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Protection of Journalists in Situations of Armed Conflict : Enhancing Legal Protection Under International Law

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GOLDEN GATE UNIVERSITY SCHOOL OF LAW

Protection of Journalists in Situations of Armed Conflict

Enhancing Legal Protection under
International Law

Hong TANG, Esq.

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SUBMITTED TO THE GOLDEN GATE UNIVERSITY SCHOOL OF
LAW, DEPARTMENT OF INTERNATIONAL LEGAL STUDIES, IN
FULFILMENT OF THE REQUIREMENT FOR THE CONFERMENT
OF THE DEGREE OF *SCIENTIAE JURIDICAE DOCTOR* (SJD).

THE MEMBERS OF THE DISSERTATION COMMITTEE:
Prof. Chris Okeke, Prof. Jon Sylvester, and Prof. Sophie Clavier

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Foreword

Traditionally, international law only covers sovereign states, and only states can be subject to international law. Under contemporary international law, both states and international inter-governmental organizations (such as the United Nations and its organs: it has state-like legal personality under international law) are subject to international law. Accordingly, when the author discusses the current international rules on the issue of the protection of journalists in situations of armed conflict, he divides them into two parts—the rules governing states and the rules governing international inter-governmental organizations. Although some rules impose legal obligations upon both states and international organizations and may overlap, they are discussed in separate parts due to the different perspectives. (They may be perceived as a repeat, but actually they are discussed from two different and separate perspectives: either imposing

responsibilities on states or governing international inter-governmental organizations.)

Chapter I presents the “big picture” of three different legal statuses of journalists in armed conflict under current international law, without detailing the current rules imposing obligations upon states and/or international inter-governmental organizations on this issue. This chapter presents the special circumstances of journalists in armed conflict (e.g., “The Nature of Contemporary Armed Conflict”; “Freedom of the Press’ and Armed Conflict”), and also the necessity justifying the calling for better legal protection under international law for journalists in armed conflict. This chapter lays out the big picture and also narrows the scope of this dissertation.

Chapter II mainly focuses on the current international rules (in detail) governing and imposing obligations upon states. After the survey, summary, and clarification of current rules binding states,

Chapter III further discusses the gaps and shortcomings in current international legal system on the issue of protection of journalists in armed conflict, and propose an *ad-hoc* international convention ("second-level legislation on an international level") to fill in the gap. This chapter also discusses the "Law and Punishment on International Level" that among others justifies such a proposal. Both Chapter II and Chapter III focus on the rules binding states.

Chapter IV moves on to the rules governing and imposing legal obligations upon international inter-governmental organizations (namely the U.N., its organs, and U.N. peacekeeping missions/forces who actually work on the ground in crisis to protect people in modern times). This chapter first discusses the "International Rule of Law within International Inter-governmental Organizations" and the various legal roles and functions of U.N. Security Council and its resolutions, in order to lay out a foundation for the further discussion on those rules

(binding U.N., its organs, and U.N. peacekeeping forces themselves) that were created by the organization itself.

The author arranges did not put the proposed *ad-hoc* convention near the end because the recommended *ad-hoc* convention is just part of the discussion on the rules on states (Part 1), compared to those on international inter-governmental organizations (Part 2). The proposed *ad-hoc* international convention only applies to states. After the discussion of those two sets of rules, the last chapter—Chapter V—focuses on the comparative culture and historical philosophy behind those rules.

The U.N. and its organs are special mechanisms under international law. Under contemporary international law, it is a regulator/creator/legislator of international law (one of the core issues discussed in this dissertation), and also a state-like subject and actor to international law. It creates international legal rules and is itself also subject to those rules. Some rules in the

dissertation may be discussed in several places, but they are addressed from different perspectives, either as Geneva laws and U.N. laws governing states, or as rules governing the U.N., its organs, and U.N. peacekeeping forces themselves (e.g., as the constitutional mandate of U.N. peacekeeping mission). They are actually not repetitive due to the different focuses.

The special and unique roles and functions of international law (compared to the functions of national law) are (1) to promote and strengthen the rule of law on a particular issue on both international and national levels (the proposed and international negotiation process for an *ad-hoc* convention itself serves this function); (2) to provide international technical assistance (from international community to a failing or failed state, to provide a failing or failed state with a "model rules" or "minimum standard" on a certain issue); and (3) to grant individuals the "power-of-right" (it is different when journalists say "I request to..." or "I have the right to...").

The whole dissertation addresses the overall rationale of these special and unique functions of international law, which national law does not have. This discussion is not intended to focus on a very specific right or legal provision that journalists shall enjoy (such as whether local government shall provide them with bodyguards). This discussion focuses on the big picture of promoting better protection under international legal norms, such as to fill in the gap by having an *ad-hoc* convention and to clarify the legal obligation of U.N. peacekeeping forces. Surveying, summarizing, and systematizing the current rules on the issue of protection of journalists in armed conflict that are present in various levels of different international legal instruments, serves as this rationale.

Explanation of Terms

International Judicial Tribunal *or* Judicial Institution of

International Law: A general or *ad-hoc* institution founded and mandated by an international treaty or a resolution of the United Nations Security Council carrying out judicial functions on an international level with certain international legal personality (e.g., the International Court of Justice, International Criminal Court, and International Criminal Tribunal for the former Yugoslavia).

International Mechanism *or* International Forum: a process, body, or system created and authorized by international law for achieving a certain result with regard to international affairs.

Impunity: Failure to punish violations of established norms. It is the act of not being punished or hiding from or escaping punishment either due to circumstances or to the law.

International Humanitarian Law (Law of War) or Geneva Laws: mainly the four Geneva Conventions of 1949 and their two Additional Protocols of 1977.

U.N. Laws: the **broad** U.N. laws include but not limited to the General Assembly Resolutions, Security Council Resolutions, Secretary-General Reports to the Security Council, and also the judgments of the International Court of Justice (ICJ)⁶. Due to the fact that the judges in international judicial tribunals come from either civil law or common law jurisdictions, the author of this dissertation considers the judicial decisions and advisory opinions of international judicial tribunals as part of “laws” under an international legal system (just like “case law” under a common law legal system).

⁶ Due to the fact that the International Court of Justice (ICJ) is part of the United Nations system.

Rule of Law: a doctrine mainly including but not limited to the supremacy of law, government of law, equity before law, and procedural and legal transparency.

International Rule of Law: a rule-based international system; the reflection and promotion of the rule of law on both international and national levels.

Background and Overview

While the doctrine of “limited war”⁷ has been recognized by the international community and become the view of the majority nowadays, the practice in real life is sometimes different from the theory, as is often the case in human affairs.

The recent several U.S.A.-initiated wars are a perfect illustration of the growing risks faced by journalists performing their profession in situations of armed conflict. It is necessary and important to call for renewed interest and attention to this issue in order to promote the better protection of this special professional group.

⁷ Humanity in Warfare: Geoffrey Best, Weidenfeld and Nicolson (1980); War and Laws since 1945: Geoffrey Best, Oxford (1994).

Contemporary armed conflicts involve not only state actors but also non-state armed groups⁸ and involve not only international but internal conflicts as well. This raises a new issue such that every individual state and the whole international community, and in particular international inter-governmental organizations, shall bear the burden and responsibility to prevent harm to civilians and journalists caused by non-state armed groups in the respective territories of individual states (responsibility to protect and collective action).

Under current international law, attacks against journalists and their equipment are illegal and may be subject to charges of war crimes and crimes against humanity.⁹ Journalists cannot be a

⁸ Such as the "Janjaweed" ("devil on horseback", or "a man with a gun on a horse") in the Darfur region of Sudan.

⁹ The End of Exceptionalism in War Crimes: The International Criminal Court and America's Credibility in the World—Scheffer, Cooper, and Kohler, online at *Harvard International Review*, August 2007

legitimate target of attacks unless they are being exploited to instigate grave breaches of international humanitarian law.¹⁰

Chapter I of this dissertation generally reviews the different statuses of journalists under the current international legal regime. It discusses the importance and special characteristics of journalists performing their profession in areas of armed conflicts, which reflects the need for additional international humanitarian conventions or other appropriate legal instruments to promote better protection of journalists engaged in dangerous missions, particularly in areas where an armed conflict is taking place, whether international or internal.

Chapters II, III, and IV detailedly review the current international laws that grant legal protection to journalists in situations of armed conflict. These international legal instruments include but not limited to international conventions, international charters,

¹⁰ For example, if journalists act as spies, they may become legitimate targets of attacks.

customary international law, and U.N. laws. It is intended to give readers a much more informed survey and description of current international rules on this particular issue.

Based on the review of current needs and legal protections for journalists in situations of armed conflict, this dissertation makes a recommendation for a future special international convention (governing and imposing responsibility on sovereign states¹¹). It focuses particularly on the issue of the protection of journalists in situations of armed conflict and discusses the basic provisions that should be included in such an *ad-hoc* convention (“second-level” legislation in international law).

Traditionally, only states can be subject to international law. States negotiate international treaties by a long process. States sign and then ratify international treaties and are thereafter bound by them.

¹¹ Compared to “international inter-governmental organizations”

In 1945, the Charter of the United Nations (U.N.) was signed in San Francisco, California. The U.N. is an international inter-governmental organization whose stated aims are to facilitate cooperation in international law, international security, economic development, social progress, and human rights issues.¹² It is a creation by international law, primarily the international treaty—the Charter of the United Nations. In addition, the U.N. serves in more roles and legal functions on an international level nowadays, just like a state. It has developed far beyond a multilateral political forum. It has an independent legal personality under international law.¹³ The United Nations is also a creator, regulator, and actor of international law, along with its role of subject to international law.

Under contemporary international law, the United Nations and its

¹² Article 1 of the Charter of the United Nations

¹³ *Reparation for Injuries Suffered in the Service of the United Nations (Advisory opinion)*, International Court of Justice, April 11th 1949: in the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, the United Nations as an Organization has the capacity to bring an international claim against the responsible de jure or de facto government with a view to obtaining the reparation due in respect of the damage caused to the United Nations.

organs are creating international rules, in addition to its original role of an international multilateral political forum.

Under the doctrine of international rule of law (a rule-based international system; the reflection and promotion of the rule of law on both international and national levels), contemporary international law serves some special and unique functions, more than those of national law. In detail, the most important function of contemporary international law is to promote and strengthen the rule of law on both national and international levels, more than merely as "rules." The negotiation process of an international convention itself serves this function. It also reflects the modern international technical assistance from the international community to a failing or failed state through an international forum and mechanism. In the meanwhile, as "soft law," an international convention also serves to grant individuals a power of right. A demand for rights engenders a completely different type of response than a request for help.

In this context of the contemporary international legal regime and rule of law, when we discuss international rules regarding the issue of the protection of journalists in situations of armed conflict, we have to distinguish them into two different but related parts.

Chapter II and Chapter III cover the first part. The first part is those laws governing and imposing burden and responsibility on states. These include: (1) *general* international conventions on the law of war (such as the Geneva Conventions of 1949 and their Additional Protocols of 1977); (2) *ad-hoc* international conventions on a particular group involved in war (for example, the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict); (3) the laws of the United Nations (U.N. laws, such as the “legislative” Resolutions of the U.N. General Assembly and Security Council); and (4) the precedents (case law) of international judicial tribunals (such as the

judgments of the International Court of Justice and the International Court for the Former Yugoslavia).

After surveying and reviewing existing international rules on the issue of the protection of journalists in armed conflict, I found that there is a clear gap in the current international legal regime regarding this issue—there is no *ad-hoc* international convention in particular addressing this special professional group in armed conflict. I propose a future *ad-hoc* international convention regarding this issue.¹⁴ In the meanwhile, the effects and impacts of such an *ad-hoc* international convention are also discussed.

Chapter IV covers the second part. The second part includes those laws governing and imposing burden and responsibility on

¹⁴ Only states are parties to a convention. States negotiate conventions. States sign and ratify conventions and thereafter are bound by those conventions. Although international inter-governmental organizations have a state-like independent legal personality under international law, they are only the forum for facility of the negotiation process of a convention, rather than a party to a convention. This is also why the author of this dissertation purposes a future *ad-hoc* convention (governing individual states) before discussing the rules governing international inter-governmental organizations.

international inter-governmental organizations, namely the United Nations, including its organs and peacekeeping missions (which are actually working on the ground in crisis to protect civilians and journalists.). These include those international conventions creating the organization (such as the Charter of the United Nations), those constitutional mandates of the organization and peacekeeping missions, and also the international laws created by the organization itself (such as those “generally applicable” “legislative-character” Resolutions of the Security Council and the General Assembly). As both creator and actor and also subject to international law, the United Nations shall also be subject to and respect the rules created by itself under the doctrine of international rule of law.

Chapter V discusses the comparative philosophy and cultures (both Eastern and Western values) relative to the issue of the protection of civilians/journalists in armed conflict, which are

behind and support those contemporary international laws on the issue.

While journalists who perform their profession in situations of armed conflict run great risks, what legal protection does international law provide them with to protect them and to facilitate the exercise of their professional activities?

The purpose of this dissertation is to highlight the specific conditions created by armed conflicts (international and internal armed conflicts), and to survey and discuss the international laws (governing both sovereign states and international inter-governmental organizations, or governing either sovereign states or international inter-governmental organizations) that can promote better protection for journalists in the circumstances of armed conflict.

This dissertation also serves to reaffirm those elements of international humanitarian law that apply to the protection of civilians and journalists in situations of armed conflict; to re-establish and promote the authority of those basic rules on both international and national levels; to improve and even develop current international law on this issue for adaptation to contemporary requirements; and to clearly define and strengthen the legal "power of rights" of those journalists who perform their profession in situations of armed conflict for the public interest of the whole international community.

With the proliferation of armed conflict around the world, Journalists in the exercise of their profession in war zones have suffered hardship and even paid the ultimate price with their lives. Journalists, who are bringing information to the whole international community for the public interest, are entitled to and desire better legal protection under international law.

Chapter I. Legal Status and Special Circumstances of Journalists in Armed Conflict under International Law

International human rights, humanitarian, and refugee laws permit the reasonable use of force and compassionate conduct towards unarmed non-combatants. They emphasize restraint and intent to respect common human rights and humanity and to avoid unreasonable human suffering.

Failure by parties to armed conflict to meet their obligations to protect civilians may give rise to individual criminal responsibility that may be subject to judicial proceedings in national courts, the International Criminal Court, or other *ad hoc* judicial institution of international law. The International Criminal Court is one of the most important judicial institutions of international law to fight crimes against humanity (war crimes, genocide, etc.).

During an armed conflict, either international or internal, journalists are facing more dangers than regular civilians in armed conflict due to the unique characteristics of their career. The circumstances of armed conflict expose journalists performing their profession in dangerous situations that often exceed the level of danger normally encountered by civilians.

About 116 journalists were killed in 2006, which is four times the number killed in 2002. At least 871 were arrested, 1,472 physically attacked or threatened, and 56 kidnapped in 2006.¹⁵ It has been reported that 58 journalists were killed in 2007 (as of October 2007).¹⁶

Journalists are the key to the basic human right of freedom of expression. It is undeniable that there is huge interest on the part

¹⁵ According to the Archives of the Reporters without Borders, available on its Web site through a general search and careful statistics.

¹⁶ According to the Archives of the Committee to Protect Journalists, available on its Web site through a general search and careful statistics.

of the public when journalists look for information and communicate it to the public.

A free, secure, and independent media is one of the foundations of peace and democracy. It provides people with access to information, empowers individuals, strengthens the rule of law, and advances development. This empowerment holds government and others (such as those leaders of non-state armed groups) accountable.

On the other hand, in the new warfare that has emerged, the impact of armed conflict on journalists goes far beyond the notion of collateral damage. Targeted attacks and indiscriminate killings collectively paint an extremely grim picture of the human costs of armed conflict.

There have been a number of situations in which the threats to journalists have deepened and called for extraordinary measures to be taken for their protection.

Whatever the nature of the threat to journalists, compliance with international humanitarian, human rights, and refugee laws by all parties concerned provides the strongest basis for ensuring respect for the safety of journalists. The hardships borne by journalists during armed conflict, particularly where violence is specifically directed against them, have a direct impact on freedom of the press, durable peace, reconciliation, and development.

The United Nations Security Council Resolution 1738 (2006) recognizes that “the consideration of the issue of protection of journalists in armed conflict by the Security Council is based on the urgency and importance of this issue, and recognizing the valuable role that the Secretary-General can play in providing

more information on this issue.”¹⁷ Under current international law, journalists are protected in three categories: war correspondents, civilians, and embedded/unilateral journalists. They are granted different types of legal protection and immunity under current international law.¹⁸

Section 1. The Legal Definition of “Journalist”

According to the 1975 draft *United Nations International Convention on the Protection of Journalists Engaged in Dangerous Missions in Areas of Armed Conflict*, the term “journalist” means “any correspondent, reporter, photographer, and their technical film, radio, and television assistants that are ordinarily engaged in any of these activities as their principal occupation.”¹⁹

¹⁷ United Nations Security Council Resolution 1738 (2006), December 23rd, 2006.

¹⁸ The Four Geneva Conventions of 1949 and their two Additional Protocols of 1977.

¹⁹ Article 2(a) of the draft U.N. International Convention on the Protection of Journalists Engaged in Dangerous Missions in Areas of Armed Conflict (1975); according to the

International humanitarian law distinguishes between but does not specifically define two types of journalists: war correspondents, who are accredited to the armed forces, and independent journalists.²⁰

The general protection and immunity granted to journalists by international law is not linked to the nationality of the person concerned. Any journalist who is a national of a state involved in the conflict or a national of a neutral state is generally protected by international law.²¹

Merriam-Webster Dictionary, a "journalist" is a person who practices journalism. "Journalism" is: (a) the collection and editing of news for presentation through the media; (b) the public press; (c) an academic study concerned with the collection and editing of news or the management of a news medium; (d) writing designed for publication in a newspaper or magazine; (e) writing characterized by a direct presentation of facts or description of events without an attempt at interpretation; (f) writing designed to appeal to current popular taste or public interest.

²⁰ Military press personnel are not covered by this dissertation because they are part of the armed forces. Their status is the same as that of other members of the armed forces, and they do not enjoy any special rights or immunity.

²¹ The Protection of Journalists Engaged in Dangerous Professional Missions: Hans-Peter Gasser, *International Review of the Red Cross* (1983).

Section 2. The Legal Status of Journalists in Armed Conflict
under International Law

The International Criminal Tribunal for the Former Yugoslavia (ICTY), in the *Randal* case²², ruled that journalists performing their profession in situations of armed conflict serve “a public interest” because they “play a vital role in bringing to the attention of the international community the horror and reality of conflict.” The Court noted that investigation and reporting by journalists enables citizens of the international community to receive vital information from conflict zones. On this basis, the Court even granted journalists testimonial privilege with respect to events relating to their profession in order to protect the ability of

²² *The Prosecutor vs. Radoslav Brdjanin & Momir Talic*, International Criminal Tribunal for the former Yugoslavia, December 11th, 2002.

journalists to carry out their profession in situations of armed conflict.²³

Sub-section a. Journalists who are Considered “War Correspondents”

The category “war correspondent” is the most historical, traditional, and original protection category concerning journalists under international humanitarian laws. It has existed since the Hague Conventions of 1899.

Under the Third Geneva Convention relative to the Treatment of Prisoners of War, war correspondents are “persons who follow armed forces without actually being members thereof.”²⁴

²³ The Protection of Journalists and News Media Personnel in Armed Conflict: Alexandre Balguy-Gallois, *International Review of the Red Cross* (2004).

²⁴ Article 4A(4) of the Third Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.

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As war correspondents are not part of the armed forces, they enjoy civilian status as well and therefore benefit from the corresponding protection.²⁵ Under the Geneva Conventions of 1949 and its Protocols of 1977, journalists—even those accredited to armed forces as war correspondents—shall still enjoy general protection and immunity against dangers arising from military operations. They shall not be the object of attack or of reprisals due to their civilian status.

In addition, war correspondents are, in a way, associated with the war effort; they can also enjoy prisoner-of-war status if they fall into an enemy's hands, provided that they have been authorized to follow the armed forces.²⁶ Under the Geneva Conventions of 1949 and its Protocols of 1977, those journalists shall enjoy the general protection afforded to prisoners of war. They must at all times be

²⁵ Article 50(1) of the Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflict, 8 June 1977.

²⁶ Article 4A(4) of the Third Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.

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humanely treated. Any unlawful act or omission by the detaining power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited and will be regarded as a serious breach of the Geneva Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind that are not justified by the medical, dental, or hospital treatment of the prisoner concerned and carried out in his interest. Specifically, Chapter II of the Annex to the 1907 Hague Convention covered the treatment of prisoners of war in detail. These were further expanded in the Third Geneva Convention of 1929 and its revision of 1949. For example, "Prisoners of War are entitled in all circumstances to respect for their persons and their honor... Women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favorable as that granted to men... Prisoners of War shall retain the full civil capacity which they enjoyed at the time of their capture. The Detaining Power may not restrict the exercise,

either within or without its own territory, of the rights such capacity confers except in so far as the captivity requires."²⁷

Article 4 of the Third Geneva Convention of 1949 protects captured military personnel, some guerrilla fighters, and certain civilians, including war correspondents. It applies from the moment a prisoner is captured until he or she is released or repatriated. One of the main provisions of the Convention makes it illegal to torture prisoners and states that a prisoner can only be required to give his or her name, date of birth, rank, and service number.²⁸ Here, journalists are legally entitled to greater autonomy than most other civilian non-combatants. Journalists can be detained only for "imperative reasons of security" and even then are entitled to be held with the same legal protections as a prisoner of war, including the right not to respond to interrogation,

²⁷ Article 14 of the Third Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.

²⁸ Article 17 of the Third Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.

although their notebooks and film may legally be confiscated by military personnel.

Sub-section b. "Independent" Journalists in Areas of Armed Conflict are Considered "Civilians."

The International Committee of the Red Cross (ICRC) 1974-1977 Diplomatic Conference in Geneva supplied Article 4A(4) of the Third Geneva Convention in order to meet the requirement of that time by including a special provision in the Additional Protocol of 8 June 1977 on "Measures of Protection for Journalists."²⁹ It does not change the regime governing war correspondents but indirectly includes the personnel covered under the definition of civilians.

"Article 79—Measures of Protection for Journalists

²⁹ Article 79 of the Additional Protocol of 8 June 1977 to the Geneva Convention of 12 August 1949.

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FORT BELLEVILLE, ILLINOIS

Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians within the meaning of Article 50, paragraph 1.

They shall be protected as such under the Conventions and this Protocol, provided that they take no action adversely affecting their status as civilians, and without prejudice to the right of war correspondents accredited to the armed forces to the status provided for in Article 4(A)(4) of the Third Convention.

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 territory he resides or in which the news medium employing him is located, shall attest to his status as a journalist.”

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³⁰ Article 79 of the Additional Protocol of 8 June 1977 to the Geneva Convention of 12 August 1949.

Article 79 stipulates "independent" journalists in armed conflict as civilians with all the protection and immunity conferred by international humanitarian law on civilians. Therefore, they are protected against the effects of hostilities and against arbitrary conduct on the part of a party to the conflict when they are captured or arrested by it.

All journalists can enjoy the protection granted to civilians in armed conflict (regardless of whether they are able to obtain additional rights and privileges as war correspondents or prisoners of war in case of capture). Nowadays, most journalists performing their profession in areas of armed conflict are independent professionals who are sent by a non-governmental organization. Most journalists themselves also prefer to be independent journalists due to the importance of independence in their profession and performance of freedom of expression and the press. Therefore, most journalists are only protected by

international law as civilians but not war correspondences in areas of armed conflict.

Under the four Geneva Conventions of 1949 and their two Additional Protocols of 1977, as well as the resolutions of the U.N. General Assembly and Security Council, most journalists are considered to be a special group under the definition of "civilians," and enjoy the regular protection granted by international legal instruments to civilians who are in areas of armed conflict. They cannot be the object of attack and can benefit from total protection. In addition to the expressive provision in Geneva laws, this basic rule of the law in all armed conflicts is the expression of a general legal principle as well. It is a binding customary norm independent of Protocol II of the Geneva Conventions.³¹

³¹ Armed Conflicts, Fundamental Rules: Partsch, in Bernhardt (ed.), *Encyclopedia of Public International Law* 3 (1981); Applicability of Customary International Law in Non-International Armed Conflicts: Kalshoven, in Cassese (ed.), *Current Problems of International Law* (1975).

More than a decade after the world did nothing to halt genocide in Rwanda and in the shadow of ongoing atrocities in the Darfur region of Sudan, the international community made new commitments to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. The United Nations 2005 World Summit brought together representatives from more than 170 countries, including the United States.³² While largely reiterating previous international development and security goals, the Summit culminated with an agreement that the international community, acting through the United Nations, bears a responsibility to help protect populations from genocide and other atrocities when their own governments fail to do so. The agreement further announced a willingness to take collective

³² Summary Document of the 60th U.N. General Assembly General Debates (2005).

action through the Security Council to protect populations if peaceful means prove inadequate.³³

Under the principle of “responsibility to protect” affirmed by the U.N. General Assembly and reaffirmed by the ICJ decision of February 2007, each individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. The core of this principle is the protection of civilians.

In other words, as civilians, journalists in armed conflicts shall enjoy the protections from not only each state but also the international community. Such responsibilities are defined by

³³ The Responsibility to Protect: The U.N. World Summit and the Question of Unilateralism: Bannon, Alicia L, *Yale Law Journal* 115 (2006).

international legal instruments such as the Geneva Conventions, U.N. Resolutions, ICJ decisions, and so on.

Under current international law, the international community should, as appropriate, encourage and help states to exercise this responsibility and support the United Nations in establishing an early warning capability (prevent conflict, protect civilians, etc.). The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian, and other peaceful means to help protect civilians (including journalists), and to take collective action on a case-by-case basis should peaceful means be inadequate and national authorities manifestly fail to protect their civilians (including journalists).

Recognizing the urgency of this issue in recent years, the United Nations Security Council adopted Resolution 1738 (2006). It called upon all parties to conflict to end attacks against journalists and media professionals and to comply fully with their

international obligations. It urged states and all other parties to conflict to prevent violations of international humanitarian law against journalists and media professionals and, critically, to end impunity and prosecute those responsible for such violations.³⁴

Sub-section c. "Embedded"/"Unilateral" Journalists³⁵

Embedded/unilateral journalists are inserted into military units and agree to a number of ground rules obliging them to remain with the unit to which they are attached and which ensure their protection.³⁶ They do not carry personal weapons. This kind of journalist has drawn more and more attention in recent years because there were a large number of journalists of this type during the recent war in Iraq.³⁷ Those journalists are usually

³⁴ United Nations Security Council Resolution 1738 (2006), December 23rd 2006

³⁵ Those journalists traveling with troops and reporting from the battlefield.

³⁶ The Ground Rules Agreement established by the Coalition Forces Land Component Command (CFLCC) for the media, at Reporters without Borders.

³⁷ Embedded journalists in the Iraq war: Are they at greater psychological risk?, Feinstein and Nicolson, *Journal of Traumatic Stress* (2005).

required to sign a “Hold Harmless/Release from Liability Statement”³⁸ by the military with which they are embedded.

For years, the press has been demanding better access to war proceedings from the U.S. military. During the recent war in Iraq, they did make some progress. In a change of information policy, the Pentagon embedded about 900 journalists with British and American units during the war in Iraq.³⁹ Some of their reports, film reports, and photographs were sent via satellite from the front lines. The official reason for the Pentagon’s change in information policy can be found in the introductory passage of the “ground rules” for embedded reporters: “We need to tell the factual story—good or bad—before others seed the media with disinformation and distortions, as they most certainly will do.”⁴⁰

³⁸ The Ground Rules Agreement established by the Coalition Forces Land Component Command (CFLCC) for the media, at Reporters without Borders.

³⁹ BBC News Report: Cutting through Iraq's 'fog of war', by Joseph Winter, BBC News Online, March 27th, 2003.

⁴⁰ The Ground Rules Agreement established by the Coalition Forces Land Component Command (CFLCC) for the media, at Reporters without Borders.

There were an estimated 700 embedded journalists in Iraq in 2003.⁴¹ The legal status of this kind of journalist is currently unclear. They tend to be equated with war correspondents within the meaning of the Third Geneva Convention to benefit from the prisoner-of-war status, but there is still some doubt. For example, French military authorities consider such journalists to be entitled only to civilian status,⁴² as provided in Article 79 of the Additional Protocol of 8 June 1977 to the Geneva Conventions.

Such journalists may, however, lose not their right to protection as civilians but *de facto* protection if they stay too close to a military unit or approach military targets. They can no longer avail themselves of the protection due to their profession because that unit is a lawful target of enemy attacks. Journalists thus act at their

⁴¹ Weapons of Mass Communication, War Reporting from Iraq: 1991-2003, Jean-Marie Charon and Arnaud Mercier, the CNRS Communication Series 2004.

⁴² The Protection of Journalists and News Media Personnel in Armed Conflict: Alexandre Balguy-Gallois, *International Review of the Red Cross* (2004).

own risk and forfeit *de facto* the protection to which they are entitled.⁴³ Similarly, if journalists wear clothing that too closely resembles military uniforms, they may *de facto* incur risks of a similar nature and lose effective protection.

Section 3. Special Circumstance of Journalists in Situations of Armed Conflict

Sub-section a. The Nature of Contemporary Armed Conflicts

In 2006, there were 17 major armed conflicts in 16 locations, compared to 19 in 17 locations in 2004.⁴⁴ The majority of conflicts today continue to be non-international. Such conflicts have always been marked by an imbalance in the military capacity of the warring parties.

⁴³ The Protection of Journalists and News Media Personnel in Armed Conflict: Alexandre Balguy-Gallois, *International Review of the Red Cross* (2004).

⁴⁴ Stockholm International Peace Research Institute (SIPRI) Yearbook 2007.

In such conflicts, to overcome their inferiority in conventional military strength, militarily weaker parties have resorted to strategies that flagrantly violate international humanitarian law, such as deliberate attacks against civilians (including journalists). Such attacks include suicide bombings as well as hostage-taking and intentional placement of combatants and other military objectives amid civilian infrastructure. Such acts are inexcusable violations of international humanitarian law of which civilians bear the brunt.⁴⁵

Sub-section b. “Freedom of the Press” and Armed Conflict

When we discuss the special circumstance of journalists in areas of armed conflict, we have to know the profession of journalists first, which determines the special characteristics and importance of journalists.

⁴⁵ The Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, U.N. Security Council, October 28th 2007.

As has been mentioned earlier, a journalist is a person who practices journalism. Journalism is a discipline of gathering, writing, and reporting news, and broadly it includes the process of editing and presenting the news articles. Journalism applies to various media but is not limited to newspapers, magazines, radio, and television.

Journalism is the key to the freedom of the press (freedom of publication). Freedom of the press is generally considered the guarantee by a government of free public press for its citizens and their associations, extended to members of news gathering organizations and their published reporting.⁴⁶ It is the right of print and broadcast media to express political views and to cover and

⁴⁶ Rights of the People—Individual Freedom and the Bill of Rights: U.S. Department of State, December 2003.

publish news, also extending to news gathering and processes involved in obtaining information for public distribution.⁴⁷

As society has grown increasingly complex, people rely more and more on newspapers, radio, and television to keep abreast with world news, opinion, and political ideas. One sign of the importance of a free press is that when antidemocratic forces take over a country, their first act is often to muzzle the press.

Freedom of the press has always been emphasized as an essential basis for the democratic functioning of a society. A free press is one of the foundations of a democratic society, and as Walter Lippmann, the 20th-century American columnist, wrote, "A free press is not a privilege, but an organic necessity in a great society."⁴⁸

⁴⁷ Rights of the People—Individual Freedom and the Bill of Rights: U.S. Department of State, December 2003.

⁴⁸ Same as above.

Not all countries are protected by a bill of rights or a constitutional provision pertaining to freedom of the press. This is especially true in countries having internal ongoing armed conflicts or being involved in trans-border armed conflicts.

However, those who target journalists and seek to muzzle the fundamental human rights of freedom of expression and freedom of the press are sabotaging the reconstruction of a failing country as a free, democratic country. When they attack journalists, they attack every individual's right and ability to make informed decisions and play a part in the development of the country.

In developed countries, freedom of expression implies that all people should have the right to express themselves in writing or in any other way of expressing personal opinion or creativity.

Freedom of the press is a subset of freedom of expression. The right to freedom of opinion and expression is the basis of

democracy and is of fundamental importance to the safeguarding of human dignity. Diversity of sources of knowledge and information is an essential prerequisite for cultural diversity, creativity, prosperity, tolerance, and the development of societies worldwide.⁴⁹

War is the most profound action any government can take, and for that reason, the decision to wage and conduct it must be subject to the continuing scrutiny of a well-informed public.⁵⁰ There is a right to information and freedom of expression even in wartime.⁵¹

While the justification or legality of journalistic activities in times of war originates from human rights, the scope of the Geneva Conventions is more limited, namely in diminishing the effects of war on people. In other words, international humanitarian law

⁴⁹ Official Statement of the International Publishers Association, IPA Online.

⁵⁰ Freedom of Expression and the War—Press and Speech Restrictions in the Gulf and F.B.I. Activity in U.S. Raise First Amendment Issues: The Fund for Free Expression, January 28th, 1991.

⁵¹ See the UNESCO report "Voix multiples, un seul monde" drawn up by the International Commission for the Study of Communication Problems, 1986.

does not protect the journalists' function but does protect human beings engaged in this activity.⁵²

Freedom of expression is embodied in many international treaties and declarations. Most prominently, they can be found in the following international and regional legal instruments:

Article 19 of the *Universal Declaration of Human Rights*, adopted and proclaimed by U.N. General Assembly Resolution 217 A (III) of 10 December 1948:

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

⁵² The Protection of Journalists Engaged in Dangerous Professional Missions: Hans-Peter Gasser, *International Review of the Red Cross* (1983).

Article 19 of the *International Covenant on Civil and Political Rights*, adopted and opened for signature, ratification and accession by U.N. General Assembly Resolution 2200 A (XXI) of 16 December 1966:

"1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law or are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals."

Article 10 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, signed on 4 November 1950:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity of public safety, for the prevention of disorder

or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority or impartiality of the judiciary."

Freedom of the press is usually accompanied by legislation ensuring various degrees of freedom of scientific research (known as scientific freedom), publishing, press, and printing. The depth to which these laws are entrenched in a country's legal system can go as far down as its constitution. The concept of freedom of speech is often covered by the same laws as freedom of the press, thereby giving equal treatment to the media and individuals.⁵³

However, in recent years, during wartime even the most democratic governments often treat the press as an inconvenience

⁵³ For example, the First Amendment of U.S. Constitution was ratified on December 15th, 1791. The Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

and an obstacle to their efforts rather than respecting its role as an independent means of presenting information to the public. Their policies often impose significant press and speech restrictions, which impair the free flow of information to and from the war zones. For example:

Excerpts from the U.S. Department of Defense, Public Affairs Office:

"Operation Desert Shield—Ground Rules":

"The following information should not be reported because its publication or broadcast could jeopardize operations and endanger lives:

- Information on intelligence collection activities, including targets, methods and results.
- Information on the effectiveness or ineffectiveness of enemy camouflage, cover, deception, targeting, direct and indirect fire, intelligence collection, or security measures.

- Special operations forces' methods, unique equipment or tactics.
- Information on operational or support vulnerabilities that could be used against U.S. forces, such as details of major battle damage or major personnel losses of specific U.S. or coalition units, until that information no longer provides tactical advantage to the enemy and is, therefore, released by CENTCOM. Damage and casualties may be described as 'light,' 'moderate,' or 'heavy'."

"Guidelines for News Media":

- "You must remain with your military escort at all times, until released, and follow their instructions regarding your activities. These instructions are not intended to hinder your reporting. They are intended to facilitate movement, ensure safety, and protect operational security.
- Security at the source will be the policy. In the event of hostilities, pool products will be subject to security review

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prior to release to determine if they contain information that would jeopardize an operation or the security of U.S. or coalition forces. Material will not be withheld just because it is embarrassing or contains criticism. The public affairs officer on the scene will conduct the security review. However, if a conflict arises, the product will be expeditiously sent to JIB Dharhan for review by the JIB Director. If no agreement can be reached, the product will be expeditiously forwarded to OASD(PA) (Office of Assistant Secretary of Defense for Public Affairs) for review with the appropriate bureau chief.”

During the U.S. invasion of Grenada in 1983, “the Reagan Administration established the precedent for total censorship ..., having watched with envy how Prime Minister Margaret Thatcher kept the ever-servile British press under very tight restrictions and

banned television crews from the Falklands during her brief and successful war to recapture that colony from Argentina.”⁵⁴

Those military censorships reflected some new restrictions that were imposed by the U.S. government on the media. The implementation of those new, restrictive policies has created “managed news” that fails to uphold the spirit of freedom of the press.⁵⁵

Previously, in World War II, “American newsmen were allowed easy access to the battlefield in 1941-45.”⁵⁶ During the Vietnam War, “reporters could go anywhere—anytime—often with the military taking them along. There were two basic restrictions in Vietnam. First, that no troop movements be reported prior to engagement. Second, that no faces of dead or wounded soldiers be

⁵⁴ No News—Bad News: Nation Magazine, January 28th 1991

⁵⁵ Managed News, Stifled Views—U.S. Freedom of Expression and the War—An Update: the Fund for Free Expression, February 27th 1991.

⁵⁶ Battle Lines—Report of the Twentieth Century Fund Task Force on the Military and the Media: Priority Press Publications (1985).

shown before their families had been properly identified. Both restrictions were totally understandable, and there were virtually no violations of the guidelines by any American news organizations.”⁵⁷

Sub-section c. Journalists Pursuing Freedom of the Press in Areas of Armed Conflict

It is a widely accepted view that transmitting as much information as possible regarding events during armed conflict is important.⁵⁸

In most developing countries, especially in those experiencing ongoing armed conflict, freedom of the press is often abandoned with some other basic human rights, although there may be clear statements about freedom of the press in their national legislation.

In such circumstances, journalists usually encounter much more

⁵⁷ *The Nation Magazine vs. U.S. Department of Defense*, 91 civ. 0238 (S.D.N.Y.).

⁵⁸ “The Commentary on Article 79—Measures of Protection for Journalists,” the International News Safety Institute, INSI online.

difficulty than they would face in developed countries and peaceful circumstances.

Furthermore, the circumstance of armed conflict exposes journalists performing their profession in such a dangerous situation, which often exceeds the level of danger normally encountered by regular civilians. In most situations, the risks are even similar to the dangers faced by members of the armed forces, despite the fact that most journalists do not belong to the armed forces. While many journalists face similar dangers as those encountered by members of the armed forces, most journalists lack even basic self-defense abilities in armed conflict.

It is undeniable that there is huge interest on the part of the public when journalists exercise the freedom of the press to look for information and communicate it to the public. The special characteristics of journalism require that most journalists in areas

of armed conflict maintain their independence from any armed forces.

Journalists in areas of armed conflict are exposed to the physical danger of war. They can be victims of the direct effects of hostilities and also the victims of arbitrary acts of armed forces. They can become pawns and hostages.⁵⁹ While journalists who perform their profession in situations of armed conflict run great risks, what legal protection does international law provide them with to protect them and to facilitate the exercise of their professional activities?

In 2006, and for the fourth consecutive year, Iraq was reportedly the most dangerous country for the media, with 64 journalists and media assistants killed, the majority of them Iraqi nationals. Another 43 were killed in Iraq during the first six months of

⁵⁹ The Responsibility to Protect—Report of the International Commission on Intervention and State Sovereignty (ICISS), December 2001.

2007,⁶⁰ with fatalities also reported in Afghanistan, the Democratic Republic of the Congo, Haiti, the occupied Palestinian territory, Somalia, and Sri Lanka.

Somalia has long been home to a range of thriving independent newspapers and radio stations. Many of them continue to report courageously on events across the country during the ongoing armed conflicts. As a result, journalists have been targeted by all sides of the conflict.⁶¹

In Somalia, attacks on journalists have significantly increased in the highly politicized environment since 2006. The international media presence is minimal. Nine Somali journalists were killed in 2007, making it the most devastating year for Somali journalism

⁶⁰ According to the Archives of the Reporters without Borders, available on its Web site through a general search and careful statistics.

⁶¹ Somalia—Beleaguered Journalists Recognized for Courage: Human Rights Watch, June 2nd, 2008.

since 1991.⁶² At least five of them were assassinated, apparently to coerce them into changing their coverage of events.⁶³ As many as one hundred others have fled the country because of repeated death threats or actual attacks upon their homes or offices.⁶⁴ The Transitional Federal Government (TFG) of Somalia has repeatedly closed independent media outlets, such as the Shabelle Media Network, the HornAfrik, and other smaller radio stations serving Mogadishu. Several journalists have been detained for long periods without charge, apparently in an effort to suppress independent reporting.⁶⁵ Similar situations also happen in another hot zone—Sudan.⁶⁶

⁶² The Human Rights Crisis in Somalia: Human Rights Watch, March 31st, 2008 (delivered during the “Arria formula” meeting on Somalia held by U.N. Security Council).

⁶³ Somalia—Beleaguered Journalists Recognized for Courage: Human Rights Watch, June 2nd, 2008.

⁶⁴ Same as above.

⁶⁵ Same as above.

⁶⁶ Sudan—End Crackdown on Press: Human Rights Watch (2002); Sudan—Persecuted Journalists Flees Country: Human Rights Watch (2003).

In some cases, fatalities result from excessive risk-taking, or from being caught in a crossfire. Others result from deliberate targeting by parties to conflict in order to deter or prevent reporting, particularly on abuses.⁶⁷ The practice of embedding with a party to a conflict also puts journalists at close quarters with military objectives and may give the impression that they are combatants and thus legitimate targets.⁶⁸

The *U.N. Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression* confirms that the number of journalists killed in war zones has also increased because the media, especially television reporting, is now considered to be an essential element of war propaganda.⁶⁹ It is emphasized that media reporting may substantially create and eventually change the public's views on a conflict depending on

⁶⁷ The Report of the Secretary-General on the Protection of Civilians in Armed Conflict, U.N. Security Council, October 28th, 2007.

⁶⁸ Same as above.

⁶⁹ The Civil and Political Rights including the Question of Freedom of Expression, U.N. Commission on Human Rights—ECOSOC (2005).

the perspective they offer. On the other hand, in many instances, journalists have offered a multifaceted view of conflict and have contributed to the ordinary citizen's independent assessment of it.

The escape and failure to act by the international community and the decision of the United Nations Security Council to withdraw its mission in Rwanda during the period of genocide in the 1990's have shamed the whole international community.⁷⁰ At that time, there was no provision to authorize the engagement of U.N. peacekeepers for the protection of civilians in crisis in the constitutional mandates of U.N. peacekeeping missions around the world. At that time, U.N. peacekeeping missions acted only as "observers." The U.N. peacekeepers were authorized to use force only when they themselves faced imminent threat.⁷¹

⁷⁰ See the Background Notes of U.N. Department of Peacekeeping Operations, regarding the United Nations Observer Mission Uganda-Rwanda (UNOMUR), May 2007.

⁷¹ Chapter IV discusses the constitutional mandates of U.N. peacekeeping missions.

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It was the reporting of journalists that actually brought this issue into the public eye of the whole international community. Journalists' reporting on the possible genocide occurring in Rwanda resulted in a series of changes in the policies of the international community, the individual Western countries and international inter-governmental organizations (such as the United Nations, the European Union, the African Union, the Organization of the Islamic Conference, the Commonwealth, the North Atlantic Treaty Organization, the Community of Portuguese Language Countries, and so on).⁷²

Therefore, due to journalists' special role in the international community serving the public interest, special rules are required for journalists who are imperiled by their professional duties in the context of armed conflict in order to enhance the legal protection

⁷² See the Background Notes of U.N. Department of Peacekeeping Operations, regarding the United Nations Observer Mission Uganda-Rwanda (UNOMUR), May 2007.

to journalists in armed conflict under international law and also to affirm the principle of freedom of the press.

To move this issue forward, the *U.N. Special Rapporteur on the Right to Freedom of Opinion and Expression* has recommended preparing a comprehensive analysis of the issue with recommendations for strengthened protection.⁷³ This would be an important step and should draw on the work of organizations with expertise in this area in the future.

Staffan de Mistura, the U.N. Secretary-General's Special Representative, expressed his condolences to the Iraqi Journalists' Union and to the family of Shihab al-Tamimi, who was killed on February 23rd, 2008: "Attacks against journalists and media representatives are tantamount to repressing press freedom and freedom of expression that are an essential component of

⁷³ The Report of the Secretary-General on the Protection of Civilians in Armed Conflict, U.N. Security Council, October 28th, 2007.

democracy. The killing of Mr. al-Tamimi is an example of the dangers faced daily by journalists in Iraq.”⁷⁴

The head of the United Nations agency tasked with defending freedom of the press, the *U.N. Educational, Scientific and Cultural Organization (UNESCO)* has condemned the killing of Iraqi journalists, declaring that the crime constitutes “a cowardly blow” to the fledgling democracy.⁷⁵

Those who target journalists and seek to muzzle the fundamental human right of freedom of expression and freedom of the press are sabotaging the reconstruction of a failing country as a free, democratic country. When they attack journalists, they attack every individual’s right and ability to make informed decisions and play a part in the development of the country.

⁷⁴ <http://www.un.org/apps/news/printnews.asp?nid=25800>, U.N. News Centre, February 2008.

⁷⁵ <http://www.un.org/apps/news/printnews.asp?nid=25818>, U.N. News Centre, March 2008.

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**Chapter II. International Rule of Law and Current
International Rules⁷⁶ on the Protection of Journalists in
Armed Conflict**

Section 1. International Rule of Law

International law and the rule of law are the foundation of the international system. Clear and foreseeable rules and a system to prevent or sanction violations of these rules are essential prerequisites for lasting peace, security, economic development, social processes, and individual freedom.

⁷⁶ Including but not limited to the definition of the Article 38 of the Statute of the International Court of Justice (ICJ): "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

While the sovereignty and integrity of the territory of individual states are generally respected by international law (such as the Charter of the United Nations) and contemporary international community, individual states also bear the responsibility to protect the human rights of people in their respective territories.

When a state fails to fulfill its responsibility, the international community must take collective action to force the state to fulfill its obligation and may also directly engage in the affair through collective action under the principle of international rule of law.

At the United Nations World Summit in 2005, member states unanimously recognized the need for “universal adherence to and implementation of the rule of law at both national and international level” and reaffirmed their commitment to “an

international order based on the rule of law and international law.”⁷⁷

To conceive of the rule of law in a manner coherent across the many contexts in which it is invoked requires a formal minimal understanding that does not seek to include substantive political outcomes—democracy, promoting certain human rights (such as freedom of expression and the press), redistributive justice, *laissez-faire* capitalism, and so on.⁷⁸

One way of considering the rule of law, particularly in its international context, is to look at the function that the rule of law is intended to serve in a society. The promotion of rule of law tends to be presented as a form of “technical assistance” (from the international community to failing or failed states). Extraordinary

⁷⁷ United Nations 2005 World Summit Outcome Document, U.N. General Assembly, September 16th, 2005.

⁷⁸ An International Rule of law?: Simon Chesterman, *American Journal of Comparative Law* (2008).

outcomes of international rule of law assistance may be achieved in the recipient community. It has been used to establish non-violent mechanisms for resolving political disputes, in addition to promoting human rights and providing a stable foundation for economic development by international inter-governmental organizations.⁷⁹

On an international level, the rule of law shall be seen as different from the rule of law on a national level in developed countries (U.S.A., U.K., France, Germany, etc.).

International rule of law shall be first seen as a “tool” of the promotion of international rules among the whole international community and the promotion of rule of law on a national level in developing countries, including failing or failed countries.

⁷⁹ The Dignity of Legislation: Jeremy Waldron, Cambridge (1999).

This difference between national (developed countries) rule of law and international rule of law requires us to look with different measures and views on the international rules that apply on an international level and bear the function of promoting the rule of law in non-industrialized-countries (national level).

Those international rules are laws. However, they serve beyond the mere function of "laws" defined in developed countries. They bear the additional, much more important functions of technical assistance (from the international community to developing countries), strengthening the rule of law within individual developing countries, and even granting the "power of rights" to individuals in developing countries. They are not only laws but also means and tools for the peace, security, and development of failing or failed states.

Section 2. Current/Existing International Rules⁸⁰ on the Issue of the Protection of Journalists in Areas of Armed Conflict

When we are trying to promote better legal protection under international law for journalists who work in zones of armed conflict, it is better for us first to review and see what rules are already present in existing international law on this issue.

Under the first Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol I to the Geneva Convention)⁸¹, journalists who engage in dangerous professional missions in zones of armed conflict are considered and protected as civilians, provided that they take no adverse actions affecting their status.

⁸⁰ Including but not limited to the definition of the Article 38 of the Statute of the International Court of Justice (ICJ).

⁸¹ The Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977.

They enjoy general protection and immunity against risks arising from military operations.⁸²

Generally speaking, journalists and their objects shall not be the object of attack. Any acts or threats of violence of which the primary purpose is to terrorize journalists are prohibited.

When journalists are captured and fall into the power of one party to the conflict, those journalists who accompany the armed forces without actually being members—war correspondents—can also enjoy the status and additional protection of prisoners of war under the Third Geneva Convention.⁸³

Under current international law, journalists who are doing their legitimate jobs in areas of armed conflict are categorized in

⁸² Article 51 of the Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflict (Protocol I) of 8 June 1977; Part II of the Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949.

⁸³ Article 4 of the Convention relative to the Treatment of Prisoners of War, 12 August 1949.

different groups, which overlap each other. Generally speaking, there are three different categories of journalists practicing their profession in areas of armed conflict.

In addition, “wounded, sick, or shipwrecked” journalists fall under the same protections as other injured persons during armed conflict, whether or not they are members of armed conflict before being injured.⁸⁴

The Hague Conventions, four Geneva Conventions, and their Additional Protocols summarize and codify most of the customary international laws on this issue as well.⁸⁵ The relevant international legal instruments on this issue include but are not limited to the following:

⁸⁴ “The Commentary on Article 79—Measures of Protection for Journalists,” International News Safety Institute, INSI online.

⁸⁵ Customary Law and Additional Protocol I to the Geneva Conventions for Protection of War Victims: Future Directions in Light of the U.S. Decision Not to Ratify—Gasser and Meron, *American Society of International Law* (1987).

- The four Geneva Conventions of 1949 and their two Additional Protocols of 1977: classifying the different types/statuses of journalists who perform their profession in armed conflict—in particular war correspondents, journalists (prisoner-of-war status for journalists in case of capture), and civilian journalists.
- The U.N. General Assembly Resolutions: classifying the principle of international rule of law, the general legal duty and responsibility of individual states to prevent harm to and protect the human rights of people in its territory, and the collective-action responsibility of the international community through international inter-governmental organizations.

- The U.N. Security Council Resolutions (its legislative power under the Charter of the United Nations ⁸⁶): classifying the specific individual or collective actions that individual states or the whole international community should take in order to fulfill their respective responsibility to protect those civilians and journalists.
- International Court of Justice (ICJ) judgments: reaffirming the treaty principle of “responsibility to protect” in international judicial decisions and creating international judicial precedent (case law) on this issue
- U.N. Secretary-General Reports to the U.N. Security Council ⁸⁷ : reaffirming and classifying international

⁸⁶ Compared to legislation on a national level, we may consider U.N. Security Council Resolutions as “regulations” that execute those general laws—“statute” and “treaty” on an international level.

⁸⁷ International Judicial Tribunal confirms U.N. Secretary-General Reports have “considerable authority” in international *ad-hoc* adjudication. (*Bosnia and Herzegovina vs. Serbia and Montenegro*, International Court of Justice, February 26th, 2007) Compared to

obligations to protect civilians and journalists in armed conflict, and classifying the actual needs and protection situations on the ground.

This chapter explores the issue of protection of journalists in armed conflict under existing international rules, respectively, with regard to the two general statuses of journalists—war correspondents and civilians, and also with regard to various levels of international legal instruments of different kinds.

As civilians, journalists are generally protected from capture or attacks in situations of armed conflict. As war correspondents, journalists enjoy prisoner-of-war status in case of capture, but they may be legitimate targets of attacks (e.g., when journalists stay too close to a military unit, they are *de facto* indistinguishable from military personnel). Generally speaking, journalists in areas of

legislation on a national level, we may consider the Reports of U.N. Secretary-General as both “Executive Order of the President” and “Presidential report to the Congress” on an international level.

armed conflict shall not be attacked, but due to the fact of their proximity and even attachment to military and armed groups at times, they may become legitimate targets of attacks.

This chapter also in particular addresses the status and issue of journalists who perform functions beyond their natural profession, such as “spy” journalists.

Section 3. Journalists Protected by International Law as “War Correspondents”

Sub-section a. The Article 4A(4) of the Third Geneva Convention with regard to “Prisoner-of-War”

“Prisoners of War, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

...

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labor units ..., provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card...⁸⁸

According to Article 79 of Protocol II to the Geneva Conventions, and most scholars⁸⁹, if journalists of such kind are captured by an enemy power, they are entitled to additional protection under the Geneva Conventions as prisoners of war in addition to the protection and immunity that regular civilians are entitled to.

⁸⁸ The Article 4A(4) of the Convention relative to the Treatment of Prisoners of War, 12 August 1949

⁸⁹ The Responsibility to Protect: From Document to Doctrine: But What of Implementation?—Hamilton, *Harvard Human Rights Journal* (2006); Crimes Against Humanity: Overcoming Global Indifference—Evans, University of New South Wales Press (2006); Operationalizing the Responsibility to Protect: the Policekeeping Approach—Graham and Freeman, *Global Governance* (2005); When is it Right to Fight?—Evans, *Survival* (2004); The Responsibility to Protect—Evans and Sanhoun, *Foreign Affairs* (2002)

Sub-section b. The Protection of "Prisoner-of-War" Journalists in Armed Conflict under the Relevant Legal Provisions in the Geneva Conventions and their Additional Protocols

As prisoners of war, journalists may only be transferred by the detaining power to a power that is also a party to the Geneva Conventions and only after the detaining power has satisfied itself of the willingness and ability of such transferee power to apply the Geneva Conventions.⁹⁰

They can enjoy the rights of prisoners of war until they are directly repatriated or accommodated in neutral countries. They are entitled in all circumstances to respect for their persons and their honors.⁹¹

⁹⁰ Article 46-48 of the Convention relative to the Treatment of Prisoners of War, 12 August 1949.

⁹¹ Article 12-16 of the Convention relative to the Treatment of Prisoners of War, 12 August 1949.

Under Article 13 of the Third Geneva Convention, prisoners of war must at all times be humanely treated. None of them may be subjected to physical mutilation, to medical or scientific experiments of any kind, or to any acts of violence or intimidation.

Under Article 19 of the Third Geneva Convention, captured war correspondents shall be evacuated as soon as possible after their capture to camps situated in an area far enough from the combat zone for them to be out of the danger zone. They shall not be unnecessarily exposed to danger.

Captured war correspondents are subject to internment. They are obligated to remain in the camp where they are interned. However, they shall be partially or wholly released on parole or promise according to the laws of the detaining power due to health reasons.⁹² Under Article 110 of the Third Geneva Convention, for

⁹² Article 118-119 of the Convention relative to the Treatment of Prisoners of War, 12 August 1949.

serious health reasons, war correspondents may be entitled to repatriation or accommodation in a neutral country.

They shall be entitled to sufficient food, clothing, and medical attention. They even enjoy complete latitude in the exercise of their religious duties, including attendance at services of their faith.⁹³

Although they may be required to perform labor, they shall not be employed in labor that is of an unhealthy or dangerous nature under Article 52 of the Third Geneva Convention. More important, as war correspondents, journalists are entitled to regular visitation from a central prisoners of war information agency and relief society, such as the International Committee of the Red Cross (ICRC) to ensure just treatment.⁹⁴

⁹³ Article 34-38 of the Convention relative to the Treatment of Prisoners of War, 12 August 1949.

⁹⁴ Article 122-125 of the Convention relative to the Treatment of Prisoners of War, 12 August 1949.

Section 4. Journalists Protected by International Law as
“Civilians”

Sub-section a. Article 79—Measures of Protection for Journalists
of the Additional Protocols to the Geneva Conventions

This is the fundamental and master clause on the issue of protection of journalists in situations of armed conflict in existing international rules.

“Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians...

provided that they take no action adversely affecting their status as civilians.”⁹⁵

⁹⁵ Article 79 of the Additional Protocol of 8 June 1977 to the Geneva Convention of 12 August 1949.

Under Article 50 of the Protocol and Article 4 of the Third Geneva Convention, civilians are defined as those who do not engage in hostilities and are in the hands of a power of which they are not nationals. It stipulates that “In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.” Therefore, the legal presumption is that journalists are civilians, even in case of doubt.⁹⁶

Generally speaking, based on the plain language of Article 79 of Protocol I to the Geneva Conventions, every journalist who practices his or her profession in an area of armed conflict shall be treated and protected as a civilian, free from being the object of attacks. This provision is merely declaratory and does not create new status.⁹⁷

⁹⁶ The Protection of Journalists and News Media Personnel in Armed Conflict: Alexandre Balguy-Gallois, *International Review of the Red Cross* (2004).

⁹⁷ “The Commentary on Article 79—Measures of Protection for Journalists,” The International News Safety Institute, INSI online.

Also falling in this category, journalists who accompany and are accredited to armed forces are additionally considered to be war correspondents and enjoy the rights under prisoners of war provisions if they are captured by enemy forces. Only war correspondents may be captured, because regular civilians (including those who are also non-war correspondent journalists) shall be free from capture and attack under the Fourth Geneva Convention and Protocol II to the Geneva Convention.

Sub-section b. The Protection of “Civilian” Journalists in Armed Conflict under the Relevant Legal Provisions in the Geneva Conventions and their Additional Protocols

Under Article 27 of the Fourth Geneva Convention of 1949⁹⁸, as civilians, journalists are entitled in all circumstances to respect for their persons, honor, family rights, religious convictions and

⁹⁸ The Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949.

practices, manners, and customs. Journalists shall be protected against all acts of violence or threat and against insults and public curiosity. They are also entitled to regular visitation of international humanitarian organizations, such as the International Committee of the Red Cross and the National Red Cross, for assurance of their just treatment.⁹⁹

Under Article 35 of the Fourth Geneva Convention, alien journalists are entitled to leave the conflicting territory at will. This article is especially important to most journalists in areas of armed conflict because most journalists practicing their profession in zones of armed conflict are foreigners (non-nationals of the conflicting territory) from BBC, CNN, the Associated Press, Reuters, and some other big media companies headquartered in developed countries.

⁹⁹ Article 136-141 of the Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949.

Under Article 45 of the Fourth Geneva Convention, civilian journalists, as protected persons, shall not be transferred to a power that is not a party to the Geneva Conventions. In occupied territory, civilian journalists cannot be compelled to serve in the armed forces of the occupying power. Their employment and work conditions in occupied territory are also protected under the Fourth Geneva Convention, as are those of regular civilians.¹⁰⁰

Under Chapter III of the Fourth Geneva Convention, when journalists are captured, they are entitled to sufficient food, clothing, and medical attention. Under all four Geneva Conventions, civilian journalists—journalists taking no active part in the hostilities—shall be protected against “violence to life and person,” including murder of all kinds and cruel and unusual treatment or torture.¹⁰¹

¹⁰⁰ Section III of the Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949.

¹⁰¹ Article 3 of all four Geneva Conventions of 1949.

The Protocol to the Geneva Conventions requires, in particular, armed forces to distinguish at all times between civilian and military objectives, and only the latter can be lawful targets of attack.¹⁰² Similarly, the armed forces are also obligated by Article 57 of the Additional Protocol to take measures of precaution (“Precaution in Attack”).¹⁰³

Armed forces are obligated to give advance warning to journalists under Protocol I to the Geneva Conventions. The main aim of this rule is to give journalists the chance to seek refuge from the effects of a planned attack and military authorities the opportunity to evacuate them.¹⁰⁴

The Geneva Conventions impose a principle of “proportionality” on the armed forces when the loss and damages to journalists

¹⁰² Article 48 of the Protocol I of 1977 to the Geneva Convention of 1949.

¹⁰³ The Protection of Journalists and News Media Personnel in Armed Conflict: Alexandre Balguy-Gallois, *International Review of the Red Cross* (2004).

¹⁰⁴ Kosovo 1999: The Air Campaign: Have the Provisions of Protocol I Withstood the Test?—Peter Rowe, *International Review of the Red Cross* (2000).

(collateral damage) are incidental. Subject to the balancing test, the incidental harmful effects affecting journalists must not be “excessive” in relation to the military advantage anticipated.¹⁰⁵

Under the Fourth Geneva Convention with respect to journalists, it is prohibited whatsoever to take hostages, inflict humiliating or degrading treatment, and pass sentence without proper judgment of a duly constituted court. The detaining power may institute a penal inquiry against detained journalists “for imperative reasons of security.”¹⁰⁶ If the charges against journalists are not serious enough to sentence them, journalists must be released.

Journalists who are nationals of a third, non-belligerent state are entitled to receive support and protection from their country’s

¹⁰⁵ NATO’s War in Kosovo and the Final Report to the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia: Schwabach, *Tulane Journal of International and Comparative Law* (2001); Proportionality and Force in International Law: Gardam, *American Journal of International Law* (1993); The New Humanitarian Law of Armed Conflict: Cassese, *American Journal of International Law* (1980).

¹⁰⁶ Article 76 and 78 of the Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949.

diplomatic and consular representative under international treaties.¹⁰⁷ A deliberate attack causing the death or injury of a journalist constitutes a serious breach of the Protocol to the Geneva Conventions and is a war crime.¹⁰⁸

While they are protected by the four Geneva Conventions, journalists are also bound by the Conventions to respect the wounded, sick, and shipwrecked, and shall commit no act of violence against them, even if they belong to an opposing party.

Sub-section c. The Protection of "Civilian" Journalists in Armed Conflict under the Laws of the United Nations (U.N. Laws¹⁰⁹)

Pursuant to the Charter of the United Nations, peace and security, development, and human rights are the pillars of the United

¹⁰⁷ The Vienna Convention on Diplomatic Relations; and the Vienna Convention on Consular Relations.

¹⁰⁸ Article 50 of the Protocol I of 1977 to the Geneva Convention of 1949.

¹⁰⁹ The broad U.N. laws include the judicial judgments of the International Court of Justice (ICJ), due to the fact that the ICJ is part of the United Nations system.

Nations system and the foundations for collective security and well-being.

Representing the majority of the international community, the United Nations and its agencies bear the primary burden to take collective measures to maintain peace and security in the world according to their respective mandates. The Affirming and Enforcing the Principle of the Protection of Journalists in Armed Conflict is part of the U.N.'s obligation due to the mandates.¹¹⁰

- The Protection of Journalists in armed conflict under U.N. Security Council Resolutions 1265, 1674, and 1738:

The deliberate targeting of civilians and journalists or other protected persons and the committing of systematic, flagrant, and

¹¹⁰ Rethinking Collective Action: the Responsibility to Protect and the Duty to Prevent—Charolette, Evans and Feinstein, Annual Meeting of the American Society of International Law, 2004.

widespread violations of international humanitarian and human rights laws in situations of armed conflict may constitute a threat to international peace and security.

As the sole international mechanism authorized by the Charter of the United Nations to carry out legislative, executive, and judicial functions regarding international peace and security, the U.N. Security Council passes Resolutions, which constitute a significant part of the international system of laws.¹¹¹

In this regard, the United Nations through its Security Council may, when necessary, adopt appropriate steps to prevent harm to protected persons defined under international law, under the U.N.'s Charter authority to maintain or restore international peace and security. The Security Council's continuous adoption of these Resolutions marked a significant milestone, reflecting the

¹¹¹ The Role of the Security Council in Strengthening a Rules-based International System: Final Report and Recommendations from the Austrian Initiative—Austrian Federal Ministry for European and International Affairs, 2004-2008.

international community's growing commitment to better address the tragic plight of journalists and civilians trapped in situations of armed conflict.

The United Nations Security Council Resolution 1265 is the first Security Council Resolution to address the issue of the protection of civilians in armed conflict. In this Resolution, the Security Council expressed its deep concern regarding the erosion in respect for international humanitarian, human rights, and refugee laws and principles during armed conflict, in particular deliberate acts of violence against all those protected under such laws.¹¹²

In April 2006, the Security Council adopted Resolution 1674 to reaffirm the principles and provisions in its prior Resolutions 1265 and 1296, and also the Charter of the United Nations, as to the protection of civilians in armed conflict.¹¹³

¹¹² United Nations Security Council Resolution 1265 (1999), September 17th, 1999.

¹¹³ United Nations Security Council Resolution 1674 (2006), April 28th, 2006.

In paragraph 10 of this Resolution, the Security Council expressly emphasized its willingness to “respond to situations of armed conflict where civilians are being targeted.”

The Resolution 1674 endorses the general principle that deliberately targeting civilians, including those journalists who practice their profession in areas of armed conflict, is a flagrant violation of international humanitarian laws.¹¹⁴

It clearly affirms that parties to armed conflict bear the primary responsibility to take all feasible steps to ensure the protection of affected civilians and journalists, while the responsibility of the international community represented by the United Nations to take collective measures aimed at conflict prevention and solution is secondary.¹¹⁵

¹¹⁴ United Nations Security Council Resolution 1674 (2006), April 28th 2006.

¹¹⁵ Same as above.

The Security Council demanded that all parties to conflict comply strictly with the obligations applicable to them under international law, in particular those contained in the Hague Conventions of 1899 and 1907 and in the four Geneva Conventions of 1949 and their two Additional Protocols of 1977.¹¹⁶

Those basic principles and rules in the aforementioned international law are also reaffirmed by the Security Council Resolution. “All acts of violence or abuses committed against civilians”¹¹⁷ are clearly prohibited in situations of armed conflict in violation of applicable international legal instruments.

The issues in particular addressed in the Resolution are: (i) torture and other prohibited treatment, (ii) gender-based and sexual violence, (iii) violence against children, (iv) the recruitment and

¹¹⁶ United Nations Security Council Resolution 1674 (2006), April 28th 2006.

¹¹⁷ Same as above.

use of child soldiers, (v) trafficking in humans, (vi) forced displacement, and (vii) the intentional denial of humanitarian assistance, as well as demands that all parties put an end to such practices.¹¹⁸

In December 2006, the United Nations Security Council adopted Resolution 1738 regarding the issue of protection of journalists in situations of armed conflict.¹¹⁹ It recalls the Geneva Conventions of 1949, in particular the Third Geneva Convention on the treatment of prisoners of war, and the Additional Protocols of 1977, in particular Article 79 of Additional Protocol I regarding the protection of journalists engaged in dangerous professional missions in areas of armed conflict.¹²⁰

¹¹⁸ United Nations Security Council Resolution 1674 (2006), April 28th 2006.

¹¹⁹ United Nations Security Council Resolution 1738 (2006), December 23rd, 2006.

¹²⁰ Same as above.

The Security Council was “deeply concerned”¹²¹ by the frequency of acts of violence in many parts of the world against journalists, media professionals, and associated personnel in armed conflict, in particular deliberate attacks in violation of international humanitarian law.

The Security Council calls upon all parties to conflict to put an end to such practices of intentional attacks against journalists, media professionals, and associated personnel in situations of armed conflict. The Resolution also confirms that media professionals and associated personnel engaged in dangerous professional missions in areas of armed conflict shall be considered civilians as a general rule, and also as prisoners of war if they are accredited to armed forces and captured.¹²²

¹²¹ United Nations Security Council Resolution 1674 (2006), April 28th, 2006.

¹²² Same as above.

The Resolution emphasizes that “(journalists) shall be respected and protected as such, provided that they take no action adversely affecting their status as civilians.”¹²³ This is without prejudice to the right of war correspondents accredited to the armed forces to the status of prisoner of war, provided for in Article 4 of the Third Geneva Convention.¹²⁴

Under the Resolution, all parties to an armed conflict shall comply fully with the obligations applicable to them under international law relative to the protection of civilians in armed conflict, including journalists, media professionals, and associated personnel.

An individual state itself and all other parties to armed conflict are obligated under international humanitarian law, including but not limited to the four Geneva Conventions and their Additional

¹²³ United Nations Security Council Resolution 1674 (2006), April 28th, 2006.

¹²⁴ The Convention relative to the Treatment of Prisoners of War, 12 August 1949.

Protocols, to do their utmost to prevent violations of international humanitarian law against journalists, media professionals, and associated personnel. An individual state has its conventional obligation to end impunity and to prosecute those responsible for serious violations of international humanitarian law.

In the meanwhile, in addition to the Geneva Conventions, U.N. Security Council Resolutions specifically states that media equipment and installations also constitute civilian objects, and in this respect shall not be the object of attack or reprisals¹²⁵ unless they are military objectives, according to the Geneva Conventions. Indeed, international humanitarian laws require that attacks be strictly limited to military objectives. When journalists' equipment is temporarily used for military purposes or employed for both media and military use, they may be legitimate targets of attack.¹²⁶

¹²⁵ Law on the Battlefield: Rogers, Manchester (1996).

¹²⁶ U.S. Army Field Manual.

When media equipment is used to incite people to commit grave breaches of international law, such as inciting acts of genocide or violence, as occurred in Rwanda in 1994, they become legitimate targets of military attacks.¹²⁷

Journalists are generally considered to be civilians, and intentional attacks on civilians may be considered crimes against humanity. Therefore, all incitements to violence against journalists in situations of armed conflict may constitute crimes against humanity, and individuals who incite such violence may be brought to justice in accordance with applicable international law.

The Security Council expressed in the Resolutions 1738 its willingness to authorize U.N. peacekeeping missions in response to media broadcasts that incite genocide, crimes against humanity, and serious violations of international humanitarian law.

¹²⁷ *The Prosecutor vs. Ferdinand Nahimana, Hean-Bosco Barayagwiza and Hassan Ngeze*, International Criminal Tribunal for Rwanda, December 3rd, 2003.

All parties involved in situations of armed conflict are obligated to respect the professional independence and rights of journalists, media professionals, and associated personnel as civilians, as reaffirmed in the Security Council Resolution 1738.¹²⁸

Under its Charter, the United Nations has the obligation and right to maintain or restore peace and security in the world through its Security Council actions. The deliberate targeting of journalists and other protected persons and the commission of systematic, flagrant, and widespread violations of international humanitarian and human rights law in situations of armed conflict may constitute a threat to international peace and security. Therefore, it is subject to the jurisdiction of the United Nations Security Council.

¹²⁸ United Nations Security Council Resolution 1738 (2006), December 23rd, 2006.

U.N. Security Council Resolutions are legally binding on all states. A breach of a Security Council Resolution decision is subject to Security Council sanctions. We may say that, in addition to the Hague Conventions, the Geneva Conventions, and their additional Protocols, The United Nations Security Council Resolutions also constitute a substantial part of international humanitarian law. U.N. Security Council Resolutions affirm, improve, and even develop the traditional principles and basic rules of international humanitarian conventions.¹²⁹

- The Protection of Journalists under the U.N. General Assembly Resolution—concurrently the Agreement of 191 U.N. member states in the 2005 World Summit Outcome on a fundamental “responsibility to protect”

¹²⁹ Chapter IV, Section 2 further discusses the International Roles and Legal Functions of the U.N. Security Council.

The provisions of paragraphs 138 and 139 of the United Nations 2005 World Summit Outcome Document ¹³⁰ (regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity) clearly identify the principle of protection of civilians and journalists in situations of armed conflict.

It is affirmed in the legal instrument that each individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means.

¹³⁰ United Nations General Assembly, The Resolution referred to the High-level Plenary Meeting of the General Assembly by the General Assembly at its fifty-ninth session (integrated and coordinated implementation of and follow-up to the outcomes of the major United Nations conferences and summits in the economic, social, and related fields, follow-up to the outcome of the Millennium Summit), September 15th, 2005.

All the 191 U.N. member states unanimously confirmed in the Sixtieth U.N. General Assembly in 2005 that they accept the responsibility and will act in accordance with it.¹³¹

The U.N. General Assembly Resolution and Agreement of September 15th 2005 authorize the international community through the United Nations and its organs to encourage and help states to exercise this responsibility, and to establish an early warning capability in international community to respond to this responsibility. The United Nations, bound by its mandate and Resolutions, also has the responsibility to use appropriate diplomatic, humanitarians, and other peaceful means to protect civilians and journalists and help protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.

¹³¹ The Responsibility to Protect: The U.N. World Summit and the Question of Unilateralism—Bannon, *Yale Law Journal* (2006).

All U.N. member states confirm in the General Assembly Resolution of 2005 that they are prepared to take collective action, “in a timely and decisive manner, through the Security Council, in accordance with the Charter (of the United Nations),” on a case-by-case basis and in cooperation with relevant regional organizations.¹³² In case peaceful means are inadequate and “national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity,” collective action of the international community is necessary.¹³³

Under aforementioned Resolution, it is clear that each state bears the primary responsibility to protect civilians and journalists from genocide, war crimes, ethnic cleaning, and any other crimes against humanity. In the meantime, the international community, through the United Nations and especially its Security Council,

¹³² Paragraph 189 of the United Nations General Assembly Document A/60/L.1, September 15th, 2005.

¹³³ Same as above.

shall take appropriate collective action when national authorities fail to do so (Responsibility to Protect).

In addition to the basic principles and rules of the Charter of the United Nations, the Hague Conventions, the Geneva Conventions with their Additional Protocols, and other applicable international laws, the United Nations General Assembly Resolution imposes additional obligation on the international community, including every member state of the United Nations, to help individual states build capacity to protect their civilian populations from genocide, war crimes, ethnic cleansing, and crimes against humanity and also to assist those that are under stress before crises and conflicts break out.¹³⁴

¹³⁴ Paragraph 189 of the United Nations General Assembly Document A/60/L.1, September 15th, 2005.

- The protection of “civilian” journalists in armed conflict under the ICJ decision of February 2007 on the “Responsibility to Protect”

As part of the principle of the protection of civilians and the responsibility to protect, a state has obligation to prevent genocide, not only under the Conventions to which it is a party (such as the Convention on the Prevention and Punishment of the Crime of Genocide) but also under customary international law.¹³⁵ A state has the duty to protect civilians in its territory.

In the judgment rendered on February 26th, 2007, by the International Court of Justice (ICJ), *Bosnia and Herzegovina vs. Serbia and Montenegro*, (regarding the application of the Convention on the Prevention and Punishment of the Crime of

¹³⁵ Applicability of Customary International Law in Non-International Armed Conflicts: Kalshoven, in Cassese (ed.), *Current Problems of International Law* (1975); Customary Law and Additional Protocol I to the Geneva Conventions for Protection of War Victims: Future Directions in Light of the U.S. Decision Not to Ratify—Gasser and Meron, *American Society of International Law* (1987).

Genocide), the principle of state responsibility to protect was reaffirmed by the principal judicial organ of the United Nations. This issue is adjudicated by an international judicial tribunal.

The Court went on to address the issue of the applicable law and noted that its jurisdiction in the case is based solely on Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948. This means that the Court has the power to rule on alleged breaches of obligations imposed by the Genocide Convention, but not on breaches of other obligations under international law, such as those protecting human rights in armed conflict, even if these breaches are of obligations under peremptory norms or of obligations that protect essential humanitarian values.¹³⁶

¹³⁶ Applicable law part, *Bosnia and Herzegovina vs. Serbia and Montenegro*, International Court of Justice, February 26th, 2007.

Under Article I of the Genocide Convention, states have obligation to prevent genocide. The Court found that international law also implies a prohibition against states themselves committing genocide, and that if an organ of the state or a person or group whose acts are attributable to the state commits an act of genocide or a related act enumerated in Article III of the Genocide Convention, the international responsibility of the state is incurred. The Court observed in that respect that states can be held responsible for genocide or for complicity in genocide, even if no individual has previously been convicted of the crime by a competent court.¹³⁷

The Court also ruled that when a state manifestly fails to take all measures within its power to prevent genocide and might have contributed to preventing the genocide, the state is subject to international responsibility.

¹³⁷ Decision part, *Bosnia and Herzegovina vs. Serbia and Montenegro*, International Court of Justice, February 26th, 2007.

It is sufficient in the situation that the state was aware, or should normally have been aware, of the serious danger that acts would be committed. A position of “influence” of the state is sufficient to make the state subject to the international responsibility to protect civilians and journalists.

- The protection of “civilian” journalists in armed conflict under the U.N. Reports of Secretary-General to the Security Council on the Protection of Civilians

In the judgment of the International Court of Justice in the case of *Bosnia and Herzegovina vs. Serbia and Montenegro*, (regarding the application of the Convention on the Prevention and Punishment of the Crime of Genocide), the Court noted that the

reports of the United Nations Secretary-General have “considerable authority.”¹³⁸

As of March 2008, there have been six reports of the United Nations Secretary-General to the Security Council on the Protection of Civilians. The first one was presented in September 1999.¹³⁹

The U.N. Secretary-General Report of October 2007 on the Protection of Civilians clearly notes and identifies the issue of protection of journalists as a main concern in paragraphs 29 and 30.¹⁴⁰

The report clearly addresses the concern regarding “the increasing number of journalists and media assistants killed or injured while

¹³⁸ Question of proof, *Bosnia and Herzegovina vs. Serbia and Montenegro*, International Court of Justice, February 26th, 2007.

¹³⁹ U.N. Security Council, <http://www.un.org/sc>, March 2008.

¹⁴⁰ The Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, U.N. Security Council, October 28th, 2007.

reporting from areas of conflict...”¹⁴¹ It emphasizes that in some cases, fatalities result from excessive risk-taking or from being caught in crossfire; others result from deliberate targeting by parties to conflict in order to deter or prevent reporting, particularly on abuses. The practice of embedding with a party to a conflict also puts journalists at close quarters with military objectives and may give the impression that they are combatants and thus legitimate targets.¹⁴²

The U.N. Secretary-General and Security Council urge states and all other parties to conflict to prevent violations of international humanitarian law against journalists and media professionals and, critically, to end impunity and prosecute those responsible for such violations.¹⁴³

¹⁴¹ The Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, U.N. Security Council, October 28th, 2007.

¹⁴² Same as above.

¹⁴³ Same as above.

The U.N. Secretary-General's Report to the Security Council on the Protection of Civilians in Armed Conflict of May 2004 affirms the responsibility of non-state armed groups.¹⁴⁴

Violent attacks on civilians and journalists by non-state armed groups are common characteristics of today's armed conflicts. Promoting respect for international humanitarian law and human rights norms in areas under the control of armed groups require dialogue with those groups, which is essential. As defined in the report, non-state armed groups along with the international community must commit themselves to the principles of international law based on justice, peaceful settlement of disputes, and respect for human dignity.¹⁴⁵

As also confirmed in U.N. Secretary-General's reports, it is now generally recognized that the maintenance of international peace

¹⁴⁴ The Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, U.N. Security Council, May 28th, 2004.

¹⁴⁵ Same as above.

and security requires action by the Security Council at all stages of a conflict or potential conflict. In a series of resolutions adopted since 1991, the Security Council has reaffirmed its "primary responsibility for the maintenance and restoration of international peace and security" as set out in Article 24 of the Charter of the United Nations. The Security Council also recognizes that massive and systematic breaches of human rights law and international humanitarian law constitute threats to international peace and security and therefore demand its attention and action.¹⁴⁶

Section 5. Journalists Who are Excluded from the General Immunity and Favorable Protections, Such as "Spy" Journalists

Under all the four Geneva Conventions of 1949 and their two Additional Protocols of 1977, journalists are generally protected

¹⁴⁶ The Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, U.N. Security Council, September 8th, 1999.

by international law as civilians and immunized from being the target of any attacks, provided that they "take no active part in the hostilities." When they are in the hands of an enemy, journalists may even enjoy the more favorable status and protections of prisoners of war.

In other words, if they act beyond the scope of their profession, such as being involved in the hostilities, journalists lose their immunity under international law. When they take part in hostilities, though they lose their immunity as civilians, journalists may be entitled to prisoner-of-war protection when falling into the hands of armed forces to conflict under Article 45 of the first Protocol to the Geneva Conventions of 1977.

In the meantime, the standard for treating an arrested or captured journalist also depends on the journalist's origin and nationality. Journalists arrested by their own authorities are subject to the law of their country. They are detained if internal legislation permits.

It can be argued that the fundamental guarantees of Article 75 of Protocol I to the Geneva Conventions and international human rights provisions apply to journalists captured in situations of armed conflict if their national legislation is less favorable to them.¹⁴⁷

On the other hand, if journalists are nationals of a third non-belligerent state and are arrested by a party to the conflict, they are subject to and may even benefit from the normal peacetime legislation and bilateral agreements of the third state and the party to the conflict.

In accordance with Article 29 of the Annex of the Convention (IV) respecting the laws and customs of war on land, *Regulations Concerning the Laws and Customs of War on Land* of 18 October 1907, a person can only be considered a spy when acting

¹⁴⁷ The Protection of Journalists Engaged in Dangerous Professional Missions: Hans-Peter Gasser, *International Review of the Red Cross* (1983).

clandestinely or on false pretences, obtaining or endeavoring to obtain information in the area of operations of a belligerent, with the intention of communicating it to the hostile party.

If he or she acts as a spy, a journalist can enjoy neither civilian nor prisoner-of-war status and loses all privileges and immunity under them.

In accordance with Article 46 of the Additional Protocol of 1977 to the Geneva Conventions of 1949 (relating to the protection of victims of international armed conflict), "spy" is a special category under the Geneva Conventions.

Persons who engage in espionage shall not have the more favorable status of civilians (immunity from attack or arrest), or prisoner-of-war when they fall into the power of an opposing party. They may be only treated as spies, a much less favorable status under international humanitarian law, and only have the

fundamental guarantees under Article 75 of the aforementioned Protocol.

Journalists are liberal in looking for information and communicating it to the public within, of course, the limits permitted by national law. These limits are justified on grounds of state interest, which might be harmed if classified information were made public.¹⁴⁸ The basic presumption is that journalists on dangerous missions remain within the limits imposed on them, unless it is proved otherwise. When overstepping these limits, they run the risk of being accused of spying and losing their immunity under the Geneva Conventions.

A serious misuse of the status and sign of journalists in situations of armed conflicts may be considered a war crime.¹⁴⁹ Strict control

¹⁴⁸ The Protection of Journalists Engaged in Dangerous Professional Missions: Hans-Peter Gasser, *International Review of the Red Cross* (1983).

¹⁴⁹ Article 85 of the Protocol I of 1977 to the Geneva Conventions of 1949.

is indispensable if special provisions and privileges are to be granted.

Chapter III. Proposing a Future Convention on the Protection of Journalists in Areas of Armed Conflict

The protection of journalists in areas of armed conflict would be largely assured if the parties to conflict respected the provisions of international humanitarian law. It is necessary to promote full respect for international humanitarian law among states and non-state actors, and particularly on parties to conflict. It is also essential to ensure that violations of these international legal instruments are addressed through appropriate judicial processes.

Based on existing international legal instruments¹⁵⁰ (especially those specifically touching the issue of the protection of

¹⁵⁰ The major international legal instruments in international humanitarian law are the four Geneva Conventions (1949) and the two Additional Protocols (1977), of which the latter covers internal armed conflicts. The major international human rights treaties are the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), the Convention on the Prevention and Punishment of the Crime of Genocide (1948), the Convention on the Elimination of All

journalists in situations of armed conflict), the *1975 Draft U.N. Convention on the Protection of Journalists Engaged in Dangerous Missions in Areas of Armed Conflict*¹⁵¹, and the contemporary circumstances and special needs of journalists in areas of armed conflict, we may say that there are clear gaps in current international law.

In particular, it lacks an international convention on the issue of the protection of journalists in situations of armed conflict. It is

Forms of Discrimination against Women (1979), the Convention on the Rights of the Child (1989) and its Optional Protocol (2000), the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), and the Convention on the Rights of Persons with Disabilities and its Optional Protocol (2006). The major international legal instruments of refugee law are the Convention on the Status of Refugees (1951) and its Protocol (1967). Other relevant international legal instruments are the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (1997), the Convention on the Safety of United Nations and Associated Personnel (1994), the Statute of the International Criminal Court (1998), the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) and its Protocol (1999), and the Convention on Conventional Weapons (1980) and its four Additional Protocols.

¹⁵¹ Human Rights in Armed Conflicts: Protection of Journalists Engaged in Dangerous Missions in Areas of Armed Conflict, Annex I, U.N. General Assembly, August 1st, 1975.

necessary to recommend additional measures to enhance better legal protection under international law to journalists who perform their profession in situations of armed conflict.

The recent several Bush administration-initiated wars are a sufficient illustration of the growing risks faced by journalists performing their profession in areas of armed conflict. It is necessary and important to call for renewed interest and attention to this issue in order to promote better contemporary protection of this special professional group.

International legal instruments are essential tools for the legal protection of journalists in armed conflict and should therefore be a major focus of the international community. A future convention on the protection of journalists in areas of armed conflict is proposed.

Section 1. Gap in Current International Legal System on the issue of the Protection of Journalists in Armed Conflict

Pursuant to the common practice in international rule of law, a mature international legal system regarding a particular issue (such as international human rights under international law) includes several levels of rules. On the top, it is a general international multilateral treaty on various related issues, including the particular issue. The second level is a special *ad-hoc* international convention in particular addressing the particular issue. The third level is the legislation of an *ad-hoc* or general international inter-governmental body with mandates covering the particular issue. In addition to the three-level international legal system on an *ad-hoc* issue, the decisions of international judicial tribunals constitute the precedents on an international level.

One recent example of such common practice in an international legal system is with respect to persons with disabilities. Various

international human rights treaties¹⁵² have proclaimed and affirmed the universality, indivisibility, interdependence, and interrelatedness of all human rights and fundamental freedoms. They have proclaimed and agreed that everyone is entitled to all the rights and freedoms without distinction of any kind. In addition to all of these general conventions, the recently-adopted *U.N. Convention on the Rights of Persons with Disabilities* (2006)¹⁵³ is an *ad-hoc* international convention, in particular addressing the issue of promoting and protecting the rights and dignity of persons with disabilities.

There is a gap in the existing international legal system on the issue of the protection of journalists in armed conflict. There is no

¹⁵² The Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), the Convention on the Elimination of All Forms of Discrimination against Women (1979), the Convention on the Rights of the Child (1989) and its Optional Protocol (2000), the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

¹⁵³ It enters into force in May 2008.

“second-level” legislation (an *ad-hoc* international convention) on an international level regarding the promotion of better protection of journalists who are doing their legitimate professional jobs in situations of armed conflict.

[First Level] As has been mentioned in prior chapter, the first-level “legislation” on the issue of the protection of journalists in situations of armed conflict—the general international treaty covering this issue is the Geneva Conventions of 1949 and their Additional Protocols of 1977.

In the Protocol I to the Geneva Conventions¹⁵⁴, journalists are generally protected as civilians and free from being the target of any attacks. In addition, provided they are accredited to and following a military force, journalists may also enjoy all the rights and privileges of prisoners of war in case of capture by an opposing military.

¹⁵⁴ Article 79 of Protocol I of 1977 to the Geneva Conventions of 1949.

Also, in case they are sick or wounded, journalists fall in and enjoy the rights and privileges of the special protection category of wounded and sick personnel, whether they are military or non-military personnel before becoming sick or wounded.¹⁵⁵

[Third Level] The United Nations, in particular the Security Council and the General Assembly along with the Secretary-General, constitute the principal international general and *ad-hoc* “legislative” mechanisms covering this issue. Those Resolutions and Reports of the United Nations constitute the third-level legislation on this issue in the international legal system.

As a general international inter-governmental organization, the United Nations is bound and authorized by its mandate—the

¹⁵⁵ Article 3 of all the Geneva Conventions of 1949.

Charter of the United Nations—to deal with all the international affairs.¹⁵⁶

In particular, as a principal organ of the United Nations, the Security Council is authorized by the U.N. Charter to take all necessary measures to maintain and restore international peace and security.¹⁵⁷ The Security Council is the *ad-hoc* international mechanism to address the issue of the protection of journalists in armed conflict. Authorized by the U.N. Charter, the Security Council bears legislative, executive, and even judicial authority. Its resolutions and reports serve these functions in a rule-based international system.¹⁵⁸

In addition, the General Assembly is a general international mechanism that covers all international affairs.¹⁵⁹ As the “chief

¹⁵⁶ Article 1 of the Charter of the United Nations.

¹⁵⁷ Article 24-26 of the Charter of the United Nations.

¹⁵⁸ Article 34, 39-42 of the Charter of the United Nations.

¹⁵⁹ Article 10 of the Charter of the United Nations.

administrative officer”¹⁶⁰ of the United Nations, the Secretary-General serves a function on an international level, comparable to that of the U.S. President in the United States of America.

The resolutions and reports of the Security Council and the General Assembly along with the Secretary-General constitute the third-level international “legislation” on the issue of the protection of journalists in situations of armed conflict.

As mentioned in prior chapter, the Security Council has passed a number of general and specific resolutions to address this issue and called for the respect of the rules of the Geneva Conventions and their Protocols (the first-level legislation). The General Assembly has passed resolutions to confirm the responsibility to protect of individual states and the responsibility of the international community to take collective action. The Secretary-General reports to the Security Council specifically address the

¹⁶⁰ Article 97 of the Charter of the United Nations.

issue and even the situations on the ground, and call for the protection and respect of journalists engaged in dangerous missions in zones of armed conflict. All these international legal instruments constitute the third-level legislation in the international legal system on the issue of the protection of journalists in armed conflict.

["Precedents" in international judiciary]¹⁶¹ The International Court of Justice (ICJ) is the principal judicial organ of the United Nations.¹⁶² The International Criminal Court (ICC) created by the Rome Statute of 1998, serves the principal international criminal tribunal on war crimes and crimes against humanity, and its decisions constitute precedents (case law) with regard to the protection of journalists.¹⁶³

¹⁶¹ Because the judges in international judiciary come from different legal backgrounds (mainly a civil law system, a common law system, or a mixed system), those decisions of an international judicial tribunal may be considered as precedents (case law under a common law system, not just evidence) in international adjudication.

¹⁶² Article 92 of the Charter of the United Nations.

¹⁶³ Part of U.N. Laws

Along with some other *ad-hoc* international judicial tribunals created by the resolutions of the U.N. Security Council under its U.N. Charter authority [such as the International Criminal Tribunal for the Former Yugoslavia (ICTY)], the ICJ and the ICC constitute the judiciary on an international level. Their decisions may be considered the precedents on the international level.

In particular, the ICJ confirmed the treaty rule of state responsibility to protect in its judgment of February 2007—*Bosnia and Herzegovina vs. Serbia and Montenegro*. It also confirmed the authority of the U.N. Secretary-General reports to the Security Council.¹⁶⁴

Since all these international judicial tribunals (either general or *ad-hoc*) are established by the Charter of the United Nations, a

¹⁶⁴ Question of Proof, *Bosnia and Herzegovina vs. Serbia and Montenegro*, International Court of Justice, February 26th, 2007.

founding treaty adopted by U.N. General Assembly (such as the Rome Statute of 1998), or a founding resolution of the U.N. Security Council, they are also considered to be members of the United Nations system. The judicial judgments and advisory opinions rendered by these international judicial tribunals are also considered within the broad U.N. laws. Current international law lacks an *ad-hoc* international convention on the issue of the protection of journalists in armed conflicts.

The recent a series of armed conflicts in Iraq, Afghanistan, Somalia, Kenya, and the Democratic Republic of the Congo etc. are sufficient illustrations of the growing risks faced by journalists who are doing their legitimate jobs in areas of armed conflict. It is necessary and important to call for renewed interest and attention to this issue in order to promote better protection of this special professional group. It is necessary to fill in the gap through an *ad-hoc* international convention addressing this issue in particular.

Section 2. Law and Punishment on an International Level

One of the most powerful resources in favor of the protection of journalists in situations of armed conflict is the growing movement for international humanitarian and human rights laws and criminal punishment in armed conflicts.¹⁶⁵

While an increasing body of conventions of international law regarding the rules of war has been developed since World War II to affirm the rights of civilians and legal obligations of warring parties to respect them, the approach of “law and punishment” has become more powerful nowadays. The contemporary international system of law enforcement can hold people accountable for war crimes, crimes against humanity, and genocide. Since the precedent of the international criminal tribunal at the end of the World War II, there have been a number of new international judicial tribunals (mainly criminal tribunals) formed. These

¹⁶⁵ Killing Civilians: Method, Madness, and Morality in War—Slim, Columbia (2008).

newly-born international criminal tribunals have prosecuted and convicted people for their conduct towards civilians in armed conflicts in Rwanda, Sierra Leone, the former Yugoslavia, etc. This approach has been systemized in the creation of the International Criminal Court (ICC) in The Hague in 1998.

Even the United States government's confrontational approach to the ICC is now regarded as defunct even by Bush administration officials. No matter who becomes the U.S. president in 2009, the U.S.-ICC relationship will likely deepen, just as it has been in the rest of the world.¹⁶⁶

The idea and approach to create a series of new international legal instruments to affirm the human rights of people and legal obligations of parties to conflicts, and the creation of new international criminal tribunals to enforce international criminal laws, have increased significantly the likelihood of punishment

¹⁶⁶ ASIL Newsletter, Vol. 24, Issue 1, January-March 2008.

under the international legal system. The fear of punishment can mobilize the self-interest of parties to conflict to promote the protection of non-combatants in armed conflicts.

It is not hard to image that if the duty and obligation of conflicting parties to those non-combatant journalists in situations of armed conflict can be clearly defined by an international legal instrument, the fear of legal obligation and consequent criminal liability under prosecution and imprisonment by international criminal tribunals can have a powerful effect on those conflicting parties to promote the protection of journalists. Therefore, it is necessary for us to promote the establishment of a new international legal instrument that can clearly define the issue of the protection of journalists in situations of armed conflict.

In the meantime, such an international legal instrument can also have an impact upon the journalists themselves. There are absolute differences between a "request" and a "right." Such an

international legal instrument can deeply and effectively empower the journalists themselves. A demand for rights engenders a completely different type of response than a request for help.¹⁶⁷

As the second-level legislation on an international level on a particular issue, an *ad-hoc* international convention serves the functions far beyond creating and defining those “rules,” compared to those on a national level. An *ad-hoc* international convention serves the more important functions calling for renewed international attention to this issue, promoting the rule of law on both international and national levels through international forums¹⁶⁸, technical assistance from the international community to a failing or failed state, and even strengthening individual rights within states.

¹⁶⁷ Killing Civilians: Method, Madness, and Morality in War—Slim, Columbia (2008).

¹⁶⁸ Ownership in Theory and in Practice: Transfer of Authority in UN State-Building Operations—Chesterman, *The Journal of Intervention & State-Building* (2007).

The negotiation process among states for such an *ad-hoc* convention itself serves to promote the rule of law on the international and national levels and to promote respect and better protection of journalists in areas of armed conflict.

Most of those states where armed conflicts are taking place are failing or failed states, such as Iraq and Afghanistan. The creation of such an *ad-hoc* international convention on the issue of the protection of journalists in armed conflict may even serve as a “model rule” as part of the general technical assistance from the international community to those failing or failed states. This is a special function of international law that no national law bears.

These special functions of an *ad-hoc* international convention have been widely proved by a various conventions, such as the Convention on the Rights of Persons with Disabilities, which was adopted by the U.N. General Assembly in December 2006 and entered into force in May 2008. Human rights treaties since 1949

(such as the Universal Declaration of Human Rights) have been advocating the rule of law as the foundation of a rights-respecting state. The rule of law on both national and international levels, essential for economic growth and conflict solution, have been promoted through the negotiation process of *ad-hoc* conventions by various international actors, including states and international and regional organizations.¹⁶⁹

As discussed earlier, an *ad-hoc* international convention also serves to grant the “power of right” to individuals within states, which strengthens the rights of individuals.

Section 3. The Contents of the Protection of Journalists in the 1975 Draft U.N. Convention on the Protection of Journalists Engaged in Dangerous Missions in Areas of Armed Conflict¹⁷⁰

¹⁶⁹ An International Rule of law? Simon Chesterman, *American Journal of Comparative Law* (2008).

¹⁷⁰ Human Rights in Armed Conflicts: Protection of Journalists Engaged in Dangerous Missions in Areas of Armed Conflict, Annex I, U.N. General Assembly, August 1st, 1975.

The Hague Conventions of 1899 and 1907 and the Geneva Convention of 1929 (relative to the treatment of prisoners of war) were already aware of and briefly mentioned "newspaper correspondents."¹⁷¹ At that time, a journalist must have received authorization to follow the armed forces, and only those journalists accredited to the armed forces were protected (only during the period of detention).¹⁷²

The United Nations General Assembly Resolution 2444 of December 1968 concerned, in particular, the studies undertaken by the Secretary-General in consultation with the International Committee of the Red Cross to address the need for additional humanitarian international conventions or for other appropriate legal instruments to ensure the better protection of victims in all armed conflict. In addition, the General Assembly Resolution

¹⁷¹ The Protection of Journalists Engaged in Dangerous Professional Missions: Hans-Peter Gasser, *International Review of the Red Cross* (1983).

¹⁷² Same as above.

2673 of December 1970 expressed its conviction that "there was a need for an additional humanitarian international instrument to ensure the better protection of journalists engaged in dangerous missions, particularly in areas where an armed conflict was taking place."¹⁷³

In 1970, the French Minister for Foreign Affairs at the time suggested in the annual General Assembly debates that the United Nations should take the initiative in promoting the better protection of journalists in situations of armed conflict.¹⁷⁴ As a follow-up action, the U.N. Commission on Human Rights expressed, in its Resolution No. 15 (March 1971), that there was an urgent need to examine the question of the protection of journalists engaged in dangerous missions, both on humanitarian grounds and in order to enable journalists with due respect for the

¹⁷³ U.N. General Assembly Twenty-sixth Session, Resolution 2854, 2027th plenary meeting, December 20th, 1971.

¹⁷⁴ See Official Records of the U.N. Economic and Social Council Fiftieth Session, Supplement No. 4 (E/4949), chap. XIX.

law “to seek, receive and impart information fully, objectively and faithfully” in the spirit of the purpose and principles of the Charter of the United Nations and the Universal Declaration of Human Rights concerning freedom of information.¹⁷⁵

The question of the protection of journalists in situations of armed conflict has been examined by the U.N. General Assembly since its twenty-fifth session in 1970. In its Resolution 3058 of November 1973, the General Assembly expressed the opinion that it would be desirable to adopt a convention ensuring the protection of journalists engaged in dangerous missions in areas of armed conflict. In November 1974, the General Assembly adopted Resolution 3245, titled “Human Rights in Armed Conflicts: Protection of Journalists Engaged in Dangerous Missions in Areas of Armed Conflict.”¹⁷⁶

¹⁷⁵ See Official Records of the U.N. Economic and Social Council, Fiftieth Session, Supplement No.4 (E/4949), Chapter. XIX.

¹⁷⁶ Human Rights in Armed Conflicts: Protection of Journalists Engaged in Dangerous Missions in Areas of Armed Conflict, Annex I, U.N. General Assembly, August 1st, 1975.

It was confirmed that “too frequently journalists engaged professionally in dangerous mission in areas of armed conflict do not enjoy adequate protection” in the Resolution on journalists engaged in dangerous missions, adopted at its second session by the Diplomatic Conference on the *Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict*.¹⁷⁷

Under the invitation of the U.N. General Assembly and at the request of the U.N. Economic and Social Council,¹⁷⁸ there was a draft convention addressing the issue of “Protection of Journalists Engaged in Dangerous Missions in Areas of Armed Conflict” submitted by the Commission on Human Rights in the 1970’s.

¹⁷⁷ Human Rights in Armed Conflicts: Protection of Journalists Engaged in Dangerous Missions in Areas of Armed Conflict, Annex III, U.N. General Assembly, August 1st, 1975.

¹⁷⁸ Human Rights in Armed Conflicts: Protection of Journalists Engaged in Dangerous Missions in Areas of Armed Conflict, Note by the Secretary-General, U.N. General Assembly, August 1st, 1975.

The authors of the draft U.N. International Convention for the Protection of Journalists Engaged in Dangerous Missions in Areas of Armed Conflict (1975) (hereinafter "draft convention") had attempted to improve the situation of journalists on dangerous professional missions by creating a special status. The draft convention addressed the definition of "journalist," as "any correspondent, reporter, photographer, and their technical film, radio, and television assistants who are ordinarily engaged in any of these activities as their principal occupation and who, in countries where such activities are assigned their particular status by virtue of laws, regulations or, in default thereof, recognized practices, have that status (by virtue of the said laws, regulations or practices)."¹⁷⁹ As laid down in the draft convention, a journalist is a person who is considered as such by virtue of national legislation or practice. The draft convention covered both

¹⁷⁹ Article 2(a) of the draft U.N. International Convention for the Protection of Journalists Engaged in Dangerous Missions in Areas of Armed Conflict (1975).

international and non-international armed conflicts, according to its Article 2.

The draft convention defined the “dangerous professional missions” of journalists as “any professional activity exercised by a journalist carried out in an area where there is armed conflict for the purpose of collecting information, photographs, films, sound recordings or any other material and disseminating them through media of public information.”¹⁸⁰

The draft convention also proposed to establish an “International Professional Committee” appointed by the U.N. Secretary-General in consultation with the Chairman of the Commission on Human Rights.¹⁸¹ The Committee was proposed to be in charge of the issue, renewal, and withdrawal of a special identity card for

¹⁸⁰ Article 2(c) of the draft U.N. International Convention for the Protection of Journalists Engaged in Dangerous Missions in Areas of Armed Conflict (1975).

¹⁸¹ Article 3-4 of the draft U.N. International Convention for the Protection of Journalists Engaged in Dangerous Missions in Areas of Armed Conflict (1975).

certifying the status of journalists engaged in missions in areas of armed conflict, and to bear the duty to submit annual reports regarding the protection of journalists in armed conflict to the U.N. General Assembly.

The draft convention proposed to obligate not only the state parties to the convention but also all other parties to an armed conflict in the territory of a state party to the convention to duly recognize and give effect to the special status of journalists as proved by the identity card and distinguishing emblems.¹⁸² Article 10 required not only the state parties to the convention but also all parties to an armed conflict in the territory of a state party to the convention to, in particular:

“(a) Extend to journalists reasonable protection from the inherent dangers of the conflict;

(b) Warn the journalists to keep out of dangerous areas;

¹⁸² Article 7 of the draft U.N. International Convention for the Protection of Journalists Engaged in Dangerous Missions in Areas of Armed Conflict (1975).

(c) Grant, in case of internment, treatment identical to that provided for in Articles 79 to 135 of the Geneva Convention relative to the Protection of Civilians Persons in Time of War of 12 August 1949...”

The draft convention also imposed the duty on all parties to conflict to notify adequate international organizations and the next-of-kin of journalists when a journalist is killed, injured, seriously ill, missing, arrested, or imprisoned. This is privilege that the Geneva Conventions usually only grant to prisoners of war. A separate article was proposed by the then-USSR to require journalists on a dangerous professional mission in an area of armed conflict to conform to the instructions of the military authorities, especially with regard to movement, access to areas in which fighting is actually taking place, and bans on the collection of information or the transmission to any other person.¹⁸³

¹⁸³ Human Rights in Armed Conflicts: Protection of Journalists Engaged in Dangerous Missions in Areas of Armed Conflict, Annex III, U.N. General Assembly, August 1st, 1975.

In the meantime, the draft convention imposed duty on the journalists themselves during their missions “to behave in a way consistent with the highest professional standards of integrity, NOT to interfere in the internal affairs of States to which he travels and not to participate in any political or military activity or in any activity which could imply direct or indirect participation in the conduct of hostilities in areas where the dangerous mission is being carried out.”¹⁸⁴

Section 4. Proposed Articles/Provisions for a Future Convention on the Protection of Journalists in Armed Conflict

There is an evident need for the adoption of a new international legal instrument in order to fill in the gap regarding this issue in current codified international law and to enhance better legal

¹⁸⁴ Article 5(2) and the annex (sample identity card) of the draft U.N. International Convention for the Protection of Journalists Engaged in Dangerous Missions in Areas of Armed Conflict (1975).

protection to journalists in situations of armed conflict. It shall not only reaffirm those principles and elements of international humanitarian laws that are applicable to journalists and their equipment in situations of armed conflict but also re-establish the authority of those rules that are too often ignored. In the meantime, the new international legal instrument shall also improve and develop existing international law for better legal protection of journalists in situations of armed conflict¹⁸⁵ and adapt it to the circumstances and requirements of today.¹⁸⁶

In addition to the articles and provisions of the 1975 draft U.N. Convention on the Protection of Journalists Engaged in Dangerous Missions in Areas of Armed Conflict, the following articles and provisions may also be necessary for a future convention on the

¹⁸⁵ The Declaration on the Safety of Journalists and Media Personnel in Situations Involving Armed Conflict (2003), Reporters without Borders.

¹⁸⁶ The Protection of Journalists and News Media Personnel in Armed Conflict: Alexandre Balguy-Gallois, *International Review of the Red Cross* (2004).

issue of the Protection of Journalists in Situation of Armed Conflict.

1. The definition of “journalist” in situations of armed conflict:

In addition to the definition in the 1975 draft convention, we may also need to include modern non-traditional media, such as Internet blogs, discussion group reporters, and so on. It shall include but not limited to the definition of “journalists” under the national laws of not only the territory or country where the conflict is taking place and journalists are conducting their activities but also the territory or country of the journalists themselves.

2. The legal status of journalists in situations of armed conflict (both international and non-international conflicts):

Journalists who perform their profession in areas of armed conflict shall be generally considered civilians and free from being the target of any attacks. In case journalists fall into the hands of

armed forces, they shall be entitled to the status and rights of prisoners of war of the Geneva Conventions.

3. The presumption of civilian and prisoner-of-war status, in case of doubt:

In case of doubt, journalists shall always be presumed to be entitled to the rights and privileges afforded to civilians and prisoners of war.

4. The obligations of precaution in attacks liable to affect journalists:

While journalists shall not be the target of any attacks, armed forces shall also bear the duty and obligation to take precautionary measures to separate and identify journalists from legitimate military targets.

5. The protection of journalists' equipments:

Media equipment and any other equipment of journalists for the performance of their profession shall be protected and free from any attacks.

6. Compensation and damages for injury and harm to journalists and their equipment:

In case journalists and their equipment are intentionally and illegally or incidentally damaged by armed forces, journalists shall be entitled to reasonable compensation and damages.

7. The responsibility and obligation of journalists themselves to maintain their special status and obey to the local laws and instructions of the military authorities:

Journalists acting beyond the scope of their profession such as spying may lose their status, rights and privileges protected by international law as civilians and prisoners of war.

8. The obligation of state and non-state armed forces to issue and honor the identity cards of journalists:

Any armed forces (including non-state armed groups) shall fully respect and give effect to the identity cards and emblems of journalists and afford necessary protection and assistance to them.

9. Freedom of the press and the independence of journalists:

Freedom of the press shall be respected by all parties to conflict, whether it is a state party or non-state armed group. Journalists are entitled to and also shall act independently and neutrally, free from the influence of any parties to conflict.

10. Journalists' obligations to the armed forces:

Journalists shall not take part in hostilities and shall not engage in any activities beyond their profession in areas of armed conflict.

11. The sovereignty of states:

Journalists shall fully respect the sovereignty of states and the applicable national and local laws and regulations and shall not interfere with the internal affairs of a member state of the United Nations.

12. The application of national laws with respect to the crossing of frontiers or the movement or residence of alien journalists:

Each state has the exclusive right to regulate and exclude the admission of any alien journalists to its territory by national laws.

13. War crimes and crimes against humanity:

Any intentional acts targeting and attacking journalists may be considered war crimes and crime against humanity and are subject to prosecution and penalty by the adjudication of a competent international judicial tribunal.

14. Without prejudice to other rights, privileges, and protections:

The rights, privileges, and protections granted to journalists under this Convention shall be considered, without prejudice to any other special status and protections borne by journalists under other international legal instruments, including but not limited to the Hague Conventions, the Geneva Conventions, and their Additional Protocols.

15. The settlement of disputes:

Any dispute with respect to the interpretation or application of the Convention that is not settled by the parties shall be referred to the International Court of Justice in The Hague for a decision.

These are just some recommendations for sample articles and provisions that may be necessary for a future proposed convention on the issue of the protection of journalists in situations of armed conflict under the contemporary circumstances of international

and non-international armed conflicts. It would be a supplement to the 1975 Draft U.N. Convention on the Protection of Journalists Engaged in Dangerous Missions in Areas of Armed Conflict.

Such a proposed *ad-hoc* international convention on the issue of the protection of journalists in situations of armed conflict, along with its long negotiation process, can serve to call for renewed international attention to this issue, to promote the rule of law on this issue on both the international and national levels, to provide “model rules” or “minimum standard” to failing or failed states as part of the international technical assistance, and even to grant and enhance the “power of rights” to individual journalists on the ground within states.

All of these functions of the proposed *ad-hoc* international convention in particular on the issue of the protection of journalists in armed conflict are beyond those functions of “national” legislation in a single jurisdiction. These are the special

and unique functions of international law, as "soft law" compared to national law.

**Chapter IV. U.N.'s ¹⁸⁷ Legal Role & Function and its
Peacekeeping-Mandate ¹⁸⁸ Obligations on the Protection of
Civilians and Journalists in Armed Conflict**

**Section 1. International Rule of Law within International Inter-
Governmental Organizations**

For traditional international law and its relationship to the sovereignty ¹⁸⁹, only states can be the actors and subject to international law. States negotiate, sign, and ratify treaties and are thereafter bound by the treaties. International law imposes a duty and obligation on individual sovereign states.

¹⁸⁷ The United Nations, including its organs and those U.N. peacekeeping missions on the ground in crisis.

¹⁸⁸ The U.N. Security Council adopts those "peacekeeping-mandate contents" resolutions that establish, authorize and deploy peacekeeping missions around the world. Those resolutions constitute the Constitutional Mandates of U.N. Peacekeeping Missions.

¹⁸⁹ An International Rule of law? Simon Chesterman, *American Journal of Comparative Law* (2008).

The United Nations is a creature of treaty. Its legal personality was recognized in the 1949 advisory opinion of the International Court of Justice as implicit in the decision of fifty original states to create the international inter-governmental organization.¹⁹⁰ Therefore, the United Nations is not only an outcome of international law but also an actor and subject to international law, just like a sovereign state.

One of the core definitions of the rule of law is that “the rule of law expresses a legal doctrine of fundamental importance, namely that government must be conducted according to law.”¹⁹¹ As both a creature of law and an actor and subject to law, the United Nations itself is accountable to laws. The rule of law is a concept at the very heart of the U.N.’s mission. It requires measures to ensure adherence to the principles of supremacy of law, equality

¹⁹⁰ Reparation for Injuries Suffered in the Service of the United Nations (Advisory opinion), International Court of Justice, April 11th, 1949.

¹⁹¹ Constitutional and Administrative Law: Bradley & Ewing, Longman (1997).

before the law, accountability to the law, and procedural and legal transparency.¹⁹²

The United Nations is not a party to any international humanitarian or human rights treaty. Nevertheless, a committee of the American Society of International Law indicated that international humanitarian law was fully applicable to U.N. forces.¹⁹³ This was further affirmed by the U.N. Secretary-General through his administrative order.¹⁹⁴

As both regulator and actor in international peace and security, what are the various roles of the United Nations, especially its Security Council and peacekeeping missions?

¹⁹² The Report of U.N. Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, U.N. Security Council, August 2006.

¹⁹³ Bivens, Report of Committee on the Study of the Legal Problems of the United Nations, 46 *American Society of International Law Proceeding* 216, 220 (1952).

¹⁹⁴ U.N. Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law, August 1999.

The Geneva Conventions and their Protocols, the General Assembly Resolutions, the Security Council Resolutions, and the precedents of international judicial tribunals all affirm that under international law, individual states shall have the responsibility to protect those journalists and civilians in areas of armed conflict in their respective territories. In case a state fails to do so, international community through the United Nations shall take collective action.

Under the Charter of the United Nations, the U.N. Security Council has state-like roles and functions on an international level of legislative, executive, and even judicial organs for all affairs related to international peace and security. The Security Council is in charge of adopting resolutions, which cover “General Rules” on international peace and security,¹⁹⁵ “Targeted Sanctions” governing individual states and even individuals, “Peacekeeping

¹⁹⁵ Such as counter-terrorism and proliferation of weapons of mass destruction—See The Security Council as World Legislature: Stefan A. Talmn, *American Journal of International Law* (2005).

Mandates” to establish and deploy U.N. peacekeeping missions to a specific crisis, and “Judicial Tribunal Mandates” to create *ad-hoc* international judicial tribunals. In the meantime, the United Nations, including the Security Council and all peacekeeping missions, are also subject to and shall respect those international rules created by itself.

The U.N. peacekeeping missions are the actors who are directly obligated to protect journalists and civilians in crisis on the ground, in addition to state actors. They represent the whole United Nations on the ground during crises. Both U.N. peacekeeping missions and individual states are required by international law (treaty and constitutional mandate duties) to protect journalists and civilians in crisis.

Section 2. International Roles and Legal Functions of the U.N.

Security Council

The U.N. Security Council is the most powerful international multilateral political institution. It has grown well beyond its initial function as a political forum and serves more important legal roles and functions on the international level nowadays. The traditional roles and legal functions of the U.N. Security Council include determining that a threat to the peace, breach of the peace, or act of aggression has occurred, and to prescribe specific, legally binding obligations on U.N. member states under Chapter VII of the Charter of the United Nations. Contemporary roles and legal functions of the U.N. Security Council embrace the establishment of complex regimes to enforce its decisions such as U.N. peacekeeping missions, and to adopt resolutions of “general”

rather than specific application (“legislative-character” resolutions).¹⁹⁶

The Security Council has grown beyond its initial function as a political forum, expanded the range of its activities, and served important legal functions on an international level. It serves as legislator, executive, and even judge. The Security Council’s current wide activities include the establishment of international judicial tribunals, the maintenance of complex sanctions regimes, the protection of civilians and journalists, and the temporary administration of territory. It establishes binding rules of general application on an international level, overseeing the implementation of its decision, and making determinations of law or fact.¹⁹⁷

¹⁹⁶ The Role of the Security Council in Strengthening a Rules-based International System: Final Report and Recommendations from the Austrian Initiative—Austrian Federal Ministry for European and International Affairs, 2004-2008.

¹⁹⁷ Same as above.

The Security Council adopts “legislative” resolutions on the issue of the protection of journalists in situations of armed conflict. It passes “targeted sanction” resolutions to maintain and enforce its decisions, such as the various sanctions on the Sudanese government due to the situation in the Darfur region. It adopts “peacekeeping mandate” resolutions to establish, authorize, and deploy U.N. peacekeeping missions to a particular crisis to work on the ground, including the protection of journalists and civilians in crisis. It passes “judicial-tribunal mandate” resolutions to establish and authorize *ad-hoc* judicial institutions of international law, which serve to prosecute those breaching international humanitarian and human rights laws, such as the International Criminal Tribunal for the Former Yugoslavia, the Special Court of Sierra Leone, the Special Tribunal for Lebanon, and so on.

The Security Council serves as an international “legislator.” It is clearly reflected by its passage of quasi-legislative resolutions, such as Resolution 1373 (2001) on terrorism (in response to the

September 11th, 2001, attacks on the United States of America), Resolution 1540 (2004) on the proliferation of weapons of mass destruction (after revelations concerning the A.Q. Khan network), Resolution 1566 (2004) on terrorism (following the terrorist attack in Beslan, Russia)¹⁹⁸, and all the resolutions on the protection of journalists and civilians in armed conflicts.

This kind of legislation is a shortcut to law on an international level authorized by a general multilateral treaty—Chapter VII of the Charter of the United Nations.

The U.N. Charter establishes the International Court of Justice as the “principal judicial organ”¹⁹⁹ of the United Nations. However, it is silent on whether the Security Council might also assume judicial functions in carrying out its specific duties and responsibility to maintain international peace and security. Instead,

¹⁹⁸ <http://www.un.org/sc>, U.N. Security Council, March 2008.

¹⁹⁹ Article 49 of the Chapter of the United Nations.

it implies that each U.N. organ can determine the scope of its own competence and lacks a separation of powers.

In fact, the Security Council has adopted resolutions to establish various *ad-hoc* international judicial tribunals and quasi-judicial commissions around the world, such as in Sierra Leone, Cambodia, Lebanon, East Timor, Iraq, and Kuwait.²⁰⁰ Such judicial or quasi-judicial institutions of international law, created by Security Council resolutions, are not completely independent from the Security Council and enjoy an ambiguous relationship to both domestic and international jurisdictions.

The Security Council even creates exemptions to the independence and jurisdiction of the International Criminal Court (ICC) created by the Rome Statute of 1998. Security Council Resolutions 1422 (2002) and 1487 (2003) provided that the International Criminal Court would not investigate or prosecute

²⁰⁰ <http://www.un.org/sc>, U.N. Security Council, March 2008.

officials from a state not party to the Rome Statute, extending that provision on an annual basis.²⁰¹

As both executive and judiciary, the Security Council adopts resolutions imposing targeted sanctions to punish those breaching specific or general Security Council legislative resolutions, and to limit their ability to undermine international peace and security, such as the sanctions on Sudanese government due to the situation in Darfur region.²⁰²

As both legislator and executive, the Security Council passes resolutions on peacekeeping mandates to establish, authorize, and deploy an international peacekeeping mission to a particular crisis to restore and maintain international peace and security,²⁰³

²⁰¹ United Nations Security Council Resolution 1422 (2002), July 12th, 2002; and United Nations Security Council Resolution 1487 (2003), June 12th, 2003.

²⁰² Save Darfur Campaign Document, at the Human Rights First.

²⁰³ The U.N. Security Council adopts those “peacekeeping-mandate contents” resolutions that establish, authorize and deploy peacekeeping missions/forces to those areas in crisis.

including the responsibility to protect journalists and civilians in armed conflict.

When the United Nations and especially the U.N. Security Council serve in various international roles and legal functions as “creature[s] of international law,” “actor and subject to international law,” legislator, executive, and even judge of international law, it does not operate free of legal constraint. Its powers are exercised subject to the Charter of the United Nations, other international multilateral treaties, and the doctrine of *jus cogens*.

Those U.N. Security Council resolutions constitute the Constitutional Mandates of U.N. Peacekeeping Missions/Forces.

Section 3. Current International Laws²⁰⁴ that Impose Legal Obligations upon the U.N. to Incorporate the Contents of the Protection of Civilians and Journalists into its Peacekeeping Mandates

Sub-section a. U.N.'s Switch from Non-engagement to Engagement

Those who target journalists and seek to muzzle the fundamental human rights of freedom of expression and freedom of the press sabotage the reconstruction of a failing country as a free, democratic country. When they attack journalists, they attack

²⁰⁴ The term "international laws" used in this dissertation include but not limited to the definition found in Article 38 of the Statute of the International Court of Justice (ICJ) : "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

every individual's right and ability to make informed decisions and play a part in the development of the country.

The failure to act by the international community, and then the decision of the United Nations Security Council to withdraw its mission in Rwanda during the period of genocide in the 1990's have shamed the whole international community.²⁰⁵ At that time, there was no provision in the mandates of U.N. missions around the world to authorize the engagement of U.N. peacekeepers to engage in the protection of civilians and journalists. At that time, U.N. missions only acted as observers. The U.N. peacekeepers were authorized to use force only when they themselves faced imminent threat.

Under the Charter of the United Nations, the United Nations has the duty to maintain or restore the peace and security of the world.

²⁰⁵ The Background Notes of U.N. Department of Peacekeeping Operations, regarding the United Nations Observer Mission Uganda-Rwanda (UNOMUR), May 2007

Therefore, the obligation to protect civilians and journalists in zones of armed conflict shall fall not only on the shoulders of states and armed forces but also on the shoulders of the United Nations. Some regional organizations (such as the African Union) also bear such kind of obligations in their respective regions pursuant to their respective constitutional mandates.

In areas of armed conflict (either international or internal), U.N. performs its duty to maintain the world's Peace and Security not only by diplomacy mechanism but also by U.N.'s Peacekeeping Missions on the ground in areas of armed conflict. There are U.N. Peacekeeping Missions in the conflict zones around the world.

As of June 30th 2007, there are 15 U.N. peacekeeping operations and 3 U.N.DPKO-led special political and/or peacebuilding missions all over the world. There are totally 104,414 U.N.-led personnel (83,170 uniformed personnel), who are serving at 18

field operations for the Peace and Security. These include 15 countries which are in serious armed conflict.²⁰⁶

There is legal authority in current international laws (mainly the “generally applicable” “legislative-character” resolutions of U.N. Security Council and General Assembly) imposing legal obligations upon U.N. to incorporate the contents of the Protection of Civilians and Journalists in Armed Conflict into the Constitutional Mandates of U.N. Integrated Peacekeeping Missions and U.N.-A.U. Joint Peacekeeping Missions around the world. The threat or use of international or regional force against the local parties to conflict can effectively compel them to respect the protection of civilians and journalists in situations of armed conflict.²⁰⁷ International intervention is known as the most effective and strongest approach to compel warring parties to

²⁰⁶ The Background Note of United Nations Department of Public Information and Department of Peacekeeping Operations, June 30th, 2007.

²⁰⁷ Killing Civilians: Method, Madness and Morality in War—Slim, Columbia (2008).

respect international laws and principles in contemporary international community.

Article 24 of the Charter of the United Nations authorizes and also imposes the duty and obligation upon the United Nations, and in particular the Security Council, to take all necessary measures to “maintain and restore international peace and security.”

Sub-section b. The Obligation imposed by U.N. Security Council Resolutions

Paragraph 4 of the United Nations Security Council Resolution 1738 (2006) reaffirms the Security Council’s condemnation of all incitements to violence against civilians in situations of armed conflict. It further reaffirms the need to bring to justice, in accordance with applicable international law, individuals who incite such violence, indicating its *willingness* to authorize peacekeeping missions to consider steps in response to media

broadcasts inciting genocide, crimes against humanity, and serious violations of international humanitarian law.²⁰⁸

The Security Council, under its U.N. Charter authority and duty, expresses in its sanctionable resolution (“generally applicable”, “legislative-character” resolution) the *willingness* to authorize U.N. peacekeeping missions to engage in acts in response to conduct inciting crimes against humanity and serious violations of international humanitarian laws. As discussed earlier, the protection of journalists as civilians in situations of armed conflict is a general principle under international humanitarian law that is widely recognized and confirmed by a series of international legal instruments.

The United Nations Security Council is the U.N. organ that is in charge of and decides the Constitutional Mandates of U.N.

²⁰⁸ United Nations Security Council Resolution 1738 (2006), December 23rd, 2006.

Peacekeeping Missions around the world.²⁰⁹ The Security Council resolutions of any kind are legally binding and sanctionable among all member states of the United Nations, under the Charter of the United Nations.

The Security Council Resolution 1674 (2006) of April 28th 2006, is of particular importance in elaborating a framework for action that provides for inclusion in the Constitutional Mandates of United Nations Peacekeeping Missions the provision of “the protection of civilians”.²¹⁰

In sub-paragraph 16 of its Resolution 1674 (2006), the United Nations Security Council reaffirmed its practice of ensuring that

²⁰⁹ The U.N. Security Council adopts those “peacekeeping-mandate contents” resolutions that establish, authorize and deploy peacekeeping missions. Those resolutions constitute the Constitutional Mandates of U.N. Peacekeeping Missions, and should be distinguished from those “generally applicable” “legislative-character” resolutions.

²¹⁰ United Nations Security Council Resolution 1674 (2006), April 28th, 2006; and the Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, U.N. Security Council, October 28th, 2007.

the mandates of United Nations peacekeeping, political, and peacebuilding missions include provisions regarding:

1. the protection of civilians, particularly those under imminent threat of physical danger within their zones of operation;
2. the provision of humanitarian assistance.

The Security Council expressed in the Resolution its intention to ensure: (a) that such mandates include clear guidelines as to what missions can and should do to achieve those goals, (b) that the protection of civilians is given priority in decisions about the use of available capacity and resources, including information and intelligence resources, in the implementation of the mandates, and (c) that protection mandates are implemented.²¹¹ The Security Council has increasingly mandated peacekeeping operations to undertake activities in support of the protection of civilians and journalists since the adaptation of the provision in this resolution.

²¹¹ United Nations Security Council Resolution 1674 (2006), April 28th, 2006.

It is confirmed in the Charter of the United Nations and widely recognized that the maintenance and restoration of international peace and security requires actions by the Security Council at all stages of a conflict or potential conflict. In a series of resolutions adopted since 1991, the Security Council has reaffirmed its “primary responsibility for the maintenance of international peace and security,” as set out in Article 24 of the Charter of the United Nations. In addition, the Security Council also recognizes and notes that threats and attacks on civilians and journalists seriously affect international peace and security, and “massive and systematic breaches of human rights law and international humanitarian law constitute threats to international peace and security and therefore *demand its attention and action.*”²¹²

Sub-section c. The Obligation imposed by U.N. General Assembly Resolutions

²¹² The Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, U.N. Security Council, September 8th, 1999.

In the meantime, because under the Charter of the United Nations, the General Assembly bears the highest authority in the whole United Nations system, the Security Council—the organ of United Nations that is in charge of and decides the mandates of U.N. peacekeeping missions—is also subject to the decisions of the General Assembly, in addition to its own resolutions.

The provisions of paragraphs 138 and 139 of the United Nations General Assembly 2005 World Summit Outcome Document²¹³ regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity clearly identify the principle of protection of civilians and journalists in situations of armed conflict.

²¹³ United Nations General Assembly, The Resolution referred to the High-level Plenary Meeting of the General Assembly by the General Assembly at its fifty-ninth session (Integrated and coordinated implementation of and follow-up to the outcomes of the major United Nations conferences and summits in the economic, social and related fields, Follow-up to the outcome of the Millennium Summit), September 15th, 2005.

It was affirmed in the 60th General Assembly in 2005 that each individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means; and the “*international community through the United Nations and its organs to encourage and help States to exercise this responsibility and to establish an early warning capability in the international community to respond to this responsibility.*”²¹⁴

The United Nations and its organs, bound by its mandates and resolutions, also have the responsibility to use appropriate diplomatic, humanitarian, and other peaceful means to protect civilians and journalists and help protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity, as noted in the General Assembly Resolution of September 15th 2005. It was emphasized in the resolution that the

²¹⁴ Summary Document of the 60th U.N. General Assembly General Debates (2005).

United Nations is prepared to take collective action in a timely and decisive manner through the Security Council in accordance with the U.N. Charter when peaceful means are inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.²¹⁵

Under the General Assembly Resolution of September 15th 2005, it is clear that: each State bears the primary responsibility to protect civilians and journalists from genocide, war crimes, ethnic cleaning, and any other crimes against humanity, and in the meantime the international community through the United Nations, especially its Security Council, shall take appropriate collective action, if national authorities fail to do so. One of the modern collective actions of the international community is the establishment, authorization, and deployment of U.N. peacekeeping missions in zones of armed conflict.

²¹⁵ Summary Document of the 60th U.N. General Assembly General Debates (2005).

In addition to the principles of the Charter of the United Nations, the Hague Conventions, the Geneva Conventions and their Additional Protocols, and any other applicable international laws, The United Nations General Assembly Resolutions impose additional obligations upon the international community, reflected as the United Nations and especially its Security Council, to help individual states build capacity to protect their civilian populations from genocide, war crimes, ethnic cleansing, and crimes against humanity and to assist those who are under stress before crises and conflicts break out through measures such as the establishment, authorization, and deployment of U.N. international forces in crises.²¹⁶

²¹⁶ United Nations General Assembly, The Resolution referred to the High-level Plenary Meeting of the General Assembly by the General Assembly at its fifty-ninth session (Integrated and coordinated implementation of and follow-up to the outcomes of the major United Nations conferences and summits in the economic, social and related fields, Follow-up to the outcome of the Millennium Summit), September 15th, 2005.

As regulator, subject, and actor to international law, the United Nations, including its General Assembly, Security Council, and Peacekeeping Missions on the ground around the world are obligated and subject to international laws, including those international legal rules created by themselves. In particular, as the legislator creating those constitutional mandates of U.N. peacekeeping missions, the Security Council is subject to and obligated by both its own resolutions and the resolutions of the General Assembly to incorporate the contents of the protection of civilians and journalists in armed conflict into the constitutional mandates of U.N. peacekeeping missions.

Section 4. The Protection of Civilians and Journalists under Current Mandates²¹⁷ of U.N. Integrated Peacekeeping Missions²¹⁸

²¹⁷ Those “peacekeeping-mandate contents” resolutions adopted by U.N. Security Council to establish, authorize and deploy peacekeeping missions are the constitutional mandates of U.N. Peacekeeping Missions on the ground. Those “peacekeeping-mandate contents” resolutions are different from those “generally applicable” “legislative-character” resolutions.

²¹⁸ Including the U.N.-A.U. (United Nations—African Union) Joint Peacekeeping Missions.

As demonstrated in the constitutional mandate of the African Union-United Nations (AU-UN) Hybrid Operation in Darfur, the joint peacekeeping mission is authorized to take the necessary action to protect civilians and journalists.²¹⁹ Paragraph 15 of the U.N. Security Council Resolution 1769 (2007) clearly emphasizes that acting under Chapter VII of the Charter of the United Nations, the Security Council decided that UNAMID (African Union/United Nations Hybrid operation in Darfur) is authorized to take the necessary action in areas of deployment of its forces and as it deems within its capabilities in order to (a) support early and effective implementation of the Darfur Peace Agreement, (b) prevent the disruption of its implementation and armed attacks, and (c) protect civilians, without prejudice to the responsibility of the government of Sudan.²²⁰

²¹⁹ United Nations Security Council Resolution 1769 (2007), July 31st, 2007.

²²⁰ United Nations Security Council Resolution 1769 (2007), July 31st, 2007.

In September 2007, the Security Council authorized the establishment of the United Nations Mission in the Central African Republic and Chad, with an express mandate to protect civilians with the support of the European Union operation.²²¹ Security Council Resolution 1778 (2007) determines that the situation in the region of the border between the Sudan, Chad, and the Central African Republic constitutes a threat to international peace and security. Therefore, the Security Council approved the establishment in Chad and the Central African Republic of a multidimensional presence intended to help create the security conditions conducive to a voluntary, secure, and sustainable return of refugees and displaced persons, inter alia by contributing to the protection of refugees, displaced persons, and civilians in danger.²²² Under its mandate, the U.N. peacekeeping mission in Chad and the Central African Republic is authorized to contribute to the “security and protection of civilians,” for example to select,

²²¹ United Nations Security Council Resolution 1778 (2007), September 25th, 2007.

²²² United Nations Security Council Resolution 1778 (2007), September 25th, 2007.

train, advise, and facilitate support to elements of the police forces; to liaise with the national army and police forces, etc.; and to contribute to the creation of a more secure environment.²²³

In its aforementioned Resolution, the Security Council, by its authority (“taking adequate measures to maintain or restore International Peace and Security”) under Chapter VII of the Charter of the United Nations, also authorizes the European Union (EU) to deploy an operation to take “all necessary measures ... to contribute to protecting civilians in danger, particularly.” The European Union operation in Chad and the Central African Republic is authorized by the United Nations through its Security Council to take all “appropriate measures” to fulfill the aforementioned mandates.²²⁴

²²³ Same as above.

²²⁴ United Nations Security Council Resolution 1778 (2007), September 25th, 2007.

While those missions are in their early stages, as the first U.N. mission authorized to directly engage in the protection of civilians and journalists, the 8-year activities of the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) notes the critical role that peacekeepers can play in protecting civilians and journalists through a military presence and direct involvement to prevent and end violations of human rights and humanitarian law.²²⁵

Through Security Council Resolution 1291 (2000) and Resolution 1565 (2004), the U.N. peacekeeping mission in the Democratic Republic of the Congo (MONUC) is authorized to “take all necessary measures” to ensure the protection of civilians and journalists.²²⁶

²²⁵ The Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, October 28th, 2007.

²²⁶ United Nations Security Council Resolution 1291 (2000), February 24th, 2000; and United Nations Security Council Resolution 1565 (2004), October 1st, 2004.

As creator and regulator of international law, the United Nations and its organs adopt legislative resolutions to develop international law. As actor and subject to international law, the United Nations and its organs, including the U.N. peacekeeping missions on the ground around the world, are subject to and obligated by international laws and *jus cogens*. They must respect those rules created by themselves as well, under the principle of international rule of law. Those U.N. Peacekeeping Missions on the ground are bound by the rules created by the Security Council and the General Assembly.

The U.N. and its organs are mandated to take actions to protect civilians and journalists in armed conflict when national authority fails to do so. The physical international interventions (international collective actions) by a U.N. presence in such situations are mandatory under contemporary international legal rules, as has been discussed.

Chapter V. The Culture of Protection and the Common Ground and Mutual Understanding on the Protection of Civilians and Journalists

Since journalists performing their profession in situations of armed conflict are generally protected as civilians under international humanitarian laws, this leads us to touch on another issue: why civilians shall be protected in time of war.

At the time of the passage of the Hague Conventions of 1907, four Geneva Conventions of 1949, and their Additional Protocols of 1977, the whole world was still dominated by several big Western countries. Therefore, the Hague Conventions and the Geneva Conventions are generally considered to be a fruit of and reflecting Western culture and values on the issue of the protection of civilians and journalists, although non-Western states are technically parties to the Geneva Conventions. There is

even common culture of impunity in Africa,²²⁷ which is completely on the opposite side of the principles of international humanitarian laws. "Impunity" is usually defined as the failure to punish violations of established norms. It is the act of not being punished or hiding from or escaping punishment either due to circumstances or to the law.²²⁸ Impunity occurs sometimes by legal means (by adopting measures of amnesty, clemency, pardon, mercy, or any other measure taken to prevent the prosecution of perpetrators of violations) and sometimes *de facto* (refusal to

²²⁷ CLARIFICATION OF CONCEPTS: Justice, Reconciliation and Impunity, by Adama Dieng (2002), U.N. Under-Secretary-General and Registrar of the International Criminal Tribunal for Rwanda: "The question that is usually asked is how to punish those who commit serious violations at a time when a State sets out to democratize public life. This is a matter of great concern for many African countries, which must reconcile a politically violent past with the pursuit of national reconciliation. The commitment of States to human rights cannot be credible unless the State puts an end to the conditions that destroy values and thus perpetuate impunity. What should be done with those responsible for serious violations of human rights? The human rights map shows that the African political environment is characterized by violence at the top most level ... It is becoming disconcertingly prevalent in Africa where it is considered that, after a period of conflict, the best way to achieve peace and national reconciliation is to shroud it in oblivion, without first having elucidated it. *That has allowed many leaders with blood on their hands and the tormentors of their peoples to remain as unavoidable partners in achieving peace, with the consequent trivialization of serious violations of human rights and serious breaches of international humanitarian law.*"

²²⁸ Same as above.

undertake investigations to determine the facts, refusal of the Courts to punish perpetrators because of political motives or through intimidation).

In Western culture, the doctrine of "limited war" is honored and has become the majority view.²²⁹ This particular view of war emphasizes restraint and the intent to respect the common humanity and human rights and avoid unreasonable human suffering. It encourages reasonable use of force and compassionate conduct towards unarmed non-combatants. It aims to set boundaries to organized human violence. It reflects a balance between the "necessities" of war and the principle of "protection," which is recognized by major Christian theologians and philosophers.

²²⁹ Humanity in Warfare: Geoffrey Best, Weidenfeld and Nicolson (1980); War and Laws Since 1945: Geoffrey Best, Oxford (1994).

There are a number of human rights, self-interest, and incentive factors in this doctrine for the promotion of the protection behavior of armed groups, such as profits and reputation.²³⁰ These factors focus on armed groups' obtaining resources and rewards, which encourage them not to harm but to respect civilians and journalists as good military science. An armed group may realize that if it keeps on harming civilians and journalists, it may soon become the master of nothing and the enemy of the whole international community. In this doctrine, the damage done to an armed group's reputation and legitimacy through its military brutality may encourage it to respect and protect civilians and journalists. Ignoring or rejecting the protection of journalists is not only morally reprehensible but also bad military science. Unknown to many Western scholars, this doctrine is also proved in Eastern culture and values.

²³⁰ Killing Civilians: Method, Madness and Morality in War—Slim, Columbia (2008).

Section 1. Eastern Culture on the issue of the Protection of
Civilians and Journalists

General Sun Tzu's Art of War

Sun Tzu's *Art of War* is a Chinese military treatise written during the 6th century BC by General Sun Tzu. Composed of 13 chapters, each of which is devoted to one aspect of warfare, it has long been praised as the definitive work on military strategies and tactics of its time. Sun Tzu's *Art of War* is one of the oldest books on military strategy in the world. It is also one of the most prestigious studies of strategy and has had a huge influence on contemporary military planning, business tactics, and beyond.²³¹

²³¹ Military applications—in many East Asian countries, Sun Tzu's *Art of War* was part of the syllabus for potential candidates of military service examinations. During the Vietnam War, some Vietnam officers studied Sun Tzu's *Art of War* and reportedly could recite entire passages from memory. The Department of the Army in the United States, through its Command and General Staff College, has directed all units to maintain libraries within their respective headquarters for the continuing education of personnel in Sun Tzu's *Art of War*. *The Art of War* is specifically mentioned by name as an example of works to be maintained at each individual unit, and staff duty officers are obliged to prepare short papers for

Here is some content from *The Art of War* related to the protection of civilians and journalists and the responsibility to protect in common nature:

“... The art of war, then, is governed by five constant factors, to be taken into account in one’s deliberations, when seeking to determine the conditions obtaining in the field...

There are: (1) The Moral Law: ...

The Moral Law causes the people to be in complete accord with their Rulers, so they will follow their rulers regardless of their lives, undismayed by any danger...”²³²

Unlike the Western value of protection, in Eastern values, the protection of civilians and journalists in situations of armed

presentation to other officers on their readings. (*Military History and Professional Development*, the U. S. Army Command and General Staff College, Fort Leavenworth, Kansas: Combat Studies Institute).

²³² Sun Tzu’s *Art of War*, Chapter I. Laying Plans.

conflict does not originate from human rights and humanity but from the purposes of the benefit and incentive of the ruler and the political stability of a state or an authority.

In Eastern values, it is a kind of moral obligation for rulers to protect civilians and journalists in order to obtain support from them in return for the "State's political stability." The moral law which is mentioned in *The Art of War* reflects this traditional Asian value of protection and responsibility. This kind of responsibility to protect is not based on west-normal international humanitarian, human rights, and refugee laws, although it does reflect the basic humanitarian principles that are universal in nature, common to and rooted in the values of both Western civilized countries and Eastern non-rule-by-law countries.

One interesting thing is that almost all the thoughts in *The Art of War* reflect the relationship between support from non-combatants in return and success in war, and always encourages consideration

of non-combatants' advantages into the decision-making process of military leaders and rulers.²³³ *The Art of War* noted that "The General who advances... without fearing disgrace, whose only thought is to *protect his country and civilians*, ... is the jewel of the kingdom."²³⁴

The Art of War even linked success in war to the benefits and advantages of civilians and analyzed the relationship between military assets and expenses and civilians' poverty. It *de facto* proposed to protect civilians and any other non-combatants, and discouraged armed groups from obtaining revenue and contributions from non-combatants, which would result in poverty.²³⁵ It encouraged rulers to pursue mutually beneficial (win-win) positions with non-combatant civilians and insisted on the importance of winning the "hearts and minds" of civilians,

²³³ Sun Tzu's *Art of War*, Chapter VII. Attack by Fire, and Chapter V. Terrain.

²³⁴ Same as above.

²³⁵ Sun Tzu's *Art of War*, Chapter II. Waging War.

journalists, and any other non-combatants.²³⁶ Sun Tzu's *Art of War* insisted that one of the purposes of war is to "protect civilians/mass." It noted the use of force shall be initiated only when it is necessary for the benefits and advantages of the people. It discouraged the rulers from using force simply to gratify their own spleen or simply out of pique.²³⁷

These doctrines supporting the protection of civilians and journalists are also reflected in most other dominant Asian values, such as the "Asian Bible"—Confucianism, Buddhism, and Taoism. Buddhism affirms the Western doctrine, one of the bases of the responsibility to protect—"the threat of retaliation." If you ill-treat civilians and journalists, you will most likely be responded to with ill-treatment from civilians, journalists, and even the whole international community.²³⁸

²³⁶ Sun Tzu's *Art of War*, Chapter IV. The Army on the March.

²³⁷ Same as above.

²³⁸ *Killing Civilians: Method, Madness and Morality in War*—Slim, Columbia (2008).

In fact, a lot of principles in the Hague Conventions and the Geneva Conventions have existed in Asian values for a long time and even before the Geneva Conventions of 1949. Some of these principles of international law even appear in very simple and understandable guideline language in Asian values.

In 1949, the Chinese People's Liberation Army (CPLA) won the Chinese civil war (revolution) and established the current China—the People's Republic of China. It surprised the whole world. How could the poor CPLA defeat the Chinese Nationalist Army that was supported by the United States? One of the most important reasons is that the CPLA won wide support from civilians. This partially resulted as a result of the CPLA's one most significant military directives—the “Three Main Rules of Discipline & Eight Points for Attention.”²³⁹

²³⁹ The Three Rules of Discipline & Eight Points for Attention is a military doctrine that was issued in 1928 by Mao Zedong and his associates for the Chinese Red Army, who were then fighting against the Kuomintang (the Nationalist Army). The contents vary slightly in

“Three Main Rules of Discipline”:

1. Obey orders in all your actions;
2. Do not take a single needle or piece of thread from the mass/civilians;
3. Turn in everything captured.

“Eight Points for Attention”:

1. Speak politely to civilians;
2. Pay fairly for what you buy from civilians;
3. Return everything you borrow from civilians;
4. Pay for anything you damage (civilians' property);
5. Do not hit or scold mass/civilians;
6. Do not damage agricultural crops;
7. Do not take liberties with women (protecting women);
8. Do not maltreat captives.

different versions. One of the major distinctions of the doctrine was its respect for civilians during wartime.

This simple military directive of the Chinese military in the 1930's and 1940's used extremely simple language to cover the basic principles of international humanitarian laws regarding the protection of civilians and journalists and their property in situations of armed conflict. It was created and used before the Geneva Conventions of 1949.

Section 2. The Philosophy of Limited War and the Protection of Civilians and Journalists in Armed Conflict under International Law

The philosophy and idea that there are certain groups of people who should be protected from killing and wounding in war is an ancient and enduring one. This philosophy holds that there is a category of people who must somehow be set apart from the fury of battle because of "who they are, what they do or what they

cannot do.”²⁴⁰ Historically, women, children, doctors, and religious personnel have often been considered as unthreatening or useful in some way. In recent years, the elderly, persons with disabilities²⁴¹, humanitarian aid workers, and media workers have also been added to this category. These people have been described as innocent. They should be given safe passage and helped even in situations of armed conflict. This is called mercy. Civilian casualties are not only morally reprehensible but also bad military science.

This inter-culture and inter-religion sense that people should be protected from war, and that most of us are civilians, is essentially a moral idea of mercy and restraint. It is intended to respect the common humanity. It is known as the notion of limited war.²⁴²

²⁴⁰ *Killing Civilians: Method, Madness and Morality in War*—Slim, Columbia (2008).

²⁴¹ See the new U.N. Convention on the Rights of Persons with Disabilities, which enters into force in May 2008.

²⁴² *Humanity in Warfare: Geoffrey Best, Weidenfeld and Nicolson (1980); War and Laws Since 1945: Geoffrey Best, Oxford (1994).*

This philosophy encourages the reasonable use of force and compassionate conduct towards non-combatants.

This ideology existed long before the thirteenth century. In Christian culture, this philosophy originates from the idea of “just war,” after an initial tradition of pacifism.²⁴³ This view of war with regard to civilian protection encourages people to consider that “the enemy is like us,” and the innocence of non-combatants is presumed.²⁴⁴

In both the “Brussels Declaration” and “Oxford Manual” of the 1800’s,²⁴⁵ there are sections that clearly distinguish between

²⁴³ Ideology, Reason and the Limitation of War: Religious and Secular Concepts 1200-1740, Johnson, Princeton (1975).

²⁴⁴ War in the Hebrew Bible: A Study in the Ethics of Violence—Niditch, Oxford (1993).

²⁴⁵ The Records of the International Committee of the Red Cross (ICRC)—On the initiative of Czar Alexander II of Russia, the delegates of 15 European States met in Brussels on 27 July 1874 to examine the draft of an international agreement concerning the laws and customs of war submitted to them by the Russian government. The Conference adopted the draft with minor alterations. However, since not all the governments were willing to accept it as a binding convention, it was not ratified. The project nevertheless formed an important step in the movement for the codification of the laws of war. In the year in which it was

combatants and non-combatants. The Brussels Declaration has a small section concerning with the population or inhabitants of occupied territories.²⁴⁶ The "Oxford Manual" on War of 1880, states in its Article 49 that "Family honor and rights, the lives of individuals, as well as their religious convictions and practices, should be protected."²⁴⁷

The American Civil War made this issue of non-combatants obvious and inescapable. The position of non-combatants in armed conflict was addressed in detail and at length by Abraham Lincoln in the "Lieber Code" of 1863.²⁴⁸ A principle to protect the

adopted, the Institute of International Law, at its session in Geneva, appointed a committee to study the Brussels Declaration and to submit to the Institute its opinion and supplementary proposals on the subject. The efforts of the Institute led to the adoption of the Manual of the Laws and Customs of War at Oxford in 1880. Both the Brussels Declaration and the Oxford Manual formed the basis of the two Hague Conventions on land warfare and the Regulations annexed to them, adopted in 1899 and 1907. Many of the provisions of the two Hague Conventions can easily be traced back to the Brussels Declaration and the Oxford Manual.

²⁴⁶ See footnote #245: The Project of an International Declaration concerning the Laws and Customs of War, Brussels, 27 August 1874, ICRC.

²⁴⁷ See footnote#245: The Laws of War on Land, Oxford, 9 September 1880, ICRC.

²⁴⁸ The Records of the International Committee of the Red Cross (ICRC)—"Lieber Code" ("Lieber Instructions") represent the first attempt to codify the laws of war. They were

unarmed population was firmly established in the "Lieber Code."²⁴⁹

In 1938, the International Law Association made a pre-war attempt to protect civilians with its "Amsterdam Draft." It clearly states in its Article 1 that "the civilian population shall not form the object of an act of war."²⁵⁰

In modern times, this historical moral philosophy has been reflected, described, codified, and emphasized in a wide range of international legal instruments. Unfortunately, it was conceived

prepared during the American Civil War by Francis Lieber, then a professor of Columbia College in New York, revised by a board of officers, and promulgated by President Lincoln. Although they were binding only on the forces of the United States, they correspond to a great extent to the laws and customs of war existing at that time. The "Lieber Instructions" strongly influenced the further codification of the laws of war and the adoption of similar regulations by other states. They formed the origin of the project of an international convention on the laws of war presented to the Brussels Conference in 1874 and stimulated the adoption of the Hague Conventions on land warfare of 1899 and 1907.

²⁴⁹ See footnote #248: Instructions for the Government of Armies of the United States in the Field (Lieber Code), April 1863, ICRC.

²⁵⁰ Life, Death and Resurrection: Khan, Bantam (2004).

only after the widespread civilian atrocities and genocide of the World War II.

Contemporary international law grants special protection and immunity to these non-combatant people. The Geneva Conventions of 1949 and their Additional Protocols of 1977 generally define these people as "civilians," a term that seeks to emphasize a stark contrast between ordinary unarmed people and the armed forces that either defend or attack them. The civilian label is now the mark of a very important distinction between combatants and non-combatants in armed conflicts, between the strong and weak.

Under the general rules of Geneva Conventions of 1949, those *ad-hoc* Conventions (in particular focusing on one particular group or particular human right under the general term of civilians) define and describe the rights of and protections for women, children, religious personnel, humanitarian aid workers, and the elderly,

respectively.²⁵¹ These rules regarding rights, protections, and immunities are further described and emphasized in the “next-level” international legislation—the laws of the United Nations, through its resolutions and reports.

Today, all 192 U.N. member states have signed and ratified the Geneva Conventions of 1949.²⁵² Three-fourths of them have

²⁵¹ The major international human rights treaties are the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), the Convention on the Prevention and Punishment of the Crime of Genocide (1948), the Convention on the Elimination of All Forms of Discrimination against Women (1979), the Convention on the Rights of the Child (1989) and its Optional Protocol (2000), the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), and the Convention on the Rights of Persons with Disabilities and its Optional Protocol (2006). The major international legal instruments of refugee law are the Convention on the Status of Refugees (1951) and its Protocol (1967). Other relevant international legal instruments are the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (1997), the Convention on the Safety of United Nations and Associated Personnel (1994), the Statute of the International Criminal Court (1998), the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) and its Protocol (1999), and the Convention on Conventional Weapons (1980) and its four Additional Protocols.

²⁵² The Record of the International Committee of the Red Cross, ICRC Online.

signed and ratified the Additional Protocols of 1977.²⁵³ The principle of civilian protection in armed conflict and the philosophy of limited war have emerged as a strong global ethic that is formally embodied in international legal instruments and the mandates of international inter-governmental organizations.

Section 3. Contemporary Common Ground and Mutual Understanding on the Protection of Civilians and Journalists

The United Nations General Assembly is composed of 192 member states (as of January 2008), and each member state has one equal vote under the Charter of the United Nations. Therefore, the resolutions and decisions of U.N. General Assembly may be considered the fruit and reflection of the common ground and mutual understanding of the whole international community, including all the minority and non-Western states.

²⁵³ The Record of the International Committee of the Red Cross, ICRC Online.

United Nations General Assembly resolution affirms and even imposes additional obligations upon the international community, including every member states of the United Nations to help individual states build capacity to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity and to assist those who are under stress before crises and conflicts break out.²⁵⁴ This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. The United Nations 2005 World Summit clearly identified the principle of protection of journalists and civilians in situations of armed conflict.²⁵⁵

All the 191 U.N. member states of the United Nations in 2005 confirmed at the Sixtieth U.N. General Assembly that they accept the responsibility and will act in accordance with it.²⁵⁶ The

²⁵⁴ Paragraph 189 of the United Nations General Assembly Document A/60/L.1, September 15th, 2005.

²⁵⁵ Summary Document of the 60th U.N. General Assembly General Debates (2005).

²⁵⁶ Same as above.

General Assembly Resolution of September 15th 2005 even authorized the international community through the United Nations and its organs to encourage and help states to exercise this responsibility and to establish an early warning capability in the international community in response to this responsibility. All the 191 U.N. Member states unanimously confirmed in the diplomatic conference of 2005 that the whole international community is prepared to take collective action, through the U.N. Security Council in accordance with the U.N. Charter, in case peaceful means are inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.²⁵⁷

Nowadays, it is a mutual understanding and common ground for the whole international community, including minority and non-Western states, that each state bears the “primary responsibility” to protect journalists as civilians from genocide, war crimes,

²⁵⁷ Summary Document of the 60th U.N. General Assembly General Debates (2005).

ethnic cleaning, and any other crimes against humanity. In the meantime, the international community, through the United Nations and especially its Security Council, shall take appropriate collective action (the “secondary responsibility”: in case national authorities fail to do so) under the U.N.’s obligation and authority to “maintain or restore international peace and security” under the Charter of the United Nations. On the other hand, while violence around the world is not infrequent, the power of the fear of intolerable pressure by world opinion (originated, brought, and safeguarded by the press and journalists for the public interest of the international community) may be one of the most powerful measures to maintain and restore international peace and security. Journalists who are performing their profession in situations of armed conflict and bringing information to the whole international community for the public interest are entitled to and desire better legal protection under international law.

Conclusion

The protection of journalists in armed conflict is part of the philosophy of "limited war" and exists in both Eastern and Western cultures for centuries. It is a mutual understanding and common ground for the whole international community and required by international law.

Journalists performing their legitimate profession in situations of armed conflict are serving the public interest of the whole international community. They communicate the information and situations about war zones to the whole world. They are the key to the fundamental human rights of freedom of expression and the press. They bring the fear of intolerable pressure of world opinion to areas where armed conflict is taking place. This may be one of the most important and powerful non-violent measures to restore and maintain international peace and security, as part of the contemporary globalization process.

The Geneva Conventions of 1949 and their Additional Protocols of 1977 grant legal protection and immunity to journalists in armed conflict. Under the Geneva laws, journalists are generally protected as civilians and immunized from any attacks by armed forces. For those journalists who are accredited to an armed force, they enjoy additional protection and immunity as prisoners of war in case they fall into the enemy's hands. In case they become sick or wounded, journalists can also be treated under the special category of "wounded or sick personnel" under the Geneva laws, just as the other military or non-military personnel in a war zone are.

This legal protection and immunity for journalists who work in zones of armed conflict, along with their rights and privileges are further reaffirmed, clarified, and detailed not only in the laws of the United Nations (U.N. laws—legislative resolutions and reports of the U.N. Security Council, General Assembly, and Secretary-

General), but also in the precedents of international judicial tribunals.

Under international law, individual states bear the primary duty and responsibility to prevent harm to and protect the human rights of civilians and journalists in their respective territories. Failure by states to meet their obligations under international law to protect civilians and journalists can give rise to individual criminal responsibility and may be subject to judicial proceedings in national courts, the International Criminal Court, or other *ad-hoc* international judicial tribunals.

The recent a series of armed conflicts in Iraq, Afghanistan, Somalia, Kenya, the Central Africa Republic and the Democratic Republic of the Congo etc., and the serious situations faced by those journalists in the war zones are examples of the growing risks faced by journalists performing their profession in areas of armed conflict. It is necessary and important to call for renewed

interest and attention to this issue in order to re-establish and strengthen the authority of those basic international rules, and reaffirm states' responsibility to prevent harm to and protect the human rights of those journalists. After all, it aims to promote the better protection of this special professional group.

A future *ad-hoc* international convention on the issue of the protection of journalists in situations of armed conflict is proposed to fill in the gap in current international law on this issue. Along with its possible long negotiation process, such an *ad-hoc* international convention can serve to call for renewed international attentions to this issue, to promote the rule of law on this issue on both the international and national levels, to provide "model rules" or "minimum standard" to failing or failed states as part of international technical assistance, and even to grant and enhance the "power of rights" to individual journalists on the ground within states. All of these are the important, special, and

unique roles and functions of international law, as “soft law” rather than national law.

On the other hand, as both the creator-regulator and subject to contemporary international law, the United Nations, including its organs and especially those U.N. peacekeeping missions on the ground in crisis, is also obligated to prevent harm to and protect the human rights of civilians and journalists through international intervention (collective action) in case national authorities fail to do so. Under the contemporary doctrine of international rule of law, not only states but also the United Nations itself, are subject to and must respect the laws of the United Nations (U.N. laws), which constitute a significant part of contemporary international law.

Journalists performing their profession in situations of armed conflict around the world communicate necessary information from war zones to the whole international community and also

bring pressure from the international community to those parties to conflict as part of the process to restore or maintain international peace and security. They serve the public interest of the whole international community. They are entitled to and desire better protection from both individual sovereign states and international inter-governmental organizations (including the U.N. peacekeeping missions on the ground around the world), under contemporary international law.

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