

I. Protection of Journalists and Media Professionals in Time of Armed Conflict

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[**Source:** “Protection des journalistes et des médias en période de conflit armé,” ALEXANDRE BALGUYGALLOIS, IRRIC, March 2004, Vol. 86 No. 853, pp. 37-68; available on <http://www.icrc.org>; original in French; unofficial translation. Footnotes omitted.]

The number of journalists killed in the world in 2003 – 42 – is the highest since 1995. This figure can be largely explained by the recent military campaign in Iraq, which inflicted a proportionally higher number of casualties on journalists than on members of the coalition’s armed forces: 14 journalists and media personnel lost their lives, two went missing and a dozen or so were wounded while covering the conflict and its aftermath. In recent years, one might also mention the deliberate targeting of journalists in the occupied Palestinian territories, the bombing of the Serbian State radio and television (*Radio Televisija Srbije – RTS*) building in Belgrade by NATO forces in 1999 and the bombing, by US forces, of the Kabul and Baghdad offices of the Qatar-based Al-Jazeera television network.

The general trend is towards the deterioration of the working conditions of journalists in periods of armed conflict. “...Covering a war is becoming more and more dangerous for journalists. Added to the traditional dangers of war are the unpredictable hazards of bomb attacks, the use of more sophisticated weapons against which even the training and protection of journalists is ineffective – and belligerents who care more about winning the war of images than respecting the safety of media staff. So many factors that increase the risks of war reporting...”

This particularly worrying situation prompted Reporters Without Borders to issue a “Declaration on the safety of journalists and media personnel in situations involving armed conflict,” which was opened for signing on 20

January 2003 and revised on 8 January 2004 in light of the events in Iraq. The purpose of the declaration is to remind belligerents of the principles and rules of international humanitarian law that protect journalists and media personnel in periods of armed conflict and to improve the law by adapting it to present needs. In this regard, it would seem necessary to reaffirm the illegality of attacks on journalists and news media and to remind the authorities of their obligation to take precautions when preparing attacks that might affect them.

Illegality of attacks on journalists and news media

The illegality of attacks on journalists and news media derives from the protection granted to civilians and civilian objects under international humanitarian law, and from the fact that the media, even when used for propaganda purposes, cannot be considered as military objectives except in special cases. In other words, while no specific status exists for journalists and the equipment they use, both journalists and their equipment benefit from the general protection enjoyed by civilians and civilian objects unless they make an effective contribution to military action.

Protection of journalists as civilians

Without providing a precise definition of them, humanitarian law distinguishes between two categories of journalists working in conflict zones: war correspondents accredited to the armed forces and “independent” journalists. According to the *Dictionnaire de droit international public*, the former category comprises all “specialized journalists who, with the authorization and under the protection of a belligerent’s armed forces, are present on the theatre of operations with a view to providing information on events related to the hostilities.” This definition reflects a practice followed during the Second World War and the Korean War, when war correspondents wore uniforms, enjoyed officers’ privileges and were placed under the authority of the head of the military unit in which they were incorporated. As for the term “journalist,” it designates, according to a 1975 draft UN convention, “...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...”

Protection of war correspondents

War correspondents fall into the ill-defined category of “persons who accompany the armed forces without actually being members thereof .” Since they are not part of the armed forces, they enjoy civilian status and the protection derived from that status. Moreover, since they are, in a manner of speaking, associated with the war effort, they are entitled to prisoner-of-war status when they fall into the hands of the enemy, provided they have been duly authorized to accompany the armed forces.

Protection of journalists engaged in dangerous professional missions

The participants in the Diplomatic Conference held in Geneva from 1974 to 1977 felt that in order to better respond to the needs of their time it would be advisable to include a special provision on “measures of

protection for journalists” in Protocol I to supplement Article 4 (A) (4) of the Third Geneva Convention. The resulting provision – Article 79 – does not change the regime applicable to war correspondents. [...]

Article 79 formally states that journalists engaged in dangerous professional missions in zones of armed conflict are civilians within the meaning of Article 50 (1). As such, they enjoy the full scope of protection granted to civilians under international humanitarian law. Journalists are thus protected both against the effects of hostilities and against arbitrary measures taken by a party to the conflict when they fall into that party's hands, either by being captured or being arrested. The framers of Protocol I did not wish to create a special status for journalists, since “... any increase in the number of persons with a special status, necessarily accompanied by an increase in protective signs, tends to weaken the protective value of each protected status already accepted...” The identity card mentioned in Article 79 (3) does not create a status for its holder, but merely “...attests to his status as a journalist.” It is therefore unnecessary to own such a card in order to enjoy the status of civilian. Moreover, while it is true that protection measures for journalists are only codified in the case of international conflicts (Protocol I), journalists also enjoy the protection granted to civilians in non-international armed conflicts. [...]

Protection of “embedded” journalists

Some ambiguity surrounds the status of “embedded” journalists, that is to say those who accompany military troops in wartime. Embedment is not a new phenomenon; what is new is the sheer scale on which it has been practiced since the 2003 conflict in Iraq. The fact that journalists were assigned to American and British combat units and agreed to conditions of incorporation that obliged them to stick with these units, which ensured their protection, would liken them to the war correspondents mentioned in the Third Geneva Convention. And indeed, the guidelines issued by the British Ministry of Defence regarding the media grant the status of prisoners of war to embedded journalists who are taken prisoner. According to unofficial sources, however, it would seem that the French military authorities consider “embeds” as “unilaterals” who are only entitled to civilian status, as stipulated in Article 79 of Protocol I. A clarification on this point would seem essential. [...]

The way in which “unilateral” journalists surround themselves with armed bodyguards can have dangerous consequences for all journalists. On 13 April 2003, the private security escort of a CNN crew on its way to Tikrit (northern Iraq) responded with an automatic weapon after the convoy came under fire at the entrance to the town. Some journalists are concerned by this new type of behaviour, which is contrary to all the rules of the profession: “Such a practice sets a dangerous precedent that could jeopardise all other journalists covering this war as well as others in the future,” said Reporters Without Borders secretary-general Robert Ménard. “There is a real risk that combatants will henceforth assume that all press vehicles are armed. Journalists can and must try to protect themselves by such methods as travelling in bulletproof vehicles and wearing bulletproof vests, but employing private security firms that do not hesitate to use their firearms just increases the confusion between reporters and combatants.”

Loss of protection

Under Articles 79.2 and 51.3 of Protocol I, journalists enjoy the protection afforded by international humanitarian law provided that they do not take a direct part in the hostilities. [...] According to the Commentary of Article 51.3, “direct participation in the hostilities” means “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.” The fact that a journalist engages in propaganda cannot be considered as direct participation (see below). It is only when a journalist takes a direct part in the hostilities that he loses his immunity and becomes a legitimate target. Once he ceases to do so, he recovers his right to protection against the effects of the hostilities. [...]

Protection of media facilities as civilian objects

Radio and television facilities are civilian objects and as such enjoy general protection. The prohibition on attacking civilian objects has been firmly established in international humanitarian law since the beginning of the twentieth century and was reaffirmed in 1977 Protocol I and in the Statute of the International Criminal Court.

In particular, it follows from the twofold obligation mentioned in Article 48 of Protocol I – namely, at all times to distinguish between civilian objects and military objectives and, accordingly, to direct operations only against the latter – that civilian objects, along with the civilian population, enjoy the general protection set out in Article 52. While Article 85 of the same Protocol makes it a war crime to attack civilians, no similar provision exists for civilian objects. It is, nonetheless, a war crime to attack certain objects to which special protection is afforded, namely works and installations containing dangerous forces, non-defended localities, demilitarized zones, historic monuments, works of art and places of worship. Protocol II grants no general protection to civilian objects; only certain objects, of particular importance to civilians, are entitled to specific protection under its provisions, that is to say medical units and transports, objects indispensable to the survival of the civilian population and cultural objects. [...]

Obligation to presume that civilian objects are being used for civilian purposes

In case of doubt, objects normally dedicated to civilian purposes, such as radio and television facilities, are to be presumed as being used for such purposes, as stipulated in Article 52.3 of Protocol I. [...]

Loss of protection for civilian objects

It clearly follows from the above-mentioned instruments of international humanitarian law that the immunity enjoyed by civilian objects and protected objects is not absolute and that such immunity is lost if these objects are used for hostile purposes. Civilian objects (ships, aircraft, vehicles and buildings) that contain military personnel, equipment or supplies or that in any way make a major contribution to the war effort,

incompatible with their status, constitute legitimate targets. [...] For example, if the facilities of the RTS building in Belgrade were really being used as radio relay stations and transmitters by the military and special police forces of the Federal Republic of Yugoslavia, the review committee set up by the International Criminal Tribunal for the Former Yugoslavia (ICTY) was right in concluding that they constituted legitimate military targets for NATO. [See Federal Republic of Yugoslavia, NATO Intervention]

Can media facilities constitute legitimate military objectives?

International humanitarian law requires attacks to be strictly limited to “military objectives.” Although the doctrine of “limited war” has now replaced the doctrine of “total war,” greatly reducing the category of “military objectives,” the objects that can be considered as such are still extremely numerous. According to the ICRC, the above-mentioned doctrine and the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, radio and television facilities may, under certain conditions, be included among them. [...]

Dual civilian and military use of media equipment and facilities

In today's highly technological society, dual civilian and military use is often made of goods and resources and this is not without consequences in terms of protection. Civilian objects (roads, schools, railways, etc.) that are temporarily put to military use or used both for civilian and for military purposes constitute legitimate targets. On 27 March 2003 coalition forces twice bombed the Ministry of Information building in Baghdad although it was known to shelter offices of the international media. On 8 April 2003, after a US tank fired on the Palestine Hotel, a gathering spot for the foreign press in Baghdad, a spokesman for the American Defense Department claimed that the hotel was a legitimate target since Iraqi officials had held meetings there 48 hours earlier. During NATO's air campaign in Yugoslavia, NATO representatives justified the bombing of the RTS building in terms of the dual use that had been made of it: in addition to their civilian use, RTS facilities were incorporated into the C3 (command, control and communications) network of the Serbian army. In its final report, the ICTY review committee stated that in so far as these facilities were used as transmitters by the armed forces, they constituted a military objective [See Federal Republic of Yugoslavia, NATO Intervention]. This conclusion seems to reflect both the spirit and letter of Protocol I: it is lawful to attack objects that are being put to dual use when the conditions of Article 5 (2) of Protocol I are met. Likewise, if, as a US spokesman claimed to justify the bombing of 12 November 2002, the building of the Arab Al-Jazeera television network in Kabul really sheltered offices belonging to Taliban forces and Al Qaeda operatives, then it was a legitimate target. Whatever the case may be, the obligations that belligerents have to take precautions are greater when the object is used for dual purposes.

Does the use of media facilities for propaganda purposes make legitimate targets of them?

During the 2003 military campaign in Iraq, the British media were attacked by certain ministers and members of Parliament who accused them of playing into the hands of the Iraqi propaganda machine. Four years earlier, various NATO representatives publicly justified the bombing of the RTS building in Belgrade in terms

of the wish to neutralize a propaganda tool. While there is no doubt that the RTS was used for propaganda purposes, Article 52 of Protocol I cannot reasonably be interpreted as meaning that this, in itself, could justify the military attack.

The ICTY commission adopted a firm and clear position in this regard. In its report, the commission states that the media cannot be considered as a “legitimate target” merely because they are disseminating propaganda, even though such an activity supports the war effort. It also specifies that civilian morale as such is not a “legitimate military objective.” The British Defence Doctrine, published in 1996, makes the same assertion, as does the report presented by Volker Krönig to the NATO Parliamentary Assembly in November 1999. This constitutes a break with the doctrine of “total war” – first described, with lucidity, by the Prussian general von Clausewitz in his treaty *On War* – according to which, to quote the famous words of Winston Churchill, “enemy morale is also a military objective.” If psychological harassment of the population were recognized as a legitimate war aim, no limits would be placed on violence, as was the case during the Second World War. That is why the following statement by Amnesty International can only meet with approval:

“Amnesty International recognizes that disrupting government propaganda may help to undermine the morale of the population and the armed forces, but believes that justifying an attack on a civilian facility on such grounds stretches the meaning of “effective contribution to military action” and “definite military advantage” [Article 52(2) of Protocol I] beyond the acceptable bounds of interpretation.”

Not all forms of propaganda are authorized, however. Propaganda that incites war crimes, acts of genocide or acts of violence is forbidden, and news media that disseminate such propaganda can become legitimate targets. “Whether the media constitutes a legitimate target group is a debatable issue. If the media is used to incite crimes, as in Rwanda, then it is a legitimate target...” It is not clearly established whether or not media that incite genocide, as Radio-Télévision Libre des Mille Collines and the newspaper *Kangura* did in Rwanda in 1994, constitute a legitimate target. A positive reply to this question may no doubt be found in an interpretation of Article 52 (2) of Protocol I or of the principle whereby protection is lost in the event of participation in the hostilities. The ICTY commission itself replies as follows: “If the media is used to incite crimes, as in Rwanda, it can become a legitimate military objective. It may also be argued that “hate media” constitute legitimate targets by virtue of the obligation to repress breaches of the Geneva Conventions (Articles 49/50/129/146 respectively of the four Geneva Conventions) and Protocol I (Article 85). Indeed, under common Article 1 of the Geneva Conventions and Protocol I, States Parties undertake to respect and “ensure respect” for these instruments.

Obligation to take precautionary measures when launching attacks that could affect journalists and news media

The lawfulness of an attack depends not only on the nature of the target – which must be a military objective – but also on whether the required precautions have been taken, in particular as regards respect for the

principle of proportionality and the obligation to give warning. In this regard, journalists and news media do not enjoy a particular status but benefit from the general protection against the effects of hostilities that Protocol I grants to civilians and civilian objects.

The principle of proportionality: a curb on immunity for journalists and media

[...] It was only in 1977 that [the principle of proportionality] was enshrined in a convention, namely in Articles 51 (5) (b) and 57 (2) (a) (iii) of Protocol I. This principle represents an attempt to reduce as much as possible the “collateral damage” caused by military operations. It provides the criterion that makes it possible to determine to what degree such damage can be justified under international humanitarian law: there must be a reasonable correlation between legitimate destruction and undesirable collateral effects. According to the principle of proportionality as set out in the above-mentioned articles, the accidental collateral effects of the attack, that is to say the incidental harmful effects on protected persons and property, must not be excessive in relation to the anticipated military advantage. [...]

Obligation to give advance warning of an attack

Although NATO contended that it had “made every possible effort to avoid civilian casualties and collateral damage” when bombing the RTS building, doubts were expressed about whether it had met its obligation to warn the civilian population in advance of the attack, as provided for under Article 57 (2) (c) of Protocol I (“effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit”). When the United States bombed the Baghdad offices of the Al-Jazeera and Abu Dhabi television networks on 8 April 2003, killing one journalist and wounding another, it would also seem that no advance warning of the attacks had been given to the journalists. [...]

Obligation to give “effective advance warning”

Protocol I requires that “effective advance warning” be given. According to Doswald-Beck, “common sense must be used in deciding whether and how to give warning, and the safety of the attacker will inevitably be taken into account.” The rule set out in Article 57 (2) (c) most certainly does not require that warning be given to the authorities concerned; a direct warning to the population – by means of air-dropped leaflets, radio or loudspeaker messages, etc., requesting civilians to remain at home or stay away from certain military objectives – must be considered as sufficiently effective. [...]

In 1987, lieutenant colonel Burrus M. Carnahan, of the US Joint Chiefs of Staff and Michael J. Matheson, deputy legal adviser to the US Department of State, expressed the opinion that the obligation to give warning was customary in character. This *opinio juris* is confirmed by the practice of a considerable number of States in international and internal armed conflicts. [...]

Adequacy of means

In a message to Amnesty International dated 17 May, NATO contended that it had made “every possible effort to avoid civilian casualties and collateral damage... “during the attack on RTS, in accordance with the

prescriptions of Article 57 (“Precautions in attack”) of Protocol I. Beyond the specific cases of RTS in Yugoslavia, Al-Jazeera in Afghanistan or Baghdad and the Palestinian radio-television offices in Ramallah, it may more generally be asked whether the bombing of radio-television facilities is the most adequate means to the sought end. According to Article 52.2 of Protocol I, the destruction of a military objective is not the only possible solution: it may be enough to capture or neutralize the objective. These other solutions may be justified from a military point of view in terms of economy and concentration of means, since the destruction of a military objective implies the destruction of materials and ammunition. But these solutions are justified above all from a humanitarian point of view, by making it possible to “minimize loss of civilian life” (Article 57.2 (a) (ii) of Protocol I).

For all these reasons, would it not be preferable to use other means than bombing whenever possible? [...]

Conclusion

It follows from the above that journalists and their equipment enjoy immunity, the former as civilians, the latter as a result of the general protection that international humanitarian law grants to civilian objects. However, this immunity is not absolute. Journalists are protected only as long as they do not take a direct part in the hostilities. News media, even when used for propaganda purposes, enjoy immunity from attacks, except when they are used for military purposes or to incite war crimes, genocide or acts of violence. However, even when an attack on news media may be justified for such reasons, every feasible precaution must be taken to avoid, or at least limit, loss of human life, injury to civilians and damage to civilian objects. [...]

II. UN Security Council Resolution on the Protection of Journalists during Armed Conflict

[Source: United Nations Security Council, Resolution 1738 (2006), 23 December 2006; available at <http://www.un.org>]

Resolution 1738 (2006)

Adopted by the Security Council at its 5613th meeting, on 23 December 2006

The Security Council,

[...]

Reaffirming that parties to an armed conflict bear the primary responsibility to take all feasible steps to ensure the protection of affected civilians,

Recalling the Geneva Conventions of 12 August 1949, in particular the Third Geneva Convention of 12 August 1949 on the treatment of prisoners of war, and the Additional Protocols of 8 June 1977, in particular

article 79 of the Additional Protocol I regarding the protection of journalists engaged in dangerous professional missions in areas of armed conflict,

Emphasizing that there are existing prohibitions under international humanitarian law against attacks intentionally directed against civilians, as such, which in situations of armed conflict constitute war crimes, and *recalling* the need for States to end impunity for such criminal acts,

Recalling that the States Parties to the Geneva Conventions have an obligation to search for persons alleged to have committed, or to have ordered to be committed a grave breach of these Conventions, and an obligation to try them before their own courts, regardless of their nationality, or may hand them over for trial to another concerned State provided this State has made out a *prima facie* case against the said persons,

[...]

Deeply concerned at the frequency of acts of violence in many parts of the world against journalists, media professionals and associated personnel in armed conflict, in particular deliberate attacks in violation of international humanitarian law,

Recognizing that the consideration of the issue of protection of journalists in armed conflict by the Security Council is based on the urgency and importance of this issue, and recognizing the valuable role that the Secretary-General can play in providing more information on this issue,

1. *Condemns* intentional attacks against journalists, media professionals and associated personnel, as such, in situations of armed conflict, and calls upon all parties to put an end to such practices;
2. *Recalls* in this regard that journalists, media professionals and associated personnel engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians and shall be respected and protected as such, provided that they take no action adversely affecting their status as civilians. This is without prejudice to the right of war correspondents accredited to the armed forces to the status of prisoners of war provided for in article 4.A.4 of the Third Geneva Convention;
3. *Recalls* also that media equipment and installations constitute civilian objects, and in this respect shall not be the object of attack or of reprisals, unless they are military objectives;
4. *Reaffirms* its condemnation of all incitements to violence against civilians in situations of armed conflict, further reaffirms the need to bring to justice, in accordance with applicable international law, individuals who incite such violence, and indicates its willingness, when authorizing missions, to consider, where appropriate, steps in response to media broadcast inciting genocide, crimes against humanity and serious violations of international humanitarian law;
5. *Recalls its demand* that all parties to an armed conflict comply fully with the obligations applicable to them under international law related to the protection of civilians in armed conflict, including journalists, media professionals and associated personnel;
6. *Urges* States and all other parties to an armed conflict to do their utmost to prevent violations of international humanitarian law against civilians, including journalists, media professionals and

associated personnel;

7. *Emphasizes* the responsibility of States to comply with the relevant obligations under international law to end impunity and to prosecute those responsible for serious violations of international humanitarian law;
8. *Urges* all parties involved in situations of armed conflict to respect the professional independence and rights of journalists, media professionals and associated personnel as civilians;
9. *Recalls* that the deliberate targeting of civilians and other protected persons, and the commission of systematic, flagrant and widespread violations of international humanitarian and human rights law in situations of armed conflict may constitute a threat to international peace and security, and *reaffirms in this regard its readiness* to consider such situations and, where necessary, to adopt appropriate steps;
10. *Invites* States which have not yet done so to consider becoming parties to the Additional Protocols I and II of 1977 to the Geneva Conventions at the earliest possible date;

[...]

Discussion

1. Would you consider that journalists on dangerous mission were adequately protected before the special provision, Art. 79 of Protocol I, was adopted?
2. Before Art. 79 on journalists, what was the situation in that regard? (HR, Art. 13; 1929 Geneva Convention, Art. 81; GC III, Art. 4(A)(4))
3. Does Art. 79 introduce any obligation for the parties to a conflict? Or does it introduce a right for journalists that would not exist without this provision? What is the benefit of that provision for journalists? Does it clarify the fact that they cannot be considered as spies? Does it protect their professional activities, namely their search for news? (GC IV, Art. 4; P I, Arts 46, 51 and 79)
4. What is the difference under IHL between war correspondents accompanying the armed forces and other journalists? Does IHL give them the same rights under IHL, whether they belong to the one category or the other? Do only “freelance journalists” come into the second category? Or also permanent media correspondents?
5. What are the rights under IHL of war correspondents accompanying the armed forces? What are the criteria they have to fulfil to be qualified as a war correspondent? What would happen if they do not fulfil those criteria? Is the ID card a prerequisite for a journalist to be entitled to POW status? Is that card still relevant under Art. 79 of Protocol I? Do you think that by making an explicit distinction between journalists engaged in dangerous missions and war correspondents, IHL broadens the protection of journalists? Or does it undermine their protection?
6. During the “*travaux préparatoires*” of Art. 79, the idea of special protection for journalists was put forward. Why was this idea rejected? Do you think that considering journalists as a special category of protected persons or providing them with a distinctive sign would give them better protection? Does Art. 79 of Protocol I clarify Art. 4(A)(4) of Convention III? What are the main rights of a journalist, other than a war correspondent covered by Convention III, who is detained during an international armed conflict? Do these rights differ from those of war correspondents covered by Convention III? Do you think that one category is more likely to be subjected to ill-treatment on being captured than the other?
7. If a journalist accompanies an army unit and is shot at by the enemy forces, would you consider this as a breach of IHL? Do the enemy forces have to take special care in a conflict to distinguish between combatants and journalists? Can military necessity justify the killing of a journalist?

8. Are journalists adequately protected in non-international armed conflicts? Are they civilians? Does the rule in Protocol I's Art. 79, stating that journalists in dangerous missions are considered at all times as civilians and therefore enjoy the same protection, also apply in non-international armed conflicts?
9. Has the 2003 war in Iraq and the unclear status of the "embedded" journalists made a clarification of the protection of journalists necessary? What consequences could the use of armed guards have for the status of journalists?
10. Should propaganda media be considered a legitimate target? Is the deliberate targeting of these facilities a violation of IHL? Where should the line be drawn between "hate media" and "normal" war propaganda? Is it possible to make such a distinction and target media in accordance with it? Is a journalist who encourages war crimes a legitimate target for an attack? Does everyone who commits war crimes lose protection against attacks?

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