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The International Legal Framework for the Protection of Journalists in Conflict Zones:

A Round Peg in a Square Hole?

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Declaration

This is to certify that the work contained within has been composed by me and is entirely my own work. No part of this thesis has been submitted for any other degree or professional qualification.

Signed:

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Abstract

Journalists reporting from conflict zones are increasingly at risk of injury or death. Not only are they at risk of becoming a casualty in the crossfire, they are now often directly targeted and killed because of their profession. The legal framework protecting journalists in conflict zones consists predominantly of International Humanitarian Law, supplemented by International Human Rights Law and International Criminal Law. The main body of law providing protection to journalists consists of the Geneva Conventions and their additional Protocols, which are now several decades old. Since their drafting, there have been significant changes in the way we conduct wars, as well as in the way journalists operate and report from conflict zones. This raises the question whether this legal framework is still suitable for the protection of journalists in contemporary conflicts.

This thesis confirms that the legal framework contains, at least in theory, a significant number of provisions that continue to provide protection for journalists in conflict zones. What is clear, however, is that there are significant differences in the protection awarded to journalists based on the type of journalist, for example whether they are embedded or function independently in conflict zones, the type of conflict they are covering and even their nationality. The result is a rather complicated legal framework that is not always easy to apply in practice.

It has been argued by the International Committee of the Red Cross, a view also reflected in most of the academic literature, that the protection offered by the current legal framework is adequate, but that the enforcement of it is lacking. This is considered the predominant reason why journalists reporting on conflicts currently face such significant risks to their safety. While this is clearly part of the problem, this thesis challenges the notion that the legal framework provides all necessary protection and that only through stronger enforcement can protection be increased. In particular, it suggests that this ignores the effect that clarity and the comprehensiveness of the framework can have on enforcement. Having explored the gaps and limitations in the existing law, this thesis sets out the case for introducing a

dedicated convention for the protection of journalists in conflict zones in order to clarify and streamline the current legal framework.

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1. Introduction

News reporting from conflict areas is becoming increasingly dangerous. Since the start of the war in Iraq in 2003, there has been a sharp increase in deaths amongst journalists. In 2013 alone, there were 70 known cases in which journalists were killed as a result of their work, which includes deaths on dangerous missions and deaths in crossfire.[1] This statistic does not include cases of killings where no motive could be confirmed, which suggests the actual number of work-related deaths may be considerably higher. Of those 70 cases where motive could be confirmed, the majority took place in conflict territories and 51% of the journalists who were killed were covering a war.[2] While conflict reporting is inherently dangerous due to the circumstances in which it takes place, a disconcertingly high percentage of deaths is not related to violence inherent to conflict, such as cross-fire. Journalists are increasingly targeted directly because of their work.[3] There appears to have been a significant shift in the culture of respect towards journalists that previously existed amongst combatants. Journalists have gone from being protected by the unwritten rule of 'don't shoot the journalist', to being a direct target in the hostilities.[4] The current legal framework protecting journalists in conflict zones is thus based upon a cultural outlook of respect for journalists, which no longer seems to exist.

Journalists play an essential role in society. They assist in the fulfilment of one of the key components of the right to freedom of expression, recognised in various human rights treaties: the right to receive information. This collective right "empowers populations through facilitating dialogue, participation and democracy".[5] However,

[1] Committee to Protect Journalists (CPJ), "70 Journalists Killed in 2013/Motive Confirmed" (2014), available at: http://cpj.org/killed/2013/. Other organisations provide slightly different numbers, such
[2] CPJ (2014).
[3] F Smyth "Iraq War and the News Media: A look inside the death toll" (18 March 2013) *CPJ*, available at: http://cpj.org/blog/2013/03/iraq-war-and-news-media-a-look-inside-the-death-to.php.
[4] See for example: H Tumber and F Webster, *Journalist under Fire: Information war and journalistic practices* (London: Sage Publications, 2006), p. 167; D Bennett, "The Life of a War Correspondent is Even Worse than You Think" (10 July 2013) *The Wire*, available at: http://www.thewire.com/global/2013/07/life-war-.correspondent/67038/.
[5] UNESCO, "The Safety of Journalists and the Danger of Impunity: Report by the Director-General" (27 March 2012) *International Programme for the Development of Communication*, available at:

journalism equally has the power to mislead and cause prejudice. The influential role journalists have in society is enhanced during conflict, when ordinary checks on government behaviour and breaches of law break down and most of the information that reaches local and international audiences comes through journalists, who can be the last observers present to witness and report on the conflict.[6]

The need to protect journalists has long been recognised by International Humanitarian Law (IHL). From the rise of the war correspondent during the Crimean War, IHL has attempted to provide protection to war correspondents. This protection has largely consisted of a single provision in the Geneva Conventions and other IHL treaties, which has seen little change from its first inclusion to the extensive revision of the Geneva Conventions in 1949.[7] The first real reconsideration of the protection offered to journalists came with Additional Protocol I (1977) to the Geneva Conventions,[8] which recognised that reporting practices had changed to such an extent during the numerous conflicts post-WWII that the inclusion of a new provision to protect journalists was required. At the same time, there was significant discussion as to whether journalists reporting on conflicts should be protected through their own international convention. This suggestion was abandoned in favour of including a new, dedicated, provision for the protection of journalists in Protocol I, as it was felt it would be quicker and more effective and would have the added advantage of ensuring journalists were made fully aware of IHL.[9] The suggestion of a dedicated convention has resurfaced several times over the last few decades, but has never resulted in significant efforts at the international level to create one.

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http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/images/Themes/Freedom_of_expression/Safety_Report_by%20DG_2012.pdf, p. 29.

[6] S Kagan and H Durham, "The Media and International Humanitarian Law: Legal protection for journalists" (2010) 16 *Pacific Journalism Review*, 96, p. 96.

[7] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949; Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949; Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 (hereafter, the Geneva Conventions (1949)).

[8] Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (hereafter, Protocol I).

[9] ICRC, "Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts", Geneva (1947-1977), Vol. VIII, CDDH/I/Sr 31, Para. 11.

Over the last decade the focus of providing additional protection to journalists has switched from creating a new dedicated convention to improving enforcement of the legal protection currently available to journalists. Crimes against journalists suffer from exceptionally high rates of impunity, with worldwide impunity levels fluctuating between roughly 85-95% over the last decade.[10] These statistics have influenced the idea that the legal framework for the protection of journalists in conflict zones provides sufficient protection, at least in theory, and that "the most serious deficiency is not a lack of rules, but a failure to implement existing rules and to systematically investigate, prosecute and punish violations".[11] This approach is strongly supported by the academic literature,[12] and most international efforts now focus on combatting impunity. Consequently, the International Committee for the Red Cross's (ICRC) four-year action plan for the implementation of humanitarian law, published in 2011, which calls for enhanced protection for journalists in conflict zones, does not suggest there is a need for a new treaty.[13] The United Nations' (UN) recent *Plan of Action on the Safety of Journalists and the Issue of Impunity*[14] similarly does not suggest significant revisions to the legal framework are required.

This thesis does not disagree with the strong international focus on combatting impunity to enhance the protection of journalists in conflict zones. It does, however,

[10] CPJ, "1062 Journalists Killed Since 1992" (2014), available at: http://cpj.org/killed/.
[11] Robin Geiss, a legal expert for the International Committee of the Red Cross (ICRC), considered this issue in a 2010 interview: R Geiss, "How does International Humanitarian Law Protect Journalists in Armed Conflict Situations?" (27 July 2010) *ICRC Interview*, available at: http://www.icrc.org/eng/resources/documents/interview/protection-journalists-interview-270710.htm.
[12] See for example: I Düsterhöft, "The Protection of Journalists in Armed Conflicts: How can they be better safeguarded?" (2013) 29 *Utrecht Journal of International and European Law*, 4; K Davies and E Crawford, "Legal Avenues for Ending Impunity for the Death of Journalists in Conflict Zones: Current and proposed international agreements" (2013) 7 *International Journal of Communication*, 2157; H-P Gasser, "The Journalist's Right to Information in Time of War and on Dangerous Missions" (2003) 6 *Yearbook of International Humanitarian Law* 367; K Dörmann,"International Humanitarian Law and the Protection of Media Professionals Working in Armed Conflicts" (2007) *ICRC*, available at: http://www.icrc.org/eng/resources/documents/article/other/media-protection-article-.htm.
[13] ICRC, "Four-Year Action Plan for the Implementation of International Humanitarian Law: Draft resolution of the 31st International Conference of the Red Cross and Red Crescent (28 November 2011), Doc. No. 311IC/22/5.1.3 DR, Annex I, objective 3, available at: http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-4year-action-plan-11-5-1-3-en.pdf.
[14] UNESCO, "UN Plan of Action on the Safety of Journalists and the Issue of Impunity" (2012) *International Programme for the Development of Communication*, CI-12/CONF.202/6.

take issue with the notion that there are no underlying issues with the current legal framework that require attention. As clearly articulated by the ICRC, above, the focus on combatting impunity is generally paired with the assertion that the legal framework is satisfactory and just not adequately enforced. This approach, however, potentially ignores one of the underlying causes of impunity: a lack of a clear and concise legal framework that can be easily implemented. The thesis will therefore explore the current international legal protection offered to journalists in conflict zones through IHL, International Human Rights Law (IHRL) and International Criminal Law (ICL) in order to ascertain whether the claim that there are no problems with the current legal framework for the protection of journalists in conflict zones is correct and, if not, to consider what further steps may be required.

1.1 Research context

There have been numerous suggestions as to how to address the increasing risks faced by journalists reporting from conflict zones. These include the creation of a distinctive emblem to identify journalists and avoid 'accidental targeting',[15] the explicit classification of deliberate attacks on journalists as a war crime under the Rome Statute of the International Criminal Court of 17 July 1998,[16] enhancing protection through advocacy and education,[17] and, more ambitious still, the creation of a dedicated instrument for the protection of journalists in conflict zones.[18]

[15] Though this suggestion had already been made during the drafting stages of Protocol I, the most ardent supporters, currently, of this proposal are the Press Emblem Campaign (http://www.pressemblem.ch/), further discussed in chapter 8 of this thesis.
[16] One of the strongest supporters of specific inclusion in the Rome Statute is Geoffrey Robertson QC, see: E Goetz, "On the Front Line of Accountability: Should the killing of journalists be a war crime?" (26 January 2011) *International Criminal Law Bureau*, available at: http://www.internationallawbureau.com/index.php/on-the-front-line-of-accountability-should-the-killing-of-journalists-be-a-war-crime/.
[17] This is strongly supported by a wide variety of actors and academics, concrete proposals focus on areas such as enhancing safety training and equipment for journalists, increasing knowledge of the current legal protection amongst different actors in conflict zones, etc.
[18] Such a convention was first mooted by the 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 and the suggestion has resurfaced periodically since.

As noted, the suggestion of a dedicated convention to address the risks journalist face when reporting from conflict zones is not new. It has resurfaced periodically since the 1970s when it was mooted through a UN draft convention. After the convention was replaced with the inclusion of a dedicated article in Protocol I, the suggestion has fallen out of fashion, largely due to the perceived difficulties of drafting and implementing international treaties. One of the few, relatively recent, proponents of the creation of a dedicated convention is Alexander Balguy Galois, who noted in 2004 that there is an evident need for such a convention in order:

> On the one hand to reaffirm those elements of humanitarian law that apply to journalists and media personnel, and thus to re-establish the authority of certain basic rules that are all too often flouted, and, on the other hand to improve existing law and adapt it to the requirements of today.[19]

Galois' article itself contains, however, few concrete suggestions as to how such a dedicated convention should look and there has been little interest in this solution over the last decade.[20] While some authors acknowledge that there may be grounds for amending and changing the current legal framework, the suggestion is generally discarded on the basis that attaining the necessary global agreement on international treaties is slow and generally suffers from a low success rate, without any engagement with the value and content of such a dedicated convention.[21] But is the mere difficulty of drafting and implementing international treaties sufficient justification for shifting focus away from the legal framework? Given the sharp rise in the number of deaths amongst journalists in various conflicts since the last

[19] A Balguy-Gallois, "The Protection of Journalists and News Media in Armed Conflicts" (2004) 86 *International Review of the Red Cross*, 37, p. 37. This article was partly a response to the declaration of Reporters without Borders "on the safety of journalists and media personnel in situations involving armed conflict".

[20] One notable exception is the Press Emblem Campaign (PEC), which is essentially trying to create a new convention, though the primary focus is on the creation of a protective emblem, see: (http://www.pressemblem.ch/).

[21] See for example: K Davies and E Crawford, "Legal Avenues for Ending Impunity for the Death of Journalists in Conflict Zones: Current and proposed international agreements" (2013) 7 *International Journal of Communication*, 2157, p. 2157; I Düsterhöft, "The Protection of Journalists in Armed Conflicts: How can they be better safeguarded?" (2013) 29 *Utrecht Journal of International and European Law*, 4, pp. 17-18; see generally on the issues of revising international law: M Evangelista and D Wippman (eds.), *New Wars, New Laws? Applying the laws of war in twenty-first century conflicts* (Ardsley (N.Y): Transnational Publishers, 2005).

outspoken support for the creation of a new international legal framework,[22] it is time to revisit the notion of a dedicated convention. After all, the current international legal framework forms the core for the protection of journalists in conflict zones and it is therefore illogical to attempt to address declining protection while ignoring potential issues with the underlying framework which provides the basis for that protection. This thesis will therefore contribute to the current research in not only setting out a case for renewing efforts towards creating a dedicated convention for the protection of journalists, but by setting out the approach such as convention should take to increase its chance of reaching international consensus and thus significant ratification, as well as the subject matter such a convention should address.

Currently, most journalists do not have a special status under international law. Though they are named as a category of persons, unlike for example medical personnel, the Geneva Conventions (1949) only provide them with the protection it provides to all civilians: they are classed as civilians and receive protection as such. But this status under international law is not necessarily a comfortable fit with the reality of conflict reporting. There are essentially two statuses under IHL, you are either a combatant or a civilian, but there is little in between. While, given those two options, journalist should therefore be classed as civilians in the context of IHL, equating them to 'ordinary' civilians, in terms of required protection under international law both ignores their function and their behaviour in conflict zones. As acknowledged by the commentary on Protocol I "The circumstances of armed conflict expose journalists exercising their profession in such a situation to dangers which often exceed the level of danger normally encountered by civilians."[23] Journalists are more likely to run towards the fighting than away from it, they have generally no interest in being removed from the conflict and seek to access areas ordinary civilians will often have no interest in accessing. Furthermore, they are

[22] The PEC were the last, or most recent, group to propose a dedicated convention for the protection of journalists in conflict zones in 2007, though their campaign is still ongoing, as will be discussed in more detail in chapter 8.
[23] H-P Gasser, "Article 79 – Measures of Protection for Journalists", in: Y Sandoz, C Swinarski and B Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff Publishers, 1987), para. 3245.

likely to collect large amounts of information, potentially from both sides of the conflict, which can be seen as suspicious behaviour by local authorities and combatants.[24] Yet they do not receive any specific protection under IHL. The legal framework currently presumes that journalists comfortably fit in the 'square hole' of general civilian protection and that this 'hole' provides sufficient guarantees to ensure their physical safety. But can we really fit journalists in the general protective legal framework of civilians in conflict zones, or are we trying to force a round peg in a square hole?

1.2 Research question

This thesis will review the legal framework protecting journalists in conflict zones, assess its strengths and weaknesses, evaluate aspects which are unclear, explore to what extent it falls short in providing the necessary protection and consider the scope for addressing any potential shortfalls through the creation of a dedicated convention for the protection of journalists. It will do this through the following research question:

> Is there scope for increasing the physical protection of journalists in conflict zones through amending the current international legal framework?

It is important to note that this thesis will be strictly concerned with the physical protection of journalists and will not consider wider issues such as freedom of speech and quality of reporting unless they impact on physical safety. While this is a significant limitation, it stems form the principle that we first must ensure that journalists can *physically* survive reporting from conflict zones, before we can engage with broader journalistic (content) issues. This is reflective of the approach taken by IHL, which solely concerns itself with the physical protection of journalists from the harmful effects of conflict and does not concern itself with the right to obtain and disseminate information.[25] This thesis thus aims to provide a base line for

[24] M Campbell, "Under Cover of Security, Governments Jail Journalists" (2013) *CPJ*, available at: http://www.cpj.org/2013/02/attacks-on-the-press-misusing-terror-laws.php.
[25] Gasser (1987), para. 3246.

protection, which solely seeks to protect the lives of journalists, on which further and wider protection subsequently can be built to improve issues relating to journalistic content and freedom of speech. This thesis is further limited to the approach taken to protecting journalists at the international level and does not significantly engage with domestic legislation.

1.3 Terminology

One of the challenges of discussing the protection of journalists under international law is that there is no single standard definition of the term 'journalist' in the international context. Different documents use different definitions and there is extensive discussion on who should and should not be included in the definition.[26] This thesis will discuss the definitions for the different legal framework where relevant, but will generally not attempt to provide a general definition of the term 'journalist'. It is sufficient to note here that where the term journalist is used in this thesis, this term includes media support staff, such as cameramen and technicians, and not just journalists themselves, which is in line with some of the more widely accepted international definitions of the term that will be discussed in this thesis.

This thesis considers different types of journalists in conflict zones. Based on their legal status and function it is possible to discern three distinct groups of journalists: war correspondents, (independent) journalists, and local journalists. This thesis will follow the legal terminology of the Geneva Conventions (1949) to distinguish these different categories of journalists. War correspondents are civilian journalists who travel with, and are accredited to, a military unit. As discussed in the next chapter, this has been the predominant reporting style up to WWII. Currently, reporters who are embedded with the military are generally placed in this category during international armed conflict, though there is some discussion as to the validity of this. Post-WWII a new style of reporting became popular amongst journalist: reporting on

[26] See for example: E Ugland and J Henderson, "Who Is a Journalist and Why Does it Matter" Disentangling the legal and ethical arguments" (2007) 22 *Journal of Mass Media Ethics*, 241; I Shapiro, "Why Democracies Need a Functional Test of Journalism Now More Than Ever" (2014) *Journalism Studies* (online).

a conflict by travelling independently through conflict territory. These journalists, now the majority, are generally simply referred to as 'journalists', though where necessary to differentiate this specific section of journalists from journalists in general, the term 'independent journalist' will be used in this thesis. While local journalists generally fall under the class of 'independent' journalists, they form a distinct category when discussing the protection of journalists under international law, as protection can differ based on nationality.

Arguably, there is a fourth category of journalists: military correspondents. Military correspondents are members of the armed forces that are acting as journalists in the military's own press corps. This thesis does not consider this particular group of journalists as their status is clear under international law and significantly different rules apply to them compared to the other groups of journalists. Military correspondents are full members of the armed forces and are therefore considered 'combatants' under the relevant legal framework, a status completely distinct from the civilian status of the other two groups of journalists, whose exact protection is subject to significant discussion.

The term 'conflict' is used to describe situations of armed violence, in preference to the term 'war'. This is in line with the approach of the ICRC, which avoids the use of the term as it generally has a political connotation and is more limited than the term 'conflict'.[27] The exact definition of this term depends on the legal document in question and its various definitions will be discussed in more detail in chapter 3 of this thesis.

1.4 Methodology and structure

This thesis comprises a legal study of the media. Due to its subject matter a wide variety of legal and non-legal sources are used, which differ significantly depending

[27] J Pictet, *The Geneva Conventions of 12 August 1949 : Commentary - Vol. 1, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Geneva: ICRC, 1952), p. 32.

on the topic under discussion. To place the development of the current legal framework into context use is made of historic social and legal secondary materials, dating back to the mid-19th century, when the first war correspondents emerged. For the discussion of independent journalists, material post 1950 is most relevant when independent reporting emerged as a practice in conflict zones. For the discussion of the legal framework and its application extensive use is made of both primary and secondary source material. In terms of primary sources, significant use is made of the Geneva Conventions (1949) and their Additional Protocols, various international human rights treaties, with a focus on the European Convention on Human Rights (1950) and the International Covenant on Civil and Political Rights (1966), case law of international courts and tribunals, such as the International Criminal Court, the International Court of Justice and the International Criminal Tribunal for the former Yugoslavia, the declarations and resolutions of various international bodies such as the United Nations and the Council of Europe and the *travaux préparatoires* of the Geneva Conventions. Secondary materials include the official commentary on the Geneva Conventions and Protocols, legal and social science academic writing, as well as policy documents and papers by various professional and civil society organisations, such as Reporters without Borders, the Committee to Protect Journalists and the International News Safety Institute.

To understand the current legal framework protecting journalists in conflict zones, it is essential to understand the motivation for the development of this framework. This thesis will therefore commences in chapter 2 with a brief history of the development of war reporting, starting from the Crimean War and the subsequent Brussels Declaration, which contained the first provision concerning war correspondents in an IHL treaty, as well as a brief history of the evolution of armed conflict itself. This is designed to help us understand those challenges journalists faced in the past and are facing now when reporting from conflict zones and how the legal framework has tried to respond to these challenges. The *travaux préparatoires* of article 79 of Protocol I, which recognised the need to supplement the traditional protection offered by IHL treaties in light of changing journalistic practice, are of particular interest here.

Chapter 3 considers the current legal framework of IHL, exploring the extent to which it provides protection to journalists in conflict zones. Both treaty-based IHL, which in this context consists of the Geneva Conventions (1949) and their Additional Protocols (1977), as well as customary IHL are considered here, the latter providing an insight into the extent to which customary law provides protection over and above that of the relevant IHL treaties. Customary IHL is generally considered to exist where *usus*, state practice and *opinio juris sive necessitatis,* the belief that this practice is necessary, required or prohibited (depending on the rule in question), can be demonstrated.[28] The existence of IHL is thus especially relevant here as customary law addressing issues not covered by the Geneva Conventions can signal potential international support for amending the current legal framework.

Chapter 4 reviews the protection offered by IHRL and ICL, noting that the application of both relies to a significant extent on state cooperation, which can limit their value in practice. An additional challenge is that a significant number of human rights can be derogated from or limited in times of war and other national emergencies. This chapter also considers the relationship between IHL and IHRL which can apply concurrently but also have the potential to contradict each other, leading to conflicting results when evaluating the legality of actions taken against journalists.

Chapter 5 moves beyond a theoretical study of the legal framework to consider the extent to which the various legal regimes offer practical protection to journalists in the field. It considers the application of IHL, IHRL and ICL by a variety of courts and international organisations. In addition it explores the limitations of the existing rules in regulating conduct and explores in detail some of the reasons for the high levels of impunity that exists in relation to crimes against journalists. In so doing, it hopes to enhance our understanding of the practical effect of the current legal framework and why it may fail to adequately protect journalists in practice.

[28] J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (Cambridge: Cambridge University Press, 2005), p. XXXVIII.

Chapter 6 explores the practical application of the current legal framework for journalists in more detail by considering the two different categories of journalists under the legal framework: war correspondents and independent journalists. It examines to what extent the legal protection covers journalists operating in modern conflicts, as well as the advantages and drawbacks of this protection. It further considers a number of concrete cases where journalists have been exposed to significant violence in conflict zones, in some cases resulting in death, and considers the extent to which the legal framework has the capability to shield journalists from these dangers.

Chapter 7 considers the situation where legal protection no longer applies by taking a closer look at the notion of 'direct participation' in hostilities by journalists and how media stations may become legitimate military targets, which can result in loss of protection under the legal framework, thus effectively allowing journalists to be direct (legal) targets of violence. It focuses on international practice, statements, guidance and case law to explore the extent to which reports in the media produced by journalists can be deemed to contribute to the hostilities. In particular, what type of reports fall within the protective scope of the legal framework and what types will result in a loss of protection?

Chapter 8 draws the research together by considering whether there is scope to address the existing gaps and deficiencies of the legal framework highlighted in previous chapters through the creation of a dedicated convention for the protection of journalists in conflict zones. It discusses some of the questions in terms of scope and content that must be taken into account in such a project and seeks to put forward provisions that strike a balance between an ideal level of protection for journalists and what is realistically possible in an international context. This is followed by a short conclusion on the practicality and feasibility of such a dedicated convention.

2. Historical background of conflict reporting and its protection under International Humanitarian Law

Journalists operating in conflict areas have long been offered (limited) protection by International Humanitarian Law (IHL) treaties. One of the first IHL provisions to specifically mention journalists operating in conflict zones can be found in the 1874 Brussels Declaration.[29] Since 1874 there have been significant changes to warfare, as well as to the ways journalists report on those wars to the audience at home. Important developments in IHL have followed the major conflicts in the 20th century, when the IHL framework often proved inadequate to regulate the conduct of hostilities.[30] Technological and scientific progress has changed the way wars are fought giving rise to situations and behaviour which were not always envisioned by the relevant legal framework. Both World War I and World War II led to substantial revisions in the Laws of War with the Geneva Conventions of 1929[31] and the Geneva Conventions of 1949.[32] The Additional Protocols of 1977[33] were added to deal with some of the challenges of conflict that had (partly) developed after the drafting of the Geneva Conventions of 1949 due to changes in warfare. The protection offered to journalists under IHL, however, did not change significantly under most of the substantial revisions and updates to the IHL framework. By the time the 1977 Protocols to the Geneva Convention were drafted, the situation for journalists in conflict zones had however changed enough to warrant a new provision in the

[29] Brussels Conference, Project of an International Declaration concerning the Laws and Customs of War, Brussels, 27 August 1874, discussed in more detail below.
[30] D Wippman, "Introduction: Do new wars call for new laws?" in: D Wippman and M Evangelista (eds.), *New Wars New Laws? Applying the laws of war in 21st century conflicts* (Ardsley: Transnational Publishers Inc., 2005), 1-30, p. 2.
[31] Convention Relative to the Treatment of Prisoners of War, Geneva, 27 July 1929.
[32] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (hereafter Geneva Convention I);[32] Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (hereafter, Geneva Convention II);[32] Convention (III) relative to the Treatment of Prisoners of War (hereafter Geneva Convention III);[32] and Convention (IV) relative to the Protection of Civilian Persons in Time of War (hereafter Geneva Convention IV).
[33] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (hereafter, Protocol I), 8 June 1977; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (hereafter, Protocol II), 8 June 1977.

Geneva Conventions.[34] To understand the legal framework which protects journalists in conflict zones, it is necessary to understand the circumstances these legal frameworks were responding to.

Any argument that the provisions found in the Geneva Conventions of 1949 and the Additional Protocols of 1977 are *no longer* sufficiently capable of dealing with the realities and dangers of modern conflict, should start from the premise that there has been a significant change in the challenges war correspondents face in modern conflicts compared to the conflicts fought pre-1977. In order to establish this, it is necessary to ascertain the changes that have taken place in the character of conflict as well as the changes that have taken place in war reporting since the latest significant revision of the IHL framework in 1977. In order to do so, this chapter briefly considers the historical development of war reporting and the way journalists have operated throughout different conflicts during the last century. It also discusses the evolution of the protection afforded journalists under the relevant treaties that form a part of the IHL framework.

2.1 The evolution of conflict and conflict reporting in the 20th century and beyond

During the last century there have been technological and scientific advancements in weaponry that have changed the way conflicts are fought. Other technological and scientific advances have changed the way that news is reported to, and consumed by, the public. These changes have created different challenges for journalists covering conflict in different parts of the world. For example, aerial bombing campaigns are more difficult to observe and report on than ground wars where journalists can follow or accompany the military, while increasing involvement of non-state actors makes it more difficult to distinguish journalists from combatants in conflict zones. Journalist equipment has also changed from a notepad and sketchbook, to television cameras and satellite uplinks. Modern technology now requires reporters to get

[34] Art. 79 Protocol I.

closer to the action in order to get the material demanded by home audiences. In addition, where news would once take several days to reach the home audience, it now takes mere seconds, if that, which can lead journalists to expose themselves to increasing danger in order to 'get the story' to fulfil the continuing demand.[35]

2.1.1 War reporting pre-1945: The patriotic war reporter

News, in whatever form presented, has long been concerned with the coverage of international conflict. Until the mid-19th century, news concerning war came not from independent reporters but mostly from the military itself, or was copied from foreign media.[36] The 'modern' concept of a civilian war reporter, writing reports specifically for a civilian audience at home, is generally considered to have started during the Crimean War, in the mid-19th century, when the Times sent William Howard Russell to the cover the conflict from the frontline.[37] Russell followed the British army in its campaigns during the war, dressed in parts of mismatched military uniform and armed with a sword.[38] He stayed mostly out of the action and based his reports on the eyewitness accounts of every officer or soldier he could find to question about the battle.[39] Less than a decade later, the civilian war reporter had become a well-established concept and the American Civil War saw a surge in war reporters being sent to the front. More than 500 correspondents were sent to cover the war for the North alone, European correspondents were sent to cover the war directly for the audience in Europe and the conflict would eventually firmly establish war correspondence as a separate section of journalism.[40] The wide-scale use of the telegraph network made relaying news faster and more extensive than before, though it incurred high costs for newspapers.[41] The reporters were often young, inexperienced, underpaid and under immense pressure to produce news, which did

[35] H Tumber and F Webster, *Journalists under Fire* (London: Sage Publications, 2006), p. 119.
[36] P Knightly, *The First Casualty* (London: John Hopkins University Press, 2004), p. 2.
[37] *Ibid,* pp. 2-3; "War Correspondents, Past and Present" (16 February 1907) *The Spectator*; see also more generally: W Russel, *The War from the Landing at Gallipoli to the Death of Lord Raglan* (London: George Routledge & Co., 1855).
[38] As he was not provided with a uniform, but felt he should wear one, he ended up with: "a gold-banded commissariat officer's cap, a rifleman's patrol jacket, cord breeches and butcher's boots", Knightly (2004), p. 7.
[39] *Ibid,* pp. 7-8; T Royle, *War Report: The war correspondent's view of battle from the Crimea to the Falklands* (Edinburgh: Mainstream, 1987), pp. 27-28.
[40] Knightly (2004), pp. 19 and 41.
[41] J Andrews, *The North Reports the Civil War*, (Pittsburgh: University of Pittsburgh Press, 1985), p. 6.

not lead to the most accurate of reporting.[42] They were firmly attached to the 'side' of the war that sent them, and as such at risk from the other side, which viewed them as much as the enemy as the soldiers themselves.[43] The concept of an independent, objective account of war was not yet in use.

In the period between the American Civil War and the First World War (WWI), war correspondents were sent to cover a wide variety of conflicts. The rise of the popular press and the increasing coverage of the telegraph network ensured fast delivery of news and accounts of conflicts were highly popular with the audience at home.[44] What is interesting to note is that war reporters, though technically mostly civilian, were by no means considered 'non-combatants'. They rode with military units, were generally armed, and more importantly not unwilling to use these weapons in battle, not just in self-defence.[45] This behaviour of war correspondents led to their protection under IHL as being treated mostly on a par with military personnel, when captured, as discussed below. The lines between war correspondents and soldiers were, however, by the late 19th century becoming more defined. The British War office issued a ruling after the Sudan Campaign in 1898 that no man should be both correspondent and soldier.[46] This rule was in practice during the Boer wars, though still bypassed at times, most notably by Winston Churchill, who seemed unable to make up his mind whether he was primarily a soldier or a war reporter.[47] The negative newspaper response to his active participation in a battle over an armoured train during the conflict, in which he both fought and claimed non-combatant status as a newspaper reporter after his capture, shows that the principle that newspaper reporters should be and act as non-combatants at all times had taken hold.[48]

[42] Knightly (2004), pp. 22-26.
[43] Andrews (1985), pp. 18-19.
[44] Knightly (2004), pp. 43-44.
[45] M Roth, *Historical Dictionary of War Journalism* (Westport: Greenwood Press, 1997), p. 7; Knightly (2004), p. 45.
[46] Knightly (2004), p. 70 and W Churchill, *My Early Life: A roving commission* (London: Macmillan & Co., 1944), p. 320.
[47] Knightly (2004), p. 69; Churchill (1944), throughout, buts see in particular pp. 266 and 320.
[48] For an overview of some of the articles appearing in newspapers in response to the incident see: Churchill (1944), pp. 314-315.

War correspondents were deeply unpopular with the army, as their reports brought home the horrors of battle, which previously had been kept largely away from the people at home. They criticised the military at times, and could expose sensitive information that could aid the enemy.[49] The censorship and unpopularity of war correspondents with the military led to few correspondents receiving permission to accompany military units at the start of WWI. Especially on the British side, where strict censorship was combined with an order to arrest and expel any war correspondent found in Belgium, many journalists went to cover the war clandestinely, away from the military units they had accompanied during previous conflicts to report on the fighting.[50] The Germans were far more supportive of war correspondents, which consequently meant that the majority of the information about the war that made it into the newspapers now came from the German side of the war.[51] This forced the French and the British to accredit at least some war correspondents,[52] only two of them photographers, who, while heavily censored, were allowed to travel with military units, as they had in previous conflicts, wearing military uniforms.[53] Journalists from neutral countries fared better in the early stages of the war, with access being provided to the front. This changed soon after the fighting and the losses on all sides intensified. A British and subsequent German ruling forced neutral correspondents to commit to one side of the war, if they were found reporting from the other side, they would be executed as spies.[54]

The Second World War changed little in the way war correspondents operated in the field, though technological advances had led to radio reports now being made directly from war zones, and the use of video cameras became more common,

[49] A good account of the military's feelings towards war correspondents can be found in: G Wolseley, *The Soldier's Pocket -Book for Field Service* (London: Macmillan and co., 1871) which speaks of the "the newly-invented curses to armies – I mean war reporters", p. 82.
[50] Knightly (2004), pp. 91-94.
[51] Knightly (2004), p. 100. See also: M Weber, "Politics as a Vocation" (1919), who praised the German press for its critical assessment of the Kaiser and the Imperial German General Staff and their leadership during WWI, pp. 11-12, available at: http://anthropos-lab.net/wp/wp-content/uploads/2011/12/Weber-Politics-as-a-Vocation.pdf.
[52] Largely under pressure of the Americans, who pointed out that the French and British refusal to engage with war reporters and allow them at the front, meant that the only war news written by American war correspondents trusted by the American public now came from the German side, which was harming Britain's cause in the US, see: Knightly (2004), p. 100.
[53] Knightly (2004), pp. 100-102.; also Royle (1987), pp. 106-107.
[54] Knightly (2004), p. 122.

allowing for more varied news production. News became valued in terms of its service towards the war effort.[55] While this was not a new development, allied leaders had accepted the view that publicity rather than silence benefited the conduct of war by a nation since 1915, it became more pronounced during the Second World War.[56] This view risks exposing journalists to pressures to create news stories that provide the best obtainable contribution to the war effort, rather than truthful and accurate reporting and most stories, partly through censorship, were essentially propaganda. All material, written, broadcast or photographed, had to be passed by censors before publication, which did mean, however, that there were few restrictions on access to frontlines and military campaigns.[57]

Especially the written press, by far the largest group of journalists in the field, still often travelled with the military. They accompanied military units into battle while wearing the uniforms of officers.[58] These journalists were however not meant to take arms against the enemy and were officially non-combatants, though they still occasionally drifted towards acting as combatants when under attack.[59] They were mainly viewed as being part of the military of the country they represented. General Eisenhower explicitly stated that as far as he was concerned war correspondents were military personnel and would be treated as such.[60] During the D-Day invasion the 48 correspondents reporting for the BBC were given military training, uniforms and were assigned to specific units.[61] The Americans were the first to award military decorations to civilian war correspondents and in the later stages of the war, carrying guns became more commonplace for civilian war correspondents.[62] There are even accounts of 'jeeploads' of journalists arriving in towns ahead of the allied forces and essentially 'liberating' those towns and accepting surrenders.[63] 'Neutral journalists'

[55] J Mathews, *Reporting the Wars* (Minneapolis: University of Minnesota Press, 1957), p. 175.
[56] *Ibid.*
[57] J Sylvester, and S Huffman, *Reporting from the Front: The media and the military* (New York: Rowman & Littlefield, 2005), p. 13.
[58] Royle (1987), p. 148; For American reporters see: D Porch, "No Bad Stories: The American media-military relationship" (2002) 55 *Naval War College Review*, 84, p. 88.
[59] Knightly (2004), pp. 333-334.
[60] "I regard war correspondents as quasi staff officers (…) as staff officers your first duty is a military duty (…)". A copy of the speech can be found in Royle (1987), p. 148.
[61] Royle (1987), p. 160.
[62] Knightly (2004), pp. 345-346.
[63] *Ibid*.

who didn't accompany military units to the front also reported on the war. Groups of them were based, for example, in Germany and Russia, but they formed a minority and were dependent on material provided to them by Officials which tended to be mostly propaganda or heavily censored reports.[64] Germany took a different approach and conscripted a large number of artists, writers, photographers etc. in the Propaganda division of the Army, essentially turning them into military correspondents. They received basic training and were expected to fight, leading to a high casualty rate, on par with the German infantry.[65]

2.1.2 War reporting 1945-1975: Strained media-military relationship

At the start of the Korean War in 1950, a large majority of the press both in Britain and the US were supportive of the decision to intervene in South Korea, after North Korea invaded the country, though six months into the war support began to waver.[66] Faced with a somewhat hostile press, full military censorship was imposed by the Americans from 1951 to the end of the war.[67] Television reporting was still in its infancy at the time of the Korean War and it was not a conflict that was extensively reported on. The distance of Korea in combination with a war that posed no real immediate physical threat to the West, caused the media in both the UK and US to lose interest as the war went on.[68] Those correspondents at the front, from a variety of nationalities, were, as they were in WWII, mostly carrying weapons, some for self-defence, but others with less justifiable motives.[69]

By the time the Vietnam War broke out, television was starting to become part of daily life and provided a more intimate and graphic picture of the war than news bulletins through radio, cinema or newspapers delivered during previous wars. While there was no official censorship policy in place, all journalists had to be accredited by the Joint Public Affairs Office (JPAO) to cover "the operational, advisory and support activities of the Free World Military Assistance Forces", which also

[64] Knightly (2004), pp. 240-241; also Mathews (1957), pp. 180-181.
[65] Knightly (2004) pp. 240-241.
[66] M Hudson and J Stanier, *War and the Media* (Stroud: Sutton Publishing, 1997), pp. 90-97; Royle (1987), p. 177.
[67] Royle (1987), p. 193; Knightly (2004), pp. 376-377.
[68] Hudson and Stanier (1997), p. 94; Royle (1987), p. 177.
[69] Knightly (2004), pp. 368-369.

provided military transportation services.[70] Conversely, the lack of an official censorship policy made military officials more reluctant to talk to the press and as transport could virtually only be obtained from the military, reporting could be limited by denying access to transport.[71] Unlike in the Second World War, journalists no longer wore military clothing, but most wore tailor made safari jackets which roughly resembled a military uniform, from a distance, which allowed them to be less conspicuous in the field.[72] The question of whether correspondents could carry weapons came up for discussion again during the Vietnam War. The official line was that they should not, or risk being viewed as legitimate targets by the enemy, but many continued to carry personal weapons, mostly for self-defence.[73]

Vietnam was one of the first major conflicts where the media seemingly actively withdrew their support for a conflict and the patriotism that had been characteristic of reporting in previous conflicts disappeared.[74] While later studies showed the press was largely supportive of the war until the Tet Offensive and didn't form public opinion as much as followed it,[75] this was not the view held by the military. General Westmoreland, in command of all US military operations in Vietnam from 1964-1968, famously noted that "Vietnam was the first war ever fought without censorship. Without censorship, things can get terribly confused in the public mind", a viewpoint which influenced the media-military relationship in subsequent conflicts.[76] Vietnam was also the conflict where questions underlying the ethics of war reporting became more pronounced and openly discussed, with a stronger 'to observe, but not interfere' mentality emerging.[77] It was a war that was difficult to

[70] Royle (1987), pp. 204-205.
[71] R Keeble, "Words as Weapons: History of war reporting – 1945 to present" in: R Fortner and P Fackler (eds.), *The Handbook of Global Communication and Media Ethics* (Chichester: John Willey and sons ltd., 2014), 193-214, p. 197; Hudson and Stanier (1997), p. 106.
[72] Knightly (2004), p. 443.
[73] Knightly (2004), p. 445. There have been instances where correspondents set out to kill and/or have killed during the conflict, but they are rare: *Ibid.*
[74] Hudson and Stanier (1997), pp. 110-118; C Thayer, "Vietnam: A critical analysis," in: PE Young (ed.), *Defence and the Media in Time of Limited War* (New York: Frank Cass, 1992), 89-115, pp. 91-94.
[75] See for example: C Thayer, (1992); WM Hammond, *Public Affairs: The military and the media, 1968–1973* (Washington, D.C.: Center of Military History, 1996).
[76] Porch (2002), pp. 91-92; C Paul and J Kim, *Reports on the Battlefield: The embedded press system in historical context* (Santa Monica: Rand, 2004), pp. 36-38.
[77] Knightly (2004), pp. 448-450.

report on,[78] with no clear front line, leading journalists to travel through dangerous territory in search of something to report.[79] The death toll of the conflict was high; more than 70 local and foreign journalists were killed in the field.[80] Some of them were highly experienced correspondents, and causes of death varied from landmines and helicopter crashes to being killed directly by the Vietcong.[81]

2.1.3 War reporting 1975 - present: The rise of the embedding system

The 1980s saw a variety of conflicts, some of which were heavily reported on in the international media. The Falklands War posed difficulties for the press in terms of access, leaving them heavily reliant on the military for transportation, which led a number of journalists to accompany the military to the Falklands, rather than report on the conflict independently.[82] During the conflict in Grenada in 1983, largely in response to the negative press during the Vietnam War, the US military refused to allow any media to accompany the Marines during the first 48 hours of the invasion.[83] The resulting lack of coverage resulted in a backlash which led to the creation of a press pool in the US, a group of pre-selected and screened reporters who could cover late-breaking, or secret, military operations at short notice.[84] The system failed at the first major hurdle in Panama, where the press pool was kept away from the battlefield, while a number of reporters not part of the press pool, managed to get to the action on their own and provide better coverage than those in the press pools.[85] The subsequent review of the failure to include the press in Panama, led General Collin Powell, then chairman of the Joint Chiefs of Staff, to send a directive to all major military commanders stating (in part) that: "Commanders are reminded that the media aspects of military operations are important (...) and warrant your personal attention. (...) Media coverage and pool

[78] There was no clear battle objective as there had been in previous wars. Complex political issues were mixed in with military aspects and propaganda and news management made reporting even more challenging. See: Knightly (2004), p. 423.
[79] Royle (1987), pp. 205-206.
[80] Keeble (2011), p. 197.
[81] The journalists directly killed by the Vietcong were ambushed, and in spite of shouting "press" in Vietnamese were shot: Knightly (2004), p. 445.
[82] Hudson and Stanier (1997), pp. 169-170.
[83] Paul and Kim, (2004), p. 39; Hudson and Stanier (1997), pp. 195. Access was allowed thereafter, though all the fighting was over by that point.
[84] Paul and Kim (2004), p. 20.
[85] Porch (2002), p. 95.

support requirements must be planned simultaneously with operational plans and should address all aspects of operational activity (…)."[86] The directive assisted in changing the military's attitude towards the media and began to improve the integration of them with the military in combat missions.[87] Though the press pools were maintained during the Gulf War, there were still lingering problems and they were unpopular with journalists for a variety of reasons, in particular as they offered many restrictions and very little exclusive access to information.[88] Many journalists chose therefore to function independently of the military outside the pool system during the conflict.[89] This, combined with technological advancement allowing 'live' broadcasting from the battlefield for the first time during a major conflict, complicated the regulation of information for security purposes.[90]

The dissatisfaction with the press pool system and the propensity of reporters to bypass it, led to the eventual development of the embedding-system.[91] The term 'embedded-press' was first used in 1995 in Bosnia, where reporters were being assigned to a unit and lived and deployed with them on a long-term basis.[92] The character of the subsequent Kosovo Conflict, which was largely an aerial campaign, granted less access to the embedded reporters than a ground campaign and reporters once again looked to alternative sources for information. The conflict proved that in the information age it has become very difficult for the military to fully limit media access to information and a propaganda war, where both sides try to win public support, is easily started.[93] Similarly, the Kosovo conflict showed that 'information operations', or managing the public image of a conflict, has now become an essential

[86] F Aukofer and W Lawrence, *America's Team: The odd couple – A report on the relationship between the media and the military* (Nashville: Freedom Forum First Amendment Center, 1995), p. 45.
[87] *Ibid,* see also: D Moore "Twenty-first Century Embedded Journalism: Lawful targets?" (2009) 31*The Army Lawyer*, 1, p. 7.
[88] For an overview of the issues associated with the press pools see Porch (2002), pp. 95-97; see also: Paul and Kim (2004), pp. 44-45.
[89] Porch (2002), p. 95.
[90] Aukofer and Lawrence (1995), p. 11.
[91] Or re-introduction thereof, albeit in more formalised form as the reporters had been effectively embedded with military units during World War II and to some extent Vietnam, see: Porch (2002), p. 97.
[92] Paul and Kim (2004), p. 48.
[93] Paul and Kim (2004), p. 50.

part of military operations.[94] This opens the door to considering the work of reporters to be part of a country's military strategy, which exposes them to becoming potential military targets, as will be discussed in more detail in chapter 7. Journalists have noted they feel the war in Bosnia has been some form of turning point in terms of respect for journalists. As noted by Marie Colvin of the Sunday Times: "So many journalists have been killed in the last few years… We used to have almost an unofficial diplomatic status. We were seen unofficially as objective and unofficially as neutral. And now we're actually targets".[95]

The move towards embedding reporters has, in part, also been enacted in response to the problems posed by changes in the character of warfare. Whereas it is relatively straightforward for a reporter to follow ground-troops to the front, as had been the case in past wars, modern wars are no longer predominantly fought this way. War now tends to consist of coordinated air-, land- and sea-action, with high-speed 'manoeuvre warfare', with pockets of action, rather than a clear front line.[96] The rapid movement of troops and fighting means the most effective way for reporters to follow the war is to be placed with a military unit, preferably before fighting breaks out and to travel with them.[97] Similarly coverage of humanitarian operations poses their own challenges.[98] The Iraq invasion saw the embedded press system become the preferred method of allowing the press access to the action, while still keeping some control over the flow of information.[99] The battle phase of the invasion was covered by around 2100 'unilateral' reporters, independent journalists not attached to a military unit, and roughly 600 embedded reporters of different nationalities who

[94] Porch (2002), p. 101.
[95] Quoted in: H Tumber and F Webster, *Journalist under Fire: Information war and journalistic practices* (London: Sage Publications, 2006), p. 119; see also: D Bennett, "The Life of a War Correspondent is Even Worse than You Think" (10 July 2013) *The Wire*, available at: http://www.thewire.com/global/2013/07/life-war-.correspondent/67038/. Marie Colvin was killed in 2012, while covering the conflict in Syria.
[96] Aukofer and Lawrence (1995), pp. 45-46.
[97] *Ibid.*
[98] For an overview of the issues associated with media coverage of humanitarian operations, see: Porch (2002), pp. 99-100.
[99] This has been accompanied by a worrying attitude to those journalists functioning outside the embedded system, often referred to as unilaterals, see for example: D Kuttab, "The Media and Iraq: A bloodbath for and gross dehumanization of Iraqis" (2007) 89 *International Review of the Red Cross*, 879, p. 883; A Cooper, "Journalists in Iraq: From 'embeds' to targets" (13 December 2014) *CPJ*, available at: http://cpj.org/2004/12/journalists-in-iraq-from-embeds-to-targets.php.

were embedded with different parts of the military.[100] Embedding has also been proven to be safer for journalists than travelling through conflict zones independently, with far fewer deaths occurring in Iraq amongst embedded reporters than amongst 'unilaterals'.[101] Embedding is now seen as the future system of choice for media coverage of large-scale combat operations.[102]

2.2 The evolution of armed conflict

It goes beyond the scope of this thesis to give a full account of the evolution of armed conflict over the last century, but some consideration must be given to the changes in the way conflicts are fought that impact on the operation and protection of journalists in conflict zones.

At the time of the first appearance of civilian war correspondents on the battlefield during the Crimean War, wars were fought very differently from the way they are these days. Weaponry available to combatants largely dictates the conduct of warfare. The wars of the 19th century, with weapons limited in range, were generally fought along a clear front.[103] This made it relatively easy for journalists to cover a war, as all fighting took place along clearly identifiable lines. Subsequent wars saw advances in weaponry but remained fought across fairly clear fronts. The advantage of a clear battle front is that journalists can travel relatively safely through a conflict zone, as fighting is concentrated along certain lines behind (or before) which it is generally safe to travel. While reporters in these early conflicts were mostly at risk from disease or being shot or stabbed by the enemy, the advance of chemical warfare during World War I, added to the risks they faced when being close to the fighting, though the risks posed by disease diminished with the advances made in medicine.

[100] Paul and Kim (2004), pp. 54-55; B Katovsky and T Carlson, *Embedded: The media at war in Iraq* (Guilford: Lyons Press, 2003), p. XIV.
[101] CPJ, "Iraq: Journalists in Danger" (2009), available at: http://cpj.org/reports/2008/07/journalists-killed-in-iraq.php.
[102] Paul and Kim (2004), p. 2, quoting a Pentagon spokeswoman; see also Moore (2009), p. 12 and sources cited therein.
[103] See generally: G Wawro, "War, Technology and Industrial Change" in R Chickering, D Showalter and H van der Ven (eds.), *The Cambridge History of War Volume 4: War and the modern world* (Cambridge: Cambridge University Press, 2012), pp. 45-68.

By the time of the Vietnam War, the experience for reporters in the field had changed. It was one of the first major wars that had no clear front. There were pockets of fighting across a large area, but no frontline that was moving forward or backwards. While the character of the conflict cannot be simply classed as guerrilla warfare,[104] it had some of its characteristics, which made a clear overview of the progress of the war difficult to obtain and report on and travelling through the territory dangerous.[105] It was also, as discussed above, a war where the potential influence of the media on the outcome of a conflict became more pronounced. These two changes to warfare: the lack of a clear front line and the perceived influence of the media on public support for a conflict, have remained part of and, to some extent, intensified in later conflicts. As stated by Colonel Jack Ivy during the Kosovo Conflict; "public information is a battle space (…) that must be contested and controlled like any other."[106] The bombing of the Serbian Television station in 1999 and subsequent attacks on television stations have showed that media equipment is increasingly perceived as a military target within a conflict, as are journalists themselves.[107]

The International Committee of the Red Cross (ICRC) has noted that it is possible to identify two main features of armed conflict in recent years. Firstly, armed conflict is now fought in a diversity of situations, which range from conflicts where the most advanced weapon systems are deployed in asymmetric confrontations, to low technology conflicts with a high degree of fragmentation of the actors involved.[108] Importantly, the majority of conflicts can no longer be classified as international

[104] See for example: J Record, "Vietnam in Retrospect: Could we have won" (1996-1997) 26(4) *Parameters*, 51.
[105] See Knightly (2004), p. 423.
[106] Porch (2002), p. 101.
[107] See for example: ICTY, "Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia" 13 June 2000, available at: http://www.icty.org/sid/10052, paras. 71-79; Human Rights Watch, "Israel/Gaza: Unlawful Israeli attacks on Palestinian media" (20 December 2012), available at: http://www.hrw.org/news/2012/12/20/israelgaza-unlawful-israeli-attacks-palestinian-media.
[108] ICRC, "International Humanitarian Law and the Challenges of Armed Conflict" *31st International Conference of the Red Cross and Red Crescent*, Geneva, 28 November-1December 2011, available at: http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf, p. 5.

armed conflict, [109] as wars are now often fought against non-state actors and will therefore be classified as non-international armed conflict. This is especially problematic in terms of the legal protection offered to journalists, as they derive their protection largely from the Geneva Conventions, which are not fully applicable in non-international armed conflict,[110] as will be discussed in the next chapter. The second main feature of modern conflict is the change in the duration of conflicts. Enduring situations of armed conflict have become more common, where the conflict fluctuates between phases of high and low intensity and instability without a reasonable expectation of lasting peace in the near future.[111] Similarly unresolved inter-state disputes have resulted in long-term occupation.[112]

The increasing complexity of armed conflicts has given rise to concerns over the adequacy of the current IHL framework to deal with these conflicts. Legal issues that have given rise for concern are the adequacy and practicability of the existing armed conflict classifications in relation to the new realities of organised armed violence, especially the current criteria for determining the existence of international armed conflict and non-international armed conflict.

2.3 The development of protection for journalist under IHL treaties

IHL, sometimes referred to as the law of armed conflicts, is defined by the ICRC as: "a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare." IHL is made up of a body of treaty laws and customary law, the latter consisting of rules that, through the development of custom and state practice during the conduct of war, have become

[109] *Ibid*.
[110] For an overview of the issues associated with these classifications see: R Bartels, "Timelines, Borderlines and Conflicts: The historical evolution of the legal divide between international and non-international armed conflict" (2009) 91 *International Review of the Red Cross*, 35.
[111] ICRC (2011), p. 7.
[112] *Ibid*.

accepted as legally binding.[113] While treaty law is generally only binding on the states party to these treaties, customary law is binding on all states.[114] Treaty law can however contain, or consist entirely of, provisions that are seen as declaratory of customary law, in which case the provisions are binding to all states, including those not party to the treaty.[115]

Examples of customs governing the conduct of warfare can be found throughout history under different civilisations.[116] Historically, most texts considering the conduct of war between states, such as the *de Jure Belli ac Pacis*,[117] described customary law, rather than containing multi-party treaty law. Customs were often confined to a specific territory and changed over time. It was not until the mid-19th century that attempts were made to create a body of international laws, codified in treaty form and signed by multiple state-parties that were to govern the conduct of warfare between those parties.[118] One of the first such treaties was the first Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field,[119] signed by 16 countries in 1864. This was followed by the Hague Declarations of 1899[120] and the Hague Conventions of 1907.[121] They form, together with the Geneva Conventions the basis for IHL, which now consists of a multitude of treaties governing aspects of war such as the use of biological and chemical weapons, the protection of cultural property during armed conflict and the protection of children in armed conflicts, as well as a growing body of customary law. IHL now covers two main areas: the protection of persons not, or no longer, taking part in conflict; and the conduct of warfare, such as the use of certain types of weapons and

[113] UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004), paras. 1.11-1.12.
[114] UK Ministry of Defence (2004), para. 1.11.
[115] UK Ministry of Defence (2004), para. 1.13.
[116] J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (Cambridge: Cambridge University Press, 2001), p. XV.
[117] Grotius, *De Jure Belli ac Pacis* (1625).
[118] ICRC, "War and International Humanitarian Law" (29 October 2010), available at: http://www.icrc.org/eng/war-and-law/overview-war-and-law.htm.
[119] Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, 22 August 1864.
[120] Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 29 July 1899.
[121] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907.

tactics.[122] There are currently no multi-party international treaties that specifically seek to protect journalists in conflict areas.

While at first glance it may seem logical to assume journalists operating in conflict zones will be classed as civilians under IHL provisions, as they generally do not participate in a conflict but are there to observe and document, the legal framework shows that the situation is not as straightforward as this. As has been shown above, journalists operate in different ways in conflict zones, and practice has changed over time, impacting on their legal status under IHL. Journalists accompanying a military unit making use of the equipment and protection offered by the military may be classed differently from journalists travelling through conflict zones independently. While the Geneva Conventions of 1949 and its Additional Protocols of 1977 contain several provisions that are relevant to journalists, few mention journalists specifically.

2.3.1 The development of the Geneva Conventions

The first Geneva Convention, the "Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field" was adopted in 1864, after a conference organised by the Swiss government. The conference was an extension of the work undertaken in the previous years by a committee established by the Geneva Public Welfare Society, which sought to alleviate the suffering of the wounded soldiers in the wars that were taking place in Europe.[123] The committee would go on to become the International Committee of the Red Cross in 1875. The first Geneva Convention consisted of a set of 10 basic provisions aimed at improving conditions for wounded soldiers and protecting the medical personnel providing services in the field. Several international treaties were enacted in the years following the adoption of the first Geneva Convention, such as The Hague Conventions, and the Geneva Convention itself was eventually replaced by the second Geneva Convention "Geneva Convention for the Amelioration of the Condition of the Wounded in

[122] ICRC, "Treaties and Customary Law: Overview" (29 October 2010), available at: http://www.icrc.org/eng/war-and-law/treaties-customary-law/overview-treaties-and-customary-law.htm.
[123] ICRC, "The ICRC and the Geneva Convention (1863-1864)" (20 December 2004), available at: http://www.icrc.org/eng/resources/documents/misc/57jnvt.htm.

Armies in the Field" in 1906. This Convention, consisting of 33 articles, provided considerable progress in terms of detailed provisions and was more precise in its terminology than its predecessor. The Convention remained in force until the last state party to the Convention acceded to the later Geneva Convention of 1949 in 1970.[124] While more detailed than the first Geneva Convention, no specific consideration was given to war correspondents, which is largely due to the character of the treaty and the content. There are however other (older) international treaties on the laws of war which do give specific consideration to newspaper correspondents in conflict zones. These treaties would go on to form the basis of the Geneva "Convention relative to the Treatment of Prisoners of War" of 1929 which was the first Geneva Convention to give specific consideration to correspondents.

One of the first international declarations concerning the laws and customs of war to mention war correspondents specifically in one of its articles is the 1874 Brussels Declaration. The Declaration, consisting of delegates from 15 European states, adopted a draft of an international agreement concerning the laws and customs of war submitted to them by the Russian Government.[125] While it was never ratified and largely ignored at the international level,[126] it formed the basis for the later Hague Conventions which were more successful and would become a binding convention. Article 34 of the Brussels Declaration states:

> Individuals in the vicinity of armies but not directly forming part of them, such as correspondents, newspaper reporters, sutlers, contractors, etc., can also be made prisoners. These prisoners should however be in possession of a permit issued by the competent authority and of a certificate of identity.

The proceedings of the conference, as far as they have been published, show that there was no discussion on whether war correspondents are deserving of prisoner of

[124] ICRC, "Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field", Geneva, 6 July 1906", available at: http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=C64C3E521F5CC28FC12563CD002D6737&action=openDocument.
[125] Project of an International Declaration concerning the Laws and Customs of War, Brussels, 27 August 1874.
[126] D Bujard, "The Geneva Convention of 1864 and the Brussels Conference of 1874 (II)" (1974) 14 *International Review of the Red Cross*,575, p. 579.

war status, nor if this is the best protection that can be granted to them.[127] The content of article 34 of the Brussels Declaration was subsequently adopted into the Hague Conventions of 1899 and 1907,[128] with alternative wording, as the original formulation of the article was considered to be confusing. It seemingly states that persons who accompany the army without being part of it can be made prisoners if they have been provided with a permit by a competent authority, suggesting that if they do not have a permit they can go free, which was not the intention of the provision.[129] There are however, again, no recorded deliberations at this point on whether war correspondents are entitled to prisoner of war status, or whether this the most suitable protection for them.[130] All that is said in this regard is: "This text keeps in sight that these persons cannot really be considered as prisoners of war at all. But it may be necessary to detain them either temporarily or till the end of the war and in this case it will certainly be advantageous for them to be treated like prisoners of war."[131]

The "Geneva Convention relative to the Treatment of Prisoners of War" of 1929 sought to complete the earlier Hague Treaties of 1899 and 1907 concerning the treatment of prisoners of war, which had proven inadequate during World War I.132 The Convention was signed by 47 nations and clarified state obligations to treat prisoners of war humanely. While the Convention is no longer in operation after the universal acceptance of the later Geneva Convention of 1949, it is the first Geneva Convention in which 'correspondents' and 'news reporters' are given express consideration. Article 81 of the 1929 Geneva Convention, which is nearly identical

[127] See the notes of A Horsford, the British delegate to the conference, which provide an extensive summary of the proceedings, published in: J Lorimer, *The Institutes of the Law of Nations: A treatise of the jural relations of separate political communities*, Vol. II (Edinburgh: William Blackwood and Sons, 1884), p. 368.
[128] Article 13, Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899; Article 13, Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.
[129] International Peace Conference, *The Proceeding of the Hague Peace Conferences, Translation of the Official Texts: The conference of 1899* (New York: Oxford University Press, 1920), p. 57
[130] *Ibid*, pp. 480-181.
[131] *Ibid,* p. 57.
[132] A Krammer, *Prisoners of War: A reference handbook* (Westport, Conn.: Praeger Security International, 2008), p. 122.

to the previously discussed wording of article 13 of the Hague Convention of 1899 and 1907, which applies the convention to certain categories of civilians:

> Persons who follow the armed forces without directly belonging thereto, such as correspondents, newspaper reporters, sutlers, or contractors, who fall into the hands of the enemy, and whom the latter think fit to detain, shall be entitled to be treated as prisoners of war, provided they are in possession of an authorization from the military authorities of the armed forces which they were following.

The article still only gives consideration to those correspondents who accompany the army, which reflects the reporting practice of the time as discussed above. While the article offers correspondents some protection, it also places them in a vague legal category of people who are and remain civilians, but are simultaneously considered prisoners of war.[133] This provision is continued in the Geneva Convention of 1949, which is currently in force. The Geneva Conventions of 1949 were enacted in response to the deficiencies in the Geneva Convention of 1929, which proved unable to stop the many atrocities committed by different states during World War II. While WWII had yet to come to its conclusion, the ICRC announced in February 1945 their intention to revise the convention on prisoners of war and create a new convention to protect the civilian population from the effects of war.[134] The Conventions, while based on the previous Geneva Conventions and The Hague Conventions, were also heavily influenced by a number of international treaties and agreements that had been enacted between 1929 and 1949, as well as the national and international positions to war crimes taken during the Second World War.[135]

The 1949 Geneva Conventions had significantly broadened the scope of the previous Geneva Conventions and, most importantly, added protection for the civilian population to the Conventions. By the 1970s however, more than two decades after the implementation of the 1949 Conventions, several wars had been fought which

[133] As described by Gasser in: H-P Gasser, "The Protection of Journalists Engaged in Dangerous Professional Missions" (1983) 23 *International review of the Red Cross*, 3, p. 5.
[134] For more information on the historical background of the Conventions and the process of creating the 1949 Conventions, see: W Hitchcock, "Human Rights and the Laws of War: The Geneva Conventions of 1949", in: A Iriye, F Goedde and W Hitchcock (eds.), *The Human Rights Revolution: An international history* (Oxford: Oxford University Press, 2012), 93-112, p. 96.
[135] For a discussion of the influences of the 1949 Geneva Conventions see: K Nabulsi, *Traditions of War: Occupations, resistance and the law* (Oxford: Oxford University Press, 1999), pp. 11-12.

exposed several issues with the Conventions. While the 1949 Conventions sought to protect the civilian population from arbitrary action by enemy parties, it did not seek to protect the civilian population from the effects of hostilities in general.[136] This gap is addressed in the Additional Protocols. It was clear from the start of the process that there was no intention to rewrite, or completely revise, the Geneva Conventions, as it was felt this could have weakened them. It was considered to be sufficient to extend them, where needed, to include matters not covered by the 1949 Convention and to clarify some contentious points, which is how the idea of the Additional Protocols was developed.[137] Two protocols were eventually added to the Geneva conventions in 1977, which not only updated and added to the Geneva Conventions of 1949 but also updated and codified the Hague Convention, which had not been revised since 1907: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977. The provisions of the Geneva Conventions (1949) and Protocol I will be discussed in more detail in the next chapter.

2.4 Conclusion

The civilian war correspondent is a relatively new phenomenon which developed in the mid-19th century when the first civilian correspondents were sent to cover the Crimean War for the audience at home. Civilian war reporters quickly grew in numbers and had become a distinct and sizeable group within journalism by the time of the American Civil War. Around the same time the protection of journalists was incorporated in IHL treaties. The protection offered, reflected the reporting practice of the time and saw little change in subsequent revisions of IHL. By the 1970s reporting practice had changed, with fewer journalists travelling through conflict zones with military units and increasing numbers preferring to cover conflicts with

[136] Y Sandoz, C Swinarski and B Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff Publishers, 1987), p. XXIX.
[137] *Ibid,* p. XXX.

little restraints to their movements. A rise in the number of journalists killed in action saw the incorporation of an article in Additional Protocol I to the Geneva Conventions in 1977, aimed at increasing protection for journalists travelling independently through conflict zones. This has been the last update of the IHL framework to consider journalists.

Since 1977 there have been significant changes in the way journalists operate in conflict zones, their perceived influence on the audience at home and the way in which conflicts are fought more generally. These changes may affect the ability of the current IHL framework to protect journalists. Concerns have similarly arisen over the adequacy of IHL in general, questioning whether the current body of substantive norms is capable of dealing with the reality of modern conflict, as well as concerns over its applicability in certain cases.[138] One thing is clear; journalists perceive the dangers in reporting from war zones to be increasing,[139] which seems to be supported by the statistics provided by the Committee to Protect Journalists (CPJ),[140] which is a worrying development. During the past century the Geneva Conventions have been revised roughly every 25 years, which may suggest it is time for another international conference to consider changing the laws of war to deal with the challenges of contemporary armed conflicts. Given the fact that the deaths of 17 foreign correspondents in 1970 was sufficient reason for the UN to propose a dedicated convention for the protection of journalists, the death of 28 journalists in Syria alone in 2013, with 70 deaths worldwide,[141] might indicate the time has come to take serious action in this area. The next chapters will consider the exact protection offered by the provisions of the IHL framework, as well as additional protection

[138] ICRC (2011), p. 7.
[139] Tumber and Webster, for example, quote a number of journalists stating respect for journalists is decreasing to the point where they are now targets in the hostilities: Tumber and Webster (2006), pp. 119-120.
[140] CPJ, "1063 Journalists killed since 1992" (2014), available at: http://cpj.org/killed/; CPJ, "Iraq – Journalists in Danger: A statistical profile of media deaths and abductions in Iraq 2003-09" (2008), available at: http://cpj.org/reports/2008/07/journalists-killed-in-iraq.php.
[141] CPJ, "70 Journalists Killed in 2013/Motive Confirmed" (2014), available at: http://cpj.org/killed/2013. Especially the recent death of James Foley, an American free-lance journalist kidnapped in 2012 while covering the conflict in Syria and executed August 2014 by militant fighters of Islamic State has brought the issue of journalist's safety under renewed international attention.

offered by International Human Rights Law and will consider whether these together are still capable of providing adequate protection for journalists in conflict zones.

3. International Humanitarian Law

International Humanitarian Law (IHL), or the law of armed conflict, consists of a set of rules which govern the way armed force can be used during hostilities.[142] It forms part of the larger framework of public international law. This body of law comprises international conventions, international custom, general principles and, as a subsidiary source, judicial decisions and the teachings of the most highly qualified publicists.[143] IHL seeks to protect both combatants and non-combatants from the effects of armed conflict, by limiting unnecessary suffering and by protecting those who are not, or no longer, involved in the conflict.[144] The IHL framework is primarily made up of treaty law, which is only binding on those states which are party to the treaty, and customary law, which consists of state practices which have developed over time and are now considered legally binding on *all* states.[145] The laws of war have primarily been developed in the context of wars between states and while IHL applies fully to international armed conflict, fewer provisions apply during non-international, or internal, armed conflict as will be discussed below. This is becoming increasingly problematic in terms of the legal protection of journalists as the provisions that provide the most specific protection to them, may not fully apply in the majority of the conflicts journalists now cover.

This chapter aims to provide an overview of the current framework of IHL that protects journalists in conflict zones. It will set out the relevant provisions of the Geneva Conventions (1949) and its Additional Protocols, as well as other relevant international documents concerned with the protection of journalists. It will further consider the application and interpretation of the relevant provisions in different types of conflict, such as international and non-international armed conflict, as well as differences in protection offered to different types of reporters.

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[142] UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004), para. 1.2.
[143] United Nations, Statute of the International Court of Justice, 18 April 1946 (hereafter: Statute of the ICJ), art. 38.
[144] UK Ministry of Defence (2004), para. 1.8.
[145] *Ibid*, para. 1.111

3.1 International Humanitarian treaty Law

Humanitarian treaties have developed historically as contracts between two or more states on the basis of reciprocity. However, the underlying principles of humanitarian law became more pronounced during the period following the First World War (WWI), as demonstrated by the significant expansion of the provisions in the Geneva Convention (1929) concerning the treatment of prisoners of war and the further extension of the material field of application of the Conventions (1949). The Conventions (1949) became consequently less regarded as a set of reciprocal contracts drawn up in national interest and more as "solemn affirmations of principles respected for their own sake, and as a series of unconditional engagements on the part of each of the Contracting Parties 'vis-à-vis' the others."[146] This can be seen in the suggested pre-amble for the Conventions, which stated: "Respect for the personality and dignity of human beings constitutes a universal principle which is binding even in the absence of any contractual undertaking."[147] Though the proposed pre-amble met with no objections, it was later abandoned when no agreement could be reached on a number of suggested additional clauses.[148] However, the underlying principle runs throughout the Conventions (1949) and is most notable in terms of the widening of the application of some provisions to non-international armed conflict, a field IHL had not been previously concerned with, as will be discussed in paragraph 3.1.3.

There are several provisions in the Geneva Convention and their Additional Protocols that provide protection to journalists working in conflict zones. While these provisions seek to protect journalists from harm, they do not concern themselves with journalism and make no statements on the legality or justification of journalistic activities in such areas.[149]

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[146] J Pictet, *The Geneva Conventions of 12 August 1949 : Commentary - Vol. 1, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Geneva: ICRC, 1952), p. 28.
[147] *Ibid*, p. 21.
[148] *Ibid*.
[149] H-P Gasser, "The Protection of Journalists Engaged in Dangerous Professional Missions" (1983) 23 *International Review of the Red Cross*, 3, p. 12.

3.1.1 The Geneva Conventions of 1949

Conventions I-III were based on previous Conventions, though they significantly expanded and revised previous subject matter, while the addition of Convention IV brought a new field of application to IHL by seeking to protect the civilian population from the effects of war, an area of law not previously covered by IHL.[150] Another important addition was made in the form of article 3 common to all four Conventions. While the entire text of the Conventions only applies to international armed conflict, common article 3 extends the application of some provisions, mainly those concerned with humane treatment of civilians and captured combatants, to 'armed conflict not of an international character',[151] as will be discussed in more detail below.

The Conventions were eventually adopted on the 12th of August 1949 and are made up of four treaties, combined into a single charter adopted on the 12th of August 1949. They consist of Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (hereafter Geneva Convention I);[152] Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (hereafter, Geneva Convention II);[153] Convention (III) relative to the Treatment of Prisoners of War (hereafter Geneva Convention III);[154] and Convention (IV) relative to the Protection of Civilian Persons in Time of War (hereafter Geneva Convention IV).[155] They entered into force on the 21st of October 1950 and currently have 194 state parties and have achieved universal acceptance.[156]

[150] Hitchcock (2012), pp. 96-97.
[151] For more information see Hitchcock (2012), pp.103-106.
[152] ICRC, *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. I, (Berne: Federal Political Department), pp. 205-224.
[153] *Ibid,* pp. 225-242.
[154] *Ibid*, pp. 243-296.
[155] *Ibid*, pp. 297-341.
[156] ICRC, "Geneva Conventions of 1949 Achieve Universal Acceptance" (21 August 2006) *News Release ICRC*, available at: http://www.icrc.org/eng/resources/documents/news-release/2009-and-earlier/geneva-conventions-news-210806.htm.

Article 4A(4) Geneva Convention III and article 13(4) Geneva Convention I-II

Only one article in the Geneva Conventions (1949) directly concerns the protection of journalists, which is included in nearly identical wording in the first, second and third Convention. Article 13(4) in Geneva Convention I and II, and article 4A(4) in the Geneva Convention III consider war correspondents: journalists who accompany the armed forces and have been given authorisations by the armed forces to do so. Conventions I and II state in article 13(4) that the Conventions shall apply respectively to the wounded and sick and to the wounded, sick and shipwrecked at sea, belonging to the following categories:

> Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, (..) provided that they have received authorization from the armed forces which they accompany. [157]

This provides war correspondents with the same protection offered to that of combatants during a conflict. Article 4A(4) of the third Geneva Convention follows the exact wording of this article to state that this category of persons, is entitled to prisoner of war status upon capture, though the article adds that the armed forces "shall provide them for that purpose with an identity card similar to the annexed model." Article 13 is mostly included out of a desire to be precise, as it does not confer significant new rights to war correspondents, who would already be receiving the same care that article 13(4) confers to them, under customary law.[158] Furthermore, there is little difference between being considered a category 13(4) civilian or an 'ordinary' civilian under Convention IV; in both cases the care and protection they (should) receive will largely be essentially the same. As the commentary on the Conventions states: Conventions I and IV "are entirely complementary, and cover the whole field of human suffering".[159]

Article 4A(4) is, however, generally referred to as the main (and only) article concerning war correspondents as it conveys significant new rights to them. When captured, war correspondents will be classed as prisoners of war, granting them the

[157] This provision will for the remainder of this thesis be referred to as art. 4A(4) as this is seen as the main article concerning war correspondents.
[158] Pictet (1952), p. 145.
[159] *Ibid*.

full scope of protection offered under Convention III. The article differs from the previous provision in article 81 of Geneva Convention (1929) in that it no longer states that war correspondents are entitled to be *treated* as prisoners of war, it actually gives them the *status* of prisoner of war. The article in question is one of the most discussed articles of the Geneva Conventions and has undergone several changes from its original draft to its eventual adoption.[160] Most of the discussion focussed on who exactly is deserving of prisoner of war status, with the status of resistance movements or 'partisans' proving especially contentious.[161] The principle that war correspondents should be treated as prisoners of war if captured, however, did not come under discussion.[162] This seems to have been a well-established principle of law, which since its appearance in the Brussels Convention of 1874, has been incorporated in several important international treaties concerning humanitarian law, without coming under serious discussion.

The term 'war correspondent' is not defined in the Geneva Conventions, but the article itself contains two requirements, which aid identification: 1) they should be accompanying the armed forces and 2) they should have received authorisation to do so. This excludes most journalists from this category as the majority of journalists now travel independently through conflict zones, as will be discussed in more detail in chapter 6. Given the description of a 'journalist' considered appropriate for the interpretation of article 79 Protocol I, discussed below, a war correspondent can be described as any personnel who work for the media as their principal occupation and are following the armed forces with authorisation from the armed forces to do so. The exact definition of war correspondent is not of great concern here, as article 4A(4) provides an indicative list of civilians who should receive prisoner of war status if captured, rather than an exhaustive one.[163] Obtaining an identity card from the armed forces would prove beneficial for clarification purposes and is advisable

[160] See the discussion on art. 3, which eventually became art. 4A in the final version of the Convention, in: ICRC, *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. I- III, (Berne: Federal Political Department, 1949), pp. 243-296.
[161] J Pictet, "The New Geneva Conventions for the Protection of War Victims" (1951) 45(3) *The American Journal of International Law*, 462, p. 471.
[162] ICRC, *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II, (Berne: Federal Political Department, 1949), pp. 243-296.
[163] ICRC, *Report on the Work of Government Experts for the Study of the Conventions for the Protection of War Victims* (Geneva, 1947), p. 113.

for journalists travelling in this position. The Geneva Convention (1929) which contained a similar article, made the carrying of an identification card mandatory for receiving prisoner of war protection. This has been abandoned in the Geneva Conventions (1949), which state that carrying an identity card is not a requirement but rather a supplementary safeguard to clarify status.[164] A model for the identity card is contained in Annex IV to the third Convention which requires basic information such as a photo, name, place of birth and the capacity in which the civilian accompanies the armed forces.

The rationale behind this provision is that though war correspondents, and the other persons mentioned in article 4A(4), are civilians, combatant forces may need to detain them during military operations for security reasons.[165] When this happens, it is important that they have the same rights and receive the same protection as prisoners of war, due to the access to information about the armed forces they are likely to have in this situation. Convention III provides additional protection over and above that of 'ordinary' civilians. It provides prisoners of war, with the right, for example, not to have to answer during questioning (article 17) and should they be captured with the military unit they are accompanying, they cannot be accused of being a spy.[166]

3.1.2 Additional Protocols to the Geneva Conventions (1949)

Article 79 Protocol I: protection for journalists

Article 4A(4) of the Third Geneva Convention protects war correspondents: those reporters who have special authorisation to follow the armed forces without actually being a member thereof. The article offers no protection to journalists who travel independently through conflict zones. To remedy this, article 79 was drafted and incorporated in Protocol I, without opposition to the proposed text or modifications other than minor drafting changes.[167] The article is the first time journalists who are

[164] Pictet (1960), p. 65.
[165] Pictet (1960), p. 49.
[166] For a general overview of the provisions concerning spies, see: Fleck (ed.) (2008), paras. 322-235.
[167] H-P Gasser, "Article 79 – Measures of Protection for Journalists", in: Y Sandoz, C Swinarski and B Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff Publishers, 1987), para. 3253.

not travelling with an army unit are given special consideration under international humanitarian law. This reflects the changing practice in war reporting at the time, as discussed previously, where reporters increasingly entered conflict zones independently. As argued during the deliberations of the draft for article 79, which noted the increase in deaths of journalists in conflict zones: "too frequently journalists engaged in dangerous professional missions in areas of armed conflict do not enjoy adequate protection."[168]

It is interesting to note that the article did not result from the original ICRC draft for the Diplomatic conference, but was based on a draft United Nations Convention on the Protection of Journalists Engaged in Dangerous Missions in Areas of Armed Conflict of 1975. The need for increased protection for journalists was brought to the attention of the UN when in 1970 seventeen foreign correspondents disappeared in Cambodia.[169] While the majority of the consulted government experts were in favour of providing special protection for journalists, the consulted Steering Committee for Human Rights (CDDH) suggested that the protection should be included in general IHL, rather than a special convention.[170] As stated by the delegate from Canada during the discussion of the draft of article 79:

> The inclusion of the new article in draft Protocol I would be a quicker and more effective means of ensuring the necessary protection for journalists engaged in dangerous professional missions than the drafting of a separate convention. Moreover, it would have the practical advantage of making the journalists in question more familiar with the Geneva Conventions and the Protocols.[171]

[168] ICRC, "Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts", Geneva (1947-1977), Vol. X, CDDH/219 rev. 1, para. 190ter.
[169] UNESCO, *New Communication Order 4: Protection of journalists* (Paris: UNESCO, 1985), p. 2.
[170] ICRC (1987), para. 3252.
[171] ICRC, "Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts", Geneva (1947-1977), Vol. VIII, CDDH/I/Sr 31, Para. 11.

The draft article, based on the UN Convention, was adopted without opposition and only minor drafting changes to the text.[172] The discussions during the various Committee meetings focussed mainly on what information was to be included on the identity cards for journalists and the question of whether journalists should wear a protective emblem to make them easily identifiable from a distance during conflict, the latter of which was decided against, as will be discussed in more detail in chapter 8.[173]

Unlike the 1949 Geneva Conventions, Protocol I has not achieved universal acceptance and has not been ratified by significant military powers such as the United States and Iran.[174] This may be problematic in terms of protection for journalists in conflicts involving these military powers, though this is partly negated by customary law, as will be discussed further below.

Article 79 of Protocol I is the only article of the Geneva Conventions and their Additional Protocols specifically aimed at the protection of journalists. Article 79 states that:

> 1. Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians within the meaning of Article 50, paragraph 1.
>
> 2. They shall be protected as such under the Conventions and this Protocol, provided that they take no action adversely affecting their status as civilians, and without prejudice to the right of war correspondents accredited to the armed forces to the status provided for in Article 4A(4) of the Third Convention.
>
> 3. They may obtain an identity card similar to the model in Annex II of this Protocol. This card, which shall be issued by the government of the State of which the journalist is a national or in

[172] For a collection of the full discussions at the various stages of the drafting process of art.79, see: H Levie (ed.), *Protection of War Victims: Protocol 1 to the Geneva Conventions*, Vol. 4, (Dobbs Ferry, N.Y.: Oceana Publications, 1981), pp. 119 -143.
[173] See for the discussion on the protective emblem especially: ICRC, "Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts", Geneva (1947-1977), Vol. VIII, CDDH/I/Sr 35, Paras. 14-40.
[174] A list of the current state parties to Protocol I can be accessed at: http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470.

> whose territory he resides or in which the news medium employing him is located, shall attest to his status as a journalist.

The first paragraph of the article confirms that journalists are civilians under IHL. This remains true even when using military logistical support for, for example, transportation, or when accompanying the military other than as an accredited correspondent under article 4A(4).[175] The article is not meant to create new law, it simply is intended to confirm and clarify the status of journalists in conflict territory.[176] The wording of the article is somewhat confusing though, as journalists should not just be *considered* civilian, they *are* civilian. This issue was raised during the drafting stage, though the original wording was kept to avoid re-opening the discussions when there was already consensus on the text.[177] The deliberations make clear though that the article is not meant to suggest anything other than that journalists are civilians under IHL.[178] The Geneva Conventions do not define the term journalist, though the draft UN convention on which article 79 is based does:

> The word 'journalist' shall mean any correspondent, reporter, photographer, and their technical film, radio and television assistants who are ordinarily engaged in these activities as their principal occupation.[179]

The term 'journalist' therefore covers a broad set of media personnel but does seemingly require that their work for the media is their primary occupation, which can pose a problem for freelancers, as will be discussed in chapter 8. The reference to "dangerous professional mission" in article 79, covers all activities journalists engage in in a conflict zone.[180] While concerns can be raised about the clarity of the language of the article, it is important to keep in mind that the aim of the article is to *confirm* that journalists are civilians. Even where it could be argued that, for example, a part-time non-professional journalist does not meet the definition of

[175] *Ibid,* para. 3257.
[176] *Ibid*.
[177] ICRC, "Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts", Geneva (1947-1977), Vol VIII CDDH/I/Sr 31 (hereafter OR Vol VIII), para. 53.
[178] *Ibid,* paras. 13 and 19.
[179] Art. 2a 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.
[180] H-P Gasser (1987), para. 3263.

journalist under this article, it is unlikely that this person would be considered anything other than a civilian and would therefore find the same protection under the Conventions as if they were classed as journalists under article 79. This, however, also demonstrates the relative weakness of article 79: it does not provide any protection to journalist over and above that of 'ordinary' civilians, even though journalists often behave very differently in conflict zones and thus face different risks, as will be discussed in more detail in chapter 6.

The second paragraph of the article reiterates that journalists, as civilians, receive the full protection the Conventions and Protocol I offer to civilians, as long as they take no action adversely affecting their status. This roughly entails that journalists are protected as long as they do not take on the role of combatant, as will be discussed below. It's important to note here that while the Conventions give them the right to protection as civilians, their own actions may effectively negate this. Journalists may not be directly targeted in battle, though if they are close to a military unit or other legitimate target during battle, they may be caught in the crossfire and killed without violating the Conventions.[181] Finally, the second paragraph notes that this article does not affect the protection of war correspondents as defined by article 4A(4) of Convention III, effectively creating two categories of journalists in conflict zones: war correspondents who travel with and are accredited to a military unit and independent civilian journalists not accredited to a military unit.

The final paragraph of article 79 considers the identity card for journalists. A model for the card is given in Annex II to Protocol I. The language of the article, "*may* obtain a card" clarifies that an identity card is not imperative for receiving civilian protection. Without the card they would still be civilians, the card simply clarifies their status and the protection they receive as civilians. The model card, which is based on the model card for war correspondents, states in five different languages:

> This identity card is issued to journalists on dangerous professional missions in areas of armed conflicts. The holder is entitled to be treated as a civilian under the Geneva Conventions of 12 August 1949 and their Additional Protocol I. The card must be carried at

[181] *Ibid,* paras. 3269-3270.

> all times by the bearer. If he is detained, he shall at once hand it to the detaining Authorities, to assist in his identification.[182]

The card should include the name of the country issuing the card. The model contained in Annex II is a suggestion only, while the card should contain the information on the model card, information may be added to this by national authorities.[183] By leaving it with national authorities to supply the card, it is up to individual states to decide who to supply these cards to, thus leaving the definition of 'journalist', essentially with national authorities.[184] Whether this is the best option in this case, or whether there might be advantages to working towards harmonising the definition of journalist, will be discussed in chapter 8.

Article 50 and 51 Protocol I: definition and protection of civilian population

The protection offered to journalists, as civilians, is set out in articles 50 and 51 of Protocol I. Article 50 defines civilians as:

> A civilian is any person who does not belong to one of the categories of persons referred to in Art 4A(1), (2), (3) and (6) of the Convention and art 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

The article therefore essentially employs a negative definition: if a person is not a member of the armed forces, he is a civilian.[185] As noted, article 79 removes any doubts that journalists are classed as civilians. Article 50 clarifies that the presence of non-civilians in a civilian population does not change the character of that population and they should still be protected as civilians. Parties to the conflict are obliged under article 58 Protocol I to keep civilians away from military objectives, to the maximum extent feasible, to avoid them being caught in the crossfire. This raises the question whether this article requires journalists, as civilians, to be kept away from military objectives. If so, this could hamper their ability to carry out their professional duties. The article has clearly not been drafted for this situation, as it is one of several articles in the Protocol which requires parties to the conflict to protect the civilian population where possible and allow them the opportunity to remove themselves

[182] Annex II to Protocol I.
[183] H-P Gasser (1987), para. 3277.
[184] *Ibid*, paras. 3274-3275.
[185] *Ibid,* para. 1913.

from the lines of fire for as far as feasible during the conflict. It was not drafted to provide parties to the conflict with a legal measure to remove a civilian from a military objective against his or her own wishes, but rather to give those civilians that wish to be removed from the fighting the opportunity and right to be removed.[186] However, nothing in the wording of the article prohibits the removal of persons against their will. This is a clear demonstration of how journalists' behaviour in conflict zones is different from the behaviour of civilians, which can cause difficulties under the legal framework. Journalists may want to stay near military objectives to cover the action, a situation not considered by the Conventions, whereas 'ordinary' civilians are less likely to elect to stay close to danger when given the opportunity to remove themselves from the situation.

Article 51, one of the most important articles of Protocol I, considers the protection the civilian population should receive during conflict in further detail. The article aims to protect civilians as far as possible from the effects of conflict and prohibits a number of actions, such as direct attacks on,[187] or reprisals against,[188] the civilian population. With regards to journalist article 51(2), which states that "the civilian population as such, as well as individual civilians, shall not be the object of attack", provides important protection as it prohibits journalists being made the direct object of an attack. Article 85(3)a of Protocol I lists wilful direct attacks against civilians which cause death or serious injury to body or health as a grave breach of Protocol I, which will generally also be classed as a war crime.[189]

Civilians lose all protection offered by article 51 when taking direct part in hostilities, but only for as long as they are taking a direct part.[190] Once they cease to take a direct part in hostilities they regain their protection as civilians. According to

[186] See C Piloud and J de Preux, "Article 58 – Precautions Against the Effects of Attacks" in: Y Sandoz, C Swinarski and B Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff Publishers, 1987), paras. 2239-2258.
[187] Art. 51(2) Protocol I.
[188] Art. 51(6) Protocol I.
[189] For an overview of the relationship between "grave breach" and "war crime" and the legal consequences of this classification see: M Öberg, "The Absorption of Grave Breaches into War Crime Law" (2009) 91 *International Review of the Red Cross*, 163.
[190] Art. 51(3) Protocol I.

the Commentary on Protocol I, 'direct participation' in hostilities are acts which, "by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces".[191] Included in this can be preparation for, and returning from, combat.[192] Participation in the war effort is not the same as participation in hostilities, which can often be required from a civilian population during a conflict. These two actions should thus be treated as two distinct (legal) categories.[193] There can be discussion as to when exactly journalists can be considered to be participating in the war effort and when they start taking an active part in the hostilities. There is, for example, much discussion regarding the extent to which the media can influence the outcome of a conflict and to what extent they have become part of military strategy through information operations, and thus potentially the war apparatus, in modern conflict. Especially where the media perform a significant propaganda role within a conflict area and incites action against an enemy, it can be questioned whether media personnel consequently lose their civilian status. This will be discussed in further detail in Chapter 7.

Article 52: protection of civilian objects

Civilian objects, which include for example TV stations and (civilian) transmission equipment, like civilian themselves, are protected under the Geneva Conventions. Article 52 of Protocol I states that civilian objects "shall not be the object of attacks or reprisals". As with the term 'civilian', the article operates a negative definition: "civilian objects are all objects which are not military objectives." It defines military objectives as:

> limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

[191] C Piloud and J de Preux, "Art 51 – Protection of the Civilian Population" in: Y Sandoz, C Swinarski and B Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff Publishers, 1987), para. 1944.
[192] OR Vol XV, CDDH/III/224, p. 330.
[193] C Piloud and J de Preux (1987), para. 1945.

An object must therefore both make an effective contribution to military action and its capture, destruction, or neutralisation must offer a definite military advantage. The article concludes by stating that in case of doubt whether an object normally dedicated to civilian purposes is being used to make an effective contribution to military action, the presumption should be against military use. Article 51 is especially important for the media, in that it protects media equipment from attacks. As with 'participation in hostilities', there can be discussion as to when media equipment, such as TV or radio stations, become a military objective due to its potential contribution to military action. In recent conflicts there have been several instances where radio and television stations have been attacked, for example during the Kosovo conflict when a Serbian TV and radio station was bombed by NATO[194] and during the Gaza conflict, where there was a missile attack on Palestinian media stations.[195]

3.1.3 Application

The Geneva Conventions seek to regulate armed conflict and limit the effects thereof. Protocol I supplements the Geneva Conventions and follows the scope of application of the 1949 Conventions, which is set out in common article 2, while Protocol II roughly follows the application of common article 3 Geneva Conventions (1949), which regulates internal armed conflict and will be discussed in more detail below.[196] Article 1 of Protocol I extended the scope of article 2 in 1977 to include "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination (…)".

[194] ICTY, "Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia", 13 June 2000, paras. 71-79, available at http://www.icty.org/sid/10052.
[195] See for example: Human Rights Watch, "Israel/Gaza: Unlawful Israeli attacks on Palestinian media" 20 December 2012, available at: http://www.hrw.org/news/2012/12/20/israelgaza-unlawful-israeli-attacks-palestinian-media.
[196] Art. 1(3) Protocol I.

As discussed in the previous chapter, early developments of IHL treaties solely sought to regulate conduct between state parties.[197] This changed with the inclusion of common article 3 in the Geneva Conventions (1949) which applies to internal conflicts. IHL thus recognises two separate categories of conflict: international and non-international armed conflict. Article 2 common to the Geneva Convention states that the full Geneva Convention shall be applicable during the first type of conflict, while only article 3 common to the Geneva Conflicts regulates the second type. Conflicts may evolve from one type into the other, but legally speaking there are no other categories of armed conflict currently recognised under IHL.[198]

International armed conflict

The full Geneva Conventions only apply where armed conflict has arisen between two or more of the 'High Contracting Parties':

> all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.[199]

The article clearly states that the Conventions shall apply to the full extent in cases of declared war, whether this declaration is made by all parties to the conflict or just one. In this case the application of the Geneva Convention is clearly defined. More difficulties arise in cases where there is no declaration of war by any party, but an armed conflict has arisen nonetheless. While the 1907 Hague Conventions provide that hostilities should not commence without a (conditional) declaration of war,[200] experience post-1907 proved that these formalities were not always followed and many international armed conflicts displaying all characteristics of war arose without

[197] D Akande, "Classification of Armed Conflicts: Relevant Legal Concepts" pp. 32- 79, in: E Wilmshurst (ed.) *International Law and the Classification of Conflicts* (Oxford: Oxford University Press, 2012), p. 32; Bartels (2009), pp 44-48.
[198] ICRC, "How is the Term 'Armed Conflict' Defined in International Humanitarian Law?" (March 2008) *ICRC Opinion,* available at: http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf.
[199] Art. 2 Common the Geneva Conventions.
[200] Art. 1 Hague Convention (III) 1907.

such declarations.[201] Difficulties arose in cases of capitulation or annexation of territory, leading to the 'disappearance' of a state and therefore, arguably the state of war, and cases where a state contested the legitimacy of an enemy government and therefore refused to recognise them as a party to the conflict.[202]

The 1949 Conventions sought to remedy this by including in common article 2 "any other conflict which may arise between two or more of the High Contracting Parties". By the inclusion of "any other armed conflict" the application of the convention is no longer based on state-recognition of a conflict, but is to be evaluated depending on objective criteria.[203] Any armed conflict will trigger the application of the Geneva Conventions, from the moment hostilities commence. If during the course of a conflict a territory becomes occupied by a foreign power, the full Geneva Conventions will apply in the occupied territory as the occupation is a component of the armed conflict to which the Geneva Conventions apply. The article additionally notes that in the event that occupation of a territory is not met with armed resistance, the full Geneva Conventions will still apply, thus extending the Conventions to 'peaceful' occupation of foreign territory not part of a wider armed conflict.

The difficulty that arose from situations where only one of the parties to a conflict had signed up to a treaty regulating their behaviour in times of war, has been remedied by the Geneva Conventions (1949) with the inclusion of a final paragraph to article 2 stating that:

> Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

While a treaty cannot, in principle, bind those who are not a party to the treaty, the provisions seeks to give the Conventions the broadest possible application. The commentary on the article suggests that contracting parties should apply the

[201] J de Preux, *Commentary on the Geneva Convention Relative to the Treatment of Prisoners of War* (Geneva: ICRC, 1960), p.19.
[202] *Ibid,* pp. 19-20.
[203] Vité (2009), p. 72; Pictet (1952), pp. 32-33.

Conventions until the non-contracting party has had a chance to consider and state its intentions on applying the convention.[204] The article requires non-contracting parties to 'accept' and 'apply' the Conventions to bring them into force during a conflict with a contracting party should they wish to do so. The universal application of the Geneva Convention renders such discussion moot, however, where the Conventions of 1949 are concerned, as they have achieved universal acceptance.[205] Such discussion remains, however, relevant for Protocol I, which has not achieved universal acceptance and has not been ratified by military powers such as the United States and Iran.[206]

The Geneva Conventions do not attempt to define the term 'armed conflict', whether internal or international. The term 'armed conflict' was chosen over the use of the term 'war' for the application of the Geneva Conventions, as the latter is more limited in its scope.[207] There is no single definition of armed conflict, though the concept is described in the official commentary on article 2 of the Geneva Conventions:

> Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place.[208]

and

> Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war.[209]

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[204] Pictet (1952), p. 35.
[205] ICRC, "Geneva Conventions of 1949 Achieve Universal Acceptance" (21 August 2006) *News Release ICRC* 06/96, available at: http://www.icrc.org/eng/resources/documents/news-release/2009-and-earlier/geneva-conventions-news-210806.htm.
[206] A list of the current state parties to Protocol I can be accessed at: http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470.
[207] Pictet (1952), p. 32
[208] *Ibid*.
[209] de Preux (1960), p. 20.

The International Criminal Tribunal for the former Yugoslavia (ICTY) has provided a definition of international armed conflict in the *Tadić* case: "an armed conflict exists whenever there is a resort to armed force between States".[210] This definition has subsequently been adopted by other international bodies, such as the International Law Commission,[211] and is widely recognised as authoritative.[212]

Non-international armed conflict

As discussed above, the full Geneva Conventions apply during international armed conflict. During non-international armed conflict taking place in the territory of one of the High Contracting Parties, only common article 3 of the Geneva Conventions (1949) applies. For the application of common article 3 it is irrelevant whether the conflict takes place between two different armed groups (without Government involvement) or between an armed group and the Government; in both cases common article 3 will apply.[213] The article contains no specific provisions concerning journalists, but protects those not or no longer taking part in hostilities, a group which journalists would be classed under. During the negotiations of the Geneva Conventions 1949, it was clear that contracting parties did not intend to apply common article 3 of the Geneva Conventions to all types of non-international conflict and in particular not to any type of anarchy or rebellion against the government. The possibility of defining the term 'armed conflict' in this context was discussed, though ultimately abandoned.[214]

The discussion of the conditions that should be met to trigger the application of the Geneva Convention does provide, however, some valuable insight in what type of conflicts article 3 seeks to regulate. Most notably it requires a certain level of organisation of the insurgent party to the conflict and requires them to have a level of

[210] ICTY*, The Prosecutor v. Dusko Tadić* , Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para.70.
[211] See for example: United Nations, *Report of the International Law Commission: 60th session* (2008) General Assembly, Official records, supplement no 10 (A/63/10), p. 90.
[212] S Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford: Oxford University Press, 2012), p. 155.
[213] Moir (2002), pp. 103-105; UK Ministry of Defence (2004), para. 3.5.
[214] Pictet (1952), p. 49.

authority over the members of their group.[215] In 1995 a more precise definition of non-international armed conflict was provided in the ICTY *Tadić* case, which defined non-international armed conflict as: "protracted armed violence between governmental authorities and organized armed groups or between such groups within a state."[216] This definition has been adopted and utilised by both international criminal courts as well as other international bodies.[217] As with the discussions during the drafting stage of article 3, this definition also requires a certain level of organisation within the armed group. It does, however, place more emphasis on the requirement that a certain level of violence is reached.[218] Violence that does not reach the required level to trigger article 3 is likely to be classed as internal disturbances or tensions. These terms, cited in article 1(2) Protocol II, are currently not defined in law.[219] Defining and identifying non-international armed conflict remains problematic and the subject of heated debate.[220]

The substantive provisions of article 3 common to the Geneva Conventions reflect customary IHL,[221] by stating that the sick and wounded must be collected and cared for and, where necessary, an impartial humanitarian body may offer its assistance to parties to the conflict. It similarly provides that those not, or no longer, taking part in

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[215] ICRC, *Final Record of the Diplomatic Conference of Geneva*, 1949, Vol. II-B (Berne: Federal Political Department, 1949), p. 121. For a more extensive overview of the relevant factors in determining whether art. 3 should apply, see: Pictet (1952), pp. 49-50.

[216] ICTY*, The Prosecutor v. Dusko Tadić* , Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para.70.

[217] For example the Special Court for Sierra Leone, the ICC, the International Law Commission, and the ICRC. For a more extensive overview see: Sivakumaran (2012), p. 166.

[218] S Vité, "Typology of Armed Conflicts in International Humanitarian Law: Legal concepts and actual situations" (2009) 91 *International Review Red Cross*, 69, pp. 75-77; see also for example: ICTY*, Prosecutor v Dusko Tadić* , Judgement (Trial Chamber), 7 May 1997, paras. 561-568; ICTY, *Prosecutor v Boskoski*, Judgement (Trial Chamber), 10 July 2008, para. 175.

[219] For more information on these terms see: Sandoz, Swinarski and Zimmerman (eds.) (1987), paras. 4475-4476; A Eide, "International Disturbances and Tensions" in: Henry Dunant Institute, *International Dimensions of Humanitarian Law* (Paris: Unesco, 1988), 241-256; H-P Gasser, "Humanitarian Standards for Internal Strife: A brief overview of new developments" (1993) 33 *International Review of the Red* Cross, 221*;* D Fleck (ed.), *The Handbook of International Humanitarian Law* (Oxford: Oxford University Press, 2008), para. 1205.

[220] Sivakumaran (2012), p. 155;

[221] This has been confirmed by the ICJ in *Nicaragua v US* (Judgement of 27 June 1986) (Merits) 1986 ICJ Rep. 14, which states in para 218 that "Art 3 (..)in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity". See also in ICTY*, The Prosecutor v. Dusko Tadić* , Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para 98; International Criminal Tribunal for Rwanda (ICTR), Prosecutor v. Akayesu, Case No. ICTR-96-4-T (Trial Chamber), September 2, 1998, paras. 608–609.

hostilities must be treated humanely. It specifically prohibits under any circumstances: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees that are recognized as indispensable by civilized peoples.[222] The commentary refers to this article as 'a Convention in miniature' that applies to all non-international armed conflict, without the requirement of reciprocity.[223] The sole fact that armed conflict is taking place within the territory of a High Contracting party is sufficient to require *all* parties to the conflict, not just those party to the Conventions, to observe these humanitarian requirements which form the basic principles of the Geneva Conventions.[224] Article 3 thus binds, to a certain extent, parties which have not signed up to the Geneva Conventions. This is not without controversy, and is much debated in academic literature.[225] Sivakumaran sums up the most common theories in a helpful manner:

> "Either there is a rule of customary international law according to which [nonstate armed groups] are bound by obligations accepted by the government of the state where they fight, or the principle of effectiveness implies that any effective power in the territory of a state is bound by the state's obligations, or they are bound via the implementation or transformation of international rules into national legislation or by the direct applicability of self-executing international rules."[226]

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[222] Art. 3 Common to the Geneva Conventions 1949.
[223] Pictet (1952), p. 48. See further for application of this principle for example *Nicaragua v US (Judgement of 27 June 1986) (Merits) 1986 ICJ Rep. 14, at 114;* Report No 55/97 (30 October 1997) Case No 11.137 (Argentina), para 174.
[224] Common art. 3 states: "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, *each* Party to the conflict shall be bound to apply (..)". See also for example: L Moir, *The Law of Internal Armed Conflict* (Cambridge: Cambridge University Press, 2002), pp. 52-58.
[225] See for example: C Ryngaert, "Non-Sate Actors and International Law" (2008) *Institute for International Law Working paper,* available at: http://www.law.kuleuven.be/iir/nl/onderzoek/wp/WP146e.pdf; Sivakumaran (2012), pp. 236-254; A Cassese, "The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts" (1981) 30 *International and Comparative Law Quarterly*, 416, pp. 420-430.
[226] M Sassòli, 'Transnational armed groups and international humanitarian law' (2006) 6 *HPCR Occasional Paper Series*, 1, p. 12.

Article 3 also requires that "parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention". This urges parties to consider applying, on a voluntary basis, the wider set of the provisions of the Geneva Conventions to the conflict, which can be beneficial to all parties, especially when the conflict intensifies and the basic principles of article 3 prove insufficient to regulate all conduct during the conflict. The article finally notes that: "The application of the preceding provisions shall not affect the legal status of the Parties to the conflict". This sentence is added to the article to avoid interference with a state's internal affairs. The mere application of article 3 does not constitute recognition of the legality or authority of a government-opposing party, nor does it limit a government's right to suppress a rebellion.[227] It does, however, require them to act humanely while doing so.

The application of article 3 proved problematic as the lack of definition of armed conflict in this context led to different interpretations of the term and the existence of a non-international armed conflict was often denied by state parties, significantly reducing the practical application of the article.[228] Protocol II sought to clarify the rules applicable to non-international armed conflict, but did not want to affect the application of common article 3.[229] It however failed in this aim and the resulting Protocol II did little to clarify the concept of non-international armed conflict, creating significant discussion as to its application.[230] The Protocol, which develops and supplements the rules contained in common article 3, has a slightly different field of application and is almost a self-contained instrument, in spite of dealing with the same subject matter: non-international armed conflict.[231] While it can be argued that this has created two types of non-international armed conflict: 'common article 3 conflict' and 'Protocol II' conflict, this was not necessarily the intention of the Protocol,[232] nor does the distinction significantly affect the protection of journalists under IHL for the purpose of this thesis. This is largely due to the additional

[227] Pictet (1952), pp. 60-61.
[228] Sandoz, Swinarski and Zimmerman (eds.) (1987), para. 4448; Moir (2002), pp. 67-88.
[229] SS Junod, "Additional Protocol II: History and Scope" (1983) 33 *American University Law Review*, 29, pp. 31-32.
[230] See for example Moir (2002), pp. 101-103 and 119-132;
[231] Sandoz, Swinarski and Zimemrman (eds.) (1987), para. 4454.
[232] Sivakumaran (2012), pp. 164 and 190-192.

protection offered by customary law, discussed below, which makes no distinction between the two types.[233] I will therefore refer to 'non-international armed conflict' in general in my research.

Protocol II does provide a more detailed indication of what should be considered armed conflict in a non-international setting (under this Protocol):

> [A conflict taking] place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

The Protocol further specifically states that it does not apply to situations of internal disturbances and tensions, "such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts", confirming that not all internal conflict will lead to the application of the Convention. While journalists are not specifically mentioned in Protocol II, they are entitled to the basic general protection provided to civilians under that protocol. The Protocol is thus designed to safeguards journalists from, amongst other things, violence to life, health and physical or mental well-being; collective punishments; taking of hostages; acts of terrorism; outrages upon personal dignity; slavery and the slave trade in all their forms; pillage and threats to commit any of these.[234] Where article 3 binds all parties to the conflict, including non-state parties such as insurgents, the situation is not as clear for Protocol II, and its application by non-state parties depends on their willingness to apply it, which limits the practical application of the Protocol.[235] Protocol II is not as detailed as Protocol I or the Geneva Conventions and only contains 15 substantive regulations.

Non-international or international armed conflict

The lines between international and non-international armed conflicts are not always clear. This is problematic given the significant differences in the applicable law,

[233] S Vité, "Typology of armed conflicts in international humanitarian law: legal concepts and actual situations" (2009) 91 *International Review Red Cross*, 69, pp. 80-81.
[234] Art. 4 Protocol II.
[235] Moir (2002), pp. 103-105 and 107-109.

depending on the typology of the conflict. There are three principal ways a non-international armed conflict can be brought under the law of international armed conflict: belligerency, wars of national liberation and intervention of an outside state in the conflict.

The first situation, belligerency, requires the formal acknowledgement of a State that an existing conflict between an armed non-state group within a territory and the central government of that territory constitutes a civil war. While the exact practice and requirements are much debated,[236] it is sufficient to note here that this formal recognition is required to bring the law of international armed conflict into force. The recognition of belligerency has not been common and is no longer in active use, partly due to the increase in regulations applicable to non-international armed conflict.[237] The second situation, a war of national liberation, must satisfy the requirements laid down in article 1(4) of Protocol I: "(..) peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination". Where these requirements are satisfied the Geneva Conventions will become applicable in full. The practical effect of this provision is, however, fairly limited.[238] The third situation is currently the most common. Where a foreign power intervenes in an existing internal conflict, this may, depending on the level of involvement, 'internationalise' the conflict. There is much discussion on this subject,[239] which goes beyond the scope of this thesis. Relevant factors include on which 'side' of the conflict intervention takes place and the level and type of intervention itself. It is sufficient to note here that it is possible to internationalise a non-international conflict.

For civilian journalists, the change in the character of a conflict from non-international to international will not significantly impact on their protection, as

[236] See for example: Sivakumaran (2012), pp. 9-20.
[237] See for example: F Bugnion *"Jus ad Bellum, Jus in Bello* and Non-International Armed Conflicts" (2003) 6 Yearbook of International Humanitarian law, 192; YM Lootsteen, "The Concept of Belligerency in International Law" (2000) 166 *Military Law Review,* 109.
[238] Sivakumaran (2012), p. 222.
[239] See for example Moir (2002), pp. 46-52; Sivakumaran (2007), pp. 222–228; H-P Gasser, "Internationalized Non-International Armed Conflicts: Case studies of Afghanistan, Kampuchea and Lebanon" (1982) 31 *American University Law Review*, 145; Vité, (2009), p. 71; ICTY*, Prosecutor v. Dusko Tadić* , Judgement, IT-94-1-A, 15 July 1999, paras. 84-145

civilians should receive more or less the same protection in both types of conflict, though the provisions concerning their protection are far less detailed under non-international armed conflict. The real impact would be felt by war correspondents who, in international armed conflict, find protection under article 4A(4) of Geneva Convention III (1949). They would not be classed as prisoners of war should they be captured while accompanying a military unit during a non-international armed conflict.[240]

3.1.4 Duration

The duration of the application of the four Geneva Conventions is different, due to the nature of their subject matter. Convention I, concerning the wounded and sick armed forces in the field, simply states in article 5 that: "For the protected persons who have fallen into the hands of the enemy, the present Convention shall apply until their final repatriation". The only side note that must be made here is that once the wounded and sick are cured, they cease to fall under the category of 'protected person' under Convention I and 'move on' to be classified solely as prisoners of war under Convention III, which has a different duration of application. The second Convention II, concerning the wounded, sick and shipwrecked armed forces at sea, applies only for as long as the armed forces are physically at sea; as soon as they set foot on land they are subject to the relevant provisions of the first, third and/or fourth Convention.[241]

Geneva Convention III, concerning prisoners of war, states in article 5 that it applies "from the time they fall into the power of the enemy and until their final release and repatriation". This entails that prisoners of war fall under the protection of Geneva Convention III until they are reinstated in the situation they were before being captured.[242] If this repatriation is to an occupied territory, the Geneva Conventions will 're-apply' as soon as they are re-interred in their home country under article 4B, which concerns the treatment of persons belonging, or having belonged, to the armed forces of an occupied country. Where there is any doubt concerning the status of a

[240] In Non-international conflicts fighters cannot claim treatment as prisoners of war upon detention: Fleck (ed.) (2008), para. 1215.
[241] Art. 4 Geneva Convention II (1949); see also Pictet (1960), p. 41.
[242] de Preux (1960), p. 74.

prisoner, i.e. whether he is eligible for prisoner of war status or not, the Convention will apply until their status is decided by a competent tribunal.[243]

Geneva Convention IV, concerning the protection of the civilian population during times of war, applies "from the outset of any conflict or occupation mentioned in Article 2" and will cease at "the general close of military operations".[244] In the case of an occupied territory, the application of the Convention normally ceases one year after the general close of military operations, though there are some exceptions.[245] The exceptions concern the situation where an occupying force remains to exercise governmental functions in the occupied territory. The term from 'the outset' has been used to clarify that the Convention should take effect from the first act of violence and from the moment troops come in contact with the civilian population.[246] The end of the application of this Geneva Convention, the "general close of military operations", will be relatively straightforward where the conflict concerns only two states, for example the moment of the signing of an armistice or capitulation.[247] Where multiple states are involved this may be more complicated and is generally taken to mean "the final end of all fighting between all those concerned in the conflict".[248]

3.2 Customary law

The Geneva Conventions and their Additional Protocols, as well as other international treaties, provide extensive regulation for the conduct of hostilities and offer protection to a wide range of persons during international armed conflict. Treaty law is by its nature, however, limited in application to those states that have ratified a treaty. One of the inherent drawbacks from treaty law is thus that the applicable law will vary from conflict to conflict, dependent on the parties involved.

[243] Art. 5 Geneva Convention III. This is relevant, for example, for a war correspondent who was accompanying the armed forces at the time of capture, but lost his identity card proving his status.
[244] Art. 6 Geneva Convention IV.
[245] *Ibid.*
[246] Pictet (1958), p. 59.
[247] *Ibid*, p. 63.
[248] *Ibid*, p. 62.

Another problem is caused by the fact that current IHL treaty law only provides limited regulation of non-international armed conflicts,[249] which a large portion of the conflicts currently being fought would be classed as.[250] The IHL treaties that do regulate non-international armed conflict provide less detailed regulation than those that concern international armed conflict.[251] This gap is partly filled by customary law, which provides significant regulation of both non-international and international armed conflict.

Customary law can roughly be described as "a general practice accepted as law".[252] It has widely been accepted as source of International law,[253] and is applied by international courts such as the ICTY and the International Criminal Court (ICC).[254] Many treaties, such as the Rome Statute of the ICC codify generally accepted norms of international law.[255]

Proving the existence of a rule of customary law can be challenging and in practice it is mostly courts, tribunals and other influential bodies that determine the existence of such a rule, which is subsequently confirmed or denied by states.[256] For a rule of

[249] Those that do apply are: the Convention on Certain Conventional Weapons (1980), the Statute of the ICJ (1946), the Ottawa Convention on the prohibition of Anti-Personnel mines (1997), the Chemical Weapons Convention (1992), the Hague Convention for the Protection of Cultural Property and its second protocol (1954), and Additional Protocol II (1977) and article 3 common to the Geneva Conventions (1949).
[250] J-M Henckaerts, "Study on Customary International Humanitarian Law: A contribution to the understanding and respect for the rule of law in armed conflict" in: AM Helm (ed.), *The Law of War in the 21st Century: Weaponry and use of force – International Law Studies Vol. 82* (Newport, Rhode Island: Naval War College, 2006), 37-79, p. 40.
[251] Henckaerts (2006), p. 40.
[252] Art. 38.1(b), Statute of the ICJ.
[253] See art. 38 Statute of the ICJ for an authoritative provision on the sources of International law.
[254] See for example: UN Security Council "Report of the Secretary General pursuant to paragraph 2 of Security Council resolution 808" (3 May 1993), para 43; Prosecutor v. Hadžihasanović, Alagić & Kubura, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, para 44 (July 16,2003); Kupreskic, Trial Chamber Judgment, Case No. IT-95-16-T, 14.01.2000; Art 8(2)b Art. 7, UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, which defines war crimes, amongst others, as "Other serious violations of the laws and customs applicable in international armed conflict".
[255] Further examples are the UN Charter, the Geneva Conventions (1949) and the 1969 Vienna Convention on the Law of Treaties. For further details see A Boyle and C Chinkin *The Making of International Law* (Oxford: Oxford University Press, 2007) pp. 233-262; RY Jennings, *What is International Law and how do we tell it when we see it* (Deventer: Kluwer, 1983).
[256] S Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford: Oxford University Press, 2012), p. 104.

customary law to exist, two elements are generally required: *usus*, state practice and *opinio juris sive necessitatis,* the belief that this practice is necessary, required or prohibited (depending on the rule in question).[257] These two elements have been the subject of much discourse and can be difficult to fully separate as they often overlap,[258] but both need to be present for a rule of customary law to exist.[259] In customary IHL greater emphasis is placed on the *opinio juris* element than in other international customary law.[260] As stated by the ICTY in *Tadić:*

> In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.[261]

The burden of proof concerning customary law will generally lie with the party arguing the existence of such a rule.[262] As considered in more detail below, while consistent practice is important in establishing a rule of customary law exists, the existence of inconsistent practice is not necessarily a barrier to proving a rule of customary law exists, as long as such practice is considered a breach of the rule.[263]

In 1995 the ICRC received a mandate from the 26th conference of the Red Cross and Red Crescent, with the assistance of experts in IHL and experts from governments and international organisations, to compose a report on the customary rules of IHL

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[257] J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (Cambridge: Cambridge University Press, 2005), p. XXXVIII. ICJ, *North Sea Continental Shelf (Germany v Denmark v The Netherlands)* [1969] 3, para 44.
[258] See for example: ICJ, *Asylum Case (Colombia v Peru)* [1950] 266; ICJ, *Fisheries (United Kingdom v Norway)* [1951] 5; ICJ, *North Sea Continental Shelf (Germany v Denmark v The Netherlands)* [1969] 3; ICJ, *Continental Shelf Libya v Malta)* [1985] 13; ICJ, *Military and Paramilitary Activities in and out of Nicaragua (Nicaragua v United States)* [1986] 14; see more generally: Henckaerts and Doswald-Beck (2005), p. XLVI.
[259] ICJ, *North Sea Continental Shelf (Germany v Denmark v The Netherlands)* [1969] 3, para. 77; for a discussion on the required balance between the two, see: AE Roberts, "Traditional and Modern Approaches to Customary International Law: A reconciliation" (2001) 95 *American Journal of International Law*, 757.
[260] AE Roberts (2001); Henckaerts and Doswald-Beck (2005), p XLVIII; Moir (2002), pp. 138-139.
[261] ICTY*, The Prosecutor v. Dusko Tadić* , Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para.99.
[262] Sivakumaran (2007), p. 104.
[263] Boyle and Chinking (2007), p.235. See further: J Charney, "The Persistent Objector Rule and the Development of Customary International Law" *British Yearbook of International Law* (1986) 58, pp. 1-24.

governing both international and non-international conflicts.[264] The resulting study has been described as taking the 'classic' approach to establishing customary law, which has been set out by the ICJ in a number of cases.[265] While the exact methodology and some of the results of the study have been criticised,[266] the general approach to formulating rules of customary law applied in this study provides a useful indication of how the existence of such rules will be established in practice.

The study considered in terms of state practice: official physical and verbal acts of states; the practice of executive, legislative and judicial organs of a state; actions and communications from certain international organisations; and the practice of armed opposition groups.[267] It also noted that actions of states that are never disclosed cannot contribute to establishing state practice, nor can the decisions of international courts, as they are not state organs, though the latter can provide evidence of the existence of state practice.[268] State practice has to be sufficiently 'dense' to create customary law:[269] it must by virtually uniform, extensive, representative and some time may need to have elapsed before something can be considered state practice, though this is not a 'hard' requirement.[270] *Opinio Juris* often overlaps with state practice and requires the practice to be carried out 'as of right'.[271] The ratification, implementation and interpretation of treaties can provide an indication of the existence of a rule of customary law, as they can show how a state views specific rules of international law.[272]

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[264] ICRC, '26th International Conference of the Red Cross and Red Crescent, Geneva Dec 3-7 1995 - Resolutions, *International Review Red Cross* (1996) 36, p. 84 (resolution II).
[265] Henckaerts and Doswald-Beck (2005), p. XXXVIII.
[266] See for example: Y Dinstein, "The ICRC Customary International Humanitarian Law Study" in: AM Helm (ed.), *The Law of War in the 21st Century: Weaponry and use of force – International Law Studies Vol. 82* (Newport, Rhode Island: Naval War college, 2006), 99-112; JB Bellinger III and WJ Haynes II, "A US Government Response to the International Committee of the Red Cross Study 'Customary International Humanitarian Law'" (2007) 89 *International Review of the Red Cross*, 443.
[267] For full details of what was considered under state practice, see: Henckaerts and Doswald-Beck (2005), pp. XXXVIII-XLII.
[268] *Ibid*, p. XL. Decisions of courts which are subsequently confirmed by states are a different matter of course, though it is the confirmation by the state, rather than the decision itself that is important here.
[269] ICJ, *Nuclear Weapons Case*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, para 70–73.
[270] Henckaerts and Doswald-Beck (2005), pp. XLII-XLV; ICJ, *Military and Paramilitary Activities in and out of Nicaragua (Nicaragua v United States)* [1986] 14., para 98.
[271] *Ibid*, p. XLV, for a full overview of the consideration on *Opinio Juris*, see pp. XLV-XLVIII.
[272] *Ibid*, pp. XLVIII-XLIX.

3.2.1 Rules concerning Journalists

The study on customary law undertaken by the ICRC was concluded in 2005 and the results were incorporated in a database in 2010, which is updated regularly to reflect ongoing changes in customary law.[273] One should keep in mind when discussing the rules included in this database that the same degree of emphasis cannot be placed on the wording of a rule of customary law as on a rule of treaty law. The formulation of customary law is imprecise because of the very nature of customary law, and customary law provides a certain ambiguity and elasticity as to the exact details of a specific rule of law.[274] Neither is the study intended to be exhaustive, but rather a starting point from which discussion and further study can take place.[275] The study does include a rule on the protection of journalism though, which I will discuss in this context.

Rule 34, of the Customary Law database concerns the protection and respect for journalists. The rule is placed under the Part II of the database: "Specifically Protected Persons and Objects". The rule states: "Civilian journalists engaged in professional missions in areas of armed conflict must be respected and protected as long as they are not taking a direct part in hostilities." The wording of the article reads as a basic summary of article 79 of Protocol I to the Geneva Conventions, containing essentially the same message, though in much less detail, which is partly due to the nature of customary law. The rule is, importantly, considered to be applicable in both international and non-international armed conflict and can be found in a wide range of military manuals, as well as in official statements and practice,[276] thus extending the protection of article 79 to non-international conflicts in which the full Geneva Conventions and the Additional Protocols are not applicable, as well as extending the obligation to protect journalists to those states that are not party to Protocol I. There is currently no official practice contrary to rule

[273] ICRC, "Customary IHL Database", available at: http://www.icrc.org/customary-ihl/eng/docs/home.
[274] TLH McCormack, "Australian Perspective on the ICRC Customary study" in: AM Helm (ed.), *The Law of War in the 21st Century: Weaponry and use of force – International Law Studies Vol. 82* (Newport, Rhode Island: Naval War college, 2006), 81-97, p. 88.
[275] Foreword to the study by Dr Yves Sandoz in: Henckaerts and Doswald-Beck (2005), p. XXIII.
[276] For an overview of this see: J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law, Volume II: Practice* (Cambridge: Cambridge University Press, 2005), pp. 661-670.This includes military manuals and practice of states not party to Protocol I.

34, neither in international nor in non-international armed conflict and any intentional attacks on journalists have generally been condemned.[277]

It is interesting to note that rule 34 not only calls for the protection of civilian journalists, but also calls for 'respect' to be afforded to them. This goes further than the protection offered by article 79 and is based on practice which condemns measures specifically taken to dissuade and/or hamper journalists from carrying out their professional activities.[278] This benefit is not offered under treaty law in either international or non-international conflicts and enforcement of this rule may be difficult. This will be considered in more detail in chapter 6. It is also important to keep in mind that civilian journalists are entitled to the full protection offered to civilians in general under customary law, which includes all the rules contained in Part V of the database: "Treatment of Civilians and Persons Hors de Combat". These rules protect journalists from a wide variety of actions, such as inhuman treatment, discrimination, violence to life, deprivation of liberty and hostage taking.[279]

3.2.2 Application

As discussed above, the application of customary humanitarian law is not subject to the same constraints as treaty law. Many rules of customary law are not just confined to situations of armed international conflict, but apply equally in armed non-international conflict.[280] As noted, treaty provisions can become binding on those not party to a treaty where they reach the status of customary law. As discussed above, several criteria will have to be met and the acquiescence of non-parties will be especially relevant here.[281] Whether a provision of customary law applies in a conflict will have to be assessed separately for each rule though, as there are no general rules concerning the application of customary law as a whole in different types of conflict. Though the rules of customary law are often less detailed than those

[277] *Ibid*.
[278] See for example: UN General Assembly, Res. 53/164 calling to refrain from harassment and intimidation of journalists in the Kosovo conflict and UN Commission on Human Rights, Res. 1995/56, which deplored the attacks, acts of reprisal, abductions and other acts of violence against representatives of the international media in Somalia.
[279] See rules 87-105 Customary IHL Database.
[280] ICTY*, The Prosecutor v. Dusko Tadić* , Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para. 70.
[281] ICJ, *North Sea Continental Shelf (Germany v Denmark v The Netherlands)* [1969] 3, paras 71-72.

of international humanitarian treaty law, they provide important protection in situations where most treaties will not be applicable (in full). The wider applicability of customary law also has important consequences for the application of some treaty provisions, such as those of the Geneva Conventions (1949), which by achieving status of customary law, attain a much wider field of application then they did in their original treaty form.

3.3 Other international documents

There have been a number of recommendations and declarations by international bodies and non-governmental organisations aimed at reducing violence against journalists. Though these are non-binding in nature, they emphasise the existing provisions and provide more detailed recommendations for the protection of journalists, flagging up potential weakness in the current legal protection. They also emphasise the internationally recognised value of journalistic work to society.

In 1996, the Council of Europe, which has regularly been involved in the protection of journalists, adopted a recommendation concerning the protection of journalists in situations of conflict and tension.[282] Though not binding, this recommendation shows recognition for the need for more concrete protection of journalists in conflict situations than is currently available. The Council reaffirms the importance of the protection offered by article 79 of the Geneva Convention, but mostly seek to emphasise the need to *respect* journalists as well as protect them, as is reflected in rule 34 of customary law. The principles contained in the appendix of this document call on member states to improve on a wide variety of issues: such as access to territory, freedom of movement, confidentiality of sources, and impunity.[283]

In 2003, in response to a sharp rise in the number of deaths of journalists in conflict zones, Reporters without Borders (RwB) published the *Declaration on the safety of*

[282] Council of Europe, Recommendation No. R(96)4 On The Protection of Journalists in Situations of Conflict and Tension, 3 May 1996.
[283] *Ibid,* Appendix.

journalists and media personnel in situations involving armed conflict. The aim of this Declaration is to reaffirm the principle rules of IHL concerning journalists as well as proposing a number of improvements to bring the law up to date with present-day requirements.[284] In 2007 the Press Emblem Campaign (PEC) launched the ambitious *Draft proposal for an International Convention to strengthen the protection of journalists in armed conflicts and other situations including civil unrest and targeted killings*,[285] reaffirming some aspects of IHL, but further calling for the creation of a protective emblem for the press, which has proven controversial and more ambitious provisions such as a right to information and freedom of movement. Both will be discussed in more detail in chapter 8.

In 2007, 200 media professionals adopted the United Nations Educational, Scientific and Cultural Organisation (UNESCO) Medellin Declaration on Press Freedom[286] at a conference organised by UNESCO. The Medellin Declaration emphasises the need to avoid impunity in cases where rights of journalists are violated. Though this Declaration is not specifically aimed at journalists in conflict situations, it contains provisions relevant to journalists in that situation. The Declaration further urges states to comply with the 1997 Resolution 29,[287] adopted by UNESCO's General Conference to combat impunity of crimes against journalists and Resolution 1738,[288] adopted by the United Nations General Assembly, condemning attacks against journalists in conflict situations.

These, and several other documents in similar spirit, call for a number of different measures. Though a coherent approach is distinctly lacking, they do all ask for the reaffirmation of IHL and for those states that have not yet ratified the Additional Protocols to do so.

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[284] A Balguy-Gallois, "The Protection of Journalists and News Media in Armed Conflicts" (2004) 86 *International Review of the Red Cross,* 37, p. 38.
[285] 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" (2007), available at: http://www.pressemblem.ch/4983.html.
[286] Accessible at: http://portal.unesco.org/ci/en/ev.php-URL_ID=23875&URL_DO=DO_TOPIC&URL_SECTION=201.html.
[287] UNESCO, Resolution 29: Condemnation of Violence Against Journalists, 12 November 1997.
[288] UN Security Council, Resolution 1738 (Condemning Attacks against Journalists), S/RES/1738, 23 December 2006.

3.4 Conclusion

As we have seen above, there are two articles in the current IHL framework that specifically seek to protect reporters in conflict zones: article 4A of Geneva Convention III which protects war correspondents and article 79 of Protocol I (1977) which protects civilian reporters. The application of these articles is, however, confined to international armed conflicts, which hampers their effectiveness. During non-international armed conflict, currently one of the most common type of conflicts, a limited number of provisions of the IHL framework apply, which only provide basic protection for civilians and therefore journalists in conflict areas. This gap in legislation is partly addressed by customary law, which contains protection for journalists in both international and non-international conflict. The protection offered by customary law goes further than current treaty law, in the sense that it requires respect for journalists as well as protection. Yet it is also more limited, in the sense that it does not provide special protection to those civilian journalists accompanying the armed forces, who would, during international conflict, find protection under article 4A(4) Geneva Convention III.

The variety of declarations, recommendations and proposals aimed at the protection of journalists in conflict zone that have been drafted over the last two decades show that it is a subject which receives international attention. While the reaffirmation of the current IHL framework for the protection of journalists in these documents is a strong indication of the importance of IHL in this area, it also shows that the IHL framework is currently not (yet) protecting journalists to the required level. The reasons for this will be discussed in chapters 5 to 8 of this thesis.

4. International Human Rights Law

International Human Rights Law (IHRL) and International Humanitarian law (IHL) share at their core a central value: the protection and integrity of the human person.[289] They are, however, two distinct frameworks which govern different relationships and are derived from different backgrounds, with different underlying values. Historically they have been viewed as two separate, mutually exclusive, regimes,[290] though this has changed over the last decades. IHRL, which was originally drawn up to apply during peace time, has slowly been accepted to apply equally during conflict, offering potential additional protection to journalists in conflict zones. This does however raise significant questions on which of the two frameworks, takes precedence where both apply and potentially conflict.

This chapter will consider the changing attitude towards the application of IHRL which has led to the application of the framework to some, but not all actors during armed conflict. It will then consider the approaches that may be taken where IHRL conflicts with IHL and discuss the human rights provisions which are relevant for journalists working in conflict zones. The discussion of these topics will be fairly limited compared to the amount of academic literature on this topic. The focus of this thesis requires establishing whether journalists can find protection under IHRL during different types of conflict. This chapter therefore examines if, and to what extent IHRL applies during armed conflict. It will attempt to provide a brief overview of the extensive academic discussion on the interaction of IHL and IHRL in conflict zones and the potential impact this interaction can have on Journalists' safety.

There are a large number of human rights treaties that are relevant in this area with different territorial application and significant overlap in subject matter, which can

[289] R Provost, *International Human Rights and Humanitarian Law* (Cambridge: Cambridge University Press, 2002), p. 2.
[290] See for example: GIAD Draper, "Humanitarian Law and Human Rights" (1979) *Acta Juridica*, 193.

unfortunately not all be discussed here. The UN currently has nine[291] core human rights treaties which are referred to as the main international human rights conventions.[292] Of these the International Covenant on Civil and Political Rights (ICCPR) is the most important treaty for the protection of journalists in conflict zones. The other relevant treaty is the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). This treaty contains a limited number of human rights, but will be mentioned where relevant to the protection of journalists in conflict zones. The remaining seven are, however, of limited use to the protection of journalists. Aside from the world-wide UN human rights treaties there are several regional systems which promote and protect human rights: The Council of Europe, the Organisation of American States and the African Union.[293] Below the discussion of specific rights will be limited to the ICCPR, as one of the most widely ratified international human rights conventions, and the European Convention on Human Rights (ECHR), which has served as a model for the adoption of regional treaties in other parts of the world.[294]

4.1 Historic development of International Human Rights Law

IHRL and IHL developed as two separate legal frameworks, which had little to do with each other until the 1970s. As discussed in the previous chapters, the laws of

[291] International Convention on the Elimination of All Forms of Racial Discrimination (1965); International Covenant on Civil and Political Rights (ICCPR), 1966; International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 1984; Convention on the Rights of the Child (CROC), 1989; International Convention for the Protection of All Persons from Enforced Disappearances (ICPED), 2006; International Convention on the Rights of Persons with Disabilities (CRPD), 2006.

[292] UN Secretary General, "Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties to the International Human Rights Treaties" [HRI/GEN/2/Rev.6], 3 June 2009.

[293] There are other regional human right treaties, but these are generally less developed, see: O De Schutter, *International Human Rights Law: Cases, material, commentary* (Cambridge: Cambridge University Press, 2010), p.292.

[294] See for more detail: A Gioia, "The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict" in: O Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law: Pas de deux* (Oxford: Oxford University Press, 2011), 201-249, pp. 301-203.

war have developed over millennia, becoming consolidated into an international system of humanitarian laws from the Middle Ages onwards.[295] Human rights are not as old and are generally considered the product of the Age of Enlightenment, though their roots can be traced much further back in time.[296] Human rights instruments emerged during the Enlightenment as instruments of social and political change.[297] IHL has focussed, from its inception, on the relationship between states and is one of the oldest fields of public international law. Human rights law on the other hand, originally, solely consisted of national law concerning the rights of the individual versus the power of the state.[298] This changed in the period after WWII when IHL developed in response to the atrocities committed during the war, moving human rights from domestic regulation to the field of public international law.[299] This resulted in the Universal Declaration of Human Rights (UDHR) adopted by the United Nations General Assembly on 10 December 1948 as a non-binding resolution,[300] which would go on to inspire a rich body of IHRL.[301]

While the UDHR and the significant revision and expansion of the Geneva Conventions were prepared during the same post-war period, there is little cross-referencing between the two works in their respective *travaux préparatoires*, nor does legal doctrine of the 1940s and 1950s mention IHRL when discussing IHL and vice versa.[302] *Kolb* identifies several reasons for this strict separation between the two fields of law. As discussed in the previous chapters, the 1949 Geneva Conventions contained a significant expansion of the subject matter, moving a field of law which was previously viewed as a set of reciprocal contracts drawn up in

[295] R Kolb, "The Relationship between International Law and Human Rights Law: A brief history of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions" (1998) 38 *International Review of the Red Cross*, 409, p. 410.
[296] MH Randall, "The History of Human Rights Law" in: R Kolb and G Gaggioli (eds.), *Research Handbook on Human Rights and Humanitarian Law* (Cheltenham: Edward Elgar Publishing Limited, 2013), 3-34, pp. 5-9.
[297] *Ibid*, p. 7.
[298] See for example Kolb (1998), p. 410; Randall (2013), p. 10.
[299] Kolb(1998), p. 410.
[300] UN General Assembly, "Universal Declaration of Human Rights", GA Res. 217A (III), UN Doc. A/810 (1948).
[301] Provost (2002), p. 2.
[302] R Kolb, "Human Rights Law and International Humanitarian Law between 1945 and the Aftermath of the Teheran Conference of 1968" in: R Kolb and G Gaggioli (eds.), *Research Handbook on Human Rights and Humanitarian Law* (Cheltenham: Edward Elgar Publishing Limited, 2013), 35-52, pp. 39-41.

national interest to "solemn affirmations of principles respected for their own sake". The emphasis of the Conventions on respect and dignity for human beings caught up in conflicts opened the door to a closer relationship with human rights, but this ideological change was still very young in the 1940s and 1950s.[303] Similarly the UDHR was one of the first major developments in the field of IHRL, which was during the post-WWII period still in its infancy, with hardly any positive law at the international level.[304] Another reason was that the fields were 'championed' by two distinct sets of lawyers: IHL was the concern of military, politically neutral, lawyers, while Human rights law was the concern of civil society lawyers, who were often highly politicised and there was little trust between these groups.[305] Furthermore, IHL and IHRL have distinct institutional backgrounds as IHRL was during this period largely produced by UN political organs, while the International Committee of the Red Cross (ICRC) was responsible for IHL. The independent ICRC did not wish to open the field of IHL to the political organisation that was the UN, fearing it would affect the neutrality of IHL, while the UN considered the ICRC re-drafting rules of war as a suggesting the UN would be unable to fulfil its principal aim: to maintain peace.[306] Finally there were issues concerning the material (including temporal) field of application as, during the first decades after WWII, IHRL was generally considered to apply (solely) during peacetime, while IHL applied during armed conflict, rendering the two mutually exclusive.[307]

The strict separation between the two fields of law disappeared over time, when IHRL grew increasingly stronger and developed positive international law.[308] In the 1960s, the continuing development of IHL had come to a halt due to little international support for an extension of the existing Geneva Conventions, while, in

[303] *Ibid*, p. 41; WI Hitchcock, "Human Rights and the Laws of War: The Geneva Conventions of 1949" in A Iriye, P Goede and WI Hitchcock (eds.), *The Human Rights Revolution: An international history* (Oxford: Oxford University Press 2012), 93-112, pp. 97-106.
[304] Kolb (2013), pp. 41-42; D Schindler, "Human Rights and Humanitarian Law: Interrelationship of laws" (1981-1982) 31 *The American University Law Review*, 935, pp. 935-936.
[305] *Ibid*, p. 42.
[306] *Ibid,* pp. 42-43; KD Suter, "Enquiry into the Meaning of the Phrase 'Human Rights in Armed Conflicts'" (1976) 15 *Military Law and Law of War Review*, 393, p. 400.
[307] Kolb (2013), p. 43; J Meurant , "Humanitarian Law and Human Rights Law: Alike yet distinct" (1993) 33 *International Review of the Red Cross*, 89, pp. 89-90.
[308] See for example the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966).

contrast, support for ongoing development of IHRL was still going strong.[309] There was a pressing need however, for increased protection for victims of war in several of the ongoing conflicts throughout the world, which was sought in a partial fusion of the increasing number of international human rights treaties and IHL.[310] The turning point of the relationship between IHL and IHRL is generally considered to be the 1968 Teheran Conference on *Human Rights in Armed Conflicts*.[311] One of the resolutions of the conference was Resolution XXIII *Respect for Human Rights in Armed Conflicts*, which though not explicitly stating that human rights should apply during armed conflicts, stated that "even during the periods of armed conflicts, humanitarian principles must prevail".[312] This resolution was followed by several more resolutions from the UN General Assembly,[313] amongst them Resolution 265 which explicitly affirmed that: "fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict".[314] The two fields have continued to grow closer to each other, with some IHL now bearing close resemblance to IHRL, [315] though significant differences between these two areas of international law remain.[316]

[309] Provost (2002), p. 2.
[310] Provost (2002); GIAD Draper, "The Relationship between the Human Rights Regime and the Law of Armed Conflict" (1971) 1 *Israel Yearbook on Human Rights*, 191, pp. 194-195.
[311] Kolb (2013), p. 45; Provost (2002), p. 5; AH Robertson "Humanitarian Law and Human Rights" in: C Swinarski (ed.) *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (The Hague: Nijhoff, 1984), 793-802, p. 795.
[312] Reaffirmed by: UN General Assembly, "Respect for Human Rights in Armed Conflict" GA Res. 2444 (XXIII), UN Doc. A/7433 (1968).
[313] For a list of the resolutions in this area adopted in the run up to the 1977 Additional Protocols to the Geneva Conventions 1949, see: Y Sandoz, C Swinarski and B Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff Publishers, 1987), pp. 1571-1577.
[314] UN General Assembly, "Basic principles for the Protection of Civilian Populations in Armed Conflicts", GA Res. 2675 (XXV), Un Doc. A/8178 (1970).
[315] See for example: Art. 75 of Protocol I which resembles art. 14 ICCPR; the 1989 UN Convention on the Rights of the Child which refers to IHL in art. 38; also UN Secretary-General, "Report on Minimum Humanitarian Standards", UN Doc. E/CN.4/1998/87, para. 99.
[316] As discussed, one of the main differences remains the different relations they cover: the relationship between states and individuals and the relations between belligerent states themselves, as well as the fact that one essentially regulations state conduct during peace time, while the other concerns itself with state conduct during war: Provost (2002), pp. 6-8.

4.2 Do human rights apply during conflict?

The increasingly close relationship between IHL and IHRL has led to the general, though not universal, acceptance that human rights apply during conflict.[317] As described above, historically, legal scholars have subscribed to the separation theory for the relationship between IHL and IHRL, which considers the two areas of law to be two distinct branches that are deemed mutually exclusive. The reasoning behind this is that they apply in different situations and to different relations: IHL applies during wartime, while IHRL applies during peace[318] and where IHL largely governs the relationship between states, IHRL governs the relationship between the state and the individual.[319] The concept of strict separation of the two fields has however eroded over the last few decades and is no longer the dominant approach.[320]

4.2.1 Current practice

There are several judicial decisions from international courts which consider the application of human rights during conflict. One of the first international courts to address the issue directly was the International Court of Justice (ICJ) in their often cited *Nuclear Weapons* Advisory opinion:

> The Court observes that the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of

[317] See for example: Lubell (2005); Provost (2002); L Moir, *The Law of Internal Armed Conflict* (Cambridge: Cambridge University Press, 2002), ch. 5; M Milanović, *Extraterritorial Application of Human Rights Treaties*, (Oxford: Oxford University Press, 2011) (hereafter Milanović 2011a); H Mathews, "The Interaction between International Human Rights Law and International Humanitarian Law: Seeking the most effective protection for civilians in non-international armed conflicts" (2013) 17 *The International Journal of Human Rights,* 633; for a conflicting view see: WH von Heinegg, "Factors in War and Peace Transitions" (2004) 27 *Harvard Journal of Law and Public Policy,* 843, pp. 868-869.

[318] Most human Rights can be limited in times of national emergencies, see for example See for example art. 4 ICCPR and art. 15 ECHR.

[319] Provost (2002), p. 7.

[320] Some scholars do however still subscribe to the separation theory. See for example: B Bowring, "Fragmentation, Lex Specialis and the Tensions in the Jurisprudence of the European Court of Human Rights" (2009) 14(3) *Journal of Conflict and Security Law*, 485.

> one's life applies also in hostilities. The test of what is arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[321]

While this paragraph clearly states that the ICCPR continues to apply during armed conflict, proponents of the separation theory have pointed out that the reference to IHL as the *lex specialis,* means that while human rights may, in theory, remain applicable during armed conflict, they are replaced by IHL and therefore cease to apply in practice.[322] Subsequent decisions of the ICJ make this interpretation of the above citation unlikely though. The ICJ Advisory Opinion in *Wall* states in paragraph 106:

> More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.[323]

This view, that IHL and IHRL both apply during conflict is not only expressed by international courts and tribunals, but is also supported by important international bodies such as the ICRC[324] and the UN Human Rights Committee (HRC), which has

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[321] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, 226, para. 25 (hereafter, *Nuclear Weapons* Advisory Opinion).
[322] See for example: N Lubell, "Challenges in Applying Human Rights Law to Armed Conflict" (2005) 87 *International Review of the Red Cross*, 737, pp. 737-738; O Hathaway et al., "Which Law Governs During Armed Conflict? The relationship between International Humanitarian Law and Human Rights Law" (2012) 96 *Minnesota Law Review*, 1883. pp. 1895-1896.
[323] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, 9 July 2004, ICJ Reports 2004, 136 (hereafter, *Wall* Advisory Opinion).
[324] ICRC, "International Humanitarian Law and Other Legal Regimes: Interplay in situations of violence - address by Jakob Kellenberger, President of the International Committee of the Red Cross" (4 September 2003) *reports and documents*, available at: http://www.icrc.org/eng/assets/files/other/irrc_851_kellenberger.pdf.

stated that "both spheres of law are complementary, not mutually exclusive".[325] This is the preferred interpretation for journalists in conflict zones as well, as it provides the most extensive protection. By allowing the two spheres to complement each other, journalists are entitled to protection from a wider set of regulations, especially as human rights consider certain issues relevant to journalists, which are not covered by IHL, such as freedom of movement and freedom of speech. Assuming that both bodies of law apply, this raises the question as to the exact extent states are bound during conflict by the human rights treaties they have signed up to.[326]

4.2.2 The extraterritorial application of human rights during armed conflict

As we have seen in the previous chapter, IHL, by its very nature, stipulates the conduct of the armed forces of a state both inside that state during internal armed conflict and outside the territory of the state during international armed conflict. The same does not necessarily apply to IHRL. Human rights law has traditionally sought to regulate the relationship between the state and those in its own territory. During international armed conflict, the military of a state is likely to operate outside its own territory, which raises questions as to the extraterritorial application of human rights law. IHRL stems from a wide variety of treaties as well as a number of customary international human rights norms, most of which operate under different terms, which makes it impossible to provide general rules for its application.[327] Public International Law provides no assistance here as there is no general rule on the extraterritorial application of treaties, nor a default presumption in favour or against extraterritorial application.[328] To consider the extent of the scope of state obligations under IHRL we must therefore consider the relevant treaty provisions in this area.

The ICCPR states in article 2(1) that: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant". A narrow reading of

[325] HRC, "General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant", UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para 11.
[326] O Ben-Naftali, "Introduction" in: O Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law: Pas de deux* (Oxford: Oxford University Press, 2011), 3-10, pp. 5-6 and works cited therein.
[327] Hathaway et al. (2012), p. 1891.
[328] M Milanović, (2011a), pp. 10-11.

this article, suggests that states must apply the Covenant only where individuals are both in their territory and under their jurisdiction, negating possible extraterritorial application of the Covenant. Both the United States and Israel follow such a narrow interpretation of the Covenant.[329] Other states, international bodies and the majority of academic discourse do not subscribe to such a narrow interpretation of the jurisdiction clause of the ICCPR.[330] As the ICJ states in one of their Advisory Opinions: "[T]he International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory".[331] This view is echoed by the HRC: "[A] State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of the State Party, even if not situated within the territory of the State Party".[332] The view that the ICCPR applies in all cases where individuals are within the jurisdiction of a state signed up to the Covenant, brings the jurisdiction clause of the ICCPR into line with the jurisdiction clause of the ECHR.[333] The ECHR states in article 1: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". Unlike the ICCPR, it does not mention territory at all and only requires jurisdiction for the convention to be applied. What next must be answered is thus when exactly individuals are considered to be under the jurisdiction of a state during conflict. Generally speaking, there is significant consensus amongst both international bodies

[329] M Sassòli, "The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts" in: O Ben-Naftali (ed*.), International Humanitarian Law and International Human Rights Law: Pas de deux* (Oxford: Oxford University Press, 2011), 34-94, p. 64; *Wall* Advisory Opinion, paras. 102 and 110; HRC, "Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: United States of America" (28 November 2005) CCPR/C/USA/3, pp. 109-11.

[330] See for example: Sassòli (2011), p. 64; A McBeth, J Nolan and S Rice, *The International Law of Human Rights* (Melbourne: Oxford University Press, 2011), pp. 634-635; H King, "Extraterritorial Human Rights Obligations" (2009) 9(4) *Human Rights Law Review*, 521; Milanović (2011a), p. 11.

[331] *Wall* Advisory Opinion, para. 111.

[332] HRC (2004), para. 10. For application of this see *Wall* Advisory Opinion, para 111 and 179; see further Ibrahima Gueye et al. v. France, Communication No. 196/1985, U.N. Doc. CCPR/C/35/D/196/1985 (1989); Sophie Vidal Martins v. Uruguay, Communication No. R.13/57, U.N. Doc. Supp. No. 40 (A/37/40) at 157 (1982).

[333] This also brings it more into line with some of the other human rights treaties which have similar jurisdiction clauses to the ECHR, such as the American Convention on Human Rights (ACHR) and the UN Convention on the Rights of the Child (CRC), see: Milanović (2011a), pp. 11-12.

and states that human rights law obligations apply extraterritorially where states exercise 'effective control' over territory or individuals outside their borders.[334]

The European Court for Human Rights (ECtHR) has stated in *Loizidou*: "Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory".[335] The ECtHR motivated this on the grounds that any other decision would create a vacuum in which no human rights apply. The Court thus looks at the measure of effective control over a territory to establish jurisdiction, echoing General Comment 31 of the HRC. [336] A body of case law has arisen on what can be considered 'effective control' over either territory or persons. The position of the ECtHR on 'effective control' has been set out in *Banković*, where the ECtHR stated that it only recognises the exercise of extra-territorial jurisdiction by a contracting state under exceptional circumstances: it has only found jurisdiction "when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government".[337] *Banković* thus required a state to be physically present in order to have effective control and jurisdiction for the purpose of the ECHR, a view that was heavily criticised for being too narrow.[338]

The ECtHR has, however, recently accepted extraterritorial jurisdiction where there was no physical presence, but individual's rights were violated directly by state actions, bringing it more into line with some of the other major human rights treaties. In *Issa,* which considered the allegation of the killing of an Iraqi national by Turkish

[334] Hathaway et al. (2012), p. 1893.
[335] *Loizidou v. Turkey (preliminary objections)*, ECtHR, 23 March 1995 (Application no. 15318/89), para 62.
[336] HRC (2004).
[337] *Banković et al. v Belgium et al. (admissibility)*, ECtHR, 12 December 2001 (Application no. 52207/99), para 71.
[338] Sassòli (2011), p.64; McBeth, Nolan and Rice (2011), p. 638; E Roxstrom, M Gibney, T Einarse, "The NATO Bombing Case (*Banković et al. v Belgium et al.)* and the Limits of Western Human Rights Protection" (2005) 23 *Boston University International Law Journal*, 55.

forces in Northern Iraq during military operation, the ECtHR found jurisdiction beyond the limits of *Banković:*

> A State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating, whether lawfully or unlawfully, in the latter State. Accountability in such situations stems from the fact that Article 1 cannot be interpreted so as to allow a State Party to perpetrate violations of the Convention on the territory of another State which it would not be permitted to perpetrate on its own territory.[339]

The ECtHR further noted in this case that it is possible that as a consequence of military action temporarily effective control over a particular portion of a foreign territory arises.[340]

The issue of extraterritorial jurisdiction was further clarified in *Al-Skeini,* where the ECtHR confirmed that where state agents, such as the military, exercise physical control and authority over an individual outside its territory, both in another Council of Europe (CoE) Member State as well as a state outside the CoE, the rights contained in the ECHR should be secured for that individual.[341] The Court further reiterated its finding in *Loizidou* that a state, through lawful or unlawful military action, can exercise effective control over an area outside its national territory.[342] Though *Al-Skeini* provided some clarifications, the ECtHR's case law on this issue remains inconsistent and does not provide a clear indication of when and under which circumstances exactly 'effective control' can be established.[343] The case law currently seems to suggest that jurisdiction may be found where state agents detain or exercise physical power and control over an individual outside the state's territory

[339] *Issa and others v Turkey* [2005] 41 EHRR 27, para. 71. See also *Pad et al. v Turkey (admissibility)*, ECtHR, 28 June 2007 (Application no. 60167/00), where Turkey accepted jurisdiction over the deaths of seven Iranians outside Turkish territory were killed by Turkish helicopter gunships.
[340] *Issa and others v Turkey*, para. 74.
[341] *Al Skeini and others v United Kingdom* [2011] 53 EHRR 18, paras. 137 and 142.
[342] *Ibid,* para. 138.
[343] S Miller, "Revisiting Extraterritorial Jurisdiction: A territorial justification for extraterritorial jurisdiction under the European Convention" (2009) 20 *European Journal of International Law*, 1223, p. 1229; the inconsistency in 'effective control' cases of the ECtHR has also been criticised by national courts, see for example: *Al-Skeini and Others v. Secretary of State for Defence* [2007] UKHL 26, paras. 65 and 67.

and where states are, through occupation or other method, effectively in control of a territory outside their own state, leaving a potential gap where state agents target and kill a person on foreign territory which is not subject to the state's effective control.[344]

The Human Rights Committee (HRC) is clearer and more univocal on the issue of extraterritorial jurisdiction than the ECtHR. One of the first decisions to consider extraterritorial application of the ICCPR was the 1981 *Lopez Borgos* case, in which the HRC stated: "it would be unconscionable to so interpret the [State's] responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate in its own territory."[345] This statement has been echoed by the ECtHR in the later *Banković* case discussed above. The HRC further clarified its position in General Comment 31:

> [A] State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party (..) This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.[346]

As discussed above, there are a small number of states who deny the extraterritorial application of the ICCPR based on the wording of article 2, though this view has been explicitly rejected by the ICJ in 2004.[347]

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[344] RK Goldman, "Extraterritorial Application of Human Rights to Life and Personal Liberty, Including *Habeas Corpus*, during Situations of Armed Conflict" in: R Kolb and G Gaggioli (eds.), *Research Handbook on Human Rights and Humanitarian Law* (Cheltenham: Edward Elgar Publishing Limited, 2013), 104-124, p. 109.
[345] HRC, *Lopez Burgos v Uruguay*, Communication No. R.12/52, UN Doc. CCPR/C/13/D/56/1979, para. 12.3.
[346] HRC (2004), para 10. See also: HRC "Concluding Observations on Israel", 21 August 2003, UN Doc. CCPR/CO/78/ISR, para. 178, which confirms the extraterritorial application of the ICCPR for military operations and peace keeping missions.
[347] *Wall* Advisory Opinion, para. 111.

In spite of the protestations of some states and the more narrow view of extraterritorial application taken by the ECtHR, there seems to be a growing international consensus that states must apply the provisions of IHRL in situations of effective control over persons or territory outside their own state.[348] This ensures stronger protection for journalists, as state actors essentially 'take their human right obligations' along when they interact with journalists during conflict. Outside the situation of effective control, the extraterritorial application of IHRL is currently unclear and will likely depend on the nature of the situation and the human rights involved.[349]

4.2.3 Which groups are bound by IHRL during conflict?

Having established that IHRL is likely to apply during conflict, the question arises who are bound by this field of law. As we have seen in the previous chapter, common article 3 of the Geneva Conventions (1949) binds all parties to the conflict, both state and non-state actors, due to its customary law nature. The same does not necessarily apply for IHRL. Human rights law is traditionally concerned with the relationship between the state and the individual and only creates positive obligations for state actors. Consequentially, IHRL only addresses states as duty holders.[350] Under the traditional interpretation of IHRL, IHRL therefore does not bind non-state actors. In practice, the situation is not so clear cut and there are situations in which non-state actors are now bound, at least to a certain extent, by IHRL as will be discussed below.

During armed conflict, the military will be bound by IHRL as they are acting as a state agent. If they are fighting a non-state armed group, however, their opponent is likely not to be bound by the same laws. Conversely, a state may be held responsible for the human rights violations of non-state actors. This is the case where actions of

[348] F Coomans and M Kamminga, "Comparative Introductory Comments on the Extraterritorial Application of Human Rights Treaties" in: F Coomans and T Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (Antwerpen: Intersentia, 2004), 1-8, pp. 4-5.
[349] McBeth, Nolan and Rice (2011), p. 636.
[350] This applies for both the main universal and regional human rights law treaties. See JM Henckaerts and C Wiesener, "Human Rights Obligations of Non-State Armed Groups: A possible contribution from customary international law" in: R Kolb and G Gaggioli (eds.), *Research Handbook on Human Rights and Humanitarian Law* (Cheltenham: Edward Elgar Publishing Limited, 2013), 146-169, p. 148 and sources cited therein.

non-state actors can be attributed to the state or where the state failed to take adequate measures to protect individuals within their territory.[351] Acts can still be attributed to a State if they are committed by a non-state organ empowered by the law of that State to exercise elements of the governmental authority and the organ acts in that capacity, even if it exceeds its authority or contravenes instructions.[352] Furthermore, acts committed by (a group of) person(s) can be attributed to the State if a (group of) person(s) is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.[353] During armed conflict situations it is, however, unlikely that a non-state actor can be considered to fall within the full control of a state and if neither the state nor the non-state actor is responsible for the human rights violations committed by the latter, this would leave victims without any protection from IHRL.

The general consensus in the academic literature is that armed non-state actors, for example armed groups or individual fighters, are in principle not bound by IHRL during armed conflict situations, though there are exceptions.[354] The reason for treating non-state actors differently from state actors in this situation is that human rights law is based on a vertical relationship between the state and an individual in which the state has significant power and control.[355] This is not necessarily the case to the same extent for the relationship between non-state actors themselves, or non-state actors and individuals. Non-state actors may therefore not be capable of fulfilling certain human rights obligations, especially in conflict situations.[356] There is additional concern that extending human rights obligations to armed non-state actors may dilute the human rights responsibility of states themselves, as it could

[351] De Schutter (2010), pp. 366-379; McBeth, Nolan and Rice (2011), p. 642.
[352] Art. 4-7 United Nations, "Responsibility of States for International Wrongful Acts", General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4.
[353] *Ibid*., art. 8, for the full circumstances in which acts of non-state actors can be attributed to the state, see art. 4-11.
[354] *Ibid,* p. 647; see also: Moir (2002) p. 194; N Rodley, "Can Armed Opposition Groups Violate Human Rights Standards" in: KE Mahoney and P Mahoney (eds.) *Human Rights in the 21st Century: A global challenge* (Nijhoff: The Hague, 1993), 297-318; M Sassòli and LM Olson, "The Relationship between International Humanitarian and Human Rights Law where it matters: Admissible killing and internment of fighters in non-international armed conflicts" (2008) 90 *International Review of the Red Cross*, 599, p. 616.
[355] Henckaerts and Wiesener (2013), p. 149.
[356] See for example: Rodley (1993); Moir (2002), p. 147; Sassòli (2011), pp. 57-58.

reduce their responsibility for certain actions taking place in their territory.[357] Furthermore, as with IHL in the past, there is a general reluctance from states to place international law obligations on armed non-state actors as this is perceived as affording them legitimacy, recognition and status under international law.[358] There are, however, several arguments put forward in the academic literature which argue for the application of IHRL to armed non-state actors.[359] Forcing state actors to observe human rights law to an adversary who does not reciprocate creates a significant imbalance between parties in relation to a conflict and non-state actors can have a significant impact on civilian suffering. Furthermore, human rights law covers situations that are not covered by IHL, thus creating a significant disadvantage for a population, as well as journalists, operating in a territory controlled by a non-state actor.[360] Similarly, where a conflict has not reached sufficient intensity to invoke the application of IHL but actions of armed non-state actors are already significantly affecting individual's rights, IHRL could bridge an important gap in the protection of civilians.[361] Under current practice, two situations must be considered: the situation where armed non-state actors have significant control over a territory and the situation where they do not.

In situations where non-state actors have significant control over a territory and are acting as the defacto government of that territory, there is strong doctrinal support for placing human rights obligations on those actors.[362] The UN, for example, recognises that non-state actors have human rights obligations in this situation. As stated by the

[357] See for example: UN Commission on Human Rights, "Report of the Working Group on Enforced or Involuntary Disappearances, Addendum, Mission to Columbia (5-13 July 2005)", 17 January 2006, E/CN.4/2006/56/Add.1, para. 48-49.
[358] Henckaerts and Wiesener (2013), p. 151.
[359] See for example: A Clapham, *Human Rights Obligations of Non-State actors* (Oxford: Oxford University Press, 2006), p. 28; L Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge: Cambridge University Press, 2002), pp. 38-50, providing an overview of the argument in favour and against application of IHRL to non-state actors.
[360] Henckaerts and Wiesener (2013), p. 152; Clapham (2006), p. 285. See in this regard also "The Application of International Humanitarian Law and Fundamental Human Rights, in Armed Conflicts in which Non-state Entities are Parties", Resolution adopted at the Berlin Session, 25 August 1999, art. II and especially art. X.
[361] Henckaerts and Wiesener (2013), p. 153.
[362] See for example: Sassòli (2011); Clapham (2006); Zegveld (2002). For a detailed discussion of effective control see ECtHR, *Agim Behrami and Bekir Behrami v. France,* App. No. 71412/01 and *Ruzhdi Saramati v. France, Germany and Norway*, App. No. 78166/01, Grand Chamber decision of 2 May 2007. These cases proved controversial, increasing the requirement for effective control. See the discussion on extraterritorial application under 4.2.3

UN Truth Commission on El Salvador: "when insurgents assume government powers in territories under their control, they too can be required to observe certain human rights obligations that are binding on the state under international law".[363] Similar statements have been made by the UN Security Council, UN Special rapporteurs and experts and several other UN Committees.[364] In situations where control is taken over from a state which results in the formation of a new government for that territory, the situation under the ICCPR is clarified in General Comment 26 of the HRC: "once the people are accorded the protection of the rights under the Covenant, such protection devolves with the territory and continues to belong to them, notwithstanding a change in the government or state party, including dismemberment in more than one state or state succession".[365] While this does not bind non-state actors during the conflict while they are still non-state actors, it can be relevant for the protection of journalists when during an ongoing conflict the leadership of a state or territory changes.

There is no evidence of human rights obligations for armed non-state actors in territories not under their control. The current consensus is here that they are not fully subject to human rights obligations, though they may be subject to *jus cogens* or peremptory norms of customary law, discussed below.[366] This situation will however be rare and will largely only occur where non-state actors have made explicit statements committing to abide by certain standards. This in turn will assist in establishing the development of customary norms in this area, as discussed above, at 3.2.

[363] UN Commission on Truth in El Salvador, *Report*, UN Doc. S/25500 (1 April 1993).
[364] See for example: Security Council Resolution 1367 (9 November 2001); President of Security Council, "Democratic Republic of the Congo" S/PRST/2002/27 (18 October 2002); "Report of the Panel of Experts on Sudan, UN Doc. S/2007/584 (3 October 2007); Committee on the Rights of the Child, Report on the 27th session UN Doc. CRC/C/108 (23 July 2011); *Elmi v Australia*, Committee against Torture, Communication No 120/1998, UN Doc. CAT/C/22D/120/1998 (14 May 1999).
[365] HRC, "General Comment 26: Continuity of Obligations" UN Doc CCPR/C/21/Rev.1/Add.8/Rev.1 (1997), para. 4. See also United Nations (2001), art. 10.
[366] International Law Association, Committee on Non-State Actors, First Report of the Committee, "Non-State Actors in International Law: Aims, approach and scope of project and legal issues" *The Hague Conference* (2010), p. 17 available at: http://www.ila-hq.org/download.cfm/docid/7EFF9EAA-D573-441E-A40C8D2FB7740C6A; Henckaerts and Wiesener (2013), p. 160 and sources cited therein.

International organisations are classed as non-state actors in this context and are therefore in principle not bound by IHRL, though they can be bound by customary international law. International organisations can currently not become parties to a significant number of IHL and IHRL treaties, including the Geneva Conventions.[367] This is logical in that there are a large number of provisions that an international organisation could not observe, for example because they require parties to have courts or tribunals.[368] Some international organisations, however, have undertaken to observe IHL and IHRL provisions for as far as possible in their situation.[369] While the organisations themselves are not necessarily subject to IHL and IHRL provisions, the individuals working for them may still be held accountable under these laws. This arises mostly in the context of peacekeeping missions, for example by the NATO or the UN. Troops are provided by states, which are bound by IHL and IHRL, to an international organisation which is not bound, raising questions whether actions by personnel in the field should be attributed to the state or the international organisation they work for during that peacekeeping mission.[370] Under recent case law their actions should be attributed to the international organisation and they fall therefore outside the scope of IHL and IHRL.[371] They may however still be subject to customary law norms or be individually responsible under international criminal law, discussed below.

4.3 The relationship between International Humanitarian Law and International Human Rights Law

As we have seen in chapter 3, IHL applies in full during international conflict. During non-international armed conflict common article 3 of the Geneva Conventions 1949 applies, supplemented by customary IHL. Where violence does not reach the required duration or intensity to be classed as armed conflict, IHL does not apply and only IHRL and local laws remain. During armed conflict, as discussed

[367] Sassòli (2011), p. 60; W Kälin and J Künzli, *The Law of International Human Rights Protection* (Oxford: Oxford University Press, 2010), p. 86.
[368] Sassòli (2011), p. 60.
[369] See for example: UN Secretary-General, "Observance by United Nations Forces of International Humanitarian Law", 6 August 1999, UN Doc ST/GB/1999/13.
[370] Kälin and Künzli (2010), pp. 92-93.
[371] *Behrami v France and Saramati v France, Germany and Norway* [2007] 45 EHRR SE10.

above, IHRL continues to apply, which can lead to situations where both sets of norms are equally applicable. There are situations, in which only one of the two sets of norms provides an answer and is therefore the applicable norm. An example would be a bombardment of a media station installation during international armed conflict. While in that situation IHL and IHRL may be equally applicable, IHRL provides no regulation for what is a military objective which can be attacked and what constitutes a civilian object, which cannot lawfully be attacked under most circumstances. IHL will therefor govern this aspect of the fighting.[372] In this case there is simply no norm conflict. This can similarly be the case where IHRL governs a situation during conflict which is not covered by IHL, for example when a journalist claims the right to freedom of expression when writing controversial content, which is not an aspect IHL is concerned with.

There are situations, however, where both sets of norms provide detailed regulation for a specific event/aspect of fighting. Where the two sets of rules lead to the same result few problems arise,[373] but there are cases where the two lead to contradictory results. As discussed, IHL and IHRL are related and share some common features, but there are also significant differences, for example in the context of use of deadly force, where simultaneous application of both sets of norms is seemingly challenging. In these situations one of the two must take precedence. Some authors argue that such norm conflicts may be resolved through creating a stronger complementary approach, taking elements of both areas of law creating one fully an integrated framework of norms.[374] This is however not the case in current practice, in which norm conflicts do arise.

The ICJ has approached the issue by stating that "some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international

[372] N Lubell, *Extraterritorial Use of Force against Non-State Actors* (Oxford: Oxford University Press, 2010), p. 242.
[373] Models of conflict avoidance can be particularly helpful here, though a detailed discussion of these falls outside the scope of this thesis. See for more detail on norm conflict avoidance between IHL and IHRL: Milanović (2011a), pp. 239-242.
[374] Arnold and Quénivet (eds.) (2008); see also: Heintze (2013), pp.61-62.

law".[375] There is some consensus that problems arising from the simultaneous application of IHL and IHRL can be resolved by the *lex specialis derogat legi generali* principle, though the exact interpretation of the principle in this context is subject to extensive debate.[376] The ICJ has, for example, on occasion given precedence to IHL as the *lex specialis* during armed conflict, but has also clarified that this will not always be the case,[377] suggesting that decisions must be made on a case-to-case basis.[378] It has further been suggested that the *lex specialis* approach is an oversimplification of the norm-conflict between IHL and IHRL that cannot so easily be dealt with.[379] Several models have been put forward which seek to address the difficulty of parallel application of IHL an IHRL but there is no consensus on this issue.[380] Few authors argue that IHL should always be considered the *lex specialis* in armed conflict situations and there is a strong consensus from states, international bodies, courts and tribunals, derogation clauses and academic literature on the complementary nature of IHL and IHRL and their joint application during conflict.[381] There is similar agreement that the joint application of the two frameworks should, where possible, lead to a harmonious interpretation, to avoid norm conflicts.

Judging what the *lex specialis* is in a given case is not a straightforward matter. The rationale behind the *lex specialis* approach is that a specific rule is more to the point than a general one, which means it is better able to take account of and deal with the relevant circumstances, thus regulating the matter more effectively than general rules

[375] *Wall* Advisory Opinion, para. 106.
[376] See for example: Sassòli (2011), p. 69; M Koskenniemi, "Fragmentation of International Law: Difficulties rising from the diversification and expansion of international law – report of the study group of the International Law Commission" UN Doc/A/CN.4/L.682 (13 April 2006).
[377] *Nuclear Weapons* Advisory Opinion, para. 25; clarified in: *Wall* Advisory Opinion, para. 106 and *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ General List No 116 (19 December 2005), para. 216.
[378] Sassòli (2011), p. 71.
[379] Lubell, 2010, p. 240; Milanović (2011a), pp. 232-233; C McCarthy "*Lex Specialis* and International Human Right Standards" in: R Arnold and N Quénivet (eds.), *International Humanitarian Law and Human Rights Law: Towards a new merger in international law* (Martinus Nijhoff: Leiden, 2008), 101-118.
[380] See for example: Provost (2002); Lubell (2010), ch. 9; Milanović (2011a), ch. 5; Hathaway et al. (2012).
[381] M Milanović, "Norm Conflicts IHL ad IHRL" in: O Ben-Naftali (ed*.), International Humanitarian Law and International Human Rights Law: Pas de deux* (Oxford: Oxford University Press, 2011), 95-125, p. 101 (hereafter Milanović 2011b).

by providing greater clarity.[382] To resolve a conflict between IHL and IHRL in a given situation it must therefore be established which of the two is more 'precise' in a given situation: which norm explicitly addresses the problem and in the greatest detail.[383] Another relevant factor can be which norm offers a solution that is closest to the systemic objective of the law, though this is more controversial.[384] It should be noted that by selecting the *lex specialis* in a given situation of armed conflict, the *lex generalis* is not discarded, but remains relevant according to the dominant view.[385] As stated above, where possible a conflict between the two should be avoided, thus leaving the *lex generalis* to influence the interpretation of the *lex* specialis,[386] working towards a harmonious interpretation of norms. Some argue that this is not a true application of the *lex specialis* principle as it is meant to operate as a method of conflict avoidance, not conflict resolution.[387] In practice, it is sufficient to establish here that norm conflicts do arise and that there is no standard practice for resolving these conflicts, creating some uncertainty for those fighting and living in armed conflict situations. Such conflicts are however relatively rare and as there is significant support for resolving conflicts between IHL and IHRL through the *lex specialis derogat legi generali* principle, in the most common situations what the rules are will be relatively clear for army lawyers, though likely not for those less aware of the legal framework, which can impact on their observance.[388]

It should further be noted that there is little scope for a norm conflict between rules of customary law due to the way customary law is formed. Customary law is based on state practice and *opinio juris* in relation to a specific situation which results in a

[382] Koskenniemi (2006), para. 60.
[383] Sassòli and Olson (2008), p. 604.
[384] Koskenniemi (2006), para. 107.
[385] HJ Heintze, "Theories on the Relationship between International Humanitarian Law and Human Rights Law" in: R Kolb and G Gaggioli (eds.), *Research Handbook on Human Rights and Humanitarian Law* (Cheltenham: Edward Elgar Publishing Limited, 2013), 53-64, pp. 57-61.
[386] See for example: J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (Cambridge: Cambridge University Press, 2005), p. 299.
[387] Milanović (2011b), pp. 113-116.

'standard' practice for that situation, it is unlikely that two conflicting 'standard' practices will form, especially in fields as closely related as IHL and IHRL. [389]

4.4 Relevant International Human Rights Law

There are several human rights provisions that are relevant to the physical protection of journalists in conflict zones, namely the right to life, the right to personal liberty and security, the right to fair trial and freedom of expression. Their protective value during conflict is limited, however, as most rights can be derogated from during war or other state of emergency which 'threatens the life of the nation'.[390] This must be done through notifying the international community of the derogation and establishing that a state of emergency exists, as well as providing reasons why the derogation is strictly necessary and proportionate under the circumstances.[391] State practice shows that the use of the derogation clause is limited; during international armed conflict states generally do not officially derogate and the practice with non-international armed conflict is mixed. [392] Derogations can further not be made where they violate state obligations under international law and can therefore not be made where they would violate IHL obligations, which limits the practical application of the derogation clause in the ICCPR and ECHR.[393] The discussion of specific human rights relevant to journalists in paragraphs 4.4.1-4.4.5 below, will note which rights are derogable and which are non-derogable. All rights discussed below are subject to extensive discussion in academic literature as well as detailed case law. I will only consider the most relevant aspects of these rights to journalists in conflict zones, to flag up potential protection under IHRL, rather than discuss this protection in detail,

[389] Sassòli and Olson (2008), p. 605. The ICRC study into customary law, discussed in the previous chapter, demonstrates this by extensively referring to human rights in conflict situations to establish customary humanitarian law.
[390] See for example art. 4 ICCPR and art. 15 ECHR. The ECtHR has defined public emergency as "an exceptional situation of crisis or emergency which afflicts the whole population and constitutes a threat to the organised life of the community of which the community is composed" *Lawless v Ireland* (No 3) (1961) 1 EHRR 15.
[391] See for example: S Tierney, "Determining the State of Exception: What role for parliament and the courts?" (2005) 68(4) *Modern Law Review*, 668.
[392] C Droege, "The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict" (2007) 40 *Israel Law Review,* 310, p. 319.
[393] Mathews (2013), p. 637; also Moir (2002), pp. 196-197.

which is difficult in the context of armed conflict where much will depend on the exact circumstances of the case.

4.4.1 Right to life

Article 6 ICCPR and article 2 ECHR establish the non-derogable right to life,[394] which provides that no one may be arbitrarily deprived of their life, though the articles provide exceptions to this rule. This is the most basic human right which protects journalists in conflict zones. It is also one which is often seen as conflicting with IHL, which allows for the killing of persons under certain circumstances. In the context of journalists operating in conflict zones, this means a conflict between IHL and IHRL norms may arise where journalists become 'collateral damage' in a military attack. Generally in this situation IHL would take precedence over this norm of IHRL. As discussed above, in this circumstance IHL will provide guidance as to the interpretation of 'the right to life' during conflict. [395]

The protection for journalists under this article is however still relevant and has several aspects. First of all, the articles prohibit intentional killing by the state and state parties must take adequate measures to prevent arbitrary killing by their own state agents.[396] The articles also protect against so called 'disappearances'. In the context of art 6 ICCPR the HRC has stated that the state must take effective and specific measures against disappearances and ensure that instances of suspicious deaths and missing persons are thoroughly investigated. [397] While these articles do not prohibit states from executing the death penalty for serious offences, under Protocol 6 of the ECHR, which has been signed by all CoE States,[398] the death penalty is abolished and extradition to a country with the death penalty is not

[394] Art. 15(2) ECHR notes specifically that deaths resulting from lawful acts of war are exempted.
[395] The 'right to life' as contained in art. 6 of the ICCPR, for example, only provides the general provisions that "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life", which does not give details on when a civilian can and cannot be deprived of life during conflict. Art. 51 Protocol I on the protection of the civilian population on the other hand, provides far more detailed provisions on how the lives of the civilian population must be protected and when this protection is lost. See further Doswald-Beck and Vité (1994), p.107.
[396] HRC, "General Comment 6 - Article 6", UN Doc. HRI/GEN/1/Rev.1/Add.13 at 6 (1994), para. 3 (hereafter (HRC, 1994a); *Suárez de Guerrero v Colombia*, Comm. No. 45/1979 (1982); See for the ECHR for example: *McCann and others v United Kingdom* [1995] 21 EHRR 97.
[397] HRC (1994a), para. 4; for the ECHR see for example: *Timurtaş v Turkey* [2001] 33 EHRR 121.
[398] It has further been ratified by all CoE States except Russia.

permitted, thus providing practical protection from the death penalty for journalists under the jurisdiction of CoE States. The ICCPR does not provide the same protection, but specifically states that the death penalty may only be imposed "for the most serious crimes in accordance with the law in force at the time of the commission of the crime" and after final judgement by a competent court.[399]

Most importantly, these articles impose upon the state the positive obligation to protect life. States must therefore put in place a legal framework which provides effective deterrent against any unlawful killing by both state agents and individuals.[400] As noted above, such a framework does not have to protect against killings thsat are the result of legitimate actions during conflict, but does place the obligation to protect against illegitimate or arbitrary killing. This is especially relevant for journalists, whose deaths (in conflict zones) suffer from a high level of impunity, which arguably means that states are not providing a sufficiently effective deterrent against killing journalists.

4.4.2 Personal liberty, security and fair trial

While this right aims to provide safeguards against arbitrary arrest and detention, rather than directly protecting physical safety, being arrested can carry significant risks to physical safety through, for example, interrogation methods and detention conditions. For this reason both these rights and the right to a fair trial discussed in the next paragraph, are relevant in the context of this thesis and will therefore be briefly discussed here.

Article 5 ECHR and article 9 of the ICCPR protect journalists from arbitrary arrest and or detention, though the right can be derogated from in times of emergency. The articles ensure that arrests can only be made with lawful authority and proper judicial control, and must satisfy several procedural requirements. The ECtHR has further

[399] Art. 6(2) ICCPR; Extradition to a state with capital punishment is also prohibited under this article, see for example: *Roger Judge v Canada*, Comm. No. 829/1998, U.N. Doc. CCPR/C/78/D/829/1998 (2003).
[400] HRC (1994a), para. 3; S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases, materials and commentary* (Oxford: Oxford University Press, 2004), pp. 181-184; *Kiliç v Turkey* [2001] 33 EHRR 1357.

taken the view that not only must detention be 'lawful'; the law governing the detention must be of a certain quality, thus providing some procedural safeguards.[401] Detainees have the right to challenge the lawfulness of their detention before a court, which will speedily decide whether or not the detention is lawful. The ECtHR has further emphasised that while the court does not have to be a 'traditional' court, it must be independent from the executive and involved parties and must have the power to order release should the detention be found to be unlawful.[402]

Connected to the right of personal liberty and security is the prohibition of torture contained in article 3 ECHR and article 7 ICCPR which state: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". This protection is absolute and no derogations can be made. There is significant case law on what constitutes "torture, cruel, inhuman or degrading treatment".[403] It is sufficient to note here that this article, due to its absolute nature, provides considerable protection against maltreatment of journalists by state actors. States further have a positive obligation to take sufficient measures to prevent such treatment of persons by private and/or state parties, which includes the obligation to investigate any instances of such treatment[404] and ensure conditions of detention do not result in such treatment.[405] Journalists may further find protection in the Convention Against Torture, which provides detailed protection and currently has 155 state parties.[406]

[401] *Steel, Lush and others v United Kingdom* [1998] 28 EHRR 603; *Mr. C v Australia*, Comm. No. 900/1999. UN Doc. CCPR/C/76/D/900/1999 (2002). For more detail see: C Ovey and R White, *The European Convention on Human Rights* (Oxford: Oxford University Press, 2006), pp. 127-129.
[402] *Neumeister v Austria* [1968] 1 EHRR 91, para. 24; *Hussein and Singh v United Kingdom* [1996] 22 EHRR 1, para 65.
[403] For an overview see: Ovey and White (2006), pp. 75-84; Joseph, Shultz and Castan (2004), pp. 195-211.
[404] *Aksoy v Turkey* [1996] 23 EHRR 553, para. 47; *Sevtap Veznedaroglu v Turkey* [2001] 33 EHRR 1412; HRC, "General Comment 20 – Article 7" U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994), para. 14 (hereafter, HRC 1994b); *Joaquin David Herrera Rubio et al. v Colombia,* Comm. No. 161/1983, UN Doc. CCPR/C/OP/2 at 192 (1990).
[405] See for example: HRC (1994b), para. 11; *Price v United Kingdom* [2002] 34 EHRR 1285.
[406] UN, "United Nations Treaty Collection: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en.

Connected to the right to personal liberty and security, is the derogable right to a fair trial contained in article 6 ECHR and article 14 ICCPR. The ECHR and the ICCPR articles state that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". This applies to both to civil and criminal trials. The articles further state that everyone charged with, or accused of a criminal offence, shall have the right to be presumed innocent until proved guilty according to the law. This right provides important protection for journalists, in combination with other human rights, from arbitrary arrests and charges which may endanger their freedom, or even lives. The articles contain a number of procedural safeguards aimed at ensuring all trial proceedings adhere to a minimum standard of fairness for the accused. There is a wealth of case law on these articles, and while some of its aspects apply to both civil and criminal suits, those referring to criminal trials are the most relevant to journalists operating in war zones.[407]

The tribunal before which a case is brought must be independent, impartial, and established by law. Hearings should be public, though there can be overriding considerations to close a trial for the public, such as national security.[408] Judgements should be announced publicly and trials should take place without undue delays/in reasonable time. The ICCPR further states that "everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law",[409] a right which is also contained in Protocol 7 to the ECHR.[410]

The right to silence and the principle against self-incrimination is contained in article 14(3)g ICCPR. It is not explicitly contained in article 6 ECHR, but is considered part of internationally recognised standards of a fair trial and is recognised in the case law for article 6.[411] This provides protection for journalists from being compelled to incriminate themselves during questioning. The articles further explicitly provide

[407] This is not to say the procedural safeguards for civil lawsuits are irrelevant, but journalists' physical safety is predominantly affected by (the threat of) criminal proceedings against them.
[408] Art. 6(1) ECHR and art. 14(1) ICCPR.
[409] Art. 14(5) ICCPR.
[410] Art. 2 Protocol 7 ECHR, though not all states have signed and ratified this Protocol.
[411] Ovey and White (2006), p. 196; *JB v Switzerland* [2001] Criminal Law Review 748; *Saunders v United Kingdom* [1997] 23 EHRR 313.

useful rights during the trial, such as adequate time to prepare a defence, to be provided with legal assistance, an interpreter if necessary and to examine witnesses. Finally, article 7 ECHR and article 15 ICCPR, which are both non-derogable, protect against retro-active criminalisation of actions by stating that: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed." This include the requirement that legislation must be sufficiently clear,[412] which, at least in theory, ensures that journalists can be aware before taking action whether they would risk prosecution under domestic legislation.

4.4.3 Freedom of Expression

Article 10 ECHR and article 19 ICCPR concern the derogable right to freedom of expression, which is subject to a number of limitations ranging from national security to protecting the reputation and rights of others. While freedom of expression is of paramount importance for journalists in terms of ensuring they can carry out their work subject to minimum interference of public authorities, for the purpose of this thesis an important part of the value of these articles lies in the positive obligations it creates for states to actively protect journalists from harm. IHRL concerning freedom of expression therefore provides journalists with different forms of protection. It stops states from unduly interfering with journalistic expression, which has some indirect effect on journalist safety as interference with freedom of expression must be justified, which, in theory, places limitations on the reasons journalists can be arrested and imprisoned and the risks that come with that.[413] It further creates a positive obligation to protect journalists against interference from private parties, though there is little international case law on this aspect of the freedom of expression to date.[414]

The ECtHR has recognised the obligation to protect the effective exercise of freedom of expression through positive measures on several occasions, most notably in *Özgür*

[412] *Kokkinakis v Greece* [1994] 17 EHRR 397, para. 52.
[413] See for example: HRC, "Concluding observations of the Human Rights Committee: Lesotho" (1999) UN Doc. CCPR/C/79/Add. 106, para 22, where the HRC condemns continuing harassment of, and repeated libel suits against, journalists criticising the government.
[414] Kälin and Künzli (2010), p. 473.

Gündem v. Turkey, where they found Turkey was under obligation to investigate and take protective measures when newspaper staff were subject to a campaign of intimidation and violence.[415] The court stated here: "Genuine, effective exercise of this freedom does not depend merely on the state's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals".[416] Similar notions on the positive obligations under freedom of speech have been expressed by the UN General Assembly.[417]

4.4.4 Right to property

The right to protection of property, though included in article 17 of the UDHR is not included in either the ICCPR or the ECHR as no agreement could be reached on the scope and meaning of the article. Protocol 1 to the ECHR, which was drafted shortly after the Convention itself came into force, does recognise the right to protection of property. The protocol states in article 1 that "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law", though derogations can be made. This article is relevant to the protection of journalists as it, in theory, protects them from unauthorised confiscation of safety equipment, such as bullet proof vests and helmets. It can further provide some protection from attacks on media stations and equipment where journalists may be injured or killed.

4.5 Customary International Human Rights Law

Some human rights enshrined in the various IHRL treaties have achieved customary law status.[418] The ICJ has emphasised that under international law states have certain

[415] *Özgür Gündem v. Turkey* [2001] 31 EHRR 49.
[416] *Ibid*, para. 43.
[417] UN General Assembly, "Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms", Resolution 53/144 of 9 December 1998.
[418] This is generally accepted, though some authors still argue this is not the case, see for example: AM Weisburd, "The Significance and Determination of Customary International Human Rights Law:

obligations towards the international community which are the concern of all states, such as the basic rights of the human person.[419] While customary law has to be derived from state practice, it has been argued that in the field of human rights, the resolutions of the UN General Assembly and statement made by other international organisations, which demonstrate a clear commitment of the international community towards certain values, can indicate the existence of customary law.[420]

Which exact rights achieve this status of customary law is however still subject of dispute. There is no official list of recognised customary human rights, or peremptory norms, though violations are generally accepted to include: genocide, violence to life, crimes against humanity, slavery, racial discrimination, deviating from fundamental principles of fair trial, arbitrary deprivations of liberty and torture and inhuman or degrading treatment.[421] The human rights contained in the Rome Statute of the International Criminal Court of 17 July 1998 (hereafter Rome Statute), discussed below, are generally considered to have achieved customary law status, which is the reason they are included in the Statute.[422] Similarly, most of those rights contained in Universal Declaration of Human Rights are also considered to have acquired customary law status and thus bind armed groups and individuals.[423] International organisations have (limited) legal personality and are bound by customary law where they engage in the same activities as states, though the exact extent of their obligations is open to debate.[424]

The effect of treaties and other formal international acts on the customary law of human rights" (1996) 25 *Georgia Journal of International and Comparative Law*, 99.

[419] ICJ, *Case of Barcelona Traction, Light and Power Company Limited* (Belgium v Spain), ICJ reports 1970, p. 3, paras. 33-34.

[420] De Schutter, (2010), p. 50.

[421] Henckaerts and Wiesener (2013), p. 159; Kälin and Künzli (2010), p. 62; International Law Commission, "Commentary on the *Draft Articles on Responsibility of States for Internationally Wrongful Acts"* (November 2001) Supplement No. 10 (A/56/10), chp.IV.E.1, p. 206-209, available at: http://www.eydner.org/dokumente/darsiwa_comm_e.pdf ; HRC, "General Comment 29: States of Emergency (article 4)", UN Doc. CPR/C/21/Rev.1/Add.11 (2001), para. 11.

[422] Kälin and Künzli (2010), p. 74.

[423] De Schutter (2010), p. 50.

[424] Sassòli (2011), p. 60; Kälin and Künzli (2010), p. 87.

4.6 International Criminal law

International Criminal Law (ICL) significantly overlaps with human rights law and humanitarian law, as it criminalises a number of actions, such as crimes against humanity and genocide, which also pose breaches of IHL and IHRL.[425] The focus of ICL lies on different actors though. Where both IHL and IHRL are primarily concerned with state actions and state responsibility for actions in their territory, ICL focusses on holding individuals responsible for gross breaches of human rights and humanitarian law for which a state may or may not have concurrent responsibility. Consequently in a single (serious) breach of a journalist's rights, two questions must be asked in order to determine which bodies of law have been breached and thus which remedies might be available: 1) is the individual who committed the breach individually responsible under ICL and 2) can the state be held responsible for that individual's actions?

ICL consists of both treaty law and customary international law and has been codified in the Rome Statute of the International Criminal Court. Individuals can only be held responsible under ICL if their conduct was criminalised in either sources of ICL before the conduct took place, otherwise it would breach the human rights principle against retrospective criminality discussed above. The main categories of criminalised behaviour are genocide, crimes of aggression, crimes against humanity, and war crimes,[426] of which the latter two are the most relevant for the protection of journalists. The term crimes against humanity stems from the 1907 Hague Convention preamble, which sought to codify customary law of armed conflict and were established in positive international law for the first time in the prosecution agreement for the Nuremberg trials.[427] Crimes against humanity are defined by the Rome Statute as: "any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack" and continues to lists crimes such as murder, rape and imprisonment and other depravation of liberty in violation of fundamental rules of

[425] McBeth, Nolan and Rice (2011), p. 404.
[426] *Ibid,* p. 406.
[427] Art 6(c) "Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal (IMT).

international law.[428] These crimes differ from 'ordinary' crimes in the sense that they systematically target the civilian population.[429] War crimes on the other hand are simply defined as "grave breaches of the Geneva Conventions of 12 August 1949" and a number of crimes applicable to international and non-international armed conflicts such as wilful killing, torture and rape are set out, which are relevant to the protection of journalists in conflict zones.[430] Not all breaches of IHL will also constitute breaches of ICL, only the gravest breaches invoke criminal liability.

Under ICL the person who commits the crime, either alone or with others can be held accountable, but also the individual who "orders, solicits or induces the commission of such a crime" and the person who "for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission".[431] ICL is enforced through domestic courts and international courts and tribunals, for example through the International Criminal Court (ICC) and some of the regional tribunals set up to deal with specific conflicts, such as the International Criminal Tribunal for the former Yugoslavia (ICTY). Enforcement of ICL through such tribunals will be discussed in more detail in chapter 5.

4.7 Conclusion

The application of IHRL to conflicts provides journalists, at least in theory, with valuable protection when reporting on conflict. IHRL has a wider scope then IHL in protecting civilians and its application can thus extend the protection journalists are

[428] Art. 7, UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998 (hereafter Rome Statute). It is not necessary for the 'attack' referred to in this article to occur during armed conflict. In this context 'attack' according to art 7(2) means "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack" and this article thus provides protection outside the scope of armed conflict as well as during armed conflict.
[429] Kälin and Künzli (2010), p. 62. See also ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* Judgement of 26 February 2007, ICJ reports 2007, p.43.
[430] Art. 8 Rome Statute.
[431] Art. 25 Rome Statute.

entitled to. Rights such as freedom of expression can provide journalists with additional protection by creating positive obligations for state actors, but this is not their only value in terms of protecting journalists. The underlying message: that one cannot prosecute journalists for the content they produce,[432] can also provide protection as it reinforces the notion that journalists should not be targeted, during peace or during conflict. In this sense the acceptance of extraterritorial application of human rights is a positive development, as not only does it force actors to apply human rights during conflict, it normalises those rights in the sense that it sends the message that these rights apply *continuously*, for as far as possible, at home or away.

While IHRL thus has the potential to provide a valuable additional source of protection for journalists operating in conflict zones, the extent of this protection remains unclear and is unfortunately likely to be limited. One of the main issues is the fact that there are only a small number of international human rights that cannot be limited or derogated from in times of public emergency or war and while some norms of IHRL are thus generally accepted to apply, these are limited in practice. The protection that is available largely overlaps with treaty-based and customary IHL thus not making a significant addition the protective body of law. This is however not the say that IHRL does not add anything at all to the protection of journalists in conflict zones. It can provide more detailed interpretation of norms contained in IHL, such as the right to a fair trial and can increase protection through such means. What does pose a significant problem, is that IHRL only applies to non-state actors to a limited extent. As journalists are increasingly covering conflicts with involvement of one or more non-state actors, these actors are increasingly posing a risk to their safety and the limited application of IHRL in interaction between non-state actors and journalists, thus significantly limits its value.

Another major hurdle in applying human rights law in conflict situations is that the human rights treaty law is formulated in very general language. Compared to IHL which is formulated as clear duties that combatants have to obey, the general formulation of the rights in IHRL require a significant amount of interpretation

[432] There are of course exceptions to this, as will be discussed in detail in chapter 7.

before they can be applied as a legal framework. The reliance on the exact circumstances of the case to establish which rights apply and potentially which (conflicting) rights take precedence in a given combat situation, makes it difficult for those involved to apply IHRL 'in the field', especially for non-state actors with limited or no legal training. As noted, journalists are increasingly interacting with non-state actors, which is thus problematic. Similarly, even in situations where clear human rights obligations for non-state actors can be identified, international law largely lacks accountability mechanisms for human rights violations, which renders IHRL law ineffective for protecting victims during conflict. Humanitarian law was created for situations where victims have no opportunity to assert their rights, while human rights law assumes victims will be able to assert their rights and will be able to instigate judicial proceeding, which does not sit well with conflict situations.[433] The methods by, and the extent to which, IHRL is enforced in practice will be discussed in the next chapter.

[433] Schindler (1981-1982), p. 941.

5. Enforcement of legal norms and impunity

The previous chapters have shown that there are a significant number of legal provisions that have the potential to provide protection for journalists working in conflict territories. On the other hand statistics demonstrate that in spite of these provisions, journalists are still being targeted and that these incidences are increasing rather than diminishing. The Committee to Protect Journalists (CPJ) has identified 70 cases in 2013 in which journalists were killed in direct relation to their work, which includes deaths on dangerous missions and deaths in crossfire.[434] This statistic does not include cases of killings where no motive could be confirmed, which means that the actual number of work-related deaths will be considerably higher than this. Of those 70 cases where motive could be confirmed, the majority took place in conflict territories and 51% of the journalists who were killed were reporting on war.[435]

These statistics raise questions as to whether the current legal framework provides adequate protection for journalists in practice. Robin Geiss, a legal expert for the International Committee of the Red Cross (ICRC), considered this issue in a 2010 interview, concluding that the legal framework concerning the protection of journalists in conflict zones provides sufficient protection in theory and that "the most serious deficiency is not a lack of rules, but a failure to implement existing rules and to systematically investigate, prosecute and punish violations", something which must be improved upon.[436] In 2011, the ICRC published a four-year action plan for the implementation of humanitarian law, which similarly calls for enhanced protection of journalists in conflict zones, but does not suggest there is a need for a new treaty to enhance protection for journalists.[437] In order to fully evaluate the legal

[434] CPJ, "70 Journalists Killed in 2013/Motive Confirmed" (2014), available at: http://cpj.org/killed/2013/. Other organisations provide slightly different numbers, such as Reporters Without Borders, who counts 76 journalists targeted and killed for their work in 2013, due to minor differences in the criteria used: Reporters Without Borders, "2013: Journalists Killed" (2014), available at: https://en.rsf.org/press-freedom-barometer-journalists-killed.html?annee=2013.
[435] CPJ (2014).
[436] R Geiss, "How does International Humanitarian Law Protect Journalists in Armed Conflict Situations?" (27 July 2010) *ICRC Interview*, available at: http://www.icrc.org/eng/resources/documents/interview/protection-journalists-interview-270710.htm.
[437] ICRC, "Four-Year Action Plan for the Implementation of International Humanitarian Law: Draft resolution of the 31st International Conference of the Red Cross and Red Crescent (28 November 2011), Doc. No. 311IC/22/5.1.3 DR, Annex I, objective 3, available at:

framework protecting journalists, we must therefore take a closer look at how this framework is implemented in practice and consider to what extent crimes against journalists in conflict zones go unpunished.

International courts and tribunals play an important role in the enforcement of the legal framework governing conflict. Their role often goes beyond simply providing fora and procedures for post-conflict dispute resolution and settlements. They also play an important role in emphasising, defining and explaining the content of the relevant legal framework during, or even prior to, a conflict taking place.[438] This chapter will first consider the variety of courts and international bodies that implement and enforce IHL, IHRL and International Criminal Law, before examining the issues behind the high levels of impunity for crimes against journalists in conflict zones.

5.1 Enforcement of IHL

The enforcement of IHL involves a two-pronged approach: enforcement through judicial methods and enforcement through non-judicial methods. The judicial enforcement of IHL takes place through a number of national and international courts and tribunals. Enforcement through non-judicial measures can take many forms, such as truth and reconciliation commissions which can work towards addressing past violations as well as ensuring that such violations do not occur in the future.[439] There is however no real systematic international enforcement system of IHL, which hampers its effectiveness.[440]

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http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-4year-action-plan-11-5-1-3-en.pdf.

[438] C Foster, "The Role of International Courts and Tribunals in Relation to Armed Conflict" in: U Dolgopol and J Gardam (eds.), *The Challenge of Conflict: International law responds* (Leiden: Martinus Nijhoff Publishers, 2006), 105-144, p. 143.

[439] See for example: UN Security Council, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General" (23 August 2004) UN Doc. S/2004/616.

[440] R Alley, "The Culture of Impunity: What journalists need to know about International Humanitarian Law, (2010) 16 *Pacific Journalism Review*, 78, p. 89.

Historically, one of the most common methods for enforcing IHL was reprisal. If one side of a conflict violated the laws of war their opponents would respond in kind, both as a punishment and as an attempt to force the other party to change their conduct.[441] The Geneva Conventions of 1949 have severely limited this form of enforcement, as has customary law. The ICTY indicated on this subject that the defining characteristic of modern IHL is "the obligation to uphold key tenets of this body of law regardless of the conduct of enemy combatants,"[442] which is incompatible with the system of reprisals. Having limited the scope of enforcement through reprisals, the Geneva Conventions (1949) provide for alternative methods of enforcement, such as the designation of a Protecting Power,[443] though this option has rarely been employed in practice, or through establishing a fact-finding commission.[444] In practice IHL is enforced through a variety of state and non-state actors working both in war and peace to ensure observation of the relevant principles of law during conflict.

Common article 1 of the Geneva Conventions (1949) states that: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances". States are therefore required to ensure that all those under their control respect IHL. How they must achieve this is up to individual states to a certain extent, though article 80(2) of Protocol I specifically requires parties to a conflict to "give orders and instructions to ensure observance of the Conventions and this Protocol" as well as supervise their execution. Ensuring respect for the provisions of IHL is likely to require both repressive and preventive measures, such as military training in the content of the Conventions.[445] There are a number of provisions contained in the Geneva Conventions which concern the

[441] A Cassese, "On the Current Trend towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law" (1998) 9 *European Journal of International Law*, 2, p. 3.
[442] ICTY, *Prosecutor v Kupreškić et al.* Judgement (Trial Chamber), 14 January 2000 (para. 511).
[443] Art. 8 Geneva Conventions I-III, art. 9 Geneva Convention IV.
[444] Art. 90 Protocol I; for more information see: Cassese (1998), p.4.
[445] T Pfanner, "Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims" (2009) 91 *International Review of the Red Cross*, 279, p. 280.

enforcement of IHL, though not all are, or have been, in use since the drafting of the Conventions.[446]

One of the preventive measures required by the Geneva Convention is the dissemination of the text of the Conventions to civilians and military personnel, both during times of war and peace time. Such dissemination should be as wide as possible to ensure that the population of a state is familiar with the content of the Conventions.[447] Special reference is made in this context to the study of the Conventions during military training programmes. To ensure military forces are fully aware of their obligations and responsibilities under the Conventions, article 82 Protocol I requires state parties to ensure that "legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject".

5.1.1 National Courts

IHL's primary method of enforcement is through the domestic courts of the state where the violation in question has occurred or the state of which the alleged offenders are nationals.[448] To this end, several provisions in the Geneva Conventions (1949) require the adoption of national legislative measures to fulfil the obligations contained in the Conventions.[449] These national provisions, to a certain extent, make it easier to bring breaches of the Conventions before a court. Most importantly, article 49 of Geneva Convention I requires states to "enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches, of the present Convention".[450] The provision

[446] The enquiry procedure, for example, has never been used. For further information see for example: Pfanner (2009), pp. 285-286.
[447] Art. 47 Geneva Convention I, art. 48 Geneva Convention II, article 127 Geneva Convention III, art. 144 Geneva Convention IV; art. 83 Protocol I all have similar wording to this extent. See for Protocol II art. 19, which contains a similar provision.
[448] D Akande and S Shah, "Immunities of State Officials, International Crimes and Foreign Domestic Courts" (2011) 21 *European Journal of International Law*, 815, p.816.
[449] See for example art. 26, art. 44, art. 53 and art. 54.
[450] See also art. 50 Geneva Convention II, art. 129 Geneva Convention III, art. 146 Geneva Convention IV, which have the same wording as art. 49 Geneva Convention I . A 'grave breach' is generally defined as: "wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and

further requires state parties to search for persons who have committed, or have ordered to have committed, such grave breaches and bring them before the national courts. There does not need to be a connection between the state exercising jurisdiction and the perpetrator for the prosecution of grave breaches.[451] Finally, the article provides that state parties must also take all measures necessary to suppress breaches that do not meet the threshold of 'grave breach'. While these provisions are only applicable to international armed conflict, the ICJ has held that similar obligations exists for non-international conflicts that fall under the scope of common article 3 of the Geneva Conventions.[452]

It is not always necessary for national courts to have a 'direct connection' to the breaches of IHL in order to prosecute them. Under the principle of Universal Jurisdiction, states may bring charges against individuals for committing the grave breaches of IHL regardless of a connection with the crime, victim or alleged offender.[453] The Geneva Conventions (1949) as well as Protocol I establish such universal jurisdiction where grave breaches of the Conventions are concerned.[454] Universal Jurisdiction is further not limited to international armed conflicts. The ICTY has explicitly confirmed that violations of the laws and customs of war as laid down in article 3 common to the Geneva Conventions attract customary criminal

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appropriation of property, not justified by military necessity and carried out unlawfully and wantonly", see: art. 50 Geneva Convention I, art. 51 Geneva Convention II, art. 130 Geneva Convention II, art. 147 Geneva Convention IV and artt. 11(4) and 85 Protocol I.

[451] The intentional killing of a journalist during conflict would likely be classed as a 'grave breach' under the legal framework.

[452] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* Judgement of 27 June1986, ICJ Reports 1986, para. 220.

[453] For more information on the principle of Universal Jurisdiction and connected issues, see for example: KC Randall, "Universal Jurisdiction under International Law" (1987-1988) 66 *Texas Law Review,* 785; M Cherif Bassiouni, "Universal Jurisdiction for International Crimes: Historical perspectives and contemporary practice" (2001-2002) 42 *Virginia Journal of International Law*, 81.

[454] Geneva Convention (I), Article 49; Geneva Convention (II), Article 50; Geneva Convention (III), Article 129; Geneva Convention (IV), Article 146; Additional Protocol I, Article 85(1). While these articles do not specifically state jurisdiction is universal in the sense that it can be asserted regardless of the place of offense, it has generally been interpreted as such: ICRC, "The Scope and Application of the Principle of Universal Jurisdiction: ICRC statement to the United Nations, 2013" (18 October 2013), available at: http://www.icrc.org/eng/resources/documents/statement/2013/united-nations-universal-jurisdiction-statement-2013-10-18.htm.

liability and universal jurisdiction.[455] Generally speaking, however, states have been reluctant to prosecute violations of IHL though national jurisdiction.[456]

National Courts may order those who are responsible for breaches of IHL to pay compensation to their victims. This is a longstanding principle of IHL and is currently contained in several treaties, amongst them article 91 of Protocol I and article 38 of the Second Protocol to the Hague Convention for the Protection of Cultural Property. Reparation does not necessarily take the form of monetary compensation and other forms of remedies may be ordered by the courts.[457] The existence of an individual right to compensation under IHL is debatable, and in many cases individuals will have to rely on their own governments to bring a claim.[458] This is largely due to the nature of IHL which deals primarily with conflicts between states, rather than states and individuals. The situation is different under International Criminal Law (ICL), which does allow for individual claims, as well as under Human Rights Law, which can coincide with IHL, thus effectively providing an individual right to claim compensation. Both are discussed below.

5.1.2 International Courts

The International Court of Justice (ICJ) was the first international tribunal to be established by the UN in 1945 and has assisted in improving the observance of IHL worldwide. The court does not solely concern itself with IHL, its remit being much wider. The ICJ settles disputes between states in accordance with international law and can further provide Advisory Opinions on legal questions which have been referred to it by authorised United Nations (UN) organs and specialized agencies.[459] The Advisory Opinions are especially important in terms of enforcement of IHL as they can establish the legality of actions in advance of or during a conflict, rather than retroactively ascertain their permissibility.[460] It has published several important Advisory Opinions in the field of IHL, such as the *Nuclear Weapons* Advisory

[455] ICTY, *Prosecutor v. Tadić*, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), 2 October 1995, para 83. See also: ICRC (2013)
[456] Cassese (1998), pp. 5-7; Akande and Shah (2011), p. 816.
[457] Pfanner (2009), p. 287.
[458] Pfanner (2009), pp. 288-289.
[459] ICJ, "The Court", available at: http://www.icj-cij.org/court/index.php?p1=1.
[460] Foster (2006), p. 140.

Opinion,[461] discussed in the previous chapter, which (partly) clarified the relation between IHL and IHRL. Advisory Opinions are however primarily a declaration of the applicable law, rather than specific directions which parties must follow and the scope of their judicial role and jurisdiction are subject to debate.[462]

There are further a number of international courts and tribunals such as the International Tribunal Responsible for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC) which all assist in the enforcement IHL. These courts and tribunals deal with individual criminal responsibility through ICL which encompasses gross violations of IHL. These institutions are discussed separately below at paragraph 5.3.

5.1.3 The International Committee of the Red Cross (ICRC)

One of the main objectives of the ICRC is "to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles".[463] Its fundamental principles dictate, amongst others, neutrality, impartiality and independence in all its activities, which limits the work which the ICRC can undertake to enforce the correct application of IHL during conflicts.[464] This does not, however, prevent them from making a valuable contribution to the observance of IHL principles. The work of the ICRC therefore focusses on providing assistance during conflict to those in need, rather than enforcing their rights.[465]

The ICRC is active in the dissemination of the Conventions and their incorporation into national law. At the start of an international armed conflict, the ICRC

[461] ICJ, *Nuclear Weapons Case*, Advisory Opinion, 8 July 1996.
[462] *Ibid*, pp. 140-142.
[463] ICRC, "The ICRC's Mission Statement" (19 June 2008), available at: http://www.icrc.org/eng/resources/documents/misc/icrc-mission-190608.htm.
[464] ICRC, *The Fundamental Principles of the Red Cross and Red Crescent* (Geneva: ICRC, 1996).
[465] Pfanner (2009), p. 299; J Pictet, *The Fundamental Principles of the Red Cross: Commentary* (Geneva: Henry Dunant Institute, 1979), p. 54.

traditionally draws attention to the need to observe the norms of IHL.[466] The ICRC may further publicly denounce serious violations of IHL and call on the international community to end these violations, as they have done during conflicts in Rwanda, Yugoslavia and Somalia, amongst others.[467] They also provide practical assistance to journalists in conflict zones. The ICRC runs a 24-hour hotline dedicated to journalists requiring assistance while covering armed conflict and other situations of violence. The hotline can be accessed by employers, media and family to report a journalists who have been injured, captured, detained or have gone missing.[468] The ICRC will further seek permission to visit detained journalists, accompanied by a doctor if necessary and seek to establish contact between the journalist and their family.[469]

The Geneva Conventions regularly refer to the ICRC throughout their text and provide them with a legal basis to supervise the application of IHL.[470] During conflicts ICRC personnel actively provides humanitarian assistance directly to those in need in a conflict zone. Some of these activities are explicitly specified in the Geneva Conventions, but the work of the ICRC is not limited to these and they can undertake any humanitarian activities "for the protection of wounded and sick, medical personnel and chaplains, and for their relief" under article 9 Geneva Conventions I-III, provided it has the consent from the parties to the conflict.[471] It can work with other humanitarian relief organisations to improve their reach and resources and can thus provide valuable assistance in ensuring the observance of the principles of IHL during conflict.

5.1.4 The United Nations

The UN plays an important role in the worldwide implementation and enforcement of IHL. The Security Council, for example, not only adopts resolutions condemning

[466] They have done so, for example at the start of the Gulf War in 1990 and the war in Iraq in 2003, see: Pfanner (2009), p. 292.
[467] Panner (2009), p. 296.
[468] S Kagan, H Durham, "The Media and International Humanitarian Law: "Legal protection for journalists" (2010) 16, *Pacific Journalism Review*, 96, p.107.
[469] *Ibid*. The Red Cross does not, however, campaign for their freedom or demand their release, as this would affect their neutrality in the conflict.
[470] See for example art. 81 Protocol I.
[471] See also art. 10 Geneva Convention IV.

violations of IHL, but has also organised debates on specific topics connected to the application of IHL, which can inform policy creation by UN members.[472] More importantly, the Security Council has on several occasions ordered investigations into the (alleged) violation of IHL during conflicts, ensuring that serious violations of IHL do not go unnoticed by the international community.[473] Where the Council suspects IHL is being violated by parties to a conflict, it can choose to refer the case to the International Criminal Court (ICC) who can further investigate and bring charges where necessary (see below at 5.3).[474] The UN Secretary General is tasked with providing the research required by the Security Council, though his work is not solely dependent in requests from the Security Council as he has the power to provide reports on situations of armed conflict, or specific aspects of combatant behaviour, on its own initiative.

The UN has established several tribunals which enforce IHL, such as the ICJ, discussed above, as well as several temporary international ad hoc tribunals that provide a platform for the prosecution of those having committed grave breaches of IHL during specific conflicts, such as the ICTY and the ICTR. The role of these tribunals in enforcing IHL and IHRL is discussed below at paragraph 5.3.

5.2 Enforcement of International Human Rights Law

Human rights treaties have been drafted to confer basic rights to individuals and individuals enjoy these rights against any state bound by those treaties.[475] IHRL treaties can only be effective in protecting individuals if those who breach their rights can be held accountable before courts and tribunals. For the enforcement of human rights against state actors, it is especially important that individuals have access not

[472] F Kalshoven and L Zegveld, *Constraints on the Waging of War: An introduction to International Humanitarian Law* (Cambridge: Cambridge University Press, 2011), p. 221.
[473] This is unfortunately not always the case. See for example the investigation and subsequent condemnation of the use of chemical weapons during the Kuwait invasion by Iraq, which did not halt the use of these weapons during the conflict.
[474] See for example the referral to the ICC of the situation in Darfur: UN Security Council, Resolution 1593 (31 March 2005).
[475] R Provost, *International Human Rights and Humanitarian Law* (Cambridge: Cambridge University Press, 2002), p. 24.

only to national courts, but also to international courts when national courts fail to provide a remedy for the alleged violation. One of the issues here, however, is that an individual case of a state breaching the rights of its own citizens rarely poses a threat to other states, thus there is less incentive to 'police' non-compliance with IHRL at the international level, than there is incentive to 'police' IHL.[476] Consequently, the effective enforcement of international human rights treaties largely depends on the willingness of individual states to implement and apply these treaty provisions.

Generally speaking, both at the national and international level, it is likely to be insufficient to solely provide ex-post facto remedies for human rights violations, as these have limited effectiveness, especially in cases where the victim has lost their life. While convictions for human rights violations will certainly have some deterrent effect, where possible, preventive measures should be put in place to ensure the violations do not occur in the first place. One of the ways to achieve this is to ensure that any draft legislation is compatible with human rights treaties and that similar procedural checks on compatibility are in place for administrative practice.[477] Another important means to achieving effective enforcement of international human right treaties is to ensure remedies to human rights violations actually address the underlying issues and are aimed at preventing a re-occurrence of the breach of rights, rather than simply compensating a past breach. A wide scope of remedies that can be employed in this context and the suitability of any particular remedy will be dependent on the exact circumstances of the case.[478]

5.2.1 Enforcement of the International Covenant on Civil and Political Rights

Article 2(1) of the ICCPR states that state parties must "respect and ensure" the rights listed in the Covenant to all individuals in their territory. Article 2(3) of the ICCPR provides that persons who have had their rights or freedoms violated must

[476] OA Hathaway, "Do Human Right Treaties Make a Difference?" (2002) 111 *Yale Law Journal*, 1935, p. 1938; O De Schutter, *International Human Rights Law: Cases, material, commentary* (Cambridge: Cambridge University Press, 2010), pp. 729-730.
[477] Committee of Ministers of the Council of Europe, Recommendation Rec(2004)5 "On the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights" (12 May 2004).
[478] For a general overview of remedies and their individual effectiveness and drawbacks, see: D Shelton, *Remedies in International Human Rights Law* (Oxford: Oxford University Press, 2005).

"have an effective remedy". The Human Rights Committee (HRC) has noted that this entails that parties must establish "appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law".[479] What exactly an effective remedy entails will depend on the circumstances of the case,[480] and the HRC has noted that such remedies may include: "restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations."[481] Bringing a complaint before the relevant national courts may be particularly difficult during conflict and even where this can be done, the results may be unsatisfactory. It is therefore important that a higher international body monitors the application of the ICCPR by individual states and can hear complaints. For the ICCPR, this body is the HRC.

The ICCPR allows complaints to be brought concerning alleged violations of human rights by other states, though states must have made a declaration indicating acceptance of such complaints.[482] To date this procedure has never been used.[483] More relevant, therefore is the individual complaint procedure under the ICCPR, which is established in Optional Protocol I. Under Optional Protocol I, states recognise the competence of the HRC to hear complaints from individuals of alleged breaches of their rights under the ICCPR. As of April 2014, the Protocol has been ratified by 115 states. For any case to be considered by the HRC, certain procedural requirements must be met, as set out in Protocol I. The key requirements are that the complaint must be brought by the individual whose rights have been violated (article 1),[484] all domestic remedies must be exhausted (article 2 and 5(2)b) and the matter is not being investigated under other international procedures (art 5(2)a).[485]

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[479] HRC, "General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant", UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 15.
[480] A McBeth, J Nolan and S Rice, *The International Law of Human Rights* (Melbourne: Oxford University Press, 2011), p. 114.
[481] HRC (2004), para. 16.
[482] See art. 41 ICCPR.
[483] Office of the High Commissioner for Human Rights, "Human Rights Bodies: Complaints procedures", available at: http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx.
[484] There are however exceptions to this rule and under certain circumstances complaints can be brought on behalf of a direct victim. For details see: S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases, materials and commentary* (Oxford:

If the HRC finds a violation it will ask the relevant state party to take appropriate steps to remedy the situation in a manner suitable to the circumstances of the case.[486] Although the HRC's decisions are technically not binding, in practice their decisions are much like binding rulings,[487] as has recently been confirmed by the International Court of Justice.[488] While the HRC does follow up on the implementation of its decisions, it is difficult to assemble exact data on the practical effect of its rulings.[489] The general opinion in academic literature and practice is however that the individual complaints procedure of the HRC is slow and that more could be done to increase its effectiveness in the enforcement of the rights contained in the ICCPR.[490]

5.2.2 Enforcement of European Convention on Human Rights

The enforcement of a regional human right treaty can be stronger than the enforcement of a large international, multi-region, treaty. There are several reasons for this. A common heritage and history of a region can ensure that a regional human right treaty is more 'in tune' with the cultures it covers, thus improving the chance of broad political consensus on the interpretation of those rights.[491] Similarly, the enforcement of such treaties may be stronger as judgement by neighbouring states with a common heritage may be easier to except than judgement by states with different cultural and political background.[492]

Oxford University Press, 2004), pp. 64-82. Note though that anonymous complaints are not allowed (art. 3 Optional Protocol I to the ICCPR).

[485] For more details on these requirements see for example: Joseph Schultz and Castan (2004), pp. 55-138; De Schutter (2010), pp. 806- 831.

[486] HRC. "Human Rights Committee Annual Report to the UN General Assembly", A/49/40 vol. 1 (1994), para. 458.

[487] HRC, "General comment 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights" UN Doc. CCPR/C/GC/33 (2008), para 11-13.; see also for a more general discussion: H Keller and G Ulfstein (eds.) *UN Human Rights Treaty Bodies: Law and legitimacy* (Cambridge: Cambridge University Press, 2012), pp. 73-115.

[488] ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo)* 30 November 2010, para. 66.

[489] UN General Assembly, "Report of the Human Rights Committee", 94–96th Sessions, (1 October 2009), UN Doc. A/64/40 (Vol. I), para. 232.

[490] See for example: Keller and Ulfstein (2012), pp. 103-108; UN General Assembly (2009), para 106.

[491] McBeth, Nolan and Rice (2011), p. 292.

[492] *Ibid*.

All member states of the Council of Europe (CoE) agree to adhere to the ECHR, which gives it a wide geographical field of application. They must further accept the jurisdiction of the European Court of Human Rights (ECtHR), which, importantly, allows individuals to petition the court directly.[493] States may also bring complaints against each other before the court, though this is a rare occurrence. Article 13 ECHR states that: "where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress".[494] The ECtHR has clarified that the remedy required by this article must not only be 'effective' in practice but also in law: "The 'effectiveness' of a 'remedy' within the meaning of article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the 'authority' referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective".[495] The ECtHR is a court of last resort[496] which will only address cases where national courts have failed to address alleged violations. The ECtHR leaves certain discretion to states, in terms of how rights are implemented in national systems, to allow for the accommodation of societal differences through its 'margin of appreciation'.

In terms of remedies for human rights breaches, it can afford 'just satisfaction' to the victim, where the national system fails to do so.[497] The Committee of Minsters of the CoE supervises state implementation of the decisions of the ECtHR. States have a legal obligation to implement the court's decisions, though they enjoy a margin of appreciation in terms of the exact implementation method.[498] While the court has no powers to actively enforce ECtHR decisions, the compliance system enforced by the Committee of Minsters contained in article 46 ECHR allows for the application of

[493] Council of Europe, "Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the Control Machinery Established Thereby", 11 May 1994.
[494] *Silver and others v United Kingdom* [1985] 5 EHRR 547, para 113.
[495] *Čonka v Belgium* [2002] 34 *EHRR* 54, para 75.
[496] See also art. 35 ECHR.
[497] Art. 41 ECHR.
[498] Council of Europe, "Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights", available at: http://www.coe.int/t/dghl/monitoring/execution/Presentation/Pres_Exec_en.asp.

political pressure and the compliance rate is relatively high.[499] The ultimate sanction for non-compliance is suspension or expulsion from the CoE, though this has never been used.

It is important to note here that the ECtHR generally does not apply IHL, regardless of whether IHL and IHRL may overlap in a given case.[500] Article 32 of the ECHR states that "The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto", thus limiting the jurisdiction of the court to the application of the ECHR. The Court has shown reluctance in referring to norms of IHL and avoids referring to IHL even in support of decisions taken based on the ECHR.[501] The value of the ECtHR in protecting journalist in conflict zones lies thus firmly in the enforcement of IHRL that is part of the protective framework. The enforcement of IHL is left to other bodies.

5.3 Enforcement of International Criminal Law

ICL has grown in importance over the last decades, as an interpretation and enforcement mechanism of IHRL and IHL.[502] Both IHRL and IHL traditionally only consider the role of the state in relation to violations, ICL on the other hand considers the role of individuals in those violations. By enhancing the individual responsibility for grave breaches of IHRL and IHL, ICL is trying to tackle the culture of impunity that exists in relation to war crimes. Not all violations of these bodies of law will amount to ICL violations though. As discussed in the previous chapter, ICL is

[499] McBeth, Nolan and Rice (2011), p. 295; V Mantouvalou and P Voyatzis, "The Council of Europe and the Protection of Human Rights: A system in need of reform" in: S Joseph and A Mcbeth (eds.), *Research Handbook on International Human Rights Law* (Cheltenham: Edward Elgar, 2010), 326-352, pp. 330-331.
[500] See for example: A Gioia, "The role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict" " in: O Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law: Pas de deux* (Oxford: Oxford University Press, 2011), 201-248; H-J Heintze, "The European Court of Human Rights and the Implementation of Human Right Standards During Conflict" (2002) 45 *German Yearbook International Law*, 60; W Abresch, "A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya" (2005) 16 *European Journal of International Law*, 741.
[501] Gioia (2011), p. 216.
[502] Pfanner (2009), p. 284.

limited to gross humanitarian law and human rights violations, which are criminalised in treaty law or customary international law and are generally considered to include: genocide, violence to life, crimes against humanity, slavery, racial discrimination, deviating from fundamental principles of fair trial, arbitrary deprivations of liberty and torture and inhuman or degrading treatment.[503]

Until the end of the Cold War, there was little scope for creating international tribunals to enforce ICL due to the lack of international cooperation between the East and the West. After the end of the Cold War, this changed, resulting in the creation of international ad hoc tribunals by the Security Council, such as the ICTY and the ICTR, to deal with a number of conflicts taking place in the 1990s. Both tribunals focus on individual criminal responsibility, rather than state responsibility.[504] While the establishment of these tribunals has been an important step forward in the enforcement of IHL and IHRL, the tribunals have their limitations. The remedies available through the ICTY and the ICTR are limited in the sense that they do not provide a procedure for compensation claims by (or on behalf of) victims, instead leaving this to national courts, though they can order the return of property and proceeds acquired by criminal conduct to be returned to their rightful owners.[505] The tribunals are also still strongly dependent on state cooperation, with limited enforcement mechanisms of their own and inquiries can be costly and time consuming. The issues arising with the operation of the tribunals led to an expert group, appointed by the Security-General, publishing a report setting out ways to improve the efficiency of ad hoc tribunals. This in turn led to changes being made to the operation of the ICTY and ICTR, thus improving the efficiency of the

[503] Henckaerts and Wiesener (2013), p. 159; Kälin and Künzli (2010), p. 62; International Law Commission, "Commentary on the *Draft Articles on Responsibility of States for Internationally Wrongful Acts"* (November 2001) Supplement No. 10 (A/56/10), chp.IV.E.1, pp. 206-209, available at: http://www.eydner.org/dokumente/darsiwa_comm_e.pdf; HRC, "General Comment 29: States of Emergency (article 4)", UN Doc. CPR/C/21/Rev.1/Add.11 (2001), para. 11.

[504] For more information on both tribunals see: DA Mundis, "New Mechanisms for the Enforcement of International Humanitarian law" (2001) 95 *The American Journal of International Law*, 934, pp. 949-951.

[505] Art. 24 Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 7 July 2009), 25 May 1993. See also: UN, "International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991: Rules of procedure and evidence" (22 May 2013) IT/32/Rev.49, rules 105 and 106.

tribunals.[506] While they continue to have limitations, they make an important contribution to ensuring the enforcement of international law. The ICTY in particular has advanced the interpretation and application of key principles of IHL.[507]

Aside from the rise of ad hoc tribunals, another important development in the enforcement of ICL has been the establishment of the International Criminal Court (ICC). The ICC is the first permanent, international, treaty-based criminal court, established to combat the ongoing impunity of serious international law violations by individuals, such as genocide, crimes against humanity and war crimes.[508] The Court is based on a treaty, the Rome Statute,[509] which has been signed by 139 countries as of April 2014, though not all have ratified the Statute.[510] Importantly for journalists, the Statute of the court explicitly states that intentionally directing an attack against a civilian amounts to a war crime, whether this happens during international or non-international conflict.[511] The effectiveness of the ICC is, however, undermined by the fact that amongst those who have not yet ratified its Statute are significant military power such as the United States and Russia.

Unlike the previous ad hoc tribunals such as the ICTY and ICTR, the ICC is not limited in its jurisdiction to a geographical area or a specific time period. In principle, a person falls within the jurisdiction of the court where they have committed a crime on the territory of, or are a national of, a state party or a party that has officially accepted the court's jurisdiction.[512] The ICC does, however, only have

[506] UN General Assembly, "Comprehensive Report on the Results of the Implementation of the Recommendations of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda: Note by the Secretary General" (4 march 2002) UN Doc. A/56/853.
[507] DJ Scheffer, "Perspectives on the Enforcement of International Humanitarian Law" (3 February 1999) *The Fifth Hauser Lecture on International Humanitarian Law*, available at: https://www.mtholyoke.edu/acad/intrel/persp.htm.
[508] ICC, "About the court", available at: http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx.
[509] UN General Assembly, Rome Statute of the International Criminal Court (as amended 29 November 2010), 17 July 1998 (hereafter, Rome Statute).
[510]UN, "United Nations Treaty Collection: 10. Rome Statute of the International Criminal Court", available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en.
[511] Art. 8(2)b Rome Statute.
[512] Art. 12. This jurisdiction can be expanded by the Security Council (art 13(b)).

prospective jurisdiction from the date it was established and can therefore not prosecute crimes having taken place before July 2002.[513]

Under the Rome Statute, any of the state party can arrest and prosecute persons for breaching the provisions of the Statute within their jurisdiction, or within the jurisdiction of another state party, thus providing a wide basis for the enforcement of the international legal framework through national courts. If states do not wish to try a case before their national courts, or are unable to do so, they can refer the case to the ICC.[514] Individuals cannot bring a case before the ICC and must rely on a state party bringing the case before the Court.[515] Cases can further be referred to the Court by the United Nations Security Council,[516] or alternatively the Prosecutor of the Court can bring a case in accordance with the provisions of article 15 of the Rome Statute.

The ICC functions on the basis of complementarity, which means the Court will only take up investigation and prosecution where a state is "unwilling or unable to genuinely carry out the investigation or prosecution".[517] This includes situations where a state has decided not to prosecute after investigation, unless this decision resulted from the unwillingness or inability of the state to genuinely prosecute (art 17(b)). Therefore where alleged perpetrators are acquitted, or after investigation no charges are brought against them, the ICC will not consider the case, unless the underlying investigation or court proceedings were illegitimate.

While the ICC has a relatively broad territorial and personal jurisdiction, they have, however, limited resources, which can slow down its prosecution rate. Furthermore, where offences are committed in non-state party, they can only be prosecuted if the prosecutor of the ICC chooses to do so, or if he is ordered to do so by the UN Security Council.[518]

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[513] Art. 11 Rome Statute.
[514] For the full jurisdiction of the ICC and admissibility rules see artt. 11-21 Rome Statute.
[515] Art. 14 Rome Statute.
[516] Art. 13(b) Rome Statute.
[517] Art. 17 Rome Statute.
[518] The latter would require the agreement of all five permanent members of the Security Council.

The ICC differs from previous ad hoc tribunals in the sense that the ICC can award compensation to victims, rather than relying on national courts to provide remedies. Article 75 of the Rome Statute states that the ICC "shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation" and that the court can directly order convicted persons to make reparations. It further provides in article 79 for the establishment of a trust fund for the benefit of victims that fines can be transferred into. This saves victims from having to file separate proceedings through their national court system, as was previously the case under the ad hoc tribunals, in order to obtain compensation.

5.4 Impunity in relation to crimes against journalists

As explained above, IHL and IHRL are enforced through a variety of national and international courts. Where violations are established a variety of remedies are available, the appropriateness of which depend on the circumstances of the case. Furthermore, enforcement of both bodies of law does not solely take place ex post facto, and a number of organisations as well as national governments have implemented measures aimed at preventing violations ever taking place. Yet, as noted above, it has been argued that one of the most difficult aspects of protecting journalists in conflict zones is not the lack of an appropriate legal framework ensuring their safety, but rather the high levels of impunity with regards to attacks on media personnel. Impunity can be defined here as: "the failure to bring perpetrators of (human rights) violations to justice".[519] To summarise, there is a legal framework in place protecting journalists, which can be enforced in a variety of ways, yet the statistics clearly show that there is little, and in some instances no enforcement of that legal framework in practice. While not all risks can be mitigated for journalists working in conflict zones, as the nature of their job puts them in an unsafe environment, the failure to enforce the current legal framework exposes them to

[519] UNESCO, "The Safety of Journalists and the Danger of Impunity: Report by the Director-General" (27 March 2012) *International Programme for the Development of Communication*, available at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/images/Themes/Freedom_of_expression/Safety_Report_by%20DG_2012.pdf), p. 29 (hereafter UNESCO 2012a).

higher risks than might necessary have been the case if the framework was effectively enforced.

The International News Safety Institute (INSI) has noted that 9 out of 10 journalists are killed with impunity.[520] As long as this is the case, violence against journalists will continue, as there is simply little reason for both state and non-state actors to observe the international legal framework where it is 'inconvenient' to do so, if they do not have to worry about being held accountable for breaching it. It is clear that relevant international law and potential enforcement mechanisms exist, yet this has not resulted in widespread application of these laws. This raises the question of why impunity rates are this high. While there is no single general answer to this question, as impunity rates are influenced by the circumstances and location of a conflict, it is possible to identify a number of factors which influence these high levels of impunity. Social, political and legal factors all play a role in this context and can significantly disrupt the effective application of any legal framework.

5.4.1 The Causes of impunity: disruption of national judicial system and authority

One of the main causes for impunity in conflict territories is that the local justice system no longer functions as a consequence of the very conflict which journalists are reporting on. In this situation, violence against journalists is not necessarily condoned by the local authorities, but they are simply unable to do anything about it. This sentiment is well illustrated by the Islamic Republic of Afghanistan in its response to an enquiry by UNESCO into the investigation of the killing of journalists in Afghanistan. While cooperating with the enquiry, they also noted that in similar situations to the deaths of the reporters, thousands of Afghanis soldiers and soldiers belonging to troops of partner countries have lost their lives in the fight against 'the invisible enemy'.[521] As they noted "there are certain acts that necessarily manage to avoid the normal practices of legal systems".[522]

[520] INSI, "Urgent Appeal from the International News Safety Institute" (14 September 2012), available at: http://www.newssafety.org/latest/news/insi-news/detail/urgent-appeal-from-the-international-news-safety-institute-103/.
[521] UNESCO (2012a), p. 22.
[522] *Ibid.*

In a conflict zone the local judicial system is often interrupted, with neither the personnel nor the resources available to fully investigate all crimes taking place.[523] Where domestic legal systems collapse, there can be no effective enforcement of IHL and the possibility to establish international and hybrid tribunals will be compromised.[524] This is especially relevant in high-intensity conflicts, which is demonstrated by the fact that in 2014, two of the countries that have seen some of the worst fighting in that year, Somalia and Iraq, had the highest number of journalists killed on the job as well as the highest rates of impunity.[525] Significant problems further arise outside high-intensity conflicts where the conflict is between state and non-state actors and the non-state actors are attacking journalists. In this situation, it will often be difficult for the government to apprehend the perpetrators and prosecute them, without first destroying the whole armed group.[526] The ineffectiveness of the local judicial system will also affect the safety of witnesses, who will be unwilling to come forward if it endangers their own lives, leading to evidentiary issues where investigations do take place.[527] Conflict is often accompanied by a rising criminality due to diminishing effectiveness of the legal system, which can pose a serious threat to journalists.[528]

In many situations where states still have a functioning judicial system, it may simply be no match against other powers operating in the state, as is currently the case in Pakistan. In Pakistan too many state and non-state actors, such as the Inter-Services Intelligence Directorate, the Taliban and the military are using violence against journalists, while the underfunded and under-protected judiciary cannot hold

[523] S Elliot, M Elbathimy and S Srinivasan, "Threats to the Right to Life of Journalists" (2012) *CGHR Working Paper 4*, University of Cambridge Centre of Governance and Human Rights, p. 11.
[524] Alley (2010), p. 88.
[525] CPJ "Getting Away with Murder: CPJ's 2014 Global Impunity Index spotlights countries where journalists are slain and the killers go free" (16 April 2014), available at: http://cpj.org/reports/2014/04/impunity-index-getting-away-with-murder.php.
[526] Elliot, Elbathami and Srinivassan (2012), p. 11.
[527] CPJ "Getting Away with Murder: CPJ's 2013 Global Impunity Index spotlights countries where journalists are slain and the killers go free" (2 May 2013), available at: http://www.cpj.org/reports/2013/05/impunity-index-getting-away-with-murder.php.
[528] Alley (2010), p. 79.

them accountable out of fear for their livelihood and even lives and the government is not a strong enough entity to back them up.[529]

In this situation international courts may offer a solution, especially international criminal courts, where individuals can be held accountable for their actions. These are however significantly limited by the ways in which they operate. As noted above, it must first be established that national remedies have been exhausted, which can be more or less onerous depending on the situation and the court in question and there tend to be significant delays in bringing cases before international courts. Furthermore, significant aspects of the enforcement of IHL and IHRL through international courts depend on the willingness of states to cooperate with the proceedings, due to the principle of state sovereignty.

5.4.2 The Causes of impunity: unwillingness to apply legal framework

The other side of the coin is that a functioning judicial system may still be in place, but there may be a general unwillingness to (fully) apply the relevant legal framework. This is one of the leading causes of impunity and it can occur for a variety of reasons, from a desire to protect one's own military personnel and citizens to broader concerns around accountability.

International law functions around the concept of state sovereignty, which can hinder the prosecution of crimes taking place across borders. Generally, states are reluctant to hold their own military personnel responsible for actions in conflict zones. Similarly, states may be reluctant to prosecute enemy fighters out of fear that this would bring to light violations committed by their own military.[530] Consequently, even though instances of violence against the press may be investigated by the 'home state' of those responsible, these investigations may simply exonerate the perpetrators. This was, for example, the case with the death of James Miller, a British freelance cameraman, who was killed by Israeli tank fire as he was filming in the

[529] E Rubin, "Roots of Impunity: Pakistan's endangered press and the perilous web of militancy, security and politics", (May 2013) *Special Report of the Committee to Protect Journalists*, p. 36, available at: https://cpj.org/reports/CPJ.Pakistan.Roots.of.Impunity.pdf.
[530] Cassese (1998), p. 5.

Gaza strip.[531] While the British coroner's report ruled it an unlawful killing, the soldier in question was cleared by the Israeli authorities.[532] As primary jurisdiction rested with Israel, as the place where the incident took place, there was little that could be done. Similar situations have arisen in the context of the US. The US military has been responsible for the death of a number of journalists in Iraq and there seems to be a general unwillingness to launch adequate investigations or take steps to mitigate the risk of similar incidents occurring in the future.[533] While a handful of these deaths have been investigated by US authorities, in all cases the soldiers in question have been exonerated.[534]

A more extreme situation arises when government forces themselves are actively and purposefully targeting journalists. This can happen for a variety of reasons, but will take place to ensure no uncensored information about unlawful actions during conflict will be reported to the outside world. It can further happen where journalists are considered to have affiliations with foreign governments or NGOs which pose a danger to the ruling government in a conflict zone.[535] Similar situations arise with non-state actors, who will often be roughly aware of (some) of the relevant international legal provisions preventing them from actively targeting journalists, but feel that international law has nothing to do with them and that they have little reason for obeying such laws.[536] This leads to one of the main difficulties with a culture of impunity: impunity breads impunity, creating a vicious cycle that is hard to break. State and non-state actors are reluctant to apply the existing legal framework if it

[531] C Urquhart, "C4 Cameraman killed in Gaza" (3 May 2003) *Guardian*; CPJ "James Miller", available at: http://cpj.org/killed/2003/james-miller.php.
[532] BBC, "Film-maker 'murdered' by Soldier" (6 April 2006) *BBC News*; there have further been instances where the Israeli military fired on journalists after receiving official notification of their status, see: Reporters without Borders, "Israel/Gaza, Operation "Cast Lead": News control as a military objective" (February 2009), Available at: http://en.rsf.org/IMG/pdf/Rapport_Gaza_janvier_2009_GB-2-2.pdf.
[533] CPJ, "Who Kills Journalists and Why: Report by the Committee to Protect Journalists to the committee of inquiry" (23 May 2005), available at: http://www.cpj.org/2005/05/who-kills-journalists-and-why-report-by-the-commit.php.
[534] F Smyth, "Murdering with Impunity" (2010) 32(3) *Harvard International Review* (online); INSI, "Killing the Messenger: Report of the global inquiry by the International News Safety Institute into the protection of journalists" (2006), available at: http://www.wan-press.org/IMG/pdf/REPORT_FINAL.pdf, pp. 40-41.
[535] Elliot, Elbathami and Srinivassan (2012), p. 11; HN Foerstel, *Killing the Messenger: Journalist at risk in modern warfare* (Westport: Praeger Publishers, 2006), p. 81.
[536] JM Lisosky and J Henrichsen, "Don't Shoot the Messenger: Prospects for protecting journalists in conflict situations" (2009) 2 *Media, War & Conflict*, 129, p.143.

does not suit their needs precisely because they have little reason to expect that they will be held accountable for a breach, while they likely receive few concrete benefits from observing the framework. It is therefore clear that one of the most obvious, though hardly simple, ways to address this particular cause of impunity is to actively prosecute all significant breaches of the relevant legal framework.

Again, in this situation the international community might intervene and enforce the appropriate application of the legal framework, but here too arise difficulties in terms of the willingness to fully apply legal provisions, though for different reasons from the ones stated above. Bringing perpetrators to justice is not always the primary concern of the international community. International Courts and Tribunals often perform a function in the wider context of building a lasting peace in a post-conflict situation. While holding those who have committed gross human rights and humanitarian law violations responsible is one component of the process, there are other concerns to take into account in this context, such as amnesty and reconciliation, as well as wider political concerns.[537] Consequently, there may be overriding concerns in holding an individual or a group of people responsible for a single act of violence against a journalist. While providing amnesty to groups who do not deserve it creates a dangerous presumption amongst actors that one can get away with serious human rights violations, endangering a peace process out of a desire to hold every single person accountable for their actions may also not be beneficial.[538] The balance between reconciliation and holding perpetrators responsible can be extremely difficult to get right.[539]

[537] See for example: MC Bassiouni, "Combatting Impunity for International Crimes" (2000) 71 *University of Colorado Law Review*, 409; Cassese (1998) pp. 5-6; N Roth-Arriaza (ed.) *Impunity and Human Rights in International law and Practice* (Oxford: Oxford University Press, 1995).
[538] Interestingly, art. 10 of the Agreement for and Statute of the Special Court for Sierra Leone, 16 January 2002, specifically states that: "An amnesty granted to any person falling within the jurisdiction of the Special Court (…) of the present Statute shall not be a bar to prosecution". This demonstrates that the rise of the enforcement of ICL, which is done on individual basis and thus may have less effect on fostering collective guilt, might be negating some of the concerns in this area, see: Cassese, (1998), p. 9; however concerns about the effect of criminal prosecutions on the wider peace process remain see: UN Security Council (2004), paras. 38-48.
[539] See for example: E Bertram, "Reinventing Governments: The promise and perils of United Nations peace building" (1995) 39 *Journal of Conflict Resolution*, 387.

Furthermore, the international community may be willing to apply the legal framework in full and bring perpetrators to justice, but if the relevant state refuses to cooperate, international courts and tribunals only have limited measures to force compliance.[540] International tribunals have no law enforcement comparable to national law enforcement and are thus reliant on national authorities for carrying out arrests.[541] Some, like the ICC, do however have their own investigators, though these too will rely on a certain level of cooperation from the state in question. Furthermore, the ICJ has held that based on customary law, certain incumbent state officials have personal immunity from criminal jurisdiction, which prevents them from being held accountable of any breaches of ICL by foreign states while in office.[542] Under these circumstances, it can be years before perpetrators are brought to justice and in the intervening time violence against journalists is likely to continue as there is no significant deterrent against it.

5.4.3 The causes of impunity: lack of a clear and concise legal framework

As discussed in chapters 2, 3 and 4, conflicts are no longer predominantly fought between states, with the majority of conflicts now involving one or more non-state actors.[543] These conflicts are generally unlikely to be classed as international conflicts under the IHL framework. Significant difficulties are caused by the dichotomy of international and non-international conflict which affects the application of IHL provisions. The legal framework for non-international armed conflicts is significantly less detailed and established than it is for international

[540] This is demonstrated for example by the procedural rules of the ICC, which is limited in its ability to bring war crimes committed in non-state parties before the ICC. See: K Davies and E Crawford, "Legal Avenues for Ending Impunity for the Death of Journalists in Conflict Zones: Current and proposed international agreements" (2013) 7 *International Journal of Communication*, 2157, p. 2172.
[541] Cassese (1998), pp. 11-16; The ICC for example relies exclusively on member states to enforce arrest warrants. For more detail see: GP Barnes "The International Criminal Courts Ineffective Enforcement Mechanisms: The indictment of President Omar Al Bashir" (2011) 34 *Fordham International Law Journal*, 1584.
[542] ICJ, *Case concerning an arrest warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)* 14
February 2002, ICJ Reports 2002, p.3; See also: Akande and Shah (2011); Advisory Committee on issues of Public International Law, "Advisory Report on the Immunity of Foreign State Officials" (May 2011) *Advisory Report no. 20, The Hague*, available at: http://cms.webbeat.net/ContentSuite/upload/cav/doc/cavv-report-nr-20-immunity_foreign_officials.pdf.
[543] A 2002 Study showed that of the 225 armed conflicts between 1946 and 2001 only 19% qualified as international armed conflicts, see: NP Gleditchs et al., "Armed Conflict 1946-2001: A new dataset" (2002) 39 *Journals of Peace Research*, 615.

armed conflict.[544] Consequently, most of the provisions protecting journalists in statutory IHL are not applicable during non-international armed conflict, as the Geneva Conventions are essentially reduced in application to common article 3. Journalists operating in non-international armed conflicts are increasingly dependent on customary law, which by its very nature is more difficult to establish in detail than treaty law.

As previously noted, the nature of the conflicts covered by journalists has changed over the last century from predominantly international armed conflict to predominantly non-international armed conflict. This increase in non-international armed conflicts brings an increase in non-state actors involved in conflicts. These non-state actors are not always as well trained and disciplined as their state counterparts and may not be fully aware of the rights of journalists.[545] Most military manuals have sections on media workers and journalists and interaction with them is covered during training, which will generally not be the case for non-state actors. This is well demonstrated by the experience of a journalist reporting from the Ivory coast who, when threatened by a soldier who had obviously no knowledge of the Geneva Conventions, tried to explain her rights by referring to the rights of men and Christian compassion, which due to cultural differences did not exactly improve the situation.[546] A poll conducted by the ICRC in 2009 showed that in a sample drawn from the population of Afghanistan, the Democratic Republic of Congo, Liberia, Haiti, the Philippines, Lebanon, Georgia and Colombia, only 43% of those surveyed had even heard of the Geneva Conventions.[547] Such statistics show a clear obstacle for effective implementation of the legal framework.

The more complicated and less well defined the legal framework is, the more likely there will be a lack of awareness of the applicable rules. Journalists themselves,

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[544] See for example: B Saul, "The International Protection of Journalists in non-International Conflicts" (2008) 14 *Australian Journal of Human Rights*, 99.
[545] See for example: R Tait, "Journalism Safety: Practice review" (2007) 1 *Journalism Practice*, 435, p. 437.
[546] J Di Giovanni "Bearing Witness" in: J Owen and H Purdey (eds.) *International News Reporting: Frontlines and deadlines* (Oxford: Oxford University Press, 2009), 1-14, pp. 5-6.
[547] ICRC, "ICRC Poll Shows Rules of Armed Conflict Enjoy Broad Support but Are Considered to Have Limited Impact" (10 August 2009), available at: http://www.icrc.org/eng/resources/documents/interview/research-interview-100809.htm.

however, can assist in raising awareness of the legal framework through their reporting. The ICRC, for example, provides training courses for journalists in IHL, not just so that they are aware of the protection that they are entitled to, but also so that they can recognise abuses of IHL and report them to the wider international community.[548] This will help to raise awareness of the legal framework. What remains problematic though, is that the concept of journalists as neutral players in a conflict is simply less well defined than that of, for example, medical personnel. Furthermore, the circumstances of non-international conflict where non-state actors will often be fighting out of uniform make it more likely for civilians and journalists to be targeted during combat as it is more difficult to distinguish between them and armed fighters.[549]

It is not just non-state actors though who are affected by the lack of clarity of the legal framework, it also affects some actions by state-actors. Under the current legal framework, journalists lose all legal protection if they are 'directly participating' in the hostilities. When, exactly, journalists breach this threshold has been subject of extensive debate. The view that actively spreading propaganda arises to 'active participation' in hostilities by the media, thus negating their protection under international law, has led to the bombing of a number of Television and Radio Stations over the past decade, most cases leading to civilian casualties and all bombings have been condemned by various international organisations for breaching international law.[550] The most famous of these was the bombing by NATO of a television station during the Kosovo war. In its final report on the bombing, the ICTY noted that: "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. If it is merely disseminating propaganda to generate support for the

[548] Kagan and Durham (2010), p. 108.
[549] Elliot, Elbathami and Srinivassan (2012), p. 12; JA Williamson, "Challenges of Twenty-First Century Conflicts: A look at direct participation in hostilities" (2010) 20 *Duke Journal of Comparative & International Law*, 457, p. 463.
[550] Human Rights Watch, "Israel/Gaza: Unlawful Israeli attacks on Palestinian media" (20 December 2012), available at: http://www.hrw.org/news/2012/12/20/israelgaza-unlawful-israeli-attacks-palestinian-media; UN, "UN Official Deplores NATO Attack on Libyan Television Station"(8 August 2011), available at: http://www.un.org/apps/news/story.asp?NewsID=39255#.U1_DgfldVrM.

war effort, it is not a legitimate target".[551] The confusion around the notion of 'direct participation' in the hostilities by the media will be discussed in more detail in chapter 7.

5.5 UN work plan on the safety of journalists and the issue of impunity

The UN has a specialised agency for the promotion of the "free flow of ideas by word an image":[552] the United Nations Educational, Scientific and Cultural Organisation (UNESCO), which has been an active player at the international level in enhancing the protection of journalists in conflict zones. In 2006, the UN adopted *Resolution 1738* which condemned "intentional attacks against journalists, media professionals and associated personnel, as such, in situations of armed conflict" and called on the Secretary-General to report on the "safety and security of journalists, media professionals and associated personnel" in further reports on the protection of civilians in armed conflict.[553] This report on the implementation of *Resolution 1738* has become an annual event. In 2007 UNESCO published the *Medellin Declaration*, which calls on member states to investigate all instances of violence against journalists and media personnel and to bring the perpetrators of such acts before the courts.[554] UNESCO has further, in cooperation with Reporters without Borders (RwB), published a practical guide for journalists working in conflict territories which is regularly updated and regularly undertakes activities to raise awareness for journalists' safety, such as 'World Press Freedom Day' on the 3rd of May each year. Recently, the Director-General of UNESCO organised a UN Inter-Agency Meeting on the safety of journalists and the issue of impunity, which took place September 2011. Out of this meeting emerged a plan of action for a "comprehensive, coherent

[551] ICTY, "Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia" (13 June 2000), para. 47. The bombing in this case was justified on the basis of disrupting an enemy communications network being used in the war effort, which made it a legitimate target, but a pure propaganda station would likely not be, *Ibid* paras. 75-76.
[552] UNESCO Constitution (16 November 1945), art. 1.
[553] United Nations Security Council, Resolution 1738, S/Res/1738/ (2006), paras. 1 and 12.
[554] UNESCO, *Medellin Declaration: Securing the Safety of Journalists and Combatting Impunity* (2007), available at: http://www.unesco.org/new/en/unesco/events/prizes-and-celebrations/celebrations/international-days/world-press-freedom-day/previous-celebrations/worldpressfreedomday2009000/medellin-declaration/.

and action-oriented UN-wide approach to the safety of journalists and the issue of impunity".[555] This action plan calls for the strengthening of UN mechanisms as well as reinforcing collaboration with other organisations and institutions on the issue of journalist safety as well as cooperation with member-states to ensure full implementation of the existing international rules and principles and to improve relevant national legislation.[556] The plan further calls to increase awareness of the danger of impunity of crimes against journalists, as well as to foster safety initiatives to prevent injury and deaths.[557]

In 2013, UNESCO followed up on the UN's plan of action on the safety of journalists and the issue of impunity, by publishing a detailed work plan on the issue, which seeks to "conceptualize journalist safety as part of fostering unhindered access to information and knowledge, which is one of the four key principles underlying knowledge societies".[558] The work plan is in line with the UN's action plan and its objective is "to promote a free and safe environment in both conflict and non-conflict situations, for journalists, with a view to strengthening peace, democracy and development worldwide".[559] The action points for combatting impunity in conflict situations are especially relevant for this thesis. For the purposes of the work plan, journalists are defined as: "journalists, media workers and social media producers who generate a significant amount of public-interest journalism".[560] The action lines contained in the UNESCO work plan follow the ones in the 2012 UN plan of action. In terms of the legal framework, the focus of both clearly lies on enhancing the implementation of the existing international legal norms and principles, rather than amending existing rules and creating new and more detailed regulation. The action plans do however acknowledge that there might be scope for the development of more detailed legislative frameworks to create "a safe environment for journalists to perform their work independently and without undue interference" though the

[555] UNESCO (2012a), p. 33.
[556] UNESCO, "UN Plan of Action on the Safety of Journalists and the Issue of Impunity" (2012) *International Programme for the Development of Communication*, CI-12/CONF.202/6, paras. 5.1 - 5.14 (hereafter UNESCO 2012b).
[557] *Ibid,* paras. 5.15-5.24.
[558] UNESCO, "UNESCO Work Plan on the Safety of Journalists and the Issue of Impunity" (3 June 2013) CI/FEM/FOE/2013/299 (hereafter UNESCO 2013a), para. 6.
[559] *Ibid*, para. 7.
[560] *Ibid*.

emphasis here lies on national measures by member states, rather than international efforts.[561]

While the UN's efforts in this area are an important step towards combatting the issue of impunity, the steps proposed by the action plans are neither a radical, new approach to combatting the issue, nor particularly detailed. The general points contained in the plans can provide important protection to journalists working in conflict zones, but much will depend on how these plans are taken forward and implemented in practice over the next few years. The first implementation strategy for the work plan for 2013-2014 has been published and contains the detailed steps which will be undertaken over the next two years, to improve the protection for journalists. In terms of measures concerning the current legal framework, several action points of the implementation strategy directly address issues in this area. Member states will be provided with assistance "to fully implement existing international norms and principles, particularly within the framework of the international human rights law, humanitarian law and criminal law" and international and regional conferences will be organised to encourage discussion on the issue of journalist safety and impunity.[562] Support will further be provided for the development of "appropriate national policy, legislative and institutional frameworks to increase safety for journalists",[563] clearly indicating that any drafting of a new legal framework to protect journalists is expected to take place at the national rather than the international level.

5.6 Conclusion

International judicial bodies can make an important contribution to the enforcement of IHL and IHRL in conflict zones. However, most international courts offer

[561] UNESCO (2012b), para 5.6; UNESCO (2013a), para 16.
[562] UNESCO, "Implementation Strategy 2013-2014: UN plan of action on the safety of journalists and the issue of impunity" (2013), available at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/official_documents/Implementation_Strategy_2013-2014.pdf (hereafter UNESCO 2013b), p. 13.
[563] UNESCO (2013b), p. 14.

retrospective assessments of the legality of states' and individuals' behaviour after a conflict has taken place.[564] Their preventive function arises out of ensuring compliance with IHL and IHRL in future conflicts through punishing past breaches. It is therefore important to ensure that as few breaches of these laws as possible go unpunished. High impunity rates result in a greater likelihood of illegal actions taking place in future conflicts, as there are simply insufficient deterrents to prevent such behaviour.

While the work of journalists in conflict zones is inherently dangerous simply due to the circumstances in which they operate, the lack of enforcement of the legal protection they are entitled to makes their jobs more dangerous than it needs to be. There are limited legal measures that will protect journalists from injury and death due to situations that are inherent to getting close to conflict situations, such as crossfire. The issue is, however, that even during conflict, a major cause of the premature/untimely death of journalists is murder, which is in direct contravention of several legal instruments and should not endure the high levels of impunity it is currently subject to.

Improving the enforcement of the current legal framework is an obvious place to start enhancing the protection of journalists operating in conflict zones, but this does not mean it is the only way to achieve this. Impunity has many causes, and some relate to potential issues with the current legal framework, which should be more closely examined. As identified above, it can be argued that the current legal framework is complicated and does not provide clear legal rules for all situations that journalists can find themselves in. It is clear that journalists' safety can be greatly improved by ensuring that any breaches of the legal framework that protects them are prosecuted by national and international courts and tribunals. However, whether this would be sufficient to protect journalists from violence in future conflicts, or whether more must be done, such as the creation of a new, more detailed, comprehensive legal framework will be discussed in the next chapters.

[564] Foster (2006), p. 108.

6. Protecting different types of journalists.

Chapters 3 and 4 of this thesis have provided an overview of those legal frameworks providing protection to journalist in conflict territories: International Humanitarian Law (IHL), Human Rights Law (HRL) and International Criminal Law (ICL). They have further considered how and to what extent the legal framework is enforced in practice. The combined legal framework provides, at least in theory, a significant number of provisions seeking to protect civilians, and therefore journalists, in conflict zones. It has also become clear, however, that there are significant differences in the awarded protection based on the type of journalist, the type of conflict and, as we shall see below, even the nationality of the journalist. As mentioned in the previous chapter, it is often argued that the current legal protection is adequate, but that the enforcement of it is lacking and that this is the predominant reason why journalists reporting on conflicts face such significant risks to their physical safety. While this is undoubtedly part of the problem, this chapter will examine whether the legal framework really is up to the task of protecting journalists in conflict zones and whether there are any gaps in the protection that cause difficulties in practice.

Journalists operating in conflict zones can be classed into three different categories under the international legal framework: accredited war correspondents, (independent) journalists and local journalists. Arguably, there is a fourth category of journalist: military correspondents, which is a term used for journalists in active military service reporting on a war.[565] Legally, these journalists are classed as combatants and their status does not differ from other military personnel. They make up only a small, distinct portion of those journalists reporting on conflict and, unlike their civilian counterparts, have a clear status as combatant under the legal framework. They will therefore not be included in the discussion below.

[565] See for example: J Kiss, "Meet the Army's own Media Corps: The Combat Camera Team is the army's own embedded corps, reporting from Afghanistan" (20 August 2010) *The Guardian.*

The differences in terminology have been touched upon in the introduction of this thesis and will be discussed in further detail below. The previous discussion of the legal framework has focused on the 'general class' of journalists, while occasionally noting protection only available to specific types of journalist. Below, the range of legal protection available to journalists will be applied to the three different categories of journalists. This will highlight not only the differences in protection received under international law, but also highlight some of the difficulties that are inherent to the protection on offer. As we shall see below, journalists are classed as either prisoners of war or general civilians when captured. Yet the protection that comes with being classed in one of these two categories may not always be as suitable to journalists as it is to the general class they are grouped with. There are further some relatively common dangers for journalists that are not addressed by the current legal framework, such as accusations of spying and collaboration.

6.1 Accredited war correspondents

As discussed in chapter 3, accredited war correspondents are those journalists who accompany the armed forces during conflict and have received authorisation to do so from the armed forces they accompany. The *Dictionnaire de Droit International Public* defines them as:

> Specialised journalists who, with the authorisation and under the protection of the armed forces of a belligerent, are present on the theatre of operations with a view to providing information on events related to the ongoing hostilities.[566]

The term 'war correspondent' in popular culture is often used as a term for all journalists reporting from conflict zones. As noted in the introduction, this thesis uses the term strictly in its legal sense and it therefore only covers those journalists accredited to the military.

[566] J Salmon (ed.), *Dictionnaire de Droit International Public* (Brussels: Bruylant, 2001), p. 275 (translated
from French).

To summarise the discussion in chapter 3: during international armed conflict, war correspondents retain their classification as civilians under IHL, but are entitled to prisoner of war status upon capture.[567] They enjoy this protection together with other civilians who accompany the armed forces, such as military aircraft crews and supply contractors. The group entitled to protection under this article is open, as article 4A(4) Geneva Conventions 1949 only provides an indicative list, rather than specifying a closed group of persons, who are awarded this type of protection.[568] Consequently, all authorised media staff accompanying and accredited to the armed forces, not just journalists, but also, for example, camera crews and other media support staff, are entitled to prisoner of war status under this article. Those accompanying the armed forces should carry an identity card testifying to their status for their own safety, though this is not a requirement for receiving protection under article 4A(4). When there is doubt upon capture concerning their status, they should be presumed to be entitled to prisoner of war protection, until proven otherwise.[569]

As discussed, the rationale behind this is that by accompanying the military, these journalists are likely to have access to significantly more (sensitive) information about the armed forces they accompany than ordinary civilians not connected to the military. Prisoners of war cannot be compelled to answer during questioning and cannot be accused of being spies, their capture must further be notified to the relevant authorities and their families, which means they cannot be held without contact to the outside world.[570] If the same protection is not extended to those who accompany them and have access to similarly valuable information this can lead to significant difficulties for those in possession of such knowledge, which could endanger their lives. The dangers of missing this protection will be discussed in more detail below at paragraph 6.2. While there are thus advantages to their status, the main danger for war correspondents is that their proximity to the armed forces will endanger them. While war correspondents retain their classification as civilians and

[567] See art. 4A(4) Geneva Convention III (1949).
[568] ICRC, *Report on the Work of Government Experts for the Study of the Conventions for the Protection of War Victims* (Geneva, 1947), p. 113.
[569] Art. 5 Geneva Convention III (1949).
[570] Artt. 70-71 Geneva Convention III (1949), this is mostly additional protection in the sense that journalists cannot "disappear" after being captured and authorities will be able to monitor the circumstances of their detention.

can therefore not be targeted directly during the hostilities, they generally wear clothes resembling military uniforms and travel with a military unit, rendering them indistinguishable from combatants. Should they be killed in this situation, their killing is therefore unlikely to violate the laws of war.[571] While this is a risk faced to a far lesser degree by independent journalists, embedded journalists, who during international armed conflict will generally be classed as accredited war correspondents, as will be discussed below, suffered significantly fewer casualties than their independent counterparts, suggesting that being accredited to a military unit is safer than covering conflict independently.[572]

Aside from article 4A(4) and IHL in general, war correspondents will find protection under IHRL for so far as these rights are applicable in conflict zones and are not superseded by relevant *lex specialis*. This can provide additional protection to a certain extent, but as many of the human rights not reflected in IHL can be limited in their application or derogated from in times of conflict, IHRL is likely to be of limited use to accredited war correspondents.

6.1.1 Prisoner of War status

While there are clear benefits to being classed as a prisoner of war upon capture, there are also significant drawbacks, at least where journalists are concerned.[573] The problem is that classification as a prisoner of war under the legal framework is not an easy 'fit' for the function journalists perform in conflict zones. Prisoner of war status was largely created to remove enemy soldiers from the battlefield and ensure they no longer pose a threat to one's own armed forces without having to kill them all.[574] The

[571] C Piloud "Article 79 – Measures of Protection for Journalists" in: Y Sandoz, C Swinarski, B Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff Publishers, 1987), para 3269. In this case they do not lose their right to protection, but they do lose their effective protection under that right.
[572] During the war in Iraq seven embedded reporters died, as opposed to 132 non-embedded reporters: CPJ, "Iraq - Journalists in Danger: A statistical profile of media deaths and abductions in Iraq 2003-2009" (July 2008), available at: http://www.cpj.org/reports/2008/07/journalists-killed-in-iraq.php.
[573] See for example: B Saul, "The International Protection of Journalists in Armed Conflict and other Violent Situations" (2008) 14 *Australian Journal of Human Rights*, 99, p. 104, though he argues that there are also no real benefits for journalists to being classed as prisoner of war, which ignores the benefits of not having to answer during questioning and protection from being accused of being a spy.
[574] Montesquieu noted in his work *De l'Esprit des Lois* that "the only right that war gives over a captive is secure his safe-keeping and to prevent him from doing harm". CL Montesquieu, *De l'Esprit des Lois*, liv. XV, ch. II (1748).

obvious problem here is that this simply does not apply to journalists. Journalists are non-combatants and thus do not pose the same threat as combatants do. As noted in chapter 2, article 4A(4) stems from a time when the behaviour of war correspondents was much closer to that of combatants than today.[575] While it may be necessary to detain journalists temporary during military operations for security reasons,[576] this is unlikely to be the case for the entire duration of the conflict, yet this is precisely what happens to prisoners of war. It makes sense to deny enemy fighters the option to return to their own state during a conflict, as this makes it possible for them to be redeployed against one's own armed forces, but this is not a risk that applies to journalists. There have even been cases where the media has denied that captured journalists should be classed as prisoners of war, in the hope that they could secure the release of their personnel, rather than have them detained for the duration of the conflict.[577] This demonstrates that at least some of the additional 'protection' offered to prisoners of war is less than ideal for journalists.

Detaining journalists for the duration of the conflict does not seem to confer a real benefit to journalists or belligerent parties. In theory, it actually harms the international community. Journalists play an essential part in providing audiences around the world with information about conflicts they cannot witness for themselves. Freedom of expression is not just the right to impart information, it is also the right to receive information. As stated by United Nations Educational, Scientific and Cultural Organisation (UNESCO), it is a "collective right, which empowers populations through facilitating dialogue, participation and democracy, and thereby makes autonomous and sustainable development possible".[578] Journalists

[575] For example, most countries which have embedded reporters travel with their military expressly state that war correspondents cannot carry arms, as will be discussed in more detail in chapter 7.
[576] J Pictet, *The Geneva conventions of 12 August 1949 : Commentary - Vol.2, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (Geneva: International Committee for the Red Cross, 1960), p. 49.
[577] This happened for example in Iraq, where after the arrest of 4 CBS media workers, the CBS Vice president stated: "We are doing all we can to make clear to Iraq that they are not prisoners of war, that they are not spies. I am concerned Saddam Hussein understand that these four men are journalists and that they are non-combatants and that he make the decision to release them". See: H Kurtz, "CBS News Crew Held In Baghdad; Fate of Bob Simon, Others Now Up to Saddam" (16 February 1991) *Washington Post*.
[578] UNESCO, "The Safety of Journalists and the Danger of Impunity: Report by the Director-General" *International Programme for the Development of Communication* (27 March 2012), available at:

in conflict zones therefore serve the public interest. In the words of the ICTY: "war correspondents play a vital role in bringing to the attention of the international community the horrors and reality of conflict."[579] Removing a journalists from a conflict means removing a source of information from an audience which is likely already reliant on a small number of (independent) sources. While this may physically keep the journalist out of harm's way, providing the circumstances of his capture fully comply with the international legal framework, this is not beneficial to the wider international community.

6.1.2 Non- international conflicts

The situation for war correspondents is radically different during non-international armed conflict. During this type of conflict the Geneva Conventions are reduced in application to common article 3, which makes no mention of war correspondents or indeed prisoners of war in general, and merely requires humane treatment of those not or no longer taking part in the hostilities. As there is no additional protection in this situation for war correspondents over and above that offered to independent journalists who are treated in both situations as 'ordinary' civilians, there is thus little difference between war correspondents and (independent) journalists in this situation. As noted previously, this article is generally taken to bind both state and non-state actors thus protecting journalists from maltreatment by all parties to the conflict.[580] The article additionally requires that "parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention". This urges parties to consider applying, on a voluntary basis, a wider set of the provisions of the Geneva Conventions to the conflict. Where the provisions concerning war correspondents and prisoners of war are brought into force, this can make a difference to the status of war correspondents.

Customary law will assist those embedded journalists who during international conflicts would have been classed as war correspondents, as discussed below, in non-

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http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/images/Themes/Freedom_of_expression/Safety_Report_by%20DG_2012.pdf), p. 29.

[579] ICTY, *Prosecutor v Radoslav Brdjan and Momir Talic* decision on interlocutory appeal (11 December 2002) IT-99-26, para 36.

[580] Though, as noted, this is not without controversy, see the discussion under para. 3.1.3 of this thesis.

international armed conflicts as well, as the customary rule that "Civilian journalists engaged in professional missions in areas of armed conflict must be respected and protected as long as they are not taking a direct part in hostilities," applies during both international and non-international conflicts. In practice, however, journalists accompanying state military units may put themselves at greater risks during non-international armed conflict than (independent) journalists. Faced upon capture with non-state actors who are likely to have less knowledge of the international legal framework, the very fact that these war correspondents are travelling with the armed forces will make it far more difficult to convince their capturers that they are in fact 'independent observers' and are not combatants, but 'ordinary' civilians.[581]

6.1.3 War correspondents in modern conflicts: 'embeds'

The term 'embedded press' was first used during the Bosnia campaign in 1995 to describe a style of reporting that referred to reporters being assigned to a specific unit, deploying and living with that unit for significant periods of time.[582] It was used on a limited scale during that conflict, but became a fully developed system for covering media-military relationships during the war in Iraq. While embedding journalists with military units was not a radical new approach to covering conflict, a similar system was used during WWII and Vietnam, it was more formalised and employed on a much wider scale then during previous conflicts.[583] Journalists embedded with different military branches and more than 600 reporters participated in the embedding programme.[584] The program proved popular with both the military and the press,[585] though the latter raised concerns about impartiality, loss of objectivity and the narrowness of the information available to embedded reporters,

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[581] Marcus Wilford, vice president for News International Digital, who oversaw the network's operations in Afghanistan and Iraq discusses the problem of remaining independent in the context of the extreme difficulties with convincing a source that an embedded reporter is not in league with the military. Similar issues will likely arise in the context of convincing a non-state actor of the same thing. M Wilford, "The Big Story: Our embattled media" (Fall 2009) *World Affairs*, available at: http://www.worldaffairsjournal.org/article/big-story-our-embattled-media.

[582] C Paul and JJ Kim, *Reports on the Battlefield: The embedded press system in historical context* (Santa Monica: Rand, 2004), p 48.

[583] *Ibid*, p. 51.

[584] BR McLane, "Reporting from the Sandstorm: An appraisal of embedding" (Spring 2004) *Parameters*, 77, p. 81.

[585] *Ibid*, p. 87; Paul and Kim (2004), p. 31; J Shafer, *Embeds and Unilaterals* (1 May 2003) *Slate*, available at: http://www.slate.com/articles/news_and_politics/press_box/2003/05/embeds_and_unilaterals.html.

making it difficult to report a broader picture of the conflict.[586] Embedding is now generally considered to be the likely model for media-military relations during future conflicts, as it provides the military with a certain control over information which is difficult to achieve due to modern technology.[587] It has, however, been pointed out that the embedding programme has not really been tested with sustained negative news stories, as coverage has always been largely positive and negative stories concerning the war effort from embedded reporters have received little public attention.[588] Only once the embedded programme has been put through this test will we know how future-proof it really is.

The current system of embedding raises some question as to how these journalists must be classed under the legal framework. The strongest arguments are to class embedded journalists, who operate during international armed conflict and have received official accreditation from the armed forces, as war correspondents, as they meet all criteria of article 4A(4) of the Geneva Conventions 1949.[589] They operate in a way closely related to accredited war correspondents in WWII, who the drafters of the Geneva Conventions had in mind when drafting the Conventions of 1949. Some doubts have been raised, however, as to whether this is the correct classification. There has been suggestion that the French class embedded reporters as (independent) journalists even during international armed conflict, rather than as accredited war correspondents, leaving them without prisoner of war status upon capture.[590] Their motivation for this is unclear and whether they really class embedded reporters this way has proven difficult to verify. Legally speaking, during international armed conflict, it seems sensible to class them as war correspondents given the way they

[586] See for example: M Hirst and R Patching, *Journalism Ethics: Arguments and cases* (Melbourne: Oxford University Press, 2005), pp. 122-123; S Aday, S Livinston and M Hebert, "Embedding the Truth: A cross-cultural analysis of objectivity and television coverage of the Iraq war" (2005) 10 *The Harvard International Journal of Press/Politics*, 3; R Keeble, *Ethics for Journalists* (New York: Routledge, 2008), pp. 235-238.
[587] Mclane (2004), pp. 86-87; Paul and Kim (2004), p. 2, quoting a Pentagon spokeswoman; see also D Moore "Twenty-first Century Embedded Journalism: Lawful targets?" (2009) 31*The Army Lawyer,* 1.
[588] McClane (2004), p.84. Ayres describes for example strong reactions by the military to a negative news story he wrote while embedded in Iraq: C Ayres, *War Reporting for Cowards* (London: John Murray Publishers, 2005), pp. 279-280.
[589] See for example: Saul (2008), p.108.
[590] A Balguy-Gallois, "The Protection of Journalists and News Media in Armed Conflicts" (2004) 86 *International Review of the Red Cross,* 37, p. 42.

operate in conflict zones. This is further supported by practice. The British government, for example, has made clear that embedded reporters are entitled to prisoner of war status upon capture, as per the Geneva Conventions (1949).[591] This is also the dominant position in the academic literature and is supported by the ICRC.[592] Yet the issue remains that it can be difficult to ascertain the exact circumstances of the capture of a journalists travelling with a military unit, which in practice leads to difficulties with their classification.[593] That some confusion concerning the status of embedded reporters persists is well demonstrated by the fact that Reporters without Borders, in response to the UN action plan on the Safety of Journalists and the Issue of Impunity,[594] has requested clarification of the legal status of embedded reporters to clearly establish whether they should be treated as prisoners of war upon capture, or as ordinary civilians.[595] As discussed under 6.1.2, during non-international armed conflict the provisions in the Geneva Conventions (1949) concerning war reporters generally do not apply and embedded reporters operating in these conflicts will be classed as independent journalists.

6.2 Independent journalists

Journalists not accredited to a military unit are referred to as independent journalists, or 'unilaterals', a term coined during the war in Iraq to differentiate between them

[591] UK Ministry of Defence, *MoD Working Arrangements with the Media in Times of Emergency, Tension, Conflict or War* (31 January 2013) Joint Service Publication 580, version 8, para. 37.
[592] R Geiss, "How does International Humanitarian Law Protect Journalists in Armed Conflict Situations?" (27 July 2010) *ICRC Interview*, available at: http://www.icrc.org/eng/resources/documents/interview/protection-journalists-interview-270710.htm. See further for example: Balguy-Gallois, p. 42; H-P Gasser, "The Journalist's Right to Information in Time of War and on Dangerous Missions" (2003) 6 *Yearbook of International Humanitarian Law* 367, p. 384; I Düsterhöft, "The Protection of Journalists in Armed Conflicts: How can they be better safeguarded?" (2013) 29 *Utrecht Journal of International and European Law*, 4, p. 12.
[593] See for example the capture of a French journalists in Colombia: E Pachico, "Is Kidnapped French Journalist a POW" (6 May 2012) *InSightCrime*, available at: http://www.insightcrime.org/news-analysis/is-kidnapped-french-journalist-a-pow.
[594] UNESCO, "UN Plan of Action on the Safety of Journalists and the Issue of Impunity" (2012) *International Programme for the Development of Communication*, CI-12/CONF.202/6.
[595] Reporters without Borders, "RSF Welcomes UN's Commitment to Tackle the Issues of Journalists' Safety and Impunity" (28 February 2013), available at: http://en.rsf.org/rsf-welcomes-un-s-commitment-to-28-02-2013,44150.html.

and the embedded reporters.[596] While from an IHL point of view this class of journalists could be referred to as 'civilian journalists' this tends to lead to confusion in popular culture where that term is occasionally used to refer to 'citizen journalists', discussed at 6.3.2 below. Therefore the term 'independent journalist' is preferred in this context.[597]

As discussed in chapter 3, independent journalists find protection under article 79 of Protocol I to the Geneva Conventions. This article does not provide any additional protection; it simply confirms that journalists are civilians and they therefore should be granted all the protection civilians are entitled to under the Geneva Conventions (1949). As with the term 'war correspondent' there is no official definition of a journalist under the Geneva Conventions, though the UN draft convention on which article 79 is based, defines journalists as: "any correspondent, reporter, photographer, and their technical film, radio and television assistants who are ordinarily engaged in these activities as their principal occupation".[598] As with war correspondents, supporting media personnel are thus covered by article 79.

6.2.1 Nationality

The protection of civilians under IHL is dependent on the nationality of the civilian. Consequently, nationality influences the protection journalists are entitled to in conflict zones. Article 4 of Geneva Convention IV relative to the protection of civilian persons in times of war, sets out which groups of civilians the Convention applies to. In principle the Convention applies to two groups of civilians: "persons of enemy nationality living in the territory of a belligerent state", which are referred to as 'protected persons' in Geneva Convention IV[599] and "the inhabitants of occupied

[596] Shafer (2003).
[597] K Davies and E Crawford, "Legal Avenues for Ending Impunity for the Death of Journalists in Conflict Zones: Current and proposed international agreements" (2013) 7 *International Journal of Communication*, 2157, p. 2161. Furthermore, accredited war correspondents are still civilians, thus even legally there can be confusion surrounding the term "civilian journalist".
[598] Art. 2a 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.
[599] "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals (art. 4 Geneva Convention IV). "in the hands of a Party" is meant in an "extremely general sense" according to the Commentary on the Convention and will cover merely being in the territory of a party: OM Uhler et al., *The Geneva Conventions of 12*

territories".[600] Nationals in their own state are thus excluded. The provisions are detailed and rather complicated, with different criteria applying to different parts of the Convention.[601] Generally in conflict areas the Convention applies to "all persons of foreign nationality and to persons without any nationality," with the following exceptions: "nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State" as long as the state of which they are nationals has normal diplomatic representation in the state in whose hands they are.[602] This qualification may however not provide quite as much protection as envisioned by those drafting the Geneva Conventions. Even where states maintain diplomatic representation this does not always mean they will be able to provide sufficient assistance to nationals who are, for whatever reason, in trouble with the local authorities. As noted in the previous chapter, states will often have to take into account a wide range of (international) interests before interfering in the affairs of a foreign country. They may therefore choose not to employ the full range of the protection they could offer in a contentious case, in order to preserve diplomatic relations.

Establishing nationality is however not as straightforward as it may seem. Nationality is not only a matter of establishing of which state a person is a national. The requirement has been interpreted to extend, in certain circumstances to allegiance. The ICTY established in *Tadic* that 'substantial relations' between a person and enemy state, can be relevant and that factors such as ethnicity, allegiance, and other close bonds with the enemy state must therefore be taken into account.[603] Effectively, therefore, while a person may not meet the 'standard' requirement for

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August 1949: Commentary - Vol. 1V, Geneva Convention Relative to Protection of Civilian Persons in Times of War (Geneva: ICRC, 1958), p. 44.

[600] Uhler et al. (1958), p. 45.

[601] Notably, the provisions in part II apply according to art. 13 regardless of nationality and are thus applicable to local journalists.

[602] Art. 4 Geneva Convention IV. Nationals from states not party to the convention are also excepted, though this is no longer relevant since the universal ratification of the Conventions, and naturally those protected under Conventions I-III (i.e. combatants) are not protected either. See for more detailed discussion Uhler et al. (1958), pp. 45-51.

[603] See Prosecutor v. Delalię et al. (20 February 2001), Case IT-96-21-A, Judgement of the Appeals Chamber, para 52-84 for an extensive discussion. See also ICTY, *The Prosecutor v. Dusko Tadić* , Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para 166.

nationality to qualify as a 'protected person' under article 4 Geneva Convention IV, for the purposes of this Convention they may still have 'assimilated' a nationality which brings them under the scope of the Convention.

What does this mean in practice for journalists? During armed conflict journalists who are nationals from co- or non-belligerent states are essentially subject to peacetime legislation: domestic law, potentially supplemented by human rights law and the protection of diplomatic relations between their home state and the state they are operating in, though the latter may provide only limited assistance.[604] In this situation IHL has only limited application. Similarly, during conflict journalists in their own states remain subject primarily to domestic legislation, IHL provisions concerning the local civilian population and applicable human rights law. Nationals from belligerent states, or those allied with them however, are subject to domestic law, additional protection of IHL for 'protected persons' and human rights law and therefore find additional safeguards under the international legal framework.[605] There are significant advantages and drawbacks to the protection journalists receive under the international legal framework, which will be discussed below.

6.2.2 Protection

One of the biggest advantages for journalists is that they cannot be the direct target of hostilities.[606] They further receive the protection entitled to civilians when captured, which is different from the treatment received by prisoners of war. This has both advantages and disadvantages. As discussed above, the exact extent of protection differs depending on nationality, though a number of general provisions concerning civilians apply irrespective of nationality and thus to all journalists.[607] These

[604] Where diplomatic relations have broken down completely, these journalists fall into the same category as nationals from belligerent states and they essentially become a protected person under Geneva Convention IV. For more information see: H-P Gasser, "The Protection of Journalists engaged in Dangerous Missions" (1983) 23 *International Review of the Red Cross*, 3, pp. 15-16.
[605] During occupation the situation is only different for nationals of a neutral state. During occupation they are protected regardless of existing diplomatic relations, see art. 4.
[606] Their proximity to military objectives, such as army units or targets, can however mean that while they cannot be directly targeted they may become lawful "collateral damage".
[607] There is some discussion whether this protection applies equally to a state's own nationals, though the Commentary on Protocol I argues it does: Y Sandoz, C Swinarski and B Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff Publishers, 1987), para. 3017-3021.

provisions cover some of the most practical protection, which especially in combination with the provisions of IHRL means that all civilian journalists (theoretically) receive largely the same basic protection in conflict territories, though detailed protection will still vary depending on nationality; those journalists who are classed as 'protected persons' under Convention IV, meaning those who are nationals from belligerent states, or states who no-longer maintain diplomatic relations, receive additional protection. For example, article 31 of Convention IV prohibits the use of physical or moral coercion against 'protected persons', especially to give up information, which can be valuable protection for journalists.[608] The Convention further states that where protected persons are detained for security reasons they can have this decision reviewed "as soon as possible" by an appropriate court or administrative board and there is thus limited scope to detain journalists who fall under this category long term.[609] There are numerous other provisions offering additional protection to those classed as protected persons under the legal framework, but these are less relevant for the current discussion.

All journalists receive basic protection in the sense that, regardless of their situation murder, torture, corporal punishment and mutilation are all prohibited, as are outrages upon personal dignity, the taking of hostages, collective punishments and threat to do any of the aforementioned.[610] When arrested or detained for actions relating to the conflict they must be informed of the reason for their detention, and basic provisions concerning fair trial, which largely mirror those of IHRL, must be observed.[611] Unlike war correspondents, journalists who are detained for actions relating to the conflict cannot simply be held until the end of the conflict. Article 75(3) of Protocol I dictates that they "shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist", unless they are detained for penal offences.

[608] See for more detail: LC Green, *The Contemporary Law of Armed Conflict* (Manchester: Juris Publishing, 2008), pp. 262-264. Women are further specifically protected from "any attack on their honour", such as rape, enforced prostitution and any form of indecent assault (art. 27).
[609] Art. 43 Geneva Convention IV. Where a court does decide internment is necessary this decision must be reviewed at least twice a year. This provision does of course not cover journalists detained for penal offences, which are decided under national law.
[610] Art. 75 Protocol I.
[611] *Ibid*.

While this means journalists must at least be charged with a crime in order to be detained for longer periods of time during a conflict, this may in practice only provide limited protection. As noted, journalists, as civilians, remain subject to local laws which often offer ample opportunity to charge journalists with 'crimes' for performing tasks which are generally part of their normal journalistic activities.

This can seriously endanger journalists on occasion. An example of this can be found in a recent case in Egypt, where 16 Egyptian journalists and four international journalists were arrested and charged for collaborating with a terrorist organisation, after reporting on the *Muslim Brotherhood*, an organisation banned by the current Egyptian government.[612] One of the arrested journalists, an Australian national, has been charged with broadcasting false news in the service of the banned organisation,[613] which in itself is a problematic legal provision as it raises questions as to who gets to decide which information is 'true'. Must information be disproven by hard facts to establish it is false, or, as seems to be the case in Egypt, is anything counter to 'political truth' false? Such a legal provision offers scope for significant abuse. The journalists' contact with the *Muslim Brotherhood*, a group opposing the current Egyptian government, is an essential component of their work in Egypt to provide a clear overview of the situation, whether they are neutral or support either side of the conflict.[614] All journalists involved have now unfortunately received lengthy sentences, a clear violation of freedom of speech.[615] An appeal is likely to follow.

As noted, the most important protection under IHL for all civilian journalists during conflict lies in the fact that they cannot be the object of attack.[616] Journalists' own actions may, however, affect this protection. Where journalists directly participate in hostilities they lose all protection. What exactly this entails is largely open to debate

[612] BBC, "Egypt Urged to Release Al-Jazeera Reporters" (29 January 2014) *BBC News.*
[613] Australian Associated Press, "Egypt extends Detention of Australian al-Jazeera Journalist Peter Greste" (24 January 2014) *The Guardian.*
[614] IHL is not applicable here as it does not concern an international armed conflict and it is arguable whether the standard for non-international armed conflict was met at this point in the unrest. Furthermore, IL does not concern itself with the content journalists produce, as discussed in chapter 3.
[615] P Kingsley, "Al-Jazeera Journalists Jailed for Seven Years in Egypt" (23 June 2014) *The Guardian.*
[616] Art. 51(2) Protocol I (1977).

and will be discussed in the next chapter. The other possibility is that journalists do not directly participate in the hostilities, but through their own actions place themselves so close to military targets that protection from harm is no longer possible. This happens for example where they use military vehicles for transport, a common practice due to general lack of transport options in conflict zones. In this situation their legal status (and right to protection) as civilians is not affected, but by placing themselves close to a military objective they lose all practical protection under IHL.[617]

Journalists are civilians both during international and non-international conflicts. The protection under statutory IHL is more limited as only common article 3 of the Geneva Conventions applies and if the conflict is of sufficient intensity, Protocol II. A significant portion of the provisions concerning protection when detained or arrested which are not part of the statutory framework of non-international conflicts, are however also covered by IHRL, which applies irrespective of the type of conflict. Furthermore, as noted in chapter 3, article 34 of the customary law database states that "Civilian journalists engaged in professional missions in areas of armed conflict must be respected and protected as long as they are not taking a direct part in hostilities." This rule applies regardless of the type of conflict and journalists are thus during both international and non-international armed conflicts treated as civilians.[618]

6.2.3 Spies and collaboration

As noted, war correspondents cannot be accused of espionage when they are captured while accompanying the armed forces. This does not apply to those war correspondents that are no longer with the military unit they have previously been accompanying. When war correspondents leave, they lose the additional protection awarded to them on the basis of article 4A(4) and become in effect independent journalists, who are not protected from accusations of spying under the legal framework. While this may seem like a minor inconvenience, accusations against journalists for spying are actually relatively common, due to the nature of their work.

[617] UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004), para. 4.3.7; see also: Gasser (2003), p. 374.
[618] J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law, Volume II: Practice* (Cambridge: Cambridge University Press, 2005), pp. 661-670.

Journalists in conflict zones will often (attempt to) talk to both sides of the conflict, in order to provide balanced and independent journalism to their audiences. This may in turn evoke suspicion of either side, who may suspect journalists are passing information along to the other side of the conflict, or otherwise collaborating with the enemy. Especially journalists who are nationals of one of the parties to the conflict are likely to risk attracting such suspicion.

The Hague regulations of 1907 define a spy as a person who "acting clandestinely or on false pretences (..) obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party".[619] Civilians who are arrested for espionage fall outside the protective scope of IHL and will be dealt with under domestic law, though safeguards concerning circumstances of detention and fair trial will remain applicable. Espionage is however in most jurisdictions a serious criminal offence, especially during conflict and will often lead to life imprisonment if not the death penalty. Journalists are not helped in this matter by the fact that there is a strong history of journalists working as spies.[620] Examples can be found throughout different conflicts, such as the Vietnam War and the Cold War, when both American and Russian journalists spied for their respective governments.[621] There are also more recent examples outside the scope of conflict. Several sport journalists from the Netherlands, for example, reporting on the 2008 Olympics in China, were revealed to have been on the payroll of the AIVD, the Dutch intelligence agency.[622] While this was strongly condemned by the Dutch Society for Journalists, who notes that this endangers independence and, more worryingly, affects the credibility of all journalists,[623] it demonstrates that journalists working as spies is hardly restricted to the past. The US partly banned the use of

[619] Art. 29 Hague Regulations 1907.
[620] See for example: BM Seeger, "Spies and Journalists: Taking a look at their intersections" (Fall 2009) *Nieman Reports*, available at: http://www.nieman.harvard.edu/reports/article/101913/Spies-and-Journalists-Taking-a-Look-at-Their-Intersections.aspx.
[621] One of the most famous was Austin Goodrich, and international journalist later discovered to be working for the CIA: B Weber, "Austin Goodrich Spy Who Posed as Journalist, Dies at 87" (10 July 2013) *The New York Times*. See also: N Daniloff, *Of Spies and Spokesman: My life as a Cold War correspondent* (Colombia: Missouri University Press, 2008).
[622] NRC "Journalisten Spioneerden voor de AIVD tijdens Olympische Spelen in China" [Journalists Spied for the AIVD during China Olympics] (15 June 2012) *NRC*, available at: http://www.nrc.nl/nieuws/2012/06/15/journalisten-spioneerden-voor-aivd-tijdens-spelen-in-china/.
[623] "NVJ Geschrokken van Spionage" [NVJ Shocked by Espionage] (15 June 2012) *De Telegraaf*, available at: http://www.telegraaf.nl/binnenland/article20080623.ece.

journalists as intelligence agents in 1997 under the Intelligence Authorization Act, though this provision can be overruled by the director of the CIA, which still happens on occasion.[624]

The lack of protection from accusations of espionage can both hamper journalists' activities and endanger journalists' lives. There have been several occasions over the past few years of (groundless) accusations of spying concerning journalists who were simply performing standard journalistic practice. Some of these led to the arrest and detention of foreign correspondents.[625] The combination of a history of journalists working for intelligence agencies and the fact that journalistic work shares significant characteristics with espionage, means that accusations and arrest on this ground are likely to continue and are not easily addressed by the legal framework. Those who are incorrectly accused of being spies through simply carrying out normal journalistic procedures, will be dependent on fair trial provisions and rigorous judicial proceedings to protect them from serious sentences.

6.2.4 Access to conflict zones

Journalists travelling independently through conflict zones are fully subject to local law, which means they are also affected by visa regulations. This can be a serious issue in terms of access to conflict territories, as sometimes restrictions will mean the only way to gather information is to flaunt restrictions and therefore to break local laws. As noted IHL is not concerned with the right to freedom of expression and ensuring journalists can carry out their duties in conflict zones; it protects their physical safety from the effects of combat, but nothing more. Provisions assisting journalists in actually carrying out their professional duties are covered solely by IHRL at the international level.

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[624] K Houghton "Subverting Journalism: Reporters and the CIA" (February 1997), available at: http://www.refworld.org/docid/47c567c020.html. The CPJ has asked for the practice to be banned completely, see: CPJ, "In US Senate Testimony, CPJ calls for US Ban on Recruiting Journalists as Spies" (2 May 2002), available at: http://cpj.org/2002/05/in-us-senate-testimony-cpj-calls-for-us-ban-on-rec.php.

[625] B Dietz, "Doubling Down on Playing the Spying Card" (23 November 2009) *CPJ Blog,* available at: http://cpj.org/blog/2009/11/doubling-down-on-playing-the-spy-card.php; CPJ, "CPJ demands Release of British Journalist and Colleagues held in Afghanistan" (1 October 2001), available at: http://cpj.org/2001/10/cpj-demands-release-of-british-journalist-and-coll.php; BBC, "Iran Spy Charges for Germans over Ashtiani Stoning Case" (16 November 2010) *BBC News*.

This thesis is concerned with the physical safety of journalists, rather than freedom of speech issues and is therefore not concerned with the legality of the act of denying access to territories to journalists. Such actions fall more in the range of censorship measures and access to information provisions. However there are situations where such restrictions impact on the physical safety of journalists, which this thesis is concerned with. The simple act of crossing a border can be labelled as terroristic activity,[626] which will often carry significant sentences and potentially even the death penalty. In 2011 two Swedish freelance journalists were arrested for, amongst other charges such as terrorism, illegally entering Ethiopia. These journalists entered the territory by embedding with the Ogaden National Liberation Front, a separatist movement in conflict with the government of Ethiopia.[627] As the events took place during a non-international conflict, the provisions concerning accredited war correspondents were not applicable and the journalists were only protected by common article 3 of the Geneva Conventions and IHRL. They were convicted and both received jail sentences of 11 years, which led to strong protest from the international community on the basis that their sentences were a serious breach of human rights law.[628] The circumstances of their detention in a notorious jail were cause for concern, as it affected their health and endangered their physical safety. It is important to note though that the lengthy jail sentence was more the effect of terrorism charges, as they were accused of aiding the rebels they were travelling with, than the fact that they had illegally entered the territory. Should they 'only' have been convicted of entering the territory illegally the response of the international community would likely have been different.

Similar issues arise during international armed conflicts where media-management policies, such as the press pool system, discussed in chapter 2, are implemented.

[626] This was for example the case in Libya where the Libyan government denied access to its country to journalists and declared that all foreign journalists who cross the border without permission will be regarded as "terrorist collaborators". See: CNN Wire Staff, "State Department warns Foreign Reporters in Libya" (24 February 2011) *CNN*.
[627] D Smith, "Ethiopia Jails Swedish Journalists on Terrorism Charges" (27 December 2011) *The Guardian*.
[628] A Mashoo, "Ethiopia Jails Swedish Journalists for Aiding Rebels" (27 December 2011) *Reuters*, available at: http://af.reuters.com/article/ethiopiaNews/idAFL6E7NR0A720111227. The journalists were eventually pardoned in 2012 and have since returned to Sweden.

Journalists travelling through the conflict territory outside of the preferred media management system, which will often be considered restrictive, can be at risk from both sides of the conflict. The authorities of the state they are working in can arrest and detain them for breaking local laws, but other parties to the conflict may equally try to remove them from the conflict. This happened for example during the first Gulf war, when journalists went outside the restrictive press pools to gain better access to information and entered Iraq independently. In the early stages of the conflict more than 20 of them were detained, often for reason of being a 'security threat', without further motivation, or with no charges at al. Some were threatened with detention by the American military forces, in some cases resulting in rough treatment.[629] Similarly, during the war in Iraq, the US made it clear they were not responsible for the safety of non-embedded reporters and attempts to inform the US military of locations where journalists were based, were met with disinterest, leading to the shelling of one of the hotels where a significant number of journalists were based.[630] Some US military officials have seemingly gone so far as to indicate that if media were not with the embedded program when in the field of operations, they could rightly be regarded as hostile, which is a clear violation of IHL.[631] Especially where journalists are legally in the country they could argue they have a right to freedom of movement under IHRL, but again, this process is likely to be too slow to be of much practical use in such a situation and would involve balancing human rights with security concerns.[632]

[629] P Knightly, *The First Casualty* (London: John Hopkins University Press, 2004), p. 491; Keeble (2008), p. 233 and 237.
[630] D Kuttab, "The Media and Iraq: A bloodbath for and gross dehumanization of Iraqis" (2007) 89 *International Review of the Red Cross*, 879, p. 883; see also for instance s of harassment of journalists in Iraq: A Cooper, "Journalists in Iraq: From 'embeds' to targets" (13 December 2014) *CPJ*, available at: http://cpj.org/2004/12/journalists-in-iraq-from-embeds-to-targets.php.
[631] Wilford (2009). This is of course a direct violation of art. 50 of the Geneva Convention, which specifically states that when in doubt concerning the status of people (ie combatant or civilian) they should be considered to be civilians and can therefore not be targeted. While the US has not ratified Protocol I this provision can be regarded to be part of customary law and is therefore applicable. See also Knightly, who points out that in the first campaign of the war in Iraq the majority of reporters were killed by the American military, all of them were unilaterals and the military showed little to no concern about this: P Knightly "History or Bunkum" (2003) 14 *British Journalism Review*, 7, p. 7.
[632] Both the ECHR (art. 2) and the ICCPR (art. 12) recognise the right to freedom of movement for those lawfully in a territory, though this right may be limited in the interests of national security or public safety, for the maintenance of ordre public etc. Several of these exceptions are likely to apply in a conflict zone.

6.2.5 Respect

Customary law states that journalists "must be respected" both in international and non-international conflicts, which is not a requirement that is explored in detail in the customary law database. It is reasonable to assume that this goes beyond the basic physical protection offered by IHL to all civilians, but refers more to specific rights connected to the work journalists undertake. It condemns measures specifically taken to dissuade and/or hamper journalists from carrying out their professional activities.[633] While this is very important in terms of the freedom journalists will have to carry out their work in conflict territory, in practice it is doubtful how much this requirement will actually assist and protect them. Customary law itself is, by its very nature, harder to enforce than treaty law and the term 'respect' is rather vague. Much of what will fall under 'respect' for journalists will be covered by IHRL, most notably through provisions concerning freedom of speech. In practice, these may be easier to enforce before a court or tribunal than a rather vague customary law norm.

What the requirement for 'respect' for journalists as an accepted international norm does indicate is the value attached to the function they perform for society in general. It also provides an indication that the possibility of reaching wide-spread international consensus on increasing protection for journalists during conflict, may not be as unattainable as it is generally perceived to be. One of the arguments against increasing protection for journalists through a new dedicated international treaty, is that such a treaty is unlikely to be ratified by a significant number of states and that reaching consensus on the wording of such provisions is unlikely to succeed. While this is certainly a strong argument against targeting efforts at creating new treaty provisions as that effort may be put to better use elsewhere, this does seem to ignore the fact that there is already sufficient international support for 'respect' for journalists to have become part of customary international law. Such support can form a valuable basis for discussions on enhancing the legal protection for the media at an international level.

[633] See for example: UN General Assembly, Res. 53/164 calling to refrain from harassment and intimidation of journalists in the Kosovo conflict and UN Commission on Human Rights, Res. 1995/56, which deplored the attacks, acts of reprisal, abductions and other acts of violence against representatives of the international media in Somalia.

6.3 Local Journalists

Local journalists, those who work in the country of their nationality, are far more at risk than international journalists, both in and outside of a conflict territory. Of all journalists killed in Iraq since 2003, 85% have been local journalists.[634] Whereas death during crossfire and combat do not generally discriminate between local and international journalists, this is not the case for murder, which in some conflicts is the leading cause of death for journalists.[635] Given the broad definition of 'journalist' accepted in international law, it stands to reason that local media support personnel, such as cameramen and sound technicians are included under the term 'local journalist'. There is further no legislation that provides any additional protection to journalists over and above those of ordinary civilians in conflict zones. Therefore the definition of a journalist is relatively irrelevant in this context and the subsequent discussion will cover all media workers as well as their support staff, such as drivers and interpreters.

Local journalists do not receive the same protection from the international legal framework as their international counterparts. Due to the concept of state sovereignty, there are significant limits to the extent the international legal framework can interfere in the relationship between a state and its citizens.[636] Their main protection under IHL derives from Geneva Convention IV, relative to the protection of civilian persons in times of war, and Additional Protocol I, though the

[634] CPJ, "Journalists killed in Iraq since 1992/motive confirmed" (2014), available at: http://cpj.org/killed/mideast/iraq/.
[635] During the conflict in Iraq for example the leading cause of the premature/untimely death of journalists was murder, not "crossfire or other acts of war", see: CPJ "Iraq - Journalists in Danger: A statistical profile of media deaths and abductions in Iraq 2003-2009" (2008), available at: http://cpj.org/reports/2008/07/journalists-killed-in-iraq.php.
[636] The concept and exact extent of state sovereignty is a hotly debated topic. For a general overview of some of the issues in this area see for example: R Cryer, "International Criminal Law vs State Sovereignty: Another round?" (2006) *European Journal of International Law*, 979; International Commission on Intervention and State Sovereignty, "The Responsibility to Protect" (2001) *Report of the international Commission on Intervention and State Sovereignty*, available at: http://responsibilitytoprotect.org/ICISS%20Report.pdf.

latter has not been ratified by military powers such as the United States and Iran.[637] They also face another difficulty, which is not strictly an issue with the legal framework as much as with its enforcement. International journalists often work for the larger, richer, media organisations. They further have the backing of a government which will likely try to intervene should they be captured or taken hostage. This is not the case for local media staff, especially not for citizen journalists, discussed below at 6.3.2, or local media support staff such as drivers and interpreters. This is painfully demonstrated by the fact that when international journalists are kidnapped or taken hostage during conflict, their release can sometimes be secured through paying a ransom, but their local media support staff rarely survive.[638]

The need to protect local reporters is of increasing importance due to increased reliance on local media to provide reports on conflicts.[639] This is partly due to the rising casualty rate of journalists reporting on conflicts, which has resulted in a reluctance to send reporters to conflict zones. Not only is there a realistic fear for the safety of staff, but also because of those safety concerns, the cost of insuring and protecting reporters, and thus reporting from conflict zones, have risen dramatically.[640] Financially, it makes more sense to buy material from local media, especially given the economic downturn which has hit an already struggling media market hard. Increasing reliance on local reporters entails increasing reliance on those reporters who are least protected under the international legal framework, which is a worrying trend.

6.3.1 Protection

[637] A list of the current state parties to Protocol I can be accessed at: http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470.
[638] See for example: K Sengupta, "The End of Bang-Bang? The risk of reporting from the frontline" (18 January 2010) *The Independent*.
[639] See for example: P Beaumont, "Reporting Libya: Freelance coverage, full-time dangers" (13 November 2011) *The Guardian*. Wilford (2009) notes that such reliance on regional and local reporters should come with measures to ensure they are adequately protected by the media employing them.
[640] Wilford (2009) notes that the cost for the larger US networks covering the war in Iraq, was around $5 to $10 million per annum, which was far above what was estimated to be needed at the start of the conflict.

In terms of IHL, it is clear that any journalist will be classed as civilian under the legal framework and therefore the general provisions concerning the local civilian population provide protection to local journalists. Further protection, at least from the most serious crimes, can be found under the Rome Statute of the ICC. Where a state has ratified international human rights treaties, these will provide some protection as well, though as discussed in chapter 4, these rights can be limited in their application during conflict. The Geneva Conventions (1949) are primarily aimed at protecting civilians in the power of an adverse party or occupying power, though there are provisions that apply to all civilians regardless of the circumstances. Two situations must therefore be distinguished in terms of the protection of local journalists under the legal framework: local journalists operating in territory occupied by a foreign power and local journalists covering a conflict in their own state under the control of their own government.

Where territory is occupied by a foreign state, Geneva Convention IV will apply as well as the Hague Conventions 1907, which together form the law of occupation. This section of IHL does not provide any specific protection to journalists, but it does contain significant protection for the local population. In this situation both local and foreign journalists are protected from a variety of harms: they cannot be interned except for imperative security reasons, and if they are interned the conditions should at minimum be equal to those of prisoners of war. Murder, torture and discrimination are all prohibited and generally speaking, as far as security permits, people should be allowed to lead normal lives.[641] While, in theory, local journalists are therefore allowed to continue their work as normal, they are likely to be subjected to significant restrictions. However, those restrictions that threaten their physical safety and lives are generally prohibited under IHL and IHRL in this situation. It is further important to note here that local criminal law will remain applicable, which, especially in areas that have criminal laws which threaten the safety of journalists, can be problematic.[642] Article 64 of Geneva Convention IV does, however, allow interference with local criminal law and courts where it constitutes "an obstacle to the application of the present Convention", providing a way for occupied forces to

[641] Geneva Convention IV, art. 47-78; artt. 27-34.
[642] Art. 64 Geneva Convention IV.

remove those laws which run counter to humanitarian law. Occupying powers can further under article 64 implement laws "which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power (..)". While such laws can affect local journalists, they cannot run counter to the protection offered to them as civilians under the Geneva Conventions (1949).[643] During non-international conflicts their protection is reduced, as it is for all journalists, to common article 3, potentially Protocol II and IHRL, which will provide basic protection against the worst dangers to life and physical safety, but not necessary the additional safeguards set out above.

Local journalists operating in their own nation involved in a conflict, find less protection under the international legal framework than most other groups of journalists. As noted above, this is largely due to reluctance at international level to interfere in the relationship between a state and its own citizens. This does not however mean that there is no protection offered at the international level. In terms of IHL, local journalists will find the same protection that is offered to the general civilian population, which, as discussed above, will protect them from some of the worst crimes. This protection can predominantly be found in article 75 of Protocol I and protects against murder, torture, corporal punishment and mutilation, as well as outages upon personal dignity, the taking of hostages, collective punishments and threat to do any of the aforementioned.[644] Article 85(3)a of Protocol I lists wilful direct attacks against civilians which cause death or serious injury to body or health as a grave breach of Protocol I, which will generally also be classed as a war crime.[645]

[643] For further information see RT Yingling and RW Ginnane, "The Geneva Conventions of 1949" (1952) 46 *American Journal of International* Law, 393, pp. 411-424.
[644] There is some discussion on whether nationals are included, but generally they are considered to be included under this article, see: Sandoz, Swinarski and Zimmerman (eds.) (1987), paras. 3017-3017, and 3082.
[645] For an overview of the relationship between 'grave breach' and 'war crime' and the legal consequences of this classification see: M Öberg, "The Absorption of Grave Breaches into War Crime Law" (2009) 91 *International Review of the Red Cross*, 163.

While protection found in local criminal law will remain applicable, as discussed in the previous chapter, it is possible that due to the conflict such legal provisions are no longer effectively enforced. Where this happens the international legal framework can provide, in theory, a 'backup', though it is likely to be hampered by similar enforcement issues. During non-international conflict protection will be even more limited and IHRL will likely provide more concrete protection, assuming the state in question has ratified one of the relevant human rights treaties.

Regardless of whether local journalists are working in occupied territory or not, they face the same difficulties in terms of laws concerning espionage as their international counterparts. Local journalists, who for work purposes have contact with a belligerent party, may be accused of being spies by their own authorities, which is a serious risk.

6.3.2 Citizen journalism

Technological progress has seen a sharp rise in so called 'citizen journalism'. As is the case with journalists, there is no officially recognised definition of 'citizen journalists', though the term is generally taken to indicate non-professional media-active citizens who engage in journalistic activities.[646] Such activities can include political and current affairs blogging and photo and video sharing. Citizen journalism is not necessary confined to the online sphere, though it is most prolific there, as material can, for example, be incorporated in traditional journalism, such as news broadcasts.[647] As a form of journalism, it has gained importance over the last decade, with especially smartphones ensuring that wherever incidents occur, some of the witnesses are likely to carry a camera in their pocket.

While citizen journalism concerning a conflict is by no means limited to the local population, for the purpose of this thesis, it is sensible to discuss this topic in the context of local journalism. The majority of citizen journalists at risk in a conflict zones are likely to be part of the local population, who are close to the action and can

[646] L Goode, "Social News, Citizen Journalism and Democracy" (2009) 11 *New Media & Society*, 1287, p.1288.
[647] *Ibid*, pp. 1288-1289.Self-publishing on current affairs in hard copy is another example of "offline" citizen journalism.

provide eyewitness accounts of the conflict. Those citizen journalists writing from a country that is not involved in the fighting will face fewer risks. Citizen journalist reporting on a conflict will generally receive the same legal protection as local journalists, at least in terms of the international legal framework, as they belong to the same 'class' of persons: the local civilian population. Because of this, they are faced with a similar lack of protection from certain issues. Where the domestic legal regime fails to provide them with adequate protection, their main recourse is through human rights tribunals, or, if crimes against them rise to the level of war crimes, they can rely on a case being brought before the ICC by a state party, or the Prosecutor of the ICC if their country has ratified the Rome Statute, or recognises the court's jurisdiction,[648] as discussed in more detail in section 5.3 of this thesis. There is further a chance that they receive even less protection than local professional journalists under domestic law, as some specific local legislation concerning the work of journalists, such as source protection, may not extend to citizen journalists.[649] Such protection is however likely to be of little value as provisions are often limited in their application for security reasons during conflicts.

Citizen journalism provides a way for those who are dissatisfied with the views and facts presented by traditional media outlets to be heard. It makes it possible for ordinary citizens to gather support for a cause and to gauge how likely protests are to succeed.[650] The events in Egypt during the Arab spring clearly demonstrate the increasing power of citizen journalism. While political activism online to express dissent with the current regime was not a new phenomenon in Egypt before the uprisings during the Arab spring, it became much more pronounced during the revolution and, combined with the ability of protesters to organise themselves through online platforms such as Facebook and Twitter, led the Egyptian government

[648] If their country is neither party to the Statute nor recognizes the court's jurisdiction the United Nations Security Council could potentially still bring a case before the ICC, though this would likely happen only in the most extreme circumstances, see the discussion under 5.3 of this thesis.
[649] M Cooper, et al., "Standing up to Threats to Digital Freedom: Can we keep the Internet free? – policy note" (November 2012) *Index on Censorship*, available at: http://www.indexoncensorship.org/wp-content/uploads/2012/11/Index-IGF-Policy-Note.pdf, pp. 8-9.
[650] C Freeland, "The Middle East and the Groupon Effect" (18 February 2011) *Reuters*, available at: http://blogs.reuters.com/chrystia-freeland/2011/02/18/the-middle-east-and-the-groupon-effect/.

to completely shut down the Internet in January 2011 for nearly a week.[651] Yet citizen journalism continued on a large scale, as inventive ways of bypassing the restrictions, for example through the use of old fashioned dial-up connections, made it possible to still get content online.[652]

With the increasing power of this section of the media, there is also growing risk for those engaging in citizen journalism. The Arab Spring demonstrated the increasing influence of citizen journalism and its global reach. It was not just the local population who accessed the information online, but it was also picked up and further disseminated to an international audience by mainstream international media.[653] It can therefore be a highly valuable source of information for both the local and the international community. There is a limit to the amount of paid journalists any given territory can support, based on how 'newsworthy' the local situation is. When previously quiet areas, with a small number of professional journalists, erupt into violence, citizen journalists can move into the role of journalist to ensure enough information and news is reported about the conflict to meet the demand.[654] This makes citizen journalists as much a target for those who wish to suppress information about a conflict as their professional counterparts. Freedom House noted in their report on *Freedom on the Net 2013* that in 28 of the 60 countries examined users had been arrested or imprisoned for posting online content.[655] In Syria, one of the countries experiencing significant levels of conflict at the moment has seen 48 citizen journalists killed in direct relation to their media activity.[656]

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[651] While Internet controls were in place in Egypt before the revolution, these were less restrictive than for example those in Tunisia and political discourse online was fairly widespread. See: S Khamis and K Vaughn, "Cyberactivism in the Egypt Revolution: How civic engagement and citizen journalism tilted the balance" (2011) *Arab Media and Society* (online), pp. 12-13; see also S Khamis, "The Transformative Egyptian Media Landscape: Changes, challenges and comparative perspectives" (2011) 5 *International Journal of Communications*, 1159, pp. 1159-1166.
[652] BBC, "Old Technology finds Role in Egyptian Protests" (31 January 2011) *BBC News*.
[653] *Ibid*, pp. 20-22.
[654] Davies and Crawford (2013), p. 2167. There will in such a situation generally be a delay between the eruption of conflict and the arrival of international media.
[655] Often for rather worrying reasons such as "misuse of democratic freedom to attack state interests" as happened in Vietnam. For more detail see: S Kelly, et al. (eds.), "Freedom on the Net 2013: A global assessment of Internet and digital media" (2014) *Freedom House*, pp. 10-12, available at: http://www.freedomhouse.org/sites/default/files/resources/FOTN%202013%20Summary%20of%20Findings_1.pdf.
[656] Reporters without Borders, "2013: Netizens and Citizen Journalists killed in Syria" (2014), available at: http://en.rsf.org/press-freedom-barometer-netizens-and-citizen-

What makes it even more dangerous for citizen journalists, is that they do not have the support of a professional media organisation behind them which most professional journalists do have. Citizen journalists therefore generally lack the support of an organisation who can campaign for their freedom should they be detained or arrested and can provide legal assistance when necessary. Similarly, they will likely lack valuable safety training that many of the larger media groups offer to their staff.[657] Yet any attempts to improve their safety at an international level will run into the same issues as attempts to protect local journalists do. The suggestion of creating an international treaty providing a special status for journalists under international law already meets with significant resistance on all fronts. Including 'ordinary' civilians engaging in media activities in such a treaty is even less likely to find support as it entails an even stronger encroachment on state sovereignty, as will be discussed in more detail in chapter 8.

6.4 Conclusion

It is clear from the above that there is significant protection for journalists under the international legal framework. The exact extent of this protection depends, however, on the way journalists operate in conflict zones, as well as on their nationality as interpreted under Geneva Convention IV, at least where protection under IHL is concerned. Their foremost protection, regardless of their status, lies in the fact that they cannot be the direct target of hostilities, though this provision has limited practical use for war correspondents. Protection from physical harm is reasonably similar for all types of journalists as long as they are operating in the field. This significantly changes, however, when they are arrested or detained, be it for security reasons or penal offences, when they receive widely varying levels of protection. While it is clear that the consequences of arrest and detention can significantly

journalists.html?annee=2013. The index differentiates between "Netizens" citizens active online in for example media activism and citizen journalists.

[657] See for example International News Safety Institute, "Training" (2013), available at: http://www.newssafety.org/safety/training/; BBC Academy, "Journalism: Safety" (2014), available at: http://www.bbc.co.uk/academy/journalism/safety.

endanger a journalist's physical safety, it is in this area that the legal framework becomes complicated and less than uniform. While infringement of basic standards is by no means solely caused by a lack of knowledge of the relevant legal framework, it is a strong contributing factor. The more complicated the legal framework, the harder it will be to disseminate and thus combat non-enforcement.

The legal framework as it stands is not ideal. While it does provide significant protection to journalists in conflict zones, there are also areas that the legal framework fails to address, or where the protection offered is not as suitable to the situation of journalists as it should ideally be. This seems to be primarily caused by attempts to fit journalists in the existing categories under the international framework. I am by no means arguing that journalists should not be classed as civilians under the international legal framework. They are civilians and should be classed as such. This does however not address the issue that they do not *behave* like 'ordinary' civilians in conflict zones, which creates some deficiencies in the legal framework. Journalists are more likely to run towards danger than away from it, as 'ordinary' civilians tend to prefer. They are further constantly recording material and gathering information about the conflict and in doing so will often have contact with both sides to the fighting, which again is unusual for 'ordinary' civilians. This leaves them open to accusations of spying. The classification of war correspondents as prisoners of war upon capture carries some difficulties as well. The potential to intern war correspondents until the end of the conflict is neither advantageous, nor necessarily based on the justification for detaining prisoners of war.

There is another significant factor in evaluating the effectiveness of the legal protection for journalists under the international framework. When the protection discussed in this chapter is not available to them at all, journalists become legitimate targets under the international legal framework. This occurs when journalists are deemed to be directly participating in the hostilities, a difficult to define situation, which is discussed in the next chapter.

7. Direct participation in hostilities

Journalists are entitled to significant protection under the international framework due to their classification as civilians under International Humanitarian Law (IHL). While the protection offered to them may not always be ideally suited to their situation and does not cover all issues that place journalists at risk in conflict zones, it does, at least in theory, significantly improve their safety. The legal protection available to them may however be compromised where journalists are deemed to be 'directly participating' in the hostilities. In this situation journalists will be deemed to be making a direct contribution to the fighting and will therefore become legitimate targets under international law. Obviously, the consequences of such an assessment are far reaching, yet there is no clear definition of 'direct participation' in hostilities. Journalists' 'ordinary' professional activities are covered by the international framework and cannot be considered to constitute hostile acts which compromise their civilian status resulting in the loss of protection under IHL.[658] Yet there is also consensus that under certain circumstances the media *can* be considered to be directly participating in the hostilities. However, intense debate remains concerning where the line between these two cases must be drawn. When exactly the media can be deemed to be directly contributing to the war effort, rather than just covering the hostilities and presenting information on one or multiple parties to the conflict is not an easy question to answer.

The loss of the protection granted to civilians in conflict zones when directly participating in the hostilities may seem to only affect the application of IHL and, indirectly, International Criminal Law (ICL) as protection against those actions criminalised under ICL is in various cases dependent on the civilian status of the victim. However, the protection of journalists under IHRL is likely to be affected as well. Due to the potential simultaneous applicability of IHL and IHRL, discussed in chapter 4, it is likely that, at least in some situations in conflict zones, IHL will

[658] H-P Gasser, "The Journalist's Right to Information in Time of War and on Dangerous Missions" (2003) 5 *Yearbook of International Humanitarian Law*, 366, p. 373.

override the protection offered by IHRL. For example, by directly participating in the hostilities journalists can become legitimate targets under IHL, which in the context of a conflict is likely to override the protection the right to life offers under IHRL. The consequences of being found to be directly participating in hostilities are therefore far reaching and can lead to loss of life.

Some direct participation by journalists is relatively straightforward to assess. For example, where journalists travelling with a military unit have taken up arms and are actively exchanging fire with a belligerent party, they are likely to be deemed to be directly participating in the hostilities. When the direct participation flows from the content journalists produce, rather than combat actions, the situation is far more difficult to assess. Over the last few years there have been multiple instances when television and radio stations have been attacked because the broadcasting (equipment) was deemed to be contributing to the war effort. Several of these attacks have led to a number of journalists losing their lives. To understand how and when the media can be considered to be directly participating in a conflict, we must first consider the legal concept of 'direct participation' before considering how this can be applied to the media.

7.1 The concept of direct participation in hostilities

The Geneva Conventions offer significant protection to civilians in conflict zones, but provide that this protection is dependent on civilians refraining from participating directly in the hostilities.[659] The Convention and Additional Protocols do not however specifically state how 'direct participation' in hostilities is to be defined and a clear, uniform definition has not yet emerged from state practice.[660] The concept has been hotly debated at the international level, which has led the ICRC to publish

[659] See for example common art. 3 to the Geneva Conventions (1949), art. 51 Protocol I (1977) and art. 13 Protocol II (1977).
[660] J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (Cambridge: Cambridge University Press, 2005), p. 23.

an official non-binding interpretive guidance on the term in 2009.[661] The Guidance notes that where, previously, the distinction between combatants and the civilian population was a relatively straightforward one, over recent decades this has changed and lines have started to blur. This is to a significant part due to the shift from predominantly international armed conflicts to non-international armed conflicts,[662] but other reasons may be identified. There have been three marked trends which blur the lines between civilians and combatants: there has been a shift from conducting hostilities on battlefields, to conducting them in civilian population centres, thus intermingling armed actors with civilians; previously traditional military functions are being outsourced to a range of civilian personnel; and there has been a general failure of persons participating in hostilities to adequately distinguish themselves from the civilian population.[663] Consequently, the concept of 'direct participation' in hostilities has grown in importance, as it distinguishes civilians from armed actors in situations where it is increasingly difficult to establish who can be targeted during hostilities. Yet this is not a straightforward assessment to make and there is no official agreement on when exactly civilians can be deemed to be taking direct part in the hostilities.[664]

7.1.1 Direct participation by civilians

Article 51 of Protocol I to the Geneva Convention sets out the general protection awarded to the civilian population during conflict, which aims to protect them from the dangers arising from military operations. This article confirms a longstanding

[661] ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Law* (Geneva: ICRC Publication, 2009). This guidance has been criticised for various reasons, with especially part IX concerning "restraints on the use of force in direct attack" proving contentious. See for example: PW Hays, "Part IX of the ICRC Direct Participation in Hostilities Study: No mandate, no expertise, and legally incorrect" (2009-2010) 42 *New York University Journal of International Law and Politics*, 769; MN Schmitt, "The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis" in: MN Schmidt, *Essays on the Law and War at the Fault Line* (The Hague: TMC Asser Press, 2012), 513-546.

[662] NP Gleditchs et al., "Armed Conflict 1946-2001: A new dataset (2002) 39 *Journal of Peace Research*, 615; JA Williamson, "Challenges of Twenty-First Century Conflicts: A look at direct participation in hostilities" (2010) 20 *Duke Journal of Comparative & International Law*, 457, p. 463.

[663] ICRC, (2009), p. 5.

[664] The US for example takes a different approach than the majority of nations who follow the "Protocol I" approach, by using the functionality test, which allows for the inclusion of a wider range of acts in 'direct participation'. See for more information: DW Moore, "Twenty-First Century Embedded Journalists: Lawful targets?" (2009) *The Army Lawyer* (online), pp. 19-2; E Christensen, "The Dilemma of Direct Participation in Hostilities" (2010) 19 *Journal of Transnational Law and Policy*, 281, pp. 290-298.

rule of customary IHL and thus binds all States, not just those who have ratified Protocol I.[665] The article also states, however, at 51(3) that: "Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities". The reasoning behind this is that it is reasonable for a belligerent party to defend themselves from hostile acts during conflict, whether they are undertaken by civilians or combatants. The Commentary on Protocol I defines hostile acts as those acts which "by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces".[666] There must further be a "sufficient causal relationship between the act of participation and its immediate consequences".[667] Such situations must be distinguished from 'participation in the war effort' which is often required from the civilian population during war.[668] Participation can be required in many different ways, for example through manufacturing uniforms, or preparing food for the armed forces. These activities do not entail loss of civilian protection.[669] Even manufacturing weapons does not constitute 'direct participation' as it is more an indirect act, though the factory in which such manufacturing takes place is likely to be a military objective, as discussed below, and civilians working in such a place accept the risks of a potential attack.[670]

The Guidance of the ICRC clarifies the difference between direct participation and indirect participation through, for example, providing general support for the war effort. They set out three cumulative requirements which must be met for an action to qualify as 'direct participation' in the hostilities: the act "must be likely to adversely affect the military operations or military capacity of a party to an armed conflict, or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack" (threshold of harm); a "direct causal link between the act and

[665] Y Sandoz, C Swinarsk and B Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff Publishers, 1987), para. 1923.
[666] *Ibid*, para. 1942.
[667] *Ibid*, para. 4787.
[668] *Ibid*, para. 1945.
[669] C Fabre, "Guns, Food and Liability to Attack in War" (2009) 120 *Ethics*, 36; Y Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2010), pp. 27-28.
[670] Henckaerts and Doswald-Beck (2005), p. 23.

the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part" (direct causation) must be present; and "the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus)."[671] The guidelines further specifically note that whether an act rises to the level of 'direct participation' can only be assessed on a case by case basis and that in case of doubt the civilians in question should retain their protection from direct attacks.[672]

During non-international armed conflicts a similar condition for civilian protection applies. The basic protection set out in common article 3 to the Conventions starts with setting out the protection for persons taking 'no active part' in the hostilities thus signalling that protection for civilians during non-international armed conflicts is similarly reliant on them not taking an active part in the hostilities.[673] This is supported by customary IHL.[674]

7.1.2 Duration of loss of protection

Protocol I to the Geneva Conventions states that civilians are protected unless "and for such time" as they take a direct part in hostilities.[675] This limitation of direct participation has resulted in what has been named the 'revolving door' debate in academic literature, where the validity of the potential of continuously loosing and regaining civilian protection between attacks is debated.[676] While the issue of regaining protection between direct participation is not universally accepted, it is generally accepted that civilians can indeed cease to take part in hostilities and return to their 'ordinary' civilian protection under the legal framework. This raises the

[671] ICRC (2009), pp. 47-64.
[672] *Ibid*, p. 64. This is similar to the position of the ICTY, which holds the view that assessments must be made on case-by-case basis: ICTY, *Prosecutor v Pavle Strugar* (2008), Case No. IT-01-42-A, para. 178, as well as the UK Manual on the Law of Armed Conflict, see: UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004), para. 5.3.3.
[673] For conflicts that reach the required threshold of intensity for the application of Protocol II, see also art. 13, which States, like Protocol I, that: "Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities".
[674] Henckaerts and Doswald-Beck (2005), p. 21.
[675] Art. 51(3) Protocol I.
[676] See for example MN Schmitt, "Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees" (2004-2005) *Chicago Journal of International Law*, 511, pp.535-536.

question when participation is generally understood as commencing and ending. While this is an important assessment in terms of targeting, there is still much discussion on the exact temporal scope of direct participation.[677] A balance must be struck between humanitarian concerns regarding the protection of civilians and the need for military forces to be able to prevent attacks by stopping them in the preparatory phase.[678]

Preparatory measures are generally considered to have the potential to be included in the temporal scope of 'direct participation' and will therefore lead to loss of civilian protection.[679] In light of the requirements for direct participation there must however be a sufficiently close link between the preparation and the execution of the attack itself and "preparatory measures aiming to establish the general capacity to carry out unspecified hostile acts" cannot be considered part of direct participation in the hostilities.[680] Including preparation to undertake hostile acts within the scope of direct participation brings the concept into line with the requirements for the military under article 43 of Protocol I. This article concerns the requirement for combatants to distinguish themselves from civilians and specifically states this requirement applies not just during attacks, but also when preparing for those attacks.[681] The return from a hostile act should be equated to military withdrawal and will therefore generally also form part of the 'direct participation'.[682] The return from participation ends when there is a 'physical separation' from the act, for example by storing equipment and resuming activities distinct from those related to the hostile act.[683]

Questions on duration are different for civilians who do not carry out 'incidental' hostile acts, but are members of an organised armed group and have a 'continuous

[677] The ICRC struggled with the exact temporal delineation of 'direct participation' and discussion on the matter persists in academic literature. See for example: B Boothby, "'And for such Time as': The time dimension to direct participation in hostilities" (2009-2010) 42 *New York University Journal of International Law and Politics*, 741.
[678] Williamson (2010), p. 468.
[679] ICRC (2009), p. 65; Sandoz, Swinarski and Zimmerman (eds.) (1987), para. 1945.
[680] ICRC (2009), pp. 65-66; see however Israeli Supreme Court, *Public Committee Against Torture in Israel v Government Of Israel* HCJ 769/02 (11 December 2005), paras. 35-37 using a fairly wide category of included supporting actions which can amount to 'direct participation'.
[681] For more information see: Boothby (2009-2010), p. 746.
[682] ICRC (2009), p. 67.
[683] *Ibid*.

combat function'. Such civilians lose protection from attack for the duration of the assumption of their continuous combat function and temporal delineation of loss of protection is thus relatively straightforward in this context.[684]

7.1.3 Civilian objects

Civilian objects are, like the civilian population, generally protected from attacks or reprisals.[685] As discussed in chapter 3, they are negatively defined: civilian objects are those objects which are not military objectives. Military objectives are then defined as: "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage".[686] The inclusion of "purpose or use" in the definition is to indicate that it is possible to make use of ordinarily civilian objects in such a way that they become military objectives. The standard example is that of a hotel which is turned into military headquarters during the hostilities, which can turn it into a legitimate military objective.[687] What exactly constitutes an 'effective contribution to military action' is not without controversy. There is strong debate on whether so-called 'war sustaining' objects that indirectly, but effectively, support and sustain war fighting capabilities are included. The US position is that they are,[688] though this is strongly contested by others.[689] This is due to the fact that the US and a few other countries which do not follow the 'Protocol I approach' apply instead a 'functionality test', which does not look at actual harm resulting from an action or object, but considers the importance and the level of functions carried out and how these

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[684] *Ibid*, pp. 72-73. For a more detailed discussion of armed groups and 'direct participation', see: K Watkin, "Opportunity Lost: Organized armed groups and the ICRC 'Direct Participation in Hostilities' interpretive guidance" (2009-2010) 42 *New York University Journal of International Law and Politics*, 769.

[685] It should be noted, however, that where an attack on the civilian population constitutes a war crime under art. 85 Protocol I, there is no such provision for civilian objects unless an object is granted special protection under the legal framework, such as historic monuments.

[686] Art. 52 Protocol I (1977).

[687] Sandoz, Swinarski and Zimmerman (eds.) (1987), para. 2022.

[688] US Navy, US Marine Corps and US Coast Guard, *The Commander's Handbook on the Law of Armed Conflict* (July 2007), Doc. NWP 1-14M, available at: https://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP).

[689] For more detail see: MN Schmidt, "Deconstructing Direct Participation in Hostilities: The constitutive elements" (2010) 42 *International Law and Politics*, 697, pp. 717-718.

contribute to the military effort.[690] The requirement that in the context of the circumstances at the time of the attack the total or partial destruction must offer a definite military advantage, is to ensure that attacks on such objects, which depending on their location have the potential to endanger the civilian population, will not take place where they will provide merely indeterminate or potential advantages.[691] When there is doubt whether an object constitutes a civilian or a military objective, the presumption must be that of a civilian object and such objects can therefore not be attacked.[692] It is of course possible for objects to serve both the civilian population and the military. Such objects are referred to as 'dual use' objects, which are generally not protected from attacks. In these circumstances additional precautions must be taken when planning the attack, to minimalize loss of life of civilians, and the military advantage of such an attack must be weighed against the potential loss of life amongst the civilian population.

The concept that only military objectives may be targeted can be traced back to some of the earliest codifications of humanitarian law.[693] While Protocol I has not been signed by some military powers, the provisions of article 52 are firmly based on customary law and will therefore apply regardless of the parties to the conflict. The rationale for this provision is the concept that conflicts are won by overcoming the military forces of the enemy.[694] Arguably, however, this is no longer the case. Sometimes acquiring a non-military advantage can be more effective in winning a conflict than a military advantage.[695] Some argue therefore that in modern conflicts civilian support for the war, or indeed even anything that prolongs the war, can constitute a military objective.[696] Such broadening scope of 'military objective' can

[690] Moore (2010), p. 21.
[691] *Ibid*, para. 2024.
[692] Art. 52(3) Protocol I (1977).
[693] Declaration Renouncing the Use, in Time of War, of Certain Explosive Projectiles Under 400 Grammes Weight (1868), St Petersburg; and more specifically in the Hague Conventions 1907.
[694] M Sassòli, "Targeting: The Scope and Utility of the Concept of "Military Objectives" for the Protection of Civilians in Contemporary Armed Conflicts", in: D Wippman and M Evangelista (eds.), *New Wars, New Laws? Applying the laws of war in 21st century conflicts* (Ardlsey: Transnational Publishers, 2005), 181-210.
[695] JM Meyer, "Tearing down the Façade: A critical look at the current law on targeting the will of the enemy and air force doctrine" (2001) 51 *Air Force Law Review*, 143.
[696] See for example: WJ Fenrick, "Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia" (2001) *European Journal of International Law*, 489, p. 491, discussing the influential theory of the "five strategic rings": political leadership, economic systems,

seriously increase the risks for the civilian population during conflicts. Practice and theory seem to have started to diverge at this point, as both the legal framework and courts maintain that objects that affect the morale of the civilian population but do not have a military purpose do not constitute military objectives, yet during modern conflicts such objects are increasingly targeted,[697] as will be discussed in the context of the media, below.

The principle that only military objectives can be targeted is considered to constitute customary law applicable during non-international conflict. The express protection of civilian objects during such conflicts is however less detailed due to the general nature of customary law, and during non-international conflicts which reach the threshold for the application of Protocol II, there is only express protection for a very limited number of civilian objects, such as medical units and objects indispensable to the survival of the civilian population.[698]

7.1.4 Consequences of direct participation

As discussed, the main consequence of civilians participating directly in the hostilities is that they lose their immunity from attack for the duration of their participation. They regain this protection as soon as their participation ends and until such time as they commence participation again. The ICRC Guidance notes that while it is permissible to use lethal force against civilians participating in the hostilities, the degree of force should not exceed what is necessary to accomplish the

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supporting infrastructure, population and military forces, set out in: JW Crawford, "The Law of Noncombatant Immunity and the Targeting of National Power and Electric Systems" (1997) 21 *Fletcher Forum of World Affairs*, 101 ; JA Burger, "International Humanitarian Law and the Kosovo Crisis: Lessons learned or to be learned" (2000) 82 *International Review of the Red Cross*, 129, p. 132. For a wider discussion on the increasing scope of "military objective" see: Sassoli (2005), pp. 190-203.

[697] Sassòli (2005), pp. 193-196: Especially the US military is seemingly broadening the scope of "military objective" by considering objects that "indirectly but effectively support and sustain the enemy's war-fighting capability" legitimate targets, which allows for the inclusion of a much wider range of objects. For more detail on the US position see further: L Turner and LG Norton, "Civilians at the Tip of the Spear: Department of Defence Total Force Team" (2001) *Air Force Law Review,* 1, pp.11-12. The Israeli army similarly seems to view propaganda media as legitimate targets, see: Reporters without Borders, "Israel/Gaza, Operation "Cast Lead": News control as a military objective" (February 2009), available at: http://en.rsf.org/IMG/pdf/Rapport_Gaza_janvier_2009_GB-2-2.pdf, p. 6.

[698] Artt. 11 and 14, Protocol II (1977).

military purpose in the situation.[699] The inclusion of this statement led to significant discussion in the preparatory stages of the guidance, though as the ICRC explains in the final report "it would defy basic notions of humanity to kill an adversary or to refrain from giving him an opportunity to surrender where there is manifestly no necessity for the use of lethal force."[700] It should also be noted that while civilians regain protection from attacks as soon as their participation ends, they can still be held responsible for acts committed while participating in the hostilities by the judicial system. Combatants cannot be held responsible for acts which do not violate the laws and customs of war, such as killing enemy soldiers and damaging or destroying military objectives during armed conflict, which is generally referred to as combatant immunity.[701] As civilians who are directly participating in the conflict are not awarded the same immunity and will therefore fall into a somewhat ill-defined group of unlawful combatants,[702] they can be held responsible for their actions during their participation in the hostilities by domestic courts.

Civilians who are captured after resuming their civilian protection will thus generally be subject to penal prosecution under the domestic law of the detaining state concerning their actions during the hostilities, and may further be charged with perfidy[703] under article 37(1)c depending on the circumstances.[704] The exception to this rule is where civilians are contracted by the armed forces and there is a related

[699] ICRC (2009), p. 77.
[700] *Ibid*, p. 82.
[701] Combatant immunity constitutes a generally accepted principle of international law, see for example the Lieber Code (1863) which states in art. 57 that "So soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses."
[702] Värk (2005), p. 193; see for more information and the historical development of the concept 'unlawful combatant': RR Baxter, "So-Called 'Unprivileged Belligerency': Spies, guerrillas, and saboteurs" (1951) 28 *British Yearbook of International Law,* 323. For further discussion on their status and protection under IHL see: K Dörmann, "The Legal Situation of Unlawful/Unprivileged Combatants" (2003) 85 *International Review of the Red Cross*, 45.
[703] Art. 37(1) states that "acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy". It can therefore be argued that under certain circumstances civilians attacking the armed forces are feigning non-combat status, while in fact taking part in the hostilities.
[704] The exception is where civilians have taken part in the hostilities during a *levée en masse*, which is when civilians collectively spontaneously take up arms to defend themselves against an invading force, this is however rare and unlikely to be relevant in the context of this thesis. It is therefore sufficient to note that civilians participating in *levée en masse* are protected as prisoners of war should they be captured. For more information see: I Detter, *The Laws of War* (Cambridge: Cambridge University Press, 2000), p. 140.

agreement with the relevant authorities on jurisdiction.[705] Civilians participating in the hostilities can be prosecuted regardless of whether their actions violate IHL when their actions violate domestic law.[706] They do still receive protection from the Geneva Conventions, though this protection is relatively limited. Article 5 of Geneva Convention IV states that those who are in enemy territory and suspected of activities hostile to the state, do not receive the rights and privileges they would normally be entitled to under the Geneva Convention where granting such rights and privileges would be prejudicial to the security of the state.[707] These derogations have limited practical effect though and at a minimum they should still receive humane treatment and a fair trial.[708] Furthermore, the fundamental guarantees of article 75,[709] which also constitute customary law, are applicable to all unlawful combatants regardless of their status or nationality as long as they find themselves in the power of a party to the conflict, which is a requirement that due to its broad interpretation is easily met.[710] While they thus receive some protection from the Conventions, the bigger concern for most unlawful combatants will be the lack of protection of combatant immunity, which means they can be held accountable for their actions by national courts. The majority of actions undertaken by unlawful combatants will violate laws that carry significant sentences when found guilty of such violations.

As noted above, the situation is slightly different in non-international armed conflicts, though not fundamentally so, where only the basic guarantees of common article 3 are applicable. Common article 3 is solely concerned with those taking 'no

[705] See generally: D Fleck (ed.), *The Handbook of the Law of Visiting Forces* (Oxford: Oxford University Press, 2001). In Iraq, for example, civilian government personnel and government contractors were granted immunity from prosecution during the occupation, the resulting jurisdictional vacuum was filled by the US establishing domestic criminal jurisdiction for civilians employed abroad by the US military, see: Schmitt (2004-2005), pp.516-517.
[706] There is however some doubt whether they can be prosecuted for merely participating in the hostilities where such participation does not violate any domestic or international laws, see: ICRC, "Direct Participation in Hostilities - report" (31 May 2005), available at: http://www.icrc.org/eng/resources/documents/misc/participation-hostilities-ihl-311205.htm.
[707] Such activities not include political or religious convictions; conviction must be translated into action before they fall within the scope of this article. See OM Uhler et al., *The Geneva Conventions of 12 August 1949: Commentary - Vol. IV, Geneva Convention Relative to Protection of Civilian Persons in Times of War* (Geneva: ICRC, 1958), p. 56.
[708] Värk (2005), p. 197.
[709] This article ensures humane treatment and protects against (amongst others): murder, torture, corporal punishment and mutilation, as well as outages upon personal dignity, the taking of hostages, collective punishments and threat to do any of the aforementioned.
[710] Sandoz, Swinarski and Zimmerman (eds.) (1987), para. 2912.

active part in the hostilities' and all combatants will receive, at least theoretically, the same treatment under domestic law or can be prosecuted for war crimes where their actions meet the required components. This is different from international conflicts where combatant immunity and prisoner of war status applies.[711] During non-international conflict all those arrested for taking part in the hostilities will thus have the same status before the law.[712]

As noted, civilian objects or property lose their protection from direct attacks if they are used by the military or otherwise become a military objective. This does not, however, provide a justification to attack such objects under all circumstances. Article 51(5)b of Protocol I codifies the customary law principle of proportionality of force, by prohibiting attacks "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated". What exactly constitutes 'excessive' casualties or damage is open to debate and must be judged on a case-by-case basis. If alternative measures to destruction are available which would accomplish the same effect, those should be considered.[713] Article 57 of Protocol I further requires parties to take precautions to protect civilians as much as possible during hostilities, by requiring, amongst other things, advance warning where possible.[714] These provisions do not generally limit the damage that can be caused to objects whose destruction can have a significant

[711] For example, lawful combatants can kill other combatants during hostilities without being charged with murder under most circumstances. This is, however, not necessarily the case for civilians who can be charged under domestic law for such actions.
[712] There is some discussion on whether combatant immunity applies during non-international armed conflict, though it is generally considered not to apply. See for example: R Värk, "The Status and Protection of Unlawful Combatants (2005) 10 *Juridica International*, 191, p. 193; WA Solf, "Status of Combatants in Non-International Armed Conflicts under Domestic Law and Transnational Practice" (1983) 33 *American University Law Review, 53,* pp. 58-61; M Sassoli, "Query: Is there a status of unlawful combatant?" (2006) 80 *International Studies, US Naval War College,* 57, p. 63. This situation changes of course when during a non-international conflict additional provisions of the Geneva Conventions are brought into force by mutual agreement of the belligerent parties, as parties to a conflict are encouraged to do under art. 3 Common to the Geneva Conventions (1949).
[713] For example jamming radio signals, rather than destroying a radio station being used by the enemy: B Saul, "The International Protection of Journalists in Armed Conflict and other Violent Situations" (2008) 14 *Australian Journal of Human Rights*, 99, p. 114.
[714] For more detail see: A Balguy-Gallois, "The Protection of Journalists and News Media in Armed Conflicts" (2004) 86 *International Review of the Red Cross*, 37, pp. 60-67.

effect on the local population.[715] They do however seek to minimise the loss of civilian lives during such attacks.

7.2 Direct participation in hostilities by journalists

In modern conflicts, individual journalists and media equipment are increasingly becoming direct targets during the hostilities. As they are generally protected from attack due to their civilian status, we must now turn to the question whether such attacks can be justified on the basis that both individual journalists and media equipment can constitute a legitimate military target, under certain circumstances, due to their direct participation in the hostilities. For example, during both the Kosovo air campaign and the war in Iraq a number of television and radio stations were targeted. While some of these attacks were justified on the basis that the equipment in question had dual use, as it not only broadcast media content but also functioned as a military communications network, this has not always been the case and some official government and NATO statements seem to consider the media to be inherently a legitimate target during the hostilities.[716] NATO, for example, has stated in the context of the Kosovo air campaign that: "Strikes against TV transmitters and broadcast facilities are part of our campaign to dismantle the FRY propaganda machinery which is a vital part of President Milosevic's control mechanism", while the then Prime Minister Tony Blair stated in the same context that the media "is the apparatus that keeps him [Milosević] in power and we are entirely justified as NATO allies in damaging and taking on those targets".[717] Similarly, some authors argue that since winning a modern conflict is as much

[715] This is especially true for objects with a dual use.
[716] Sassòli (2005), p. 193; K Payne, "The Media as an Instrument of War" (Spring 2005) *Parameters*, 81, p. 90; US Department of Defence, "Joint Statement on Kosovo After Action Review in the US Mission to Kosovo" (14 October 1999), available at: http://www.defense.gov/Releases/Release.aspx?ReleaseID=2220.
[717] ICTY, "Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia" (13 June 2000), para. 74, which cites statements by the then Prime Mister Tony Blair and the NATO which clearly identify the media as a military target based on their propaganda function. Conversely, close to the bombing of a television during the war in Kosovo a spokesman from the NATO stated "There is no policy to strike television and radio transmitters as such. Allied air missions are planned to avoid civilian casualties, including of course journalists", cited in: N Joffe, "At War with the Nato" (23 October 2001) *The Guardian*.

dependent on military victory as it is on public support by both the domestic and international community, the media has now indeed become a weapon of war.[718] Yet the legal framework clearly states that journalists are civilians[719] and not a military target and must therefore be directly participating in the hostilities to become one.

From the discussion above we can differentiate between two scenarios. On the one hand, when media equipment, such as radio and television transmitters, is used for military purposes it will lose its protection as a civilian object due to its direct contribution to the hostilities. On the other hand, we can distinguish a situation where the equipment itself is only used for civilian purposes, but the message that is being broadcast over it makes such a significant contribution to the conflict that it reaches the level of direct participation in the hostilities. The latter scenario assumes that the media can have such an effect on its audience and actively contributes to the hostilities through this influence. The exact extent of media influence on audiences is a hotly debated topic, as will be discussed below and goes beyond the scope of this thesis. What will follow is therefore a short discussion highlighting evidence suggesting that media can, at least potentially, perform acts which "by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces",[720] and will therefore meet the requirements of direct participation in the hostilities.

7.2.1 Do journalists have the power to directly participate in the hostilities?

Evaluating when media content becomes so influential that journalists provide a direct contribution to the hostilities is no easy task. The extent to which media influences audiences has been the subject of a number of studies, yet there is no clear answer to the question to what extent audiences are concretely affected by the media

[718] Payne (2005), pp.81-84, noting that when civilian media broadcasts are directly interfering with the accomplishment of a military mission there is nothing in the legal framework prohibiting the use of minimum force to shut them down; Reporters without Borders (February 2009), p. 4, quoting the head of the Israeli government press office, who noted when discussing banning journalists form conflict zones: "It has happened and it will happen again, particularly when we know the extent to which the media can constitute weapons of war". See further: M Kalb and C Saivetz, "The Israeli – Hezbollah War of 2006: The media as a weapon in asymmetrical conflict" (2007) 12 *The Harvard International Journal of Press/Politics*, 43.

[719] By extension their equipment, when solely used by them, is therefore also civilian in nature.

[720] *Ibid*, para. 1942.

content they consume.[721] Some authors have for example argued that the effects of media violence on viewers have been conclusively demonstrated, while others argue against this, pointing to weaknesses in the relevant research.[722]

A political science theory called the 'CNN effect', also known as the 'CNN factor', suggests that the media has the power to affect audiences and public opinion, which in turn will influence the conduct of diplomacy and foreign policy.[723] This is based on the assumption that the advent of 24 hour news broadcasting and live audiovisual coverage of conflicts has significantly increased media impact on public opinion formation concerning national and international events, which in turn can influence military and political elites.[724] To put it in the words of former United Nations Secretary Boutros Boutros-Ghali: "CNN is the sixteenth member of the security council".[725] This theory has commanded widespread support, though especially in more recent years it has also been widely criticised for overstating the power the media actually commands.[726] In terms of military engagement in conflicts, the media is but one small component of a decision to engage, amongst many other relevant factors.[727] The theory has therefore mostly been discredited in situations where there is a high level of consensus on policy or strategy. Here the media will have little

[721] See for example: J Curran, A Smith and P Wingate (eds.), *Impacts and Influences: Media power in the twentieth century* (New York: Routledge, 2013); Eilders (2005), pp. 645-64; E Gilboa, *Media and Conflict: Framing Issues, Making Policy, Shaping Opinion* (New York: Transnational Publishers, 2002).
[722] See for example: CA Anderson et al., "The Influence of Media Violence on Youth" (2003) *Psychological Science in the Public Interest*, 81; J Freedman, *Media Violence and its Effect on Aggression: Assessing the scientific evidence* (Toronto: University of Toronto Press 2002); J Savage, "Does Viewing Violent Media Really Cause Criminal Violence? A methodological review" (2004) *Aggression and Violent Behavior*, 99.
[723] S Livingston, "Clarifying the CNN Effect: An examination of media effects according to type of intervention" (June 1997) Harvard Research Paper R 18 *Joan Shorenstein Center on Press, Politics and Public Policy*, p.1, available at: http://www.genocide-watch.org/images/1997ClarifyingtheCNNEffect-Livingston.pdf.
[724] P Robinson, *The CNN Effect: The myth of news, foreign policy and intervention* (London: Routledge, 2002), p. 2.
[725] L Minear, C Scott and TG Weiss, *The News, Media, Civil War and Humanitarian Action* (Boulder: Lyne Reinner Publishers Inc., 1996), p. 4.
[726] See for example: N Gowing, "Real-time Television Coverage of Armed Conflicts and Diplomatic Crises: Does it pressure or distort foreign policy decision making?" (Spring 1994) Harvard Working Paper 94-1, *Joan Shorenstein Center on Press, Politics and Public Policy*, p. 9, available at: http://shorensteincenter.org/wp-content/uploads/2012/03/1994_01_gowing.pdf; W Strobel, "The CNN Effect" (1996) *American Journalism Review*, 32.
[727] SL Carruthers, *The Media at War: Communication and Conflict in the Twentieth Century* (New York: Macmillan, 2000), p. 5.

power or influence to change the minds of the military and political elite.[728] As former United Nations Secretary General Kofi Anan explains: "When governments have a clear policy, they have anticipated a situation and they know what they want to do and where they want to go, then television has little impact."[729] However, where there is significant discord on policy or strategy, in other words, policy uncertainty, the situation may be different.[730] In this situation, the media can be used by policy makers to promote one policy or strategy over another and thus to generate support for a specific course of action. Using the media in such a way indicates that the media has, at least potentially, the power to influence audiences and affect the conduct of hostilities. It can therefore be argued that journalists are capable of 'participation in the hostilities' under certain circumstances through the content they produce, but whether it has a significant enough influence to meet the legal requirements for a 'direct' contribution, is open to debate.

It is possible to identify a number of instances where media coverage has seemingly contributed to the decision to undertake humanitarian intervention, which can be considered an argument in favour of the assumption that the media can, at least in theory, affect behaviour during conflict. This happened for example after the end of the Gulf War in 1991 when television coverage of Kurdish refugees fleeing the civil war in Iraq led to strong political pressure on the West to intervene, which led to the establishment of 'humanitarian enclaves' in the North of Iraq.[731] Similarly, the extensive coverage of Kosovo refugees fleeing the ethnic cleansing led to strong political support for intervention, resulting in the air campaign by the NATO.[732] Conversely, the conflicts in Rwanda and Sudan received low levels of media

[728] D Fitzsimmons, "On Message: News media influence on military strategy in Iraq and Somalia" (2007) 9(4) *Journal of Military and Strategic Studies* (online); Robinson (2002), p. 30.
[729] Cited in J Keating, "Is Obama a Victim of the CNN effect?" (10 September 2013) S*late*, available at: http://www.slate.com/blogs/the_world_/2013/09/10/obama_tells_americans_to_watch_videos_of_the_attack_is_he_a_victim_of_the.html).
[730] P Robinson, "The Policy-Media Interaction Model: Measuring media power during humanitarian crisis" (2000) 37 *Journal of Peace Research*, 613.
[731] R Keeble, *Ethics for Journalists* (New York: Routledge, 2008), pp. 247 -248; M Shaw, *Civil Society and Media in Global Crises: Representing distance violence* (London: Pinter, 1996), pp. 156-174.
[732] *Ibid*, p. 249.

attention in the US and no military intervention.[733] Yet, as noted, while media coverage can contribute to a public call for intervention, they will generally be a contributing factor amongst a wide number of other political factors and will rarely solely be responsible for sparking intervention.[734]

7.2.2 Indirect v direct participation by journalists

As the commentary on Protocol I states: "many activities of the nation contribute to the conduct of hostilities, directly or indirectly; even the morale of the population plays a role in this context".[735] But media can have a significant impact not just on morale, but also potentially, as discussed above, on political decisions and possibly, indirectly, even on military strategy.[736] The Vietnam War for example, has been widely perceived to have been lost due to the loss of public support for that war. Where the media produces nothing but propaganda during a conflict, it is hard to argue that this does not have the potential of, at the very least, prolonging the conflict. However, as we have seen above, not all contributions to the hostilities constitute 'direct participation' and therefore loss of protection under the international framework. 'Indirect participation', which constitutes general support for the war effort, must be differentiated from 'direct participation'. Whether the media is merely providing an indirect contribution rather than a direct contribution will depend on the circumstances of the case,[737] but some general observations can be made.

The ICRC Guidance on 'direct participation' states specifically that the production of propaganda does not constitute direct participation.[738] Producing media content that rises above the level of 'general' propaganda, to propaganda that directly incites to violence, can however potentially rise to the level of 'direct participation'. Yet it can be very difficult to draw a clear line between the two types and much will depend on

[733] Fitzsimmons (2007), p.3.
[734] See for example: Gowing (1994); Keeble (2008), pp. 248-249.
[735] Sandoz, Swinarski and Zimmerman (eds.) (1987), para. 1945.
[736] Fitzsimmons (2007).
[737] ICTY, "Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia" (13 June 2000), para. 47, available at: http://www.icty.org/sid/10052.
[738] ICRC (2009), p. 50.

the circumstances of the case, which creates uncertainty for those making targeting decisions in the field. It is interesting to note here that article 20(1) of the ICCPR specifically states that "Any propaganda for war shall be prohibited by law", which should however be given a narrow interpretation which brings it significantly into line with the ICRC Guidance and this provision is not currently actively enforced by the Human Rights Committee (HRC).[739] Given the far-reaching consequences of media content breaching the level of permissible 'general' propaganda, more detailed guidance on the principle in terms of media participation would be welcome.

There are two cases concerning media content that have been discussed at length in academic literature and by the international community providing guidance in terms of what content is permissible to produce and what is not: *Radio Television Libre des Milles Collines (RTLMC)* during the Rwanda genocide and *Radio Television Serbia (RTS)* during the air campaign in Kosovo. The production of the former's content was deemed to reach the level of 'direct participation' in hostilities by the International Criminal Tribunal for Rwanda (ICTR), the latter was not. During the conflict in Rwanda RTLMC's some content reached the level of direct and public incitement of genocide, while other content met the lower, though still unlawful threshold of instigation to genocide by the Appeal Chamber.[740] It called on its listeners to go out and kill Tutsis, providing essentially instructions for genocide. Three key media executives of RTLMC were convicted for their role on the genocide by the ICTR.[741] While on appeal the court thus confirmed that the media content in this case had breached the level of 'general propaganda' and had breached the limits of lawful content, it also noted that under ICL persons cannot be held responsible for hate speech which does not directly incite genocide or other violence among members of an armed group.[742]

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[739] For an extensive discussion of the permissibility of war propaganda under international law, see: MG Kearney, *The Prohibition of Propaganda for War in International Law* (*Oxford*: Oxford University Press, 2007).
[740] ICTR, *Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v The Prosecutor* (appeal judgment), 28 November 2007, Case No. ICTR-99-52-A, paras. 678-679.
[741] The notion that 'extreme' propaganda can reach the level of 'direct participation' is further supported by the academic literature. See the overview of the issue in: Balguy-Gallois (2004), p. 49.
[742] ICTR, *Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v The Prosecutor* (appeal judgment), 28 November 2007, Case No. ICTR-99-52-A, para. 693.

Conversely, the content broadcast by RTS during the conflict in Kosovo had failed to meet the level of direct incitement to commit crimes (against humanity) according to the ICTY. As noted by the court: "At worst, the Yugoslav government was using the broadcasting networks to issue propaganda supportive of its war effort" rather than for the incitement of crimes.[743] The ICTY summarised its decisions as follows: "If the media is used to incite crimes, as in Rwanda, then it is a legitimate target. If it is merely disseminating propaganda to generate support for the war effort, it is not a legitimate target."[744] The report does not, however, clearly indicate the difference between legitimate propaganda and criminal war propaganda,[745] only discussing the extremes of the spectrum and noting that this extreme had not been met in the current case.

It may be difficult to draw the line in less extreme cases during conflict. When determining whether journalists are directly participating in the hostilities through the content they produce and therefore loose all protection offered to civilians under the Geneva Conventions is no easy matter. As noted in the ICRC Guidelines there are three essential components to 'direct participation': the act "must be likely to adversely affect the military operations or military capacity"; there must be a "direct causal link between the act and the harm likely to result"; and "the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another."[746] If we apply those criteria to the production of media content it becomes clear that propaganda, which does not directly incite criminal violence will indeed fail to meet both these requirements as there is an insufficient causal link between general propaganda and harm to meet these requirements. [747] Even if a media station lost their protection as a civilian object because the propaganda they are broadcasting is considered to make an "effective

[743] ICTY (2000), para 76; see also Joffe (2001).
[744] ICTY (2000), para. 47. The bombing in this case was justified on the basis of disrupting an enemy communications network being used in the war effort, which made it a legitimate target, but a pure propaganda station would likely not be: *Ibid,* paras. 75-76. See also: Reporters without Borders (2009), p. 7.
[745] Gasser (2003), p. 281.
[746] ICRC (2009), pp. 47-58.
[747] *Ibid*; S Kagan and H Durham, "The Media and International Humanitarian Law: Legal protection for journalists" (2010) 16 *Pacific Journalism Review*, 96, p. 103. For a full discussion on propaganda see: ICTY (2000), para 76.

contribution to military action" the fact remains that the disruption of propaganda is unlikely to offer the required "definite military advantage" to justify an attack, as discussed under 3.1.2. The advantage of destroying media equipment is often limited as broadcasting can resume from elsewhere, as was for example the case in Kosovo, where broadcasting resumed within hours of the attack and equally with the bombing of Asqa TV in Gaza City were there was already broadcasting from an alternative studio when the air raid started.[748] Furthermore, the influence of propaganda on the population can be overstated, as people are often well aware that their media content is strictly controlled by the state and cannot always be taken at face value.[749]

It is, however, hard to deny that the media play an influential role on the formation of public support or opposition to a conflict and it is this support which has become increasingly influential. As noted above, winning a modern conflict is now as dependent on military victory as it is on public support by both the domestic and international community.[750] In the words of Colonel David Kilcullen: "It's now fundamentally an information fight", noting that when insurgents ambush an American Convoy "they're not doing that because they want to reduce the number of Humvees we have in Iraq by one. They're doing it because they want spectacular media footage of a burning Humvee."[751] Much emphasis is now placed on how the media represent certain events in conflicts and both state and non-state parties are fully aware of the importance of this.[752]

Military information operations, which are designed to influence or disrupt the decisions made by the enemy party and to, amongst other things, reduce the adversary's will to fight,[753] have long played a part in the conduct of warfare.

[748] ICTY (2002), para 78; Reporters without Borders (2009), p. 6.
[749] Joffe (2001).
[750] Payne, (Spring 2005), pp.81-84; Reporters without Borders (February 2009).
[751] Cited in G Packer, "Knowing the Enemy: Can social scientists redefine the war on terror?" (18 December 2006) *The New Yorker*.
[752] This is perhaps best demonstrated by the demand of the Taliban, that their assassination attempt on Malala Yousafzai should receive unbiased media coverage, rather than the purely negative coverage it was receiving, see: J Hudson, "Taliban Demands Unbiased Coverage of its attempted Murder of a 14-Year-Old Girl" (17 October 2012), *The Atlantic Wire*, available at: http://www.thewire.com/global/2012/10/taliban-demands-unbiased-coverage-its-attempted-murder-14-year-old-girl/58017/.
[753] Moore (2009), p. 24. Gasser (2003), pp. 384-385.

Increasing emphasis is however being placed on the value of information operations for achieving victory.[754] They now form an essential component in the conduct of hostilities and the media play an important role in this. The more emphasis is placed on 'information warfare', not only for tactical support of military operations, but more directly for achieving victory in the increasingly important battle for public opinion, the more journalists are at risk of losing their civilian protection during conflict. By taking part in this important battlefield, it could indeed end up being considered to be 'directly participating' in the hostilities. This is especially true for those countries using a wider definition of 'direct participation', such as the US.[755] The line between ordinary journalistic activities and those which actively participate in the war effort is becoming increasingly blurred, as military influence on media content is not always easily identified.[756] The question of where indirect participation ends and direct participation begins is therefore more important than ever for the safety of journalists, yet more difficult to answer than ever before. To decide on a case by case basis which content is and is not permissible, makes it difficult to apply the concept of 'direct participation' in a systematic and coherent way, leading to confusion for those making targeting decisions, but also for journalists themselves, who may not be able to adequately assess when they have lost all protection under the legal framework. Journalists would therefore benefit from authoritative guidance on the notion of 'direct participation' by journalists.

7.2.3 Dual use of media equipment

Media equipment, when solely being used by the media, will generally not constitute a military objective, except for extreme cases where the content being broadcast amounts to 'direct participation', as discussed above, though establishing when this is the case remains problematic. This is however not the only way media equipment can become a target in the hostilities. Media equipment can become a target during the hostilities through use by parties other than the media during conflict, such as the military. This is a relatively common occurrence and several examples can be found

[754] C Eilders, "The Media under Fire: Fact and fiction in conditions of war" (2005) 37 *International Review of the Red Cross*, 635, p. 643.
[755] *Ibid*, p. 25. This is especially true for embedded reporters who operate under the direct influence of the military in terms of limitations and even censorship, see: Moore (2009), pp. 26- 27.
[756] Gasser (2003), p. 385.

in recent conflicts where media equipment was indirectly targeted due to the dual use of equipment or premises they found themselves in. This has for example been the case with the RTS bombing during the Kosovo air campaign, where the media transmitters were deemed to be used for military communication, and the bombing of the Ministry of Information in Bagdad in 2003, which also housed offices of the international media.[757]

Dual use of media equipment, use for both military and civilian purposes, is relatively easy to establish as it is mostly based on facts, though these can be hard to come by depending on the trustworthiness of the available in formation during conflict. This does not mean, however, that there are no value judgments to be made in this context. Importantly, as discussed above, any attack on such objects must meet the required standard of proportionality at all times and advance warning must be given where possible.[758] This entails that with any attacks on such targets, the military advantage must be weighed against the potential for civilian casualties, which are likely to be higher for dual use objects due to their civilian nature. The ICTY considered this requirement in the context of the RTS bombing, noting that: it is much easier to "formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values."[759] The final report did not reach a clear conclusion on the proportionality of the attack, noting that the available evidence is conflicting, but that there are indications that the NATO did provide advance warning to mitigate civilian casualties, even though the warning was not received by all.[760] Generally speaking though, precautions to limit civilian casualties should be taken. This can be done for example by giving such advance warning to allow civilians to evacuate equipment or areas that are about to be destroyed by military

[757] M Sassòli, AA Bouvier and A Quintin, *How does Law Protect in War: Cases, documents and teaching materials on contemporary practice in International Humanitarian Law, Vol II* (Geneva: ICRC, 2011), p. 592.
[758] Both of these principles are based on customary law and applicable during non-international conflict, see: Sassòli, Bouvier and Quintin (2011), p. 594.
[759] ICTY (2000), para. 48.
[760] *Ibid*, para 77. It found however no evidence of significant wrongdoing that would warrant further investigation into the matter of proportionality.

force.[761] The final report of the ICTY on the RTS bombing considered that the bombing, which resulted in several civilian deaths, was justified on the basis of the dual use of the equipment.[762] Here it was determined that the equipment functioned not only as a television station but also that the transmitters were integrated into the military communications network, which could be disrupted by its destruction.[763]

7.3 Armed security teams and carrying weapons

The dangerous nature of the work journalists undertake in conflict zones raises questions on how best to protect them from these dangers. In the past this discussion has to a significant extent considered the question whether journalists can, and should, carry weapons for purposes of self-defence, or whether this would compromise their protection under the legal framework. In recent times, a similar question has arisen in terms of the use of private, armed, security teams for the protection of journalists, a practice which is becoming increasingly common in modern conflict.

Whether journalists are legally permitted to carry a weapon will depend on the domestic legal system they are operating in. As noted, journalists are civilians and therefore subject to domestic law. The legal consequence of carrying weapons for their protection under IHL is a separate question and one that is not directly addressed by the Geneva Conventions. It is generally assumed that the mere fact of carrying a weapon for self-defence purposes is not enough to amount to 'direct participation' and will therefore not make journalists legitimate military targets, but when journalists use their weapons to commit acts of violence or to participate in the hostilities, this changes. [764] The results of such actions are, however, not well defined. Depending on the circumstances, journalists taking up weapons can

[761] R Alley, "The Culture of Impunity: What journalists need to know about humanitarian law" (2010) 16 *Pacific Journalism Review*, 78, pp. 84-86.
[762] The report, however, also confirmed it would not have been justified solely based on the argument that it was a propaganda tool. There was further discussion on the question of whether adequate warning should have been given before the bombing.
[763] ICTY (2000), paras. 72-74.
[764] Gasser (2003), p. 377.

constitute legitimate self-defence, for example, when defending themselves against a criminal act, or against an act which amounts to a war crime.[765] Yet such an action can equally constitute direct participation in the hostilities when, for example, returning fire with military forces while under attack by combatants, in which case a claim to self-defence is not available.[766] The assessment of the legal permissibility of returning fire and the consequences under the various legal frameworks must therefore be assessed on a case-by-case basis. Restrictions may further be imposed by those providing logistical support. For example, neither the US Armed Forces, nor the British Ministry of Defence permit members of the media accredited to them to carry personal weapons.[767]

Journalists are also increasingly making use of armed bodyguards when travelling through conflict zones.[768] Simply being accompanied by armed guards does not make journalists a legitimate military target under IHL,[769] but where such company actively fires on assailants, this blurs the line between reporters and combatants.[770] In 2003, for example, a CNN crew came under fire in Northern Iraq and their security escort responded with automatic weapons fire. This raised concerns amongst journalists as this goes against established practice of unarmed reporters and potentially gives of the wrong signal.

With both the carrying of weapons and the use of armed guards the concerns lie not just with the legal loss of protection. Especially during non-international armed conflict, the distinction between fighters and civilians will not always be obvious. By directly or indirectly using weapons for protection, journalists are likely to at least create the perception that they are indeed part of the conflict, rather than impartial observers, which can endanger their lives. Journalists who are captured with armed

[765] ICRC (2009), p. 64, stating that both individual self-defence and defence of others against violence prohibited under IHL does not constitute direct participation in the hostilities.
[766] Saul (2008), pp. 102-103. For a general discussion on civilians in conflict zones and self-defence v direct participations, see: Schmitt (2004-2005), pp. 538-539.
[767] Turner and Norton (2001), p. 23; UK Ministry of Defence, *MoD Working Arrangements with the Media in Times of Emergency, Tension, Conflict or War* (31 January 2013) Joint Service Publication 580, version 8, para. 31.
[768] M Wilford, "The Big Story: Our embattled media" (Fall 2009) *World Affairs*, available at: http://www.worldaffairsjournal.org/article/big-story-our-embattled-media.
[769] Gasser (2003), p. 377.
[770] Sassòli, Bouvier and Quintin (2011), p. 590.

rebels or other participants in the conflict are often accused of supporting such groups, or even directly participating in the hostilities themselves.[771] Such accusations may be much harder to fight if journalists are captured with weapons. While carrying weapons for protection, or being surrounded by those who do, may therefore not technically result in loss of civilian protection under the legal framework, it may still result in significant risks when captured and will increase. Furthermore it creates a perception of being part of the conflict, which should be avoided.

7.4 Consequences for the media

As noted, some content can be so extreme that journalists become a direct participant in the hostilities and thus lose their protection from attack. But what are the consequences of such direct participation?

When the journalists or media stations lose their protection from attack, this raises questions as to the duration of such loss. There is a general consensus that civilians regain their protection when they stop participating in the hostilities. The exact moment of finishing the act of 'direct participation' is up for debate, but regaining protection once it is done is not. Yet can journalists stop participating in the hostilities once they have started? The tone of the content they produce can change, but this is likely to be a gradual process, making it very difficult to determine when participation ends. If journalists can participate in the hostilities by publishing content that is so incendiary that it constitutes 'direct participation', can this really be seen as an individual act from which one can 'return' and resume civilian character? Researching, editing and other activities that are part of journalistic life are almost continuous, which makes the assessment of the duration for which they lose protection from attacks highly problematic. The consequences of this could be severe as it would leave journalists without civilian protection for much of the conflict.

[771] See for example the case discussed in the previous chapter at para 6.2.4 of the two Swedish journalists arrested in Ethiopia who were accused of having received weapons training from the rebels they were travelling with.

Similar considerations can be made in terms of television and radio stations: is a single report crossing the line from propaganda to incitement to crimes enough to justify it becoming a military target and if content returns to 'general' propaganda afterwards? This is even more problematic given the difficulties of distinguishing permissible propaganda from propaganda which incites violence. Furthermore, when exactly is protection regained? With the next report? After several reports on the 'right' side of the line? And can such protection be regained at all, as the influence of media content will likely continue long beyond the duration of a single report? There are no clear answers to these questions.

It is clear there must be a provision concerning the loss of civilian protection for equipment and persons who make a direct contribution to the hostilities, to make it possible to target those who are directly contributing the fighting. The problem is that as it stands, it offers a rather convenient 'get out' clause for those targeting the media for reasons other than 'direct participation', which weakens the legal framework. The bombing of the Serbian State Television, for example, seemed more motivated by it being a symbol of the enemy regime, than by its actual functioning as military equipment.[772] The wider we interpret the requirement of 'direct participation', the easier it will become to use this as a loophole in the legal framework protecting journalists in conflict zones. It seems likely that with the increasing permeation of media in society, the importance of winning the war for public opinion through the media is likely to increase, which in turn will only worsen the problems outlined above.[773]

7.5 Conclusion

Journalists receive significant protection under the international legal framework, yet this protection is negated where they are deemed to be directly participating in the hostilities. The consequences of such participation are therefore severe and can lead to loss of life, yet there is little clarity, or international consensus, on the exact scope

[772] See for example: Fenrick (2001), pp. 496-497; Sassòli, Bouvier and Quintin (2011), p. 592.
[773] Payne (2005), p. 92.

of ‘direct participation’. The specific situation of direct participation by the media is unfortunately no clearer.

There currently seems to be a worrying trend of an increasing willingness to widen the scope of direct participation by the media to include the broadcasting of propaganda. This is disconcerting, as it is the start of a slippery slope where protection for the media can go downhill fast. Considering the dissemination of propaganda to constitute direct participation in the hostilities is further problematic as content constituting propaganda is not easily delineated. Is all biased reporting propaganda? If this is so, the next logical step would likely be that only those media that are neutral and report objectively and independently in a conflict cannot be targeted. But if this is the case, how do we define neutral and objective? Do we require it in single news reports, or should coverage overall be balanced and objective? Is it even possible to achieve such coverage in a conflict, where it may not be possible to gather all information necessary for such reports? Imposing such requirements on the media is at the very least dubious in terms of the right to freedom of expression, and wholly unpractical. It would further widen the scope of ‘direct participation’ for the civilian population in general, if general support for the war effort were to constitute direct participation in the hostilities. Moreover, requiring the media to be neutral to receive protection under the international legal framework would run counter to the main principles of IHL, where it is a clear standard that those who do not actively engage in the hostilities cannot be targeted, not just those who hold a neutral position in the conflict.

Overall, it must be emphasised that it is highly undesirable for states to consider media equipment a legitimate target during conflict. As discussed in chapters 3, 4 and 5, there are significant efforts at the international level by a number of states and a variety of actors to improve protection for journalists in conflict zones. If these same states condone or even undertake bombing of media equipment during conflict, this sends a highly confusing message to those who are not fully aware of the legal framework and even to those who are. The message that journalists are independent observers and should under no circumstances be targeted for doing their job does not

sit well with the increasing targeting of media equipment during conflicts. While it may be necessary to stop the media from broadcasting in extreme cases such as the direct incitement to commit genocide in Rwanda, attacks should only be carried out in the most extreme cases. When attacks are carried out, they must be clearly motivated by evidence of dual use of media equipment, or clear evidence of 'direct participation' by journalists or broadcasters, that rises well above the level of propaganda. Propaganda has always been used during conflicts, by all sides, and to widen the scope of 'direct participation' to the broadcasting of propaganda exposes a previously restrictive legal category to the possibility of significant abuse.

8. A dedicated convention for the protection of journalists in conflict zones

The previous chapters have shown that while the legal framework provides significant protection for journalists working in conflict zones, there are situations journalists face which are not fully addressed by this legal framework. The legal framework as it currently stands is complicated and unclear on a number of points, which, especially when dealing with actors with limited legal expertise, can endanger journalist safety. The rising death toll amongst journalists is a serious concern for the international community and there have been numerous initiatives over the past few years aimed at enhancing the safety of journalists in conflict zones. The majority of these efforts are targeted at improving enforcement of the current legal framework. While impunity, "the failure to bring perpetrators of (human rights) violations to justice",[774] is one of the main issues endangering journalists, it is important not to lose sight of the improvements that could be made within the current legal framework, which could have a positive effect on journalist safety. As noted in chapter 5, one of the underlying causes for impunity is a lack of a clear and concise legal framework, as this affects how well the legal framework is known amongst different actors in conflict zones and therefore its application. While it may seem counter-intuitive to focus efforts on enhancing a legal framework which is often not observed in practice, clarifying and simplifying the legal framework could have a positive impact on its application.

The main argument put forward in the academic literature against attempting to amend or supplement the current legal framework, concerns the general challenges associated with drafting international treaties.[775] Achieving meaningful consensus on

[774] UNESCO, "The Safety of Journalists and the Danger of Impunity: Report by the Director-General" (27 March 2012) *International Programme for the Development of Communication*, available at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/images/Themes/Freedom_of_expression/Safety_Report_by%20DG_2012.pdf), p. 29.

[775] This is perhaps best summarised by Davies and Crawford who note that: "the process of negotiating global agreement on international treaties is incrementally slow and can be hindered by distracting calls for actions that would better suit some minorities but are unlikely to gain broad support needed to ratify a legal instrument". See: K Davies and E Crawford, "Legal Avenues for

any issue by international treaty is a long and drawn out process. Yet it is not impossible and the potential positive effects of amending the international legal framework for the protection of journalists in conflict zones should not be discarded solely based on the perceived difficulties of such a project. As noted in chapter 6, it is encouraging that there is already a sufficient level of state practice and international support for 'respect' for journalists in conflict areas to have this become part of customary international law. This suggests that enhancing the protection currently available to journalists through the creation of a new legal instrument might not be as unattainable as is often suggested.

While the current legal framework does offer significant protection, several issues remain which may affect its application and therefore the protection it offers to journalists in the field. A dedicated convention could address these concerns and clarify the current legal framework. The implementation of such a convention is not a new suggestion. Prior to the drafting of article 79 of Protocol I, there was significant consensus on the need for special protection for journalist under international law through a dedicated convention.[776] This plan was abandoned in favour of including article 79, which states that journalists are civilians and should be treated as such, in Protocol I, as will be discussed below at 8.2. It may however be time to revisit the need for such a dedicated convention in light of the increasing death toll amongst journalists operating in conflict zones.

There have been other attempts to create an international convention for the protection of journalists in conflict zones. Most notably, the previously mentioned Press Emblem Campaign (PEC), a Geneva based NGO, published a *Draft proposal for an International Convention to strengthen the protection of journalists in armed conflicts and other situations including civil unrest and targeted killings* in 2007.[777] The convention, largely based on IHRL rather than IHL, has not

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Ending Impunity for the Death of Journalists in Conflict Zones: Current and proposed international agreements" (2013) 7 *International Journal of Communication*, 2157, p. 2157.

[776] H-P Gasser, "Article 79 – Measures of Protection for Journalists", in: Y Sandoz, C Swinarski and B Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff Publishers, 1987), para. 3252.

[777] The draft convention is available at: http://www.pressemblem.ch/4983.html.

been taken up by an international body, but has received the support of a number of journalist unions and organisations, though some journalist organisations have rejected it.[778] The proposal contained far reaching provisions, such as "Any State, whether party or not to an armed conflict, has the obligation to assist journalists in the line of duty giving them free access to information and all relevant documents and to facilitate their movements" (article 3) as well as compensation for victims of violence against journalists (article 9) and the creation of a protective emblem to identify journalists in conflict zones (article 7), especially the latter has proven highly controversial,[779] as will be discussed below at 8.2.5. Generally speaking, it is a highly ambitious proposal, which, should it be taken forward, is unlikely to achieve significant ratification at the international level due to its far reaching provisions but lessons can be learned from the work of the PEC. As discussed below at 8.2, a convention along the lines I consider would mirror IHL, rather than IHRL, to provide a more limited base line of protection for journalists, which should thus prove less controversial and have a better chance of being taken forward at the international level.

This chapter provides a brief summary of the current issues which are not, or are inadequately addressed by the legal framework discussed in the previous chapters. It then considers the scope for addressing these issues through a dedicated convention and the likelihood of achieving significant support for such a convention were it to be proposed.

8.1 Challenging the current legal framework

The discussion in the previous chapters has flagged up several issues for journalists working in conflict zones, which are not adequately addressed by the legal framework. These issues can be summarised as follows:

[778] For the full list see: PEC, "List of Journalists' Syndicates and Organisations Supporting the PEC Campaign" (2014), available at: http://www.pressemblem.ch/4902.html.
[779] See generally: Davies and Crawford (2013), pp. 2167-2171.

- The lack of consistent rules and laws for the protection of journalists in international and non-international conflicts (see 8.1.1);
- The different protection for different types of journalists such as war correspondents and 'unilaterals' (see 8.1.2);
- The lack of a comfortable fit for journalists with the legal status of 'ordinary' civilians and for war correspondents with the legal status of prisoner of war when arrested or detained during conflict (see 8.1.3);
- The lack of a clear legal concept of direct participation in the hostilities by journalists (see 8.1.4).

It is possible to identify a number of (varied) reasons for these deficiencies in the current legal framework. Some originate from the historic development of IHL as well as the emphasis on the concept of State sovereignty within international law, while others have developed or have become more pronounced due to the changes that have taken place over the last few decades in the nature of warfare, communications technologies and journalistic practice. While all these points threaten the safety of journalists working in conflict zones, some also raise more general concerns, such as the needless complication of the legal framework, which is likely to affect the protection of journalists in practice and contribute to high levels of impunity. The limitations of the current legal framework could be addressed by the creation of a single, dedicated convention for the protection of journalists in conflict zones. Before I consider the scope for such a convention, I provide a short summary of those challenges that such a convention should aim to address.

8.1.1 Lack of consistent laws between international and non-international conflicts

As discussed throughout this thesis, international and non-international conflicts are subject to different legal frameworks, with the latter largely lacking detailed legal provisions. Consequently, there are significant differences between the protection journalists are entitled to in these different types of conflicts even though they are classed as civilians in both conflicts.

War correspondents are subject to the most significant change in treatment depending on the type of conflict they cover. In international armed conflict they

receive specialised protection due to their proximity to the armed forces. When captured, war correspondents receive the status of prisoners of war and cannot be compelled to answer during questioning, nor can they be accused of being spies. While there are also downsides to this classification, as will be discussed in more detail at 8.1.3 below, it does provide additional protection over and above that received by journalists not accredited to the armed forces. This protection is, however, not available to war correspondents in non-international armed conflicts. During non-international armed conflict they will, at least in terms of International Humanitarian Law (IHL), only be protected by the basic provisions of common article 3 of the Geneva Conventions (1949). While this article guarantees humane treatment, it provides little specific protection. This lack of detailed protection can have a significant impact on journalistic practice. Over the past decade, embedding with military units has become a relatively popular method of covering conflict. Yet this becomes effectively impossible in non-international armed conflicts due to the lack of protection upon capture. Embedded journalists are likely to have access to significant sensitive information about the armed forces they accompany, which makes them an attractive source of information, leaving them vulnerable without the benefit of additional protection. A further problem arises when journalists wish to 'embed' with a non-state party to the conflict. This is essentially impossible due to the lack of protection covering conflict in this way. When captured by government forces they could be considered part of the group of non-state actors they are travelling with and be subject to full prosecution under domestic law, which is likely to include charges such as treason and terrorism, all carrying significant sentences.[780]

The protection for independent journalists is less subject to change between covering international and non-international conflicts. This is because they are classed and treated as civilians in both types of conflict without any additional protection over and above that offered to other civilians. While war correspondents are equally classed as civilians, they do receive additional protection as set out above during international conflict. Independent journalists receive no such additional protection during international conflict, and they therefore mostly suffer in non-international

[780] This is essentially what happened to the two Swedish journalists who were arrested for covering the conflict in Ethiopia from the rebel side, see the discussion in para 6.2.4.

conflict from the same absence of detailed protection that all civilians suffer from in non-international armed conflict.

As previously discussed, the regulation of non-international armed conflicts suffers from a lack of coherent rules. These conflicts are therefore generally governed by provisions of customary law based on rules applicable in international armed conflict, supplemented by IHRL and ICL. Yet gaps remain, largely due to the problems that arise from applying norms to non-state actors that are designed to apply to states.[781] Especially those journalists who would fall into the category of 'protected person' under Geneva Convention IV (1949) receive far less detailed protection during non-international armed conflict. There is, for example, no treaty provision applicable during non-international conflict equivalent to article 31, which protects journalists and other civilians who qualify as protected persons from physical or moral coercion to give up information.[782] Article 79, the only provision in the Geneva Conventions to directly address journalists, by confirming they are civilians and should be protected as such, is also not reflected in treaty based law concerning non-international armed conflict. The article is however reflected in customary law,[783] which ensures that independent journalists do receive relatively similar protection in both types of conflict.

The lack of consistent protection in the two different types of conflict is undesirable for the following two reasons. First, one of the main concerns is that non-international conflicts are now the norm rather than the exception and the threat, for journalists, posed by non-state actors is increasing.[784] Yet these conflicts are covered by a significantly less detailed legal framework than international armed conflicts. Second, some common journalistic practice, such as embedding, is not covered by

[781] S Sivakumaran, "Re-Envisaging the International Law of Internal Armed Conflict" (2011) 22 *European Journal of International Law*, 219. For a more detailed discussion on this see chapters 3 and 4 of this thesis.
[782] Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture are however prohibited under common art. 3.
[783] J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law, Volume II: Practice* (Cambridge: Cambridge University Press, 2005), pp. 661-670.
[784] UNESCO, "The Safety of Journalists and the Danger of Impunity: Report by the Director-General" (27 March 2012) *International Programme for the Development of Communication*, available at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/images/Themes/Freedom_of_expression/Safety_Report_by%20DG_2012.pdf, p. 33.

the legal framework for non-international armed conflict. This limits war correspondents from covering non-international conflict in this way, or at least causes them to face significant risks when doing so. While they can still risk embedding with state actors in such conflicts, as this would at least largely eliminate the risk of being charged under domestic law for criminal offences, embedding with non-state actors is likely to be too dangerous. This could in theory lead to unbalanced reporting due to reduced access to one of the sides of the conflict, which could affect the appearance of independence of the journalists in question.

8.1.2 Different protection for different types of journalists

Related to the problems caused by receiving varying levels of protection during different types of conflicts, is that the protection awarded by the international legal framework is not uniform for all journalists. Depending on the type of journalist, as well as nationality as interpreted under Geneva Convention IV, there are significant differences in treatment under the legal framework. These differences are most pronounced upon capture, when war correspondents are treated as prisoners of war whereas 'independent' journalists are treated as civilians. But nationality also impacts significantly on the available protection. The protection is strongest for those journalists that qualify through their nationality as a 'protected person' under Geneva Convention IV[785] and the protection is weakest under international law for those journalists who are nationals of the state they operate in. Here the Geneva Conventions (1949) only provide the basic protection for the local civilian population and otherwise assume the domestic legal system is capable of providing the required protection, supplemented by any relevant IHRL.

The lack of consistent protection for different types of journalists and different nationalities poses several challenges. The specific difficulties with the various classifications under the legal framework will be discussed in the next paragraph, but the overall concept of differing protection is undesirable from an enforcement point of view. Violence against journalists, as well as unlawful detention suffers from a

[785] Basically, those who find themselves in a State that is party to the conflict and are nationals from a belligerent State, or are from a state which no longer maintains normal diplomatic representation in the state in whose hands they are, as well as the inhabitants of occupied territories. For a more detailed discussion see: para. 6.2.1 of this thesis.

high level of impunity, as discussed in chapter 5. One of the underlying causes for impunity is a lack of awareness of the relevant legal framework. The more complicated this framework is, the harder it is likely to be to spread awareness of the relevant legal provisions. While the basic lines can be relatively easily communicated, it is for example rarely permissible to directly target a journalist, yet even for this rule there are exceptions, and upon capture the situation becomes significantly more complicated. As noted, modern conflicts increasingly involve one or more non-state actors. These actors are likely to have little expertise in matters of international law and may feel in general that international legal obligations do not apply to them. The more varied and complicated the legal provisions are, the more difficult it will be to communicate these provisions and spread awareness of them. Actors will therefore likely be less aware of a complicated legal framework, as well as their obligation to apply such a framework, which can seriously hamper the effectiveness of the legal provisions in question.

8.1.3 Status of journalists under the legal framework

As discussed in chapters 3 and 6, war correspondents are entitled to the status of prisoner of war, which provides additional protection over and above that of civilian detainees. Aside from the specific additional protection offered by the Geneva Conventions (1949) set out above, it lessens the significant risk of prosecution under domestic law. Yet it also has a significant drawback. Prisoner of war status is specifically aimed at removing actors from a conflict for the duration of that conflict, which can be highly undesirable for journalists, who will essentially be stopped from reporting on a conflict and prevented from returning home until the conflict is over. The underlying rationale for prisoner of war status does not sit well with the function journalists perform during conflict. While it makes sense to stop enemy fighters from re-joining their ranks, enabling them to attack again, this simply does not apply to journalists who do not partake in the fighting. It may be necessary to detain journalists during military operations for security reasons, but this is likely only necessary for a limited period of time and not for the duration of the conflict.

The classification of independent journalists as 'ordinary' civilians is also an uncomfortable fit. As discussed in more detail in chapter 6, the protection journalists are entitled to will differ depending on nationality, but will, at the very least, cover protection from murder, torture, corporal punishment and mutilation, outages upon personal dignity, the taking of hostages, collective punishments and threat to do any of the aforementioned.[786] Yet this leaves journalists vulnerable to accusations under domestic law concerning, for example, treason or espionage. The problem here is that journalists do not behave like ordinary civilians in conflict zones. Their behaviour whilst 'doing their job' can easily, in any number of ways, attract attention and suspicion by all sides of the conflict. For instance, when they collect significant amounts of information, likely from both sides of the conflict, or when they seek access to areas which ordinary civilians are unlikely to wish to enter, for example battlegrounds. This type of behaviour is likely to result in charges under domestic law of varying degrees of seriousness. Yet IHL provides no protection against this, while the protection under IHRL is likely to be limited due to derogations, as well as the fact that IHRL can be difficult to enforce before domestic courts. As noted by Hackett, co-director of NewsWatch Canada: "In war time, media are not mere observers but simultaneously a source of intelligence, a combatant, a weapon, a target, and a battlefield".[787] The protection granted to civilians therefore only partly covers the risk journalists are exposed to in conflict zones and this lack of comprehensive protection can significantly endanger their lives.

Overall, journalists simply not easily conform to any of the available categories under IHL. While war correspondents may travel with combatants, they are not taking part in the hostilities, as recognised by the current legal framework, and they simply do not pose the same risks to a belligerent as combatants. Consequently, to be treated as one upon capture poses difficulties for them. Similarly, the behaviour of independent journalists does not equate to the behaviour of 'ordinary' civilians in conflict zones, exposing them to dangers the legal framework does not sufficiently take into account.

[786] Art. 75 Protocol I.
[787] RA Hackett, "Journalism versus Peace? Notes on a problematic relationship" (2007) 2 *Global Media Journal: Mediterranean Edition*, 47, p. 48.

8.1.4 Lack of a clear concept of direct participation in hostilities by journalists

The current legal framework, when enforced, provides significant protection to journalists. This protection can however be lost completely when journalists are deemed to be 'directly participating' in the hostilities. This happens if journalists are deemed to be making a direct contribution to the fighting, which in turn will make them legitimate targets under international law. While the consequences of direct participation are obviously severe, there is no clear internationally accepted definition of 'direct participation'.

While some discussion remains concerning the use of weapons and armed security teams for self-defence purposes, the permissibility of which will have to be judged on a case by case basis, most of the discussion concentrates on direct participation by journalists through the content they produce. It is generally accepted that the media do indeed have the power to directly contribute to the hostilities under certain circumstances, but significant discussion remains on the type of content and message that must be produced to qualify as direct participation. A significant majority of legal documents and courts maintain that the production and broadcasting of 'general' propaganda, which does not incite the commission of crimes and violence in a conflict, does not constitute direct participation in the hostilities by journalists, nor does it make those media stations broadcasting such content legitimate military targets, as discussed in the previous chapter. The assessment of the line between permissible and impermissible propaganda is however very difficult to draw and can only be done on a case by case assessment, which does not improve legal certainty in this area. In practice, there seem to be increasing instances where the position is taken that the consistent spread of any form of propaganda, especially where it concerns misinformation rather than biased information, is considered to make a direct contribution to the hostilities, which turns journalists and media stations into legitimate targets.[788] Over the past few years television and radio stations have thus increasingly become targets in the fighting, the permissibility of which, under the legal framework, has often been, at best, questionable.

[788] See the cases discussed in chapter 7.

The main issue with this increasing willingness to extend the scope of the concept of direct participation in hostilities by journalists is that this opens the legal framework to significant abuse. It increases the opportunities to attack both media stations and journalists which publish or broadcast an 'inconvenient' message to the belligerent parties. It further sends a highly confusing message to those involved in a conflict. On the one hand, the international community strongly denounces any type of violence against journalists who are simply performing their job in conflict zones and in other dangerous situations, while, on the other hand, many of those same countries are targeting media equipment during conflicts. At the very least this impacts negatively on the clarity of the message that journalists are mere observers and should not be subject to violence, which in turn has the potential to significantly increase impunity levels.

8.2 A dedicated convention for the protection of journalists

The suggestion that journalists would benefit from a dedicated international instrument to ensure their protection in conflict zones has long been the subject of academic debate. Article 79 of Protocol I, which states that journalists are civilians and shall be protected as such, was based on the *Draft United Nations Convention on the Protection of Journalists Engaged in Dangerous Missions in Areas of Armed Conflict of 1975*.[789] This convention was drafted by the UN in response to the disappearance of seventeen foreign correspondents in Cambodia in 1970.[790] While the majority of the government experts consulted at the time were in favour of providing special protection for journalists by international treaty, the Steering Committee for Human Rights suggested that the protection should be included in international humanitarian law, rather than a special convention.[791] The arguments for this were that it would be quicker and more effective and would have the added

[789] UNESCO, *New Communication Order 4: Protection of journalists* (Paris: UNESCO, 1985).
[790] *Ibid*, p. 2.
[791] H-P Gasser, "Article 79 – Measures of Protection for Journalists", in: Y Sandoz, C Swinarski and B Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff Publishers, 1987), para. 3252.

advantage of ensuring journalists were made fully aware of IHL. [792] However, the resulting article 79 does not provide any additional protection to journalists over and above that of ordinary civilians as it merely confirms journalists are civilians and should be protected as such and consequently does not provide any of the benefits of the detailed provisions concerning, for example, medical staff in the Conventions of 1949.

Including protection for journalists in the main body of law governing armed conflict, the Geneva Conventions (1949), certainly has its benefits, but there are also drawbacks. Due to the nature of the Geneva Conventions the protection offered to journalists is of a generic nature that does not always match their specific circumstances. As noted, while journalists are civilians, they do often not behave as 'ordinary' civilians in conflict territories. The Geneva Conventions are further not concerned with ensuring that journalists are able to carry out their professional activities, nor do they consider some of the specific risks that are inherent to the journalistic profession. They do not, for example, mention the right to freedom of speech, or a right to access conflict territories for professional purposes.

8.2.1 Special status for journalists

The creation of a dedicated international convention for the protection of journalists would create a special status for journalists under the international legal framework which sets them apart from 'ordinary' civilians and much of the discussion surrounding the creation of a new convention has focussed on this. At the moment religious, medical and civil defence personnel have a special status under IHL.[793] They must be protected and respected at all times and special conditions cover their detention. While journalists are sometimes included in the groups of people who receive special status under the Geneva Conventions, due to being specifically

[792] ICRC, "Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts", Geneva (1947-1977), Vol. VIII, CDDH/I/Sr 31, Para. 11. As most of the work on the drafting of art. 79 was done by a working group which only supplied a short report on procedural matters, little is known of the discussion at this stage.
[793] As well as, to a certain extent, Red Cross personnel. See for example: Artt. 24-32 Geneva Convention I.

named in article 79 of Protocol I,[794] this is unhelpful as it suggest journalists receive more protection than they actually do. The provisions concerning medical and religious staff confer specific rights on this group, over and above those of ordinary civilians, such as treatment as prisoners of war, but they cannot be forced to perform work outside their medical or religious duties and they must be returned to their own party to the conflict as soon as possible, which ensures they cannot simply be detained until the end of the conflict.[795] Independent journalists on the other hand receive no such special consideration and are granted only the 'confirmation' that they are civilian and should be treated as such. While they therefore are specifically named they do not really have a special status under the Conventions.

The most frequently cited argument against opening up the limited group of persons who currently receive special protection under the Geneva Conventions (1949) to a wider category of people is that any extension of such protection is likely to weaken the protection for the existing categories.[796] However, the mere fact that adding a category to those who receive special status under the Geneva Conventions might impact the protection offered to the currently protected groups should not be a reason to withhold protection to a group who may be in need of such protection.[797]

The second most frequently cited argument against granting a special status to journalist under IHL is that the only groups of persons currently privy to such a status are providing direct humanitarian assistance to the local civilian population. It is often argued that journalists do not provide such direct assistance and should

[794] See for example: ICRC, "Other Protected Persons: Humanitarian workers, journalists, medical and religious personnel - overview" (29 October 2010), available at: http://www.icrc.org/eng/war-and-law/protected-persons/other-protected-persons/overview-other-protected-persons.htm; G Verchingel, "Towards a better Protection of Journalists in Armed Conflicts" (2008-2009) 45 *Juridica Falconis*, 435, p. 435.
[795] Artt. 28-30 Geneva Convention I and equivalent provisions in Geneva Convention II, IV and Protocol I.
[796] See for example H-P Gasser, "The Protection of Journalists engaged in Dangerous Professional Missions" (1983) 23 *International Review of the Red Cross*, 3, p. 10.
[797] This argument was similarly made by the Venezuelan delegate during the drafting process, see: ICRC, "Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts", Geneva (1947-1977), Vol. VIII, CDDH/I/Sr 35, Para. 4 (hereafter CDDH/I/Sr 35).

therefore not be included in this group.[798] This is however open to debate. Journalists do perform an important function in conflict zones, which, while not providing direct assistance to the civilian population, indirectly may provide significant assistance. The previous chapter has considered the power of the media in terms of exerting political pressure and influencing policy and strategy. As noted, the media do not have unlimited power in this context, but they can be an important influencer. Journalists can often be the last observers left in a conflict zone.[799] They witness the atrocities of conflict and, unfortunately more often than not, violations of IHL. Reporting such situations to their potentially world-wide audiences allows the public to be informed and political decisions to be made. If there are no observers, there is less pressure to respect IHL, which is likely to impact negatively on the civilian population.[800] As stated by Alan Modoux, former head of information for the ICRC and senior advisor for United Nations Educational, Scientific and Cultural Organisation (UNESCO) on communication and information: "I am convinced that public opinion, conditioned by the media, is an excellent means of bringing pressure to bear on belligerents and is capable of favourably modifying the attitude of combatants to victims protected by humanitarian law".[801]

While journalists therefore provide no direct assistance to civilians, indirectly they may certainly contribute to the protection of the local population caught up in a conflict. This does of course not apply universally to all journalists, as there will be journalists who are only producing propaganda for their government and are not interested in reporting on humanitarian crimes. But journalists taken as a group do carry out this important function of reporting a conflict to an international audience who cannot observe it for themselves, which is why the international community is

[798] See for example: H-P Gasser, "The Journalist's Right to Information in Time of War and on Dangerous Missions" (2003) 5 *Yearbook of International Humanitarian Law*, 366, p. 380; A Mukherjee, "International Protection of Journalists: Problems, practice and prospects" (1994) 11 *Arizona Journal of International and Comparative Law*, 339, p. 436; I Düsterhöft, "The Protection of Journalists in Armed Conflicts: How can they be better safeguarded?" (2013) 29 *Merkourios*, 4, p. 18.
[799] S Kagan and H Durham, "The Media and International Humanitarian Law: Legal protection for journalists" (2010) 16 *Pacific Journalism Review*, 96, pp. 96-97.
[800] *Alley* further argues that a lack of reporting conflicts to wider audiences may in fact prolong such conflicts, thus lengthening the suffering of the local civilian population. See: R Alley, "The Culture of Impunity: What journalists need to know about humanitarian law" (2010) 16 *Pacific Journalism Review*, 78, p. 79.
[801] A Modoux, "International Humanitarian Law and the Journalists' Mission" (1983) 23 *International Review of the Red Cross*, 19, p. 20.

concerned about their safety. Furthermore, special status is awarded by the Geneva Conventions (1949) to those whose assignment exposes them to great risk, such as military and civilian medical personnel and civil defence staff.[802] It can certainly be argued that journalists' assignments expose them to similar risks, especially in light of the rising death toll amongst journalists in conflict zones.

A third argument against creating a special status for journalists under international law is that this would require a definition of the term 'journalist' in order to identify who would be entitled to such protection. There is currently no international universally accepted definition of the term 'journalist' and different countries define the term in different ways. This makes the inclusion of a definition in an international treaty problematic. The current definition used as the basis for article 79 of the Geneva Conventions is: "any correspondent, reporter, photographer, and their technical film, radio and television assistants who are ordinarily engaged in these activities as their principal occupation".[803] This definition would likely not be ideal as it stems from a different era of reporting and precludes those for whom journalism is not their principal occupation, such as some free-lancers as well as all 'citizen journalists'. The convention proposed by the PEC uses a different definition. This draft convention defines journalists in the preamble as "all civilians who work as reporters, correspondents, photographers, cameramen, graphic artists, and their assistants in the fields of the print media, radio, film, television and the electronic media (Internet), who carry out their activities on a regular basis, full time or part time, whatever their nationality, gender and religion". This reflects the recommendation of Article 19, a human rights organisation for the defence of freedom of information and expression, which recommends that "the term 'journalist' should be broad, to include any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication."[804] While defining the term 'journalist' would be difficult, it would not be impossible, though it would require

[802] Gasser (2003), p. 379.
[803] Art. 2a 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.
[804] Article 19, "The Right to Blog – Policy Brief" (2013), p. 2, available at: http://www.article19.org/data/files/medialibrary/3733/Right-to-Blog-EN-WEB.pdf.

important choices to be made in terms of who to include in the protective scope of a dedicated convention, as discussed further below at 8.2.3.

8.2.2 Material field of application

Addressing the field of application of a convention for the protection of journalists, raises the question which situations should be covered? Given the standard dichotomy between international and non-international armed conflict in IHL, can a convention realistically cover both situations?

Non-international armed conflict

As discussed at length in chapters 3 and 4, the current legal framework covering non-international armed conflict is fairly limited and though advances have been made over the past few decades in terms of applicable customary law, these conflicts are still only covered by basic legal norms. While there have been calls to remove the distinction between international and non-international armed conflict under IHL,[805] to do so would require a major overhaul of the current legal framework in its entirety, which is unlikely to happen anytime soon. Achieving stronger and more consistent protection for journalists operating in different types of conflict would therefore be more practical and achievable through a dedicated convention concerning the protection of journalists applicable to armed conflict in all settings. While this would not be without controversy, in theory non-state actors would be bound by such a convention through a variety of legal theories. Either they would be bound through 'legislative jurisdiction', which presumes non-state actors are bound by obligations accepted by the government of the state in which they fight, or the 'principle of effectiveness' which presumes that any party wielding effective power in the territory of a state is bound by the state's obligations.[806] Furthermore they can be bound where international rules are implemented into national legislation, or

[805] See for an overview of this discussion: R Bartels, "Timelines, Borderlines and Conflicts" (2009) 91 *International Review of the Red Cross*, 35; see further for example: JG Stewart, "Towards a Single Definition of Armed Conflict in International Humanitarian Law: A critique of internationalized armed conflict" (2003) 85 *International Review of the Red Cross*, 313; D Willmott, "Removing the Distinction between International and Non-International Armed Conflict in the Rome Statute of the International Criminal Court" (2004) 5(1) *Melbourne Journal of International Law* (online).

[806] M Sassòli, 'Transnational armed groups and international humanitarian law', *HPCR Occasional Paper Series*, Winter 2006:6, p. 12. See further the discussion under 3.1.3 of this thesis.

direct applicability of self-executing international rules.[807]. Common article 3 which applies to non-international armed conflict already binds to a certain degree parties which have not themselves signed up to the Geneva Conventions, where they are party to the conflict, as discussed in detail in chapter 3. They are bound through their state, whose signing of an international convention automatically binds all individuals under its jurisdiction.[808] While this principle is not without controversy, the general argument against extending legal provisions concerning international armed conflict to non-international armed conflict, is that this tends to be problematic as non-state actors do not have the same capabilities and resources as states. This is partly why the provisions concerning non-international armed conflicts are more limited.[809] The suggested provisions for the protection of journalists, discussed in detail below, are however of such a basic nature that there would be relatively few obstacles to application by non-state actors as it predominantly involves humane treatment and non-targeting provisions. Extending the protection of the convention to non-international armed conflict is therefore both practical and would significantly improve on the lack of detailed provisions concerning the protection of journalists in non-international armed conflict.

Internal disturbances or tensions and other violence

Including non-international armed conflict in the scope of a new convention raises the question whether to include situations of international violence which do not meet the threshold of non-international armed conflict under the Geneva Conventions (1949). For conflict to be classed as non-international armed conflict to which common article 3 of the Geneva Conventions applies, there must be "protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[810] Where the threshold is not met, the

[807] *Ibid.*
[808] Pictet (1960), p. 34; Program on Humanitarian Policy and Conflict Research, "Empowered Groups, Tested Laws, and Policy Options: The challenges of transnational and non-state armed groups", *Report on an Interdisciplinary Seminar on transnational and non-state armed groups* (November 2007), available at: http://www.hpcrresearch.org/sites/default/files/publications/Report_Empowered_Groups_Nov2007.pdf, p. 32.
[809] Note, however, that customary law does bind non-state actors to a significant extent.
[810] ICTY*, The Prosecutor v. Dusko Tadić* , Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para.70.

violence is classed as 'internal disturbances or tensions', as discussed in chapter 3 of this thesis. There is little reason why a dedicated convention should not include situations which do not meet the common article 3 threshold in its application, presuming the norms contained in such a convention can be applied by all types of actors. The dangers posed to journalists in situations of 'internal disturbances or tensions' are often similar, if not identical, to those in armed conflict. This further decreases the need to discuss whether a certain level of violence is reached or whether the required level of organisation exists within the armed non-state actor to trigger the application of the convention.[811] A dedicated convention should therefore aim for a wide scope of application which is exactly what the PEC is seeking to achieve with its draft convention, which applies in "armed conflicts and other situations including civil unrest and targeted killings".[812]

8.2.3 Defining journalists

A dedicated convention concerning the protection of journalists in conflict zones is unlikely to be able to function without providing a definition of journalists. Consequently decisions must be made in terms of how 'journalists' should be defined. For example, should only professional journalists be included in its scope or should it extend to citizen journalists?

Functional definition

As discussed above, there is no single universally accepted definition of the term 'journalist' in international law. Any convention will therefore need to define exactly to who it applies. There is much to say for the 'functional' definition as advised by Article 19. This ensures the inclusion of both part-time, full-time, free-lancers and permanently employed journalists. It is further important to specifically include those who are not directly reporting news, but are operating in a supportive role, such as cameramen and technicians, as is done in the PEC draft convention and to a

[811] See for example: ICTY*, The Prosecutor v. Dusko Tadić* , Judgement (Trial Chamber), 7 May 1997, paras. 561-568; ICTY *Prosecutor v Boskoski*, Judgement (Trial Chamber), 10 July 2008, para. 175.

[812] Art. 1 PEC draft convention states that its field of application shall include international armed conflict, non-international armed conflict and "cases of serious internal violence, which includes local conflicts, civil unrest, targeted killings, kidnapping, authorized and unauthorized demonstrations".

significant extent by the Geneva Conventions (1949). They generally face the same risks as the journalists they support and accompany and fulfil and equally important function for the general public, as they play an important role in ensuring the dissemination of information.

Citizen journalists

An important question that remains is whether or not to include citizen journalists in a dedicated convention for the protection of journalists in conflict zones. While the initial reaction is clearly towards including them, especially in the light of the increasingly important role they play in ensuring the public receives information from territories which are difficult to report from by the main-stream media, their inclusion would unfortunately be problematic. It is notoriously difficult to delineate between an 'ordinary' civilian and a citizen journalist. Those citizen journalists who run popular blogs or other media sites and regularly post content can still be relatively easily identified, but those who only occasionally function as a citizen journalists are much harder to separate from 'ordinary' civilians, as this applies to a large section of the modern population. Including all citizen journalists in the scope of a new convention would significantly blur the lines between 'ordinary' civilians and journalists who are performing a public function in conflict zones and are therefore entitled to and in need of special protection. Especially in an age where most people have smartphones, including all citizen journalists in a definition of 'journalist' would mean that the simple act of filming an event on your smartphone with the intention of disseminating it online would result in special protection under the legal framework, which is not practical or realistic in terms of enforcement. It is further likely to lead to a lower ratification rate as such a provision significantly interferes in the relationship between a state and their citizens.

Yet excluding citizen journalists altogether in an age where they are starting to play an increasingly influential role is also not ideal. This concern can be partly addressed by including in any definition of 'journalist' the requirement that they are "*regularly* or professionally engaged", as suggested by Article 19 or "carry out their activities on a regular basis" as suggested by the PEC. This ensures that not all civilians

holding up a camera phone will find themselves within the scope of a dedicated treaty, which would likely lead to significant resistance from a number of governments and reduce the value of such a treaty, while it also ensures that those citizen journalists who carry out significant journalistic tasks on a regular basis and therefore both perform the same function in society as professionally engaged journalists and face many of the same risks those journalists do, are protected under the legal framework.

8.2.4 Harmonising protection for journalists

The major advantage of creating a dedicated convention for the protection of journalists in conflict zones is that it could address some of the current gaps in the legal framework, while harmonising protection for different types of journalists of different nationalities. Reporters without Borders stated in its 2003 *Declaration on the Safety of Journalists and Media Personnel in Situations of Armed Conflict* 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" which is simply currently not the case under the legal framework and should be addressed. A dedicated convention can be tailored to the specific situation of journalists in conflict zones, rather than the general behaviour of civilians as is the case with the Geneva Conventions and their Additional Protocols. By creating a single relatively straightforward convention containing protection that applies to all types of journalists, regardless of their nationality, it is possible to clarify and reduce the rather complicated current situation to basic norms that can be easily communicated to state, and more importantly, non-state actors. This could in turn improve observance of the legal framework in practice and combat impunity.

Mirroring IHL

The content of such a convention should closely mirror current IHL,[813] both treaty and customary law, which could lead to potentially higher levels of ratification of the convention than if subject matter completely new to IHL, and likely controversial,

[813] This has been similarly suggested by Balguy-Gallois, one of the few supporters of the creation of a dedicated convention for the protection of journalists. See: A Balguy-Gallois, "The Protection of Journalists and News Media in Armed Conflicts" (2004) 86 *International Review of the Red Cross*, 37.

were to be included. This is well demonstrated by the UN's attempts at securing international protection for journalists in the early1950s through a dedicated convention, which failed to achieve political consensus as it contained the Western liberal view on freedom of information, which was strongly opposed by the Soviet countries at the time.[814] While there are relevant issues that are currently not covered by IHL, such as access to territory and other issues closer related to human rights which can affect the ability of journalists to perform their professional activities, it would be best to leave such issues outside the scope of a new convention and address these at a later stage, once the physical protection of journalists is better guaranteed than it currently is.[815]

What we are concerned with here is strictly the physical safety of journalists and it is suggested that the content of any future treaty proposal should be limited to this subject matter, as it can form a solid basis, on which further protection can be build. An additional advantage of such an approach is that it is more likely to be able to include protection for local journalists without raising significant concerns surrounding state sovereignty, as it would not confer on them any additional powers, only stronger protection from violence.[816]

Unifying protection at the strongest level

How the current differential treatment under the Geneva Conventions and its Additional Protocols should be harmonised into a single regime suitable for all journalists is, however, no easy matter to resolve. In terms of the different treatment based on nationality the answer can be relatively straightforward. It would be most beneficial for journalists to receive the protection awarded to 'protected persons' under Geneva Convention IV, as this provides the most detailed protection and removes the over-reliance on diplomatic relations, in which factors other than simple

[814] For more detail, see for example: Mukherjee (1994), p. 348.
[815] As noted, this is one of the main issues with the PEC draft convention, which is much more ambitious in this sense as it includes, as noted above, provisions such as: free access to information and to some extent movement (art. 3), a guarantee of operational internet services (art. 2) and compensation for victims of violence against journalists (art. 9) all which are likely to prove controversial in at least some cultures.
[816] While any inclusion of local journalists would affect the relationship between a state and their own citizens, by limiting the inclusion of any rights which are not necessarily available to all journalists everywhere there is likely to be less resistance to the implementation of such a convention.

concern for the safety of journalists can play a role. This is also likely to encounter relatively little resistance as none of the additional protection granted to 'protected persons' is controversial; it simply offers more detailed protection than that granted to 'ordinary' civilians to make up for the anticipated inability of the state to provide protection to its citizens on foreign (hostile) soil. Aside from removing the differences in protection based on nationality which complicate the detailed application of the current framework, it would extend the protection of article 31 of Geneva Convention IV, against physical or moral coercion to give up information, to all journalists in conflict zones, which would, at least in theory, provide valuable protection suited to their function.

If all journalists regardless of their nationality receive the protection afforded to 'protected persons' upon arrest, this ensures that when journalists are detained for security reasons without penal charges, they can have this decision reviewed 'as soon as possible' by an appropriate court or administrative board and there is thus limited scope to detain journalists long-term without charges.[817] When penal charges are brought against journalists, protection can be derived from provisions concerning fair trial. While this does not necessarily protect journalists from excessive charges under domestic law, it does in theory at least provide reasonable protection especially in combination with IHRL.

War correspondents

The issue of the different regimes applicable to independent journalists and war correspondents when detained is more complicated to resolve, as both types of journalists operate in different circumstances. The prisoner of war status for war correspondents would be best left as is, and reiterated in a dedicated convention, as any changes would require a revision of the Geneva Conventions, which is not practical, and the current provisions do not pose a significant risk to war correspondents. The most significant drawback to prisoner of war status, detention until the end of the conflict, is however neither warranted nor desirable for war correspondents. It would therefore be advisable to address this issue by including a

[817] Art. 43 Geneva Convention IV. Where a court does decide internment is necessary this decision must be reviewed at least twice a year.

provision in a dedicated convention equivalent to that of medical and religious personnel, stating that while war correspondents are entitled to prisoner of war status under article 4A(4) Geneva Convention III (1949) they should be returned to their own nation as soon as practical. This would remove this concern and would bring their treatment more on a par with those currently having a special status under the Geneva Conventions. While this solution would not result in a truly single harmonised framework that treats *all* journalists the same, it would provide a base line of protection which is equal for all journalists in both international and non-international conflicts, with additional protection available to those accredited to the armed forces during international armed conflict.[818]

8.2.5 Protective emblem

Should a dedicated convention for the protection of journalists include a means of identifying those journalists in the field, for example through the use of a protective emblem? This suggestion was put forward during the drafting stages of Protocol I,[819] but was rejected at the time. The argument in favour of the adoption of a protective emblem was that it would allow the identification of journalists in the chaos of combat, when checking identity cards would not be practical, which would protect them from 'accidental' targeting due to misidentification.[820] The objections voiced by several delegates at the time were twofold: as journalists receive civilian protection under the Geneva Convention there is no reason to distinguish them from the civilian population; and secondly, making journalists identifiable might actually increase the risks they face in conflict zones, because it would draw attention to them.[821] While the first concern would no longer be relevant if journalists were to receive protection over and above that of civilians, the second argument is still

[818] Extending prisoner of war protection to accredited war correspondents during non-international armed conflict would be desirable, but is unlikely to be practical as there generally is no prisoner of war status during non-international armed conflict. By extending the protection of 'protected persons' to journalists in non-international armed conflict war correspondents in non-international conflicts will at least be entitled to protection which is significantly similar to the protection of war correspondents in international conflict.

[819] ICRC, "Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts", Geneva (1947-1977), Vol. VIII, CDDH/I/Sr 31, Para. 24.

[820] CDDH/I/Sr 35, para 3.

[821] *Ibid*, paras. 8 and 14. Journalists themselves were also not universally in favour of wearing a protective emblem, which was seen as an argument against its implementation, see paras. 10, 12 and 14.

relevant in contemporary discussion on the issue and must be looked at it in more detail.

The discussion surrounding the need and desirability of a protective emblem for journalists has recently been renewed with the PEC's proposed convention for the protection of journalists, which includes the introduction of a press emblem similar to the emblem currently worn by Red Cross personnel in conflict zones.[822] The convention does not make it compulsory to wear the emblem in order to benefit from the protection offered by the convention. The arguments in favour and against implementation of such an emblem have not changed significantly since the discussion during the drafting process of article 79. Some journalists and organisations are in favour, others are against it and arguments concentrate on whether protecting journalists from accidental targeting outweighs the risk of making them an easier target to those ignoring the legal framework.[823] The strongest argument against wearing such an emblem is that in contemporary conflicts a significant portion of journalists are deliberately targeted for violence, rather than killed in crossfire.[824] Where this is the case, making journalists easier identifiable seems problematic and unlikely to improve their safety. Mark Willacy, a foreign correspondent for the Australian broadcasting company argued this exact point when asked about the press emblem, he noted:

> I wouldn't wear it. In conflicts like Iraq, highlighting the fact that you're a journalist was like painting a target on your forehead (…) I just don't think there's enough uniform respect for or understanding about, what we do. We're seen by many sides as

[822] Draft Proposal for an International Convention to Strengthen the Protection of Journalists in Armed Conflicts and other Situations Including Civil Unrest and Targeted Killings (2007) art. 7, available at: http://www.pressemblem.ch/4983.html.

[823] For an overview of key stakeholder opinions on the PEC proposal see: JM Lisosky and J Henrichsen, "Don't Shoot the Messenger: Prospects for protecting journalists in conflict situations" (2009) 2 *Media, War & Conflict*, 129, pp. 140-143; Kagan and Durham (2010), p. 109. For a general overview of the discussion surrounding the PEC proposal see: Davies and Crawford (2013), pp. 2169-2171.

[824] In Iraq, for example, nearly two out of three journalists are killed rather than caught up in the crossfire or "non-targeted" violence, see: F Smyth "Iraq War and the News Media: A look inside the death toll" (18 March 2013) *CPJ*, available at: http://cpj.org/blog/2013/03/iraq-war-and-news-media-a-look-inside-the-death-to.php.

> partisan combatants aligned with the ideology of one side or the other.[825]

Other concerns focus on the problems of policing the use of such an emblem. As with granting protective status to journalists, it raises the question of who would be entitled to wear such an emblem: only professional journalists, or would citizen journalists be equally entitled to its use? The Committee to Protect Journalists has raised the concern that the implementation of such an emblem would require a licencing entity to determine who is and who is not a journalist, which could open the way to establishing international regulatory controls on journalists.[826] However, providing the right to wear such an emblem to an unduly wide category of people, such as citizens occasionally engaging in online journalism would also be problematic. The lower the threshold for the right to wear such an emblem, the more it would be open to abuse, which could seriously affect its protective power. The abuse of the emblems of the Red Cross and Red Crescent is considered a war crime,[827] which assists in combating unauthorised use. Any new protective emblems which provide significant protection in conflict zones to its wearer would need to have similarly strong mechanisms against abuse of the emblem, yet such measures could potentially restrict media freedom. Furthermore, the use of such an emblem could negatively affect journalists who, for example for operational reasons, choose not to wear the emblem as they could potentially be held to be contributory negligent if they were to be harmed during conflict, as they did not properly identify themselves as journalists.

The discussions surrounding the use of a protective emblem raises the question of whether or not a treaty granting special protection to journalists can be implemented without the use of such an emblem and allow for providing proof of status through something less obtrusive such as an identity card. The use of the protective emblems of the Red Cross, Red Crescent and Red Crystal are strongly recommended for those

[825] M Willacy, personal communication, cited in: Davies and Crawford (2013), p. 2169.
[826] CPJ "Who Kills Journalists and why? Report by the Committee to protect journalists to the committee of inquiry" (2005), available at: https://www.cpj.org/2005/05/who-kills-journalists-and-why-report-by-the-commit.php. Similar concerns were raised by UNESCO in the discussion in the 1970s around the UN draft Convention which led to the adoption of art. 79, see: Gasser (1983), p. 11.
[827] Article 8(2)b Rome Statute (1998). See also art. 38 and 85 Protocol I (1977).

entitled to wear them under the Geneva Conventions, though not strictly obligatory.[828] It is not the emblem which constitutes the protection. The protection is granted by the relevant legal framework and the emblem is simply its visual manifestation.[829] For effective protection it is, however, essential that combatants can recognise those entitled to protection.[830] While it is therefore not unthinkable to create additional protection without the absolute requirement of wearing a protective emblem, in terms of targeting during hostilities there can be little practical protection for journalists without a distinctive protective symbol, as it would be difficult to identify those deserving protection. However, upon capture an identity card may provide a similar service as a protective emblem and this could be sufficient to prove entitlement to specific protection. The use of an identity card instead of an emblem has the additional benefit of making protection less open to abuse; without an emblem there would be no additional protection from direct targeting, over and above that of civilians and this is what would be most likely to be abused by non-journalists. Carrying an identity card, while not obligatory under the Geneva Convention,[831] is further already common practice and a card has the advantage that it can be carried unobtrusively and does not set journalists apart in a crowd. As it is not obligatory, it does not carry the same concerns about controls as the obligatory wearing of an emblem does.[832] A convention for the protection of journalists in conflict zones therefore need not be dependent on the willingness of media personnel to wear a protective emblem and could instead include the use of non-obligatory identity cards to provide proof of status.

Due to its controversy, it may therefore be advisable not to include a protective emblem in a new convention as the benefits of doing so are unclear and may affect the support for such a convention.

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[828] Art. 40 Geneva Convention I; art. 42 Geneva Convention II; art. 20 Geneva Convention IV; ICRC, *Study on the Use of the Emblems: Operational and commercial and other non-operational issues* (Geneva: ICRC, 2011), p. 30.

[829] ICRC (2011), p. 30; J Pictet, *The Geneva Conventions of 12 August 1949 : Commentary - Vol. 1, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Geneva: ICRC, 1952), p. 325.

[830] Pictet (1952), p. 325.

[831] See art. 79(3) Protocol I (1977).

[832] There is however some concern here about government control as the identity card under art. 79 "shall be issued by the government of the State of which the journalist is a national or in whose territory he resides or in which the news medium employing him is located" thus leaving it to national authorities to assess who is entitled to such identification, a power which can be abused, though there are currently few complaints about this system.

8.2.6 Loss of protection through direct participation

A dedicated convention mirroring the content of the Geneva Conventions would likely reiterate the point that the media lose their right to protection when directly participating in the hostilities, which is both a basic principle of the Geneva Conventions and of Customary Law. The inclusion of such a provision should however provide a more concrete indication of what can be deemed direct participation by the media than is currently provided by the general provisions concerning direct participation.

In the academic literature there is strong consensus on the fact that journalists 'ordinary' activities are covered by the protection offered to them by IHL and can therefore not be deemed to consist of direct participation in the hostilities which results in loss protection.[833] As there seems to be an increasing willingness to challenge this assertion in practice, it would be advisable to clearly reiterate this point in a legally binding document. Such a provision should make clear that the spreading of propaganda does not constitute direct participation and that journalists are not required to deliver objective an independent content to be entitled to protection under the international legal framework. It should, however, also reiterate that the broadcasting and production of content which incites to war crimes such as genocide is prohibited and will result in loss of protection under the legal framework. Here the specific incitement to *war crimes* should be included in the proposed convention, rather than the occasionally used incitement to *(criminal) violence*, which is not as clearly legally defined and is therefore potentially more open to abuse.

A short provision in a convention concerning the protection of journalists is unlikely to provide clarity in all situations and prevent arguments on exactly when the media can be deemed to be directly participating in the hostilities or what content does and does not lead to loss of protection under the legal framework, as it will remain necessary to assess this on a case by case basis. However, by specifically stating that

[833] Gasser (2003), p. 373.

propaganda is permitted content unless it directly incites to war crimes, there is at least a clear signal that ordinary media activities are protected. This could to a certain extent counter the recent public suggestions by both politicians and international organisations, discussed in chapter 7, that spreading propaganda is a reason to lose protection under the legal framework. It would further force those actors launching a direct attack on media personnel and/or equipment on the basis of the content they produce, to adequately explain the basis for a decision that in the current situation the content is of such an extreme nature that it directly incites to war crimes. This would in turn ensure that the message that journalists should not be subject to attacks and violence, remains as clear as possible and that only in rare and extreme cases the media can be subject to attack.

8.3 Conclusion

It is clear that the current legal protection for journalists in conflict zones, for a variety of reasons, does not provide adequate protection in practice. The death toll amongst journalists is increasing, rather than decreasing and international concern for the safety of journalists is growing. There are a number of international journalists organisations such as the Committee to Protect Journalists, the International Federation of Journalists, Reporters without Borders and the PEC who are all calling for something to be done to provide better protection for journalists. Aside from recommending a number of non-legal measures, such as safety training, the legal recommendations generally focus on combatting impunity. It is clear that this is an area where there is room for much improvement. If the legal framework as it currently stands would be effectively enforced in conflict zones, this would make a tremendous difference to the safety of journalists. It is for this reason that most journalist organisations currently focus on combatting impunity, rather than increasing protection by amending the legal framework. Yet this should not be taken to mean that no further progress can be made through that route.

It is clear that the creation of a dedicated convention for the protection of journalists in conflict zones will not be easy. On the one hand, there are the general difficulties associated with negotiating international conventions, as well as ensuring a sufficient level of ratifications. On the other hand, there are clear difficulties with the subject matter of such a treaty that must be overcome. Specifically, identifying journalists in conflict zones is currently at best a double edged sword. While it may prevent instances of accidental targeting, due to mistaking journalists for combatants, it also makes deliberate targeting, a significant danger, easier. Creating a special status for journalists in conflict zones will clearly be challenging, especially in terms of defining who is and who is not entitled to this protection and will lead to extensive discussion by all parties involved. However, a dedicated convention for the protection of journalists will allow several gaps in the current legal framework to be addressed in a way that few other measures can. It will further raise the profile of protection of journalists, by providing a clear international signal that journalists are entitled to protection due to their specific role and function in providing information on armed conflicts to the public.

The introduction of a convention to enhance protection for journalists along the lines discussed above would significantly improve the current minimalist framework. The convention has the potential to extend the detailed provisions of international armed conflict concerning journalists to non-international armed conflict and by removing the differences in treatment based on nationality, would further significantly enhance protection for local journalists. Clarification of the circumstances which lead to loss of protection for the media through direct participation will combat the widening of the scope of direct participation by journalists and marking media organisations as military targets and the dangerous loss of protection this entails. Finally, such a convention would simplify the current legal framework by creating (nearly) uniform protection for all journalists, regardless of nationality and type of conflict, which could greatly assist understanding of the legal framework, in turn increasing awareness of the relevant legal provisions and helping to combat impunity. While a protective emblem to indicate journalistic status could be included in the subject matter of the convention, it should not be a requirement to receiving additional

protection during conflict, and there are arguments for not taking this forward at this time.

The suggested convention is designed to work alongside the Geneva Conventions, clarifying and extending some of its principles to provide the protection journalists require in modern conflict reporting. It will have an important function in reiterating, confirming and simplifying the legal framework protecting journalists thus improving the legal protection of journalists in conflict zones, while avoiding the low ratification rates which would likely result from including more far-reaching provisions concerning freedom of speech which have been a matter of contention in previously proposed conventions. UNESCO, given its mandate, to contribute to international peace and security and to further universal respect for justice, for the rule of law and for human rights and fundamental freedoms, as well as the significant work undertaken by UNESCO to protect the media and freedom of expression, would be a suitable body to take forward such a convention at the international level.

This thesis has not only set out the case for renewing efforts towards creating a dedicated convention for the protection of journalists, as has been suggested before, but has examined and set out the approach such as convention should take to increase its chance of reaching international consensus and thus significant ratification, as well as the subject matter such a convention should address. Whether the time and effort involved in creating such a convention would be better spent on ensuring effective enforcement of the legal protection that is currently already in place, is open to debate and no easy answer can be provided to this question. There may further be concerns that attempts to amend the current legal framework would cut across the current work plans for addressing impunity. Yet even if this is the case, the often repeated assertion by the ICRC and other organisations that the current legal framework is sufficient and that the increasing death toll amongst journalists in conflict zones is solely an issue of enforcement, is unhelpful in terms of enhancing protection. The current legal framework is not perfect and it does not currently cover all dangers journalists are faced with when carrying out their professional activities. A focus on the issue of impunity may very well be the most effective approach to

increasing protection for journalists, but the simultaneous assertion that the legal framework itself does not require improvement limits debate and research into enhancing protection for journalists in conflict zones in an unhelpful manner and should be avoided.

9. Conclusion

Since the rise of the civilian war correspondent during the Crimean War international treaties concerning the laws of war have recognised the important functions they perform and have attempted to protect them from the dangers of the battlefield. This legal protection changed little up until the Geneva Conventions of 1949. War correspondents were classed as civilian 'support staff', travelling with the military units they were accredited to and, like their comrades in the unit, received protection as prisoners of war upon capture. This protection reflected the standard practice at the time and as little changed in terms of the way journalists operated in the field, there was little reason to adapt the legal framework. This situation changed, however, post-1949. During the conflicts that followed WWII, journalist started to operate independently from the military they had previously been accompanying, preferring to cover conflicts with fewer restraints on their movements. Practice changed to such a significant extend that by the 1970s it became clear that the Geneva Conventions (1949) no longer provided sufficient protection from the dangers of conflict. The increasing death toll amongst journalist saw the incorporation of a new article in Additional Protocol I to the Geneva Convention in 1977, protecting journalists travelling independently from the military in conflict zones. Article 79 confirmed that journalists are civilians and should therefore receive all protection accorded to that class under International Humanitarian Law (IHL), but did not create any additional protection for journalists over and above that of ordinary civilians.

Since 1977 there have been further significant changes to the way journalists operate in conflict zones, as well as their perceived influence on the audience at home and the way in which modern conflicts are conducted in general. Yet no changes have been made to the main body of law providing protection to journalists in conflict zones: the Geneva Conventions and their Additional Protocols. Most worryingly, there has been a significant shift in the culture of respect towards journalists that had previously existed amongst combatants in many conflicts: journalists have gone from being protected by the unwritten rule of 'don't shoot the journalist' to being a direct

target in the hostilities.[834] This change in culture has contributed to a significant increase in the death toll amongst journalists in conflict zones. Reporting from battlefields and conflict zones has always carried risks that are inherent to the situation, but increasing rates of kidnapping and murder are currently worsening conditions. The Iraq War in particular has proved deadly in this sense, as since the start of the invasion in 2003 to the end of the war in 2011, nearly two out of three journalists killed were murdered rather than caught up in the crossfire or 'non-targeted' violence.[835] The legal framework concerning the protection of journalists no longer seems to provide the protection it once did, which raises the question whether it might be time to revise this framework to bring it up to date with the current challenges of conflict reporting.

There have been a number of initiatives from international organisations and NGOs aimed at improving protection for journalists in conflict zones, though none of them have resulted in changes to the legal framework. The current stance of the International Committee of the Red Cross (ICRC), which receives significant support in the academic literature, is that the legal framework as it stands provides sufficient protection for journalists in conflict zones and that the main cause of the rising death toll is the high level of impunity in crimes against journalists. While this thesis does not challenge the assertion that significant improvement can be made by increasing the observance and enforcements of the current legal framework, it does challenge the notion that the current legal framework is sufficient and that there is no scope for increasing protection through amending that framework.

9.1 Current legal protection

The current legal framework protecting journalists consists of IHL, International Human Rights Law (IHRL), and to a certain extent International Criminal Law (ICL).

[834] H Tumber and F Webster, *Journalist under Fire: Information war and journalistic practices* (London: Sage Publications, 2006), p. 167.
[835] F Smyth, "Iraq War and the News Media: A look inside the death toll" (18 March 2013) *CPJ*, available at: http://cpj.org/blog/2013/03/iraq-war-and-news-media-a-look-inside-the-death-to.php.

The protection granted by the legal framework differs depending on the type of journalist, the type of conflict, and the nationality of the journalist.

Under IHL, journalists are only specifically mentioned in two articles: article 4A(4) of Geneva Convention III (1949) which protects war correspondents, that is those journalists which are accredited to a military unit without being a member thereof, and article 79 of Protocol I (1977) which protects independent journalists. As noted, article 4A(4) states that war correspondents are entitled to treatment as prisoners of war upon capture, which provides them, to some extent, with protection over and above that of 'ordinary' civilians under the Geneva Conventions (1949), while article 79 Protocol I confirms that journalist not accredited to the military are civilians and should be treated as such. The extent and the detail of the protection based on civilian status differ depending on nationality, with the strongest protection granted to those nationals that qualify as 'protected persons' under Geneva Convention IV. The application of these provisions, is however limited to international armed conflict, which is no longer the dominant form of conflict. During non-international armed conflict only a very limited number of provisions of the IHL framework apply, which are predominantly concerned with basic humanitarian norms. This gap in legislation is, however, partly addressed by customary law, which contains protection for journalists in both international and non-international conflict. Customary law provides that all journalists operating professionally in areas of armed conflict must be respected and protected. While this ensures that journalists receive the same basic protection they do during international armed conflict, it does not address all issues in the same detail, nor does it fully provide the same protection, as, for example, accredited war correspondents are left without the additional protection they receive during international armed conflict.

Under IHRL there are no rules specifically dealing with journalists, though the provisions dealing with the rights of all civilians are applicable to journalists. There are a number of rights that are part of the main human rights treaties which are relevant to journalists in conflict zones. Some of the most relevant include: the right to life; the right to personal liberty and security; the right to a fair trial and the right

to freedom of expression. Most human rights, the exception being the right to life, can however be derogated from during war or other state of emergency which 'threatens the life of the nation'. Consequently, many of these rights will not provide extensive protection to journalists in conflict zones. Furthermore, human rights norms are based on a vertical relationship between the state and an individual in which the state has significant power and control. Yet during conflict journalists are increasingly under threat from non-state actors, to which IHRL will generally not apply, though it depends on the exact situation. Additional problems are further posed by situations in which both IHL and IHRL apply, but the norms conflict. There is no standard practice in this situation which leads to significant uncertainty for those having to apply the norms in the field. This is further complicated by the fact that IHRL only provides general norms, rather than the more precise rules contained in IHL, and these norms still require a significant amount of interpretation before they can be applied as a legal framework. This is not ideal, especially for combatants with limited or no legal training, who have to establish, on the exact circumstances of the case, which rights apply and which conflicting rights take precedence in a given combat situation. Generally speaking, IHRL is therefore subject to too many limitations to provide significant protection to journalists in conflict zones. While IHRL expresses general norms, which can alert combatants to the fact that their actions towards journalists may be subject to legal constraints, the exact constraints are more clearly identified in IHL.

Under ICL there are a number of limitations on the treatment of civilians during conflict which apply to journalists, though no norms are specifically concerned with them. Whereas IHL and IHRL primarily govern the relationship between the state and individuals, ICL focuses more on the relationship between individuals. It can hold individuals responsible for gross breaches of IHL and IHRL, for which states may or may not have concurrent responsibility. The subject matter of ICL thus overlaps significantly with IHL and IHRL, but it introduces individual responsibility, which especially in terms of non-state actors provides a valuable addition to the protective framework for journalists in conflict zones. As with IHL, ICL consists of both treaty law and customary law, which have now been codified to a significant

extent in the Rome Statute of the International Criminal Court. For journalists it is especially relevant that crimes against humanity (article 7) and war crimes (article 8) are criminalised through the Rome Statute. Crimes against humanity include serious crimes such as murder, rape and torture when they take place as part of a widespread or systematic attack directed against any civilian population and war crimes include grave breaches of the Geneva Conventions (1949) as well as other serious violations of the customs and norms of international armed conflict. The Statute specifically states that certain crimes during non-international armed conflict, such as murder, cruel treatment, torture and intentionally directing attacks against civilians are included in its scope.

9.2 Enforcement

As discussed in chapter 5, one of the main challenges the current legal framework is facing, is a general lack of enforcement leading to high levels of impunity in crimes against journalists. IHL, IHRL and ICL are enforced through different mechanisms by domestic courts and international courts, as well as through non-judicial measures.

IHL is primarily enforced through domestic courts: the court of the state where the violation in question has occurred or the state of which the alleged offenders are nationals. States are therefore required under article 49, Geneva Convention I to "enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches, of the present Convention". State parties must further take measures to suppress breaches that do not meet the threshold of 'grave breach'. The obligations apply to both international and non-international conflicts that fall under the scope of common article 3 of the Geneva Conventions (1949). Where state parties are unwilling or unable to bring prosecution before domestic courts there are a number of international courts, depending on the conflict in which the violation has taken place, which are qualified to hear cases on breaches of IHL.

IHRL is similarly primarily enforced through domestic courts with the option to bring a case before an international court, depending on the international human rights treaty in question and the ratification of provisions allowing individual complaints before international courts. As human rights are primarily enforced against states or state actors, it is important that individuals have access not only to national courts, but also to international courts when national courts are unwilling or fail to provide a remedy for the alleged violation.

ICL has grown in importance over the last decades, as an interpretation and enforcement mechanism of IHRL and IHL, as it introduces individual responsibility for breaches where previously the focus was predominantly on enforcement against states. The enforcement of ICL is still, however, to a significant extend dependent on the willingness of states to cooperate with the process, which can hamper its effectiveness.

What remains a problem in terms of the enforcement of IHL, IHRL and ICL, is that most international courts only offer retrospective assessments of the legality of states' and individuals' behaviour after a conflict has concluded. Their preventive function arises out of ensuring compliance with IHL and IHRL in future conflicts through punishing past breaches, which increases the importance of ensuring that as few breaches as possible go unpunished. Yet practice shows they only have limited affect. The International News Safety Institute (INSI) has noted that 9 out of 10 journalists are killed with impunity,[836] and journalists are increasingly at risk, not just from the dangers inherent to conflict, but from targeted violence which the legal framework clearly prohibits. This leads to the question of why enforcement rates are so low. It is possible to identify a number of social, political and legal factors which all play a role in this context and can significantly disrupt the effective application of any legal framework. One of the primary causes of impunity is the disruption of the functioning of local authorities and the judicial system during conflict, when resources and circumstance may make it impossible to properly investigate crimes and bring

[836] INSI, "Urgent Appeal from the International News Safety Institute" (14 September 2012), available at: http://www.newssafety.org/latest/news/insi-news/detail/urgent-appeal-from-the-international-news-safety-institute-103/.

perpetrators to justice. On the other hand, the resources may be available, but there might be a general unwillingness to apply the legal framework by both state-actors and non-state actors for a variety of reasons, be it cultural, social or political. Finally, impunity can arise from a lack of a clear and concise legal framework, when actors are either unaware of the framework itself, or it is unclear as to how it should be applied. This final cause of impunity provides a strong argument for not ignoring improvements that can be made to the clarity and comprehensiveness of the legal framework when combating impunity.

9.3 Issues with the current legal framework

There are a number of situations which are not, or inadequately, addressed by the legal framework which can endanger the safety of journalists in conflict zones. Some are inherent to the structure of IHL in general, whereas others are more specific to the protection of journalists.

As has been discussed throughout this thesis, international and non-international conflicts are subject to different legal frameworks, with the latter largely lacking detailed legal provisions. This mostly affects war correspondents, or more practically, embedded journalists, who in international armed conflict are entitled to prisoner of war status. While there are downsides to this classification, it does provide additional protection over and above that received by journalists not accredited to the armed forces. This protection is however not available to war correspondents in non-international armed conflicts, when they are only protected by the basic provisions of common article 3 of the Geneva Conventions (1949), which apply to all civilians. While this article guarantees humane treatment, it provides little specific protection. The protection for independent journalists is somewhat less subject to change between covering international and non-international conflicts as they are classed and treated as civilians in both types of conflict. They therefore mostly suffer from the same absence of detailed protection that all civilians are subject to in non-international armed conflict.

Similar issues are caused by the fact that the protection awarded by the international legal framework is not uniform for all journalists. There are significant differences in treatment under the legal framework depending on nationality and mode of operation, which results in a legal framework of which the more detailed provisions applicable to a certain situation are not always easy to determine. The protection is strongest for those journalists who qualify through their nationality as a 'protected person' under Geneva Convention IV (1949) while the protection is weakest under international law for those journalists who are nationals from the state they operate in.

The classification of journalist upon capture further causes some problems, as prisoners of war or 'ordinary' civilians is not a particularly comfortable fit with the situation of embedded or independent journalists. While war correspondents' proximity to the armed forces and their significant access to military information justifies special treatment upon capture, the status of prisoner of war is not particularly well suited to their situation. Prisoners of war are detained for the duration of the conflict in order to prevent them from being redeployed in the conflict. This rationale is however wholly inapplicable to war correspondents who upon capture can consequently be detained for the duration of the conflict without proper justification. Classing journalists as 'ordinary' civilians upon capture is however similarly problematic as they do not behave as ordinary civilians which can arouse suspicion of criminal acts, such as espionage or supporting terrorism, of which journalists often will be innocent. Journalists, for example, collect significant amounts of information, from both sides of the conflict, they are likely to run towards danger rather than away from it and they will seek to access areas which ordinary civilians are unlikely to have an interest in accessing. Such behaviour may result in charges under domestic law of varying seriousness.

Civilians receive significant protection from the Geneva Conventions "unless and for such time as they take a direct part in hostilities" under article 51(3) Protocol I. When journalists are deemed to be 'directly participating in the hostilities' they therefore lose all civilian protection and can be legitimately targeted. In spite of the far

reaching consequences of this provision, there is little clarity, or international consensus, on the exact scope of 'direct participation' in general. Consequently, significant discussion persists over what actions constitute permissible indirect participation, what actions constitute direct participation and when participation commences and ends. Not all countries interpret all components of direct participation in the same way and though the ICRC has attempted to provide clarification through non-binding guidance, significant discussion remains.

In terms of 'direct participation' by the media, there seems to be a significant divergence between theory and practice. According the ICRC guidance, academic literature, as well as rulings by international courts such as the International Criminal Tribunal for Rwanda (ICTR) and the International Tribunal Responsible for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (ICTY), general propaganda, that is propaganda which is used to generate general support for the war effort, does not constitute 'direct participation in the hostilities' by the media, whereas propaganda which is used for the incitement of crimes does. It is however difficult to draw a line between the two, leaving assessments to be made on a case by case basis. In practice, however, there seems to be increasing willingness from different actors to consider the broadcasting of general propaganda as 'direct participation' leading to loss of protection under the international framework. This has resulted in several attacks on television and radio stations in recent years, throughout different conflicts, which is a worrying development.

9.4 Amending the law for the protection of journalists in conflict zones

The suggestion that journalists would benefit from a dedicated international instrument to ensure their protection in conflict zones has long been the subject of academic debate. Interest has in recent years, however, moved away from adapting the legal framework and creating a new convention. The general assertion is now that the legal framework is sufficient but that its enforcement must be improved if we are

to provide better protection for journalists. Focusing on combatting impunity while disregarding the underlying issues with the legal framework is however unwise, as this ignores the influence the legal framework itself has on impunity rates. This thesis has shown that not only are their situations which the current legal framework inadequately addresses, affecting the protection of journalists, the framework itself is also significantly complicated and there is a lack of international consensus on the application of certain important components. To return to the research question:

> Is there scope for increasing the physical protection of journalists in conflict zones through amending the current international legal framework?

The answer must be affirmative. This thesis suggests it is possible, and indeed advisable, to improve the physical protection of journalists in conflict zones by amending the current legal framework through the adoption of a dedicated convention, which would reiterate and supplement the provisions of the Geneva Conventions and their Additional Protocols. While creating a new international instrument is not a small undertaking, this alone should not be considered sufficient reason not to attempt it. Any international convention can only be effective if it receives a high level of ratification. A convention for the protection of journalists in conflict zones must therefore in terms of content and scope attempt to strike a balance between providing general, clear, protective norms, which are realistic and non-controversial in the various cultures which will have to apply it, while still providing journalists with the protection they need. A convention which is over-ambitious in its scope is likely to provide great protection for journalists in theory, but will have little practical affect due to low levels of ratification and observance. It is thus essential to create an instrument which is realistic in its scope. This does however entail striking a compromise between ideal protection and what can realistically be agreed to at an international level and be implemented.

While such a convention can address to a significant extend physical safety and protection from targeting for journalists, it will not be able to address some of the concerns which arise through the domestic legal systems of the country in which journalists are operating. Journalists, due to the way they operate, are particularly

vulnerable to accusation of significant crimes such as spying and terrorism related charges. While ideally a new legal framework would be able to protect them from these, this is simply unrealistic. Placing journalists outside the domestic legal system and granting them an immunity equivalent to combatant immunity in conflict zones would not only lead to significant international resistance, it would also create a situation where journalistic status would be a prime target for abuse by intelligence services and those wishing to do harm, which in the long run is more likely to make journalist suspect than to create the impression of neutral and independent observers. Protection from unfounded charges under domestic legal systems must therefore come through other means. IHRL, which offers significant protection in terms of fair trial and freedom of expression, will be able provide assistance here, though its application and observance must be improved upon. But the creation of a new legal instrument will indirectly be able to provide assistance with this as well. Creating a clear framework, which protects journalists and sets them apart during conflict as a group who, like humanitarian workers, deserve additional protection and should not be the subject of violence, starts to renew the concept of the journalists as an independent observer who has no part in the hostilities. The more this becomes the accepted norm, the stronger the presumption will be that they are not guilty of charges such as aiding terrorism and espionage. Journalists themselves will of course also need to contribute to this by ensuring their behaviour at all times matches their status as independent observers.

The suggested framework would closely follow the protection currently provided by the Geneva Conventions (1949), which enhances the chance of high levels of ratification. It would however extend the current protection available to journalists acting independently in conflict zones during international armed conflict to non-international armed conflict and, ideally, to other situations of violence and civil unrest. It would further simplify the current protection by taking the protection currently only available to those who through their nationality qualify for the status of 'protected person' and extend this protection to all journalists regardless of their nationality, creating a clearer and less complicated legal framework. War correspondents would retain their additional protection during international armed

conflict through their status as prisoners of war, but this would be supplemented by a provision similar to that currently available to medical and religious personnel, that they should be released as soon as practical to ensure they are not detained until the end of a conflict without good cause. Finally, a convention should clarify the concept of direct participation in the hostilities by the media by specifically stating that journalists do not lose their legal protection through spreading 'ordinary' propaganda and will only lose protection should they engage in creating and spreading content which directly incites to violence and crimes.

It is clear that crimes against journalists continue to suffer from disconcertingly high levels of impunity and that the legal framework for protection is clearly inadequately enforced. While it is clear that a viable alternative for the new convention is better enforcement of the current legal framework, we seem to lack a clear method to accomplish this. As noted, there are a number of causes for impunity that can be identified, but in tackling these we should not ignore the underlying issues with the legal framework, which complicate the practical application of the framework and thus exacerbate impunity rates. There are of course further alternative methods that can be employed to enhance protection for journalists. International efforts towards advocacy and education, supported by clear international measures and statements that emphasise the role of journalists as observers and messengers, rather than active participants in a conflict, could make a start towards reinstating the old unwritten rule of "don't shoot the journalists". This would however seek to address a significant cultural shift, which may not so easily be reversed and such measures on their own would unlikely be sufficient to address the increasing challenges journalist face.

The thesis has contributed to the current research in not only setting out a case for renewing efforts towards creating a dedicated convention for the protection of journalists, but by examining and setting out the approach such as convention should take to increase its chance of reaching international consensus and thus significant ratification levels, as well as the subject matter such a convention should address. The proposed convention, closely mirroring the Geneva Conventions (1949) and their Additional Protocols, while supplementing them and ensuring more universal

application, would create a legal framework that is much more straightforward to apply, with fewer variations depending on the circumstances of the case. It would ensure the framework can be understood and thus applied by non-state actors and should simplify application for actors with limited legal knowledge and thus enhance awareness of the applicable norms during conflict. The importance of such a change should not be underestimated. In order for rules to be effective in the chaos of conflict, their application must be straightforward for those having to apply them in the field. As noted by the defence attorney of a Private accused of breaking the laws of war during the war in Afghanistan: "The President of the United States doesn't know what the rules are (…) The Secretary of Defense doesn't know what the rules are. But the government expects this Private First Class to know what the rules are?"[837]

This thesis has demonstrated that journalists do not comfortably fit in the categories in which the current legal framework places them, leaving them without valuable protection when reporting from conflict zones. Yet they need this protection if they are to continue to fulfil their important function in society, informing and empowering populations to participate in society and democratic government. The proposed convention would address some of the main issues with the current legal framework, and while it would not provide significant new protection for journalists, it would provide a new base line of physical protection, on which further, more extensive, rights and protection can be built in the future. It is therefore time to revisit the notion of a dedicated convention for the protection of journalists in conflict zones.

[837] See T Golden, "Abuse Inquiry Yields Little Justice" (13 February 2006) *International Herald Tribune*.

Abbreviations

CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CoE	Council of Europe
CPJ	Committee to Protect Journalists
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
INSI	International News Safety Institute
RTLMC	Radio Television Libre des Milles Collines
RTS	Radio Television Serbia
RwB	Reporters without Borders
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation

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