

**Castan Centre for Human Rights Law, Monash University, Australia**

**WAR REPORTING, INTERNATIONAL HUMANITARIAN LAW  
AND THE LEGACY OF BALIBO**

**Address by Tony Maniaty, Melbourne, 15 October 2009**

---

War is everywhere, and ongoing. You don't have to look far to find armed conflict in the modern world. Straight up, there's Iraq, and Afghanistan – but not all the twenty or so wars now going on are big wars; many, as a BBC correspondent once put it, are “small-scale wars of large-scale awfulness”. But whatever the scale, wherever there's armed conflict, you will usually find journalists. Covering the story, gathering information and evidence, putting themselves at risk - often at risk of death.

Despite all the precautions and supportive measures now taken by major networks such as the BBC, CNN and the ABC - battlefield security courses, protective gear and first-aid training, and, not least, carefully-rehearsed exit strategies - reporters are still dying, and many governments are still ignoring, and in some cases, giving support to, the killing of journalists. Reporters on the frontline have always been vulnerable - many died in both World Wars and somewhere between 40 and 60 (the exact number is debatable) were killed in Vietnam. Over the past decade, more than one-thousand journalists and critical news gathering support staff - translators, fixers, drivers and the like - have died while covering wars, natural disasters, crime, unrest and other dangerous stories.

Organisations like INSI, the International News Safety Institute, launched in Brussels in 2001, have built an impressive global network of advice and assistance to news workers who face danger on international assignment or, indeed, in their own countries. My own

institution, the University of Technology Sydney, together with the International Committee of the Red Cross and the ABC, earlier this year held a war reporting safety conference in Sydney, targeting in particular young reporters who often work around these formal protection systems: buying a laptop and Handycam, a cheap air ticket to Kabul, and two days later making their way to the frontline, hoping for spectacular footage to sell to networks, and often getting killed or wounded. Few know much about International Humanitarian Law, and fewer still think it has much to do with getting into a war zone, getting great pictures and stories, and getting out alive.

In fact IHL sits at the very heart of that risky yet highly important enterprise.

I'm sure most people here know what IHL is; many will know its intricacies far better than I do, and so I'll focus tonight on what might be of more interest to you – the specific matter of how journalists operate in war zones today, what they're up against, and how they might benefit from a stronger knowledge and understanding of IHL. This is, if you like, a letter from the front - sixty years after the Geneva Conventions consolidated the international law of armed conflict into four complimentary documents, law which itself derived from principles outlined 150 years ago by Henri Dunant – the founder of the ICRC, the International Committee of Red Cross.

The Geneva Conventions are the bedrock of IHL, but what if anything does IHL say specifically about the protection of journalists covering armed conflicts? As they say on the news, here are the main points:

*The First Additional Protocol to the Geneva Conventions of 1949, Article 79 says:*

- 1. Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians (...).*
- 2. They shall be protected as such under the Conventions and this Protocol provided that they take no action adversely affecting their status as civilians (...).*

*In the ICRC Study on Customary Rules of IHL (2005), Rule 34 in Chapter 10 states that: Civilian journalists engaged in professional missions in areas of armed conflict must be*

*respected and protected as long as they are not taking a direct part in hostilities. (...) State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.*

Given the above, the following then applies to journalists:

*In all armed conflicts, IHL explicitly prohibits the following acts committed against persons not or no longer taking an active part in hostilities: any violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; the taking of hostages; outrages upon personal dignity, in particular, humiliating and degrading treatment; the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.*

Put simply, journalists in warzones should be treated as civilians and given the protections afforded to civilians. But that, as we know, is not always the case, and it's increasingly less so, and it certainly wasn't the case in East Timor with the Balibo Five, or indeed with Roger East, the sixth Australian-based journalist murdered while going about his work in Dili in 1975. Nor was it the case with Sander Thoenes, the Dutch-born, Jakarta-based correspondent for *The Financial Times* of London, shot dead in 1999 barely an hour after his arrival in Dili. His body was found in a field, with a single bullet wound and much of his face crudely sliced off with a knife - a brutal message to all foreign journalists: enter this territory and you will be targeted for death.

My own entrée into this unique sphere of media danger came in 1975, when, as a young ABC journalist in Sydney, I was dispatched with a two-person TV news crew to cover the war in East Timor – the scrappy border fighting which preceded the eventual Indonesian invasion of the territory. Given that unfolding disaster, and the mass killings that would follow, looking back it's perhaps odd that the last thing on anyone's mind was IHL, international humanitarian law, the law of armed conflict and its effects, which sets out to limit the impact of war and to protect vulnerable persons.

None of the three reporters leading the Australian TV crews in East Timor in 1975 - myself from the ABC, Greg Shackleton from Channel Seven, Mal Rennie from Channel Nine - had ever been in a war zone. We were ill-equipped and ill-prepared for what followed. Flak jackets for journalists were unheard of in those days, so we wore jeans and shorts and T-shirts in the tropical heat; we took no serious medical supplies, no emergency food supplies. We had no radios, no means of communicating with the outside world, and had no evacuation plans except to stick close to Fretilin's soldiers and hope somehow they would save our lives if things went haywire.

All of us made mistakes at Balibo, and some of those errors may have contributed to the terrible outcome. That we were all so rigidly attached to the Fretilin armed forces, to their side of the fighting, was not in itself a mistake – there was really no option for our own safety, moving through hostile territory on the border with Indonesia - but it could hardly have helped to promote an image of truly independent journalism (in modern parlance were were 'embedded'), and certainly our necessary physical attachment to Fretilin's forces was used by the Indonesians subsequently to justify what transpired. This is what happens, of course, when theory comes up against hard reality. And again and again in this story, we will see how 'the law' as it might apply in a city like this, in a room like this, can seem utterly remote and abstract in the heat and fury of battle.

There were errors of judgment, for sure. Greg Shackleton on one occasion conveyed military information for Fretilin, a point noted in the New South Wales Coroner's report in 2007 into the death of cameraman Brian Peters. "At Maliana," he declared in a report to camera, "we conveyed a message that reinforcements be sent from Maliana to Balibo. We asked for fifteen men as we were told, in two cars, but they say that all they can spare is five men to help the ten still in Balibo." Technically he should have rejected any such request to convey for Fretilin what was clearly information of a military nature, an act that amounted to 'participatory behavior', the job of reporters being to observe, not to engage in any way with the surrounding conflict. Yet the situation was risky, Fretilin after all were our sole protectors, and we don't know whether Shackleton was aware that such an action was in contraction of the Geneva accords. I don't think I had heard of IHL or its conventions, and I knew precious little about the Geneva accords as they

applied to journalists. But something in my gut instincts told me that conveying military information wasn't correct, nor a very sensible thing to do, or to report having done.

But this was 1975, not 2009 - the ground rules for TV war coverage were still being drawn up, and we were pioneers. The Balibo Five paid the ultimate price. All of us, I'm sure, carried an instinctive feeling that we would not be deliberately targeted simply for being journalists; up to that point, in Vietnam, virtually all television journalists killed on the frontline had been caught in crossfire, in an ambush, in a hail of shrapnel, or even under friendly fire. To that we should add another element of frontline naivety: that something about 'being Australians' would protect us.

Shackleton famously painted the word AUSTRALIA on a house wall in Balibo. That image has become synonymous with the tragedy, *the* iconic image of the event. Yet there is for me, after all these years, also a terrible innocence conveyed in that sign, and perhaps just a touch of youthful arrogance - that a news reporter should enter a foreign country and after just a couple of days there paint his country's name prominently on a wall in a very public space. Today it's almost impossible to imagine, say, a BBC correspondent flying into Somalia and painting the words UNITED KINGDOM on a wall in Mogadishu, and a Union Jack, and having himself filmed while doing it. Shackleton in his report says they have painted the sign "hoping it may afford us some protection".

It's hard to imagine that it would offer any such thing, and might well do precisely the opposite, drawing attention to their presence. But perhaps we all felt that spirit: that, as easy-going Australians, we were somehow not linked to the dangerous flux of events that swirled through the region; that as Australians, we were all likeable people with no malicious intent; that as Australians, we should not be judged on foreign shores by any standards but our own. In 1975, Indonesian commandos clutching machine guns and determined to wipe out Fretilin, carried no such subtleties or illusions in their heads.

Which, of course, brings us to the ultimate tragedy of Balibo, to what happened on the morning of 16<sup>th</sup> October 1975. The New South Wales Coroner's report contains evidence from enough witnesses to show beyond reasonable doubt that the five were

not killed in crossfire, as the Indonesians have always claimed, but were murdered in cold blood. It's no mystery why the Indonesians should seek to eliminate all witnesses to their illegal incursion into a foreign territory - invading armies do that sort of thing with shameless regularity.

In Balibo there were four of us, the three-man ABC crew and Rick Collins from AAP-Reuters, and there were five of them, the three from Channel Seven and the Two from Channel Nine. We were shelled and when Fretilin told us we had to pull out, we went with them. Five days later the Balibo Five were shelled with artillery, and when Fretilin told them they had to pull out, they chose not to leave - deciding to stay to get more footage. Is this what it comes down to, the line between life and death? Fate, chance and luck - bad luck that perversely for us became good luck, in being shelled and being terrified enough to obey military orders to leave? We survived, they died...

Let's just assume for a minute that we were all far more experienced, and far wiser about IHL and other international conventions of war. What would we have taken into battle, into Timor with us? Well, the simple idea that war is not a game of open slather, that not everything is permitted even within the dark parameters of that thing called war. That in fact, as journalists, we were subjected to various rules that we needed to follow, and that combatants on both sides had to follow, to ensure our safety and survival. War, of course, is war, but war is not without civilised limits of behaviour. Put bluntly, IHL is basically about 'the rules of the game' of war. Beyond that, war produces war crimes.

All of this is now globally recognised. The Geneva Conventions, the basis of IHL, are ratified by every state on earth. They are binding on all states and apply worldwide, whatever the conflict, whatever the ideology or passions driving the conflict. They make no distinctions and no judgments about which side is right or wrong. This is important for war correspondents, who usually find themselves reporting the conflict not from both sides, but from one side or the other. IHL likewise is not involved with journalists' freedom of action or freedom of speech; it does not grant rights to enter a war zone *per se* - that's something the reporter has to negotiate on the ground with the consenting authorities, whoever they might be.

But IHL does set the basic rules for the legal protection of journalists operating in conflict zones, and these are a solid base on which war reporting can be conducted, and judgments made. It also lets them know what is legally permissible in their role as media representatives, and also what - legally - combatants can do about the presence of journalists and what they cannot. Invoking the rule of law and the possibility of war crimes prosecutions may not seem much of a weapon against young soldiers with high-velocity guns, but among more senior officers it can signal that the armed forces are under international scrutiny. That alone can be a powerful deterrent.

For journalists, understanding IHL is not just a matter of survival, it's also about reporting accuracy. Knowing the rules of the game allows reporters to draw attention in stories to violations of IHL. Journalists are witnesses to history, and history tells some very cruel tales. As a witness to violations of human rights, the war correspondent is in a position to tell the world more quickly than most what is happening, and to document such violations in order to halt them and/or to bring the perpetrators to justice. Lindsey Hilsum, who covered the horrors of Rwanda and is now the International Editor for Britain's Channel 4 News, says that had she realised that she wasn't reporting anarchy but genocide, she would have reported it quite differently. "In that first terrible week," she said, "I could have explained that governments had an obligation to stop it."

One key principle of the Geneva Conventions is the notion of proportionality, that the use of force is not unlimited. Prohibitions exist against methods that cause unnecessary suffering to persons, and/or long-term and severe damage to the natural environment. A

reasonable balance must be struck between the effects of legitimate military destruction and undesirable collateral effects. Under humanitarian law, the use of certain weapons,

such as dum-dum bullets, chemical and biological weapons and blinding laser weapons is prohibited. Knowing all this, and reporting IHL abuses, makes for good journalism.

Given this, you'd assume that journalists - war correspondents especially - would be all over IHL. Yet the very idea of codified rules of behavior on the battlefield is considered anathema amongst some of the older breed of war correspondents, almost all of them male. War is war, they always say - you take your risks and your chances. This is the same breed that regards any unwillingness to face the terror of the frontline as weakness, and any suggestion of post-traumatic stress disorder as, well, the province of wimps. One of the strange outcomes of my having written with such raw honesty about what happened to us in Balibo in 1975 - what I did right, what I did wrong, my fears and anxieties - was an attack by at least one critic that I was not up to the task, that I couldn't take the heat, as if covering real wars could be reduced to the level of a John Wayne movie: the guys who can take it and those who can't.

If only war reporting, and war itself, were so simple - just send in the tough guys, eliminate all the human emotions and complexities involved, and, well, win. No doubt that's what Bush, Chaney and Rumsfeld had in mind when they stormed Iraq in 2003, expecting victory in weeks. The reality is that war is dark and dirty work, messy and grotesque, unpredictable, emotionally challenging, and that, as von Moltke, chief of the Prussian army more than a hundred years ago, famously noted, 'no plan of battle lasts the first contact with the enemy...' If that was true in 1880, if it was true in Vietnam, it's even truer today. Put bluntly, modern warfare is chaos theory in action, which makes war reporting today harder than ever...

There are two very specific reasons for this. The first is battlefield safety, or lack of it; and the second is ironically the growing power of the media itself. Why is it less safe to be a war correspondent today than, say, in the Vietnam conflict? Today's war zones are a nightmare compared to back then: like most things in the modern world, ammunition runs at higher speeds, with more power, and does far greater damage to the human body; bleeding to death from a single bullet wound to the limbs is a real possibility. Armies and even guerrilla groups have upped the ante: rocket-propelled grenades are

becoming standard issue. Today's war zones are less likely to be in open fields and more in crowded towns, in buildings and backstreets; shrapnel is bouncing off walls and into bodies, explosions have more devastating impacts. IEDs - improvised explosive devices - are everywhere, as are suicide bombers. There is no frontline; most armies now don't fight across an imaginary battle line, but in a maze where enemies are hard to detect and even harder to dislodge. Journalists covering war in the 21<sup>st</sup> century need the same sort of protective gear as soldiers, and often end up looking not unlike soldiers, holding cameras that look like weapons, with disastrous results.

Even the nature of conflicts has changed dramatically. Most fighting now is internal - within states rather than between states, between tribes and clans and communities and gangs often broken into differing factions based on politics, ethnicity, criminality. We see less of conflict fought by regular armies and more by armed groups comprising of mixtures of soldiers, police and criminals, rebels and insurgents, basically anyone who can get their hands on a gun. That's hardly a recipe for the civilized conduct of war, or the unambiguous application of international legal standards.

Even if you survive all this, they're out to get you. No longer regarded as a neutral observer, the war correspondent is now seen as an active component in the process of modern war, and in many ways he or she is. Live TV coverage screened around the world has huge influence on military and geo-political strategy, and in some cases even on minute-by-minute tactics, as was the case in the 2003 invasion of Iraq, where CNN's coverage of the taking of Bagdad was watched by Pentagon generals who changed their plans according to what they saw. Conversely, silencing journalists is part of the battle plan, whether through censorship on one side or suicide bombing on the other; and taking out a television crew is seen as a greater insurgent propaganda victory than killing a couple of US Marines, if only because of the media attention it generates. If you can kidnap a correspondent from a big network, chances are you can raise a couple of million dollars in ransom money to buy more weapons to kill more enemies. This, not unnaturally, has the effect of scaring off many journalists. Anyone who has seen the beheading of the Wall Street Journal reporter Daniel Pearl on video at the hands of Islamic extremists is most unlikely to want to follow in his footsteps.

The notion that the war correspondents of today are essentially the same as their colleagues of fifty years ago but with better cameras and laptops is, of course, a fallacy. There are notable exceptions, people who operate with rigorous independence from all authority and control, but these are rare; the emergence of a media-military complex, in which journalists are heavily integrated into the fighting machine and into the coverage of one perspective only, has fundamentally changed the nature of the business. And to a very large degree it clouds the whole question of IHL as applied to war reporting. The closer the media gets to the military, the harder it becomes - whatever IHL might say in theory - to uphold in practice their status as civilians, to protect them from combatants locked in life-and-death struggles. Given this, it's reasonable to ask whether IHL has any real meaning, or power, in the contemporary warzone? Isn't what we're describing hell on earth, a jungle where no civilized behavior exists and no rules or conventions will save us?

Those same crusty old hands in journalism will argue that legal protection isn't much use to you when you're dead, but in many cases, from Nuremberg onwards, it provides valuable assistance to the families of victims seeking justice. The fact that the New South Wales Coroner saw fit to investigate the death of cameraman Brian Peters on behalf of his sister is proof of that, as is the recent decision by the Australian Federal Police to proceed with investigations into the deaths of the Balibo Five - under pressure from their relatives, friends and supporters. Because so much of modern war is lawless, and increasingly so, ironically we need more than ever a framework of law that covers not only those who are its backroom perpetrators, those who fight it and those who are its civilian victims, but also those who cover it.

The issue is not whether IHL offers sufficient protection to journalists. On paper it does. What's really lacking is vigorous implementation of the rules, and the systematic investigation, prosecution and sanction of violations. Many authorities urge greater training about compliance with IHL principles for members of the armed forces. The reality is that those who are most likely to break the rules - undisciplined, *ad hoc* armed groups with weak leadership and extreme ideologies - are those least likely to undertake training on IHL issues and the rights of civilians populations. Having said that,

there are numerous examples of cases where more sophisticated armed forces have broken the rules and where IHL training would be more effective, and more likely to be undertaken and supported.

The complex arena of war and war reporting raises other key legal issues. One often raised in the context of Balibo is the duty of care requirements of media employers. I have never heard of a reporter being *forced* to go into a war zone and place their life at risk; far more common is the need to restrain journalists from such risky activity. War is a drug, there's no doubt about that. The appeals of reporting it are perhaps not obvious to those who'd rather curl up with a good book and a glass of wine - but Jeremy Bowen, the BBC's Middle East editor, puts it succinctly: "Life stops drifting along and suddenly has a sharp purpose. It gets reduced to a very simple and fundamental equation about death and survival, and the complications and the nonsense fall away." Maybe so, but often the complications can grow. All too often we've seen cases where life-and-death decisions are left to the correspondent in the field, always under extreme pressure to get in, get the story and get out alive.

The mantra that no story is worth a life is often replaced in battle by the drug of war itself. War is inherently risky. Soldiers die. Civilians die. Doesn't it follow that journalists also might die? As the great Magnum photographer Robert Capa said, 'If your pictures aren't good enough, you aren't close enough'. Sure enough, Capa stepped on a landmine one day in Vietnam and was blown away. He died clutching his camera. Isn't that the potential price of covering war? Are media employers to be held responsible if their half-crazed correspondents decide to run across an open field under fire to get an award-winning photograph? These are all issues for lawyers to consider. Certainly duty of care should include a degree of pre-battle security, safety and first-aid training, but what then? Increasingly, media organizations are solving the dilemma by sending absolutely nobody to war, refusing to cover war at all, getting someone else, some other organization, to do the dirty work, to take those risks, to make those awful midnight calls to anxious partners and children: 'Your father, your husband, your wife has just been killed covering a war...'

I can still recall interviewing the news chief at a network in New York several years ago, who said, 'Tony, the worst thing that can happen to a network is to have one of your correspondents killed.' I agreed, assuming that we were discussing the nature of human tragedy, but it transpired the real concern was that such an event 'tied up a couple of our staff in paperwork for a year or more'. Commercial tragedy, I guess. Organizations have a duty of care to employees, but news organizations also have another profound duty - to provide audiences with news of war, about what is really going on and about abuses of human rights and the horror of war itself. If journalists don't tell us these things, it's most unlikely that the military will fill the void with truthful, unbiased accounts of what they're up to.

Since the two World Wars and Vietnam, the vexed business of reporting war has undergone many changes, not all for the better. The technology has improved vastly and satellites spin through the skies, wars are shown live on TV, and yet somehow although we see more, we understand less - the lines have become blurred around what used to be a straightforward proposition: the observation, investigation and explanation of warfare to those 'back at home'. The multi-faceted realities of war are gradually being replaced by a palatable shorthand of war, by homogenised images that audiences can consume without revulsion, by a well-tested process of sanitation that deliberately masks the horror of war. All of which is a further erosion of the reporter's role as the eyewitness to history, to the horrors of warfare, resulting in less, and less reliable, evidence on which those of us fortunate enough to be living in democracies can make reasonable decisions about whether or not to even go to war. The resulting take on war is all too often that it's simply an arcade game of winners and losers, in which you fire electronic weapons and take your chances. No real blood, no real gore, no ethics and certainly no moral rights and wrongs.

If you travel to East Timor today, and make your way up to Balibo, you'll come across the building commonly known as the Australia House, where the Balibo Five slept and where Greg Shackleton painted the word AUSTRALIA on the outside wall. Inside, it's a

local community centre - photographs of the Balibo Five hang from the wall, and there's a visitor's book. Most of the tributes are heartfelt: "The price of freedom is high" and "The ultimate price, not to be forgotten", but at the bottom of one page appears a bolt of pure aggression: "They deserved what they got – no heroes here", and under it, "I agree".

It's a harsh reminder I guess that not all of us view the events at Balibo through the same prism, the same sense of humanity - and also a clear indication of why we need an IHL regime, some codified means to deliver justice to the victims and their families, and the full weight of the law and punishment to the perpetrators. If we see war and war reporting only through the eyes of Hollywood and Boys Own comics, a struggle of the strong versus the weak, the brave versus the coward, we will invariably create a scenario in which emotionally-charged terms like 'heroes' and 'courage under fire' and 'bravery' and 'winners and losers' give encouragement to the killers, because these are value fields in which fairness, honesty and justice don't play a big role. As a first move towards wider acceptance of the principles of IHL, as a society we need to stop viewing and presenting war as an heroic enterprise, and see it for what it fundamentally is - an inhuman, horrific and desperate act by people devoid of imagination, for whom brute force is not the last resort, but usually the first.

Over a hundred years ago, William Russell of *The Times* of London covered the Crimean War and reported the charge of the Light Brigade "...with a halo of steel above their heads, and with a cheer which was many a noble fellow's death cry, they flew into the smoke of the batteries...". Russell described himself modestly as "the miserable parent of a luckless tribe", but in reality he changed not only the notion of reportage but also of war: as his colleague Edwin Godkin of the *Daily News* noted, having a special correspondent in the Crimea "...brought home to the War Office the fact that the public had something to say about the conduct of wars and that they are not the concern exclusively of sovereigns and statesmen." That sentence sums up I believe why we still need journalists in war zones, at the frontline, and why we need not only strong laws to protect them, but also the legal systems and the political will to apply those laws forcefully - and bring to justice those who betray their intent.

We should be thankful for that 'luckless tribe'. Without them, the battlefield would be an even uglier place - without restraint, without mercy, without even the basics of human dignity. They bring news of war, and risk their lives to do so. Theirs is an honorable mission, as honorable as any soldier's, and they need our support - and they need legal protection, even if they don't always know it. The phrase 'The world is watching' underlines their work, and still carries force: the possibility of censure, of investigation and prosecution is a deterrent to abuse, and strong reporting allied to the rigorous application of IHL can add to pressure on combatants to behave themselves, to do the right thing - even in the ghastly arena of war.

Thank you.

For those interested, I suggest the following article which analyses in great detail the application of law to the question of Balibo:

*Prosecuting War Crimes at Balibo Under Australian Law: The Killing of Five Journalists in East Timor by Indonesia*; by Ben Saul, Director, Sydney Centre for International Law, Faculty of Law, University of Sydney. SYDNEY LAW REVIEW VOL 31:83