⁵ The law of war is, in turn, comprised of two major bodies of law, namely the law of the Hague and the law of Geneva. The former regulates hostilities from the conduct of military operations and is properly referred to as the law of War. The law of Geneva protects those no longer able to fight, "hors de combat", such as the sick and wounded as well as noncombatants. Also properly referred to as humanitarian law is that law which has been and is being developed by the International Committee of the Red Cross (ICRC). This law is sometimes known as the law of the Red Cross.

The law of war, which has its application in defined circumstances, has been much widened in recent years. However, by its nature it is not intended to apply at all times. Human rights law, on the other hand, seeks to guarantee fundamental rights at all times. Inevitably, human rights law will have its fullest expression in times of peace. This is especially so as the rules of human rights law often themselves provide, in terms, for derogation in times of emergency or conflict. It is in such situations that international humanitarian law, increasingly applies.

The principal promoter of international humanitarian law is the United Nations Organisation (UNO). A branch of international humanitarian law which tends to be more ideological and more politicised is that relating to human rights. UNO is keenly interested itself in the development of human rights law. The Universal Declaration of Human Rights and the International Covenants, including the International Covenant on Civil and Political Rights are increasingly well known. Their development has occurred in political *fora*. Their enforcement is, generally speaking, dependent upon the initiatives of member states of the United Nations.

On the other hand, the ICRC, in developing the law of the Red Cross has tended to be more concerned with the suffering of the victim of conflict. Intercession with governments on behalf of victims is rarely made public. An ideal of political neutrality, though not always achievable, has been aimed at by the ICRC. Writing in 1962 on a contemporary look at the International Committee of the Red Cross, A. Francis-Poncet declared:

At present in all the world there is only one authority which is not mistrusted by anyone, and whose impartiality, neutrality and loyalty are recognized by all, ie. the ... ICRC.⁶

Recent developments concerning the expulsion of South Africa from the ICRC may have strained the acceptability of that assertion in some quarters. But, generally speaking, the ICRC has earned a high international reputation both for humanitarian works and for the development of humanitarian law. It is therefore significant to examine the way in which ICRC, and other bodies, became interested in the special issue of the protection of journalists in time of war and conflict.

³ J. Fictet, "The Principles of International Humanitarian Law" (1966) 6 *International Review of the Red Cross* (No. 66) 455.

⁴ S.E. Nahlak, "A Brief Outline of International Humanitarian Law" (1985) 25 *International Review of the Red Cross* (No. 246) 187.

⁵ Note *J supra*, 11.

⁶ A. Francois-Poncet cited in M. Petitpierre, "A Contemporary Look and the International Committee of the Red Cross" (1971) 11 *International Review of the Red Cross* (No. 119) 63.

III. PROTECTION OF JOURNALISTS — EARLY DEVELOPMENTS

For practical purposes, the starting point for the protection of journalists by international law can be traced to the Civil War in the United States. In April 1863, President Lincoln authorized the Lieber Instructions which were binding on the armed forces of the United States during the Civil War. These Instructions, constituted the first attempt to codify the then existing laws of war. Notably, Article 50 provided, in part:

... Citizens who accompany an army for whatever purpose, such as sutlers, editors or reporters of journals, or contractors, if captured may be made prisoners of war, and be detained as such. (Emphasis added).

It is perhaps understandable that it was in the United States of America, seventy years after the adoption of The Bill of Rights with its special promises of freedom of the press and freedom of expression in the First Amendment, that attention should first have been paid to the particular protection of editors and reporters.

In the same year, 1863, following the publication by Henry Dunant of Geneva of his "*A Memory of Solferino*", describing the plight of almost 40,000 soldiers left wounded in a battle of fifteen hours, most of them with no medical assistance, there occurred the first meeting in Geneva of the International Committee for the Relief of the Wounded. By 1875, that Committee became known as the International Committee of the Red Cross. To this day it is a Swiss organization, although it has increasingly taken on an international character.

In 1864, a diplomatic conference adopted the Geneva Convention of that year. The preliminary work for the Convention had been done by the predecessor to the ICRC. The Convention adopted the 1863 resolutions, the chief provisions of which were the recognition of the neutrality of medical services and the provision of relief to the wounded, without distinction. Specification of medical services as a category deserving a particular and distinct treatment in time of war began the categorisation which has been expanded ever since. It provided the basic idea for distinguishing combatants and noncombatants in an international convention. Once that idea was accepted, the issue of its expansion (as for example to include journalists) was one of legitimate international debate.

In 1868 the Declaration of St Petersburg renounced the use of lightweight, exploding bullets. As the first prohibitory declaration, it is now seen as the forerunner of the law of the Hague. The outbreak of the Franco Prussian war in 1870 led to moves by the ICRC to establish an agency in Basel in order to assist in the exchange of prisoners of war in that conflict. The 1864 Convention had not mentioned them. But treatment of their predicament, by analogy to that of the wounded was a natural extension.

In 1899, twenty-six governments met in the first Hague Peace Conference. They adopted three conventions and three declarations. In the Convention with respect to the Laws and Customs of War on Land (II), extensive

provision was made relevant to prisoners of war. Article 13 of the convention provided in terms relevant to journalists and in language plainly derived from Article 50 of the United States Instructions:

Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers, contractors, who fall into the enemy's hands and whom the latter think fit to detain, have a right to be treated as prisoners of war, provided they can produce a certificate from the military authorities of the army they were accompanying.

It is to be noted that the protection is strictly limited. It is not available for freelance journalists. It is available only to those who "follow" the army. Then, it is protective only of their status if captured. Finally, it is contingent on the production of an authority which demonstrates their authorisation by the military which they are accompanying.

The same convention incorporated the provisions of the 1864 Geneva Convention and provided limited protections to civilians. The way in which conventions were developed by processes of analogous reasoning can be clearly seen even from this brief historical review.

In 1906, the Geneva Convention of that year replaced the convention of 1864. As well as for the wounded, protection was extended to the sick. In 1907, the second International Peace Conference was held at the Hague. Convention X extended the Geneva principles to warfare at sea. Convention IV differed very slightly from Convention II of 1899.

With the outbreak of the First World War, the humanitarian mission of the ICRC was extended enormously. In 1918 the Committee expanded its assistance to prisoners of war and arranged the first visits to political detainees. As in the 1870 Franco Prussian War, the focus of the Red Cross was on individual moves to relieve suffering and this even where a specific mandate in international law had not yet been established.

In the wake of the end of the Great War, numerous writers suggested an expansion of humanitarian law. In 1929, forty-seven governments attended the diplomatic conference in Geneva. The purpose was to revise the 1906 Geneva Convention and to adopt a comprehensive convention relating to prisoners of war. The result was the two Geneva Conventions of 1929. Article 81 of the "Convention relative to the Treatment of Prisoners of War" provided:

Persons who follow the armed forces without directly belonging thereto, such as correspondents, newspaper reporters, sutlers, or contractors, who fall into the hands of the enemy and whom the latter think fit to detain, shall be entitled to be treated as prisoners of war provided they are in possession of an authorisation from the military authorities of the armed forces which they were following.

Journalists continued to be dealt with as part of an anomalous category of persons following an armed force but not belonging to it. The Geneva Conventions offer no protection to journalists, as civilians. Unless accredited by the military, they were not entitled to be treated as prisoners of war. Such was the state of international law when the Second World War began.

After the Second World War, the first International Red Cross Conference was held in Stockholm, Sweden, in 1948. Under discussion were new drafts

of the 1929 Geneva Conventions which had been drawn up by the ICRC. A new draft for the protection of civilians was also considered. In 1949, sixty-three governments attended a diplomatic conference in Geneva. Four conventions were adopted. The first dealing with the wounded and sick of the armed forces, replaced the 1929 Geneva convention. The second, closely followed the first in dealing with the wounded, sick and shipwrecked at sea. It replaced the Hague Convention X of 1907. The third, dealt with prisoners of war, replacing the 1929 convention. The provision relative to journalists which had been contained in the 1929 version was repeated, with some variation, in article 13 (4) of Conventions I and II. Again, the precondition of accreditation by the armed forces was required to attract to "war correspondents" the status of prisoner of war. For the first time reference was made to the provision of an identity card provided by the armed forces to the civilian war correspondent. Like a soldier's uniform it created the presumption of entitlement to prisoner of war status.⁷

The fourth convention adopted in 1949 dealt with the protection of civilians in time of war. It was new, in that, before 1949 the Geneva Conventions had dealt exclusively with combatants.

It will be observed that the Geneva Conventions represent the centrepiece of International Humanitarian Law developments. Within a very few years of their adoption, the ICRC was making further proposals for change. In part these derived from the pace of developments in the field of military technology. In part, they could be traced to the number of international conflicts conducted as undeclared wars. So far as journalists were concerned, it was plain that the treatment of their protection was inadequate at this stage on a number of grounds, including the following:

- (1) The conventions applied only to international armed conflicts, as made plain by common article 2. The only extension, and that of debatable application, was in common article 3 which applies minimum standards of humane treatment to non international armed conflicts occurring in the territory of a party to the convention. By that article, murder, torture and degrading treatment, among other acts, are prohibited;
- (2) The protections specifically given to journalists applied only after capture. The only protection given to them against the effect of hostilities was limited, being embodied chiefly in the Hague conventions applicable to civilians; and
- (3) Only those journalists who had received armed forces' authorisation were covered. Independent and freelance journalists were left completely unprotected as such.

⁷ H.F. Gasser, "Protection of Journalists Engaged in Dangerous Professional Missions" (1983) 23 *International Review of the Red Cross* (No.232) 3, 5.

IV. SPECIFIC INITIATIVES

The modern moves for specific and particular protection to journalists in time of war or armed conflict date, in earnest, from the mid 1950s. Attitudes of governments, even in the traditional democracies, had been ambivalent so far as independent journalists were concerned. The coverage of the charge of the Light Brigade in 1854 by the first accredited war correspondent of the London *Times*, Howard Russell, caused severe embarrassment to the British Government at the time. The widespread coverage of the Civil War in the United States led to the suggestion by Union General Irwin McDowell that journalists should wear a white uniform "to indicate the purity of their character". It is not entirely clear that the suggestion was not made for an ulterior purpose. During the First World War, the French and German military authorities banned journalists from operations on their fronts. The British, on the other hand, used war correspondents and frequently made them officers. The consequence was inadequate reporting of some campaigns and a generally uncritical review of military efforts including a virtually total failure adequately to cover the attrition to the British armies at Gallipoli and on the Somme. In the Second World War, it has been estimated that some thirty-nine full time professional journalists were killed carrying out their professional duties. All major parties in that war were alert to the propaganda value of war reporting. By the time of the Korean War, in which three United States journalists were killed whilst covering the campaign, the role and importance of the journalist (and his consequent entitlements) were increasingly recognised.

In the light of the death or disappearance of journalists in various operations in South Asia and Africa in the 1950s and 1960s the International Federation of Editors in Chief at their congress in Lisbon, Portugal, in 1957 considered specifically the issue of journalist protection. Accepting that the problem had a global dimension, they referred the matter to the International Commission of Jurists. The Secretary General of that Commission at the time (Sean MacBride) reported his conclusion:

My experience is that whenever journalists are killed, arrested or kidnapped there is a general public outcry for a time. Governments are then willing, and even enthusiastic, for a time, in support of efforts which promote an international convention. However, once the original shock and horror which accompanies the killing or disappearance of journalists passes, the enthusiasm for remedial action begins to wane; the problem is then relegated to the 'lost property compartment' of government interest ... until the next episode or tragedy.⁸

In 1968 the International Conference on Human Rights met in Teheran, Iran. The conference called for the better application of humanitarian law principles and for a revision of existing conventions for the protection of civilians, combatants and prisoners. By resolution 2444 (XXIII session), the General Assembly of the United Nations affirmed the Teheran resolution

⁸ S. MacBride, *The Protection of Journalists*, International Commission for the Study of Communication Problems, Document No.90, 18.

and invited the Secretary General to study the need for a further international humanitarian convention, including in consultation with the ICRC.

Coinciding with these developments, the International Federation of Editors in Chief adopted the Montecatini draft convention dealing with the specific subject of journalist protection. Although not accepted internationally, this instrument proved influential in the development of subsequent proposals. The preamble noted the inadequacy of the Geneva Convention protections for journalists. The operative clauses proposed the creation of an International Committee for the Protection of Journalists on Dangerous Missions, its members to be selected by the Secretary General of the United Nations from a list submitted by international press associations. Also proposed was the issuing of status cards to journalists and the registration of journalists assigned to dangerous missions with the Committee. The identification by an emblem was also proposed. The draft convention envisaged that the Committee would intercede on behalf of journalists who had been captured or were in danger.

A further impetus to international concern occurred in 1970 following the disappearance of seventeen foreign journalists in Cambodia. The International Press Institute (IPI) convened two meetings. At one of these, it was recommended that an International Professional Committee for the Safety of Journalists be established. This committee would issue safety cards to journalists and keep a file of those on dangerous missions. Neither the Montecatini draft convention nor the late initiative of the IPI had much immediate impact, because of the private nature of both initiating bodies.

It was at this time, that Mr Maurice Schumann, the French Minister for Foreign Affairs made a speech to the General Assembly of the United Nations in which he urged the Organisation to take the lead in protecting journalists on dangerous missions. It was widely reported that Mr Schumann was influenced in this regard by a family member who was a journalist. Responding to this speech, the Secretary General of the UNO made an appeal on behalf of the journalists missing in Cambodia. The General Assembly passed resolution 2673 (XXXV) on the "Protection of Journalists engaged in Dangerous Missions in high areas of Armed Conflict". The resolution called in aid the four Geneva Conventions of 1949. It noted that they neither covered all categories of journalists nor sufficed for their present needs. It reaffirmed one of the basic principles of international humanitarian law in armed conflict namely "... that the distinction must be made at all times between combatants and persons not taking part in hostility". It elaborated the importance of the journalist in the modern situation of war or armed conflict and concluded:

That it is essential for the United Nations to obtain complete information concerning armed conflicts and that journalists, whatever their nationality have an important role to play in that regard Journalists engage in missions in areas where an armed conflict is taking part sometimes suffer as a result of their professional duty which is to inform world public opinion objectively.

In consequence the Economic and Social Council of the United Nations (ECOSOC) was invited to request the Commission on Human Rights:

... to consider ... the possibility of preparing a draft international agreement ensuring the protection of journalists engaged in dangerous missions and providing *inter alia* for the creation of a universally recognised and guaranteed identification document.

In 1971, stimulated by this resolution, the Human Rights Commission of the United Nations adopted a preliminary draft international convention. The purpose of the convention, as recorded in the report of the Secretary General to the General Assembly was:

Without prejudice to the application of the Geneva Conventions [of 1949] [to] guarantee for all categories of journalists, in view of the present day requirements of their profession, effective protection when they carried out dangerous missions. The commission stated its conviction of the urgent need to examine that question both on humanitarian grounds and in order to enable journalists with due respect for the law, to seek, receive and impart information fully, objectively and faithfully in the spirit of the purposes and principles of the United Nations Charter and the Universal Declaration of Human Rights and in particular article 19 of the Declaration concerning freedom of information.⁹

A comparison between the Montecatini draft and the preliminary draft of The Human Rights Commission is instructive. The former reflects the self interested professional view of the need for the widest protections. The latter bears the stamp of political compromise amongst representatives of countries having very different attitudes to the role of the press and the privileges of journalists. For example, the issue of safety cards under article 7 of the Montecatini draft envisaged their receipt by "all journalists registered by the employer publications". Under the protocol of the draft United Nations convention the professional committee was empowered to issue such cards in favour of *bona fide* journalists of *bona fide* news organisations and the committee would determine for both if they were *bona fide*. The United Nations draft envisaged the protection of journalists only to the same extent as the journalists of the state in question, whereas the Montecatini draft promised statutory guarantees of freedom from arrest, imprisonment and harassment. There were many other differences. Reaction to the preliminary United Nations draft was mixed. France urged adoption. The United States questioned the value of the standard of protection offered.¹⁰

These developments coincided with the initiation of relevant moves in the United Nations Economic, Scientific and Cultural Organisation (UNESCO) concerning "mass communications policies". As well, a conference of government experts on the reaffirmation and development of international humanitarian law was convened by the ICRC in Geneva in mid 1971 and 1972. The majority of participants at these meetings favoured the principle of

⁹ United Nations Organisation, General Assembly, Report of the Secretary General A/8371, 15 September 1971, 5.

¹⁰ M.A. Young, "Journalists Precariously Covered Covering the Globe: International Attempts to Provide for their Protection" 23 *Va Int'l L* 135 (1982); A.M. Ruikowski, "More on the 'New World Information Order'" 67 *Am Bar Assoc J* 1274 (1981); L.J. Theberge, "UNESCO's 'New World Information Order': Colliding with First Amendment Values" 667 *Am Bar Assoc J* 71 (1981).

including special protection for journalists, as had been called for in the United Nations preliminary draft. In article 7 of that draft, the ICRC had been nominated as an appropriate body to publicise the internment, injury or death of a journalist. Accordingly, the ICRC took up, and has maintained, an interest in this issue. Because of the debates and controversies surrounding the preliminary draft, the General Assembly of the UN referred the draft back to the Commission on Human Rights. However, by Resolution 2854 (XXVI) the Assembly resolved that "... it is necessary to adopt a convention for the protection of journalists engaged in dangerous missions in areas of armed conflict".

1972 saw the recommendation of the ICRC conference that special protection be granted to journalists for two reasons which were listed. These were the interest of world public opinion in the "widest possible" reporting of armed conflict and the recognition of the contribution made by the presence of journalists to the more effective implementation of humanitarian law principles. This concentration of the humanitarian law status of the journalist was reflected in article 10 of the draft articles which emerged from the 1972 meeting:

The states parties to this convention, and, as far as possible, all the parties to the conflict in the territories of the state parties to the convention, having identified a journalist as one who holds a card, shall:

- (a) do all that is necessary to protect him from the danger of death or injury or from any other danger inherent in the conflict and in the conduct of all parties to the said conflict;
- (b) inform him to the extent compatible with military requirements of the areas and circumstances in which he may be exposed to danger;
- (c) recognise in cases of internment, that the regulations for the treatment of internees set forth in articles 79 to 135 of the Geneva Convention relating to the Protection of Civilian Persons in Time of War, of 12 August 1949 shall apply;
- (d) ensure that, if a journalist who holds a card, is killed or injured, falls seriously ill, is reported missing, or is arrested or imprisoned, the information concerning the said journalist is communicated forthwith to his next of kin or to the state party that issued the card, or ensure that the said information is made public. This information may be communicated to all appropriate media, in the quickest and most effective manner and, preferably, through the International Committee of the Red Cross or the Secretary General of the United Nations, in order that the International Professional Committee may be informed without delay.

When undertaking dangerous professional missions in an area where there is a conflict within the meaning of article 2, journalists have the right to protection from an immediate danger resulting from hostilities only to the extent that they shall not expose themselves to danger without need to do so for professional reasons.

These draft articles represented an important step forward in the development of this body of law. The determination of who qualified to be a journalist was left to the "combatant authorities". So too was the power to issue or withdraw an identity card. Most importantly, article 10(a) required state parties to "do all that is necessary to protect" journalists in danger. No longer was this protection conditioned by obligations imposed on journalists.

The draft articles were referred to be examined by experts from ten nations, one of whom was Australian. In 1973 and 1974 further consideration

of the convention was deferred by the General Assembly of the United Nations. This development marked the end of the General Assembly's involvement in the issue. Meanwhile, in response to the new initiatives in UNESCO, the Soviet Union introduced a "Draft Declaration on the use of the Mass Media". By referring to the press as a "tool" of the State, this declaration asserted a perspective of state control of the media and of its employees which caused concern in western countries and drew fresh attention to the suggested unacceptability of accrediting journalists with identity passes.

In 1974 a diplomatic conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts convened in Geneva. Four sessions were held between that year and 1977. One working group of the conference drew up an article for insertion in the first protocol. It appears as article 79 and is titled "Measures of Protection for Journalists":

- 79 (1) Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians within the meaning of article 50, paragraph 1.
- (2) They shall be protected as such under the Conventions and its Protocol, provided that they take no action adversely affecting their status as civilians, and without prejudice to the right of all correspondents accredited to the armed forces to the status provided for in article 4A(4) of the third convention.
- (3) They may obtain an identity card similar to the model in annex II of this protocol. This card which shall be issued by the government of the state of which the journalist is a national or in whose state he resides or in which the news medium employing him is located, shall attest to his status as a journalist.

It will be observed that the approach of article 79 differs from that taken by the earlier United Nations preliminary draft. Journalists are to be protected within the mainstream of accepted principles and institutions of international humanitarian law rather than by a specialist covenant deriving its enforceability from the United Nations. As well, the stipulation dealing with the possession of an identity card has become permissive only. It is grafted into existing accreditation procedures rather than provided by a supra national body, the requirements of which might be regarded in some quarters to be a form of licensing. Finally, article 79 does not give journalists a special status. Instead, they are entitled to protection within the ambit of the guarantees afforded to civilians.

The developments just mentioned ran parallel with those occurring in the General Conference of UNESCO following the draft declaration submitted by the Soviet Union. The General Conference postponed consideration of the draft until 1978. In the hope of reaching a consensus on the issue, an International Commission for the Study of Communication Problems was established under the presidency of Sean MacBride. One of the submissions to that commission, made on behalf of Tunisia, proposed amongst other things "regulation of the right to information by preventing abuses of the right of access to information" and "definition of appropriate criteria to govern truly objective news selection". In the same mood was an address of

the Secretary General of UNESCO concerning the question of journalist protection in which he linked with the responsibilities that attend the exercise of a profession:

Freedom and responsibility cannot be viewed separately from protection ... Our Organisation should contribute to the gradual establishment of a common professional deontology, by helping its Member States to define the rights and duties of information personnel. But it is impossible to urge too strongly the need for effectively protecting the latter from any arbitrary action by which they might be adversely effected in the exercise of a function which demands the strictest objectivity.¹¹

In 1978, the General Conference of UNESCO adopted a modified version of the declaration sponsored by the Soviet Union on "Fundamental Principles Concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racism, Apartheid and Incitement to War". References to state control of the media were omitted. Two provisions relating to journalists were included and were generally considered unrestrictive. Article II called for protection for journalists. Article IX called for UNESCO to contribute to this end. Consideration of the protection of journalists was adopted as an official part of the UNESCO programme for 1979-80. It was included in the efforts being made by UNESCO in the area of mass communications generally, sometimes referred to as the "new information order". This inclusion was unfortunate for in many western countries, the new order was regarded as very contentious, being described as a "vague, undefined collection of communications aspirations of the developing countries".¹² The result was that UNESCO moves for journalist protection became caught up in the controversies about the new world information order and never escaped that entanglement in UNESCO.

Those controversies were enlivened by the report submitted by the MacBride Commission in 1980. The report failed to call for licensing or a special status for journalists or for professional ethical codes other than those established by professional bodies free of government interference. Explaining this conclusion, the report said:

The proposed additional measures would invite the dangers entailed in a licensing system since it would require somebody to stipulate who should be entitled to claim such protection. Journalists will be fully protected only when everyone's human rights are guaranteed.¹³

The commission report was not adopted by the UNESCO conference merely being "noted by the secretariat". In his dissenting report, the chairman Sean MacBride expressed a differing view on the grant of a special status to journalists:

I rate the role of journalists, broadcasters and other agents of the media ... to be of paramount importance to the democratic system and to world peace. Therefore I do consider it most desirable that journalists ... should be given a special status ... It is suggested that this might lead to the regimentation of journalists ... That they might have to be registered ... It appears to me that these [dangers] have been magnified out of all proportion. The only test should be that the journalist ... is employed by a newspaper, a newsagency or a broadcasting authority. An identification card could be issued or withdrawn by the employing authority, be that authority a newspaper, newsagency or broadcasting service.¹⁴

In the discussion which followed the MacBride Committee's report, the representatives of the United States of America objected to any continuing consultation about it, expressing the fear that it might result in continuing efforts to restrict the freedom of the press.

In 1981 a consultative meeting was called in Paris. Unfortunately attempts were reported to exclude western press interests from the meeting. The participants proposed a new Commission for the Protection of Journalists. But this was immediately denounced in the United States as yet another pretext for the licensing of journalists. The object of the new Commission, as described by its sponsors, was to accept responsibility for issuing identity cards and withdrawing them, thereby enforcing "generally accepted" journalistic ethics. Western news interests responded with vigorous campaigns against the UNESCO initiatives. A vivid clash of values was emerging. Everyone agreed that journalists needed more protection. But whereas western countries, led by the United States, asserted "First Amendment values", other countries considered protection to be contingent on ethical conduct. The criticism of western wire services and of their dominance of local news was reflected in different values and pre-conditions which the majority of states insisted upon as the price for additional protection.

V. LATEST RED CROSS INITIATIVES

Against the background of these somewhat dispiriting developments the director of the IPI in 1985 took a new initiative. His objective was to try to find a common ground. He asserted that what was needed was a less contentious forum than UNESCO had proved to be. A round table was called under the auspices of the ICRC. Representatives were present from sixteen international media organisations. Observers were invited from the UNO, UNESCO and the International Labor Organisation. The meeting took place in Switzerland in April 1985.

By reason of the acceptance by the ICRC of the role of convenor, the discussion on this occasion was reserved to the humanitarian aspects of the problem of protecting journalists. Accordingly, the meeting concentrated on the risks faced by journalists as human beings and the development of

¹¹ *Id.* 156.

¹² *Cited id.* 153.

¹³ UNESCO, International Commission for the Study of Communication Problems (MacBride Commission) *Many Voices, One World*, Paris 1980 264.

¹⁴ Note 8 *supra*, 29-30. See also note 10 *supra*, 166.

humanitarian law principles applicable to conflict situations, in their special application to journalists.¹⁵ There was a general recognition at the meeting that because contentious issues had hindered progress in the United Nations and its agencies what was required was a new initiative, if progress was to be made. By the same token, the selection of the ICRC as the forum required acknowledgment of the limitations within which that body traditionally works. First, the situation in which a journalist is at risk must fall within those categories which are covered by international humanitarian law principles. Secondly, the ICRC is limited in the official steps it could take to what is possible within existing principles of international humanitarian law. In this regard, it is not realistic to expect alteration of the Geneva Conventions and protocols in the foreseeable future. Thirdly, it is only possible to lessen the dangers which journalists face. Absolute safety is not possible for journalists performing dangerous work in dangerous places. For this reason, a number of the international journalistic agencies had taken their own initiatives. The IPI prepared a "Guide for Staying Alive". This deals with practical measures which can be taken by media personnel to reduce risks. In similar vein, the Inter American Press Association published a collection of "tips" including as to "surviving dangerous assignments". Fourthly, the recommendations for protection are addressed to the media profession as a whole rather than to separate groups, such as publishers or reporters.

In order to preserve as far as possible the reality and appearance of an unbiased approach in its work, the ICRC has established no formal liaison machinery with media organisations. Consultation and requests for advice and cooperation are made from time to time, as the ICRC sees fit. Professional matters have been left to the media itself. The ICRC has concentrated on journalists as civilians, i.e. as individual human beings who, with others, face risks in dangerous situation.¹⁶

In late October 1985, the ICRC accepted a recommendation that a "Hot Line" should be established on a twenty-four hour basis to mobilise Red Cross support for journalists wounded or injured in the course of their work. Concrete assistance was to be made available, including inquiries into the disappearance of journalists, the maintenance of a registry of reports, notification to families, visits to those in captivity and procedures for eventual repatriation of those captured. For these purposes and in order to predict the limits of possible assistance, it was necessary to classify conflicts within the established scheme of international humanitarian law, namely international armed conflict, non international armed conflicts and internal disturbances. In the initiatives of the ICRC, the position of journalists arrested or captured in any of these three situations follows a similar scheme.¹⁷

VI. CONCLUSIONS

The result of this analysis may seem discouraging. Every year come new reports of media personnel killed in the course of bringing news to an information hungry world. Australian journalists have been amongst these victims. Michael Birch was killed during a battle in Vietnam in 1968. Five television journalists were killed in October 1975 in East Timor whilst covering the attack of the Indonesian Government forces on the nationalist Fretilin guerillas. Three of those killed were Australians. In November 1979, an ABC journalist, Tony Joyce, was killed whilst following the Rhodesia conflict. He had been shot not in the combat zone but immediately after being arrested by Zambian police. During the last abortive coup in Bangkok, Thailand in 1985, another Australian journalist was killed when he was caught in crossfire.

The Amnesty International report from 1977 recorded that there were 104 journalists at that time imprisoned or reported missing in twenty-five countries according to Amnesty's records. Sean MacBride reported that between 1976 and 1978, twenty-four journalists were reported killed and fifty-seven wounded, tortured or kidnapped in various countries of the world. These figures are probably a significant understatement. Because of strict control of the media in many parts of the world, no realistic assembly of data can be ventured concerning the death, imprisonment or torture of those brave people who bring unpalatable, uncomfortable or embarrassing news to public notice. Yet such news is the vehicle of human progress. As the General Assembly of the United Nations has itself declared, it is a prerequisite for the development of a world community.

The weaknesses in the present international humanitarian law applicable to journalists and media personnel are obvious. The present rules have limited application. The additional protection accepted by article 79 of Protocol I in 1977 was not extended to Protocol-II concerning non international conflicts. Furthermore that protection exists only for the period following detention. It does not extend to the period before detention. Nor does it protect the journalist once he is handed over to civilian authority. Another objection is that present protections merely "consider" a journalist to be a civilian. This is a fiction for the journalist is not simply a deemed civilian. He is one in truth, unless he becomes involved in combat. The protections of the 1949 Conventions are limited to accredited war correspondents. Most media personnel nowadays covering armed conflicts and hostilities are independent employees, having no connection with armed services. Above all the present Conventions are devoid of effective sanctions for their breach. These defects explain the new reliance on the ICRC which has arisen because the efforts of international political agencies appear to have foundered on the rocks of political controversy. A misfortune of journalists is that their discipline is inevitably bound up in ideology, such is its power in the world of mass communication.

It must be acknowledged that in many cases journalists have brought

¹⁵ (1985) 25 *International Review of the Red Cross* (No.246) 187.

¹⁶ P. Rasmberg and V. Bellamy, "Red Cross Sets Up Action Plan" (1985) 34 *IPI Report* (No.6) 1, 6.

¹⁷ Note 7 *supra*, 14.

disaster on themselves. This has occurred by deliberate misconduct or naive and inexperienced action in conflict zones. Some journalists have also adopted an extremely partisan attitude, such as those who participated, mostly on the Republican side in the Spanish Civil War. Some journalists, by carrying arms allegedly to protect themselves, have made it difficult to distinguish them from combatants. Some in pursuit of a story adopt reckless actions in the naive belief that they are somehow protected by their mission. Foolhardy and premature entry of media personnel into dangerous areas at the heart of conflicts, whilst carrying objects such as television cameras (which from a distance might appear to be weapons), needlessly expose them to death and injury.

It may be seen that a number of problems stand in the way of the development of effective international law for the protection of journalists and other media personnel. These include first, the conflicting views of the proper role of journalists and the conflicting perceptions of the function of the media, including in time of war and conflict; secondly, the high importance typically attached by combatants to winning and their perception of the value of news reporting as an instrument for achieving military objectives; thirdly, the inevitable suspicion of military authorities that journalists will sometimes misuse their position or otherwise prove useful vehicles, even unwittingly, of information to the enemy; fourthly, the inability of any law totally to remove the risks faced by persons entering conflict zones; and finally, the doubts and conflicts which have arisen concerning the procedures involved in identity cards. Such cards are deemed necessary by some to avoid subterfuge such as observers masquerading as journalists. Yet once identity cards are introduced, the attendant licencing might become a means to undermine media independence.

For the time being, the most hopeful prospect of progress in protection of journalists and other media personnel by international law would seem to lie in the development by the ICRC of humanitarian law as it applies in their special case. Already, by the establishment of a hotline, clearing house facilities for the preparation of a manual for safety of journalists and by humanitarian action in individual cases, the ICRC has done useful work. But in the long run, its most useful work may be achieved by developing accepted international standards which will be incorporated in international humanitarian law to extend protections which presently exist. In particular, the extension of protections from international conflicts to national and domestic situations which are covered by the media would seem the most natural and important next step. If real progress can be made in the context of international humanitarian law, that may provide a springboard for the reopening of the debate for a more general convention under the auspices of the United Nations.¹⁸

¹⁸ (1985) 25 *International Review of the Red Cross* (No.245) 186. See also generally V. Knightly, "Reporters Guide to Warfare" *The Journalist*, May 1983, 5; A. Modoux, "International Humanitarian Law and the Journalists' Mission" (1983) 23 *International Review of the Red Cross* (No.232) 19; J. Püger, "Address to the Melbourne Press Club", *The Journalist*, January 1982, 4.

THE AUSTRALIAN PRESS COUNCIL

THE HON. J.H. WOOTTEN Q.C.*

I. THE ESTABLISHMENT OF THE COUNCIL

The Australian Press Council was established in July 1976 by agreement between the Australian Journalists Association and five newspaper organizations — the Australian Newspapers Council, the Regional Dailies of Australia Ltd, the Australian Provincial Press Association, and News Ltd. In June 1980 News Ltd withdrew from the Council but has continued to co-operate with the Council in relation to complaints made against its papers. In 1982 John Fairfax Ltd became a member and the Australian Suburban Newspapers Association Pty Ltd has also joined.

The Council is financed by its constituent members. The part-time chairman receives an honorarium, and an executive secretary and a stenographer typist make up the staff.

The Council has a constitution which it may amend by a two-thirds majority, provided twenty-eight days' notice has been given to members and constituent bodies. The government of the organization is in the hands of a Council consisting of seven members nominated by constituent newspaper organizations, three nominated by the Australian Journalists Association, four public members and a chairman. The chairman is appointed by the Council from persons who have not had any previous connection with the Press. Public members are appointed on the nomination of the chairman, after public advertisement, from persons not otherwise connected with the Press. They receive no remuneration, but, as with other members, their expenses of attending meetings are paid. An alternate is appointed for each public member. The Council appoints one of the public members as vice-chairman.

The first chairman was a retired High Court judge, the second a retired professor of law and the third a retired Supreme Court judge. The present

*The Hon. J.H. Wootten, Q.C. has been Chairman of the Australian Press Council since August 1984.