

Legal Avenues for Ending Impunity for the Death of Journalists in Conflict Zones: Current and Proposed International Agreements

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Every bullet that kills a journalist in a warzone adds passion and urgency to calls for “something” to be done to better protect frontline media workers. International humanitarian law (the body of law that includes the Geneva Conventions) offers some avenues for legal redress, but problems with compliance and policing have contributed to a sense of impunity among perpetrators of these crimes. Consequently, calls for additional laws have re-emerged. This article analyzes the current legal protections, examines a proposed new international convention, and discusses obstacles to ending impunity. It also analyzes whether a new convention would be a useful addition to international law and concludes that advocacy energies would be better spent promoting enforcement of existing laws.

Keywords: IHL, ICRC, LOAC, international humanitarian law, journalism, Press Emblem Campaign, media, combat zones, impunity

Introduction

Changing the way humans conduct wars is a slow process. For example, gaining global agreement about the humane treatment of prisoners of war was once thought to be a hopeless pipedream, but agreements about this and many other aspects of warfare have been struck and are now part of military curriculums and the daily conduct of armed conflict. While the horrors of war often prompt knee-jerk calls for “someone to do something,” 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 the broad support needed to ratify a legal instrument.

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Date submitted: 2013–04–02

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This article takes a cross-disciplinary approach and summarizes the legal details of the current international laws of armed conflict (LOAC), with specific reference to the slaughter and mistreatment of media workers. It builds on the work of scholars such as Lisosky and Henrichsen (2009), in comparing these laws with a popular but unfeasible alternative, in order to highlight the different perspectives on the issue and to emphasize the need for more engagement by media workers and creative arts practitioners in a slower but more pragmatic approach to ending impunity for war crimes. This discussion is relevant to the communications discipline because media workers are communicators and because narratives about war, atrocities, and justice permeate all of the creative and communicative arts.

The first section of this article outlines the current legal protections for media workers in armed conflicts, how they came to be (including reference to previous iterations of many of the current debates), and issues with the laws that cause confusion. The second section summarizes and critiques the Press Emblem Campaign's alternative suggestion. The final section discusses the overriding and ongoing problem of ending impunity for war crimes.

It is not a war crime for a uniformed soldier in an international conflict to kill a uniformed soldier from the opposing military force. But it is a war crime for soldiers from either side to kill a journalist who is not wearing military uniform or holding a weapon. Distinctions about what constitutes war crimes that can be tried in the courts of nations around the world and by the International Criminal Court (ICC) are detailed in the body of law commonly referred to as international humanitarian law (IHL). Promoted by the International Committee of the Red Cross (ICRC), IHL seeks to limit the effects of armed conflict (ICRC, 2004). Also referred to as LOAC, IHL comprises the four Geneva Conventions of 1949, the 1977 Additional Protocols to the Geneva Conventions, and the 1998 Rome Statute (which established the ICC).

So far there are 194 state parties to the Geneva Conventions, 165 to Additional Protocols I and II, and 59 to Additional Protocol III. This means that the laws the conventions outline are embedded in the national laws of 194 states, and they also have the status of being international customary law. Under the Rome Statute (ratified by 122 nation states), serious violations of IHL constitute war crimes, and if there are breaches within their jurisdictions or militaries, the police forces of any of those 122 nations can make arrests and their courts can prosecute the perpetrators. In cases where nations are unable or unwilling to prosecute crimes committed in their jurisdictions or by their troops, referral to the ICC is possible; the mechanisms for this process are described in the Rome Statute.

Over the past decade, one of the most vocal critics of IHL, in terms of the protections it offers media workers, has been the Press Emblem Campaign (PEC), a Geneva-based, non-governmental organization (NGO) that claims special UN consultative status and the support of 50 other NGOs and professional media associations (PEC, 2013). PEC is calling for the introduction of an internationally protected emblem, similar to the Red Cross, to help identify journalists as workers deserving special protection. Both this emblem and the concept that journalists should have a distinct legal status are key provisions of a larger proposed international convention on the protection of journalists in times of war, drafted and launched by PEC in 2007.

Despite PEC's attempts to garner support for its draft convention, the ICRC has not supported the idea. At a 2011 conference, where it outlined a four-year action plan for the Implementation of IHL, the ICRC flagged the need to better protect journalists. But the four-year plan made no mention of enhancing protection for journalists by adopting a new, specific treaty such as PEC's draft convention. PEC seems undeterred. Its website presents its campaign as current and vibrant, and in November 2012, it won the Nicolas Bouvier Award for Journalism for "its outstanding work in defending journalists across the globe" (Club Suisse de la Press, 2012; PEC, 2012, p. 1).

That journalists often find themselves in dangerous situations is not in dispute, nor is the horrific death toll among media workers in conflict zones (Committee to Protect Journalists, 2005). But the existence of and support for PEC, and the position taken by the ICRC in 2011, illustrate that there are differing opinions as to whether stronger laws, a new special legal category, and a new protected emblem would help or hinder attempts to enhance protection. This article will explore these issues.

Part 1: How Did the Current Laws Evolve and What Do They Cover?

As international laws have developed, journalists have been consistent advocates for their own rights and protections (Howard, 2002). Delegates at two meetings of the International Congress of the Press, held in Chicago and Belgium in the 1890s, declared the need for clarification of the role of the press in international affairs (Mukherjee, 1994). They were seeking to extend the recognition given to journalists, building on conflict-related documents such as the Lieber Code of 1863 (which listed the regulations used by the Union armies in the American Civil War). However, it wasn't until the emergence of new international bodies, such as the League of Nations and its successor, the United Nations, that journalists had a centralized international forum to which to direct appeals for greater international recognition.

In 1927, the League of Nations convened a Conference of Press Experts that endorsed several resolutions on media issues, such as the treatment of foreign journalists and the provision of identity cards (Conference of Press Experts, 1927), but none of these resolutions were adopted by member states at the time. The debate aired concerns, however, and important protections for journalists have been adopted by 195 states since 1949, when they were included in the Geneva Conventions.

One of the earlier triumphs of the campaign for recognition of media workers in IHL was securing protected status for journalists captured by hostile forces in some circumstances. Article 50 of the Lieber Code specified that "citizens who accompany an army for whatever purpose, such as sutlers [provisioners], editors, or reporters of journals, or contractors, if captured, may be made prisoners of war, and be detained as such" (Lieber Code, 1863). During debates in The Hague at the 1899 Peace Conferences, a similar provision regarding journalists was included. It was subsequently reiterated in the 1907 Hague Regulations on the Laws and Custom of War on Land, which provided that newspaper correspondents and reporters who follow an army without directly belonging to it are entitled to treatment "on par with" that extended to prisoners of war (PoWs). This provision was also included in the first version of Geneva Convention III on the Treatment of PoWs, in 1929. When the Geneva Conventions were

updated after World War II, the PoW provision was retained and the term “on par with” was removed. Now, as with other PoWs, the fundamental rights of captured embedded journalists (called war correspondents in IHL terminology) in international armed conflicts are legally protected, including the right to humane treatment and protection from acts of violence, such as torture and medical and scientific experimentation, and from insults and public curiosity (Geneva Convention III, 1949).

While this provision offers some protection against torture and summary execution, there are shortcomings to being classified as a PoW. In addition, it is worth noting that this provision applies only to embedded journalists in international armed conflicts, not to nonembedded journalists or to journalists reporting on civil wars. To be covered by the provision, the arrest of the journalist must have occurred during the conflict.

Also, while the safeguards IHL offers PoWs in international armed conflicts are extensive, they have as a central element the concept of detaining PoWs. Detention and confinement—for the duration of hostilities—is problematic for journalists, since the intention behind detaining PoWs is not to punish them, but to remove them from the field of hostilities and prevent them from taking part in the conflict (Fischer, 1995). This point was succinctly noted by Saul (2008), who wrote:

PoW status is a double-edged sword for journalists. While such status carries with it various protections in detention, on the other hand it renders the PoW liable to . . . detention, without charge, until the end of the conflict. Even the protections enjoyed by PoWs do not confer any particular advantage upon journalists, since other civilians detained . . . for security reasons are equally entitled to fundamental protections under humanitarian law and human rights law. (p. 104)

Therefore, describing the potential awarding of PoW status to embedded journalists as “additional protection,” as if it is something desirable, even though it is in some ways worse than the protection extended to civilians, offers scope for confusion and a consequent lack of support for IHL from journalists. This is especially relevant because “embedded journalism” has been widely acknowledged by the media perspective as not ideal (Hirst & Patching, 2005). As former head of Sky News Nick Pollard (2009) put it:

Television coverage of the Iraq war generated intense debate within the industry and the wider world. In particular the use of “embedded” reporters accompanying troops raised the question of whether they could ever be really impartial while relying on the military for safety, transport, food and shelter. Critics also questioned the value of such reporting when correspondents and camera crews were not free to roam beyond the immediate vicinity of the unit they were stationed with. (pp. 122–123)

While this type of rhetoric appears to imply that embedding was a new initiative introduced for the Iraq War, it is an old practice that was only made more noticeable in the case of the Iraq conflict because the U.S. military openly invited practicing independent journalists to apply for accreditation. Embedded journalism’s long history is evident in the Lieber Code; in the definition of “war correspondent”

in the Geneva Conventions; and in the work of veteran embedded war correspondents, such as Ernie Pyle—arguably the most famous American World War II journalist—who was killed by a Japanese machine gun bullet. There was a trend away from using content provided by embedded reporters when Pulitzer Prize-winning journalists Peter Arnett and David Halberstam produced more thorough and nuanced coverage of the Vietnam War than the embedded military reporters did. Their success has led to the current terminology problem between IHL and contemporary journalism, as Arnett and Halberstam are often referred to as famous “war correspondents,” even though they were never embedded—they worked respectively for Associated Press and *The New York Times* at the time.

Another terminology problem is that in IHL parlance it makes sense to refer to journalists who are not embedded as civilian journalists, but in media circles the term “citizen journalist” or “civilian journalist” refers to someone who is not employed by, or selling their work to, a professional media organization. Hence many professional nonembedded journalists would reject this descriptor. Widespread misunderstanding about IHL terminology has hindered attempts to disseminate information about existing legal protections within the journalism community. Illustrating this point about different uses of IHL terms, Pollard (2009) writes:

The Afghan and Iraq wars saw a steep increase in the number of journalists killed on the battlefield, some caught in crossfire, some in “friendly fire,” and others in accidents. It was also clear that journalists no longer had the “protected status” they had enjoyed in other wars and other eras. In many areas of conflict they would be just as likely to be attacked, kidnapped or murdered as soldiers themselves. (p. 12)

The term “protected status” here appears to refer not to IHL legal protections but to an unwritten rule about not killing the messenger, and his term “murdered” is colloquial in that it doesn’t acknowledge the legality of a combatant killing a combatant in an armed conflict under IHL.

Staying with the context of international conflicts (which are the primary focus of most IHL instruments), journalists who are not authorized or accredited by a military unit receive no special recognition under IHL, and are instead covered by Geneva Convention IV (1949), which deals with the protection of civilians in times of war. This means that media workers, including local reporters, fixers (local translators and organizers), freelancers, citizen journalists (who are not paid and who self-publish using social media, blogs or as user-generated content on other sites), employees of news agencies who resist embedding for fear that it will bias reporting, and stringers who produce content and then sell it (as opposed to those who are paid via contract or salary to create content), have no special status under IHL and instead are deemed to be “citizens.” As citizens it is illegal for them to be targeted or attacked, provided they take no active part in hostilities.

The laws of armed conflict were re-examined in the 1970s, and the risks facing all journalists in conflict zones were again acknowledged. The Commentary to the Additional Protocols that arose from the re-examination notes:

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. In some cases, the risks are even similar to the dangers encountered by members of the armed forces, although they do not belong to the armed forces. Therefore, special rules are required for journalists who are imperiled by their professional duties in the context of armed conflict. (Sandoz, Swinarski, & Zimmerman, 1987, para. 3245)

Article 79 of Additional Protocol I (1977) affirms the Geneva Convention IV position that journalists must be protected as civilians and adds "In case of doubt whether a person is a civilian, that person shall be considered a civilian." Recalling that it is legal to kill an enemy combatant engaged in a conflict, this means that if there is doubt about whether a person is a journalist (and therefore a civilian) or an embedded or military journalist or combatant, the default position should be to assume that he or she is a civilian. This is because the legal protection is associated with being a civilian rather than with being a journalist.

As civilians, journalists are also entitled to certain protections if they are imprisoned in relation to the armed conflict that are similar to the protections contained in Geneva Convention III for PoWs. In addition, media equipment is classed as "civilian objects" under IHL, and it is therefore not to be made the object of attack (Additional Protocol I, 1977).

However, as with other civilians, journalists lose their special protection if they take direct part in hostilities, but only for as long as they take direct part. Participation does not include activities such as interviewing, taking pictures, video, or audio recordings, or any other usual journalistic tasks (Sandoz et al., 1987). Even the dissemination of propaganda by a journalist does not amount to direct participation. The International Criminal Tribunal for the former Yugoslavia (ICTY) noted this in its final report on the NATO bombing, stating 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 war effort, it is not a legitimate target. (ICTY, 2000, para. 47)

Whereas Article 79 does not define "journalist," the commentary to the Protocols (Sandoz et al., 1987) states that the word should be understood according to the "ordinary meaning of the term," with reference to the 1975 draft International Convention for the Protection of Journalists engaged in Dangerous Missions in Areas of Armed Conflict, which was not adopted but went as far as stipulating that "the word 'journalist' shall mean any correspondent, reporter, photographer, and their technical film, radio and television assistants who are ordinarily engaged in any of these activities as their principal occupation" (Human Rights in Armed Conflicts, 1975, Annex 1, para. 3260).

This definition is only relevant because journalists defined as such under the Protocol are entitled to obtain government-issued identity cards attesting to their status as journalists. While it is not necessary for journalists to be in possession of a card in order to be protected under IHL as a civilian, it was thought that cards could help distinguish journalists from combatants in such a way that, in the heat of a conflict moment, could save a life.

In light of the PEC Campaign, it is worth noting that while the conferences reviewing the LOAC in the early 1970s were the source of most of the material in the Additional Protocols, Article 79 has different origins. In 1970, France asked the United Nations Economic and Social Council to draft a convention for protecting journalists on dangerous missions, and a number of suggestions were then submitted for consideration at the Conference of Government Experts. In a prequel to the current debate, it was decided (by the mid-1970s) that the protection of journalists engaged in dangerous missions would be better dealt with through an IHL instrument, rather than through an individual treaty. So Article 79 was included in Additional Protocol I, and the 1975 draft International Convention for Protection of Journalists engaged in Dangerous Missions in Areas of Armed Conflict was not progressed.

Since 1977, 172 nations have become state parties to Additional Protocol I (ICRC, 2013a) and at least 20 nations have embedded reference to Article 79 in their military manuals (ICRC, 2013b).

Illustrating the point that laws are at their most useful when they are widely understood, the International News Safety Institute (INSI) has drafted a set of guidelines to marshal the efforts of broadcasters and print organizations to review safety guidelines first drawn up by the BBC in the 1990s and then finessed by UK news organizations at the Newsworld Conference in 2000. Number 4 of the INSI guidelines reads:

Employers should ensure before assignment that journalists are fully up to date on the political, physical and social conditions prevailing where they are due to work and are aware of international rules of armed conflict as set out in the Geneva Conventions and other key documents of humanitarian law. (Cramer, 2009, p. 176)

The International Federation of Journalists also promotes understanding of IHL and Article 79 via its Survival Guide for Journalists (McIntyre, 2003).

The laws discussed so far apply to journalists working on international armed conflicts, defined as conflicts between two or more nation states. Where once international conflicts were the norm, they are now a rarity, eclipsed in number by internal conflicts. A 2002 study categorized the 225 armed conflicts between 1946 and 2001 describing 163 of them (72%) as internal and 21 (9%) as "extra-state" (involving a state and a nonstate group, with the nonstate group acting from another territory). Only 42 (19%) qualified as international armed conflicts (Gleditsch, Wallensteen, Eriksson, Sollenberg, & Strand, 2002).

The laws that regulate noninternational armed conflict are considerably more limited than those for international armed conflict (Bartels, 2009; Byron, 2001; Crawford, 2007). Two instruments regulate

noninternational armed conflict: Common Article 3 of the Geneva Conventions and Additional Protocol II (1977). These provide some basic regulation of conduct in all armed conflict and lay down some basic fundamental protections for those most vulnerable in times of armed conflict—namely civilians, people detained in connection with the conflict, the wounded, sick, and shipwrecked.

Journalists (embedded or otherwise) are not specifically mentioned in either Common Article 3 or Additional Protocol II. Therefore, in internal armed conflicts the PoW status (for captured, embedded journalists) does not apply, and detained journalists all fall into the category of “civilian” and are afforded the same protections as civilians.

Common Article 3 of the Geneva Conventions, states:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting [State] Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

- (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
 - (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 which are recognized as indispensable by civilized peoples.

The wounded and sick shall be collected and cared for. (Geneva Convention 1, 1949, Article 3)

Under Additional Protocol II, civilians are entitled to protection from the effects of the armed conflict (Articles 13–17) and, under Article 4(2), are not to be subject to acts of violence to life and health,

such as torture, mutilation, corporal punishment, hostage taking, sexual violence, terrorism, humiliating and degrading treatment, slavery, pillage, or collective punishment. Under Article 5, any civilian interned in relation to the armed conflict is to be afforded protections with regards to the internment. Should civilians in noninternational armed conflicts face penal prosecution in relation to the armed conflict, they are afforded legal protections under Article 6. And, under Article 18, civilians in noninternational armed conflicts should have access to relief societies and relief actions.

In summary, IHL extends considerable legal protections to embedded and nonembedded journalists in both internal and international armed conflicts. However, the current law does not create a special status for journalists—they are either civilians or, if the conflict is international and they are both embedded and captured, they are legally PoWs. This lack of a special status has been the focus of concern for some press advocates, such as PEC, who argue that the law relating to the protection of journalists should be enhanced and expanded.

Part 2: The Campaign for a Press Emblem and Special Status

The Press Emblem Campaign (PEC) is a nongovernmental, nonprofit organization based in Geneva. Founded by a group of journalists in 2004, it claims the support of “around 50 NGOs and journalists’ associations” (PEC, 2013). The campaign centers on the draft¹ International Convention to Strengthen the Protection of Journalists in Zones of Armed Conflicts and Civil Unrest, which in its 25 paragraph preamble draws attention to

the growing attacks against journalists, targeted killings, kidnapping [which] have changed the dangerous mission of the media profession which makes Article 79 inadequate to deal with the current circumstances that have amplified the problem into a global problem with journalists killed in different regions of the world. (PEC, 2007, preamble, para. 9)

The draft convention comprises 12 articles that draw heavily on International Human Rights Law (which is not the same as IHL). It affirms the protections outlined in the Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights (1966) and highlights that

journalists and media professionals have an essential role to play in order to testify and to make public the violations of human rights and humanitarian law, to denounce those who committed them and ensure the right of victims to justice and to compensation . . . [and] that the freedom of the press and the free exercise of journalism are essential to ensure the right of the public to information in all circumstances. (PEC, 2007, preamble, para. 13)

¹ See also <http://195.186.81.33/pres55/4983.html>

The Scope of Applicability

The scope of the PEC draft convention, outlined in Article 1, covers all times of “war and peace, during international armed conflicts . . . non-international armed conflicts . . . and in cases of serious internal violence, which includes local conflicts, civil unrest, targeted killings, kidnapping, authorized and unauthorized demonstrations” (PEC, 2007, Article 1, para. 1).

The lowest threshold for the applicability of IHL is Common Article 3, which applies in noninternational conflict situations (Cullen, 2010). The vagueness of the threshold in IHL was intentional; it was designed to ensure that any organized, open hostilities between armed forces could fall within its scope, but any

internal disturbances and tensions, characterized by isolated or sporadic acts of violence, do not therefore constitute armed conflict in a legal sense, even if the government is forced to resort to police forces or even to armed units for the purpose of restoring law and order. Within these limits, non-international armed conflict seems to be a situation in which hostilities break out between armed forces or organized armed groups within the territory of a single State. (Sandoz et al., 1987, p. 1319)

The key element for triggering the applicability of Common Article 3 is the degree of organization of the armed forces; this is reaffirmed in Additional Protocol II.

Another difference is that the PEC convention would apply to “all authorities representing a State, as well as all representatives and so-called non-State actors of the civil society, such as criminal networks” (PEC, 2007, Article 2, para. 1), while no reference exists to criminal networks in IHL. Therefore, if accepted and ratified, the PEC convention would be applicable in many more circumstances than current IHL.

Definition of Journalist

IHL protects journalists by categorizing them as civilians, but the PEC convention creates a special category of “journalists” and defines the term as encompassing

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. (PEC, 2007, preamble, para. 25)

The key word in this definition is “work,” which could be said to imply activity for which payment is received. This reading would render the definition problematic because it fails to take into account citizen journalism, a term used to describe “a range of web-based practices whereby ‘ordinary’ users

engage in journalistic practices" (Goode, 2009, p. 1288). Another definition, offered by Jay Rosen (2008), notes, "When the people formerly known as the audience employ the press tools they have in their possession to inform one another, *that's* citizen journalism" (p. 1). Nick Chesterfield, the editor of a news service reporting from an area experiencing oppressive government tactics and civil unrest, offers a similar perspective:

In Papua anyone with a camera will take a photo if they see something happening and this is why we want to expand, because it's extremely dangerous. We want anyone who wants to hold up a camera to be a journalist and we want them to be a safe journalist. There are ways, for instance, in a situation with live fire to ensure that footage is taken without putting yourself or your friends in harm's way. (Cited in Davies, 2012, p. 78)

While it is unclear whether the tensions in West Papua meet the threshold of organization required to meet the definition of an armed conflict for IHL to be applied, the killing and maiming of West Papuan media workers would fall within the broader scope of the PEC convention. But, if IHL was applied, it would protect the citizen journalists as civilians (as long as they were not also taking part in hostilities), while the PEC definition of journalists as people who "work" may rule out protection if they are not being paid for their media work.

These distinctions are problematic because the number of paid journalists an area can sustain is, pragmatically, limited by how many newsworthy events are happening there and by the domestic and global appetite for news about those events. This means that when newsworthy conflict emerges people not "ordinarily engaged" in news content production move into the role of journalist (or fixer) in order to meet the heightened demand from international media outlets. In addition, locals everywhere will "bear witness" when atrocities occur in their neighborhoods and, thanks to the Internet, they can now share what they see with the world, thereby functioning as journalists whether they are paid for their work or not. This makes it virtually impossible to create a legal distinction between journalists and nonjournalists, which is problematic given that a key underlying feature of IHL is the ability to distinguish, for example, between combatants and civilians, and between people actively engaged in the conflict and those not-engaged (*hors de combat*) due to injury.

General Provisions for the Protection of Journalists

Article 2 of the draft convention prohibits any "deliberate attack or aggression, threats, kidnapping or detention directed against a journalist while carrying out his or her functions." This reaffirms the IHL prohibition on targeting civilians and civilian installations and objects—including media installations and equipment. The draft convention also reaffirms that any "attack against the life and physical and moral integrity, notably killing, cruel and inhuman treatments, torture, hostage taking involving journalists" constitutes a war crime. This echoes the provisions of the Rome Statute, which criminalize violations of Common Article 3 by listing them as war crimes (Rome Statute, 1998, Article 8(c)(i)-(iv)). The draft convention also recognizes, as does IHL, that journalists must not take any action that may adversely affect their civilian status, such as being armed or contributing to the hostilities.

A curious contradiction appears in Article 4 of the draft convention. This article calls for all journalists, as defined under the convention, to be afforded PoW status if captured. This is not an inherently problematic inclusion, echoing as it does the rights of embedded journalists in Geneva Convention III, but it is at odds with Article 2 of the draft convention, which prohibits the detention of journalists.

Implementation and Enforcement of the Convention

The remainder of the draft convention covers ambitious issues, such as assistance to be rendered to journalists by state parties, and measures for implementing and enforcing its articles, including commitments by state parties to undertake inquiries into alleged violations of both IHL and the convention, training to be given to military personnel, and training both to and by journalism associations, media organizations, and employers.

The draft convention's provision for the creation of an International Media Committee (IMC) is a key element of PEC's enforcement strategy. Constituted under Article 10, the IMC would comprise independent experts, from both media and other institutions of civil society, charged with collecting "all relevant information on the protection of journalists world-wide." States would then have to report to the IMC on their own compliance with the convention.

The convention also provides that the IMC would be capable of hearing requests submitted by "injured" journalists, their families, or legal representatives for further consideration. If deemed necessary, the IMC would be empowered to establish an independent commission of enquiry to establish the facts and identify the perpetrators. In this respect, the proposed IMC is similar to the International Humanitarian Fact Finding Commission (IHFFC), an organization established in 1992 but yet to be called on to examine an issue. IHFFC is the permanent international body established under Article 90 of Additional Protocol I, "whose main purpose is to investigate allegations of grave breaches and serious violations of IHL" (IHFFC, 2013).

Other provisions in the draft convention would impose onerous obligations on state parties that make it unlikely that the document in its current form will garner the support of many, if any, national governments. These provisions include Article 3(3) giving journalists "free access to information and all relevant documents and to facilitate their movements," Article 6(1) ensuring that journalists are "without exception" given advance warning of military attacks, and Article 6(2) mandating that "media corridors, like those applied to humanitarian workers" shall be established to facilitate the movement of journalists.

The Press Emblem

Along with an expanded scope of applicability and increased protections for all journalists, Article 7 of the draft convention proposes to introduce an internationally protected emblem—an orange circle emblazoned with the word **PRESS** in black sans-serif capitals.

There are two perspectives on this idea. One is that the emblem may protect journalists who are accidentally targeted when mistaken for combatants. The allegedly accidental targeting of two Reuters journalists by U.S. troops in 2007 (Bullmiller, 2010), made famous by the *Collateral Murder* Wikileaks video, is an example of a case where an emblem may have been protective. In addition, the wearing of a distinctive emblem by journalists may help combatants make other targeting decisions—the presence of a journalist in a large crowd may “tip the balance” in favor of the presumption of a civilian designation, rather than the crowd or gathering being identified as hostile. This is one of the stated aims of the convention, which asserts that the “general protection accorded to the civilian population by Humanitarian Law would be reinforced by a more frequent presence of journalists on the ground alongside the victims” (PEC, 2007, preamble, para 21).

But, it is also possible that the obvious presence of journalists in a crowd of civilians could tip the balance the other way. Wearing the emblem could not only make journalists more clearly identifiable (and therefore targetable), it could also make it easier to identify the people who are speaking to journalists, who may as a result be deemed to be civil resistance operatives and therefore also targeted, as has occurred in some oppressive regimes (Beckett, 2006; Davies, 2012; Saul, 2008).

Mark Willacy, an Australian Broadcasting Corporation foreign correspondent, who reported from Iraq during the 2003 invasion (ABC, 2013), summed up three concerns regarding the proposed emblem: First, the targeting issue and journalists’ resistance to wearing it; second, that protective clothing would make it harder to establish empathetic connections with sources and therefore harder to get stories; and third, the risk of emblem abuse by parties to the conflict. In his words:

I wouldn’t wear it. In conflicts like Iraq, highlighting the fact you’re a journalist was like painting a target on your forehead. While conflicts have always been messy, I think modern insurgency/uprising-styled brawls are notable for the high death-toll amongst the press—due largely to the fact we have been specifically targeted (as in, Iraq, Afghanistan, Lebanon . . . and most recently in Syria). I just don’t think there’s enough uniform respect for, or understanding about, what we do. We’re seen by many sides as partisan combatants aligned with the ideology of one side or the other. Wearing that emblem would make me feel less safe. In fact, in 4 years in the Middle East I only wore a flak jacket a handful of times (usually in situations where I didn’t stand out, like in the car). Wearing a flak jacket makes you stand out, can make people suspicious and limits your movement . . . Wearing this emblem would also say to our talent that we somehow should be immune from being shot, when they—civilians, mostly—tend to be the biggest victims of conflict (like the one in Syria now). It doesn’t engender empathy. And who’s to say one side in a conflict doesn’t get a heap of **PRESS** badges made up in an attempt to launch a strike? The whole credibility of the scheme would be shot down instantly. (Personal communication, August 30, 2012)

Willacy’s first concern was noted in the 1970s during the diplomatic conference leading up to the adoption of the Additional Protocols. A proposal was put forward to require all journalists seeking the protection of Additional Protocol I Article 79 to wear a distinctive armband, similar to the one being

proposed by the Press Emblem Campaign. However, as is noted in the commentary to Additional Protocol I,

this proposal was rejected primarily on the basis of the following argument: by making the wearer of the armband conspicuous to combatants, such means of identification might make the journalists' mission even more dangerous; similarly it was argued that in this way the journalists would be likely to endanger the surrounding civilian population. (Sandoz et al., 1987, p. 919)

A press emblem proposal was rejected more recently, in 2000, by the International News Safety Institute on similar grounds. And in 2005, the Coordinating Committee of Press Freedom Organizations described the Press Emblem Campaign as a

well-intentioned response to the appallingly large number of journalists killed [in conflict zones that] . . . ignores the reality that nearly all those journalists who have been killed were either deliberately targeted or caught up in violence where no emblem would have helped them. (CPJ, 2005, para. 23)

Willacy's third concern (the risk of emblem abuse) portends problems with the policing of an emblem. Under IHL, the emblems of the Red Cross and Red Crescent are specially protected (Additional Protocol I, 1977; Additional Protocol II, 1977; Geneva Convention I, 1949; Geneva Convention II, 1949; Geneva Convention IV, 1949) and Additional Protocol III (2005) adds a third protected emblem, the Red Crystal. Misuse of these protected emblems is a war crime (Rome Statute, 1998) and all 193 state parties to the Geneva Conventions are obliged to pursue domestic criminal prosecution of people who misuse them. In addition to concerns that rogue combatants may misuse the PEC emblem to disguise themselves, if the press emblem was given the same status as the IHL emblems, and if citizen journalists sought to protect themselves through unauthorized ad hoc use, they could face charges for misuse of a protected emblem.

Further confusing PEC's position, the draft convention does not mandate wearing the emblem for protection under the convention. As noted in Article 7:

The wearing of the distinctive emblem is optional in all circumstances. Its use is left to the free choice of the journalist and/or his or her employers. No authority may impose the wearing of the distinctive emblem. When a journalist decides not to wear this emblem, he continues to benefit from all the other provisions of this Convention. (PEC, 2007, Article 7, para. 1)

This raises the issue of distinction once again. Since wearing the Red Cross/Crescent/Crystal emblem is mandatory for ICRC staff, it is reasonable to assume that they are identifiable in conflict situations and that people threatening them can distinguish them from combatants. Because of this, it is often said that the real meaning of the emblem is "Don't Shoot." Journalists not wearing a press emblem,

however, may not be easily distinguishable from combatants and/or other civilians—giving assailants a plausible excuse for failing to correctly identify them as deserving of special protection.

In addition, if use of the emblem is optional, and policing of its use is deemed too difficult, then it would function in a similar manner to current practice, which allows journalists the option of identifying themselves (and distinguishing themselves from combatants) via the use of armbands, bibs, or jackets with clearly visible media logos, or the word PRESS. Also, in relation to PEC's choice of the English word "press" in the emblem, lessons could perhaps be learned from the ICRC's experience of the need to expand the Red Cross emblem to include the Red Crescent and Red Crystal in order to avoid association with Western, U.S., or Eurocentric politics (Bugnion, 2007).

Another argument against the introduction of a new protected emblem proffered during the IHL Conferences in the 1970s was concern that it would contribute to "emblem fatigue": the notion that increasing the number of protective emblems would "weaken the protective value of each protected status already accepted" (Sandoz et al., 1987, p. 922).

A further argument raised by the Committee to Protect Journalists (CPJ), connected to the difficulty inherent in defining who is a journalist, was that

a universal press emblem is also undesirable because it would require a licensing entity to determine who is and who is not a journalist. It would open the way to restrictions on the press by encouraging governments to establish regulatory controls identifying journalists to all those who might target them for violence. (CPJ, 2005, para 22)

Yet another reason to be wary of clearly identifying journalists is that, in addition to being targeted for reasons related to the conflict and their reporting of it, foreign journalists are also at risk of being kidnapped by opportunistic criminals seeking ransom money (Brennan, Bonney, & Brennan, 2011).

Given the prevalence of kidnapping, and the above-mentioned critiques raised in the IHL Conferences and by other journalism associations, it seems ill-advised to mandate the identification of journalists. And yet, despite the many objections that have been raised about the introduction of a protected press emblem, Chris Cramer, who has held senior roles at CNN, the BBC, and Reuters, wrote in 2009 that the "controversial debate is still very much on-going" (2009, p. 177). Evidence in support of this observation can be seen in the accolades showered on PEC through the Nicolas Bouvier Award in late 2012.

Part 3: The Way Forward

So far this article has examined the history of efforts to establish legal protection for journalists working in contexts involving warfare and compared existing IHL instruments with a proposed instrument that would (in the unlikely event of its being signed and ratified) provide more legal protections. Whereas the PEC convention lays down the alleged inadequacy of IHL (specifically Additional Protocol I Article 79)

as a tenet underlying its creation, it also calls for resources to fund better enforcement of IHL (PEC, 2007). In doing so, it points to the gap between the ideal described by IHL instruments (assuming complete compliance) and the reality reflected in the death toll of media workers in conflict zones. Asked in late 2012 why so many journalists were being killed, Joel Simon, executive director of the Committee to Protect Journalists, said, "What . . . is absolutely determinative is impunity. In country after country, if the killers of journalists are not brought to justice, then the cycle of violence is perpetuated" (Sara, 2012, para 11).

Perhaps the most serious shortfall of the current protections offered by IHL is that referral to the International Criminal Court (ICC) is required in cases where governments are reluctant or unable to try their own war crimes, and resources limit the prosecution rate of the ICC. If the crimes are committed in any of the 122 countries that (so far) have signed the Rome Statute, then the crimes can be tried by those nations, or any other signatory nation, or referred to the ICC by the nation itself, or by any other signatory nation. The only way for crimes committed in nonsignatory nations to be referred to the ICC for prosecution is *a priori* (by the will of) the prosecutor or by order of the UN Security Council, requiring sign-off by all five permanent members. The ICC is still new, however, and in the process of trying its first cases—it handed down its first verdict in 2012. This fledgling process has left many war crimes languishing unprosecuted, contributing to a sense of impunity in many areas experiencing armed conflict.

In 2009, another issue was poignantly illustrated by journalist Janine di Giovanni in her account of an incident in an Abidjan cattle market where a government soldier pointed his rifle at her heart while she tried to drag an injured man into a taxi. In her words:

So I argued badly—telling this soldier who probably could not read or write about the Geneva Convention, the rights of man, and Christian compassion. His impatience was turning to rage when another journalist pulled me back into our taxi and said, "This is Africa, what the hell were you thinking?" (Di Giovanni, 2009, pp. 5–6)

Her anecdote highlights the efforts still needed to disseminate information about IHL, as awareness of legal repercussions enhances their deterrence effect and encourages compliance. One wonders whether journalists and other stakeholders might not be better off putting their time and effort into advocating for such enhanced awareness of and compliance with IHL. Other actions that could be called for by media that may enhance the effectiveness of IHL, include more prosecutions of IHL breaches by nation states to increase the fear of prosecution and better resourcing of the ICC. These alternate paths of action that the media could take are especially relevant given the lack of support PEC's campaign has received from some international journalism organizations, such as INSI and CPJ, and its vocal criticism of the adequacy of IHL.

The other major rebuttal of PEC's 2007 draft convention, which essentially rehashes arguments considered in the ICRC conferences of the 1970s, came at the 31st International Conference of the Red Cross and Red Crescent in 2011. At this conference, the ICRC outlined its *Four-Year Action Plan for the Implementation of International Humanitarian Law*. Objective three of the plan was entitled "Enhanced protection of journalists and the role of the media with regard to IHL." In contrast to PEC's call for a

special status for journalists, objective three reaffirmed that journalists are civilians and should be protected as such. It also called for states to include specific components of IHL and the protection of journalists in training of state-armed forces, train journalists in IHL and security, and enact adequate domestic legislation to prevent and sanction serious violations of IHL against civilians, including journalists (ICRC, 2011, pp. 7–8). While the states represented at the conference were party to developing these objectives, little or no media attention has been devoted to watchdogging governments to ensure that they are following through and acting on these initiatives.

In summary, while attempts by journalism organizations to remind the international community of the importance of protecting journalists are an understandable reaction to ongoing impunity for atrocities, the introduction of a new treaty would arguably not change the current situation. In addition, ongoing vocal support and promotion of the Press Emblem Campaign by parties who have not considered these issues could undermine efforts to promote enforcement and respect of existing IHL provisions (given that Article 8 of the draft convention denounces Article 79 as “ineffective”). The value of the existing laws should not be underestimated, as there is widespread international support, both among state parties to the IHL instruments, and in states that have included Article 79 in their domestic laws of armed combat. Promotion of these existing laws and extension of IHL’s social license to operate may well be more constructive than calling for a new treaty in efforts to create meaningful change in global attitudes and the conduct of warfare.

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