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PROTECTING SOURCES OF EMBEDDED JOURNALISTS

SIMON LEVETT*

The secrecy around the journalist source protection safeguard is not always in the public interest, especially for the embedded journalist in times of war. The first section of this paper assesses the secrecy aspect of source protection in the context of embedded journalism and finds it as detrimental to the public interest because of the often nefarious motivations of government and military sources in the dissemination of fake news and propaganda. This paper then examines how tensions in embedded journalism have been managed in three legal paradigms in local, regional, and international courts and tribunals — the United States Supreme Court, the International Criminal Tribunal for the Former Yugoslavia, and the European Court of Human Rights. It concludes that the European Court of Human Rights provides the most pertinent approach by considering the behaviour of the source in a broad range of criminal contexts.¹

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* Simon Levett is a Doctoral Candidate in International Law at Western Sydney University researching the protection of journalists reporting on conflict. He has a Masters of Advanced Studies in International Humanitarian Law from the Geneva Academy of International Humanitarian Law Human Rights. He has worked for the Australian Broadcasting Corporation, the United Nations Office for the High Commissioner on Human Rights and the International Criminal Tribunal for the former Yugoslavia. He also worked as a Senior Research Assistant on the biography of former Justice Michael Kirby. He can be contacted on simonlevett77@gmail.com. I would like to thank Professor Steven Freeland, Dr Susan Mowbray and the editorial board of the Griffith Journal of Law and Human Dignity for their insightful and productive remarks.

¹ Qualitative Data was gathered through interviews in Sydney, Melbourne, Brisbane in Australia and Tel Aviv, Ramallah and Jerusalem in Israel in 2018 and 2019 under the research project 'Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law' Western Sydney University ethics approval H12860. This research was enabled with an Australian Government Research Training Program scholarship.

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I INTRODUCTION

In times of war, secrecy can augment but also undermine the public interest, as this paper will demonstrate. Jean Baudrillard, a post-structuralist who wrote in 1995 about the corruption of the ordinary flow of information and ideas in wartime, criticised the frequency of secrecy in war. Baudrillard, writing about the circulation of propaganda in the Gulf War from 1990-1991 through the media, placed emphasis on the relationship between officialdom and the media. He described such secrecy as part of ‘a deceptive world in which an entire culture labours assiduously at its counterfeit’.² He referred to ‘the orgy of material, the systematic manipulation of data, the artificial dramatisation’.³

This paper has focused on secrecy in the context of embedded journalism — understood as ‘reporters traveling with military units, seeing what they see’.⁴ The obligation of keeping journalist sources secret — or confidential with regards to professional relationships — has both upheld and degraded the protection of the human right to free speech.⁵ This obligation of confidentiality has generated further information and invoked the public’s right to know, while it has also protected confidential information (although there are limitations on restricting all classified information).⁶ In some respects, secrecy, and the obligation of confidence, has weakened the flow of propaganda or fake news because sources have told the truth under the belief that their identity will be protected. This confidentiality has been a significant aspect of the journalist-source professional relationship and, in itself, has been understood as a public good.⁷ Soldiers have also provided journalists with intelligence in volatile locations such as Iraq, Syria, and Afghanistan which can ultimately help inform the public about foreign wars. In part, journalists have agreed to participate in the embedded program

² Jean Baudrillard, *The Gulf War Did Not Take Place* (Power Publications, 1995) 43.

³ Ibid 58.

⁴ Christopher Paul and James J Kim, *Reporters on the Battlefield: The Embedded Press System in Historical Context* (RAND Corporation, 2004) 67.

⁵ Cees J Hamelink, ‘Media Monitoring and Individual Duties Under International Law’ in Kaarle Nordenstreng and Michael S Griffin (ed), *Media Monitoring and Individual Duties under International Law* (Hampton Press, 1999), 264.

⁶ Ryan K McIntosh, ‘Protecting Whistleblowers in the Uniformed Services: A Unique National Security Dilemma’ (2013) 64(3) *Labor Law Journal* 148, 162.

⁷ See Sissela Bok, *Secrets: On the Ethics of Concealment and Revelation* (Vintage Books, 1983).

because of the amelioration of the risk to life and the life of the crew,⁸ (although the risks to safety are not eliminated).⁹

However, there has been a convergence with the interests of the State in their distribution of propaganda and fake news, that is, the spread of ideas or attitudes that influence opinions or behaviour,¹⁰ through the misuse of the journalist source protection safeguard. Australian freelance journalist and author, Antony Loewenstein, has been critical of the use of anonymous sourcing. He said 'in the majority of the western media, anonymous sourcing is a disgrace. It's used far too often. It's used excessively, it's used by all the mainstream media. It's used unnecessarily'.¹¹ There has been the promotion of propaganda and fake news through an exclusive dependence on the military as an information source, undermining the credibility of the media organisation.¹² Some forms of propaganda and fake news are increasingly illegal,¹³ warranting the disclosure of confidential information in courts and tribunals. At the same time, confidentiality has undermined the establishment and verification of reliable and accurate facts by the journalist. In 1917, Senator Hiram Johnson had stated that the 'truth is the first casualty of war';¹⁴ in 1958, Martin had stated, 'it is through the choice of truth that States deliver their most stinging darts'.¹⁵

In this paper, firstly, I will establish the competing interests of the journalist source protection safeguard for embedded journalists. I will also refer to interviews about journalist ethics with war correspondents based in Australia and Israel as part of my Field Research in 2018 and 2019. Their narratives have provided professional insights into the

⁸ Interview with Bel Trew (Simon Levett, *Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law*, 8 February 2019) ('Trew').

⁹ Interview with Peter Grete (Simon Levett, *Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law*, 18 December 2018).

¹⁰ Leslie John Martin, *International Propaganda: Its Legal and Diplomatic Control* (University of Minnesota Press, 1958) 10 ('Martin').

¹¹ Interview with Antony Loewenstein (Simon Levett, *Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law*, 22 January 2019) ('Loewenstein').

¹² See Arthur S Hayes, Jane B Singer and Jerry Ceppos, 'Shifting Roles, Enduring Values: The Credible Journalist in the Digital Age' (2007) 22(4) *Journal of Mass Media Ethics* 262, 270, who state that the media have suffered a steady decline in public assessment of their credibility.

¹³ *Ibid* 60; See also Human Rights Committee, *General Comment No 11: Prohibition of Propaganda for War and Inciting National, Racial, or Religious Hatred (Article 20 of the International Covenant on Civil and Political Rights)*, 19th sess, UN Doc CCPR/C/GC/11 (29 July 1983), which states that 'any propaganda for war shall be prohibited by law'.

¹⁴ Phillip Knightley, *The First Casualty* (The John Hopkins University Press, 2004).

¹⁵ Martin (n 10) 82.

strengths of the legal arguments in free speech protection. Secondly, I will assess different perspectives in the law on journalist source protection pertinent to the embedded journalist. I will refer to jurisprudence from the Supreme Court of the United States, International Criminal Tribunal for the former Yugoslavia ('ICTY') and the European Court of Human Rights ('ECHR'). These three jurisdictions have referred to local, regional, and international contexts and ultimately established parameters of source protection rather than endangering sacred cows. This section has agreed with the emerging test in the ECHR, which has guided journalists into making preliminary assessments on the credibility of a source.

II EMBEDDED JOURNALISTS IN ETHICS

The eagerness of the media to undertake a Faustian pact to embed is due to enhanced access to information and the assurances of safety.¹⁶ These trends followed complaints about military selected 'pools' of journalism in the United States Sidle Report during the First Gulf War in 1990–1991.¹⁷ Formal embedding with the military in Bosnia started in 1995 and had continued in Afghanistan from 2001 and Iraq from 2002. Embedding has extended to non-state actors such as the Peshmerga who are in Syria or Iraq,¹⁸ as well as other informal exchanges.¹⁹ In Operation Iraqi Freedom in 2002, over 600 journalists had embedded with the United States military.²⁰ There were also around 2100 'unilateral' journalists in Iraq,²¹ as well as some who accompanied the military in an informal capacity.²²

Australian journalist Ben Doherty, now working with The Guardian, undertook several embeds in Iraq and Afghanistan. Despite the benefits of freedom of movement in an

¹⁶ Trew (n 8).

¹⁷ Brendan R McLane, 'Reporting From The Sand-Storm: An Appraisal Of Embedding' (2004) 34(1) *Parameters* 77, 80 ('McLane').

¹⁸ Interview with Paula Slier (Simon Levett, Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law, 24 February 2019).

¹⁹ Loewenstein (n 11).

²⁰ McLane (n 17) 81.

²¹ Elana J Zeide, 'In Bed with the Military: First Amendment Implications of Embedded Journalism' (2005) 80(4) *New York University Law School* 1309, 1318 ('Ziede').

²² Michael Massing, 'The High Price of an Unforgiving War (Dispatches: Slices of the War)' 42(1) *Columbia Journalism Review* 33; Gordon Dillow, 'Grunts and Pogues: The Embedded Life (Dispatches: Slices of the War)' 42(1) *Columbia Journalism Review* 32; John Donovan, 'For the Unilaterals, No Neutral Ground (Dispatches: Slices of the War)' 42(1) *Columbia Journalism Review* 35; Antony Shadid 'Baghdad: Minding Your Minder (Dispatches: Slices of the War)' (2003) 42(1) *Columbia Journalism Review* 36.

embed, Doherty said that the military has overarching control of the journalist in a Foucauldian sense. He said that they have control over what stories had been filed through 'operating security' and there had often been censorship and self-censorship.²³ Australian Dylan Welch, now working for the Australian Broadcasting Corporation (ABC), undertook several embeds in Afghanistan with the Australian Defence Force.²⁴ Welch discussed the obligation of confidentiality as inhibiting the truth-seeking, democratic function of the media. Welch spoke in broad terms — he said that journalists had to be aware when they were being 'used' by people, particularly those in authority who speak 'anonymously in order to perpetuate a particular world view'.²⁵

The embed program has encouraged propaganda and fake news to the detriment of free speech. Nohrstedt and Ottosen linked unacknowledged sources as a layer of propaganda.²⁶ Zeide suggested that 'the structure of an embed program cannot help but tilt coverage in the government's favour. It exploits the psychological, professional, and economic pressures faced by both individual journalists and their organisations'.²⁷ Zeide also noted that 'most reporters will be reluctant to publish anything that the officers and soldiers around them might receive badly' even if it is to the detriment of the spread of information about war and foreign policy.²⁸

Dr Christopher Kremmer, a former war correspondent and author of 'the Carpet Wars',²⁹ explained that the obligation of confidence extended to contextual information rather than just the identity of a source. Dr Kremmer said that even if he agreed not to identify a source, there has been other identifying information that he had been obliged to keep a secret.³⁰ This worked in addition to formal agreements over state secrets or other

²³ Interview with Ben Doherty (Simon Levett, *Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law*, 3 December 2018).

²⁴ Interview with Dylan Welch (Simon Levett, *Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law*, 4 December 2018). Welch, a journalist with the ABC, referred to the Australian Media, Entertainment and Arts Alliance ('MEAA') Code of Ethics, 1994, which he said guided him while he was working as a journalist in Afghanistan. Article 3 of the MEAA Code of Ethics states 'aim to attribute information to its source. Where a source seeks anonymity, do not agree without first considering the source's motives and any alternative attributable source. Where confidences are accepted, respect them in all circumstances'.

²⁵ *Ibid.*

²⁶ Stig A Nohrstedt and Rune Ottosen, *New Wars, New Media and New War Journalism* (Nordicom, 2014) 37.

²⁷ Zeide (n 21) 1320.

²⁸ *Ibid* 1321.

²⁹ Dr Christopher Kremmer, *The Carpet Wars* (Harper Collins, 2002).

³⁰ Interview with Dr Christopher Kremmer (Simon Levett, *Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law*, 30 November 2018).

sensitive, national security information (including specific numbers of troops, equipment or vehicles, future operations, security levels, intelligence collection, or information about the effectiveness of enemy action).³¹ The result has been that embedded journalists lose the ability to fully exercise a key journalistic function — checking whether information is accurate and reliable (also the first casualty of war).³²

III EMBEDDED JOURNALIST IN THE LAW

Shield Laws have provided an explicit if incomplete layer of protection for war correspondents including embedded journalists; in Australia, shield laws have recently been relevant to war correspondents in the context of Australian Federal Police ('AFP') raids in June 2019 on the Australian Broadcasting Corporation ('ABC') ostensibly on the grounds of national security.³³ The public debate about the right to know has invoked the need for strong shield laws but international jurisprudential advances are increasingly focused on limitations of the source protection safeguard. Any potential media bill of rights in Australia could benefit from the following discussion of the jurisprudence of qualified privilege in the courts and tribunals following.³⁴

The United States Supreme Court established a high threshold for the protection of journalists' sources. In *Branzburg v Hayes*,³⁵ the United States Supreme Court ruled to inform the public of decisions in a democracy and the right to know over the rights of journalist to keep identities of sources a secret (but only in the context of criminal allegations). The 1972 landmark decision has value for embedded journalists who are compelled to give evidence at a criminal trial in the United States (although the Court is ambiguous towards protecting all types of information).³⁶ However, the right to know has

³¹ Zeide (n 21) 1315.

³² Mark Pedelty, *War Stories: the Culture of Foreign Correspondents* (Routledge, 1995) 43.

³³ Laura Tingle, 'Australia's National Security Laws Should Protect the Country, Not Its Politicians in Power', *ABC News* (online, 24 June 2019) <<https://www.abc.net.au/news/2019-06-08/afp-raids-journalist-house-abc-headquarters-laura-tingle/11191446>>.

³⁴ Tony Walker, 'Press Freedom Must Be Enshrined in a Charter of Rights', *Sydney Morning Herald* (online, 3 November 2019) <<https://www.smh.com.au/national/press-freedom-must-be-enshrined-in-a-charter-of-rights-20191031-p5368c.html>>.

³⁵ 408 US 655 (1972).

³⁶ *Ibid* 691.

been held broader than criminal justice; it includes positive measures of free speech (which have been difficult to calculate in war).³⁷

Information about the criminal behaviour of a source explicitly has equated the public interest with the prosecution of crimes presumably including illegal propaganda and false news. Justice White stated that 'the preference for anonymity of those confidential informants... is presumably a product of their desire to escape criminal prosecution, and this preference, while understandable, is hardly deserving of constitutional protection'.³⁸ White suggested that 'although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune to such conduct, whatever the impact on the flow of news'.³⁹ In this way, Justice White noted that the testimonial privilege should be only 'limited' or 'exceptional'⁴⁰ rather than confidential relationships being protected per se. The United States Supreme Court stated that 'testimony relevant to the prosecution of crime' has been required, being 'further information that this exposure might prevent'.⁴¹ This has accorded with the theory in the First Amendment jurisprudence referred to by Nestler, where journalists lack any special rights over citizens and that the press is regulated by the government authorities.⁴²

A radical United States Supreme Court in *Branzburg v Hayes* has undermined journalist source protection (although in concurrence, Justice Powell is more friendly to the media).⁴³ The Court has discounted the 'chilling effect' on the media;⁴⁴ Justice White in *Branzburg v Hayes* asserted that

the argument that the flow of news will be diminished by compelling reporters to aid the grand jury in a criminal investigation is not irrational, nor are the records before us silent on the matter. But we remain unclear how often and to what extent informers are actually deterred from

³⁷ Nina Burri, *Bravery or Bravado? The Protection of News Providers in Armed Conflict* (Brill – Nijhoff, 2015) 223.

³⁸ *Branzburg v Hayes* (n 35) 691.

³⁹ *Ibid.*

⁴⁰ *Ibid* 674.

⁴¹ *Ibid* 698.

⁴² Jeffrey S Nestler, 'The Underprivileged Profession: the Case for Supreme Court Recognition of the Journalist's Privilege' (2005) 154(1) *University of Pennsylvania Law Review* 201, 208.

⁴³ *Ibid* 222.

⁴⁴ Robert A Sedler, 'Self-Censorship and the First Amendment' (2012) 25(1) *Notre Dame Journal of Law, Ethics and Public Policy* 13, 14.

furnishing information when newsmen are forced to testify before a grand jury.⁴⁵

However, while there is no federal shield law in the United States, shield laws have provided some protection in forty-eight states and the District of Columbia,⁴⁶ with an absolute privilege existing in a minority of cases.⁴⁷

Justice White's reasoning — and his focus on crime — has not dismissed the use of embedded journalism in criminal trials because of their lack of impartiality.⁴⁸ Justice White states that

this conclusion itself involves no restraint on what newspapers may publish or on the type or quality of information between reporters and their sources. Grand juries address themselves to the issues of whether crimes have been committed and who committed them. Only where news sources themselves are implicated in crime or possess information relevant to the grand jury's task need they or the reporter be concerned about grand jury subpoenas.⁴⁹

Similarly, many constitutional and statutory shield laws in the United States have avoided making judgements on the content of the information despite challenges from non-traditional forms of journalists such as bloggers.⁵⁰ However, Justice White's reasoning has meant that, while the threshold of source protection has been kept high, non-criminal information relevant to the embedded journalist has still been withheld from a court (requiring illegality for scrutiny of all propaganda and fake news).

In 2002, the ICTY enshrined source protection for war correspondents in the context of incriminating evidence by journalists into alleged war crimes committed by officials Radoslav Brdjanin and Momir Talic;⁵¹ given the application of United States Security

⁴⁵ *Branzburg v Hayes* (n 35) 693.

⁴⁶ Nia Y McDonald, 'Under Fire: the Fight for the War Correspondent's Privilege' (2003) 47(1) *Howard Law Journal* 133, 139.

⁴⁷ *Ibid* 140.

⁴⁸ *Ibid*.

⁴⁹ *Branzburg v Hayes* (n 35) [691].

⁵⁰ Linda L Berger, 'Shielding The Unmedia: Using The Process of Journalism to Protect the Journalist's Privilege in a Infinite Universe of Publication' (2003) 39(5) *Houston Law Review* 1371, 1410.

⁵¹ *Prosecutor v Radoslav Brdjanin and Momir Talic (Decision on Motion to Set Aside Confidential Subpoena to Give Evidence)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-99-36-T, 7 June 2002); *Prosecutor v Radoslav Brdjanin and Momir Talic (Decision on Interlocutory*

Council Resolution 827 (1993) establishing the ICTY,⁵² the decision has been the closest principle to a global shield law specifically for war correspondents. However, the lack of influence of the decision has been demonstrated by several rebellious journalists who gave testimony based on their confidential information to international bodies about violations of international law. Their actions assisted in convicting the perpetrators of other alleged international crimes during the war in Yugoslavia in 1991-2001. Jackie Rowlands, a BBC reporter throughout the war, testified in 2002 at the war crimes tribunal of former President of Serbia Slobodan Milosevic; she issued a statement stating:

this was something I ought to do — had to do... I don't accept the argument that giving evidence will make my life significantly more dangerous for journalists in the future.... I don't believe that journalists are exempt from moral obligations or international justice.⁵³

The Guardian journalist, Ed Vulliamy, similarly testified against the former commander of Croatian forces in Bosnia Tihomir Blaskic. He stated in 1999 in an academic article that 'my belief is that we must do our professional duty to our papers and our moral and legal duty to the new enterprise'.⁵⁴ The approach of Rowlands and Vulliamy indicated that the pursuit of justice before the international courts and tribunals might void journalists' and their sources' safety and security. This reflected the high threshold for source protection at the United States Supreme Court, implying that embedded journalists should be regarded as active participants in a conflict with moral obligations, and as human beings and citizens, in any conflict.⁵⁵

Yet the ICTY in the *Prosecutor v Radoslav Brdjanin & Momir Talic* (or Randal's decision)⁵⁶ created a reactionary and stronger source protection safeguard for the war correspondent that lowered the source protection threshold. The Appeals Chamber in Randal's decision argued that

Appeal) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-99-36-AR73 9, 11 December 2002).

⁵² United Nations Security Council, Res 827, UN Doc S/RES/827 (25 May 1993).

⁵³ Howard Tumber, 'Journalists, War Crimes and International Justice' (2008) 1(3) *Media, War and Conflict* 261, 263.

⁵⁴ *Ibid* 264.

⁵⁵ Burri (n 37).

⁵⁶ *Prosecutor v Radoslav Brdjanin and Momir Talic (Decision on Motion to Set Aside Confidential Subpoena to Give Evidence)* (n 51); *Prosecutor v Radoslav Brdjanin and Momir Talic (Decision on Interlocutory Appeal)* (n 51).

a two-pronged test must be satisfied, [f]irst, the petitioning party must demonstrate that the evidence sought is of direct and important value in determining a core issue in the case. Second, it must demonstrate that the evidence sought cannot reasonably be obtained elsewhere.⁵⁷

This protected the rights of embedded journalists to safeguard their sources in the public interest in criminal proceedings in times of conflict.

The ICTY protected the information gathering role of the war correspondent in the context of free speech (as opposed to the local journalist). The Trial Chamber stated '[j]ournalists reporting on conflict areas play a vital role in bringing to the attention of the international community the horrors and reality of the conflict'.⁵⁸ The Appeal Chamber subsequently discussed the activities of war correspondents in detail, where they stated that 'the Appeals Chamber is of the view that society's interest in protecting the integrity of the newsgathering process is particularly clear and weighty in the case of war correspondents'.⁵⁹ Indeed, retired war correspondents have been protected by the safeguard,⁶⁰ contravening the argument that privileges ought to be defined narrowly.⁶¹ However, domestic, local journalists — who are also more immediately associated with partial information,⁶² and unsafe journalistic practices⁶³ — have been excluded from the threshold.⁶⁴ Although the use of domestic journalism could benefit international criminal justice, information by local journalists has been classified as a lesser standard of protection in Randal's decision.

The low threshold for protection means that war correspondents such as embedded journalists who may be a direct witness to war crimes might abstain from court testimony. In the opposite direction to the United States Supreme Court, 2002 decisions

⁵⁷ *Prosecutor v Radoslav Brdjanin and Momir Talic (Decision on Interlocutory Appeal)* (n 51) [50].

⁵⁸ *Prosecutor v Radoslav Brdjanin and Momir Talic (Decision on Motion to Set Aside Confidential Subpoena to Give Evidence)* (n 51) [25].

⁵⁹ *Prosecutor v Radoslav Brdjanin, Momir Talic (Decision on Interlocutory Appeal)* (n 51) [36].

⁶⁰ *Ibid* [9].

⁶¹ Michael D Saperstein, 'Federal Shield Law: Protecting Free Speech or Endangering the Nation?' (2006) 14(2) *Journal of Communications Law and Technology Policy* 543, 556.

⁶² Interview with Eric Tsolek, (Simon Levett, 'Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law', 20 January 2019).

⁶³ Interview with Joseph Dyke (Simon Levett, 'Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law', 19 January 2019).

⁶⁴ Nina Kraut, 'A Critical Analysis of One Aspect of Randal in Light of International, European, and American Human Rights Conventions and Case Law' (2004) 35(1) *Columbia Human Rights Law Review* 337, 342.

at the Special Court for Sierra Leone have extended the safeguard to human rights workers as rights bearers and guardians of the public interest.⁶⁵ It is likely that future rulings of the International Criminal Court will provide even broader protections for editors and supervisors.⁶⁶ The risk is that other, non-media information will be relied upon by international courts and tribunals, for example, information from non-governmental organisations that is of a less probative nature.⁶⁷

The ECHR, to which all the 47 members of the Council of Europe belong and for which human rights apply on an extra-territorial basis,⁶⁸ including war-torn countries such as Ukraine, has balanced an interest in Freedom of Expression alongside the administration of criminal justice, national security, and other legitimate aims.⁶⁹ Article 10 of the ECHR is the basis for the exception to the journalist source protection safeguard where 'it is justified by an overriding requirement in the public interest'.⁷⁰ However, the Council of Europe suggested that more information about the embed ought to be made public; a 2008 report suggested that 'if a system of embedded journalists needs to be maintained and journalists choose to make use of it, they are advised to make this clear in their reports and to point out the source of their information'.⁷¹

Unlike the proceeding courts and tribunals, embeds have a right to source protection before the ECHR despite concerns about reliability of information. In *Pasko v Russia* (2009),⁷² the applicant was a Naval Officer as well as a military and freelance journalist on the Russian Pacific Fleet's newspaper *Boyevaya*.⁷³ Most of his articles focused on the issue of environmental pollution but others related to the activity of the Russian Pacific

⁶⁵ *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-04-16-T, 20 June 2007) [33].

⁶⁶ Anastasia Heeger, 'Securing a Journalist's Testimonial Privilege in the International Criminal Court' (2005) 6(2) *San Diego International Law Journal* 209, 221.

⁶⁷ Matthew Powers, 'Contemporary NGO-Journalist Relations: Reviewing and Evaluating an Emergent Area of Research' (2015) 9(6) *Sociology Compass* 427, 428.

⁶⁸ *Al-Saadoon and Mufdhi v the United Kingdom* (European Court of Human Rights, Fourth Section, Application No 61498/08, 2 March 2010).

⁶⁹ Article 10 of the *European Convention on Human Rights* ('ECHR'), opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

⁷⁰ *Goodwin v the United Kingdom* (European Court of Human Rights, Grand Chamber, Application Nos 17488/90, 27 March 1986) [39].

⁷¹ Council of Europe, Committee of Ministers, *Freedom of Expression and Information in Times of Crisis Guidelines of the Committee of Ministers of the Council of Europe*, CM/Del/Dec(2007)1005/5.3, 1005th mtg, 26 September 2007, 24.

⁷² *Pasko v Russia* (European Court of Human Rights, First Section, Application No 69519/01, 22 October 2009).

⁷³ *Ibid* [8].

Fleet.⁷⁴ In that case, the Court noted that the applicant's Freedom of Expression had been held intact in the context of his role as a military officer with duties to the State rather than as a journalist.⁷⁵ However, the ECHR in *Handyside v the United Kingdom* (1975)⁷⁶ stated that 'information' and 'ideas' that 'offend, shock or disturb' are all governed by the right to Freedom of Expression in peace and war, intimating that all journalists retain the same protections.⁷⁷

Similar to the United States Supreme Court, the ECHR explicitly prevented the forced disclosure of the identity of a source because alternative measures to disclosure had been possible. In *Roemen and Schmit v Luxemburg* (2003),⁷⁸ the ECHR adjudicated on search warrants issued in relation to misconduct allegations of a Minister. The Court found that 'measures other than searches of the applicant's home and workplace ... might have enabled the investigating judge to find the perpetrators of the offences referred to in the public prosecutor's submissions'.⁷⁹

The ECHR has progressively indicated that the illegitimate behaviour of a source has overridden the notion of secrecy in the courtroom potentially on the grounds of crime or national security on a high threshold of source protection. This has arguably represented a shift towards recognising the 'motive' of a source for a journalist. Some sources have been vulnerable — for example, whistle-blowers⁸⁰ — but others have nefarious motives such as the commission of crimes. In the context of embedded journalism, military sources have been in fact 'quite powerful'.⁸¹ Sources have been opportunistic; they have taken advantage of the 'chance to provide information that promotes their interests, to publicise their ideas, or in some cases, just to get their names and faces into the news'.⁸²

⁷⁴ Ibid [7].

⁷⁵ Ibid [87].

⁷⁶ *Handyside v the United Kingdom* (European Court of Human Rights, Court (Plenary), Application No 5493/72, 7 December 1976).

⁷⁷ Ibid [49].

⁷⁸ *Roemen and Schmit v Luxembourg* (European Court of Human Rights, Fourth Section, Application No 51772/99, 25 February 2003).

⁷⁹ Ibid [56].

⁸⁰ *Guja v Moldova* (European Court of Human Rights, Grand Chamber, Application No 14277/04, 12 February 2008).

⁸¹ Herbert J Gans, *Deciding What's News: A Study of CBS Evening News, NBC Nightly News, Newsweek and Time* (Northwestern University Press, 2004) 119.

⁸² Ibid 117.

As discussed, the military has not been a neutral channel of information; rather, they can be linked to propaganda and fake news.

In *Financial Times Ltd v the United Kingdom* (2009),⁸³ applications had been made to facilitate disclosure of confidential information belonging to a Belgian brewery company under section 10 of the *Contempt of Court Act 1981*. In that case, the ECHR suggested that evidence of source behaviour — including national security information — could be a public interest justification for disclosure. However, the ECHR retreated, finding that although ‘the public perception of the principle of non-disclosure of sources would suffer no real damage where it was overridden in circumstances where a source was clearly acting in bad faith with a harmful purpose and disclosed intentionally falsified information’, ‘compelling evidence’ was necessary to void the journalist source protection safeguard.⁸⁴ Ultimately, the ECHR suggested that ‘the conduct of the source can never be decisive in determining whether a disclosure order ought to be made but will merely operate as one, albeit important, factor to be taken into consideration in carrying out the balancing exercise required under Article 10(2)’.⁸⁵ Certainly, notice of a source’s motivations will be taken into account by courts — including potentially embedded journalists.

IV CONCLUSION

Embedded journalists have the vital role of gathering news from powerful groups in war-torn societies in a relatively safe environment. When embedded journalists interview sources in war, including official and military authorities, the source protection safeguard has provided assurances in countries such as Australia that the information remains confidential. However, as seen by interviews with journalists, there is a concern about the over-reliance upon official and military sources by embedded journalists. Building upon the applicability of shield laws, decisions in national, regional, and international courts and tribunals provide a range of jurisdictional standards for any exception to journalist source protection. Notably, the jurisprudence of the ECHR has indicated the behaviour of the source as a potential factor in source protection in the context of issues

⁸³ *Financial Times Ltd and Others v the United Kingdom* (European Court of Human Rights, Fourth Section, Application No 821/03, 15 December 2009).

⁸⁴ *Ibid* [63].

⁸⁵ *Ibid*.

such as crime and national security; this decision will have relevance for the 47 members of the Council of Europe and its extra-territorial jurisdiction but also for other judicial mechanisms.

Law is applicable in war and can assist to build a system of ethical journalism. Ultimately, the approach of the ECHR has aimed not only for the protection of the information of the embedded journalist but simultaneously for a fairer approach to war journalism that respects the contribution of all sources. This scrutiny of growing embedded journalism has the potential for a more 'honest' journalism,⁸⁶ empowering war correspondents to enter into new and beneficial relationships of confidence with a range of sources.

⁸⁶ Pedelty (n 32) 227.

REFERENCE LIST

A Articles/Books/Reports

- Baudrillard, Jean, *The Gulf War Did Not Take Place* (Power Publications, 1995)
- Berger, Linda L, 'Shielding The Unmedia: Using The Process of Journalism to Protect the Journalist's Privilege in a Infinite Universe of Publication' (2003) 39(5) *Houston Law Review* 1371
- Bok, Sissela, *Secrets: On the Ethics of Concealment and Revelation* (Vintage Books, 1983)
- Burri, Nina, *Bravery or Bravado? The Protection of News Providers in Armed Conflict* (Brill - Nijhoff, 2015)
- Dillow, Gordan, 'Grunts and Pogues: The Embedded Life (Dispatches: Slices of the War) 42(1) *Columbia Journalism Review* 32
- Donvan, John, 'For the Unilaterals, No Neutral Ground (Dispatches: Slices of the War) 42(1) *Columbia Journalism Review* 35
- Gans, Herbert J, *Deciding What's News: A Study of CBS Evening News, NBC Nightly News, Newsweek and Time* (Northwestern University Press, 2004)
- Hamelink, Cees J, 'Media Monitoring and Individual Duties under International Law' in Kaarle Nordenstreng and Michael S. Griffin (ed), *Media Monitoring and Individual Duties under International Law* (Hampton Press, 1999)
- Hayes, Arthur S, Jane B. Singer and Jerry Ceppos, 'Shifting Roles, Enduring Values: The Credible Journalist in the Digital Age' (2007) 22(4) *Journal of Mass Media Ethics* 262
- Heeger, Anastasia, 'Securing a Journalist's Testimonial Privilege in the International Criminal Court' (2005) 6(2) *San Diego International Law Journal* 209
- Knightley, Phillip, *The First Casualty* (The John Hopkins University Press, 2004)
- Kraut, Nina, 'A Critical Analysis of One Aspect of Randal in Light of International, European, and American Human Rights Conventions and Case Law' (2004) 35(1) *Columbia Human Rights Law Review* 337

- Kremmer, Christopher Dr., *The Carpet Wars* (Harper Collins, 2002)
- Levett, Simon, 'Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law' (Interview Series, Western Sydney University, November 2018 - February 2019)
- Martin, Leslie John, *International Propaganda: its Legal and Diplomatic Control* (University of Minnesota Press, 1958)
- Massing, Michael 'The High Price of an Unforgiving War (Dispatches: Slices of the War)' 42(1) *Columbia Journalism Review* 33
- McDonald, Nia Y, 'Under Fire: the Fight for the War Correspondent's Privilege' (2003) 47(1) *Howard Law Journal* 133
- McIntosh, Ryan K, "Protecting whistleblowers in the uniformed services: a unique national security dilemma" (2013) 64(3) *Labor Law Journal* 148
- McLane, Brendan R., 'Reporting From The Sand-Storm: An Appraisal Of Embedding' (2004) 34(1) *Parameters* 77
- Nestler, Jeffrey S, 'The Underprivileged Profession: the Case for Supreme Court Recognition of the Journalist's Privilege' (2005) 154(1) *University of Pennsylvania Law Review* 201
- Nohrstedt, Stig A and Rune Ottosen, *New Wars, New Media and New War Journalism* (Nordicom, 2014)
- Paul, Christopher and James J Kim, *Reporters on the Battlefield: the Embedded Press System in Historical Context* (RAND Corporation, 2004)
- Pedelty, Mark, *War Stories: the Culture of Foreign Correspondents* (Routledge, 1995)
- Powers, Matthew, 'Contemporary NGO-Journalist Relations: Reviewing and Evaluating an Emergent Area of Research' (2015) 9(6) *Sociology Compass* 427
- Saperstein, Michael D, 'Federal Shield Law: Protecting Free Speech or Endangering the Nation?' (2006) 14(2) *Journal of Communications Law and Technology Policy* 543

Sedler, Robert A, 'Self-Censorship and the First Amendment' (2012) 25(1) *Notre Dame Journal of Law, Ethics and Public Policy*, 13

Shadid, Anthony, 'Baghdad: Minding Your Minder (Dispatches: Slices of the War)' (2003) 42(1) *Columbia Journalism Review* 36

Tumber, Howard, 'Journalists, War Crimes and International Justice' (2008) 1(3) *Media, War and Conflict* 261

Zeide, Elana J, 'In Bed with the Military: First Amendment Implications of Embedded Journalism' (2005) 80(4) *New York University Law School* 1309

B Cases

Al-Saadoon and Mufdhi v the United Kingdom (European Court of Human Rights, Fourth Section, Application No 61498/08, 2 March 2010)

Branzburg v Hayes 408 US 655 (1972)

Financial Times Ltd and Others v the United Kingdom (European Court of Human Rights, Fourth Section, Application No 821/03, 15 December 2009)

Goodwin v the United Kingdom (European Court of Human Rights, Grand Chamber, Application Nos 17488/90, 27 March 1986)

Guja v Moldova (European Court of Human Rights, Grand Chamber, Application No 14277/04, 12 February 2008)

Handyside v the United Kingdom (European Court of Human Rights, Court (Plenary), Application No 5493/72, 7 December 1976)

Pasko v Russia (European Court of Human Rights, First Section, Application No 69519/01, 22 October 2009)

Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-04-16-T, 20 June 2007)

Prosecutor v Radoslav Brdjanin and Momir Talic (Decision on Motion to Set Aside Confidential Subpoena to Give Evidence) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-99-36-T, 7 June 2002)

Prosecutor v Radoslav Brdjanin and Momir Talic (Decision on Interlocutory Appeal)
(International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-99-36-AR73 9, 11 December 2002)

Roemen and Schmit v Luxembourg (European Court of Human Rights, Fourth Section, Application No 51772/99, 25 February 2003)

C Treaties

European Convention on Human Rights ('ECHR'), opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953)

United Nations Security Council Res 827, UN Doc S/RES/827 (25 May 1993)

D Other

Council of Europe, Committee of Ministers, *Freedom of Expression and Information in Times of Crisis Guidelines of the Committee of Ministers of the Council of Europe*, CM/Del/Dec(2007)1005/5.3, 1005th mtg, 26 September 2007

Human Rights Committee, *General Comment No. 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Article 20 of the International Covenant on Civil and Political Rights)*, 19th sess, UN Doc CCPR/C/GC/11 (29 July 1983)

Interview with Antony Loewenstein (Simon Levett, *Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law*, 22 January 2019)

Interview with Bel Trew (Simon Levett, *Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law*, 8 February 2019)

Interview with Ben Doherty (Simon Levett, *Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law*, 3 December 2018)

Interview with Dr Christopher Kremmer (Simon Levett, *Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law*, 30 November 2018)

Interview with Dylan Welch (Simon Levett, *Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law*, 4 December 2018)

Interview with Eric Tsolek, (Simon Levett, *Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law*, 20 January 2019)

Interview with Joseph Dyke (Simon Levett, *Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law*, 19 January 2019)

Interview with Paula Slier (Simon Levett, *Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law*, 24 February 2019)

Interview with Peter Greste (Simon Levett, *Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law*, 18 December 2018)

Tingle, Laura, 'Australia's National Security Laws Should Protect The Country, Not Its Politicians in Power', *ABC News* (online, 24 June 2019)

<<https://www.abc.net.au/news/2019-06-08/afp-raids-journalist-house-abc-headquarters-laura-tingle/11191446>>

Walker, Tony, 'Press Freedom Must Be Enshrined in a Charter of Rights', *Sydney Morning Herald* (online, 3 November 2019) <<https://www.smh.com.au/national/press-freedom-must-be-enshrined-in-a-charter-of-rights-20191031-p5368c.html>>