

A CRITICAL EXAMINATION OF THE DISPARATE PROTECTION REGIMES FOR WAR JOURNALISTS UNDER INTERNATIONAL LAW*

Abstract

This paper examines the different categories of journalists engaged in war reporting. They are categorized as war correspondents, embedded journalists and independent journalists with disparate protection regimes. Journalists are naturally exposed to the same level of risks in the war zones as they strive to update the public on the goings on at the war zone irrespective of nomenclature. Being civilians, they are not to be targeted so long as they did not engage in acts that jeopardize their civilian status. However, the paper found that war correspondents and embedded journalists enjoy additional protections under humanitarian law regime. It is argued that the protection disparity in favour of war correspondents is quite unnecessary for the fact that they all are first civilians and equally exposed to the same level of danger in the course of their job. Although the paper did not advocate a collapse of the classifications, it however, criticizes the special protection afforded war correspondents for the reason only that they have the authorization of the armed forces they accompany and took the view that journalists' protection under customary international law and international human rights law is preferable to that under international humanitarian law.

Keywords: armed-conflict, civilian, hostility, journalist, protection, war

1. Introduction

Journalists or the media are important and integral part of every armed conflict, apparently for their roles in the minute by minute updates on happenings in war zones.¹ Apart from this, the media, whether electronic, online or print are at the same time seen as source of intelligence and other 'war aids' to the parties in conflict.² Most times the journalist or media is critically viewed in this latter perspective with the attendant consequence of attacks by any of the parties to the conflict, especially when such a party feels jeopardized by their activities. It is also for this latter reason the journalist is at times targeted by belligerents with some killed and others wounded or taken hostage. Their role as the watchdog and witness to the horrors of war in addition to the undeniable power of the word and image they spread has made them popular targets,³ witherward the respect and protection the law entitles them⁴ so long as they do not violate the code of their profession.⁵ For purposes of their protection regimes, war reporters have been classified as war correspondents, embedded journalists and independent journalists. This classification does not immune from the professional hazards which do not see journalists according to the classifications. Against this background, the paper argued that classification of journalists for the purposes of protection parity on one hand is unnecessary, and on the other hand, irrespective of what name some of them are called, they remain journalists and civilians like others for that matter and as such should not entitle to any special protection over and above others. The differences in names or nomenclatures as to types of journalists notwithstanding, they all by their very primary civilian status come under the same protection module which makes differentiation unnecessary in the first place since they all engage in dangerous professional missions in areas of armed conflict.

2. Journalists' Horror: A Thumbnail

In 2003 forty-two journalists were killed, a record high in eight years (since 1995).⁶ According to reports the record of journalists' death within the period was more than the number of deaths among the rank of the coalition armed forces.⁷ Other incidents of journalists' horror include the deliberate targeting in occupied territories in the Middle East; the bombardment of Radio Television Serbia ('RTS') in Belgrade in 1999 by

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¹I Dusterhoft, 'The Protection of Journalists in Armed Conflicts: How can they be Better Safeguarded?' [2013] (29) (76) *Utrecht Journal of International and European Law* 05.

²*Ibid.*

³*Ibid.*, 04.

⁴*Ibid.*

⁵A J Colangelo, 'Manipulating International Criminal Procedure: The Decision of the ICTY Office of the Independent Prosecutor not to Investigate NATO Bombing in the Former Yugoslavia', [2003] (97) (3) *Northwestern University Law Review* 1413.

⁶A Balguy-Gallois, 'The protection of journalists and news media personnel in armed conflict', [2004] (86) (853) *International Review of the Red Cross* 1.

⁷*Ibid.*

NATO⁸; the American army bombing in Kabul and Bagdad of Al-Jazeera on 8 April 2003⁹, *et cetera*. Every armed conflict has a human cost dimension which occurs during military operations and may be collateral or as a result of direct targeting. This has been the bane of journalists, right from time.¹⁰ Not surprising, it alarmingly has become a weird reoccurring decimal the number of journalists who ‘disappear, threatened, arrested, mistreated and/or killed¹¹ during armed hostilities.

According to the Committee to Protect Journalists (‘CPJ’), at least forty six journalists died on line of duty most of which happened during the Arab Spring¹² In 2011 the number of detained journalists hit 179-mark since 1996¹³ worldwide. Similarly, in 2012 19 journalists were hacked down in cross fire, 17 of them in Syria.¹⁴ It might be correct to say that the killings of journalists during armed conflicts have had a phenomenal rise since 2003 (depending however on the intensity of the conflict) peaking in 2009 with 74 casualties. This development could be attributed to two major factors: first, belligerent forces in a bid to subdue the adversary hardly respect the *jus in bello*- (laws that govern the conduct of warfare)¹⁵ even where they have been summarized and incorporated into the field manual of the belligerent. In this desperation, brazen violations of rules of engagement with respect to victims of armed conflicts¹⁶ and other categories of persons the law confer special respect and protection happen. Since the duty of the war journalist is primarily to report events from the theatre of war including violations, they automatically become targets of the party in breach. The second factor has to do with the kind of weapons belligerent armed forces deploy during hostilities. Some of these weapons are of such character that even their users most times are unable to limit their effects on military objectives. In this category are weapons such as missiles, drones and lately but more deadly the ‘Lethal Autonomous Weapon System’ (‘LAWS’), otherwise known as ‘killer robots’.¹⁷ They have the ability to select and engage targets based on programmed constraints and descriptions without significant human control.¹⁸ This negative trend is the result of advancement on weaponry. It puts belligerents at loggerheads with the limitations the law prescribes in their choice of weapons¹⁹ since some of them are deployed without cognizing the effect they could have on non-military objects.

Additional Protocol I is quite explicit on the rights of belligerents with respect to choice of weapon, it states that, ‘In any armed conflict, the right of the parties to the conflict to choose what weapons and tactics to use is not unlimited’.²⁰ It is therefore a breach of this restriction for a party to the conflict to employ weapons, projectiles and materials including method of warfare capable of causing superfluous injury or unnecessary suffering.²¹ Furthermore and awfully unfortunate is the inability of these modern weapons to, on their own identify what military targets or objectives are as required by the principle of distinction. These weapons lack the ability to exercise restraint or to decide against launching an attack in the event of contrary revelation just before the proposed attack. Like robots that they are, once they take off it becomes a journey of no return, even if the target later proved to be an unlawful one.

One cardinal safeguard against unlawful targeting in the business of war is the principle of distinction, that is, the ability to distinguish between combatants and objects that offer military advantage from civilians and their objects. This forms the hallmark of a professional and disciplined army, a practice that is fast disappearing among belligerent forces in modern armed conflicts; a complex task though, but more for the

⁸A Laursen, ‘NATO, The War over Kosovo, and ICTY Investigation’, [2002] (17) (4) *American University International Law Review* 770.

⁹L Bryant, ‘French TV Reporter’s Death Highlights Journalism Dangers of Arab Spring’, available at: <www.voanews.com/world-news/middle-east-dont-use/frnc...> Accessed 2/11/2021.

¹⁰*Ibid.*

¹¹Dusterhoft, (n 1) 06.

¹²*Ibid.*

¹³*Ibid.*

¹⁴*Ibid.*

¹⁵Especially the limitation placed on the parties in their choice of weapon by the AP I in article 35(1) and; strict adherence to the principle of distinction between military and civilian objects in launching attacks.

¹⁶These victims could be civilians who are already displaced or still in their original habitats or wounded and sick military personnel of a party to the conflict.

¹⁷These weapons are known to have been developed by countries like China, Israel, Russia, the UK and the USA.

¹⁸‘Robot killers’, available at: <www.low.org>. accessed on 30/10/2021.

¹⁹See AP I, article 36.

²⁰*Ibid.*, article 35 para. 1.

²¹*Ibid.*, para. 2.

foregoing factors²². It goes without saying that these new weapons further worsened the already precarious situation of journalists who, in their quest for professionalism in their reportage do not only go to the battle zone but at times right on the battle lines of belligerents where some of them have been hacked down, not because they hadn't their identification badges on, but for the inability of these scientifically teleguided weapons to identify them.²³ This calls for immediate action by the international community to discourage or ban the use of these robots so that the humanity international humanitarian law advocates even in worst situations of armed conflicts does not become a mere platitude.²⁴ Now the question: what protection does the law provide for journalists who accompany combatants to the war zone? It is pertinent to first identify the different types of journalists before situating each of them within the relevant laws that provide for their protections. For this purpose, three types of journalists, namely - war correspondents, embedded journalist and independent correspondents have been identified.

3. Classifications of War Reporters/Journalists

War Correspondents

War correspondents, or specialized correspondents as they are also called, are journalists who cover stories first hand from the war zone. Their job of reporting on the armed conflict bring them to the most conflict ridden parts of the world as their calling is to cover stories and issues related to war. They are specialized journalists who are present, with the authorization and under the protection of the armed force of a belligerent, on the theatre of operations and whose mission is to report events as they happen live in the battle field.²⁵ In other words, formal accreditation by a party to the conflict is a cardinal feature of war correspondents. This definition is similar to the one by the United Nations Security Council's Resolution 1738²⁶ which has been reproduced in the Green Book of the British Armed Forces²⁷ with emphasis on authorization by a belligerent as a distinguishing feature from other types of journalists²⁸. It appears, arguably though, that the nomenclatures used for the different types of journalists is basically to situate them in their appropriate protection regimes and probably too, a measure of the amount of risks they are exposed to. According to Alexandre, 'war correspondents belong to the ill-defined category of persons who follow armed forces but are not members of the military themselves'²⁹. But it can be argued that this mark of distinction by Alexandre will eventually melt away thereby collapsing all war reporters who find themselves in the war zone with or without authorization, especially against the backdrop of the definition in the Draft International Convention for the Protection of Journalists Engaged in Dangerous Mission in Areas of Armed Conflict³⁰. Furthermore, they are civilians by battle field characterization irrespective of what name they are called and by this status benefit from the protection the law affords civilians.³¹ However, a part from this general protection for civilians, war correspondents are also accorded prisoner of war treatment, the consequence of combatants' status by the third Geneva Convention³² though not members of the armed force. In its article 4A it states:

²²E A Oji, 'The Problem with International Humanitarian Law: Distinguishing Targets in Armed Conflict', [2013] *NAUJILJ* 3.

²³In the Armenia-Azerbaijan conflict for instance which broke out on September 27, 2020, it was reported by the Committee for the Protection of Journalists (CPJ) in its safety advisory in covering the conflict that as of October 9, over 300 people had been killed. According to international media reports, on October 1 report had it that at least four journalists covering the war were injured in a shelling attack in the town of Khojavend, known locally as Martuni, in the break-away Nagorno-Karabakh region of Azerbaijan. See CPJ: At least 4 journalists injured covering Nagorno-Karabakh conflict', available at: <cpj.org>2020/10>at-least-4journalists-injured coveri...> accessed on 17/11/2021.

²⁴F Alkali, 'A world free from nuclear weapons: a call to action from Nigeria', available at: <<https://blogs.icrc.org/law-and-policy/>>. Accessed 28/10/2021.

²⁵Dusterhoft, (n 1) 08.

²⁶UNSC Res 1738 adopted at 5613th meeting of 23/12/2006, SC/8929.

²⁷Dusterhoft, (n 1) 08.

²⁸*Ibid*, 08.

²⁹Balguy-Gallois, (n 6) 3.

³⁰A journalist according to article 2 of the Draft Convention refers to "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". According to Y Sandoz, *et al*, *Commentary on the Additional Protocols of 8th June 1977 to the Geneva Conventions of 12th August 1949* (ICRC 1987) 921 para 3263 the phrase "dangerous professional missions in areas of armed conflict" connotes any professional activity exercised in an area affected by hostilities is dangerous by its very nature and is thus covered by the rule. It is not necessary to give a precise geographical delimitation of such "areas of armed conflict" from either a legal or a practical point of view. In fact, journalists enjoy the rights to which they are entitled as civilians in all circumstances.

³¹AP I, articles 50 paras 1 and 2, and 51 para 3.

³²GC III, 'Relative to the Treatment of Prisoners of War', (also known as prisoner of war convention), article 4A4.

Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: Paragraph 4: ‘Persons who accompany the armed forces without actually being members thereof, such as ... war correspondents ... provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card ...’.

This provision is considered an elaboration of the customary law provision in the 1863 *Lieber Code* which states that, ‘citizens accompanying the army, such as reporters, should, if captured, be considered Prisoners of War’.³³ As a corollary to the authorization, they are to be issued with identity cards by the military in the form prescribed by the Convention for the purpose of identification by the adversary. It might be asked why a party to an armed conflict would want to particularly be accompanied by journalists based on its authorization, notwithstanding that they (journalists) are by their calling entitled to free access to war zones without any prior authorization. It is not clear what informed this practice. However, one thing that readily comes to mind is, probably, the military desires that its activities be reported by ‘its own’ journalists who have this role as their primary assignment. Assuming without being conclusive on the afore-stated probable reason for this; will these journalists be courageous enough to remain objective and unbiased especially that they are under the cover and protection of the party they accompany? In the event of undue influence by the authorizing party occasioning unprofessional conduct by the journalists against the opponent’s interest, will the protection against attack on them inure? With respect to the likely reason for journalists’ accreditation, the significance of this comes to the fore when considered against the backdrop of the need to ensure the protection of journalists generally and now fortified by the attribution of prisoner of war status by reason of such authorization. It must be buttressed here that, both the third Convention and the *Lieber Code* are on the same page on this, except that the convention makes accreditation and issuance of identity card by the military further proofs³⁴ of that fact which makes it better and tidy; and the condition for the acquisition of prisoner of war status.³⁵ It helps the military to define its scope of protection for accompanying civilians under its unit. As regards undue influence, the journalist is torn between his obligation to professionalism on one hand, and satisfying the party he accompanies on the other hand and pit his protection against the adversary.

In sum, the journalists’ job, viewed from whichever angle is no doubt a delicate and dangerous one. They need the understanding of all concerned to enable them do their work objectively. Geneva Conventions I³⁶ and II³⁷ both have verbatim provisions on the protection of this specialized type of journalists³⁸, so called because of the formal permission and the identity card they hang.³⁹ Their primary assignment is to report the activities of the armed forces they accompany⁴⁰. As observed earlier, a lot of caution is required by them in order to remain objective so as not to jeopardize their status as non-active participants in hostilities.

Embedded Journalists

Embedded journalists are quite similar to war correspondents. They are not members of the armed forces just like war correspondents and by status, civilians. An embedded reporter or journalist is a war reporter attached to a military unit involved in an armed conflict⁴¹. Although the term is applicable to many historical interactions between journalists and military personnel since the WW I, its popularity blossomed during the 2003 invasion of Iraq by the US led allied forces. Embedded reporting is defined as ‘living, eating and moving in combat with the units that the journalist is attached to’.⁴² Article 4 A4 of GC III enumerates categories of civilians accompanying the military for purposes of prisoner of war status, among which are war correspondents to the exclusion of other types of journalists and thus raise the question; whether embedded journalists qualify for prisoner of war treatment upon capture. Solis is of the opinion that all who

³³Lieber Code 1863, article 50.

³⁴D J Hessel, ‘The Pen and the Sword: International Humanitarian Law Protections for Journalism’, [2016] (14:415) *The Yale Journal of International Law* 419.

³⁵J S Pictet, (ed), *ICRC Commentary on Geneva Convention III OF 1949* (ICRC, 1960) 64-65.

³⁶GC I, article 13(4).

³⁷GC II, Article 13(4).

³⁸Dusterhofs, (n 1) 10.

³⁹Hessel, (n 34) 419.

⁴⁰*Ibid*. See C Pilloud, ‘Protection of journalists on dangerous Missions in Area of Armed Conflict’, 118 *INT’L REV. RED CROSS* 3, 4-5 (1971), Cited by Hessel, (n 34) 419.

⁴¹The same description goes for a political reporter attached assigned to follow and report on the campaign of a candidate.

⁴²Dusterhofs, (n 1) 08.

legitimately accompany the military to the battle field are prisoners of war if captured⁴³. He cited several examples that suggest the inclusion of other categories in the company of the armed force of a party to an armed conflict⁴⁴. In this respect, the plausible view is to consider the phrase ‘war correspondents’ as referring to all journalists who report events on armed conflict irrespective of their location and description. If this is taken, the embedded journalist automatically fall within the definition in GC III article 4 A4. In addition, from the affinity that exists between embedded journalists and the combatants, it is not likely that this can happen without the formal authorization of the party to whose armed forces they are attached even though there is no express mention of it in the article.

Independent Journalists

Independent journalists are no less part of occupational journalism. Being members of the same profession, independent journalists have so much in common with war correspondents except that the latter is distinguishable by formal authorization to accompany the armed forces; and the prisoner of war treatment they enjoy upon capture. Compared to embedded journalists one finds a lot of similarities: both of them are not authorized by the government or the military whose armed forces they follow; although the embedded journalist is glued to the combatants, like independent journalists, he is not given prisoner of war treatment if captured; and both of them only benefit from the protection afforded by GC IV.

4. Protection Regimes for Journalists

In addition to the prisoner of war status for war correspondents which is a result of their secondary status, they are civilians by their primary status as are embedded and independent journalists and are protected equally by a trio of norms, namely – international humanitarian law, customary international humanitarian law and international human rights law.

International Humanitarian Law

Article 50 AP I define a civilian to mean ‘... any person who does not belong to one of the categories of persons referred to in article 4A 1) 2) 3) and 6) of the third Convention and in Article 43 of this Protocol ...’⁴⁵ It does mean that war correspondents are bloody civilians in every sense of it, but once authorization is given by the government or the military they accompany, they automatically acquire additional status of prisoner of war and are so treated in the event of capture. A comprehensive and somewhat detailed provision on the protection of journalists generally is to be found in article 79 of AP I as follows: 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.⁴⁶ Article 79 was included ‘as a specific provision relating to journalists in the body of international humanitarian law’ which obligates parties to international armed conflicts to accord journalists special protection having regard to the hazards and risks they are exposed to in battle fronts. This protection entitlement to war correspondents and indeed, other types of journalists is directly connected to their dangerous roles in conflict areas and at the same time has provided the criteria upon which the definition of journalists should be based. In its Commentary on article 79 of AP I, the ICRC suggests in paragraph 3261 that, ‘the term ‘journalists’, is understood in a broad sense’,⁴⁷ taking cognizance of the definition in the Draft International Convention for the Protection of Journalists engaged in Dangerous Mission in Areas of Armed Conflict.⁴⁸ A journalist according to the Draft Convention refers to any correspondent, reporter, photographer, and their technical film, radio and television assistants who are ordinarily engaged in any of these activities as their principal occupation⁴⁹. Although this definition has no force of law, it is nonetheless extant and a pathfinder to the understanding of the scope of the meaning of journalist by deliberately expanding its sphere of application. Included in this definition are technical film, radio and television assistants who are not present in the battle field but in studios to further

⁴³G D Solis, *The law of Armed Conflict* (Cambridge University Press, 2010) 199.

⁴⁴*Ibid*, 198.

⁴⁵AP I, article 50(1) provides; ‘A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A 1), 2), 3) and 6) of the Third Convention and in Article 43 of the Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian’.

⁴⁶AP I, article 79(2).

⁴⁷Y Sandoz, *et al*, (n 30) 921 at paragraph 3261.

⁴⁸‘Preliminary Draft International Convention on the Protection of Journalists Engaged in Dangerous Missions’; via *General Assembly resolution 2673 (XXXV) of 9 December 1970* in which it invited the Economic and Social Council to request the Commission on Human Rights to study the possibility of preparing a draft international agreement ensuring the protection of journalists engaged in dangerous missions... available at: <digitallibrary.un.org/record>. Accessed on 17/11/2021.

⁴⁹*Ibid*, article 2.

develop and air news with motion pictures (in the case of television) from time to time as their colleagues in the war front transmit to them. Two issues might arise as a result, namely: the fate of the radio and television stations and their workers in the event that they air or relay news that the manner in which it was generated violates their protection code in the form of propaganda; and what should be the red line between mere and provocative propaganda. In the first scenario, it is not possible for the journalist to lose both ends as a 'combatant'⁵⁰ (in the case of war correspondents) and as civilian. Where his conduct disentitles him the benefit of prisoner of war treatment, he remains a civilian who must not be attacked except where he directly participates in hostilities. He may be picked by the enemy and, because he has lost the prisoner of war privilege may be tried under the local laws of the adversary if the alleged act(s) constitute an offence under its laws. With respect to the second issue, while a categorical statement may not be appropriate, there are however, recognized boundaries within which the conducts of journalists can be weighed with a view to determining whether they met the threshold of 'direct participation in hostilities' to warrant an attack.⁵¹ As generally understood propaganda without more cannot amount to direct participation in hostilities. Separating between the thin lines can be tricky.

The ICTY Opinion on Propaganda by Journalists

The ICTY compounded the problem in its 'Final Report on the NATO Bombing' against the Federal Republic of Yugoslavia⁵², when it stated that the media are not legitimate targets merely because they engage in propaganda even if such activities support the war effort.⁵³ This position by the ICTY is objectionable, except if the phrase 'even if such activities support the war effort' is interpreted to mean support that is not biased or capable of aiding a party against its adversary in the conflict. Anything short of this will give journalists the intrepidity to engage in activities outside their known mission with the inevitable consequence of attack by the offended party. In distinguishing between innocuous from noxious propaganda, it is very important to clearly define the red line beyond which it becomes a breach of professional ethics with the consequences of not only making themselves lawful targets, but amenable to punishment under international criminal law.⁵⁴ It is therefore, not mere propaganda where the intention is to 'incite' or spread 'hate' capable of sparking off acts of genocide or violence as was the case in Rwanda where the ICTR ruled that such acts are punishable under international criminal law.⁵⁵ Similarly, the ICRC's study on direct participation refers to political propaganda as a war sustaining activity and may fit into the notion of direct participation in hostilities.⁵⁶ It is however advisable that due care and caution be exercised when distinguishing between general propaganda from punishable 'hate' or 'inciting' propaganda because of the ambivalence that characterizes every war environment. The notion of direct participation is not clearly defined in the Geneva Conventions and the Additional Protocols however, Yves in his Commentary on the Additional Protocols has defined it as 'acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.'⁵⁷ The ICRC's Interpretation Guide on the notion of Direct Participation in Hostilities⁵⁸ elaborated Yves definition and gave more examples, namely: the taking up of arms, the attempts to capture, to injure or kill enemy forces or to purposefully destroy or damage enemy property.⁵⁹

Deducible from the foregoing is that, for any acts by journalists to amount to direct participation, they must have direct inverse impact on the both parties, that is, positive and beneficial to one party to the detriment of the other. These include malicious propaganda that dents the image of the armed forces of a party in the conflict, which in the public opinion has the effect of dispiriting and demoralizing its personnel in favour of its adversary. A number of examples give credence to this line of reasoning. For instance, in the landmark *Targeted Killing case*⁶⁰, acts

⁵⁰GC III, article 4 A4 with respect to war correspondence.

⁵¹Balguy-Gallois, (n 6) 48-49, cited by Dusterhoft, (n 1) 13.

⁵²P Benvenuti, 'The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia', [2001] (12) *European Journal of International Law* 508. These attacks ranged from attacks on a passenger train at Grdelica Gorge on 12 April 1999, on the Djakovica convoy on 14 April 1999, on the Serbian radio and television station in Belgrade on 23 April 1999, on the Chinese Embassy on 5 May 1999 to the attack on Korisa village on 13 May 1999.

⁵³Balguy-Gallois, (n 6) 11.

⁵⁴*Ibid.*

⁵⁵*Ibid.* See D Yanagizawa-Drott, 'Propaganda and Conflict Theory and Evidence from the Rwandan Genocide', *Center for International Development Working Paper No. 257, August 2012* (Harvard University 2012) 9.

⁵⁶*Ibid.*

⁵⁷Sandoz and, *et al*, (n 30) para 1944. See Hessel (n 34) 420.

⁵⁸Dusterhoft, (n 1) 13.

⁵⁹*Ibid.*

⁶⁰Public Committee against Torture in Israel v Government of Israel, case NO. HCJ 769/02, 13 December 2006, 35. Available at: http://lleyon1.court.gov.il7files_eng/02/690/007/A34/02007690.a34> accessed on 17/11/2021.

such as transporting combatants or weapons, servicing weapons and volunteering as human shield were held capable of amounting to direct participation by the Israeli Supreme Court.⁶¹ Also during the 1999 Kosovo military Campaign, the headquarters of Radio Television Serbia ('RTS'), a state owned broadcasting entity across several radio and television frequencies was bombed by the North Atlantic Treaty Organization⁶² ('NATO') following allegations that at least one of its frequencies was used for the military purpose of broadcasting orders⁶³. As further justification for its attack on the station, NATO stated that the RTS facilities, including a large, multipurpose satellite antenna were used 'as radio relay stations and transmitters to support the activities of the [Federal Republic of Yugoslavia] military special police forces, and therefore they represent legitimate military targets'⁶⁴. Indeed, this event represented a very difficult and slithering illustration of the uphill task of effectively determining the distinguishing features between military and civilian objects for the purpose of ascertaining legitimate military targets in line with API article 52. In fact, the allegation of the bias use of the facilities, kind of changed its civilian character; and part of NATO's reasons for the attack was that, 'strikes against TV transmitters and broadcast facilities are part of our campaign to dismantle the Federal Republic of Yugoslavia Propaganda Machinery which is a vital part of President Milosevic's control mechanism'.⁶⁵ These arguments (by NATO) were submitted to the Advisory Committee by the International Criminal Tribunal for Yugoslavia ('ICTY') which noted that, 'while stopping such propaganda may serve to demoralize the Yugoslav population and undermine the government's political support, it is unlikely that either of these purposes would offer the 'concrete and direct' military advantage necessary to make them legitimate military objectives⁶⁶. This incident unequivocally establish the relevant legal standards with respect to the protection article 52 offers to civilians and tactfully confirmed the propriety of NATO's attack when the advisory Committee recommended against prosecution.

Customary International Humanitarian Law

Unlike treaty based IHL, customary international humanitarian law as part of international humanitarian legal regime that governs during wartime binds all countries⁶⁷ including those who have not acceded API. It recognizes certain protections for journalists generally in wartime. In a compendium of Customary International Humanitarian Law by the ICRC in 2005, it is stated concerning journalism 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'⁶⁸. This rule, not only complements treaty-based provisions (on the protection of journalists) which in fact, respects the choice of States to be part, it in no small way expands and fortifies the horizons of journalists' protection. Up until now a handful of nations are yet to accede to AP I⁶⁹ despite the fact that the GCs have achieved a worldwide acceptance⁷⁰. Notwithstanding, such countries are bound by CIHL⁷¹. Closely related to the above is the fact that the application of CIHL extends to non-international armed conflicts ('NIAC') which is not the case with AP I⁷². In addition, the main treaty-based law governing non-international armed conflicts contains no explicit provision on the protection of journalists.⁷³

International Human Rights Law

Unlike IHL that is the *lex specialis*, human rights law applies as the *lex generalis* during peace time and is not automatically displaced by IHL, the *lex specialis* during war⁷⁴. States are still divided on the argument about the concurrent application of both branches of law in war time⁷⁵. In spite of the blend and convergence of norms especially in the protection of human rights standards and human dignities, as in Common Article 3⁷⁶ which relates

⁶¹Dusterhoft (n 1) 13.

⁶²It was formed in 1949 to provide collective security against the threat posed by the Soviet Union.

⁶³Hessel, (n 34) 442.

⁶⁴*Ibid.*

⁶⁵*Ibid.*

⁶⁶*Ibid.*

⁶⁷T F Yerima, 'Internationalization of Human Rights: A Critical Appraisal and Comparison of the Trilogy of Documents in the U.N System' [2007] (1) (1 & 2) *Ikeja Bar Review* 32.

⁶⁸*Ibid.*, 421.

⁶⁹J Gaudreau, 'The Reservations to the Protocols additional to the Geneva Conventions for the protection of war victims', [2003] (849) *International Review of the Red Cross* 3-4.

⁷⁰J Cuenoud, '40th Anniversary of the Additional Protocols of 1977 of the Geneva Conventions of 1949', [2017] *Blog of the European Journal of International Law* 2; available on: <<https://www.ejiltalk.org/40th-anniversary-of-the-additiona-protc>>.... Accessed on 17/11/2021.

⁷¹Hessel, (n 34) 421.

⁷²*Ibid.*

⁷³*Ibid.*

⁷⁴H Heintze, 'On the Relationship between Human Rights Law Protection and International Humanitarian Law' [2004] (86) (856) *International Review of the Red Cross* 797.

⁷⁵W Qureshi, 'Untangling the Complicated Relationship Between International Humanitarian Law and Human Rights Law in Armed Conflict', [2018] (6) (1) *Penn State Journal of Law & International Affairs* 215.

⁷⁶Article 3 common to all the four GCs, see particularly para. 1 (a-d).

to NIAC and AP II provisions thereto⁷⁷, a position supported by a majority of states, nonetheless, some have vehemently rejected this fusion, arguing that once IHL applies, human rights law will not⁷⁸. This view was rejected by the Advisory Opinion of the International Court of Justice ('ICJ') in the Legality of the Threat on Use of Nuclear Weapon⁷⁹ when it states that, IHL operates as *lex specialis* during war time, while human rights law applies as *lex generalis*⁸⁰, without however, stating that the former automatically displaces the latter. Even among pro-States, the question on the scope of application of human rights has proved difficult and creepy. In answering this question, the United Nations Human Rights Committee took the view that the International Covenant on Civil and Political Rights ('ICCPR'), a leading human rights treaty, applies to 'anyone within the power or effective control of that State Party'; a position the United States rejected, arguing that the ICCPR has no extra-territorial reach⁸¹. This position by the US is no doubt overreaching bearing in mind cases of occupation where the occupying power is obligated to protect all under its authority including respect for their rights in which case the provisions of the ICCPR would always come handy.⁸² Barring arguments on the extent of its application, the ICCPR contains provisions that are relevant to the protection of journalists who report on armed conflicts⁸³. In a very forward and positive manner, it provides that, 'everyone shall have the right to freedom of expression; this right shall include to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice'⁸⁴. The phrase, 'regardless of frontiers' clearly supports the extraterritorial application of ICCPR. Furthermore, it will be logically correct to infer that its application is for both war and peace times as long as its provisions are not derogated upon⁸⁵. In deserving situations, and upon fulfillment of certain conditions provided by law as are necessary, restrictions on certain protections in the interest of national security or for public order⁸⁶ may be allowed once they conform to the strict test of the law⁸⁷. In plain words, HRL provisions are derogable but must be in conformity with the law whether in peace time or war time while IHL is not; no wonder the attribution, 'specialized law' during armed conflict with a unique protection regime for journalists⁸⁸.

5. Conclusion

Journalists play indispensable role during war time as they provide to the general public updates of the goings-on in the theatre of war. This duty would naturally expose violations of the law of war by any party to the conflict, a role that has often time pit journalists against belligerent forces. In that case, it is only appropriate to ensure they are well protected by law to guarantee their safety or, to an extent reduce incidences of attacks on them. In spite of differences in names or nomenclatures as to types of journalists, they all by their very primary civilian status come under the same protection module which makes differentiation unnecessary in the first place since they all engage in dangerous professional missions in areas of armed conflict. The professional activity by journalists exercised in an area affected by hostilities is dangerous by its very nature which should entitle them to special protection whether or not authorized by the military to be in the war zone. As a matter of fact, the ICRC Commentary on the APs of 8 July 1977 considers it unnecessary to give a precise geographical delimitation of such 'areas of armed conflict' from either a legal or a practical point of view⁸⁹. In fact, journalists enjoy the rights to which they are entitled as civilians in all circumstances although war correspondents enjoy additional status of prisoner of war. This general denominator for all types of journalists for their protection purposes is evident in the convergence of norms, namely - international humanitarian law, customary international humanitarian law and international human rights law; and the concurrent application of the *lex specialis* and *lex generalis*, during war.

⁷⁷AP II, article 6.

⁷⁸Hessel, (n 34) 422.

⁷⁹Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, July 8, 1996, ICJ Rep. 1996 226; available on: <<http://www.icj-cij.org>>. accessed on 17/11/2021.

⁸⁰In the Advisory Opinion the Court rejected the view, popular though, that international human rights law only applies during peace time and states that "the protection of the ICCPR does not cease in times of war".

⁸¹C Droege, 'The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' [2007] (40) (2) *Israel Law Review* 327. See Heintz, (n 74) 798.

⁸²AP I, article 75.

⁸³Hessel, (n 34) 442.

⁸⁴ICCPR, article 19 (2).

⁸⁵*Ibid*, article 4. See Heintz, (n 74) 799.

⁸⁶ICCPR, article 4 (1); Sub article 2 however prohibits derogation on articles 6, 7, 8 (paragraphe 1 and 2) 11, 15, 16, and 18. See also the African Charter on Human and Peoples' Rights, 1981, articles 11 and 12 (2).

⁸⁷Hessel, (n 34) 422.

⁸⁸*Ibid*, 423.

⁸⁹Sandoz, *et al*, (n 30) 921.