

## **The international protection of journalists in armed conflict and other violent situations**

**Ben Saul\***

Media reporting of armed conflict and other situations of heightened violence has become increasingly perilous, with large numbers of journalists and other media personnel killed or deliberately targeted because of their professional work, including by government forces and non-government actors. The serious risks to the safety of media personnel raise questions about the adequacy and enforcement of the international legal frameworks available to protect them. This article examines the range of complicated, interlocking normative and institutional frameworks which govern media personnel and media objects in international and non-international armed conflict, and in violent emergency situations beneath the threshold of conflict, with a focus on international humanitarian law and human rights law. The legal characterisation of a violent situation has important implications for the status and treatment of media personnel, whether they are 'war correspondents', 'embedded' reporters, or independent journalists. This article reviews and clarifies the circumstances in which journalists and their equipment are protected from hostilities and when they may lose protection from attack; the measures of security, detention or restriction to which they may be subject; issues of professional privilege and confidentiality; and the perennial discussion about whether journalists should receive a special status and emblem in conflict situations.

### **Introduction**

In any legal system, the implementation and enforcement of legal norms often come under strain in the face of serious violence. Nowhere is such pressure more acute than in armed conflicts, where extreme violence becomes both normalised and authorised by law itself. Within zones of active hostilities, the regular machinery and institutions of national law enforcement are often rendered inoperative in practice, and with them disappear the ordinary forms of accountability for unlawful violence.

---

\* Director, Sydney Centre for International Law, Faculty of Law, the University of Sydney. Email: <bsaul@usyd.edu.au>.

The author is grateful for the research assistance of Ms Clare Gardoll. The author discloses that he provided advice to the Media Entertainment and Arts Alliance on the protection of journalists at the 2007 NSW Coronial Inquest into the killings of five journalists at Balibo during the conflict in East Timor in 1975.

In their place is substituted a formal system of international protection arising under the law of armed conflict, international human rights law, and international criminal law. Yet, formal protections are frequently imperfect in practice, particularly if national systems of military justice are underdeveloped, defective or inadequately resourced; or there is a lack of political will to remedy violations; or violations are a systematic feature of state policy.

In this context, the battlefield and occupied territory are frequently devoid of independent, external scrutiny of the belligerents' conduct. It may be too dangerous for human rights monitors or non-government organisations to operate there. Civilians are busy surviving and keeping their heads down, rather than being well positioned to document abuses. The belligerents may restrict freedom of movement for security reasons, deny access to particular areas or persons, and tightly control the flow of information.

The International Committee of the Red Cross (ICRC) and 'protecting powers' (seldom appointed in practice) provide important means of external supervision, and the work of the ICRC is not to be understated. But the ICRC's principle of neutrality gains it access in return for its agreement to work constructively with belligerent parties, rather than to publicly shame them, and so the broader interests of public disclosure and public scrutiny cannot be achieved through those means alone.

For these reasons, journalists have long assumed a special importance in armed conflict. Journalists in peacetime also play an important role in investigating abuses of public or corporate power, alongside other actors in civil society. In armed conflict, however, where other civil society actors are either absent or muted, journalists are among a precious few remaining actors capable of exposing illegality, whether they are classical 'war correspondents' attached to armed forces (known in contemporary conflicts as being 'embedded'), or whether they (more dangerously) operate with varying degrees of independence or autonomy from armed forces. As one humanitarian law jurist writes:

... journalists are extremely useful as part of the machinery which ensures the implementation of the rules of war when most other means of enforcement are lacking ... It is often through the reports of journalists that inhuman practices in wars are made known to the rest of the world and their function of transmitting news to those outside a particular conflict may be conducive to the condemnation by world opinion of certain methods of warfare or a certain state of affairs. [Detter 2000, 323.]

With armed conflicts underpinned by an international legal system of universal jurisdiction for war crimes, the role of the media in exposing abuses is critical in

triggering criminal investigative processes surrounding conflicts. It may also be decisive in mobilising international preventive or remedial action through, for instance, the United Nations Security Council in some cases.

Media casualties in conflict can be attributed to various causes, from the deliberate execution of journalists to poor training and preparedness by media organisations, reckless risk-taking and sheer bad luck. Inadequate implementation and enforcement of the existing international law applicable to journalists in armed conflict and other dangerous situations may well be of greater significance than any normative deficiencies in the law itself. Precisely because journalists serve such vital functions during armed conflict, 'they have become increasingly vulnerable as it became important to some authorities to "silence" negative information' (Detter 2000, 323). War reporting is an inherently perilous profession, but calculated risks are upended when military forces disregard the rules of war by deliberately targeting journalists.

In 2007 alone, 172 journalists and media staff were killed around the world (International News Safety Institute 2007a),<sup>1</sup> many in armed conflicts or other situations of heightened violence. From 2003 to May 2008, 245 journalists died in the conflict in Iraq alone (International News Safety Institute 2007b). Represented proportionally, the 20 journalists who died in Iraq between March and October 2003 represented 1 per cent of all media personnel in the area, compared to death rates of 1.4 per cent for the Iraqi military, 0.4 per cent for Coalition ground forces, and 0.03 per cent for Iraqi civilians (International News Safety Institute 2006b). Australian journalists, too, have been casualties in conflicts from Vietnam and Rhodesia to East Timor, Thailand, Iraq and Afghanistan, while the safety of journalists in nearby countries such as Indonesia and East Timor (International News Safety Institute 2007d; 2007e; Saul 2009), as well as the Philippines, remains of concern.

In recent years, the increasing targeting of journalists as a tactic by some military forces provoked the United Nations Security Council to condemn such attacks as threats to international peace and security, and the Council has called on belligerents to accord civilian protection to journalists under humanitarian law.<sup>2</sup> The broader question remains whether the existing international legal protections for journalists

---

1 Similarly, in 2006, the International News Safety Institute reported that 168 journalists and media staff were killed in 2006 (comprising 138 journalists and 30 media staff). Of the total, there were 68 deaths in Iraq, 15 in the Philippines, 8 in Mexico, 7 in Sri Lanka, 6 in Colombia, 6 in Guyana, 5 in India, 5 in Russia, 4 in Pakistan and 4 in Brazil; <[www.newssafety.com/casualties/2006.htm](http://www.newssafety.com/casualties/2006.htm)>.

2 UN Security Council Resolution 1738 (2006), paras 1–9; see below under the subheading 'UN Security Council efforts'.

are sufficient, or require reform or augmentation. Reporters without Borders argues, for instance, that lack of enforcement of the law is the key issue:

The safety of journalists working on dangerous assignments is not always guaranteed, even if international law provides adequate protection on paper, because warring parties these days are showing less and less respect for that law. News-gatherers cannot get assurances from belligerents that they will be fully protected. [Reporters without Borders 2005.]

Indeed, one study of 693 journalists killed between 1992 and mid-2008 suggests that an estimated 88.4 per cent of deaths were characterised by impunity for the perpetrators (Committee to Protect Journalists 2008).

Accordingly, this article considers measures of protection and safety for journalists under international law (see generally Kirby and Jackson 1986; Howard 2002; Mukherjee 1995; UNESCO 2007), particularly international humanitarian law, human rights law and the law of the United Nations. It does not consider domestic law, which may be relevant to the safety of journalists (such as an employer's duty of care in tort or contract, statutory occupational health and safety requirements, or whether statutory intervention is desirable). The article considers the legal regimes applicable in international armed conflict, followed by non-international conflict, and finally violent situations (or public emergencies) beneath the level of armed conflict (such as low-level insurgency, terrorism or other domestic unrest). While the normative legal frameworks protecting journalists and media objects are well developed, the application of those norms raises complex interpretive issues which are examined in this article, while there remains the residual problem — common to humanitarian law as a whole — of securing enforcement and implementation of those norms.

### **The law of international armed conflicts**

Under international humanitarian law, the status of a person determines the standards of treatment and protection to which they are entitled. The first issue, then, is to consider how different types of journalists are classified by the law, before turning to consider the treatment resulting from such classification.

#### ***Accredited war correspondents***

In international armed conflict — that is, a conflict between two or more states (1949 Geneva Conventions, Common Art 2) — 'war correspondents' have long enjoyed a special status under humanitarian law. The general principle is that they are civilians (non-combatants), but with a special entitlement (not enjoyed by other civilians) to

prisoner of war (POW) status upon capture by a belligerent force. The traditional position is stated in Art 13 of the 1899 Second Hague Convention with Respect to the Laws and Customs of War on Land and its annexed Regulations, which refer to 'newspaper correspondents and reporters' as '[i]ndividuals who follow an army without directly belonging to it' and who are entitled to POW status 'provided they can produce a certificate from the military authorities of the army they were accompanying'. This approach is embodied in other subsequent humanitarian law instruments (1907 Fourth Hague Convention, Art 13; 1929 Geneva Convention, Art 81; 1880 Oxford Manual, Art 22; 1863 Lieber Code, Art 50).

The modern Art 4(A)(4) of the 1949 Third Geneva Convention Relative to the Treatment of Prisoners of War specifies that POWs include the following who have fallen into the power of the enemy:

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 labour units or of services responsible for the welfare of the armed forces, *provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.* [Emphasis added.]

The treatment of captured war correspondents as POWs does not imply that they are *combatants* under international humanitarian law. Such persons accompanying armed forces remain civilians but are accorded POW status in recognition of their close association with the armed forces to which they are attached. Historically, as during the two World Wars, such proximity was also signified in practice by journalists frequently wearing the military uniform of the armed forces they accompanied, notwithstanding the obvious risk of being confused for a soldier by the enemy.

A key condition is that only war correspondents who 'have received authorization, from the armed forces which they accompany' are entitled to POW status. The possession of an identity card is not, however, an indispensable condition of the right to be treated as a POW, but is rather evidence that the person has received the required authorisation (ICRC Commentary to Art 4). For practical purposes, however, it would be prudent for correspondents to ensure that they have been issued such an identity card. As a protective provision, a *journalist* need not be technically designated as a 'war correspondent' to gain the protection. The list of protected persons under Art 4(A)(4) is only indicative and the provision could cover other categories who follow armed forces in a conflict under similar conditions (ICRC Commentary to Art 4). Thus, any journalist or media personnel, even if not specifically classified as a 'war correspondent' in the antique sense, would be entitled to protection if they otherwise meet the conditions.

Should doubt arise as to whether a war correspondent is entitled to POW status, as is the case with others whose POW status is in doubt, Art 5(2) of the 1949 Third Geneva Convention provides that 'such persons shall enjoy the protection of the present convention until such time as their status has been determined by a competent tribunal'. Status review need not be conducted by a judicial tribunal, although minimum procedural guarantees can be expected.

POW status is a double-edged sword for journalists. While such status carries with it various protections in detention, on the other hand it renders the POW liable to administrative detention, without charge, until the end of the conflict. Even the protections enjoyed by POWs do not confer any particular advantage upon journalists, since other civilians detained or interned for security reasons are equally entitled to fundamental protections under humanitarian law and human rights law. It might thus be questioned whether the current legal approach remains desirable for journalists, who, if (re)classified only as civilians, would otherwise likely find themselves soon released from detention if, as is likely in most cases, they posed no genuine security risk to armed forces.

Conceptually, the classification of journalists as POWs by virtue of their proximity to armed forces is odd, given the ordinary rationale for POW status, which is to incapacitate combatants of an opposing military force by detaining them until the end of conflict, and thereby to remove an essential ongoing military threat to one's own forces. The same rationale cannot be readily transplanted to the situation of journalists, who will ordinarily pose no such military threat, and yet who nonetheless may find themselves incapacitated for the duration of the conflict and thus unable to return to the field to discharge their vital accountability functions.

### *Status of other journalists*

Where a journalist is not authorised to accompany the armed forces — as in the case of a journalist operating independently — there is no entitlement to be treated as a POW upon capture by armed forces. The journalist's residual status is that of a civilian, and the journalist will be treated in the same way as any other non-combatant under humanitarian law. Under Art 4 of the 1949 Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 'protected persons' are those who:

... at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Being 'in the hands of a Party' does not require being within its actual physical custody at a particular time or place, but is used in an 'extremely general sense', including merely being in the territory of a party to the conflict or in occupied territory (ICRC Commentary to Art 4). War correspondents entitled to POW status under Art 4(A)(4) of the 1949 Third Geneva Convention are not, however, protected persons, nor are a number of other categories which may prevent some journalists being recognised as protected.

In particular, also excluded are journalists who are nationals of non-party states (though most states are now parties to the conventions); nationals of neutral states in the territory of a belligerent state; and nationals of co-belligerent states (in both cases where their states of nationality have normal diplomatic representation in the state in whose hands they are) (1949 Fourth Geneva Convention, Art 4(2)). Nationals of a neutral state present *in occupied territory* are protected persons regardless of whether their state of nationality has normal diplomatic representation with either the occupying power or the state whose territory has been occupied (ICRC Commentary to Art 4).

The availability of diplomatic protection as between 'friendly' countries (in contrast to its breakdown between warring states) is the rationale behind excluding from protection the abovementioned groups. In theory, the state of nationality of a journalist who is mistreated by another state, with whom the first state is not in conflict, may exercise its right to diplomatically protect the journalist, to the extent that the journalist's mistreatment constitutes a wrong against the state of nationality.

However, the limitations of the classic model of diplomatic protection are well known. At international law, the right is a discretionary one enjoyed by the state, which may have no strategic interest in making representations on behalf of a national; where representations are made and/or remedies received, they cannot be directed or controlled by the victim national; and few domestic legal orders compel the right to be exercised under national law (*Abbasi v Secretary of State for Foreign and Commonwealth Affairs*, 2002; *Hicks v Ruddock*, 2007).<sup>3</sup> Where a journalist's investigations might embarrass or disrupt relations between the state of nationality and the state with power over the journalist, there may be little hope of any real legal protection.

For those states which are now parties to the 1977 Additional Protocol I to the 1949 Geneva Conventions, additional specific obligations apply in relation to journalists

---

3 In *Abbasi* a legitimate expectation arose in English public law only that the UK government would consider whether to exercise diplomatic protection in respect of a national injured abroad; in *Hicks* an undecided issue arose as to whether there is a non-enforceable duty on the Australian government to exercise diplomatic protection in respect of an injured national.

(who are not accredited war correspondents under the 1949 Third Geneva Convention) (1977 Protocol I, Art 79(2)) in international armed conflict. Whereas journalists are implicitly civilians under the 1949 Fourth Geneva Convention, Art 79(1) of 1977 Protocol I expressly designates '[j]ournalists engaged in dangerous professional missions in areas of armed conflict ... as civilians' within the meaning of Art 50(1) of Protocol I,<sup>4</sup> and recognises that they 'shall be protected as such' (1977 Protocol I, Art 79(2)). Protection is lost only if they take 'action adversely affecting their status as civilians' (1977 Protocol I, Art 79(2)).

While Art 79 provides that journalists shall be 'considered' as civilians, the provision is understood as declaring the pre-existing law that such journalists *are* civilians according to Art 50(1) of Protocol I (ICRC Commentary to Art 79, para 3258). The provision creates no new status for journalists, but explicitly confirms that they are civilians; codifies the customary rule that they are immune from attack so long as they do not participate in hostilities; and does not prejudice the entitlement of authorised war correspondents to POW status. No reservations have been made to Art 79, and the rule is recognised in numerous national military law manuals and in state practice, including that of states not party to Protocol I, such as the United States (Henckaerts and Doswald-Beck 2004, 115).

A 'journalist' is not here defined but is understood according to the ordinary meaning of the term (ICRC Commentary to Art 79, para 3260). As a guide to interpretation, the ICRC has invoked the definition in draft Art 2(a) of the 1975 Draft International Convention for the Protection of Journalists Engaged in Dangerous Missions in Areas of Armed Conflict:

The word 'journalist' shall mean 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 ...

While the provision applies to journalists in 'dangerous professional missions in areas of armed conflict', that phrase does not limit the application of the protection but refers to the fact that 'any professional activity exercised in an area affected by hostilities is dangerous by its very nature and is thus covered by the rule' (ICRC Commentary to Art 79, para 3263). A 'professional mission' includes:

---

4 Civilians are there defined as any person not covered by Art 4(A)(1)–(3) of the 1949 Third Geneva Convention. A person is presumed to be a civilian in case of doubt.



... all activities which normally form part of the journalist's profession in a broad sense: being on the spot, doing interviews, taking notes, taking photographs or films, sound recording etc. and transmitting them to his newspaper or agency. [ICRC Commentary to Art 79, para 3264.]

A model identity card for journalists is annexed to Protocol I, which journalists may obtain from their state of nationality or residency, or the state of the location of their media employer (1977 Protocol I, Art 79(3)). An identity card is proof that a person is a journalist. Article 79 does not, however, create a right to be issued an identity card, but leaves it to the discretion of the issuing authority, according to their own national rules or practices (ICRC Commentary to Art 79, para 3274). The list of issuing authorities is exhaustive and so, for instance, no supranational organisation (such as professional media organisations or unions) may issue cards (ICRC Commentary to Art 79, para 3275). There is, of course, a danger that national authorities will refuse to issue identity cards in order to improperly restrict media coverage.

Article 79 stemmed from concern in the UN General Assembly in the early 1970s that humanitarian law did not sufficiently protect journalists on dangerous assignments. A 1972 Draft International Convention on the Protection of Journalists Engaged in Dangerous Missions (UNGA Resolution 2854 (XXVI) and ECOSOC Resolutions 1597 (L), annex and 1690 (LII)), prepared by the UN Commission on Human Rights, was forwarded to the ICRC Diplomatic Conference, which negotiated the 1977 Protocols I and II. Following the adoption of Art 79, no further steps were taken to adopt an international treaty devoted to the protection of journalists.

Arguably, Art 79 is a half-hearted compromise and of limited value in extending the protection of journalists. At best, its express clarification of the civilian status of journalists is useful in removing doubt about their classification, and the identity card may, for instance, potentially assist a journalist in convincing armed forces that the person is not a security risk, spy, mercenary or 'unlawful' combatant. But the provision does not provide any special status or new protections for journalists, and in some situations an identity card well may increase the risks to a journalist by allowing armed forces to more easily target those who might expose their atrocities.

### *'Embedded' journalists*

The practice of 'embedding' journalists with armed forces has been a source of some controversy in conflicts since the 1990–91 Gulf War. In that conflict, around 14,000 journalists were placed in 'press pools' by the US Department of Defense, thus

regulating their access to the battlefield (Mensore 1992; Smith 1993). Controversy about the professional ethics of such a practice (that is, concerns about journalistic independence and impartiality), or about the restrictions placed on such journalists by the armed forces, does not bear on the adequacy of the international *legal* framework.

Indeed, it is difficult to see that 'embedding' journalists creates novel legal problems. If 'embedded' journalists are authorised to accompany armed forces, then they are 'war correspondents' under the 1949 Third Geneva Convention, with civilian status and an entitlement to be treated as POWs upon capture. Such correspondents knowingly assume the risks and limitations attendant with that form of supervised (and censored) reporting. In practice, difficulty has also arisen because French military forces, for example, have regarded embedded journalists as 'unilaterals' (independent journalists) and not as war correspondents entitled to POW status (Balguy-Gallois 2006, 42). Such classification is arguably incorrect under humanitarian law.

On the other hand, the practice of embedding does raise real legal concerns if it results in armed forces forbidding non-embedded journalists from operating independently of those forces in the theatre of hostilities. As outlined below, certain security or control measures may be taken during armed conflicts which impact on journalists, but a desire to exclude all reporting that is not officially sanctioned or controlled (through embedding to the exclusion of other reporting) is not an objectively legitimate use of those security powers. As the International News Safety Institute *Safety Code* (2008, paras 9–10) exhorts:

Governments and all military and security forces are urged to respect the safety of journalists in their areas of operation, *whether or not accompanying their own forces. They must not restrict unnecessarily freedom of movement or compromise the right of the news media to gather and disseminate information.*

Security forces must never harass, intimidate or physically attack journalists going about their lawful business. [Emphasis added.]

In this regard, some militaries have adopted their own protocols governing relations between the military and journalists during armed conflict. The revised British Ministry of Defence (MOD) 'Green Book' (MOD 2006) is regarded as international best practice and was welcomed by the International News Safety Institute (2006b) after consultations between the MOD and media organisations. The Green Book recognises the right of independent journalists to freely move and report in conflict areas, and the British military's commitment not to deliberately target journalists. It also addresses

a range of other media matters in detail.<sup>5</sup> The International News Safety Institute (2007c, 11) has urged all military forces to adopt similar protocols.

### *Protection of journalists in military operations*

It is a fundamental principle of humanitarian law that parties to a conflict must distinguish between civilians (including journalists) and combatants, and between civilian objects (including media equipment and installations) and military objectives (1977 Protocol I, Arts 50–52). Attacks may only be directed against combatants and military objectives, while civilians and civilian objects must not be the object of attack. Indiscriminate attacks are prohibited (as defined in 1977 Protocol I, Art 51(3)–(4)), and a variety of precautionary measures must be taken in military operations to spare civilians and civilian objects (1977 Protocol I, Arts 57–58). Journalists cannot be used as hostages or human shields (1977 Protocol I, Art 51(7)), nor may they be made the object of reprisals. Like other civilians, journalists do not, however, enjoy absolute immunity from harm.

Where journalists (including war correspondents) are situated near or among armed forces or other military objectives which are legitimate military targets liable to attack, their incidental or collateral killing in the course of such attacks will not be unlawful, assuming the attacking forces otherwise comply with the principles of humanitarian law (including by ensuring that civilian casualties are not excessive in relation to the concrete military advantage anticipated by proceeding with an attack) (1977 Protocol I, Art 51(5)(b)).

Such risk was heightened because during the Second World War and up to the early 1960s, it was common for war correspondents and combat photographers to wear army-issue fatigues (Orme), thus making it difficult for an adversary to distinguish them from combatants. The contemporary practice since the First Gulf War in 1990 of ‘embedding’ journalists with military units also carries such danger for journalists. In such situations, journalists are responsible for placing themselves at risk (ICRC Commentary to Art 79, para 3269).

That does not, however, absolve armed forces of their own duties to avoid specifically targeting such journalists as civilians. Further, any suggestion by military

5 Including provisions concerning safety, security, media accreditation, war correspondents, embedded assignments, media briefings, pooling, restrictions on reporting for security or other reasons, control of the release of information, embargoes, casualty reporting, reporting on prisoners of war, interviews of air crew, military assistance with the travel and support of journalists, and procedures for facilitating these working arrangements between the media and the military.

commanders that independent journalists put themselves at risk of declared 'free fire zones' is not compatible with humanitarian law. The idea of a free fire zone is not admitted at law, and military personnel must at all times distinguish civilian from military targets, even in areas which have a high concentration of enemy forces.

Further, in recent conflicts some independent journalists have resorted to using private security contractors in conflict zones such as Iraq to guarantee their safety. However, this practice may blur the boundary between combatants and civilians in practice, particularly when guards are not conversant with humanitarian law or are too ready to use force in response to threats, or where they are mistaken for combatants by enemy forces, thereby heightening the risk of incidental media casualties.

### *Loss of protection as civilians*

Civilians (including journalists) lose their protection against attack 'unless and for such time as they take a direct part in hostilities' (1977 Protocol I, Art 51(3)). The general rule is applied expressly to journalists under Art 79(2) of Protocol I, under which journalists forfeit their protection if they take action 'adversely affecting their status as civilians'. This includes loss of protection for the duration of any direct participation in hostilities, as is the case for civilians generally. Taking part in hostilities does not imply that civilians then become combatants entitled to the privileges and immunities of combatants, including POW status. It does, however, make such civilians legitimate military objectives for the duration of their participation in hostilities. Journalists' organisations themselves direct journalists not to engage in hostilities (International News Safety Institute 2008; Reporters without Borders 2005, principle 8).

What it means to take a direct part in hostilities is not well settled. While there is no definition of *direct* participation in hostilities and state practice varies (Henckaerts and Doswald-Beck 2004, 22), hostile acts or direct participation in hostilities broadly 'means acts of war that by their nature or purpose struck at the personnel and matériel of enemy armed forces' (ICRC Commentary to Art 51 of 1977 Protocol I).<sup>6</sup> Examples of direct participation given in some national military manuals include serving as guards, lookouts, intelligence agents or spies, in contrast to *indirect* contributions by civilians (which do not lead to loss of protection), such as providing logistical support (for example, carrying food or messages, transporting munitions, selling goods, providing medicines or financing combat), expressing sympathy for a party (Henckaerts and

6 See also Inter-American Commission on Human Rights, *Third Report on Human Rights in Colombia*, para 811. According to the Israeli Supreme Court, 'hostilities' refer to 'acts which by nature and objective are intended to cause damage to the army': *Public Committee Against Torture in Israel v Government of Israel*, 2005, para 33.

Doswald-Beck 2004, 23), or distributing propaganda (*Public Committee Against Torture in Israel v Government of Israel*, 2005, para 35). What is required is an immediate threat of actual harm to an adversary.

Some recent national jurisprudence, however, has expansively interpreted the scope of direct participation in hostilities beyond 'merely the person committing the physical act of attack' (*Public Committee Against Torture*, para 37). In the *Targeted Killings* case, the Israeli Supreme Court suggested a range of more arguable conduct which might constitute direct participation, including transporting combatants or weapons; servicing weapons; volunteering as human shields; enlisting, sending or ordering fighters into combat; or planning such attacks (*Public Committee Against Torture*, paras 35–37).

Even where civilians are not directly participating in hostilities, in some circumstances they may still be lawful incidental casualties of attacks on military objectives, such as munitions convoys or factories in which civilians are working. It might also be possible for military forces to genuinely mistake camera lenses as weapons from a distance, and thus to reasonably conclude that such journalist is participating in hostilities. Civilian immunity is not absolute in such circumstances, and nothing in humanitarian law confers greater protection on journalists than other civilians.

However, military forces would have to comply with the ordinary precautionary rules in planning such an attack, including by doing 'everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives' (1977 Protocol I, Art 57(2)(a)). One issue of concern in the recent Iraq conflict concerns safety procedures at military checkpoints to avoid media casualties, and the Committee to Protect Journalists (2006) has, for example, recommended improvements to military identification procedures for distinguishing combatants from non-combatants, as well as the use of warning signs and non-lethal measures, such as road spikes, to disable vehicles (instead of firing weapons).

It is arguable that a journalist who, for example, transmits military messages by radio for the benefit of a party takes a direct part in hostilities, as for instance occurred during the Indonesian invasion of East Timor, where a foreign journalist conveyed a military message for the East Timorese resistance movement, Fretilin (NSW Coroner, 2007, 116). However, the better position is to regard the transmission equipment as a military objective, rather than qualifying the journalists as such as a target (see further below on 'dual use' targets). Merely spreading propaganda does not amount to direct participation in hostilities (Balguy-Gallois 2004, 48–49), despite having a degree of connection to hostilities.

There remains a difficult question as to whether civilians, including journalists, are entitled to use force in self-defence when under military attack. Self-defence is not available to a person engaging in mutual combat (O'Neal, 1996, 196). Thus, journalists who decide to participate in hostilities cannot claim self-defence, and it is further doubtful whether journalists at risk of being lawful incidental casualties of a military attack could resort to arms in self-defence.

However, it is arguable that self-defence is lawfully available to a journalist who is deliberately and unlawfully attacked by military forces in violation of international humanitarian law, where the journalist uses necessary and proportionate force in order to protect himself or herself from such a war crime. Since international humanitarian law does not criminalise mere civilian participation in hostilities (other than in the limited circumstances of perfidy), the question will chiefly arise in national criminal prosecutions, although it may also be relevant in international criminal proceedings if the defensive response involved the commission of war crimes (in which case, such response would like be disproportionate in almost all cases).

### *Protection of media equipment as civilian objects*

As a general principle, civilian objects shall not be the object of attack (1977 Protocol I, Art 52(1)). Civilian objects are negatively defined as all objects which are not military objectives. Under humanitarian law, attacks must be limited to military objectives, which are generically defined as 'objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military of advantage' (1977 Protocol I, Art 52(2)). In case of doubt, it is presumed than an object normally dedicated to civilian use (such as places of worship, houses, dwellings or schools) is civilian (1977 Protocol I, Art 52(3)). The list of objects is indicative, not exhaustive, and the presumption would likely apply to media premises and installations, such as newsrooms, studios and transmitters. As noted by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia, ordinarily the 'media as such is not a traditional target category' (*Final Report to the ICTY Prosecutor* 2000, para 55).

Some media installations may, however, be 'dual use' targets — that is, having both civilian and military functions. In the NATO bombing of Radio Television Serbia in Belgrade in 1999, a civilian broadcasting facility was also used by the Serbian military's command, control and communications network, rendering it into a legitimate military objective (above, para 55). Such use of that installation made an effective contribution to Serb military action and its destruction offered a definite military advantage (above, para 75). Another example is the American bombing of the

Iraqi Ministry of Information building in Baghdad in 2003. Such attacks are lawful if they satisfy the usual requirements of Art 52 of Protocol I, as well as the requirements of proportionality (International Federation of Avocats sans Frontières) and advance warning where possible (1977 Protocol I, Art 57(2)(c)). In the NATO bombing, the attack was arguably lawful because adequate warning was given (although the evidence was contested on that point), and the 10 to 17 civilian casualties caused were not excessive in relation to the military advantage gained by disrupting part of the command and control network (if considered within a wider attack on the various dispersed components of that network) (*Final Report to the ICTY Prosecutor* 2000, paras 77–78).

A media installation is not a military target merely because it spreads propaganda, and attacking the media to undermine civilian morale is similarly impermissible (*Final Report to the ICTY Prosecutor* 2000, paras 47, 55, 74–76; Reporters without Borders 2003). In this context, NATO's subsidiary justification for bombing Belgrade television — that it was propagandising for the Serb war effort — is dubious. As the Review Committee found:

While stopping such propaganda may serve to demoralize the Yugoslav population and undermine the government's political support, it is unlikely that either of these purposes would offer the 'concrete and direct' military advantage necessary to make them a legitimate military objective. [*Final Report to the ICTY Prosecutor* 2000, para 76.]

The military advantage anticipated must rather be 'substantial and relatively close rather than hardly perceptible and likely to appear only in the long term' (*Final Report to the ICTY Prosecutor* 2000, para 76). For similar reasons, there is doubt about whether it was lawful for American forces to bomb Al-Jazeera television facilities in Kabul and Baghdad in military engagements in Afghanistan in 2001 and Iraq in 2003; or for Israel to bomb Palestinian broadcasting facilities in Gaza and Ramallah in 2002, or Lebanese media in Beirut in 2006.

The media arguably, however, becomes a legitimate military target if it incites others to commit war crimes, crimes against humanity or genocide (*Final Report to the ICTY Prosecutor* 2000, para 55). Under human rights law, Art 20 of the International Covenant on Civil and Political Rights prohibits incitement to national, racial or religious discrimination, hostility or violence, although that branch of law, still applicable in armed conflict, does not itself authorise the use of military force to terminate such propaganda. In the *Hans Fritzsche* case, 1947, the International Military Tribunal at Nuremberg was also careful to distinguish between propaganda intended to arouse popular sentiment in favour of the government from more extreme statements which incite the commission of international crimes.

Rather, whether the media can be targeted for incitement depends on satisfying the ordinary requirements for attacking civilian objects under Art 52 or Protocol I, or on whether individual journalists are considered to be taking part in hostilities under Art 51(3) and thus lose their immunity from attack. Such tests must be independently satisfied and there is no freestanding right to attack the media simply for incitement alone. Some case examples might be the use of radio to incite violence as during the Rwandan genocide (*Prosecutor v Nahimana*, 2003; *Prosecutor v Ruggiu*, 2000), or anti-Semitic Nazi newspapers (*Julius Streicher*, 1947), which might make such media military objectives. As the ICTY indicated in *Prosecutor v Nahimana* (para 65):

The nature of media is such that causation of killing and other acts of genocide will necessarily be effected by an immediately proximate cause in addition to the communication itself. In the Chamber's view, this does not diminish the causation to be attributed to the media, or the criminal accountability of those responsible for the communication.

While the media in such circumstances is not itself directly perpetrating the killing, the proximate causation between incitement to war crimes (or indeed to participation in hostilities) and the carrying out of such conduct is sufficient to establish that the media is making an effective contribution to military action.

Another area of difficulty concerns the use of instantaneous broadcasts. In the conflict between Israel and Hezbollah in southern Lebanon in 2006, Sky News broadcast live television pictures which showed the launching of Katyusha rockets from southern Lebanon and their landing in northern Israel. While they were not attacked, the media personnel involved were accused by Israel of assisting Hezbollah to better target their rockets, and accused by Hezbollah of helping the Israelis to identify the launching sites (POLIS and BBC 2006).

In such a situation, it is arguable that the media were objects which made an effective contribution to military action and whose neutralisation offered a definite military advantage. However, it is a precautionary rule of humanitarian law that where there is a choice of military objectives for obtaining a similar military advantage, the objective must be selected which may be expected to cause the least danger to civilians (1977 Protocol I, Art 57(3)). In this regard, measures short of destroying media objects involved in such situations may be available, at least to a technologically advanced military such as Israel's, such as revoking permission to film, or jamming broadcasts, as was done in Somalia to protect United Nations personnel there in the early 1990s.



### *Security measures against journalists*

Of particular relevance to journalists are the circumstances in which a journalist (who is not a POW) may be detained during armed conflict. As civilians, journalists are subject to the local or territorial criminal law, and thus may be arrested and detained in the ordinary application of, and liability under, domestic criminal law. National law may, for instance, validly prohibit or criminalise mere participation in hostilities, itself not an offence under humanitarian law, although civilians who take part in hostilities may be liable for the war crime of perfidy (feigning civilian status in attack) (1977 Protocol I, Art 37(1)(c)). Journalists are also subject to domestic immigration law, and, for instance, may be deportable if they entered the country illegally, or worked in the country without permission.

In addition, under humanitarian law, (administrative) security detention may be permissible in some circumstances. First, *foreign nationals in the territory of a party to the conflict* may be subject to assigned residence or internment 'only if the security of the Detaining Power makes it absolutely necessary' (1949 Fourth Geneva Convention, Art 42). A person interned has a right to the review of the internment decision 'as soon as possible by an appropriate court or administrative board designated by the Detaining Power', and continuing internment must be periodically reviewed (and at least twice yearly) (1949 Fourth Geneva Convention, Art 43).

Further, if a party to the conflict is satisfied that a protected person in its territory is 'definitely suspected of or engaged in activities hostile to the security of the State', then that person forfeits rights and privileges under the convention which would be prejudicial to that party's security (1949 Fourth Geneva Convention, Art 5(1)). Such persons must, however, 'be treated with humanity' and cannot be deprived of a fair and regular trial (1949 Fourth Geneva Convention, Art 5(3)).

Second, *protected persons in occupied territory* may be subject to internment '[i]f the Occupying Power considers it necessary, for imperative reasons of security, to take [such] safety measures concerning protected persons' (1949 Fourth Geneva Convention, Art 78). Internment decisions must be made according to a regular procedure prescribed by the occupying power, and include rights of appeal and period review.

Further, a protected person detained as a spy or saboteur, or a person definitely suspected of activity hostile to the security of the occupying power, shall forfeit rights of communication under the convention if 'absolute military security' so requires (1949 Fourth Geneva Convention, Art 5(2)). Such persons must, however, 'be treated with humanity' and cannot be deprived of a fair and regular trial (1949 Fourth Geneva Convention, Art 5(3)). Internees are entitled to extensive minimum standards of treatment (1949 Fourth Geneva Convention, Arts 79–135).

Any security measures or national prosecutions are subject to the protections of Art 45 of Protocol I (including a presumption of POW status in certain cases until decided otherwise by a competent tribunal) and the fundamental guarantees of Art 75. Article 75 establishes minimum guarantees of humane and non-discriminatory treatment of all persons in the power of a party to the conflict, including absolute prohibitions on personal violence, murder, torture, corporal punishment, mutilation, outrages on personal dignity (in particular humiliating and degrading treatment, enforced prostitution and indecent assault), hostage taking, collective punishment, or threats to commit any of these acts (1977 Protocol I, Art 75(2)). The parties must further respect the person, honour, convictions and religious practices, while women and families detained are subject to special protections (1977 Protocol I, Art 75(1) and (5)).

In addition, there are specific guarantees in detention and for a fair criminal trial before an impartial and regularly constituted court respecting the generally recognised principles of regular judicial procedure (1977 Protocol I, Art 75(3)–(4) and (7)). Those arrested, detained or interned in relation to the conflict remain protected by Art 75 until they are released, even after the end of the conflict (1977 Protocol I, Art 75(6)).

### *Other measures of control*

In occupied territory, as a general principle the occupying power ‘may take such measures of control and security in regard to protected persons as may be necessary as a result of the war’ (1949 Fourth Geneva Convention, Art 27). In particular, an occupying power may:

... subject the population of the Occupied Territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them. [1949 Fourth Geneva Convention, Art 64.]

The ICRC Commentary notes that ‘a great many measures’ of control and security are permissible, including ‘comparatively mild restrictions such as the duty of registering with and reporting periodically to the police authorities, the carrying of identity cards or special papers, or a ban on the carrying of arms’. They may also include ‘harsher’ provisions, ‘such as a prohibition on any change in place of residence without permission, prohibition of access to certain areas, restrictions of movement, or even assigned residence and internment’. States have a wide discretion as to the choice of security measures. Nonetheless, any measures ‘should

not affect the fundamental rights of the persons concerned' (ICRC Commentary to Art 24 of the 1949 Fourth Geneva Convention). These include respect for the person, honour and family rights, religious convictions and practices, and manners and customs, and protected persons must also be treated 'humanely' at all times (1949 Fourth Geneva Convention, Art 27).

It is possible that occupying powers may invoke the security provisions of the 1949 Fourth Geneva Convention to restrict the access of journalists to particular areas of territory or sources of information, or to prevent them from publishing or broadcasting material considered prejudicial to the security of the occupying power. Such measures are likely to be lawful if they are objectively justified and proportionate to the security threat faced, and there is crossover here with the jurisprudence on permissible limitations on freedom of expression and movement, and privacy, under international human rights law. Blanket restrictions on the media or on journalists are, for instance, unlikely to be lawful and may interfere impermissibly in fundamental rights which might be thought to include expression.

### *War crimes liability*

Protected persons enjoy a range of humanitarian protections beyond the immediate protection from military attack enjoyed by all civilians as outlined above. The most serious violations of the 1949 Fourth Convention are regarded as 'grave breaches' of it and constitute war crimes if committed against protected persons or property (1949 Fourth Geneva Convention, Art 146):

... wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

All state parties to the 1949 Fourth Geneva Convention are required to enact legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the convention (1949 Fourth Geneva Convention, Art 146). Each state party is also required to search for such suspects and to bring them, regardless of their nationality, before its own courts (1949 Fourth Geneva Convention, Art 146). Alternatively, a state party may hand such persons over for trial to another state party that has made out a prima case against them (1949 Fourth Geneva Convention, Art 146). These provisions of the

convention establish a system of treaty-based universal criminal jurisdiction over war crimes in international conflicts.

The 1949 Fourth Geneva Convention regime is supplemented by the similar grave breaches regime under Art 85 of Protocol I. In particular, where death or serious injury to body or health is caused, it is a war crime to wilfully or indiscriminately attack civilians; to attack works or installations containing dangerous forces; to attack non-defended localities and demilitarised zones; to attack a person out of combat (such as the sick or wounded); or to perfidiously use the emblem of the Red Cross or other protective signs (1977 Protocol I, Art 85(3)). It is also a war crime to unjustifiably delay the repatriation of POWs or civilians, and to deprive a person of a fair and regular trial (1977 Protocol I, Art 85(4)).

The critical issue in the protection of journalists in international conflict is not the legal framework so much as enforcement of it; humanitarian law may be formally 'adequate' to protect journalists, but only one in eight of those accused of killing journalists worldwide are prosecuted, while in two-thirds of cases, the killers are not even identified (International News Safety Institute 2007c, 7). One recent area of concern has been the failure of US forces in Iraq to properly and promptly investigate the deaths of media personnel, including by making inquiries public and publishing findings to improve accountability (Committee to Protect Journalists 2005). The International News Safety Institute has called for full and open inquiries by military and national authorities wherever a journalist is killed (International News Safety Institute 2007c, 11). Basic military training should include instruction on the role and protection of the media (International News Safety Institute 2007c, 11).

### **Journalists in non-international armed conflicts**

Paradoxically, the legal protection of journalists is strongest in *international* armed conflicts, yet only 42 of the estimated 228 armed conflicts since 1945 were international ones (Harbom and Wallensteen 2005; Gleditsch et al 2002, 620). An increasing number of casualties result from the conduct of a variety of non-state actors (as in Afghanistan, Iraq, Palestine or Russia), rather than states which typically have the machinery for the implementation and enforcement of humanitarian law. Any efforts to improve the protection of journalists in armed conflict must, therefore, be mindful of the special problems of compliance engaged by non-state actors who are not parties to humanitarian law instruments. A further practical consideration is the problem of complex, mixed conflicts, which simultaneously involve international and non-international elements in the same territorial space, such as conflicts in the Balkans, Great Lakes and Afghanistan. Difficulties in identifying the applicable legal frameworks at a given moment

in such situations complicate efforts to secure clear normative standards and protection for journalists.

### *Common Art 3 protections*

The protection of journalists in non-international armed conflict is less developed than in international conflicts, as is true of the law as a whole on non-international conflicts. There is no international legal status of POW available in non-international armed conflicts and, further, no specific provisions are made for war correspondents or journalists. Common Art 3 of the four 1949 Geneva Conventions is the only humanitarian law provision directly applicable to an 'armed conflict not of an international character occurring in the territory of one of the High Contracting Parties' under those conventions. Such conflicts could include classic civil wars between a state and rebel forces; conflicts between competing rebel forces within a state; or a conflict between one state and non-state forces in the territory of some other state (as was the situation between the United States and Al-Qaeda in Afghanistan in 2001, as recognised by the US Supreme Court in *Hamdan v Rumsfeld*, 2006).

Common Art 3 does, however, envisage that the parties 'should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention' in a non-international armed conflict. Thus it is open to the parties to exercise a discretion to apply the remainder of the convention to non-international armed conflicts, including the provisions on the protection of civilians which may benefit journalists.

Common Art 3 provides for the humane and non-discriminatory treatment of '[p]ersons taking no active part in the hostilities', which would include journalists in that position. In this regard, it is accepted as a customary rule of humanitarian law in both international and non-international armed conflict that '[c]ivilian 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' (Henckaerts and Doswald-Beck 2004, 115). Common Art 3 specifically prohibits violence and torture, hostage taking, 'outrages upon personal dignity, in particular humiliating and degrading treatment', and unfair trials.<sup>7</sup> The wounded and sick must also be cared for. Common Art 3 further allows for the ICRC to offer its services, which may include, for example, visiting detained journalists, or mediating for the release of journalists taken hostage.

---

7 In particular, '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'.

Violations of Common Art 3 are not expressly listed as grave breaches subject to criminal liability, and until recently there was little recognition that such violations amounted to war crimes in non-international armed conflict. A significant development is, however, the recognition by the International Criminal Tribunal for the Former Yugoslavia (ICTY) that violations of Common Art 3 attract individual criminal liability as violations of the laws and customs of war (*Prosecutor v Tadic*, 1995), thus allowing the international prosecution of certain crimes committed in non-international armed conflicts.

### *Threshold of application of Common Art 3*

The threshold of application of Common Art 3 has been clarified in the jurisprudence of the ICTY since the mid-1990s and subsequently by the International Criminal Court. The test for determining the existence of an 'armed conflict' generally was set out by the ICTY in *Tadic* (para 70):

... an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.

This test has been 'consistently applied' by the ICTY (*Prosecutor v Limaj et al*, 2005, para 83). For the purpose of determining the existence of a non-international armed conflict governed by Common Art 3, this test focuses on (i) the intensity of the conflict; and (ii) the organisation of the parties to the conflict (*Tadic*, para 562). The ICTY has held that this test for the existence of a non-international armed conflict is similar to that under Art 8(2)(f) of the Statute of the International Criminal Court (*Limaj*, para 87).

A Pre-Trial Chamber of the ICC confirmed this approach (*Prosecutor v Dyilo*, 2007, paras 227–237). In a case involving a mixed international and non-international conflict in the Ituri region of the Democratic Republic of Congo in 2002–03, the pre-trial chamber of the International Criminal Court observed that the Elements of Crimes for Art 8(2) of the ICC Statute requires that article to 'be interpreted within the established framework of the international law of armed conflict'. The ICC held that the key requirements are that organised armed groups have the capacity to conceive and carry out military operations for a prolonged period (*Dyilo*, para 234).

While it has been suggested that determining the threshold of application of Common Art 3 is a subjective discretion often left to the affected State (Moir 2002, 45; Solf 1983, 294; Cullen 2004, 198), it is clear from ICTY jurisprudence that the existence of an armed conflict is an objective question. There is, however, a paucity of state practice

on the classification of particular situations of internal violence as non-international armed conflicts, such that the ICRC study of customary international humanitarian law refrained from analysing the issue. One explanation for this silence is that many states are reluctant to be perceived to be interfering in the domestic jurisdiction of states affected by violence, even in cases where domestic unrest crosses the threshold of an armed conflict and objectively attracts the application of Common Art 3. In the absence of a coherent body of state practice on the issue, ICTY jurisprudence on the existence of an armed conflict assumes particular importance in interpreting this aspect of humanitarian law.

In this regard, the two 'closely related criteria' of intensity and organisation are used 'solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law' (*Tadic*, para 562). The ICTY has noted that the ICC Statute similarly does not apply to 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature' (1998 Rome Statute, Art 8(2)(d); *Limaj*, para 87). That article embodies the similar explicit exclusion in Art 1(2) of Additional Protocol II. Other courts have elaborated upon the distinction in humanitarian law between armed conflict and lesser violence by distinguishing 'severe combat' from 'police operations' (*Ajuri v Military Commander of the Judea and Samaria Area*, 2002, 358) or anti-terrorism campaigns, although there is no bright line between low-intensity armed conflict and lesser forms of political violence.

The ICTY has noted that 'the determination of the intensity of a conflict and the organisation of the parties are factual matters which need to be decided in light of the particular evidence and on a case-by-case basis' (*Limaj*, para 90). Relevant to the *intensity* of a conflict are factors such as:

... the seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and, whether any resolutions on the matter have been passed. [*Limaj*, para 90.]

Factors relevant to the *organisation* of the parties include 'the existence of headquarters, designated zones of operation, and the ability to procure, transport, and distribute arms' (*Limaj*, para 90). The number of fighters belonging to a party may also be a relevant but not determinative factor in considering both the organisation of the parties and the intensity of the violence. No minimum number of casualties is required for

there to exist an armed conflict, although the number of casualties may be a relevant factual consideration in assessing the intensity of the violence.

As for the duration of violence, a regional human rights body, the Inter-American Commission on Human Rights, found that Common Art 3 even applied to a one-day attack by an armed group on a military base in Argentina (*Abella v Argentina (La Tablada case)*, 1997, paras 154–156). However, the test established by the ICTY in *Tadic* requires ‘protracted’ armed violence in the case of non-international armed conflicts, which did not exist on the facts in *La Tablada*. Further, the Inter-American Commission is foremost a human rights body with no explicit mandate to apply humanitarian law and lacks expertise on that body of law. Although the requirement of a ‘protracted’ conflict does not import a strict temporal dimension, referring more to intensity than duration (*Prosecutor v Haradinaj*, 2008, para 49), it nonetheless ordinarily signifies that more than a single incident is required.

The ICRC Commentary to Common Art 3 (at 49–50) also suggests factors relevant to the determination of a non-international conflict,<sup>8</sup> although such criteria are not determinative (*Lima*, paras 85–86) and it is well accepted that Common Art 3 should be applied ‘as widely as possible’ (ICRC Commentary to Common Art 3, 50) and not restrictively interpreted, since it is a humanitarian provision.

### 1977 Additional Protocol II

Article 1(1) provides that Protocol II applies to ‘all armed conflicts’ not covered by Protocol I, that is, non-international conflicts, between a state party’s forces and:

... dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

As the ICC has recently noted, the threshold of application is higher than Common Art 3 of the four 1949 Geneva Conventions, since the insurgent party must exercise stable control over territory (*Dyilo*, para 233), in addition to having the capacity to implement or enforce humanitarian law, and carry out continuous and persistent military operations. Similarly to the accepted interpretation of Common Art 3,

---

8 Including the existence of an organised, responsible military force, controlling territory, possessing the characteristics of a state, and observing ordinary law and the conventions; the use of government military force; government recognition of insurgents as belligerents; and UN attention.



however, Art 1(2) of 1977 Protocol II excludes 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts'.

Protocol II expressly guarantees the general protection of civilians from the dangers arising from military operations (1977 Protocol II, Art 13(1)). In particular, Art 13 provides that:

The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

Civilians only lose such protection if and 'for such time as they take a direct part in hostilities' (1977 Protocol II, Art 13(3)). Journalists are thus treated like other civilians in non-international conflicts in which a state is party to Protocol II. Protocol II does not, however, include any specific protection for journalists in non-international conflicts, such as that found in Art 79 of Protocol I in respect of international conflicts.

Further, Protocol II does not contain any grave breaches provision establishing international criminal jurisdiction over violations of its provisions. However, the ICTY's jurisdiction over violations of the laws and customs of war under Art 3 of the ICTY Statute has been held to include violations of treaties binding on the parties (*Tadic*, para 89), which could, for instance, include Protocol II. More importantly, the Rome Statute of the International Criminal Court establishes international criminal jurisdiction (facilitated by complementary national legislation in many countries) over a range of criminal conduct in non-international armed conflicts (1998 Rome Statute, Art 8(2)(e)(i)–(xii)).

It is desirable that the level of protection enjoyed by journalists in international conflicts, under both Art 79 of Protocol I and the more extensive protections of civilians generally in those conflicts, be extended to journalists in non-international conflicts. The ability to prosecute certain crimes in non-international conflicts pursuant to Art 8(2)(c) and (e) of the 1998 Rome Statute is a positive step. However, the Rome Statute does not transplant the entire corpus of humanitarian law applicable in international conflicts to non-international ones, nor does the ICC exercise universal jurisdiction. In particular, it is desirable to, at a minimum, apply a provision equivalent to Art 79 of Protocol I in non-international conflicts, as well as to encourage the widest possible ratification of Protocol II.

### Special treatment for journalists in armed conflict?

In light of the above analysis, a question arises whether some form of distinct, special treatment should be conferred on journalists in armed conflict, akin to that accorded to medical or religious personnel. At least two possibilities arise: the creation of a special legal status for journalists, and the related idea of a protective emblem for media personnel. In addition, questions arise about the extent to which journalists should enjoy a professional privilege concerning their sources in the context of war crimes prosecutions.<sup>9</sup>

### *Special status for journalists*

A 1972 Draft UN convention on the protection of journalists sought to establish a special status for journalists in conflict (UN General Assembly Resolution 2854 (XXVI) and ECOSOC Resolutions 1597 (L) and 1690 (LII)). The rationale for special status is the public interest served by journalists in reporting on conflicts. A special status was, however, rejected during the drafting of the 1977 Protocols, primarily on the basis that increasing the categories with a special status 'tends to weaken the protective value of each protected status already accepted, particularly that of medical personnel' (ICRC Commentary to Art 79 of Protocol I, para 3265). Some states did not believe that journalists should be treated differently to other civilians. Some journalists felt that a special status would single them out and put them at greater risk of being targeted, and preferred to keep a low profile (Gasser 1983).

For these reasons, it remains unlikely that further special provisions for journalists will be adopted, such as the recent suggestion by Balguy-Gallois (2004, 67) that a new instrument should clarify the concept of direct participation in hostilities, the status of embedded journalists, and the regulation of propaganda and incitement, or that it should strengthen warning obligations in humanitarian law (1977 Protocol I, Art 57), or require the parties to establish the facts when an attack injures or damages media personnel or equipment. Many of these issues are problems of general uncertainty as to the operation of flexible rules in humanitarian law and do not warrant specific treatment in the context of journalists alone, to the possible detriment of other civilians.

By way of contrast, a 1972 draft text by governmental experts at an ICRC conference on developing humanitarian law had sought to impose stronger obligations on governments in relation to journalists. In particular, parties were required to 'do all that is necessary to protect him [the journalist] from the danger of death or injury or from

9 Other human rights questions arise concerning the scope of freedom of expression in conflict, both in relation to security-based censorship and in the context of media incitement to crime and propaganda for war, but these issues are not addressed here.

any other danger inherent in the conflict', and to 'inform him to the extent compatible with military requirements of the areas and circumstances in which he may be exposed to danger' (ICRC Commentary to Art 79 of Protocol I). The text was never adopted.

### *Protective emblems*

A related proposal during the drafting of Protocol I to require journalists to wear a protective emblem clearly visible from a distance (a bright orange armlet with two black triangles) was rejected, mainly because it would make journalists more conspicuous and thus endanger both journalists and the civilian population (ICRC Commentary to Art 79 of Protocol I, para 3254). For the same reason, efforts to register journalists with the parties to a conflict, or to notify the parties of their presence, could equally jeopardise the safety of media personnel.

Even so, the 2004 Geneva Declaration on Actions to Promote Safety and Security of Journalists and Media in Dangerous Situations, signed by a range of peak journalism bodies,<sup>10</sup> invited the International News Safety Institute and the Press Emblem Campaign to establish an expert committee to report on, inter alia, 'the possible need for a new international convention dealing specifically with the safety and protection of journalists, including, if required, an emblem'.

The issue is therefore back on the agenda. Journalists, however, appear divided on the issue of markings (POLIS and BBC 2006). Many media organisations now

---

10 First signatories: International Federation of Journalists; Press Emblem Campaign; International News Safety Institute; Reporters sans frontières; Union européenne de radiotélévision; Impressum (Les journalistes suisses); Club suisse de la presse; Emirates Journalists' Syndicate; Iraqi Journalists' Syndicate; Emirates Red Crescent; Union internationale de la presse francophone; Commission arabe des droits de l'homme; Conseil mondial de radiotélévision; Jean Ziegler, rapporteur spécial de l'ONU; Pen Club International; Taiwanese Journalists' Association; Association of Former International Civil Servants in Egypt (AFICS) (11/2004); Washington Association of Arab Journalists; Central Asian and Southern Caucasian Freedom of Expression Network; Mauritius Union of Journalists; Nepal Press Union; National Union of Journalists of the Philippines; Pakistan Federal Union of Journalists; Somali Journalists Network; Syndicat national des professionnels de presse du Congo; Union of Press Workers (Basin Sen — Cyprus); National Federation of Israeli Journalists; Japan Federation of Commercial Broadcast Workers' Union; Association of Iranian Journalists; Association of Journalists of Macedonia; Nigerian Union of Journalists; Palestinian Journalists' Syndicate; Union des journalistes d'Afrique de l'Ouest; Syndicat national des journalistes algériens; Federation of Media Employees Trade Union (Sri Lanka); Union catholique internationale de la presse (Liban); Fundacion para la Libertad de Prensa (Colombia).

deploy their own ad hoc markings in the field in some conflict zones, with colour schemes often featuring blue and white markings and carrying the words 'Press' or 'TV'. But the current consensus appears to leave the use of markings to individual journalists or media organisations in each particular conflict (International News Safety Institute 2007c).

### *Journalists' privilege and confidentiality*

In armed conflicts, journalists will sometimes be witnesses to atrocities, obtain evidence about the perpetrators of atrocities, and receive information from confidential sources. Their work may thus play an important role in bringing to justice those who have perpetrated war crimes, since journalists themselves may become an important source of evidence in criminal trials. On the other hand, journalists have an interest in preserving the confidentiality of their sources, and their own safety, and a question arises as to the availability and scope of any professional privilege available to journalists to preclude or restrict any obligation to testify in a criminal trial.

In the first international decision on point, in *Prosecutor v Talic*, 2002 (paras 29 and 50), the ICTY recognised that war correspondents — defined as 'individuals who, for any period of time, report (or investigate for the purposes of reporting) from a conflict zone on issues relating to the conflict' — enjoy a general privilege against being compelled to testify about their work, which could only be overridden if (i) the evidence sought would be of direct and important value in determining a core issue in a case; and (ii) the evidence could not be sought elsewhere. Drawing on human rights law principles, including freedom of expression and the emerging right to information, the ICTY accepted that journalists serve the public interest in bringing conflicts to public attention, and that this function may be impaired if journalists are forced to testify:

Wars necessarily involve death, destruction, and suffering on a large scale and, too frequently, atrocities of many kinds, as the conflict in the former Yugoslavia illustrates. In war zones, accurate information is often difficult to obtain and may be difficult to distribute or disseminate as well. The transmission of that information is essential to keeping the international public informed about matters of life and death. It may also be vital to assisting those who would prevent or punish the crimes under international humanitarian law that fall within the jurisdiction of this Tribunal. [*Talic*, para 36.]

One risk is that compelling journalists to testify in international criminal proceedings against their sources may discourage sources in future from revealing information (McDonald 2004, 145). Another risk is that it may make journalists targets for those who do not wish the facts about atrocities to be disclosed, although that risk arises

anyway out of fear of exposure in the media and is not peculiarly linked to the (often remote) prospect of a prosecution in the future.

An absolute privilege is arguably not desirable in light of the competing public interest in bringing perpetrators of atrocities to justice, nor would it likely be acceptable to states. The *Talic* position effectively balances the competing interests by recognising a general privilege subject to narrowly circumscribed exceptions. That position stands in contrast to the absolute privilege asserted by the International Committee of the Red Cross, which fears that its neutrality and access to conflict areas would be impaired by being compelled to testify against parties to a conflict.

### **Dangerous situations outside armed conflict**

The relatively flexible modern interpretation of the circumstances to which Common Art 3 applies has enlarged the range of dangerous situations which are regarded as non-international conflicts and correspondingly narrowed the range of dangerous situations which are not regulated by humanitarian law. Those which remain outside of humanitarian law remain principally governed by international human rights law (including measures of derogation in public emergencies); other areas of international criminal law (including on genocide, crimes against humanity and torture); transnational criminal law (particularly concerning international terrorist acts); and relevant applicable national law. The focus here is on international human rights law.

Of foremost importance for journalists caught up in situations of lesser violence is the human right to life recognised in Art 6(1) of the 1966 International Covenant on Civil and Political Rights (ICCPR): 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.' In situations of armed conflict, the rules of humanitarian law apply as *lex specialis* for the purpose of defining when the taking of a life would be arbitrary under human rights law (*Nuclear Weapons Advisory Opinion*, 1996, paras 24–25; *Israel Wall Advisory Opinion*, 2004, para 101). Thus, the incidental death of a non-combatant in a lawful military operation is not a violation of the right to life.

In dangerous situations beneath the threshold of an armed conflict, as in isolated or sporadic cases of domestic violence, riots, rebellion, unrest or coups, protecting the right to life, especially determining whether the killing of a journalist is arbitrary, will depend on the relevant legal standards under human rights law itself. The starting point is that the right to life is non-derogable and cannot be suspended, even in a time of public emergency threatening the life of the nation (1966 ICCPR, Art 4(2)).

In general, states must take measures to protect the right to life by preventing and punishing the deprivation of life by criminal acts, and also by preventing arbitrary killing by their own security forces (UN Human Rights Committee 1982, para 3). The scope of this obligation on the state to protect life was stated by the European Court of Human Rights in *Osman v United Kingdom* (1998, para 116) as follows:

... it must be established ... that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.

States must also take steps to prevent the disappearances of individuals, and to investigate such disappearances where they may involve a violation of the right to life (UN Human Rights Committee 1982, para 4). There is substantial crossover here with the older law of diplomatic protection and state responsibility concerning injury to and mistreatment of foreign nationals.

States themselves must also refrain from arbitrarily depriving individuals of their right to life. A killing will only be justified and not arbitrary in a limited range of accepted circumstances, such as where it is necessary and proportionate to use lethal force: (a) in self-defence or defence of another against unlawful violence; (b) in order to effect a lawful arrest to prevent the escape of a person detained; or (c) in action lawfully taken to suppress a riot or insurrection (1950 European Convention for Human Rights, Art 2(2)(a)–(c)).

Accordingly, if a journalist is an innocent bystander not participating in violent activities, the journalist is entitled not to be directly targeted by law enforcement officials acting to suppress such violence. If lethal law enforcement measures (including military aid to the civilian authorities) are, however, an objectively necessary, discriminate and proportionate response to quell serious violence or unrest, then a journalist in close proximity to such unrest necessarily assumes some risk of becoming an incidental casualty, even though they may not be personally targeted.

In situations of private violence, the state owes no absolute duty towards a journalist to protect them from private killings. The state's obligation is only to do what is reasonable within the scope of its powers, in light of known risks to life. The difficulty is that in some dangerous situations covered by journalists, the state is practically unable to control private violence. It is only where the state is unwilling to control such violence, but has the capacity to do so, that it fails in its duty of protection.

Where the state itself is the source of arbitrarily killings, such violations of the right to life by the state may be difficult to prevent and remedy. Human rights law relies principally on state institutions for its enforcement, absent any regional human rights supervision mechanisms as in Europe, the Americas and, recently, Africa. The violation of a human right gives rise to a right to an effective remedy (1966 ICCPR, Art 2), which may include criminal prosecution by the state, but there is no wider *international* criminal jurisdiction to prosecute rights violations under human rights treaties where the state itself is the perpetrator and fails to provide remedies.

Only where such violations reach a high level of gravity will international criminal jurisdiction be engaged, such as where the violations also amount to an international crime of genocide (requiring an intention to destroy certain protected groups: see the 1948 Genocide Convention), torture, or crimes against humanity (requiring a widespread or systematic attack on a civilian population). Isolated killings of journalists will seldom qualify. In any case, prosecutions are principally remedial rather than preventive and protective.

International human rights law also protects other relevant rights of journalists in dangerous situations, including freedom of expression (1966 ICCPR, Art 19(2)); the right to liberty and security of person (including freedom from arbitrary detention and procedural guarantees if detained) (1966 ICCPR, Art 9); the right to a fair hearing in civil and criminal proceedings (1966 ICCPR, Art 14); and freedom from arbitrary or unlawful interference with privacy, family, home or correspondence, or unlawful attacks on honour and reputation (1966 ICCPR, Art 17).

These rights are not considered further here, other than to note that freedom of expression may be specially limited by law if necessary to protect national security or public order, or public health or morals, or the rights and reputations of others (1966 ICCPR, Art 19(3)). In addition, it is subject to derogation (suspension) *if necessary* in a public emergency, which may considerably restrict media activities. It goes without saying that journalists must respect local law, including immigration procedures.

## Other applicable regimes addressing journalists

### *1994 Convention on the Protection of United Nations Personnel and Humanitarian Workers*

The 1994 Convention on the Protection of United Nations Personnel and Humanitarian Workers has a limited application to journalists. The convention provides for the

inviolability of UN personnel, premises and equipment (Art 7); prohibits kidnapping and murder of such personnel (Art 9); imposes a duty to release detained or captured personnel (Art 8); and provides for remedies for death, disability, illness or injury in UN operations (Art 20).

While UN media officers could be covered by the convention, most journalists would not fall within the definition of personnel in Art 1, which refers to those engaged by the UN or its specialised agencies, or associated personnel assigned by a government, intergovernmental or non-governmental organisation under an agreement to fulfil a mandate of a UN operation. It is an open question whether journalists attached to military forces engaged in a UN mission are covered (Bouvier 1995).

The risk of explicitly amending the 1994 UN Personnel Convention to cover journalists is similarly that it will dilute the protection enjoyed by UN workers, who are already at great risk. Further, journalists are not entitled to the same legal immunities as UN personnel under general international law. Journalists themselves may be endangered by becoming too closely associated with UN missions and thus jeopardising their perceived neutrality, impartiality and independence.

### *UN Security Council efforts*

In addition to the various 'hard' law sources examined above, there is an increasing number of 'soft' law or standard setting instruments which have sought to address the safety of journalists, either in armed conflict or in other dangerous situations. The UN Security Council has urged the protection of civilians in armed conflict (international or non-international) (UN Security Council Resolutions 1265 (1999); 1296 (2000); 1502 (2003)), and specifically condemned attacks on journalists. For example, Resolution 1214 (1998) condemned the Taliban's capture and murder of a journalist in Afghanistan as 'flagrant violations of international law' and asked the Taliban to investigate and prosecute the crime.

Resolution 1738 (2006, para 1) specifically addresses the protection of journalists. It condemns all attacks against journalists, media professionals and associated personnel in armed conflicts, and calls on all parties to end such practices. It recalls that journalists are protected as civilians under humanitarian law, unless they take action adversely affecting their status as civilians, and recalls that media equipment and installations are civilian objects protected from attack, unless they are military objectives (paras 2-3). The resolution also condemns media incitement of violence against civilians (such as genocide, crimes against humanity and serious violations of humanitarian law) and calls for the perpetrators to be brought to justice (para 4). It then calls on all parties to conflicts to comply with their obligations towards civilians



(including journalists) and to prevent violations of humanitarian law, including through prosecutions (paras 5–7).

The resolution was not adopted under enforcement machinery of Ch VII of the UN Charter and does not impose binding obligations on UN member states. For the most part, it restates the existing legal frameworks applicable to the protection of journalists, and does not confer any new status or rights upon journalists. However, the resolution is innovative in that it specifically states that the deliberate targeting of civilians ‘may constitute a threat to international peace security’ to which the Council may respond (para 9). It is also significant in urging all parties to a conflict to ‘respect the professional independence and rights of journalists’ and media personnel (para 8), and urges states to become parties to Protocols I and II (para 10).

The resolution was favourably received by peak journalism organisations, which had lobbied for its adoption through the International Federation of Journalists (IFJ). However, the Council did not accept the IFJ’s recommendation that the Council refer cases of systematic violence to the International Criminal Court, or that the UN Secretary General record violent attacks on press freedom and refer them to the Security Council, so there is no ongoing institutionalised monitoring process as has, for instance, been adopted by the Council in relation to international terrorism.

While the attention of the Security Council to the protection of journalists in armed conflict is a welcome development, to a large extent it misses the mark. In one study of 693 journalists killed between 1992 and mid-2008, an estimated 86 per cent were not deaths of foreign correspondents working in conflict zones, but were premeditated murders of local journalists in their offices or homes, or on their way to work (Committee to Protect Journalists 2008). Of those killed, only 17.4 per cent of deaths were combat-related, while 72.4 per cent were murders. Further, militaries were identified as suspected perpetrators in only 6 per cent of cases, while other actors accounted for a larger proportion of deaths — including criminal groups (11.4 per cent), paramilitaries (7.4 per cent), political groups (31 per cent) and government officials (18 per cent).

The Security Council’s focus on *armed conflict* misdirects attention from dangerous local circumstances outside conflict areas. There is also a tendency to focus on the safety of highly visible international (usually Western) correspondents, at the expense of local reporters, who are often less visible, less resourced, more exposed and less protected. It is important to ensure that the focus of any protective measures is directed not only at journalists, but at the broad sweep of local and support staff who may be endangered as a result of the journalist’s functions.

The Security Council has very occasionally responded to some violent attacks on journalists outside armed conflicts. For example, Council Presidential Statements condemned the assassination of Lebanese journalist Samir Qassir ('a symbol of political independence and freedom') (UN Security Council Presidential Statement 2005/22) and the 'terrorist bombing' in Beirut in December 2005 that killed 'Lebanese member of Parliament, editor and journalist Gebrane Tueni, a patriot who was an outspoken symbol of freedom' (UN Security Council Presidential Statement 2005/61). Such condemnations have not, however, been accompanied by the Council imposing binding measures on states or sanctions on parties in respect of such violations.

It is notable that the UN General Assembly has also addressed the safety of journalists in conflicts, as in Afghanistan (in 1996) and Kosovo (1998), while the (former) Commission on Human Rights considered their safety in Somalia (1995). The UN Educational Scientific Cooperation Organisation (UNESCO) also adopted Resolution 29 on the 'Condemnation of violence against journalists' (UNESCO Resolution 29 of 1997). The resolution invited the Director-General 'to condemn assassination and any physical violence against journalists as a crime against society, since this curtails freedom of expression and, as a consequence, the other rights and freedoms', and to urge the authorities to prevent, investigate, punish and remedy such crimes (para 1).

UNESCO Resolution 29 (para 2) also called on member states to (i) preclude statutes of limitations for crimes perpetrated to prevent freedom of information and expression or to obstruct justice; (ii) legislate for the prosecution of assassination of those exercising freedom of expression; and (iii) legislate for the prosecution of crimes against journalists or media personnel in civilian or ordinary courts. The resolution was recommendatory and had no power to bind member states, although it signifies the concern of the international community about attacks on journalist and makes useful recommendations for constructive protections in national law.

Regional organisations have also expressed concern for the safety and protection of journalists, including the European Parliament, the Council of Europe and the Organisation of the American States (Henckaerts and Doswald-Beck 2004, 117–18; see also Council of Europe Recommendation No R (96) 4 of 1996). It is notable that some attempts to better protect journalists have, however, foundered because some states wanted to link the rights of journalists with their responsibilities, in ways which may have unacceptably regulated the profession and overly restricted freedom of expression (such as through criminal defamation liabilities). Non-governmental organisations have, on the other hand, sought to reaffirm the legal frameworks applicable to journalists in armed conflict, including their immunity as civilians (Reporters without Borders 2003).

## Conclusion

Journalists remain highly vulnerable to serious violence in the course of their professional mission in reporting on armed conflict or other situations of disorder. Although they enjoy a range of protections as civilians in armed conflict, and under international human rights law, attacks on journalists continue, and impunity for those who attack them often remains unaddressed.

Journalists must, of course, play a role in better protecting themselves. The International Federation of Journalists argues, for instance, that it should be mandatory for all media personnel deployed to conflict situations to be given appropriate hostile environment and risk awareness training by their media organisation, as well as protective health and safety equipment (such as medical packs, helmets, respirators and flak jackets) (see International News Safety Institute 2008, paras 3–5). The major western news organisations now have safety policies concerning conflict reporting, with some using dedicated safety advisers, although improvements can still be made (POLIS and BBC 2006). In Australia, the Australian Broadcasting Commission has comprehensive training and safety policies and procedures for journalists deployed on dangerous assignments (Australian Broadcasting Commission).

Media organisations should also be aware of the emotional and psychological stresses resulting from conflict reporting, and ensure journalists have support (Australian Broadcasting Commission). To that end, the International News Safety Institute *Safety Code* (2008, para 7) states that '[e]mployers must provide free access to confidential counselling for journalists'. Personal injury and death insurance for foreign and local correspondents should also be provided (para 6).

Media personnel should be urged not to pursue unwarranted risks in reporting to obtain competitive advantage at the expense of safety, while it goes without saying that media personnel should never carry weapons (International News Safety Institute 2008, paras 1 and 8). Media assignments to dangerous mission should always be voluntary (above, para 2). Principles on safety, training, insurance, counselling and voluntariness are included in the recommendations of the International News Safety Institute (2007c), Reporters without Borders (2005) and the Committee to Protect Journalists (2006).

Despite increasing attention to the media safety by international organisations such as UNESCO and the UN Security Council, and by non-government organisations representing media personnel, there remains considerable room for further practical action. In particular, governments and de facto governmental authorities must translate their formal concerns about the safety of journalists, elaborated in international forums and treaty law, into concrete measures for enhancing the safety of journalists, including at the legislative, administrative and judicial levels. ●

## References

### *International legal materials*

1863 Lieber Code (Instructions for the Government of Armies of the United States in the Field) (adopted 24 April 1863)

1880 Oxford Manual on the Laws of War on Land (adopted 9 September 1880, Institute of International Law)

1907 Hague Convention IV Respecting the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910, in (1908) 2 *American Journal of International Law* Supplement 90), annexed Regulations Respecting the Laws and Customs of War on Land

1929 Geneva Convention Relative to the Treatment of Prisoners of War (adopted 27 July 1929, entered into force 19 June 1931)

1949 Geneva Conventions (adopted 12 August 1949, entered into force 21 October 1950, (1950) 75 UNTS 31, 85 135, 287)

1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, as amended, ETS No 5)

1966 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171)

1977 Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978, (1979) 1125 UNTS 3)

1977 Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of the Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978, (1979) 1125 UNTS 609)

1994 Convention on the Protection of United Nations Personnel and Humanitarian Workers (adopted 9 December 1994, entered into force 15 January 1999, 2051 UNTS 363)

1998 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002, 2187 UNTS 3)

Council of Europe (Committee of Ministers), Recommendation No R (96) 4 on the Protection of Journalists in Situations of Conflict and Tension, 98th Session, 3 May 1996

Draft International Convention for the Protection of Journalists Engaged in Dangerous Missions in Areas of Armed Conflict, 1 August 1975, UN Document A/10147, annex I

ECOSOC Resolution 1690 (LII)

ECOSOC Resolutions 1597 (L)

*Final Report to the ICTY Prosecutor on the NATO Bombing of Kosovo* (2000)

Henckaerts J-M and Doswald-Beck L (2004) *Customary International Humanitarian Law, Volume I: Rules* (ICRC, Geneva)

Inter-American Commission on Human Rights *Third Report on Human Rights in Colombia*

International Committee of the Red Cross, Commentaries to the 1977 Additional Protocols I and II

International Committee of the Red Cross, Commentaries to the Four 1949 Geneva Conventions

UN General Assembly Resolution 2854 (XXVI)

UN Human Rights Committee (UNHRC), General Comment 6, on Article 6 of the ICCPR (16th session, 1982), UN Doc HRI/GEN/1/Rev.1 at 6 (1994)

UN Security Council Presidential Statement 2005/22 (7 June 2005)

UN Security Council Presidential Statement 2005/61 (12 December 2005)

UN Security Council Resolution 1265 (1999)

UN Security Council Resolution 1296 (2000)

UN Security Council Resolution 1502 (2003)

UN Security Council Resolution 1738 (2006)

UN Security Council Resolution 1738 (2006)

UNESCO Resolution 29 (1997), adopted at the UNESCO General Conference 29th Session, Paris, November 1997

UNESCO *Press Freedom: Safety of Journalists and Impunity* (2007) CI-2007/WS/14

### **Cases**

*Abbasi v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 159.8

*Abella v Argentina (La Tablada case)*, Inter-American Commission on Human Rights, Case No 11.137, 18 November 1997, OEA/Ser.L/V/II.98

*Ajuri v Military Commander of the Judea and Samaria Area*, Israeli Supreme Court (High Court of Justice) 7015/02, 56(6) PD 352

*O'Neal*, US Crt Military App, 18 February 1966, 16 USCMA 33; 36 CMR 189

*Hamdan v Rumsfeld*, 548 US 557 (2006)

*Hans Fritzsche case*, International Military Tribunal at Nuremberg (1947) 41 *American Journal of International Law* 328

*Hicks v Ruddock* [2007] FCA 299

*Israel Wall Advisory Opinion* (2004), ICJ Case 131

*Julius Streicher case*, International Military Tribunal at Nuremberg (1947) 41 *American Journal of International Law*

NSW Coroner, Inquest into the Death of Brian Raymond Peters, 16 November 2007 [Online] Available: <[www.lawlink.nsw.gov.au/lawlink/Coroners\\_Court/ll\\_Coroners.nsf/vwFiles/Peterssinquest2doc/\\$file/Peterssinquest2.doc](http://www.lawlink.nsw.gov.au/lawlink/Coroners_Court/ll_Coroners.nsf/vwFiles/Peterssinquest2doc/$file/Peterssinquest2.doc)> [2008, June 11]

*Nuclear Weapons Advisory Opinion* (1996) ICJ Reports 226

*Osman v United Kingdom* (1998) VIII ECHR 3124

*Prosecutor v Haradinaj (Judgment)*, ICTY Case No IT-04-84-T, 3 April 2008

*Prosecutor v Limaj et al*, Case No IT-03-66-T, ICTY Trial Chamber II Judgment, 30 November 2005

*Prosecutor v Nahimana* (2003) ICTR-99-52-T

*Prosecutor v Ruggiu* (2000) ICTR-97-32-I

*Prosecutor v Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)*, Case No IT-94-1, Appeals Chamber, 2 October 1995

*Prosecutor v Tadic*, IT-94-1, Trial Chamber Judgment, 7 May 1997, para 562

*Prosecutor v Talic* (Decision on Interlocutory Appeal), Case No IT-99-36, 11 December 2002

*Prosecutor v Dyilo*, Confirmation of Charges Decision, International Criminal Court (ICC), Pre-Trial Chamber I, 29 January 2007, Doc No ICC-01/04-01/06 (original in French)

*Public Committee Against Torture in Israel v Government of Israel (Targeted Killings case)*, Israeli Supreme Court (High Court of Justice), HCJ 769/02, 11 December 2005

### ***Books, articles and reports***

Australian Broadcasting Commission (nd) *International Assignments Safety Policy and International Emergency Management Plan*

Balguy-Gallois A (2004) 'The protection of journalists and news media personnel in armed conflict' 86 *International Review of the Red Cross* p 37

Bouvier A (1995) 'The Convention on the Safety of United Nations and Associated Personnel' 309 *International Review of the Red Cross* p 638

Committee to Protect Journalists (2008) *Statistics and Background: Journalists Killed January 1, 1992–June 20, 2008* [Online] Available: <[www.cpj.org/deadly](http://www.cpj.org/deadly)> [2008, July 29]

Committee to Protect Journalists (2006) *On Assignment: A Guide to Reporting on Dangerous Situations*

Committee to Protect Journalists (2005) 'CPJ study: US military consistently fails to probe journalist killings in Iraq' [Online] Available: <<http://cpj.org/2005/09/cpj-study-us-military-consistently-fails-to-probe.php>> [2008, November 24]

Cullen A (2004) 'The parameters of internal armed conflict in international humanitarian law' 12 *University of Miami International and Comparative Law Review* p 189

Detter I (2000) *The Law of War* Cambridge University Press, Cambridge

Gasser H-P (1983) 'The protection of journalists engaged in dangerous professional missions' 232 *International Review of the Red Cross* p 3

Gleditsch N et al (2002) 'Armed conflict 1946–2001: a new dataset' 39 *Journal of Peace Research* p 615

Harbom L and Wallensteen P (2005) 'Armed conflict and its international dimensions: 1946–2004' 42 *Journal of Peace Research* p 623

Howard D (2002) 'Remaking the pen mightier than the sword: an evaluation of the growing need for the international protection of journalists' 30 *Georgia Journal of International and Comparative Law* p 505

International Federation of Avocats sans Frontières 'Are TV stations or any media facilities legitimate military targets under International Humanitarian Law?', memorandum, Brussels

International News Safety Institute (2006a) 'Journalists and media staff casualties 2006' [Online] Available: <[www.newssafety.com/casualties/2006.htm](http://www.newssafety.com/casualties/2006.htm)>

International News Safety Institute (2006b) News Release, 28 February 2006

International News Safety Institute (2007a) 'Journalists and media staff casualties 2007' [Online] Available: <[www.newssafety.com/casualties/2007.htm](http://www.newssafety.com/casualties/2007.htm)> [2008, June 11]

International News Safety Institute (2007b) 'Journalists and media staff casualties 2007: Iraq' [Online] Available: <[www.newssafety.com/casualties/iraq.htm](http://www.newssafety.com/casualties/iraq.htm)> [2008, June 11]

International News Safety Institute (2007c) *Killing the Messenger: Report of the Global Inquiry into the Protection of Journalists*, March



International News Safety Institute (2007d) 'Media safety: East Timor' [Online] Available: <[www.newssafety.com/hotspots/countries/timorlestex.htm#Media%20Safety](http://www.newssafety.com/hotspots/countries/timorlestex.htm#Media%20Safety)> [2007, April 6]

International News Safety Institute (2007e) 'Media safety: Indonesia' [Online] Available: <[www.newssafety.com/hotspots/countries/indonesiex.htm#Media%20Safety](http://www.newssafety.com/hotspots/countries/indonesiex.htm#Media%20Safety)> [2007, March 8]

International News Safety Institute (2008) *Safety Code* [Online] Available: <[www.newssafety.com/safety/index.htm](http://www.newssafety.com/safety/index.htm)> [2008, July 28]

Kirby M and Jackson L (1986) 'International humanitarian law and the protection of media personnel' 9 *University of New South Wales Law Journal* p 1

McDonald N (2004) 'Under fire: the fight for the war correspondent's privilege' 47 *Howard Law Journal* p 133

Mensore M (1992) 'The First Amendment fights back: a proposal for the media to reclaim the battlefield after the Persian Gulf War' 49 *Washington & Lee Law Review* p 1145

Moir L (2002) *The Law of Internal Armed Conflict* Cambridge University Press

Mukherjee A (1995) 'Protection of journalists under international humanitarian law' 17 *Communications and the Law* p 27

Orme W (nd) 'Journalists, protection of' *Crimes of War Project* [Online] Available: <[www.crimesofwar.org](http://www.crimesofwar.org)>

POLIS (London School of Economics) and BBC College of Journalism (2006) *Killing Journalism*, Conference Report, London

Reporters without Borders (2003) 'Propaganda-oriented media and international humanitarian law', Legal Memorandum, January

Reporters without Borders (2004) *Declaration on the Safety of Journalists and Media Personnel in Situations Involving Armed Conflict*, adopted in Paris, 20 January 2003, revised 8 January 2004

Reporters without Borders (2005) *Charter for the Safety of Journalists Working in War Zones or Dangerous Areas* [Online] Available: <[www.rsf.org/article.php3?id\\_article=2350](http://www.rsf.org/article.php3?id_article=2350)> [2008, July 28]

Saul B (2009) 'Prosecuting war crimes at Balibo under Australian law: the killing of five journalists in East Timor by Indonesia', forthcoming, *Sydney Law Review*

Smith J (1993) 'From the front lines to the front page: media access to war in the Persian Gulf and beyond' 26 *Columbia Journal of Law and Social Problems* p 291

Solf W (1983) 'Problems with the application of norms governing interstate armed conflict to non-international armed conflict' 13 *Georgia Journal of International and Comparative Law* p 291

UK Ministry of Defence (2006) *MOD Working Arrangements with the Media for Use Throughout the Full Spectrum of Military Operations* (Green Book) [Online] Available: <[www.mod.uk/NR/rdonlyres/F83E9C03-FD20-4635-8FFF-715F64795763/0/GreenBook.pdf](http://www.mod.uk/NR/rdonlyres/F83E9C03-FD20-4635-8FFF-715F64795763/0/GreenBook.pdf)> [2008, July 28]