

# The Protection of Journalists in Armed Conflicts: How Can They Be Better Safeguarded?

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## Keywords

Journalist, media, International Humanitarian Law, armed conflict, protection, International Committee of the Red Cross

## Abstract

The years 2011 and 2012 were among the most deadly for journalists reporting from conflict situations worldwide. The numbers of assaults, arrests and attacks have been on a constant rise and portray a dramatic image of the journalistic profession. In light of the increasing threats in armed conflicts, being a war reporter has become an inherently dangerous task. Journalists are not only at risk of becoming so-called collateral damage during military operations, they are also increasingly targeted. Their role as a watchdog and witness to the horrors of war, in addition to the undeniable power of the word and image they spread, has made them popular targets. It is therefore essential that the international community re-evaluate journalists' *de jure* and *de facto* protections in armed conflicts to allow for better safeguards and consequently less casualties in the imminent future. This article examines the current protections afforded to journalists and aims at detecting proposals for enhanced safeguards that are most likely to effectively improve journalists' safety in the field. In this regard, this article will argue that the legal protections are in fact sufficient and hardly amendable and that therefore, a more practical, hands-on approach to implementation of those protections must be the focus of future actions. This goal can only be achieved by a comprehensive mission jointly pursued by governments, militaries, journalists, media, NGOs and society.

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*Merkourios* 2013 – Volume 29/Issue 76, Article, pp. 04-22.

URN:NBN:NL:U:10-1-112861

ISSN: 0927-460X

URL: [www.merkourios.org](http://www.merkourios.org)

Publisher: Igitur Publishing

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## I. Introduction

*War reporting is inherently dangerous. Indeed, it could arguably be one of the most dangerous occupations in the world. Still, out of sense of professional duty, many journalists and media professional[s] make the courageous choice to go to conflict zones, so as to tell the world about the stories of armed conflicts and the human cost they entail. Amidst the so-called 'fog of war', they play a vital role in keeping the world informed and ensuring that our responses are based on the facts and truths unfolding on the ground.<sup>1</sup>*

This statement accurately illustrates that in times of armed conflict, be it international or non-international, the media's surveillance role and their importance in informing the population are enhanced.<sup>2</sup> This is mainly due to the fact that during war,<sup>3</sup> a functioning civil society that critically monitors the behaviour of the government and military is often absent.<sup>4</sup> The media is the main, if not the sole, transmitter of information on breaches of international security<sup>5</sup> and the primary medium through which people gain a clear picture of a (distant) situation.<sup>6</sup> This essential role makes the media one of the most powerful tools in waging war. As NewsWatch Canada's Co-Director Robert A. Hackett stated, '[i]n war time, media are not mere observers but simultaneously a source of intelligence, a combatant, a weapon, target, and a battlefield'.<sup>7</sup>

As a consequence of this, conflicts and media enjoy an intricate and mutual relationship.<sup>8</sup> Reporting on armed conflict, and doing so exclusively, is highly profitable. Further, news coverage of war can function as an effective propaganda strategy to obtain a competitive advantage.<sup>9</sup> Due to the media's power in influencing the audience's opinion, media personnel<sup>10</sup> are often hindered from executing their scrutinising and educative roles. Not only are they frequently bound by regulations from their own media outlet, but also by strict guidelines from their national government or the government of the country they are reporting from.<sup>11</sup> Freedom of expression and information, which are the foundation of democracy and among the most essential human rights,<sup>12</sup> are frequently under threat, as the fear of the power of words and images drastically limits journalists' leeway to report.<sup>13</sup>

Thus, a close link between the protection of journalists and the maintenance of freedom of expression can be detected.<sup>14</sup> In fact, it could be argued that targeting journalists is a direct attack against freedom of expression and hence against democracy.<sup>15</sup> As Koïchiro Matsuura, Director-General of the United Nations Educational, Scientific and Cultural Organisation ('UNESCO'), highlighted, '[e]very aggression against a journalist is an attack on our most fundamental freedoms. Press freedom and freedom of expression cannot be enjoyed without basic security'.<sup>16</sup>

1 K Kang, 'Opening Remarks by Ms. Kyung-wha Kang Deputy High Commissioner for Human Rights at the panel discussion on the protection of journalists in armed conflict' (14<sup>th</sup> session of the Human Rights Council, Geneva) (OHCHR, 4 June 2010) <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10108&LangID=e>> accessed 23 May 2012.

2 This function of the media is often referred to as the 'fourth estate'. See D Dodge, *The War in Iraq and Why the Media Failed Us* (Praeger 2006) 1.

3 The terms 'war' and 'armed conflict' are used interchangeably.

4 S Kagan and H Durham, 'The Media and International Humanitarian Law: Legal Protections for Journalists' (2010) 16 *Pacific Journalism Review* 96, 96-97.

5 I Detter, *The Law of War* (2nd edn, Cambridge University Press 2000) 323; A Kupfer-Schneider, 'International Media and Conflict Resolution: Making the Connection' (2009) 93 *Marquette Law Review* 1, 6; A Mukherjee, 'Protection of Journalists under International Humanitarian Law' (1995) 17 *Communications and the Law* 27, 28.

6 See BA Taleb, *The Bewildered Herd: Media Coverage of International Conflicts and Public Opinion*, (iUniverse Inc 2004).

7 RA Hackett, 'Journalism versus Peace? Notes on a Problematic Relationship' (2007) 2 *Global Media Journal: Mediterranean Edition* 47, 48.

8 SL Carruthers, *The Media at War* (2nd edn, Palgrave Macmillan 2011) 1, 5.

9 HD Laswell, *Propaganda Technique in the World War* (Peter Smith 1927); JM Lisosky and JR Henrichsen, *War on Words: Who Should Protect Journalists* (Praeger 2011) xix; G Spencer, *The Media and Peace: From Vietnam to the 'War on Terror'* (Palgrave Macmillan 2005); Taleb (n 6).

10 Defined by the Committee of Ministers of the Council of Europe in *Recommendation No. 4* as 'covering all representatives of the media, namely all those engaged in the collection, processing and dissemination of news and information including cameramen and photographers, as well as support staff such as drivers and interpreters.'

11 See eg H Tumber and J Palmer, *Media at War: The Iraq Crisis* (SAGE Publications Ltd 2004, reprint 2006).

12 Enshrined in International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 19; European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953) art 10; Lisosky and Henrichsen, *War on Words* (n 9) xx; G Verschingel, 'Towards a Better Protection for Journalists in Armed Conflicts' (2008/9) 45 *Jura Falconis* 435.

13 Detter (n 5) 323; MD Kirkby and LJ Jackson, 'International Humanitarian Law and the Protection of Media Personnel' (1986) 9 *University of New South Wales Law Journal* 1.

14 C Zanghi, 'The Protection of Journalists in Armed Conflicts' in PA Fernández-Sánchez (ed), *The New Challenges of Humanitarian Law in Armed Conflicts* (Martinus Nijhoff Publishers 2005) 146.

15 JM Lisosky and JR Henrichsen, 'Don't Shoot the Messenger: Prospects for Protecting Journalists in Conflict Situations' (2009) 2 *Media, War & Conflict* 129; JM Lisosky and JR Henrichsen, *War on Words* (n 9) xviii.

16 UNESCO, 'Press Freedom – Safety of Journalists and Impunity' (2008) 4.

Regardless of their essential role and responsibility, the number of journalists who disappear, are threatened, arrested, mistreated and/or killed is on a constant rise.<sup>17</sup> It is not only the loss of lives as collateral damage during military operations that make journalists' jobs in conflicts so dangerous, but also targeted attacks, as well as the constant danger of being kidnapped, arrested or accused of espionage. The Committee to Protect Journalists ('CPJ') reported in 2011 that at least 46 journalists died due to their work.<sup>18</sup> Seventeen died on dangerous assignments and eight in combat situations, mostly during the uprisings in the Arab world.<sup>19</sup> The number of journalists imprisoned in 2011 reached its highest level since 1996, with 179 journalists being detained worldwide.<sup>20</sup> So far in 2012, nineteen journalists have already been killed in combat/crossfire, out of which seventeen have become victims of the Syrian conflict.<sup>21</sup> These statistics suggest that the numbers of killed and imprisoned journalists have been on a steady rise since 2003, with small decreases depending on the brisance of conflicts, and have reached peaks as high as a total of 74 casualties in 2009.<sup>22</sup> This is a trend that corresponds to the increasing dangers and difficulties that journalists face<sup>23</sup> and which is further illustrated by the fact that 35 per cent of all journalists killed covered stories related to wars and conflicts.<sup>24</sup>

In addition to the power of governments to control the media, journalists' assignments in armed conflicts are becoming increasingly dangerous due to two further and controversial factors: firstly, the ever developing and increasing technology used in war and secondly, the insatiable wants of the public to be provided with first-hand and close-up news stories around the clock.<sup>25</sup> War journalists are in the almost impossible situation where they have to try to please opposing interests of governments and demanding audiences, while attempting to stay safe from increasingly high-tech military attacks. Recognising this vital yet endangered role that journalists play in armed conflicts, the question arises whether journalists enjoy sufficient legal protection from dangers inherent to reporting on armed conflicts.

The main international legal regime governing the protection of journalists in wartime is the same that governs the law of armed conflict in general, international humanitarian law ('IHL').<sup>26</sup> Although IHL provides for the protection of journalists,<sup>27</sup> recent attacks on reporters in the wars in Afghanistan and Iraq as well as the conflicts in the Arab world have ignited discussions on whether this dangerous profession should be afforded special protection.

While the International Committee of the Red Cross ('ICRC'), which bases its work on the provisions of IHL, maintains that journalists are sufficiently protected by the Geneva Conventions ('GCs') and its Additional Protocols ('APs'),<sup>28</sup> a variety of international scholars and practitioners<sup>29</sup> claim instead that specific provisions are required to deter attacks and afford more protection. They are joined by international journalist non-governmental organisations ('NGOs') including: the CPJ, the International Federation of Journalists ('IFJ'), Reporters Without Borders ('RSF'), the Press Emblem Campaign ('PEC'), the

17 HP Gasser, 'The Journalist's Right to Information in Time of War and on Dangerous Missions' (2003) 6 *Yearbook of International Humanitarian Law* 367; B Saul, 'The International Protection of Journalists in Armed Conflict and Other Violent Situations' (2008) 14 *Australian Journal of Human Rights* 99; see also the statistics of the CPJ; 'Protecting the Witnesses' (2012) 2 *The Magazine of the International Red Cross and Red Crescent Movement (Red Cross)*, <[http://www.redcross.int/EN/mag/magazine2012\\_2/4-9.html](http://www.redcross.int/EN/mag/magazine2012_2/4-9.html)> accessed 3 October 2012.

18 This only refers to the number of journalists whose motive for death has been proven.

19 CPJ, *Attacks on the Press in 2011: A Worldwide Survey by the Committee to Protect Journalists* (CPJ 2011) 283-287.

20 *ibid* 341-346.

21 '19 Journalists Killed in Crossfire/Combat in 2012' (CPJ) <<http://www.cpj.org/killed/2012/in-combat.php>> accessed 28 November 2012.

22 This is mainly due to the great number of journalist deaths in the Philippines during a massacre in 2009. '59 Journalists Killed in 2012/Motive Confirmed' (CPJ) <<https://cpj.org/killed/2012/>> accessed 28 November 2012; see also RH Giles, 'An Emergent Neo-Journalism: The Decline and Renewal of News Media' (2010) XXXII *Harvard International Review* 36, 36-40; F Smyth, 'Murdering with Impunity: The Rise in Terror Tactics against News Reporters' (2010) XXXII *Harvard International Review* 41, 41-45.

23 The number of national journalists killed in conflicts clearly outweighs the number of foreign journalists, with freelancers being the most common targets. See CPJ, '59 Journalists Killed in 2012' (n 22); CPJ, *Attacks on the Press in 2011* (n 19).

24 '954 Journalists Killed Since 1992' (CPJ) <<http://www.cpj.org/killed/>> accessed 28 November 2012; see also the annual reports of the CPJ, RSF, INSI and IFJ. The number of journalist deaths, which may appear low in relation to the number of civilian deaths, is aggravated by their essential role as the fourth estate.

25 See also Lisosky and Henrichsen, 'Don't Shoot the Messenger' (n 15) 130-131.

26 This must be distinguished from other legal regimes such as human rights and national law that protect journalists during peace. D Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press 2008, reprint 2010) 1.

27 Protocol Additional (I) 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) 1125 UNTS 3 (AP I), art 79.

28 See survey by Y Dinstein (Rapporteur), '11ème Commission. Le Statut, les Droits et les Devoirs Internationaux des Journalistes Dûment Accrédités, dans un Contexte de Conflit Armé' (2009) 73 *Annuaire de l'Institut de Droit International, Session de Naples*, especially ICRC's representative, MVK Doermann; ICRC, 'Interview: How does International Humanitarian Law Protect Journalists in Armed-Conflict Situations?' (ICRC, 27 July 2010) <<http://www.icrc.org/eng/resources/documents/interview/protection-journalists-interview-270710.htm>> accessed 3 October 2012.

29 A Balguy-Gallois, 'Protection des journalistes et des médias en période de conflit armé' (2004) 86 *International Review of the Red Cross* 853; H Fujita (IHL professor), B Lempen (UN Correspondent for the Swiss News Agency and Secretary-General of PEC), Judge F Pocar (International Criminal Tribunal for the Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), Human Rights Committee) quoted in Dinstein (n 28); G Robertson and A Nicol, *Media Law* (5th edn, Penguin 2008).

International Press Institute ('IPI') and the International News Safety Institute ('INSI').<sup>30</sup> These international players have created a variety of proposals and initiatives to afford better safeguards, such as: enhanced ratification of the APs; reinforced protection by international instruments; creation of a special status; facilitation of identification; inclusion as a specific war crime under international criminal law; and better mitigation, advocacy and education. With regard to these various approaches to improving journalists' protection, so far no consensus has been made on the most appropriate initiative.<sup>31</sup>

It is therefore this article's aim to discover an answer to the debate in relation to the most appropriate (legal) protection of journalists in armed conflicts, and to determine what future initiatives should receive the most support. After providing a short background to the genre of war reporting, this article analyses the current state of international law to determine whether the protective measures for journalists are adequate, whether special provisions would be favourable and how enhanced protection could look.<sup>32</sup> In this regard, this article will argue that the *de jure* protections are in fact sufficient and hardly amendable. Hence, a more practical approach to enhanced implementation must be the focus of future actions to commonly engage governments, militaries, journalists, NGOs and societies worldwide.

The aim and approach taken by this article can be characterised as a theoretical as well as practical legal study, considering not only strictly legal arguments but also those that are related to the *de facto* implementation of the law. As this article focuses on the legal framework of IHL, the primary instruments considered are the GCs and APs. Additionally, noteworthy (legal) proposals for additional protection are introduced, next to drawing upon case law and commentaries interpreting the primary legal sources, academic literature and reliable current statistics on the protection of journalists.

## II. Journalists, Armed Conflict and the Genre of War Reporting

### A. History and Basic Distinctions

War reporting is a distinct type of journalism that has gained popularity over the past decades, while drastically changing its form and purpose to align with the rapidly shifting nature of wars worldwide. While journalists have covered wars as early as the Crimean War and American Civil War,<sup>33</sup> their engagement has increasingly professionalised, seeing a rise in the use of audio and visual means (World Wars I and II and the Vietnam War),<sup>34</sup> (real-time) TV reporting (Persian Gulf and Yugoslav wars)<sup>35</sup> and most recently, 24/7 news and cyber journalism (Afghanistan and Iraq wars),<sup>36</sup> as well as the involvement of local citizens in journalistic activities (Arab uprisings).<sup>37</sup> The role of the journalist, from an observer to an actual 'member' of the conflict, and the involvement of the general population in journalistic activities has changed drastically. This is enhanced by the fact that wars are, today, not solely fought by means of war machinery but also by (dis)information and the control thereof – the phenomenon of information warfare.<sup>38</sup>

In relation to the greater proximity of journalists to the armed conflict, their increased exposure and the (sporadic) involvement of local citizens, it is important to distinguish between two types of occupational journalism: independent journalists and war correspondents.<sup>39</sup> Independent journalists are referred to as such because they are not officially sanctioned by the military

<sup>30</sup> PEC, 'Draft proposal for an International Convention to Strengthen the Protection of Journalists in Armed Conflicts and Other Situations Including Civil Unrest and Targeted Killings' (December 2007) <<http://www.pressempilem.ch/4983.html>> accessed 28 January 2013; RSF, 'Charter for the Safety of Journalists Working in War Zones or Dangerous Areas' (March 2002) <<http://www.rsf.org/IMG/doc-1288.pdf>> accessed 28 January 2013.

<sup>31</sup> Lisosky and Henrichsen, *War on Words* (n 9). Note that as many as over 50 stakeholders and journalists support the improvement and/or clarification of current protections for journalists.

<sup>32</sup> In focusing on IHL and solely dealing with physical protection of classical war journalists operating in the field, this article neglects other fields of law, media-active civilians and the protection of media equipment in the context of its analysis. Where human rights, international criminal law and national law considerations are applicable, such will be indicated in the text or footnotes.

<sup>33</sup> William Howard Russell is considered the first modern war reporter. See A Lambert, 'The Crimean War' BBC (London, 29 March 2011) <[http://www.bbc.co.uk/history/british/victorians/crimea\\_01.shtml](http://www.bbc.co.uk/history/british/victorians/crimea_01.shtml)> accessed 3 October 2012; LP Masur, 'The Special Correspondent' *The New York Times* (New York, 24 March 2011) <<http://opinionator.blogs.nytimes.com/2011/03/24/the-special-correspondent/>> accessed 3 October 2012; D Randall, 'William Howard Russell' (*The Great Reporters*) <<http://www.greatreporters.co.uk/reporterswh Russell.htm>> accessed 3 October 2012.

<sup>34</sup> Carruthers (n 8) 44-95.

<sup>35</sup> P Hammond, "Humanitäre Intervention" und "Krieg gegen den Terror" in M Löffelholz (ed), *Krieg als Medienereignis II: Krisenkommunikation im 21. Jahrhundert* (VS Verlag für Sozialwissenschaften 2004) 101-109; D Kellner, 'The Persian Gulf TV War Revisited' in S Allan and B Zelizer (eds), *Reporting War: Journalism in Wartime* (Routledge 2004) 136-154; Carruthers (n 8) 96-174.

<sup>36</sup> Allan and Zelizer (n 35); Carruthers (n 8) 209-252; Hammond (n 35) 109-115; H Tumber and F Webster, *Journalists Under Fire* (SAGE Publications Ltd, 2006).

<sup>37</sup> S Khamis and K Vaughn, 'Cyberactivism in the Egyptian Revolution: How Civic Engagement and Citizen Journalism Tilted the Balance' (2011) 14 Arab Media and Society; RSF, *Libya: The Birth of 'Free Media' in Eastern Libya* (RSF, 2011).

<sup>38</sup> As explained in Tumber and Webster, *Journalists under Fire* (n 36) 28-44.

<sup>39</sup> The term 'journalist' covers both types of reporters. One could further distinguish between national/foreign journalists, freelancers and possibly media-active

or government, and operate 'independently' of these influences. They are defined as '[...] any correspondent, reporter, photographer, and their technical film, radio and television assistants who are ordinarily engaged in any of these activities as their principal occupation [...].'<sup>40</sup> Thus, they are freelancers, stringers or part of a media organisation and known as 'unilaterals' in journalist jargon.<sup>41</sup>

War correspondents are defined as 'specialized journalist[s] who [are] present, with the authorization and under the protection of the armed forces of a belligerent, on the theatre of operations and whose mission is to provide information on events relating to ongoing hostilities' by the *Dictionnaire de droit international public*.<sup>42</sup> This definition is similar to that adopted in the United Nations Security Council's ('UNSC') Resolution 1738 and also mentioned in the Green Book of the British Armed Forces, specifically emphasising the need for accreditation.<sup>43</sup> This distinguishes them from independent journalists who are not officially authorised by their government and accredited by the military. A distinct type of war correspondents are those that are 'embedded' with the military, a term that has gained popularity since the beginning of the Iraq war in 2003 but that was already used during World War I.<sup>44</sup> Embedded reporting is defined as 'living, eating, moving in combat with the units that the journalist is attached to' by the Director of the embedding program in the United States, Victoria Clarke.<sup>45</sup>

Yoram Dinstein, International Law Professor Emeritus at Tel Aviv University and President of the UN Association of Israel, proposes a third category in addition to independent journalists and war correspondents, which he refers to as those journalists who are members of the armed forces and cover the war for military news organs.<sup>46</sup> In the context of this article, such journalists are simply considered to be members of the armed forces, in contrast to independent or accredited journalists, and hence fall under the category of combatants.<sup>47</sup>

With regard to the increasing local presence of journalists in conflict areas and the decreasing proximity between their work places and the frontline, it may be assumed that war reporting has become ever more dangerous. In fact, Phillip Knightley, an Australian journalist, states that '[i]t is safer to be a soldier these days than a war correspondent'.<sup>48</sup> It is, therefore, essential to distinguish between traditional threats inherent to military operations and deliberate attacks on journalists.<sup>49</sup>

In many conflicts, journalists have been detained, injured or killed due to the fact that covering the frontline of conflicts is dangerous by its nature.<sup>50</sup> As the CPJ's statistics show, 173 journalists have been killed since 1992 'in crossfire/combat', seeing a drastic increase in the years that were marked by conflicts extensively reported on in the media.<sup>51</sup> One recent example is the death of Japanese video and photojournalist Mika Yamamoto, who was killed during clashes between Syrian government forces and rebels in Aleppo, Syria on 20 August 2012.<sup>52</sup>

However, even more frequently than becoming victims of dangers inherent to any type of armed conflict, journalists have become popular targets for murders and physical assaults, not least due to the growing power of the words and images which journalists produce.<sup>53</sup> In this context it is also interesting to note that according to CPJ's statistics, a great number of

civilians.

40 Draft United Nations Convention on the Protection of Journalists Engaged in Dangerous Missions in Areas of Armed Conflict (1 August 1975) UN document A/10147, Annex 1, art 2(1) (Draft UN Convention); These include freelancers and those being employed full-time by media outlets.

41 Tumber and Webster, *Journalists under Fire* (n 36) 17.

42 J Salmon (dir), *Dictionnaire de Droit International Public* (Bruylants, 2001) 275 [translated from French]. The ICTY initially defined war correspondents generally 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', omitting the need for accreditation in *Prosecutor v Brđanin and Talić* IT-99-36-AR73.9 (11 December 2002) paragraph 29.

43 United Nations Security Council Resolution 1738 adopted at the 5613<sup>th</sup> meeting, 23 December 2006, SC/8929; United Kingdom Ministry of Defence, *The Green Book: MOD Working Arrangements with the Media* 7 paragraph 31; see also ICRC (n 28).

44 R Keeble, 'Information Warfare in an Age of Hyper-Militarism' in Allan and Zelizer (n 35) 50; Gasser (n 17) 383-384; K Tuosto, 'The 'Grunt Truth' of Embedded Journalism: The New Media/Military Relationship' (2008) X Stanford Journal of International Relations 20.

45 Quoted in MM Haigh and others, 'A Comparison of Embedded and Nonembedded Print Coverage of the U.S. Invasion and Occupation of Iraq' (2006) 11 The Harvard International Journal of Press/Politics 139, 140.

46 Dinstein (n 28) 455.

47 See Part III for consequences in relation to their protection as combatants.

48 P Knightley quoted in Lisosky and Henrichsen, *War on Words* (n 9) 157.

49 Balguy-Gallois (n 29) 37.

50 See also Gasser (n 17) 367.

51 See eg in 1999, 2003, 2004, 2007, 2009. See CPJ, '954 Journalists Killed Since 1992' (n 24).

52 'Mika Yamamoto' (CPJ) <<http://www.cpj.org/killed/>> accessed 3 October 2012; 'Japanese journalist killed covering fighting in Syria' BBC (London, 21 August 2012) <<http://www.bbc.co.uk/news/world-asia-19328199>> accessed 3 October 2012. Other famous incidents include the deaths of Marie Colvin and Gilles Jacquier in early 2012.

53 Balguy-Gallois (n 29) 37; Detter (n 5) 323; Kirkby and Jackson (n 13) 1-2.

journalist deaths are caused by government officials,<sup>54</sup> which speaks for the presumption that governments try to restrain the unfavourable effects of the media's power. The recent uprisings in Libya and Egypt in 2011 for example have shown that journalists are visibly more exposed to targeted physical assaults and detention. The CPJ recorded 160 attacks on journalists during the Egyptian uprisings,<sup>55</sup> 101 attacks on journalists and their facilities, as well as 50 cases of detention during the Libyan revolution.<sup>56</sup>

#### B. International Concern for Protection

In relation to these ever-growing dangers faced by journalists, who are essential in monitoring States' respect for the rights and wellbeing of their citizens, it must be noted that the concern for their protection can similarly be traced back as far as to the Crimean and American Civil War. This was initially focused on the protection of journalists accompanying the military as prisoners of war ('POW') and on the issuance of an identity card to attest for such.<sup>57</sup> Article 50 of the Lieber Code provided that citizens accompanying the army, such as reporters, should, if captured, be considered POWs.<sup>58</sup> Similar provisions were subsequently integrated into the 1899 and 1907 Hague Convention on the Laws and Customs of War on Land (IV) under Article 13 as well as into the Prisoner of War GC of 1929 under Article 81.<sup>59</sup> Independent journalists, however, were not afforded any protection under these initial provisions, not even in the original 1949 GCs.

In the 1970s and most notably during the Vietnam War, the international community concerned itself for the first time specifically with the physical protection of independent journalists.<sup>60</sup> On 9 December 1970, the United Nations General Assembly ('UNGA') adopted Resolution 2673 (XXV), directing the Economic and Social Council to draft a 'Convention on the Protection of Journalists Engaged in Dangerous Missions in Areas of Armed Conflict' through its Human Rights Commission.<sup>61</sup> This resulted in the 1975 Draft UN Convention, which was, at the invitation of the UNGA, reviewed by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts (1974-1977). The *ad hoc* Working Group of Committee I of this conference considered that, instead of creating a separate convention resulting in a special status for journalists, the protection should rather be incorporated into existing IHL instruments. Finally, after approval of the UNGA, this lead to the inclusion of Article 79 AP I, a specific provision relating to journalists, which, however, does not afford special protections.<sup>62</sup>

The wars in Yugoslavia, Iraq and Afghanistan initiated fresh discussions on how to better protect journalists, which resulted in various proposals from the international community, including: RSF's *Charter for the Safety of Journalists Working in War Zones or Dangerous Areas* (2002);<sup>63</sup> the *Geneva Declaration on Actions to Promote Safety and Security of Journalists and Media in Dangerous Situations* (2004);<sup>64</sup> UNSC Resolution 1738 (2006);<sup>65</sup> UNESCO's *Berlin Declaration* (2000)<sup>66</sup> and *Medellin Declaration on Securing the Safety of Journalists and Combating Impunity* (2007);<sup>67</sup> and PEC's *Draft Convention to Strengthen the Protection of Journalists in Armed Conflicts and Other Situations Including Civil Unrest and Targeted Killings* (2007).<sup>68</sup>

54 CPJ, '954 Journalists Killed Since 1992' (n 24).

55 'Attacks on the Press in 2011: Egypt' (CPJ) <<http://cpj.org/2012/02/attacks-on-the-press-in-2011-egypt.php>> accessed 3 October 2012.

56 'Attacks on the Press in 2011: Libya' (CPJ) <<http://cpj.org/2012/02/attacks-on-the-press-in-2011-libya.php>> accessed 3 October 2012.

57 Kirkby and Jackson (n 13) 6. The 1949 GCs did not contain the requirement that war correspondents had to be in possession of a certificate to be protected by POW status, recognising the possibility of losing such a card during armed conflict. See Mukherjee, 'Protection of Journalists under International Humanitarian Law' (n 5) 30. The idea of establishing an identity card for journalists was already addressed at the 1927 Conference of Press Experts in Geneva. See League of Nations, *Conference of Press Experts* (1927) Doc A.34.

58 US War Department, 'Instructions for the Government of Armies of the United States in the Field (Lieber Code 1863)' in *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies* (Government Printing Office, 1899) Series III, Volume 3 148-164.

59 Hague Convention (IV) respecting the Laws and Customs of War on Land (18 October 1907 entered into force 26 January 1910) (revised versions of the 1899 original) (Hague Convention IV); Geneva Convention relative to the Treatment of Prisoners of War (27 July 1929 entered into force 19 June 1931).

60 Gasser (n 17) 370. The international Congresses of the Press in Chicago and Belgium in 1893 and 1894 focused on the freedom of the press and the improvement of working conditions.

61 Draft UN Convention (n 40) Annex 1; see the Final Act of the Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts Vol X 75.

62 Only the Waleed Sadi Report in 1990 and the Mac Bride Commission Report in 1977 treated the issues of special protection, but did not result in additional legal instruments. See D Howard, 'Remaking the Pen Mightier than the Sword: an Evaluation of the Growing Need for the International Protection of Journalists' (2001/2) 30 Georgia Journal of International and Comparative Law 505.

63 RSF, 'Charter for the Safety of Journalists' (n 30).

64 'Geneva Declaration on Actions to Promote Safety and Security of Journalists and Media in Dangerous Situations, Meeting organised by PEC' (20-21 September 2004) <<http://www.ifj.org/assets/docs/248/107/526ddf8-ce1186b.pdf>> accessed 28 January 2013.

65 Res 1738 (n 43).

66 UNESCO, 'Berlin Declaration: Journalists in Danger – How can we help?' (6 November 2000).

67 UNESCO, 'Medellin Declaration on Securing the Safety of Journalists and Combating Impunity' (3-4 May 2007).

68 PEC, 'Draft proposal for an International Convention' (n 30).

It is noteworthy that instead of resulting in a unified and coherent approach to the issue, the international concern brought about a variety of individual and rarely binding initiatives. The most common and possibly sole mutual characteristics are the call for a reaffirmation of IHL and the call upon States to ratify the APs.<sup>69</sup> This confirms the significance of IHL in the protection of journalists in armed conflicts.

### III. Protection of Journalists under International Humanitarian Law

General protective principles and the protection of journalists are part of the *jus in bello* or IHL,<sup>70</sup> which comprises a set of rules 'designed to regulate the treatment of the individual – civilian or military, wounded or active'<sup>71</sup> in armed conflicts. IHL applies the principle of distinction<sup>72</sup> and hence protects combatants<sup>73</sup> and civilians<sup>74</sup> differently. This is of importance when analysing the protection of journalists, which will be outlined in the following section. Additionally, IHL recognises persons attached to the armed forces as a special group of protected persons.

It is important to note that next to IHL, human rights law is also applicable to armed conflicts, even though most provisions can be derogated from during war and have inherent limitations. In case of conflicting and/or disharmonious provisions of IHL and human rights, IHL is to be regarded as *lex specialis* in times of armed conflict.<sup>75</sup> Thus, in such cases IHL, as the specific law in armed conflicts, overrides human rights as the general law or *lex generalis*.<sup>76</sup>

#### A. Protection Relative to Attacks

The main and most important IHL Article explicitly referring to the protection of journalists in international armed conflicts ('IACs') is Article 79 AP I, which was included as a specific provision relating to journalists in the body of IHL.<sup>77</sup> It provides that journalists engaged in dangerous professional missions in areas of armed conflict, whether independent journalists or war correspondents accompanying the armed forces, are to be considered as civilians within the meaning of Article 50(1) AP I. Thus, attacks on journalists are strictly prohibited under IHL. Journalists are afforded the whole set of protections relative to civilians, including under Articles 51 and 57 AP I<sup>78</sup> and GC IV.<sup>79</sup> This is, however, only the case unless and for as long as they do not take any action adversely affecting their status as civilians, as outlined in Article 79(2) AP I.<sup>80</sup> As soon as they take direct part in hostilities they lose their protection under this Article.<sup>81</sup> Journalists have a duty to not engage in any actions adverse to their status of civilians and may be held accountable for acts of perfidy pursuant to Article 37(1)(c) AP I and for spying pursuant to Article 46 AP I.<sup>82</sup>

69 Most proposals also emphasise the duty to investigate, prosecute and punish crimes committed on journalists.

70 Fleck (n 26) 1.

71 *ibid* 11. Today, IHL is mainly made up of the GCs and their APs. The GCs are universally ratified and hence applicable worldwide. Most provisions in AP I are considered customary international law and are therefore universally applicable. Additionally, basic rules of IHL are considered *jus cogens*, rendering any other set of rules conflicting with IHL automatically void. See Fleck (n 26); Dinstein (n 28) 454-455; TD Gill and D Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press, 2010). Customary international humanitarian law is summarised by the ICRC and Cambridge University Press in an online database and in JM Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules and Volume II: Practice Parts 1 and 2* (ICRC and Cambridge University Press 2005).

72 The principle of distinction derives from the fact that IHL is a compromise between military objectives and human necessity. It refers to the requirement of distinguishing between military objectives/combatants and civilian objects/non-combatants, providing for a limited war. AP I, art 48; Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (AP II) art 13(2)-(3); Henckaerts and Doswald-Beck (n 71) Volume I and Volume II, Rules 1, 6 and 7; Fleck (n 26) 37; Gill and Fleck (n 71) 52; Balguy-Gallois (n 29) 48.

73 AP I, art 43(2).

74 AP I, art 50.

75 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep para 25.

76 The legal maxim reads: *lex specialis derogat legi generali*. Although not the focus of this article, relevant references to human rights will be indicated in the text and/or footnotes.

77 This Article was adopted by consensus and hence no reservations have been made.

78 According to Article 51 AP I, civilians may not be made targets of military attacks or reprisals, shall enjoy general protection and may not be subjected to threats of violence. It prohibits indiscriminate attacks and the use of civilians as shields. Article 57 AP I emphasises that constant care must be taken to spare civilians.

79 This is in contrast to combatants, who may be lawfully targeted within the context of armed conflicts. IHL provides protections to combatants in relation to the following three situations: as a wounded, sick and shipwrecked, as dead and missing and as POW.

80 This implies that journalists must also respect domestic regulations relating to the access to territory and that they may lose their right to reside and work in a country if they have entered illegally. See explanation to Rule 34, Henckaerts and Doswald-Beck (n 71).

81 For the time they take part in hostilities, they fall under the protection of Article 45 AP I and immediately regain their status as civilians after seizing all adverse activities.

82 Kagan and Durham (n 4) 102.

Although AP II relative to non-international armed conflicts ('NIACs') does not contain specific provisions on the protection of journalists, their protection as civilians also extends to such conflicts.<sup>83</sup> Journalists are protected pursuant to Article 13 AP II as well as by the minimum guarantees of Common Article 3 GCs.<sup>84</sup> According to the ICRC Customary Law Study,<sup>85</sup> state practice has established the protection of and respect for journalists engaged in professional missions in armed conflicts as a norm of customary international law. This is applicable to both IACs and NIACs, providing an equivalent protection to journalists in both types of conflicts. This has been manifested in Rule 34 of the Study. The fact that both APs have not been universally ratified is thus irrelevant to the protection of journalists under this Rule.<sup>86</sup>

The illegality of attacking journalists is manifested by Article 85(3)(e) AP I, under which an attack on civilians can be considered a war crime. The subsequent investigation, prosecution and punishment of such a war crime is subject to provisions of (international) criminal law. Attacks are only permissible if all reasonable precautions have been taken and if the collateral damage is not excessive to the concrete and legitimate military aim.<sup>87</sup>

#### B. Protection Relative to Arrest and Detention

With regard to the second most important threat to journalists in armed conflicts, arrest and possible detention in armed conflicts, it is important to note that human rights complement and reinforce IHL. All types of journalists must be treated as civilians even though their exact status depends on their nationality and place of arrest. If arrested by authorities of their own country, internal laws as well as universal human rights law apply. Journalists who are citizens of a non-belligerent State are under the protection of potential diplomatic relations between the two States and are protected by peacetime law, including human rights.<sup>88</sup> Journalists arrested by authorities of another belligerent nationality do, next to the general applicability of human rights, first and foremost enjoy protection by the fundamental guarantees afforded by Article 75 AP I, including *inter alia* the prohibition of violence to life, health or physical and/or mental wellbeing, outrages upon personal dignity, the taking of hostages, collective punishments, threats and fair and humane detention and trial.<sup>89</sup>

Article 79(2) AP I also refers to specific protections in case of detention pursuant to Article 4(A)(4) GC III as POWs. The protection as POW relates *inter alia* to persons accompanying the armed forces without actually being members thereof, including war correspondents. Thus, in case of falling into the hand of the adversary, war correspondents benefit from all protections relative to POWs. Article 4(A)(4) GC III, however, does not relate to nationals of a Party to the conflict nor to nationals of co-belligerent or neutral States maintaining diplomatic relations with the belligerent State. Moreover, both Articles only apply to IACs.

In the case of NIACs, journalists are at least protected by the minimum guarantees enshrined in Common Article 3. These are similar to and amplified by AP II but still more restricted than those afforded under Article 75 AP I. The protections under the legal regime governing NIACs for example do not provide for special status as POW and also do 'not offer much help against unjustified detention'.<sup>90</sup> Nevertheless, violations of journalists' rights in detention, such as fair trial and humane treatment are considered grave breaches of IHL and lead to prosecution.<sup>91</sup>

Article 79(3) AP I is considered an additional protective measure in relation to arrests as it provides for the carrying of identification cards. Such cards, however, neither confer a special status as 'journalist' nor are they indispensable,<sup>92</sup> but simply attest to the fact that journalists are authorised to accompany the armed forces. In case of war correspondents, identity cards

<sup>83</sup> As stated by Balguy-Gallois (n 29) 41; Henckaerts and Doswald-Beck (n 71) Volume I, 115-118.

<sup>84</sup> Article 13 AP II provides for general protection and determines that civilians may not be made objects of attacks, as well as prohibits threats of violence. Common Article 3 states that it is forbidden to treat civilians inhumanely and with adverse distinction. Violence to life and person, the taking of hostages, outrages upon personal dignity, the passing of sentences as well as the carrying out of executions without previous judgments pronounced by a regularly constituted Court are prohibited.

<sup>85</sup> Henckaerts and Doswald-Beck (n 71) Volume I and Volume II.

<sup>86</sup> *ibid* Volume I, Rule 34 quotes a number of military manuals, official statements and reported practice that reinforce the obligation to respect and protect journalists.

<sup>87</sup> This refers to the additional IHL principles of proportionality, necessity and advance warning.

<sup>88</sup> Gasser (n 17) 375-376; Mukherjee, 'Protection of Journalists under International Humanitarian Law' (n 5) 37.

<sup>89</sup> Foreign journalists may be detained on two grounds: for imperative reasons of security pursuant to Articles 42 and 78 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (12 August 1949 entered into force 21 October 1950), 75 UNTS 287, or if they are thought to have committed a crime and there are sufficient grounds for a trial. See Gasser (n 17) 375.

<sup>90</sup> Dinstein (n 28) 469; Gasser (n 17) 376.

<sup>91</sup> Gasser (n 17) 375.

<sup>92</sup> See AP I, Annex II; Mukherjee, 'Protection of Journalists under International Humanitarian Law' (n 5) 37-38; Zanghi (n 14) 156.

are mandatory under GC III and must be carried at all times.<sup>93</sup>

### C. Different Protection of Independent Journalists and War Correspondents

Overall, it appears that neither independent nor accredited journalists are afforded special status. Instead, journalists are civilians in the event of attacks in both IACs and NIACs.<sup>94</sup> Although IHL does not define journalists or categories thereof, it distinguishes between war correspondents and independent journalists in case of arrest. While independent journalists remain civilians and are 'solely' afforded the protection of Article 75 AP I, Common Article 3 GCs and generally GC IV, war correspondents (including embedded journalists)<sup>95</sup> are specifically mentioned in GC III and are protected by POW status as persons accompanying the military.

This distinction is based on the differences inherent to the role of independent journalists and war correspondents. War correspondents accompany the military and are sanctioned by the government. They are generally more exposed to risks and threats due to having access to the frontlines of the conflict and due to being associated with the 'war effort'.<sup>96</sup> Independent journalists, who often do not have the means to get to the frontline because of restrictions on access and the lack of support, are perceived to be less exposed to immediate threats.

To conclude, *de lege lata*, all types of journalists are afforded a wide range of protections. Nonetheless, contentions surround the issue of *de lege feranda*, namely whether the current protection of journalists is sufficient, adequately respected and implemented.

## IV. Effectiveness of International Humanitarian Law for the Protection of Journalists

### A. Current de jure Protection of Journalists

With regard to scholars' doubts about the current state of IHL, two common points of criticism can be identified. Firstly, it has been noted that the wording of Article 79 AP I, the main protective provision for journalists, is misleading and not specific enough as it states that journalists are considered *as* civilians, when in fact they *are* civilians in armed conflicts.<sup>97</sup> Recognition of the latter, however, does not provide journalists with more protection as IHL only distinguishes between combatants and non-combatants, including civilians. Thus, this argument is not considered as one of the major issues in this article, at least for as long as journalists are not afforded a special status distinct from that of civilians.

Secondly, it has been claimed that the lack of a definition of who is a 'journalist' in the GCs and APs results in a blurred and impaired distinction between journalists and general media-active civilians.<sup>98</sup> Indeed, the increase of civilian journalists, hobby bloggers and multimedia active citizens make it progressively more difficult to determine who is a journalist and who is merely an active citizen. This, however, does not matter with regard to the protections offered by IHL because apart from war correspondents, who are additionally protected and obliged to carry identification for such purposes, all journalists are minimally and equally protected as civilians.<sup>99</sup> As for the previous argument, this concern is considered a minimal one, but may gain importance if journalists are afforded a status distinct from that of civilians.

Instead, this article identifies four other main issues in relation to the protection of journalists under IHL that need clarification and/or argue for special protection:

### 1. Lack of Determination of Direct Participation

With regard to journalists' execution of professional duty in armed conflicts, it is unclear what constitutes an action that could be interpreted as 'adverse' or characterised as 'direct participation' in hostilities, resulting in the termination of protection as

<sup>93</sup> See Geneva Convention (III) relative to the Treatment of Prisoners of War, (12 August 1949 entered into force 21 October 1950) 75 UNTS 135, Annex IV (A); United Kingdom Ministry of Defence (n 43) paras 31, 37. Identity cards are not provided for under IHL for independent journalists in NIACs.

<sup>94</sup> Zanghi (n 14) 157.

<sup>95</sup> Regardless of the intensified involvement of embedded journalists, no distinction is made between such and war correspondents as both are officially authorised and accredited. See Balguy-Gallois (n 29) 42; Dinstein (n 28) 457; Gasser (n 17) 384; ICRC (n 28) 28.

<sup>96</sup> Balguy-Gallois (n 29) 39.

<sup>97</sup> See reasoning of ie Gasser (n 17) 370; Mukherjee, 'Protection of Journalists under International Humanitarian Law' (n 5) 34; Saul (n 17) 106.

<sup>98</sup> Verschingel (n 12) 5.

<sup>99</sup> See also reasoning in Dinstein (n 28) 461.

civilians.<sup>100</sup> ‘Direct participation’ is not laid out clearly in the GCs and APs, but Yves Sandoz *et al.*’s Commentary on the APs defines it as ‘acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces’,<sup>101</sup> which is reiterated by the ICRC’s *Interpretative Guidance on the Notion of Direct Participation in Hostilities*<sup>102</sup> and includes the taking up of arms, the attempts to capture, to injure or kill enemy forces or to purposefully destroy or damage enemy property. In the landmark *Targeted Killings* case, the Supreme Court of Israel concluded that also conduct amounting to, for instance, transporting combatants or weapons, servicing weapons and volunteering as human shields can amount to direct participation.<sup>103</sup>

The term ‘direct’ implies the need for a close link between the journalists’ conduct and the effect of such on the conduct of the hostilities.<sup>104</sup> It is, however, not defined what type of activities a journalist would have to engage in or whether parts of everyday work could be considered direct participation. Common questions with regard to this are: can the carrying of a defensive weapon be considered direct participation? Can propaganda contained in news stories be considered an ‘adverse’ action? And how can someone draw a line between news investigations and espionage?

The GCs do not contain explicit provisions on the carrying of defensive weapons. Instead, domestic laws regulate this area. The British Ministry of Defence Green Book, for example, states that war correspondents are not permitted to carry arms.<sup>105</sup> With regard to IHL, it is however suggested that the mere fact of carrying a light defensive weapon for protection cannot be considered a hostile act.<sup>106</sup> Self-defence is arguably a legitimate act for journalists if they are attacked by military forces in violation of IHL and if the force applied by the journalists is proportionate and necessary to protect themselves. IHL does not criminalise civilian participation in hostilities as such (apart from perfidy) and thus, the issue of self-defence mostly falls within the scope of national law.<sup>107</sup>

Concerning propaganda, it appears that it can generally not amount to direct participation, warranting attacks on or arrests of journalists.<sup>108</sup> The ICTY stated in its ‘Final Report on the NATO Bombing’ that the media are not legitimate targets merely because they engage in propaganda, even if such activities support the war effort.<sup>109</sup> Nevertheless, this must be distinguished from ‘inciting’ or ‘hate’ propaganda for purposes such as acts of genocide or violence. This was illustrated by cases at the International Criminal Tribunal for Rwanda, where such acts are punishable under international criminal law.<sup>110</sup> Likewise, the ICRC’s study on direct participation refers to political propaganda as a war-sustaining activity, which may be considered as direct participation in hostilities.<sup>111</sup> In relation to these arguments it must, however, be borne in mind that the distinction between general propaganda and punishable ‘hate’ or ‘inciting’ propaganda is oftentimes rather difficult, especially with regard to the generally intensified rhetoric in times of war and the fact that decisions are made on the battlefield, often with limited availability of evidence.

In the same context, espionage is an act forbidden by IHL pursuant to Article 46 AP I.<sup>112</sup> However, this only relates to members of the armed forces, which journalists are predominantly not. Should journalists engage in acts of espionage on behalf of the enemy, they can be arrested and charged under domestic law. In such cases, IHL only provides for guarantees

100 ibid 462.

101 Y Sandoz and others (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987) para 1944.

102 ICRC, ‘Interpretative guidance on the notion of direct participation in hostilities under international humanitarian law’ (2008) 90 International Review of the Red Cross 872, 1020; N Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC, 2009).

103 Israeli Supreme Court (High Court of Justice) *Public Committee Against Torture in Israel v Government of Israel (Targeted Killings)*, HCJ 769/02 (11 December 2005) paras 35-37. This case concerned Israel’s policy of ‘targeted killings’ aimed at terrorists who plan, launch or commit terrorist attacks in Israel. It currently provides the most explicit and comprehensive legal analysis of the term ‘direct participation’.

104 J Mirimanoff-Chilikine, ‘Protection de la Population et des Personnes Civiles Contre les Dangers Résultant des Opérations Militaires’ (1971/2) VII Revue Belge de Droit International 619, 634 and 639.

105 United Kingdom Ministry of Defence (n 43) para 31.

106 Gasser (n 17) 377.

107 Saul (n 17) 112. It may also fall within the scope of international criminal law if concerning war crimes.

108 Balguy-Gallois (n 29) 48-49; Kagan and Durham (n 4) 103.

109 ICTY, ‘Final Report NATO Bombing’ (13 June 2000) paras 47, 55, 74, 76. This report concerned NATO’s bombing campaign against the Federal Republic of Yugoslavia in 1999, in the context of which media institutions were also targeted.

110 ibid para 55; see also more recently Rome Statute of the International Criminal Court (17 July 1988 entered into force 1 July 2002) UNGA A/CONF 183/9, 2187 UNTS 90, art 25(3)(e) (RS). The ICTR has, however, not clearly established to what extent such media can become legitimate targets. See the cases concerning the media’s responsibility in relation to public incitement: ICTR *Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngaze* ICTR-99-52-T (3 December 2003); ICTR *Prosecutor v Georges Ruggiu* ICTR-97-32-I (1 June 2000); see also Gasser (n 17) 382-382; Kagan and Durham (n 4) 104-106.

111 Melzer (n 102) 51-52.

112 See also Hague Regulations respecting the Laws and Customs of War on Land, Annex to the Hague Convention IV, 18 October 1907 (entered into force 26 January 1910) arts 29-31 (Hague Regulations).

in relation to due process and fair trial.<sup>113</sup> Admittedly, the line between thoroughly investigating and spying is easily blurred, but the Hague formula defines the hallmark of espionage as being carried out 'clandestinely' and 'on false pretences' for the benefit of the enemy.<sup>114</sup> Thus, the information must be collected 'with the intention of communicating it to the hostile party',<sup>115</sup> a definition which leaves the term 'intention' open for misinterpretation.

Generally, scholars agree on the fact that performing professional journalistic duty can never amount to a hostile act.<sup>116</sup> However, gathering information of military value and directly participating in hostilities can certainly lead to the loss of civilian status and consequently to attacks or arrests.<sup>117</sup> This raises the question of whether armed forces are always capable of distinguishing *de facto* between journalists solely performing their duties and acting within their responsibilities and those engaging in other prohibited acts. This difficult distinction is further enhanced by the possibility of mistaking journalists' gear for military equipment, leading to incidental attacks.<sup>118</sup>

Therefore, this article considers it beneficial to clarify these ambiguities within the law and to determine under what circumstances journalists may be made legitimate targets of military attacks. This would facilitate a decrease in incidental attacks on journalists, which mainly result from misunderstandings and/or the incapability of distinguishing between media and war efforts. Clarification of journalists' duties and restrictions would further (de)criminalise attacks on journalists who engage in (il)legal methods. One proposal is to create an international declaration advanced by the UNGA and drawn up at an international conference that restates IHL, clarifies its provisions and explains especially those principles in IHL that lead to common misunderstandings and decreased protection, such as direct participation.

## 2. Different Protections Afforded in International and Non-international Armed Conflicts

When analysing the current legal regime of IHL in respect to the protection of journalists it is apparent that the legal protections offered are more expansive and stronger in relation to IACs. This is not unique to the protection of journalists but applies generally to the distinction between IACs and NIACs and is a consequence of a less developed overall legal regime in relation to the latter. However, the fact that war correspondents are afforded more protection in case of arrest in IACs appears inappropriate with regard to the increasing domestic nature of conflicts.<sup>119</sup> This, thus, raises the question of whether special protection in NIACs is necessary.<sup>120</sup>

Most notably, while POWs are specifically and singularly protected by a universally ratified convention, GC III, this is unavailable for independent journalists and war correspondents in relation to NIACs. The presumption arises that people accompanying the military who are directly exposed to the threats of the conflict should, in the future, also receive maximum protection if covering NIACs. Nevertheless, the fact that POW status<sup>121</sup> is not afforded in a domestic context is rather logical. Firstly, combatant and consequently POW status generally does not exist in NIACs. Secondly, captured journalists are either from a non-belligerent country and protected by diplomatic relations and peacetime law (human rights) or from the country itself and consequently, protected by domestic law and human rights.<sup>122</sup>

Furthermore, improving the legal protections of journalists in NIACs is not as easy as one would wish. Any special protection in NIACs that specifically relates to journalists is dependent on the creation of a new special regime of protection. Only if the law of NIACs is enhanced in general will journalists be afforded additional protection – this is at least the case as long

113 Dinstein (n 28) 463.

114 Hague Regulations (1898 and 1907), art 29; now in AP I, art 46(2).

115 Dinstein (n 28) 477.

116 Balguy-Gallois (n 29) 44; Gasser (n 17) 371.

117 Gasser (n 17) 373.

118 Various journalists have been injured in the Iraq War because the armed forces mistook their cameras for weapons. See eg CNN Wire Staff, 'Video shows deaths of two journalists in Iraq in 2007' *CNN World* (Atlanta, 5 April 2010) <[http://articles.cnn.com/2010-04-05/world/iraq.photographers.killed\\_1\\_war-zones-two-reuters-journalists-gunsight?\\_s=PM:WORLD](http://articles.cnn.com/2010-04-05/world/iraq.photographers.killed_1_war-zones-two-reuters-journalists-gunsight?_s=PM:WORLD)> accessed 20 May 2012; C Cozens, 'CBS cameraman shot by US troops' *The Guardian* (London 8 April 2005) <<http://www.guardian.co.uk/media/2005/apr/08/broadcasting.Iraqandthemedia>> accessed 3 October 2012; G MacMillan, 'Journalist killed as US troops mistake camera for weapon' *PR Week* (London, 18 August 2003) <<http://www.prweek.com/uk/news/188000/Journalist-killed-US-troops-mistake-camera-weapon/>> accessed 3 October 2012; see also Saul (n 17) 111.

119 Dinstein (n 28) 468-469; N Gleditsch and others 'Armed conflict 1946-2001: a new dataset' (2002) 39 *Journal of Peace Research* 615; L Harbom and P Walensteen, 'Armed conflict and its international dimensions: 1946-2004' (2004) 42 *Journal of Peace Research* 623.

120 In addition to the local laws, GCs and AP II, Common art 3.

121 POW status is limited by three factors: that it is only applicable to war correspondents, that it solely enters into force during detention and that it is just provided for in IACs. See Gasser (n 17) 369-370.

122 See the distinction of journalists at time of capture in Mukherjee, 'Protection of Journalists under International Humanitarian Law' (n 5) 37.

as journalists are not designated a special status distinct from that of civilians. However, as it is rather improbable that a protective regime as large and complex as that of NIACs is amended in its whole, it is worth considering more prompt solutions. One proposition is raising awareness among militaries and governments worldwide of the fact that the same legal protections as in IACs (apart from POW status) apply to journalists in NIACs.<sup>123</sup> In the long run, this needs support by an official document declaring such protections applicable to NIACs.

### 3. Distinction Between War Correspondents and Independent Journalists

In line with the previous argument and in addition thereto, it appears that the distinction between war correspondents and independent journalists on the basis of their proximity to the conflict is out-dated. It may well be true that war correspondents accompanying the military are, in general, more likely to be arrested by the opposing forces due to their proximity to the war effort. However, independent journalists, whether by help of private security escorts or local fixers<sup>124</sup> and translators, are, by means of risky manoeuvres increasingly capable of monitoring conflicts from less distance, even without similar protective resources.<sup>125</sup> This is motivated by the increasing wants of audiences to be provided with unique, inside and round-the-clock news stories. Furthermore, the trend of not only fighting wars on battlefields or locations far away from civilisation, but in or around civilised areas, exposes independent journalists to constant threats of being attacked or arrested.<sup>126</sup> This results in an existing need for special protection of independent journalists similar to that of war correspondents.

With this type of argument, however, it must be borne in mind that the special protection of war correspondents as POWs only results in a comparatively small advantage and is only applicable in cases of arrest. Pursuant to Article 118 GC III, war correspondents can be detained until the cessation of active hostilities would prevent them from reporting, which is rarely a desired outcome. Independent journalists are contrarily protected by the comprehensive provisions of Article 75 AP I in cases of arrest and cannot be detained simply for reasons of limiting their access to the hostilities. It is important to point out that due to the lack of POW status in NIACs, all journalists are treated equally and exclusively as civilians, as additional protection is not available. Embedded journalists, regardless of their even increased proximity to the conflict in relation to war correspondents, are not afforded any special and/or additional protections.

Thus, the real issue appears not to be the enhanced protection of independent journalists in relation to war correspondents, as the additional measures are rather limited and not always favourable, but the lack of clarification of how distinct types of journalists are protected in different types of conflicts. In line with this, RSF stated in its *2003 Declaration* that ‘journalists have a right to identical protection regardless of their professional status, [...] of their nationality, and of whether or not they are taken off into an accompaniment system.’<sup>127</sup> Instead of separately protecting independent journalists, war correspondents and potentially also embeds, it appears favourable to creating a comprehensive special protection that applies to both types of conflicts and protects all journalists from attack and arrest.

### 4. Increasing Alternative Protection of Independent Journalists

Furthermore, as touched upon in the previous argument, independent journalists, who usually do not have the same resources to reach the front-lines of conflicts as easily as war correspondents, increasingly resort to alternative protection afforded by private agency armed escorts hired by their news agency.<sup>128</sup> These armed bodyguards solely defend journalists and do not take sides in the conflict. Regardless, the presence of armed escorts can cause misunderstandings with the distinction between combatants and non-combatants and is not explicitly regulated under IHL.

Strictly speaking, private escorts are civilians. However, their carrying of (defensive) weapons and possibly also their gear and

123 Lady H Fox QC (British Institute of International and Comparative Law, International and Comparative Law Quarterly, Institut de Droit international) and Sir Judge K Keith QC (ICJ) as quoted in Dinstein (n 28) 484-485 and 507.

124 Fixers are locals, often times also journalists, who assist foreign journalists in their news research, frequently by acting as guides, translators or support personnel. See Tumber and Webster, *Journalists under Fire* (n 36) 106-115.

125 Lisosky and Henrichsen (n 9) 162.

126 Such as eg the number of journalist deaths as a consequence of the attacks on Homs in 2012, the clashes in Cairo in 2011 and the outbursts of violence in Benghazi in 2011, where the military attacked civilian areas. See the CPJ’s statistics. Attention must be paid to the blurring of the distinction between occupational journalists and media-active citizens, the latter of which are often also present at the conflict scenes and whose material is frequently used by media outlets.

127 RSF, ‘Declaration on the safety of journalists and media personnel in situations involving armed conflict, Appendix 6 to the Handbook for Journalists’ (2005) 119 <[http://www.rsf.org/IMG/pdf/guide\\_gb.pdf](http://www.rsf.org/IMG/pdf/guide_gb.pdf)> accessed 28 January 2013; see also H Fujita in Dinstein (n 28) 495.

128 This also refers to employees of Private Military and/or Security Companies who are tasked to protect journalists reporting on armed conflicts. F Smyth, *Journalist Security Guide. Covering the News in a Dangerous and Changing World* (CPJ 2012) 41 paras 2-3.

clothing can result in misunderstandings<sup>129</sup> and incidental media casualties.<sup>130</sup> As the Secretary-General of RSF pointed out, '[s]uch a practice sets a dangerous precedent that could jeopardise all other journalists covering this war [...]. There is a real risk that combatants will henceforth assume that all press vehicles are armed [...]'.<sup>131</sup> The employment of private escorts blurs the principle of distinction between combatants and civilians and often leads to journalists being perceived as the former rather than the latter. This not only directly affects the physical protection of journalists but also the feasibility and capability of implementing IHL's principle of distinction. Thus, it is favourable to create special and effective protective measures for journalists that provide sufficient security to decrease resort to private escorts.

In conclusion, these four identified issues would benefit from clarification and support the need for special protection of journalists. However, such is only necessary and useful if there are, on the one hand, obvious misunderstandings in the practical implementation of the *de jure* protections and, on the other hand, additional protection that would effectively result in enhanced *de facto* implementation.

#### *B. Current de facto Protection of Journalists*

In spite of the identified ambiguities within the law, journalists are theoretically protected by an extensive set of provisions in IACs and NIACs. Nevertheless, the rising number of attacks on and arrests of journalists in armed conflicts worldwide paint a rather distinct picture.

In relation to academic writings on the protection of journalists and the debate for special protection, it appears that most scholars and practitioners believe that the increasing numbers of attacks and arrests are not a result of inadequate legal provisions, but a consequence of ineffective and insufficient implementation and/or respect.<sup>132</sup> Hans-Peter Gasser, former Senior Legal Adviser at the ICRC and Editor-in-Chief of the International Review of the Red Cross, for example notes that: '[t]here is hardly any room for strengthening th[e] protection through new law' and that the question remains 'whether those rules are in fact respected'.<sup>133</sup>

Overall, there are two different evaluations of the current situation, which were also identified by Joanne M Lisosky, Professor of Communication and Journalism, and Jennifer R Henrichsen, Project Assistant for the Democracy Coalition Project and Research Assistant for the Open Society Foundations: firstly, that the legal protections are not applied and/or respected and secondly, that they do not enjoy sufficient awareness.<sup>134</sup> This speaks for a common lack of awareness about the protections journalists enjoy and more importantly, frequent misunderstandings as to the essential role that journalists occupy in society.

Another common argument, which is not directly related to the legal provisions on the physical protection of journalists, reasons that the great majority of attacks are never investigated, prosecuted and/or punished.<sup>135</sup> Ben Saul, Professor of International Law, states by citing INSI that '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'.<sup>136</sup> Under human rights law, States have an evident obligation to investigate deaths caused by members of its security forces, deaths that have occurred during detention under the auspices of State authorities and unresolved killings where, potentially, allegations of collusion with State forces have been made.<sup>137</sup> In relation to armed conflicts and IHL, this procedural obligation is especially important in distinguishing whether certain lethal attacks on journalists were justified, for example, in the context of collateral damage, or determining whether an illegal act under IHL has taken place. Although this only includes the use of force by State agents, and neglects attacks committed by individuals other than security forces, the legal obligation to investigate is unambiguous. Lack of investigations and overarching impunity are especially drastic when

129 Balguy-Gallois (n 29) 43; Zanghì (n 14) 155-156.

130 Saul (n 17) 110.

131 'CNN Crew's Bodyguard Fires Back with Automatic Weapon when Crew Comes Under Fire. News Organization's Use of Firearm Sets Dangerous Precedent' (RSF, 13 April 2003) <[http://www.rsf.org/article.php3?id\\_article=6078](http://www.rsf.org/article.php3?id_article=6078)> accessed 3 October 2012.

132 Balguy-Gallois (n 29) 65; H Fujita, Sir Judge K Keith QC and MVK Doermann as quoted in Dinstein (n 28) 494, 505, 527; Gasser (n 17) 388; Saul (n 17); RSF, as quoted in Saul (n 17) 102.

133 Gasser (n 17) 388.

134 Their research included the interviewing of numerous journalists, legal practitioners and scholars.

135 Lisosky and Henrichsen *War on Words* (n 9) 176-177; Saul (n 17) 102; UNSC Resolution 1738 also emphasises States' obligations to end impunity. Res 1738 (n43). The topic of impunity was even afforded a special session at the World Press Freedom Day 2007. See UNESCO, 'Press Freedom' (n 16).

136 Saul (n 17) 118.

137 In the European context, see *McCann and Others v the United Kingdom* (Grand Chamber) 27 September 1995; *Salman v Turkey* (Judgment) 27 June 2000; *Kashiyev and Akayeva v Russia* (Judgment) 24 February 2005.

regarding the chilling effect that high impunity rates have on future journalists, and the fact that this undermines the media's crucial watchdog role.

With regard to the identified problems in relation to the implementation of IHL, concerns have mainly comprised the absence of definitions, ambiguities within the law, lack of understanding and knowledge, as well as the common disregard and disrespect. In recognition of these apparent difficulties with implementing the *de jure* protections, legal scholars and practitioners as well as journalists and NGOs have proposed a range of concrete tools, ideas and reforms to enhance the protection of journalists and possibly create additional provisions.

## V. Enhancing Journalists' Protection in Armed Conflicts

### A. Proposals for Enhanced Protection

In relation to enhancing journalists' legal as well as practical protection in armed conflicts, the great bulk of suggestions can mainly be categorised into six concrete proposals to improve journalists' current situation:

#### 1. Enhanced Ratification of the Additional Protocols

A general suggestion is that States should be urged to ratify the APs in order to provide better protection in IACs and NIACs.<sup>138</sup> The claim is that the APs are not binding on States who have not ratified them, and therefore do not have the same weight and significance as the universally applicable GCs.

However, the fact that the APs have not been signed by all States does not necessarily impede the protection afforded to journalists. Such protection is considered a given, because as established earlier in this article, the protection of journalists engaged in dangerous missions in armed conflicts is in fact customary international law. Thus, it applies universally and consistently and addresses the protection of journalists both in case of attacks and arrests.

Therefore, this proposal does not necessarily improve, *de jure* or *de facto*, the situation of journalists in armed conflicts, but can be beneficial as part of an awareness and education campaign to clarify the universal nature of journalists' protection.

#### 2. Reinforced Protection by an International Instrument

Another rather general proposal is most notably advanced by Alexandre Balguy-Gallois, Legal Adviser to RSF and Professor of IHL, namely to reinforces existing protections for journalists. However, there is no consensus on what an additional instrument for the protection of journalists should look like and which special protections it should encompass. Balguy-Gallois' efforts, for example, are geared towards summarising existing protections into one coherent and overall document, mainly for the purposes of raising awareness and clarifying potential ambiguities.<sup>139</sup>

In fact, as established above, the different protection of journalists and war correspondents and the varying provisions relating to IACs and NIACs are confusing and would benefit from a precise and coherent document. Such could reinforce protections that are applicable to IACs as well as NIACs and could address the increasing dangers that journalists face in the latter. Moreover, it could outline the difference in protection between war correspondents and journalists or could alternatively also be used to eliminate the difference in protection. By clarifying, reinforcing and potentially adding new provisions, this document would certainly improve the current legal regime. In addition, it could possibly contribute to a better understanding, resulting in enhanced implementation of the law, at least in relation to those attacks and arrests that are non-targeted.

However, it is doubtful how far such a document is actually feasible in the sense of being a legal text. It is questionable whether States would sign and ratify yet another legal instrument, even with knowledge of the unlikelihood of it becoming universal. It appears that instead, non-legal means that do not require the binding ratification of States are more likely to succeed on an international scale. This could for example be a declaration aimed at restating and clarifying the current law

<sup>138</sup> Lady H Fox QC as quoted in Dinstein (n 28) 484.

<sup>139</sup> The UN already proposed such an international instrument potentially outside the scope of IHL in its 1975 Draft UN Convention. See also Balguy-Gallois (n 29) 65-66.

and at informing militaries, governments and journalists about the essential role of the media, its missions and protections. Such an effort should be supported by a universal and coherent awareness and education campaign led by principal journalist NGOs.

### 3. Adoption of a Special Status

Moreover, another proposal is the creation of a special protective status for journalists, similar to that afforded to medical personnel, civil defence staff and by implication, delegates of the ICRC and religious personnel.<sup>140</sup> This suggestion is highly controversial, as IHL only distinguishes between combatants and non-combatants to facilitate lawful and focused targeting during the chaos of armed conflicts.

The argument is made that as journalists are increasingly directly exposed to the dangers of armed conflicts and in light of their vital role in society, they should also be afforded special protection; and allocating a special status is the best manner to achieve this. Indeed, journalists are, due to the nature of their work and their *bona fide* mission in conflict zones, within or near military objectives. This consequent proximity to the scenes of conflict exposes them to more dangers of armed conflict than ordinary civilians.<sup>141</sup> Moreover, their protection is especially important in relation to their essential role as a witness of the armed conflict and as a watchdog over the government and military.

However, it can be argued that, for example, humanitarian personnel are exposed to greater and more imminent risks in light of their direct exposure to the dangers of armed conflicts when rescuing individuals in peril. Further, they occupy an essential humanitarian role by caring for the wounded and sick and providing relief for victims, something that cannot be claimed to be done to the same extent by journalists.<sup>142</sup> Even though journalists are in fact essential to armed conflicts, their role in protecting and saving individuals cannot be compared to that of humanitarian aid personnel.

One also has to realise that yet another special status will increasingly blur the principle of distinction, enhance misunderstandings and possibly even devalue the protection afforded to humanitarian personnel.<sup>143</sup> Furthermore, it can unfortunately not be assumed that every journalist is operating in the best interest of the public. Due to war correspondents and embedded reporters being sanctioned by their own government and/or military, they are often incapable and/or unwilling to tell the whole truth and potentially engage in one-sided reporting. Thus, affording such persons with a special status similar to that provided to persons caring for victims of armed conflicts appears odd and not in line with the object of IHL to protect those who are in peril, and consequently also those that relieve the former from such situations.

The creation of a special status for journalists is arguably the foundation for the resolution of many gaps and discrepancies within IHL. The introduction of a new protective status is an opportunity to eliminate any unfounded differences between the types of journalists and also a possibility to erase the discrepancies between journalists' protections in IACs and NIACs.<sup>144</sup> However, it is also apparent that special protection can only be successfully implemented if journalists are clearly distinguishable from civilians in the field. This proposal is therefore dependent on the establishment of a reliable system of accreditation and the adoption of a distinct emblem.<sup>145</sup>

### 4. Improved Identification

The efforts geared towards facilitating enhanced identification of journalists in armed conflicts can be divided into two ideas:<sup>146</sup> the carrying of mandatory identity cards and the creation of a distinct emblem.

<sup>140</sup> The UN introduced, in its Resolution 2854 (XXVI) in 1971, the idea of granting journalists a special, distinct legal status, even though such was rejected in 1977. See also B Lempen quoted in Lisosky and Henrichsen *War on Words* (n9); A Mukherjee, 'International Protection of Journalists: Problem, Practice, and Prospects' (1994) 11 Arizona Journal of International and Comparative Law 339, 365; Dinstein (n 28) is inclined to adopt this viewpoint only to the extent that it is supported by a clear tool for identifying journalists; H Fujita and Judge F Pocar as quoted in Dinstein (n 28) 495, 509.

<sup>141</sup> Dinstein (n 28) 457, 460; Lempen quoted in Lisosky and Henrichsen, *War on Words* (n 9) 195-196.

<sup>142</sup> Gasser (n 17) 379-380; Saul (n 17) 124-125.

<sup>143</sup> Although such was not the case in relation to the relatively new special protection conferred upon civil defence personnel in AP I in 1977. See Dinstein (n 28) 470.

<sup>144</sup> See the advantages and disadvantages outlined in Mukherjee, 'International Protection' (n 140) 344-346.

<sup>145</sup> Dinstein (n 28) 470.

<sup>146</sup> Contentions regarding the non-mandatory nature of identity cards arose during the Diplomatic Conference; the 2004 *Geneva Declaration* (n 64) invited the INSI and PEC to establish an expert committee to report on the possible need for establishing an international convention dealing with the protection of journalists and the creation of an emblem. See the 2007 Draft Convention and draft emblem of the PEC (n 30). H Fujita supports mandatory identity cards as long as the

Although IHL provides for the possibility of issuing and carrying an identity card under Article 79(3) AP I and determines such as mandatory for war correspondents, proposals have been made that this should become obligatory also for independent journalists. This is mainly founded on the belief that identity cards lead to better identification and consequently protection of journalists. Indeed, making the carrying of identity cards obligatory has the advantage that in case of arrest, all journalists can identify themselves as non-combatants and/or as persons accompanying the military to receive the respective humane treatment according to domestic law, human rights and IHL. This eliminates any uncertainties as to how journalists are to be treated upon arrest.<sup>147</sup>

However, it also has to be noted that in light of the increase of journalists being deliberately targeted and mistreated for their professional activities, identity cards can have detrimental effects, in particular the identifying of journalists as unwanted witnesses. Moreover, if identity cards become mandatory, journalists will be dependent on their issuance to be able to report from war zones. Dependence on the issuing authority possibly results in an arbitrary selection process of favourable media. Such a dependency on the government, military or any other authority is certainly not in the best interest of freedom of expression, infringes honest, balanced and informative reporting and contradicts the media's watchdog role.<sup>148</sup>

Further, if identity cards are only issued to official and full-time employed journalists, independent and freelance blog-writers will continue facing the same dangers and be protected by the same provisions as ordinary citizens, despite the similarly dangerous nature of their work. In the future, this may discourage highly valuable alternative and direct sources from exercising their essential function in society, which would be detrimental to a neutral and well-balanced media. In the same context, such a lack of protection may also have chilling effects on media-active citizens who are so far not considered occupational journalists but whose reports, stories, pictures and footage are often used by various media outlets. Nevertheless, legal protection other than that afforded to ordinary citizens is rather unrealistic, due to the fact that virtually any person can blog, publish information and pictures, and/or forward such to media outlets at any point. Although individuals may go to great (and dangerous) lengths to provide information, this does not qualify them as 'occupational journalists', who are obliged to do so by occupation and who hence deserve special protection.

Additionally, it has to be considered that any official identity card is of no value if the authority by which the journalist is captured does not formally recognise it. Thus, in order for an identity card to potentially protect journalists, the contracting government has to undertake an obligation to recognise these identities and to afford the according protections. This is especially important when considering that governments may not recognise foreign military or governments as credible issuing authorities.

The second suggestion focuses on the creation of a clearly visible and distinctive emblem. This is mainly supported by the PEC, which believes that the carrying of an emblem decreases journalists' deaths resulting from lack of identification and recognition.<sup>149</sup> Overall, this brings about much of the same advantages and disadvantages as the mandatory carrying of identity cards. Naturally, the accidental targeting of journalists will decrease if they wear uniforms with a clearly visible and distinguishable emblem.

Contrarily, by becoming clearly identifiable, journalists are potentially put under even greater danger, especially in sight of the rise of deliberate attacks on this profession.<sup>150</sup> Furthermore, 'mandatory' wearing of an emblem is contrary to the media's role as fourth estate and its perceived autonomy from the government and military, as it introduces a system of licensing.<sup>151</sup> This raises further concerns about the possibility of misusing protective emblems and hence complicating the practical protection of journalists.<sup>152</sup>

loss of such does not result in the loss of status as civilian, as quoted in Dinstein (n 28) 469, 498-499.

147 Mukherjee, 'Protection of Journalists under International Humanitarian Law' (n 5).

148 Mukherjee, 'International Protection' (n 140) 366-367; see the Council of Europe's Committee of Ministers, Recommendation No R 96(4) of 3 May 1996, Principle 11. It would be necessary to establish one central authority that is equipped with the responsibility of issuing such cards.

149 This was already proposed in the Draft UN Convention of 1975 and is also supported by H Fujita and to a certain extent by Judge F Pocar. See survey in Dinstein (n 28) 478; the PEC's 2007 Draft Convention envisages an orange circle with the words PRESS in black capital letters. PEC, 'Draft proposal for International Convention' (n 30); see also Lisosky and Henrichsen (n 15) 138-143.

150 CPJ, INSI as well as numerous news stations argue against the use of emblems for exactly these reasons; Dinstein (n 28) 479 cites Lady H Fox QC and Sir Judge K Keith QC; Kagan and Durham (n 4) 109; Lisosky and Henrichsen (n 15) 140-143; Saul (n 17) 125-126.

151 Lisosky and Henrichsen, *War on Words* (n 9) 197.

152 Dinstein (n 28) 465-467.

The introduction of a special protective emblem is ‘contingent on the adoption by States of an Additional Protocol to the Geneva Convention’,<sup>153</sup> similar to AP III of 2005 introducing the Red Crystal emblem. It is questionable whether States are willing to ratify yet another AP, and it is even more doubtful whether it could ever reach universal application other than by evolving into customary international law over a substantive period of time.

Even if an emblem is introduced, the protection of journalists will not *per se* emanate from it but from their protection as civilians, as is the case with medical and religious personnel carrying distinct emblems. Failing to wear an emblem does not diminish protection, while wearing it does not enhance it *per se*. Thus, the benefits of a special and distinctive emblem are limited to the predictable decrease of indiscriminate and accidental attacks.

With regard to the proposal of making journalists more clearly identifiable, it has to be noted that this would certainly diminish misunderstandings as to who is a journalist. Direct participation, such as the mistaking of a camera for a weapon, the misjudging of investigative work for spying and the misinterpretation of private escorts as combatants, would no longer be mere discrepancies. However, neither of the proposals would be effective in cases of deliberate attacks on journalists. They also raise questions of whether both war correspondents and independent journalists should be equipped with the same identity card and emblem, and how they can be told apart with regard to POW status only being afforded to the former. For this proposal to become practicable and feasible, it has to be supplemented by an alternative suggestion for protection in case of deliberate attacks and has to be based on a clearly visible and identifiable distinction between different types of journalists until separate status is created.

## 5. Incorporation as a War Crime under the Rome Statute

Another concrete and highly debated proposal is that of most notably Geoffrey Robertson QC, who is at the forefront of legal scholars and practitioners arguing that attacks on journalists should be specifically mentioned as a war crime under Articles 8(2)(b) and (c) Rome Statute (‘RS’) of the International Criminal Court (‘ICC’).<sup>154</sup> These provisions recognise the illegality of attacking civilians not taking part in hostilities in IACs and NIACs respectively. In fact, the attacking of journalists who are protected as civilians is already a war crime in the body of IHL under Article 85(3)(e) AP I. However, Robertson argues that:

the deliberate murder of a journalist for reporting in a conflict zone should be a specific war crime. Of course, it is a crime to kill civilians, and journalists count as civilians. But they are not killed because they are civilians but because they are journalists.<sup>155</sup>

Article 8 RS does not refer to journalists in its list of war crimes and it is in fact a valuable argument that with the increasing importance of journalists in armed conflicts, a specific recognition of the unlawfulness of their targeting should be introduced. This argument gains importance when considering that since 1992, 587 deaths of journalists have never been investigated, prosecuted and/or punished and hence have resulted in complete impunity,<sup>156</sup> cumulating in roughly 62 per cent of the overall 954 journalists killed.<sup>157</sup> If special protection in form of directly applicable protective measures is not possible, why not reduce the number of attacks on journalists by the deterring effect of international criminalisation?

It is arguable that regardless of a specific mentioning of attacks on journalists as a separate war crime in the RS, journalists are protected as civilians and hence indirectly included in Article 8 RS. This would result in the additional incorporation having more of a symbolic character than one actually resulting in separate investigation, prosecution and/or punishment. Nonetheless, the specific mentioning of attacking journalists as a crime will vest it with expressiveness, which certainly reinforces the interdiction and criminal nature of targeting journalists in armed conflicts, eliminating any justifications on the basis of misunderstanding. Why not resort to international criminal law to expressively outlaw attacks on journalists if such is not possible within the confines of IHL?

<sup>153</sup> *ibid* 465.

<sup>154</sup> He is joined by A Nicol and H Fujita. See Dinstein (n 28) 480; Robertson and Nicol (n 29).

<sup>155</sup> G Coughlan, ‘Should killing journalists be a war crime?’ *Radio Netherlands World Wide* (Hilversum, 2 September 2011) para 3 <<http://www.rnw.nl/international-justice/article/should-killing-journalists-be-a-war-crime>> accessed 3 October 2012.

<sup>156</sup> ‘587 Journalists Killed with Complete Impunity since 1992’ (CPJ) <<http://www.cpj.org/killed/impunity.php>> accessed 28 November 2012; Smyth (n 22). Naturally, in order to establish the actual legal classification of the death, a review of the cases by an official legal institution, rather than by a journalist NGO, is necessary.

<sup>157</sup> These do not only refer to journalists killed in armed conflicts. Also consult CPJ, *Getting Away with Murder, CPJ’s Impunity Index*, 2012; UNESCO, ‘Press Freedom’ (n 16).

By specifically mentioning journalists as a separate category, this would introduce a difference in the expressive *de jure* protections under IHL and international criminal law. Despite possibly leading to additional confusions on whether journalists are afforded special protection, it does not change the actual legal protections, but solely reinforces such under a separate legal regime. By supporting this with a coherent and universal awareness and education campaign, this could lead to greater understanding of the explicit criminal nature of attacking journalists.

However, it has to be noted that even if attacks on journalists are incorporated under Article 8 RS, doubts remain whether murders of individual journalists meet the threshold required for war crimes. The threshold is, according to Article 8(1) RS, that the act be committed ‘as part of a plan or policy, or as part of a larger scale commission of such crimes’. Although the wording is accompanied by the term ‘in particular’, which indicates that this is not a strict requirement, the ICC has been focusing on large-scale cases and is unlikely to take into consideration a case concerning an isolated death of a journalist. This mostly eliminates incidental or individual attacks and primarily applies to those that are deliberate as well as repetitive, and/or part of a clear pattern. In relation to the fact that States Parties who have ratified the RS are under an obligation to prosecute those responsible for international crimes in national courts,<sup>158</sup> it appears that single and/or isolated casualties of journalists will in the future rather be adjudicated on a national level. In this regard, some States Parties to the RS have already created domestic legislation allowing for complementarity for the prosecution of RS crimes on a national level.<sup>159</sup> This emphasises the importance that national jurisdictions play in the protection of journalists.<sup>160</sup>

Additionally, and from a more logistical perspective, it is questionable whether the Assembly of States Parties to the ICC would be willing to re-negotiate the RS’ provisions. The reaching of consensus at the Rome conference was highly difficult and a long process. Amending provisions within the RS would require yet another consensus or at least a two-thirds majority.<sup>161</sup> The prevalent controversies surrounding the issue of special protection of journalists would make such a majority difficult.

Finally, because it comes into play after journalists have been mistreated, attacked and even killed, this proposal certainly addresses the issue of omnipresent impunity. However, in relation to *de facto* physical protection, it can only be viewed as an additional tool with regard to its intended deterrent effect. It may be aimed at discouraging future attacks on journalists by explicitly stating their criminal nature, but actual enhanced physical protection is dependent on a complementary proposal.

## 6. Advocacy, Mitigation and Education

Lisosky and Henrichsen propose a practical approach, namely to enhance journalists’ protection by means of advocacy, mitigation and education.<sup>162</sup> By ‘advocate’ they refer to collecting and disseminating data, putting increasing pressure on governments and international bodies to reduce impunity, creating a network of protection, exercising economic and financial pressure by tying the right to freedom of expression to aid from donor nations, and creating partnership organisations and international alliances for victim journalists.<sup>163</sup> Some of these valuable ideas are already put into action by a variety of journalist NGOs, however, a more collective and unified effort to enhance universal recognition of the problem is needed to improve *de facto* implementation.

In relation to ‘mitigate’ they refer to proposals such as hostile environment training, trauma and psychological training, updated information intelligence between journalist agencies and the establishment of an information forum on crisis situations.<sup>164</sup> Many casualties occur due to lack of information, lack of knowledge or misbehaviour and it appears that training and better cooperation are crucial. Both could ensure that journalists are physically and mentally well prepared to operate under extreme circumstances, as well as sufficiently informed about the character of their missions, the environment they operate in and precarious conditions.

158 See RS, preamble, para 6.

159 See ie the United Kingdom’s International Criminal Court Act 2001, 11 May 2001 (entered into force 1 September 2001) 2001 Chapter 17; Germany’s *Gesetz zur Ausführung des Römischen Statuts des Internationalen Strafgerichtshofes* vom 17. Juli 1998, 21 June 2002 (published 28 June 2002), Bonn: Bundesgesetzblatt Jahrgang 2002 Teil I Nr. 41; the Netherlands’ *Rijkswet van 20 juni 2002 tot uitvoering van het Statuut van het Internationaal Strafhof en de tenuitvoerlegging van zijn vonnissen*, Staatsblad (2002) 314.

160 It also highlights the Prosecutor’s positive approach to complementarity, encouraging ‘genuine national proceedings’, see ICC Office of the Prosecutor, ‘Prosecutorial Strategy 2009-2012’ (ICC, 1 February 2010) paras 16-17.

161 RS, art 121.

162 Lisosky and Henrichsen, *War on Words* (n 9) 178 ff.

163 ibid 179-186.

164 ibid 186-190.

Finally, under the term 'educate' Lisosky and Henrichsen summarise the proposals for a comprehensive media education program to educate society and military about the value and role of journalists as well as to train journalists on conflict theories. They further advance the idea of safety trainings as part of the education at journalism school.<sup>165</sup> These proposals would certainly result in a greater awareness and respect for journalists. Educating journalists in relation to armed conflicts and the applicable law could increasingly prevent casualties caused by recklessness or behaviour provoking adverse actions to their protective status.

This three-pronged strategy appears suitable as a practical approach to reducing *de facto* disrespect or lack of knowledge of IHL protections of journalists on a short, as well as long term. It may raise awareness of the illegality of attacking journalists and as a result possibly reduce prevalent impunity by means of transparency and pressure. However, it must also be stated that deliberate attacks on journalists not based on misunderstandings or misapprehension, are unlikely to be decreased with such a strategy and require additional means of protection.

To conclude, in relation to the proposals put forth by the international community, it is apparent that as Amit Mukherjee, Assistant Professor in Political Science, points out, the current approaches to advanced protection of journalists are 'disjointed' and 'without a clear focus'.<sup>166</sup> The proposals all constitute diverging yet complementary ideas and lack a combined and coherent effort to collectively protect journalists. Most proposals are dependent on each other and rather ineffective when introduced solely, and therefore, a coherent and universal effort is essential to the success of protecting journalists.

## VI. Recommendations and Conclusions

As was elaborated on at the beginning of this article, media, and hence also journalists, occupy an essential role in society. They stand for human rights such as freedom of expression, they are witnesses to injustices worldwide and they function as a watchdog for governments and militaries misusing their power. This essential role is, however, increasingly endangered in armed conflicts by the rapidly changing nature of warfare, continuously rising demands of audiences and the growing fear of the power of media. Tight budgets of media organisations and highly partisan militaries and governments have aggravated the protection of journalists and exacerbated the conditions under which they operate in conflicts worldwide.

Due to recognition of the increasing threats and dangers that journalists face in armed conflicts, the topic of providing special protection for journalists has recently re-gained importance. The international community of legal scholars, practitioners, journalists and media NGOs has provided a variety of proposals on how to better safeguard journalists in the future. The majority of the proposals outlined are based on the idea that journalists are worthy of protection separate from that of civilians. These are, however, for the reasons mentioned above, difficult to realise, imply vast disadvantages and do not adequately address the ambiguities within IHL when implemented individually. In relation to improved *de jure* protection it is important to note that journalists do in fact enjoy the best legal protection they can, namely as civilians and in some cases additionally as POWs. Enhancing this protection could only be achieved by the creation of a special status and possibly a separate international (legal) document. However, this is rather unlikely to occur in the form of a binding text, at least in the near future. Focusing solely on enhanced legal protection does not address issues of better *de facto* protection, especially with regard to the common nature of deliberate attacks, misunderstandings about the media's role and ignorance or lack of knowledge of the law.

Thus, instead of adding yet another *de jure* provision on the protection of journalists, which is likely to be ignored or misunderstood in the same way, this article has identified a more practical hands-on approach, focusing on the immediate reduction of attacks and arrests on journalists, as most adequate. In this regard, Lisosky's and Henrichsen's proposal for increased and improved advocacy, mitigation and education appears to be a promising solution.

Therefore, the first recommendation is the creation of a universal, coherent and comprehensive awareness and education campaign. This should be led collectively by major journalist NGOs, news outlets, scholars and practitioners to educate governments, militaries and society about the role of the media, its benefits and how journalists ought to be protected in armed conflicts. Although this will certainly not eliminate all casualties, and especially not those that are deliberate, it will

<sup>165</sup> ibid 190-194.

<sup>166</sup> Mukherjee, 'International Protection' (n 140) 346.

reduce incidental ones and those that occur due to misunderstandings or misapprehension of the role of journalists and their legal protections.

Such a campaign must naturally be complemented by efforts from the journalists themselves, who ought to respect their role in wars and must behave accordingly. Journalists who are about to be deployed to armed conflicts should be educated in relation to their responsibilities, forbidden actions and protections afforded by IHL. They should receive frequent training in respect to the dangers and threats and be provided with a code of conduct, such as the RSF's handbook. This bilateral approach will ensure greater understanding and respect from all parties involved. After all, journalists are also responsible for their own safety and must under all circumstances facilitate their distinction from combatants as well as refrain from any actions adverse to their status as civilians.

Another recommendation is the creation of an accompanying document to the awareness and education campaign, for example in the form of a declaration containing an overview of the applicable principles and a set of clarifications of contested issues, such as: who is a journalist; how are they distinctively protected in IACs and NIACs; what types of journalists are afforded what protection; which alternative resources may they use for their own protection; and what does direct participation entail. This document would restate and clarify the existing law rather than introduce new provisions and would ideally be officially adopted by the UNGA to emphasise its validity and importance. A declaration could initially be drafted and introduced by an international conference on the protection of journalists, something which should be scheduled frequently to re-examine the changing nature of their working environment, the emergence of new forms of journalism and the resulting dangers. This should be complemented by the continuous publishing of accurate statistics, which illustrate the (lack of) protection afforded to societies' essential fourth estate.

Finally, it is recommended that rather than trying to amend the vast legal regime of international criminal law under complicated circumstances and in light of the likelihood that individual cases would rarely meet the required threshold on the international level, this article favours the strengthening of national law. Domestic laws should reinforce the expressiveness of the punitive nature of attacks on journalists, the requirement to investigate, prosecute and punish any unlawful arrests and attacks and the criminalisation of any such unlawful behaviour. Despite this article's focus on IHL, it has become apparent that the protection of journalists also enters into complementing legal spheres, such as national legal systems, human rights and international criminal law.

Overall, it must be realised that all dangers and threats can never be completely circumvented or eliminated and that journalists will remain famous and effective targets in the future, not least due to the power of the words and images they distribute. It is thus also up to the demanding audiences at home to realise that the protection of journalists is essential, and that they cannot demand the impossible. The approach to enhancing journalists' protection in the future is an all-encompassing and comprehensive responsibility, which cannot be satisfactorily executed by one entity, but must rather evolve into a common mission pursued by governments, militaries, journalists, media NGOs and society.

As this article has shown, the topic of journalist protection is a vast and multi-faceted one, which deserves additional and continued attention. It has not been the focus of this article to evaluate how journalists who are engaged in dangerous situations that do not reach the threshold of armed conflicts are protected. Future research into the protection of journalists in these so-called 'hot areas' and in cases of political and criminal violence would be beneficial, especially with regard to the overarching dangers for local media personnel, which are increasingly murdered in numerous countries for reasons of their influence and power. ■