



Dr Ben Saul BA (Hons) LLB (Hons) *Sydney* DPhil *Oxford*, Barrister-at-law
Senior Lecturer and Co-ordinator, Master of International Law Program
Sydney Centre for International and Global Law

173–175 Phillip Street
Sydney NSW 2000
Australia

DX 983, Sydney
Tel: +61 2 9351 0354
Facsimile: + 61 2 9351 0200
Email: bsaul@usyd.edu.au

LEGAL OPINION (REVISED) ON THE INTERNATIONAL PROTECTION OF JOURNALISTS

***FOR THE MEDIA ARTS AND ENTERTAINMENT ALLIANCE CONCERNING
THE NSW CORONIAL INQUEST INTO THE BALIBO KILLINGS IN 1975***

You have requested my legal opinion on:

- A. The legal protection of journalists in 1975 (pp 2-17);
- B. The legal protection of journalists in 2007 (pp 18-39);
- C. Recommendations to strengthen the protection of journalists (pp 40-49, with Annexes A-D, pp 51-56).

This opinion focuses on the protection of journalists in international law, particularly humanitarian law, human rights law and the law of the United Nations. It does not consider domestic law which may be relevant to the safety of journalists, such as an employer's duty of care in tort or contract, statutory occupational health and safety requirements, or whether statutory intervention is desirable to better protect journalists on assignment in conflict areas or on other dangerous missions.

A. THE PROTECTION OF JOURNALISTS IN 1975

(a) The Law of International Armed Conflicts

(i) Origins of the Law

1. In international armed conflicts, war correspondents or journalists have long been recognised as civilians (non-combatants) under international humanitarian law. The traditional position is stated in article 13 of the 1899 Second Hague Convention with Respect to the Laws and Customs of War on Land and its annexed Regulations:

Individuals who follow an army without directly belonging to it, *such as newspaper correspondents and reporters*, sutlers, contractors, who fall into the enemy's hands, and whom the latter think fit to detain, have a right to be treated as prisoners of war, provided they can produce a certificate from the military authorities of the army they were accompanying. [emphasis added]

2. This approach is embodied in the main subsequent humanitarian law instruments, including the 1907 Fourth Hague Convention respecting the Laws and Customs of War on Land and its annexed Regulations, art 13 and the 1929 Geneva Convention relative to the Treatment of Prisoners of War, art 81; as well as in older evidence of State practice such as the 1880 Oxford Manual on the Laws of War on Land, art 22 and article 50 of the 1863 Lieber Code in the American civil war.

(ii) The Contemporaneous Law of 1975

Authorised War Correspondents

3. While some of those early instruments remain in force, the same principle was reiterated article 4(A)(4) of the 1949 Third Geneva Convention relative to the Treatment of Prisoners of War, which specifies that prisoners of war under the

Convention include the following persons who have fallen into the power of the enemy:

Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, *war correspondents*, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model. [emphasis added]

4. The treatment of captured war correspondents as prisoners of war (POWs) does not imply that they are combatants under international humanitarian law. Such persons accompanying armed forces remain civilians but are accorded POW status in recognition of their association with the armed forces to which they are attached.
5. A journalist need not be technically designated a “war correspondent” in order to fall within article 4(A)(4). The International Committee of the Red Cross (ICRC) *Commentary* on this provision observes that the list of persons is only indicative and the provision could cover other categories who follow armed forces in a conflict under similar conditions.
6. The key condition is that only war correspondents (or journalists) who “have received authorization, from the armed forces which they accompany” are entitled to POW status upon capture. The possession of an identity card is not an indispensable condition of the right to be treated as a POW, but rather is evidence that the person has received the required authorisation: ICRC *Commentary*. For practical purposes, however, it would be prudent for correspondents to ensure that they have been issued such an identity card.
7. Should doubt arise as to whether a person (including a war correspondent) is entitled to POW status, article 5(2) of the 1949 Third Geneva Convention provides that “such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”

Status review need not be conducted by a judicial tribunal, although minimum procedural guarantees can be expected.

8. While POW status carries with it considerable protections in detention, on the other hand it renders the POW liable to be detained until the end of the conflict. It might be questioned whether this approach is desirable in relation to journalists, who are non-combatants attached to the armed forces and therefore would not pose a military threat to the detaining power if released.

Other Journalists

9. Where a journalist is not authorised to accompany the armed forces, there is no entitlement to be treated as a POW. In such cases, the journalist is to be treated in the same way as any other non-combatant under humanitarian law.
10. In particular, it is a fundamental principle of humanitarian law that parties to a conflict must distinguish between civilians (including journalists) and combatants, and between civilian objects (including media equipment and installations) and military objectives. Attacks may only be directed against combatants and military objectives, while civilians and civilian objects must not be the object of attack.
11. Civilians (including journalists) lose their protection against attack only if they take a direct part in hostilities, and then only for the duration of such participation. Taking part in hostilities does not imply that civilians are combatants entitled to the privileges and immunities of combatants, including POW status. It does, however, make such civilians legitimate military objectives for the duration of their participation in hostilities. What it means to take a direct part in hostilities is not well settled and is considered below in relation to the law applicable in 2007.
12. Authorised war correspondents are similarly non-combatants immune from direct military attack. However, where they are situated amongst combatant armed forces which are legitimate military targets liable to attack, their

incidental or collateral killing in the course of such attacks will not be unlawful, assuming the attacking forces otherwise comply with the principles of humanitarian law (including the civilian casualties anticipated by proceeding with a planned attack in relation to the overall military advantage). Such risk was heightened because during the Second World War and up to the early 1960s, it was common for war correspondents and combat photographers to wear army-issue fatigues (W Orme, “Journalists, Protection of”, *Crimes of War Project*, www.crimesofwar.org), thus making it difficult for an adversary to distinguish them from combatants.

13. Likewise, journalists who are not authorised war correspondents but who are in the vicinity of armed forces during hostilities do not enjoy any absolute immunity from injury and their incidental injury may be a lawful incident of a military operation directed at nearby combatants or military objectives.

Journalists as Protected Persons

14. Depending on the circumstances, some journalists may be “protected persons” under article 4 of the 1949 Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War if they

at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

15. Being “in the hands of a Party” does not require being within the physical custody of a State, but is used in an “extremely general sense”, including merely being in the territory of a Party to the conflict or in occupied territory: ICRC *Commentary* to article 4.

16. However, the following civilians are not regarded as protected persons:
 - Nationals of a State which is not bound by the Convention;
 - Nationals of a neutral State who find themselves in the territory of a belligerent State, if their State of nationality has normal diplomatic representation in the State in whose hands they are;

- Nationals of a co-belligerent State, if their State of nationality has normal diplomatic representation in the State in whose hands they are.
17. Nationals of a neutral State present in occupied territory are protected persons regardless of whether their State of nationality has normal diplomatic representation with either the Occupying Power or the State whose territory has been occupied: *ICRC Commentary*.
 18. It may be noted that reliance on a State's discretionary right of diplomatic protection in relation to one of its nationals at risk abroad may be an inadequate safeguard. The affected national has no right to invoke protection under international law and most national legal orders similarly recognise no right to compel the State to act.
 19. In addition, war correspondents entitled to POW status under article 4(A)(4) of the 1949 Third Geneva Convention are not protected persons.
 20. Protected persons enjoy a range of humanitarian protections beyond the immediate protection from military attack outlined above: see 1949 Fourth Geneva Convention. The most serious violations of the Convention are regarded as "grave breaches" (article 146) and constitute war crimes if committed against persons or property protected by the Convention:

wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Liability to Detention

21. Of particular relevance to journalists are the circumstances in which a journalist (who is not a POW) may be detained during armed conflicts. As civilians,

journalists are subject to the local or territorial criminal law, and thus may be arrested and detained in the ordinary application of, and liability under, domestic criminal law. They are also subject to domestic immigration law, and, for instance, may be deportable if they entered the country illegally, or worked in the country without permission.

22. In addition, under humanitarian law, security detention may be permissible in some circumstances. First, *foreign nationals in the territory of a party to the conflict* may be subject to assigned residence or internment “only if the security of the Detaining Power makes it absolutely necessary”: 1949 Fourth Geneva Convention, art 42. A person interned has a right to the review of the internment decision “as soon as possible by an appropriate court or administrative board designated by the Detaining Power”, and continuing internment must be periodically reviewed (and at least twice yearly): art 43. The Detaining Power must also report the names of the internees to the Protecting Power in the armed conflict.
23. Further, if a Party to the conflict is satisfied that a protected person in its territory is “definitely suspected of or engaged in activities hostile to the security of the State”, then that person forfeits and rights and privileges under the Convention which would be prejudicial to that Party’s security: 1949 Fourth Geneva Convention, art 5(1). Such persons must, however, “be treated with humanity” and cannot be deprived of a fair and regular trial: art 5(3).
24. Secondly, *protected persons in occupied territory* may be subject to internment “[i]f the the Occupying Power considers it necessary, for imperative reasons of security, to take [such] safety measures concerning protected persons”: art 78. Internment decisions must be made according to a regular procedure prescribed by the Occupying Power, and include rights of appeal and period review.
25. Further, a protected person detained as a spy or saboteur, or a person definitely suspected of activity hostile to the security of the Occupying Power, shall forfeit rights of communication under the Convention if “absolute military security” so requires: 1949 Fourth Geneva Convention, art 5(2). Such persons must,

however, “be treated with humanity” and cannot be deprived of a fair and regular trial: art 5(3).

26. Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.
27. Internees are entitled to extensive minimum standards of treatment: arts 79-135.

Other Measures of Control

28. In Occupied Territory, the Occupying Power “may take such measures of control and security in regard to protected persons as may be necessary as a result of the war”: 1949 Fourth Geneva Convention, art 27). The ICRC *Commentary* notes that “a great many measures” of control and security are permissible, including “comparatively mild restrictions such as the duty of registering with and reporting periodically to the police authorities, the carrying of identity cards or special papers, or a ban on the carrying of arms”. They may also include “harsher” provisions “such as a prohibition on any change in place of residence without permission, prohibition of access to certain areas, restrictions of movement, or even assigned residence and internment”.
29. States have a wide discretion as to the choice of security measures. Nonetheless, any measures “should not affect the fundamental rights of the persons concerned”: ICRC *Commentary*. These include respect for the person, honour and family rights, religious convictions and practices, and manners and customs, and protected persons must also be treated “humanely” at all times: art 27.
30. Article 64 of the 1949 Fourth Geneva Convention allows the Occupying Power to

subject the population of the Occupied Territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

31. It is possible that Occupying Powers may invoke the security provisions of the 1949 Fourth Geneva Convention in order to restrict the access of journalists to particular areas of territory or sources of information, or to prevent them from publishing or broadcasting material considered prejudicial to the security of the Occupying Power. Such measures are likely to be lawful if they are objectively justified and proportionate to the security threat faced. Blanket restrictions on the media or on journalists are unlikely to be lawful and moreover may interfere impermissibly in fundamental rights, may be considered to include freedom of expression.

Threshold of Application of Humanitarian Law

32. The humanitarian law governing international armed conflicts applies if the conditions of common article 2 of the 1949 Geneva Conventions are met:

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

33. An “armed conflict” must thus exist between at least two State Parties to the Convention, but there is no requirement that the parties formally declare or recognise the existence of the conflict. This departs from the earlier law of “war”, which presupposed such formalities and allowed States to deny the existence of an armed conflict by asserting that they were merely engaged in police actions and the like.

34. The existence of an armed conflict between States is a question of fact. The ICRC *Commentary* indicates that the drafters conceived of an armed conflict as follows:

Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to human personality is not measured by the number of victims. Nor, incidentally, does the application of the Convention necessarily involve the intervention of cumbersome machinery. It all depends on circumstances.

35. In this respect, the existence of an “armed conflict” for the purposes of humanitarian law (*jus in bello*) is not dependent on satisfying the test for the existence of an “armed attack” under the international law on the use of force (*jus ad bellum*, including the frameworks of self-defence and collective security). In the context of the law on the use of force, the International Court of Justice in the *Nicaragua (Merits)* case (1986) ICJ Reports 14, paras 191 and 195, suggested that armed force by a State must reach a certain level of gravity by its scale or effects to constitute an “armed attack”, which was distinguishable from lesser uses of force, such as mere frontier incidents.
36. In any event, common article 2 also provides that the Conventions apply even to a partial occupation of territory met by no armed resistance.

(b) The Law of Non-International Armed Conflicts

37. There is no international legal status of POW available in non-international armed conflicts, and further no specific provisions are made for war correspondents or journalists. In 1975, common article 3 of the four 1949 Geneva Conventions was the only relevant humanitarian law provision applicable to an “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties”. Common article 3 provides that:

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, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

38. Common article 3 further specifies acts against such persons which are “prohibited at any time and in any place whatsoever”, including:
 - violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - taking of hostages;
 - outrages upon personal dignity, in particular humiliating and degrading treatment;
 - 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.
39. In addition, the wounded and sick must be collected and cared for. Journalists who take no active part in the hostilities in a non-international armed conflict are thus entitled to these minimum guarantees.
40. In 1975, there was little authority for the proposition that breaches of common article 3 in non-international armed conflicts could be prosecuted as war crimes, despite their obvious severity. Violations of common article 3 are not expressly listed as grave breaches subject to criminal liability, and there was insufficient State practice in 1975 to support the view that such breaches were individually criminally punishable under international law.
41. Common article 3 further allows for the ICRC to offer its services to the Parties to the conflict, which may include, for example, visiting detained journalists, or mediating for the release of journalists taken hostage.
42. Moreover, common article envisages that the Parties “should further endeavour

to bring into force, by means of special agreements, all or part of the other provisions of the present Convention” in a non-international armed conflict. Thus it is open to the Parties to exercise a discretion to apply the remainder of the Convention to non-international armed conflicts, including the extensive provisions on the protection of civilians and protected persons which may be of benefit to journalists.

(c) Dangerous Situations outside Armed Conflict

43. Where a situation of violence or unrest does not reach the threshold of an armed conflict, journalists reporting on such other dangerous situations enjoy the protection of international human rights law, and are otherwise subject to local law.
44. Foremost is the human right not to life recognised in article 6 of the 1966 International Covenant on Civil and Political Rights; in particular, art 6(1): “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”
45. In situations of armed conflict, the rules of humanitarian law take precedence as *lex specialis* for the purpose of defining when the taking of a life would be arbitrary under human rights law: *Nuclear Weapons Advisory Opinion* (1996) ICJ Reports 226, paras 24-25; *Israel Wall Advisory Opinion* (2004), ICJ Case 131, para 101. Thus the incidental death of a non-combatants in a lawful military operation is not a violation of the right to life.
46. In dangerous situations beneath the threshold of an armed conflict, as in isolated or sporadic cases of domestic violence, riots, rebellion, unrest or coups, protecting the right to life, especially whether the killing of a journalist is arbitrary, will depend on the different legal tests under international human rights life. The starting point is that the right to life is non-derogable and cannot be suspended even in a time of public emergency threatening the life of the nation: ICCPR, art 4(2).

47. In general, States must take measures to protect the right to life by preventing and punishing the deprivation of life by criminal acts, and also by preventing arbitrary killing by their own security forces: UN Human Rights Committee (UNHRC), General Comment 6, on Article 6 of the ICCPR, (16th session, 1982), UN Doc HRI\GEN\1\Rev.1 at 6 (1994), para 3.

48. The scope of this obligation on the State to protect life was stated by the European Court of Human Rights in *Osman v United Kingdom* (1998) VIII ECHR 3124, para 116 as follows:

it must be established... that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.

49. States must also take steps to prevent the disappearances of individuals, and to investigate such disappearances where they may involve a violation of the right to life: UNHRC, General Comment 6, para 4.

50. States themselves must also refrain from arbitrarily depriving individuals of their right to life. A killing will only be justified and not arbitrary in limited circumstances, such as where it is necessary and proportionate to use lethal force: (a) in self-defence or defence of another against unlawful violence; (b) in order to effect a lawful arrest to prevent the escape of a person detained; or (c) in action lawfully taken to suppress a riot or insurrection.

51. Accordingly, if a journalist is an innocent by-stander not participating in violent activities, the journalist is entitled not to be directly targeted by law enforcement officials acting to suppress such violence. If lethal law enforcement measures (including military aid to the civilian authorities) are, however, an objectively necessary, discriminate and proportionate response to quell serious violence or unrest, then a journalist in close proximity to such unrest necessarily assumes some risk of becoming an incidental casualty, even though they may not be deliberately targeted.

52. In situations of private violence, the State owes no absolute duty towards a journalist to protect them from private killings. The State's obligation is only to do what is reasonable within the scope of its powers, in light of known risks to life. The difficulty is that in some dangerous situations covered by journalists the State is practically unable to control private violence. It is only where the State is unwilling to control such violence, but has the capacity to do so, that it fails in its duty of protection.
53. Where the State itself is the source of arbitrarily killings, such violations of the right to life by the State may be difficult to prevent and remedy. Human rights law relies principally on State institutions for its enforcement, absent any regional human rights supervision mechanisms as in Europe, the Americas and, recently, Africa.
54. The violation of a human right gives rise to a right to an effective remedy (see, eg, ICCPR, art 2), which may include criminal prosecution by the State, but there is no wider *international* criminal jurisdiction to prosecute rights violations under human rights treaties where the State itself is the perpetrator and fails to provide remedies.
55. Only where such violations reach a high level of gravity will international criminal jurisdiction be engaged, such as where the violations separately amount to the international crimes of genocide (requiring an intention to destroy certain protected groups: see the 1948 Genocide Convention) or crimes against humanity (requiring a widespread or systematic attack on a civilian population). Isolated killings of journalists will seldom qualify. In any case, prosecutions are principally remedial rather than preventive and protective.
56. International human rights law also protects other relevant rights of journalists in dangerous situations, including freedom of expression (ICCPR, art 19(2)), the right to liberty and security of person (including freedom from arbitrary detention and procedural guarantees if detained) (ICCPR, art 9), the right to a fair hearing in civil and criminal proceedings (ICCPR, art 14), and freedom

from arbitrary or unlawful interference with privacy, family, home or correspondence, or unlawful attacks on honour and reputation (ICCPR, art 17).

57. These rights are not considered further in this opinion, other than to note that freedom of expression may be specially limited by law if necessary to protect national security or public order, or public health or morals, or the rights and reputations of others: ICCPR, art 19(3). In addition, it is subject to derogation (suspension) *if necessary* in a public emergency, which may considerably restrict media activities.

(d) Application of the Law to East Timor in 1975

58. In my view, the Indonesian military invasion of Portuguese East Timor in 1975 triggered an international armed conflict to which the 1949 Geneva Conventions applied. At a minimum, that armed conflict commenced on 7 October 1975, when Indonesian forces attacked Fretilin troops in the village of Batugade on the border between Indonesian West Timor (Irian Jaya) and Portuguese East Timor.

59. While the armed conflict may have commenced earlier as a result of covert military operations by Indonesian forces inside East Timor, for present purposes the overt use of military force on a significant scale by Indonesian troops against military objectives within Portuguese East Timorese territory from 7 October onwards was sufficient to establish the existence of an international armed conflict. That attack was met with military resistance from Fretilin, and ongoing Indonesian operations continued to be met by military force on a significant and organized scale. The attack on Balibo on 16 October 1975 was part of a broader offensive on Maliana, and involved a large number of Indonesian troops (up to 2,000), and naval and artillery bombardments: James Dunn, *Timor: A People Betrayed* (ABC Books, Sydney, 1996), 203-204.

60. While an earlier, non-international armed conflict may have existed between competing East Timorese forces, Fretilin and the UDT, any continuation of that armed conflict (which was doubtful by October 1975) would not prejudice the

separate legal existence of an international armed conflict. The existence of concurrent non-international and international armed conflicts on the same territory is possible under humanitarian law.

61. It might be suggested that no international armed conflict existed because Indonesia was engaged militarily against Fretilin, not Portugal, and that therefore there was no conflict between two State Parties to the 1949 Geneva Conventions as required by common article 2. The Portuguese administration and forces had withdrawn to the island of Atauro as a result of civil conflict between competing East Timorese forces from mid-August 1975, effectively ending the work of the Portuguese Decolonisation Commission. Further, if the East Timorese were a “people” entitled to self-determination under international law, the Fretilin victory in the civil conflict and its formation of government may indicate that East Timor had become an independent State, though not yet party to the 1949 Geneva Conventions.
62. That argument must be rejected. Since 1960 Portuguese East Timor was a non-self-governing territory within the UN framework, administered by Portugal. Following the change of regime in Portugal in 1974, the Portuguese authorities recognised the right of the East Timorese people to self-determination and had planned a universal secret ballot for 1976.
63. That initiative was overtaken by the UDT coup in August 1975 and the subsequent civil conflict between the UDT and Fretilin forces. That conflict signalled competing and contradictory claims by different parts of the East Timorese population, with the UDT arguing for integration with Indonesia and Fretilin seeking independence. The brief conclusion of that conflict immediately prior to the Indonesian invasion in October 1975 has never been regarded by the international community as a sufficient exercise of free choice by the East Timorese people as to their political status.
64. The Indonesian invasion of October 1975 was condemned in the UN General Assembly and Security Council and not recognised by any State (except, later, Australia): UNSC Resolution 384 (22 December 1975); UNGA Resolution

3485(XXX) (12 December 1975). The resolutions recognised that Portugal remained the “administering power” in Portuguese Timor, and called for its territorial integrity to be respected.

65. The Indonesian occupation forces established a provisional government of pro-Indonesian political parties which appointed an unelected “Regional Popular Assembly”, which passed a resolution on 31 May 1976 in favour of East Timor’s integration into Indonesia. That process has never been recognised by the international community as a direct and free expression of the political will of the East Timorese people: see Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, Cambridge, 1996), 226-230.
66. As a result, the Indonesian invasion was an attack on Portuguese territory, thus precipitating an international armed conflict. It is not to the point that Portuguese forces abstained from the fighting or that Fretilin led the armed resistance. Indonesian forces were using military violence on Portuguese territory without Portugal’s permission. It would be curious if the 1949 Geneva Conventions applied to occupations of territory which are not met by armed resistance (as in common article 2(2) of the Conventions), but they did not apply to unauthorised violence by one State on the territory of another against non-State forces in that territory.
67. Thus, an armed conflict “may arise between two or more of the High Contracting Parties” within the meaning of common article 2 by virtue of military attacks by one State on the territory of another, even if there is no direct fighting between two State’s armed forces.
68. Both Indonesia and Portugal were bound by the relevant international humanitarian law instruments in 1975. Indonesia acceded (without reservation) to the four 1949 Geneva Conventions on 30 September 1958. Portugal signed the four 1949 Geneva Conventions on 11 February 1950 and ratified them on 14 March 1961. A reservation upon signature, limiting the application of common article 3 to civil wars rather than all situations of armed rebellion, was

withdrawn by Portugal upon ratification in 1961: United Nations Treaty Series, Vol 394, 1961, p 258.

69. Indonesia has never become a party to the ICCPR, and Portugal only became a party to the ICCPR on 15 September 1978. However, even in 1975, the key provisions of the ICCPR, including the right to life, reflected customary international humanitarian law. The ICCPR was a legally binding reiteration of many of the rights in the aspirational 1948 Universal Declaration of Human Rights adopted by the UN General Assembly, and most of the UDHR had crystallised into customary law by 1975.
70. The journalists killed at Balibo in 1975 most likely qualified as protected persons under the 1949 Fourth Geneva Convention, as nationals of neutral States in occupied territory, that is, in an area controlled by Indonesia following its invasion, and irrespective of the existence of normal diplomatic relations between Indonesia and the their States of nationality.
71. There may be a question whether Indonesia “occupied” Balibo at the time of the killings. As a matter of law, “territory is considered occupied when it is actually placed under the authority of the hostile army”: 1907 Hague Regulations, art 42 (also reflecting customary law). If, for instance, the journalists were killed in cross-fire during hostilities between Indonesian and Fretilin forces, prior to Indonesia capturing Balibo, then no occupation had yet been established and the journalists could not be in the hands of any Occupying Power.
72. If, however, the facts establish that the journalists were killed after Indonesia had taken control of Balibo, then they were most likely in the hands of the Occupying Power and thus were protected persons. A military occupation can be established in the immediate aftermath of a hostile contest for control of territory, notwithstanding that full civilian or administrative structures of occupation have not yet been established to substitute for indigenous ones.

(B) THE PROTECTION OF JOURNALISTS IN 2007

(a) International Armed Conflicts

(i) Specific Protections

73. The law of the 1949 Geneva Conventions concerning authorised war correspondents and other journalists, as described above, continues to apply in relation to international and non-international armed conflicts, while international human rights law continues to apply to dangerous situations below the threshold of armed conflict.

74. For those States which are now parties to the 1977 Additional Protocol I to the 1949 Geneva Conventions, additional specific obligations in relation to journalists in international armed conflicts apply. Article 79 of 1977 Protocol I establishes measures of protection for journalists, as follows:

- (a) Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians within the meaning of Article 50, paragraph 1.
- (b) 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.
- (c) They may obtain an identity card similar to the model in Annex II of this Protocol. This card, which shall be issued by the government of the State of which the journalist is a national or in whose territory he resides or in which the news medium employing him is located, shall attest to his status as a journalist.

75. No reservations have been made to article 79, and the rule is recognised in numerous national military law manuals and in State practice, including that of States not party to Protocol I such as the United States: Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (ICRC, Geneva, 2004) (hereafter “ICRC Study”), 115.

76. While article 79 provides that journalists shall be “considered” as civilians, the provision is understood as declaring the pre-existing law that such journalists *are* civilians according to article 50(1) of Protocol I: ICRC Commentary, para 3258. The provision creates no new status for journalists, but explicitly confirms that they are civilians; codifies the customary rule that they are immune from attack so long as they do not participate in hostilities; and does not prejudice the entitlement of authorised war correspondents to POW status.
77. A “journalist” is not defined but is understood according to the ordinary meaning of the term: ICRC *Commentary*, para 3260. The ICRC has invoked the definition in draft article 2(a) of the draft International Convention for the Protection of Journalists engaged in Dangerous Missions in Areas of Armed Conflict (1 August 1975, UN Document A/10147, Annex I) as a guide to interpretation:

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...

78. While the provision applies to journalists in “dangerous professional missions in areas of armed conflict”, that phrase does not limit the application of the protection but refers to the fact that “any professional activity exercised in an area affected by hostilities is dangerous by its very nature and is thus covered by the rule”: ICRC *Commentary*, para 3263. A “professional mission” includes (ICRC Commentary, para 3264):

all activities which normally form part of the journalist's profession in a broad sense: being on the spot, doing interviews, taking notes, taking photographs or films, sound recording etc. and transmitting them to his newspaper or agency.

79. An identity card (**Annex A** to this opinion) is proof that a person is a journalist. Article 79 does not create a right to be issued an identity card, but leaves it to the discretion of the issuing authority, according to their own national rules or practices: ICRC *Commentary*, para 3274. The list of issuing authorities is

exhaustive (States of nationality or residence, or of the employer's location) and no supranational organisation may issue cards: ICRC *Commentary*, para 3275. There is, of course, a danger that national authorities will refuse to issue identity cards in order to improperly restrict media coverage.

80. Article 79 stemmed from concern in the UN General Assembly in early 1970s that humanitarian law did not sufficiently protect journalists on dangerous assignments. A 1972 Draft International Convention on the Protection of Journalists Engaged in Dangerous Missions (UNGA Resolution 2854 (XXVI) and ECOSOC Resolutions 1597 (L), annex and 1690 (LII)), prepared by the UN Commission on Human Rights, was forwarded to the ICRC Diplomatic Conference which negotiated the 1977 Protocols I and II. Following the adoption of article 79, no further steps were taken to adopt an international treaty devoted to the protection of journalists.

(ii) General Protection of Civilians

81. Protocol I codifies and elaborates on the protection of civilians in international armed conflicts. Civilians are defined as any person not covered by article 4(A)(1)-(3) of the 1949 Third Geneva Convention (Protocol I, art 50), that is, all journalists including war correspondents under article 4(A)(4) of that Convention. A person is presumed to be a civilian in case of doubt.
82. Under Protocol I, civilians enjoy general protection from dangers arising from military operations (art 51(1)) and, specifically:
- 2. ...civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
 - (a) Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.
 - (b) Indiscriminate attacks are prohibited...
 - (c) Attacks against... civilians by way of reprisals are prohibited.
83. Indiscriminate attacks are generically defined (art 51(4)) as:

- (a) those which are not directed at a specific military objective;
- (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
- (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;

and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

84. Attacks specifically prohibited as indiscriminate (art 51(5)) include:

- (a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and
- (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

85. Civilians cannot be used to shield military objectives from attack: art 51(7).

(iii) General Protection of Civilian Objects

86. Under Protocol I, civilian objects shall not be the object of attack: art 52(1). Civilian objects are all objects which are not military objectives. Attacks must be limited to military objectives, defined as “objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military of advantage”:

art 52(2).

87. In case of doubt, it is presumed that an object normally dedicated to civilian use (such as places of worship, houses, dwellings or schools) is a civilian object: art 52(3)). The list of such objects is indicative not exhaustive and the presumption would likely apply to media premises and installations, such as newsrooms, studios, and transmitters.

88. Some media installations may be “dual use” targets, that is, having both civilian and military functions, as in the NATO bombing of Radio Television Serbia in

Belgrade in 1999, a civilian broadcasting facility which was also used by the Serbian military's Command, Control and Communications Network. Another example may be the American bombing of the Ministry of Information in Baghdad in 2003. Such attacks are lawful if they satisfy the requirements of article 52 of Protocol I, as well as the usual requirements of proportionality. See, eg, International Federation of Avocats sans Frontières, "Are TV stations or any media facilities legitimate military targets under International Humanitarian Law?", Memorandum, Brussels.

89. A media installation is not a military target merely because it spreads propaganda, and attacking the media to undermine civilian morale is similarly impermissible: *Final Report to the ICTY Prosecutor on the NATO Bombing of Kosovo* (2000), paras 47, 55, 74-76; see also Reporters without Borders, "Propaganda-Oriented Media and International Humanitarian Law, Legal Memorandum, January 2003. (Article 20 of the ICCPR does, however, require war propaganda to be prohibited by law.)
90. There is, for instance, doubt whether it was lawful for American forces to bomb Al-Jazeera television facilities in Kabul and Baghdad; or for Israel to bomb Palestinian broadcasting facilities in Gaza and Ramallah in 2002, or Lebanese media in Beirut in 2006.
91. The media arguably, however, becomes a legitimate military target if it is inciting others to commit war crimes, crimes against humanity or genocide: *Prosecutor v Nahimana* (2003) ICTR-99-52-T and *Prosecutor v Ruggiu* (2000) ICTR-97-32-I (both concerning the incitement of genocide in Rwanda, although outside the context of humanitarian law analysis). In this regard, Article 20 of the ICCPR prohibits incitement to national, racial or religious discrimination, hostility or violence.
92. Whether the media can be targeted for incitement depends on satisfying the requirements for attacking civilian objects under article 52 or Protocol I, or on whether individual journalists are considered to be taking part in hostilities under article 51(3) and thus lose their immunity from attack. Such tests must be

independently satisfied and there is no free-standing right to attack the media simply for incitement.

93. One area of difficulty concerns the use of instantaneous broadcasts. In the conflict between Israel and Hezbollah in southern Lebanon in 2006, Sky News broadcast live television pictures which showed the launching of Katyusha rockets from southern Lebanon and their landing in northern Israel. While they were not attacked, the media personnel involved were accused by Israel of assisting Hezbollah to better target their rockets, and accused by Hezbollah of helping the Israelis to identify the launching sites: *Killing Journalism*, Report, POLIS and BBC College of Journalism.
94. In such a situation, it is arguable that the media were objects which made an effective contribution to military action and whose neutralization offered a definite military advantage. However, measures short of destroying the media involved may have been available, at least to Israel, such as revoking permission to film, or jamming broadcasts using technology, as was done in Somalia to protect UN personnel.

(iv) Precautionary Measures

95. Under Protocol I, constant care must be taken in military operations to spare civilians and civilian objects: art 57(1). In particular, those planning or deciding on an attack must (art 57(2)(a)):
 - (i) Do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives...;
 - (ii) Take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;
 - (iii) Refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

96. Attacks must be cancelled or suspended if it becomes apparent the objective is not a military one or is specially protected, or if the attack “may be expected to cause” incidental civilians losses “which would be excessive in relation to the concrete and direct military advantage anticipated”: art 57(2)(b).
97. Effective advance warning must be given of attacks which may affect civilians, “unless circumstances do not permit”: art 57(2)(c). Where there is a choice of military objectives for obtaining a similar military advantage, the objective must be selected which may be expected to cause the least danger to civilians: art 57(3).
98. More generally, parties to the conflict must (a) try to remove civilians and civilian objects under their control from the vicinity of military objectives; (b) avoid locating military objectives within or near densely populated areas; and (c) take other necessary precautions to protect civilians under their control against the dangers resulting from military operations: art 58.

(v) Loss of Protection

99. Under article 79(2) of Protocol I, journalists forfeit their protection if they take action “adversely affecting their status as civilians”. This includes loss of protection for the duration of any direct participation in hostilities, as is the case for civilians generally under article 51(3) of Protocol I.
100. While there is no definition of direct participation hostilities, and State practice is unsettled (ICRC Study, 22), the ICRC *Commentary* indicates that hostile acts or direct participation in hostilities “means acts of war that by their nature or purpose struck at the personnel and matériel of enemy armed forces” (see also Inter-American Commission on Human Rights, Third Report on Human Rights in Colombia, para 811).
101. Examples of direct participation given in some national military manuals include serving as guards, lookouts, intelligence agents or spies, while indirect contributions by civilians (which do not lead to loss of protection) include

providing logistical support (such as carrying food or messages, transporting munitions, or selling goods) or expressing sympathy for a party: ICRC Study, 23. What is required is an immediate threat of actual harm to an adversary.

102. However, civilians involved in some of these activities may be lawful incidental casualties of attacks on military objectives, such as munitions convoys or factories in which civilians are working. Further, it is not clear whether a journalist who, for example, transmits military messages by radio for the benefit of a party, takes a direct part in hostilities. The better position is to regard the transmission equipment as a military objective, rather than qualifying the journalists as such as a target (see further below on “dual use” targets).
103. Merely spreading propaganda does not amount to direct participation in hostilities: Alexandre Balguy-Gallois, “The Protection of Journalists and News Media Personnel in Armed Conflict” (2004) 86 *International Review of the Red Cross* 37.
104. A journalist who is captured while committing acts of hostility may be subject to measures of repression or security (as outlined above). Further, national law may validly prohibit or criminalize participation in hostilities. In addition, civilians who take part in hostilities may be liable for the war crime of perfidy (feigning civilian status in attack) under article 37(1)(c) of Protocol I.
105. Any security measures or national prosecutions are subject to the protections of article 45 of Protocol I (including a presumption of POW status in certain cases until decided otherwise by a competent tribunal) and the fundamental guarantees of article 75. Article 75 establishes minimum guarantees of humane and non-discriminatory treatment of all persons in the power of a party to the conflict, including absolute prohibitions on personal violence, murder, torture, corporal punishment, mutilation, outrages on personal dignity (in particular humiliating and degrading treatment, enforced prostitution and indecent assault), hostage taking, collective punishment, or threats to commit any of these acts: art 75(2). The parties must further respect the person, honour, convictions and religious practices, while women and families detained are

subject to special protections: art 75(1) and (5).

106. In addition, there are specific guarantees in detention and for a fair criminal trial before an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure (art 75(3)-(4) and (7)). Those arrested, detained or interned in relation to the conflict remain protected by article 75 until they are released, even after the end of the conflict: art 75(6).
107. In practice, journalists who formally or informally accompany military units, or who wear military style dress, or who are near to military objectives, necessarily put themselves at risk of becoming incidental civilian casualties, notwithstanding their civilian status: ICRC *Commentary*, para 3269. Further, there are examples in practice of military forces genuinely mistaking camera lenses as weapons from a distance. Civilian immunity is not absolute in such circumstances and nothing in humanitarian law confers greater protection on journalists than other civilians.
108. There is a difficult question whether civilians, including journalists, are entitled to use force in self-defence when under military attack. Self-defence is not available to a person engaging in mutual combat: *Carl D O'Neal*, US Crt Military App, 18 Feb 1966, 16 USCMA 33; 36 CMR 189, 196. Thus journalists who decide to participate in hostilities cannot claim self-defence, and it is further doubtful whether journalists at risk of being lawful incidental casualties of a military attack could resort to arms in self-defence.
109. However, it is arguable that self-defence is lawfully available to a journalist who is deliberately and unlawfully attacked by military forces in violation of international humanitarian law, where the journalist uses necessary and proportionate force in order to protect him or herself from such a war crime. Since international humanitarian law does not criminalise mere civilian participation in hostilities (other than in the limited circumstances of perfidy), the question will chiefly arise in national criminal prosecutions, although it may also be relevant in international criminal proceedings if the defensive response involved the commission of war crimes.

(vi) Grave Breaches – War Crimes

110. The violation of many of the protections owed to journalists as civilians, even those who directly participate in hostilities, are listed as grave breaches of Protocol I under article 85 and hence may be prosecuted by any State party as war crimes.
111. In particular, where death or serious injury to body or health is caused, it is a war crime to wilfully attack civilians; to indiscriminately attack civilians; to attack works or installations containing dangerous forces; to attack non-defended localities and demilitarised zones; to attack a person out of combat (such as the sick or wounded); or to perfidiously use the emblem of the Red Cross or other protective signs: art 85(3). It is also a war crime to unjustifiably delay the repatriation of POWs or civilians, and to deprive a person of a fair and regular trial: art 85(4) (among others).

(b) Non-International Armed Conflicts

112. A definitive 2005 ICRC study identifies the following rule of customary international humanitarian law applicable to both international and *non-international* armed conflict: ICRC Study, 115:

Rule 34: 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.

113. In addition to the customary law protection, common article 3 of the 1949 Geneva Convention continues to apply to journalists in 2007. The threshold of application of that provision has been clarified in the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) since the mid-1990s and subsequently in the International Criminal Court (see below).
114. The most significant development is, however, the recognition by the ICTY that violations of common article 3 attract individual criminal liability as violations

of the laws and customs of war (see *Prosecutor v Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)*, Case No. IT-94-1, Appeals Chamber, 2 October 1995), thus enhancing the enforcement of humanitarian law by allowing the international prosecution of crimes committed in *non-international* armed conflicts.

115. The 1998 Rome Statute of the International Criminal Court, art 8(2)(c) also establishes the jurisdiction of the ICC over violations of Common Article 3, while clarifying that it does not cover “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature”: art 8(2)(d).

(i) Threshold of Application of Common Article 3

116. The test for determining the existence of an “armed conflict” was set out by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Prosecutor v Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)*, Case No. IT-94-1, Appeals Chamber, 2 October 1995, para 70:

an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.

117. This test has been “consistently applied” by the ICTY: *Prosecutor v Limaj et al*, Case No. IT-03-66-T, ICTY Trial Chamber II Judgment, 30 November 2005, para 83 (hereafter *Limaj (2005)*).

118. For the purpose of determining the existence of a non-international armed conflict governed by Common Article 3, this test focuses on (i) the intensity of the conflict and (ii) the organization of the parties to the conflict: *Prosecutor v Tadic*, IT-94-1, Trial Chamber Judgment, 7 May 1997, para 562 (hereafter *Tadic (1997)*).

119. The ICTY has held that the test for the existence of a non-international armed conflict is similar to that under article 8(2)(f) of the Statute of the International

Criminal Court: *Limaj* (2005), para 87. A Pre-Trial Chamber of the International Criminal Court confirmed this approach in *Prosecutor v Thomas Lubanga Dyilo*, Confirmation of Charges Decision, International Criminal Court (ICC), Pre-Trial Chamber I, 29 January 2007, Doc No ICC-01/04-01/06 (original only in French), paras 227-237.

120. In that case, involving a mixed international and non-international armed conflict in the Ituri region of the Democratic Republic of Congo in 2002-03, the ICC observed that the Elements of Crimes for article 8(2) of the ICC Statute requires that article to “be interpreted within the established framework of the international law of armed conflict”.
121. The ICC thus proceeded to compare the thresholds for the existence of a non-international armed conflict in Protocol II and in the jurisprudence of the ICTY. The ICC observed that, unlike in Protocol II, the ICTY definition in *Tadic* (1995) no longer requires the control of territory: para 233. The ICC held that the key requirements are that organised armed groups have the capacity to conceive and carry out military operations for a prolonged period: para 234.
122. While it has been suggested that determining the threshold of application of Common Article 3 is a subjective discretion often left to the affected State,¹ it is clear from ICTY jurisprudence that the existence of an armed conflict is an objective question to which an international tribunal will apply legal standards.
123. There is a paucity of State practice on the classification of particular situations of internal violence as non-international armed conflicts, such that the ICRC Study of customary international humanitarian law refrained from analysing the issue.

¹ Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge University Press, 2002), 45; Waldemar Solf, “Problems with the Application of Norms Governing Interstate Armed Conflict to Non-International Armed Conflict” (1983) 13 *Georgia Journal of International and Comparative Law* 291 at 294; Anthony Cullen, “The Parameters of Internal Armed Conflict in International Humanitarian Law” (2004) 12 *University of Miami International and Comparative Law Review* 189 at 198.

124. One explanation for this silence is that many States are reluctant to be perceived to be interfering in the domestic jurisdiction of States affected by violence, even in cases where domestic unrest crosses the threshold of an armed conflict and objectively attracts the application of Common Article 3. In the absence of a coherent body of State practice on the issue, ICTY jurisprudence on the existence of an armed conflict assumes particular importance in interpreting this aspect of humanitarian law.

(ii) Differentiating Lesser Forms of Violence

125. The two “closely related criteria” of intensity and organisation are used “solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law”: *Tadic* (1997), para 562.

126. The ICTY has noted that the ICC Statute similarly does not apply to “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature”: ICC Statute, art 8(2)(d); *Limaj* (2005), para 87. That article embodies the similar explicit exclusion in article 1(2) of Additional Protocol II.

127. Other courts have elaborated upon the distinction in humanitarian law between armed conflict and lesser violence by distinguishing “severe combat” from “police operations”: *Ajuri v The Military Commander of the Judea and Samaria Area*, Israeli Supreme Court (High Court of Justice) 7015/02, 56(6) PD 352 at 358 (President Barak).

128. While the legal focus must remain on assessing the intensity of the conflict and the organisation of the parties, the exclusion of “banditry, unorganized and short-lived insurrections, or terrorist activities” may assist in assessing the existence of an armed conflict. Such analysis is primarily a question of fact, and there is no bright line between low-intensity armed conflicts and terrorist or other forms of political violence falling short of an armed conflict. Terrorism (such as assassinations, sabotage, and indiscriminate attacks on civilians) is

sometimes a phase preliminary to the escalation of an armed conflict: Frits Kalshoven, “‘Guerilla’ and ‘Terrorism’ in Internal Armed Conflict’ (1984) 33 *American University Law Review* 67 at 67.

129. On a plain textual interpretation, banditry connotes random acts or threats of violence for a private, profit-oriented motive. In contrast, limited insurrections or terrorist activities tend more towards acts or threats of public-oriented violence, such as those committed for political, religious, ideological or ethnic purposes.
130. Historically, terms such as banditry, insurrection and terrorist activities have constituted descriptive factual categories rather than legal terms of art. More recently, however, there have been numerous efforts to define terrorism in a variety of international, regional (including the European Union and Council of Europe) and national legal contexts, in order to establish the basic legal contours of the phenomenon: see generally Ben Saul, *Defining Terrorism in International Law* (Oxford University Press, 2006), chapters 3 and 4.
131. While there is still no generally agreed international legal definition of terrorism, international legal efforts to regulate terrorism nonetheless suggest the basic features of the concept (that is, outside the context of humanitarian law, in which a specialised concept of terrorism is applicable: see below). Such legal measures therefore help to indicate the range of activities that can be factually described as terrorism in concrete situations of violence. In particular, such legal measures may assist in distinguishing non-international armed conflicts from terrorist violence which does not reach the threshold of an armed conflict.
132. The ICTY has also stated that the International Committee of the Red Cross (ICRC) *Commentary* (at pp 49-50) on Common Article 3 of Geneva Convention I lists factors relevant to distinguishing non-international armed conflicts from lesser violence: *Tadic* (1997), para 562. These criteria include:
 - (1) That the Party in revolt against the de jure Government possesses an

organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.

(2) That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.

(3)(a) That the de jure Government has recognized the insurgents as belligerents; or

(b) that it has claimed for itself the rights of a belligerent; or

(c) that it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or

(d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.

(4)(a) That the insurgents have an organisation purporting to have the characteristics of a State.

(b) That the insurgent civil authority exercises de facto authority over persons within a determinate territory.

(c) That the armed forces act under the direction of the organized civil authority and are prepared to observe the ordinary laws of war.

(d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.

133. These factors are not explicit requirements of the test (*Limaj* (2005), paras 85-86), and it is well accepted that Common Article 3 should be applied “as widely as possible” (ICRC *Commentary*, p 50) and should not be restrictively interpreted, since it is a humanitarian provision. However, these non-obligatory criteria may still indicate the existence of a non-international armed conflict and their individual or cumulative absence may signal that such a conflict does not exist.

134. The ICTY has previously noted that “the determination of the intensity of a conflict and the organisation of the parties are factual matters which need to be decided in light of the particular evidence and on a case-by-case basis”: *Limaj* (2005), para 90. Relevant to the intensity of a conflict are factors such as (*Limaj* (2005), para 90):

the seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilisation and the

distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and, whether any resolutions on the matter have been passed.

135. Factors relevant to the organisation of the parties include “the existence of headquarters, designated zones of operation, and the ability to procure, transport, and distribute arms”: *Limaj* (2005), para 90. The number of fighters belonging to a party may also be a relevant but not determinative factor in considering both the organisation of the parties and the intensity of the violence.
136. No minimum number of casualties is required for there to exist an armed conflict, although the number of casualties may be a relevant factual consideration in assessing the intensity of the violence.
137. As for the duration of violence, a regional human rights body, the Inter-American Commission on Human Rights found that Common Article 3 even applied to a one-day attack by an armed group on a military base in Argentina: *Juan Carlos Abella v Argentina (La Tablada case)*, Inter-American Commission on Human Rights, Case No 11.137, 18 November 1997, OEA/Ser.L/V/II.98, paras 154-156.
138. However, the test established by the ICTY in *Tadic* (1995) requires “protracted” armed violence in the case of non-international armed conflicts, which plainly did not exist on the facts in *La Tablada*. Further, the Inter-American Commission is foremost a human rights body with no explicit mandate to apply humanitarian law and lacks expertise on that body of law.

(iii) 1977 Additional Protocol II

139. The 1977 Additional Protocol II expressly guarantees the general protection of civilians from the dangers arising from military operations (art 13(1)). In particular, article 13 provides that:

The civilian population as such, as well as individual civilians, shall not be

the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

140. Civilians only lose such protection if and “for such time as they take a direct part in hostilities”: art 13(3).
141. Protocol II does not, however, include any specific protection for journalists in non-international armed conflicts such as that found in article 79 of Protocol I in respect of international armed conflicts.
142. Further, Protocol II does not contain any grave breaches provision establishing international criminal jurisdiction over violations of its provisions. However, the ICTY’s jurisdiction over violations of the laws and customs of war under article 3 of the ICTY Statute has been held to include violations of treaties binding on the parties (*Tadic (Appeals)* (1995), para 89), which could, for instance, include Protocol II.
143. More importantly, the Rome Statute of the International Criminal Court establishes international criminal jurisdiction (facilitated by complementary national legislation in many countries) over a range of criminal conduct in non-international armed conflicts: see 1998 ICC Statute, art 8(2)(e)(i)-(xii).

(iv) Threshold of Application of Protocol II

144. Article 1(1) provides that Protocol II applies to “all armed conflicts” not covered by Protocol I, that is, non-international conflicts, between a State Party’s armed forces and

dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol

145. Article 1(2) excludes “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts”.

146. Protocol II has, therefore, a higher threshold of application than Common Article 3 of the 1949 Geneva Conventions, since it must be shown that the insurgent party has the capacity to implement or enforce humanitarian law, carries out continuous and persistent military operations, and exercises stable control over territory.

(v) Armed Conflicts Generally

147. The UN Security Council has previously addressed the general protection of civilians in armed conflict (whether international or non-international) (Resolutions 1265 (1999), 1296 (2000), 1502 (2003)), and has specifically condemned attacks on journalists in a number of contexts. Resolution 1214 (1998) condemned the Taliban's capture and murder of a journalist in Afghanistan as "flagrant violations of international law" and asked the Taliban to investigate and prosecute the crime.

148. Resolution 1738 (2006) specifically addresses the protection of journalists. It condemns all attacks against journalists, media professionals and associated personnel in armed conflicts, and calls on all parties to end such practices (para 1); it recalls that journalists are protected as civilians under humanitarian law, unless they take action adversely affecting their status as civilians (para 2); and it recalls that media equipment and installations are civilian objects protected from attack, unless they are military objectives (para 3).

149. The Resolution also condemns media incitement of violence against civilians (such as genocide, crimes against humanity and serious violations of humanitarian law) and calls for the perpetrators to be brought to justice (para 4). It then calls on all parties to armed conflicts to comply with their obligations towards civilians (including journalists) (para 5); it calls on those parties and all States to prevent violations of humanitarian law (para 6), including through prosecutions (para 7).

150. The Resolution was not adopted under enforcement machinery of Chapter VII of the UN Charter and does not impose binding obligations on UN member States. For the most part, it restates the existing legal frameworks applicable to the protection of journalists, and does not confer any new status upon journalists.
151. However, the resolution is innovative in that it specifically states that the deliberate targeting of civilians “may constitute a threat to international peace security” to which the Council may respond (para 9); it urges States to become parties to Protocols I and II (para 10); and urges all parties to a conflict to more generally “respect the professional independence and rights of journalists” and media personnel (para 8). The issue of protecting civilians (including journalists) in conflict is also kept on the Council’s agenda (paras 11-12).
152. The Resolution was favourably received by peak journalism organisations worldwide, which had lobbied for its adoption through the International Federation of Journalists (IFJ). However, the Council did not accept the IFJ’s recommendation that the Council refer instances of systematic violence to the International Criminal Court, or that the Secretary General record violent attacks on press freedom and refer them to the Council.
153. It is notable that the UN General Assembly has also addressed the safety of journalists in conflicts, as in Afghanistan (in 1996) and Kosovo (1998), while the (former) Commission on Human Rights considered their safety in Somalia (1995). Regional organizations have also expressed concern for the safety and protection of journalists, including the European Parliament, the Council of Europe (see [Recommendation \(1996\) 4](#)) and the Organisation of the American States: see ICRC Study, 117-118.
154. Non-governmental organizations have also sought to reaffirm the international legal frameworks applicable to journalists in armed conflict, including their immunity as civilians: see, eg, Reporters Without Borders, *Declaration the safety of journalists and media personnel in situations involving armed conflict* (2003).

(c) **Dangerous Situations outside Armed Conflict**

155. The relatively flexible modern interpretation of the circumstances to which Common Article 3 applies has enlarged the range of dangerous situations which are regarded as non-international armed conflicts and correspondingly narrowed the range of dangerous situations which are not regulated by international humanitarian law.
156. Those which remain outside the operation of humanitarian law remain principally governed by international human rights law, other areas of international criminal law (including the law on genocide, crimes against humanity and torture), and transnational criminal law (particularly concerning international terrorist acts).
157. The 1994 Convention on the Protection of United Nations Personnel and Humanitarian Workers has limited application to journalists. The Convention provides for the inviolability of UN personnel, premises and equipment (art 7), prohibits kidnapping and murder of such personnel (art 9), imposes a duty to release detained or captured personnel (art 8), and provides for remedies for death, disability, illness or injury in UN operations (art 20).
158. While UN media officers could be covered by the Convention, most journalists would not fall within the definition of personnel in article 1, which refers to those engaged by the UN or its specialised agencies, or associated personnel assigned by a government, intergovernmental or non-governmental organization under an agreement to fulfil a mandate of a UN operation. It is an open question whether journalists attached to military forces engaged in a UN mission are covered: see Antoine Bouvier, “The Convention on the Safety of United Nations and Associated Personnel”, *International Review of the Red Cross*, No 309.
159. The Security Council responded (without to date imposing binding enforcement measures) to some violent attacks on journalists outside armed conflicts. For

example, Council Presidential Statements condemned the assassination of Lebanese journalist Samir Qassir (“a symbol of political independence and freedom”) (UNSC Pres Stat 2005/22 (7 Jun 2005)) and the “terrorist bombing” in Beirut in December 2005 that killed “Lebanese member of Parliament, editor and journalist Gebrane Tueni, a patriot who was an outspoken symbol of freedom” (UNSC Pres Stat 2005/61 (12 Dec 2005)).

160. The UN Educational Scientific Cooperation Organisation (UNESCO) adopted Resolution 29 specifically on the “Condemnation of violence against journalists” at its General Conference, 29th Session, Paris, in November 1997. The Resolution invited the Director-General “to condemn assassination and any physical violence against journalists as a crime against society, since this curtails freedom of expression and, as a consequence, the other [human] rights and freedoms”, and to urge the competent authorities to prevent, investigate, punish and remedy such crimes (para 1).
161. UNESCO Resolution 29 also called on member States to (i) preclude statutes of limitations for crimes perpetrated to prevent freedom of information and expression or to obstruct justice; (ii) legislate for the prosecution of assassination of those exercising freedom of expression; and (iii) legislate for the prosecution of crimes against journalists or media personnel in civilian or ordinary courts (para 2). The Resolution was recommendatory and had no power to bind member States.
162. It is notable that some international attempts to better protect journalists foundered because some States wanted to link the rights of journalists with their responsibilities, in ways which may have unacceptably regulated the profession and overly restricted freedom of expression.
163. Note: For an overview of international attempts to protect journalists since the time of the League of Nations, see Mi Kirby and L Jackson, “International Humanitarian Law and the Protection of Media Personnel” (1986) 9 *UNSW Law Journal* 1; Dylan Howard, “Remaking the Pen Mightier than the Sword: An Evaluation of the Growing Need for the International Protection of Journalists” (2002) 30 *Georgia Journal of International and Comparative Law* 505; Amit Mukherjee, “Protection of Journalists under International Humanitarian Law” (1995) 17 *Communications and the Law* 27.

(C) **RECOMMENDATIONS FOR REFORM**

(a) **The Context of Reform**

164. Despite the existing international legal frameworks applicable to the protection of journalists in armed conflicts and other dangerous situations, journalists continue to be frequently killed and injured in the course of their professional activities. As Detter writes, above, 323:

As journalists are essential to the spreading of knowledge of inhuman practices and war crimes to the world at large, they have become increasingly vulnerable as it became important to some authorities to 'silence' negative information: numerous journalists were killed in the 1990s in the Yugoslav wars as well as in Rwanda and in East Timor.

165. The International News Safety Institute reported that 168 journalists and media staff were killed in 2006 (comprising 138 journalists and 30 media staff): www.newssafety.com/casualties/2006.htm. Of the total, there were 68 deaths in Iraq, 15 in the Philippines, 8 in Mexico, 7 in Sri Lanka, 6 in Colombia, 6 in Guyana, 5 in India, 5 in Russia, 4 in Pakistan and 4 in Brazil.

166. Up to 19 April 2007, 48 journalist and media staff had been killed in 2007, of which 18 died in Iraq, 3 in Indonesia, 3 in Benin, 2 in Afghanistan and 1 in the Philippines. From 2003 to April 2007, 194 journalists died in Iraq alone: www.newssafety.com/casualties/iraq.htm. The safety of journalists in both Indonesia² and East Timor³ continues to be of concern. Australian journalists

² See www.newssafety.com/hotspots/countries/indonesiex.htm#Media%20Safety: 8 March 2007: Australian Journalist 'among Plane Crash Dead'; 7 March 2007: One Journalist Missing and Others Injured in Plane Crash; 28 February 2007: Rescuers find body of journalist sinking with Levina Ferry; 26 February 2007: TV Cameraman Dies as Burnt-Out Ferry Sinks; 4 January 2007: Rising violence against journalists; 4 October 2006: Violence Increasing Against Indonesian Journalists; 25 September 2006: Journalists attacked; 15 September 2006: Channel 7 team deported from Papua Java; 5 June 2006: AJI Appeal for Support for Earthquake Survivors; 12 May 2006: Journalist Murdered in East Java; 4 May 2006: Media Independence at Risk in Papua; 20 April 2006: 'Timika Pos' Newspaper Attacked; 18 February 2006: Foreign Media Ban in West Papua; 14 November 2005: Journalists Attacked; 24 October 2005: IFJ urges authorities to do inquiry into missing reporter; 5 September 2005: Helicopter Crash Kills Journalist; 29 August 2005: Nias journalist goes missing; 9 February 2005: Tears for dead newsmen in Aceh; 27 January 2005: Growing Intolerance Towards Foreign Media; 7 January 2005: Journalists Told to Keep Quiet on Aceh Skirmish; 5 January 2005: World's broadcasters' help Asian disaster relief; 5 January 2005: Radio Netherlands helps partner radio stations in Aceh; 5 January 2005: Journalist Expelled from Aceh; 3 January 2005: Aceh's hard-hitting

have also be casualties of conflict, including in Vietnam, East Timor, Rhodesia, Thailand and Iraq.

167. Represented proportionally, the 20 journalists who died in Iraq between March and October 2003 represented 1% of all media personnel in the area, compared to death rates of 1.4% for the Iraqi military, 0.4% for Coalition ground forces, and 0.03% for Iraqi civilians: International News Safety Institute, News Release, 28 February 2006.
168. The high level media casualties can be explained by a number of factors. First, inadequate implementation and enforcement of the existing law applicable to journalists in armed conflict and other dangerous situations is of greater significance than any normative deficiency in the law itself.
169. Secondly, reporting on war and civil violence is carries inherent risks and no legal framework can completely immunise journalists from those dangers. Thirdly, prior to deployment, some journalists and media organisations have not undertaken sufficient risk assessment and/or training in the risks associated with dangerous assignments, and are accordingly unprepared to deal with those risks. Fourthly, reckless conduct by some journalists in accepting unnecessary risks cannot be discounted.

(a) Some Specific Issues

(i) Unequal Protection

newspaper survives; 3 January 2005: Aceh Daily Resumes Publication as most Staff still Missing; 31 December 2004: Journalists Appeal; 30 December 2004: IFJ Launches Appeal for Asia Disaster Media Victims; 29 December 2004: Scores of Aceh journalists missing after quake; 11 November 2004: Aceh and Papua Travel Ban; 17 May 2004: Journalist Hostage Finally Released; 7 May 2004: Journalist Hostage to be Released; 28 April 2004: Cameraman Attacked in Ambon; 19 April 2004: Journalist still held hostage.

³ See www.newssafety.com/hotspots/countries/timorlestex.htm#Media%20Safety: 6 April 2007: Reporter Covering Election Badly Beaten by Ruling Party Supporters; 14 June 2006: Newspaper Employees Beaten Up; 14 June 2006: Deteriorating Situation for Journalists in East Timor; 13 June 2006: Australian soldiers 'roughed up journalist'; 5 June 2006: Violence Undermines Media Reporting; 1 June 2006: Experienced news crews know limits; 23 May 2006: Journalist safe from renewed Timor unrest.

170. The legal protection of journalists is strongest in *international* armed conflicts, yet only 42 of the estimated 228 armed conflicts since 1945 were international ones: L Harbom and P Wallensteen, “Armed Conflict and its International Dimensions: 1946-2004” (2005) 42 *Journal of Peace Research* 623; Nils Gledistch et al, “Armed Conflict 1946-2001: A New Dataset” (2002) 39 *Journal of Peace Research* 615 at 620.
171. It is desirable that the level of protection of journalists in international conflicts, both under article 79 of Protocol I and the more extensive protections of civilians generally in international conflicts, be extended to journalists in non-international conflicts. The ability to prosecute crimes in non-international conflicts pursuant to article 8(2)(c) and (e) of the 1998 Rome Statute is a positive step.
172. However, the Rome Statute does not transplant the entire corpus of humanitarian law applicable in international conflicts to non-international ones, and in particular it is desirable to, at a minimum, apply a provision equivalent to article 79 of Protocol I in non-international conflicts, as well as to encourage the widest possible ratification of Protocol II.
173. Moreover, while the attention of the Security Council to the protection of journalists in armed conflict is a welcome development, to a large extent it misses the mark. An estimated 85% of 580 journalists killed between January 1992 and August 2006 were not foreign correspondents working in conflict zones, but were premeditated murders of local journalists in their offices, homes or on the way to work: Committee to Protect Journalists (2006). (Of those killed, 71.4% were murdered, 18.4% died in cross-fire, and 10% died during other dangerous missions.) Typically such killings are politically motivated or in the context of organised crime.
174. The Security Council’s focus on *armed conflict* misdirects attention from dangerous local circumstances outside conflict areas. There is also a tendency to focus on the safety of highly visible international (usually western) correspondents, at the expense of local reporters, who are often less visible, less

resourced, more exposed, and less protected. It is important to ensure that the focus of any protective measures are directed not only at journalists, but at the broad sweep of local and support staff who may be endangered as a result of the journalist's functions.

175. Even in armed conflicts, an increasing number of casualties result from the conduct of a variety of non-State actors (as in Afghanistan, Iraq, Palestine or Russia), rather than States which typically have the machinery for the implementation and enforcement of humanitarian law. Any efforts to improve the protection of journalists in armed conflict must, therefore, be mindful of the special problems of compliance engaged by non-State actors who are not parties to humanitarian law instruments.
176. The critical issue in the protection of journalists is not the legal framework so much as problems of enforcement; as Gasser, above, notes, humanitarian law is generally "adequate" to protect journalists. It is estimated that only one in eight of those accused of killing journalists worldwide are prosecuted, while in two-thirds of cases, the killers are not even identified: International News Safety Institute, *Killing the Messenger*, Report of the Global Inquiry into the Protection of Journalists, March 2007, 7.

(ii) Special Status

177. There is a question whether journalists a distinct, special status should be conferred on journalists in armed conflict, akin to that accorded to medical or religious personnel. This was the approach of the 1972 draft UN convention on the protection of journalists. The rationale for special status is the public interest served by journalists in reporting on conflicts. As one leading jurist writes (Ingrid Detter, *The Law of War* (Cambridge University Press, Cambridge, 2000), 323):

journalists are extremely useful as part of the machinery which ensures the implementation of the rules of war when most other means of enforcement are lacking.... It is often through the reports of journalists that inhuman practices in wars are made known to the rest of the world and their

function of transmitting news to those outside a particular conflict may be conducive to the condemnation by world opinion of certain methods of warfare or a certain state of affairs.

178. A special status was rejected during the drafting of the 1977 Protocols primarily on the basis that increasing the categories with a special status “tends to weaken the protective value of each protected status already accepted, particularly that of medical personnel”: ICRC *Commentary*, para 3265. Some journalists also felt a special status would single them out and put them at greater risk of being targeted, and preferred instead to keep a low profile: Hans-Peter Gasser, “The Protection of Journalists Engaged in Dangerous Professional Missions” (1983) No 232 *International Review of the Red Cross* 3. Some States did not believe that journalists should be treated differently to other civilians.
179. For these reasons, it is unlikely that further special provisions for journalists would be adopted, such the suggestion by Balguy-Gallois, above, that a new instrument should clarify the concept of direct participation in hostilities, the status of embedded journalists, and the protection of propaganda and the exclusion of incitement; or that it should strengthen the warning obligations in article 57 of Protocol I and further require the parties to a conflict to establish the facts when an attack injures or damages media personnel or equipment. Many of these issues are problems of general uncertainty as to the operation of flexible rules in humanitarian law and do not warrant specific treatment in the context of journalists alone, to the possible detriment of other civilians.
180. By way of contrast, a 1972 draft text by governmental experts at an ICRC conference on developing humanitarian law had imposed stronger obligations on governments in relation to a journalist. In particular, parties were required to “do all that is necessary to protect him from the danger of death or injury or from any other danger inherent in the conflict” (draft art 10(a)), and to “inform him to the extent compatible with military requirements of the areas and circumstances in which he may be exposed to danger” (draft art 10(b)). The text was never adopted.

181. In the modern context, the danger of explicitly amending the 1994 UN Personnel Convention to cover journalists is similarly that it will dilute the protection enjoyed by UN workers, who are already at great risk. Further, journalists are not entitled to the same legal immunities as UN personnel under general international law. Journalists themselves may be endangered by becoming too closely associated with UN missions and thus jeopardizing their perceived neutrality, impartiality and independence.

182. For similar reasons, efforts to register journalists with the parties to a conflict, or to notify the parties of their presence, in some circumstances may seriously jeopardize the safety of media personnel.

(iii) *Protective Emblems*

183. A related proposal during the drafting of Protocol I to require journalists to wear a protective emblem clearly visible from a distance (a bright orange armlet with two black triangles) was rejected, mainly because it would make journalists more conspicuous and thus endanger both journalists and the civilian population: ICRC *Commentary*, para 3254.

184. Even so, the 2004 Geneva Declaration on Actions to Promote Safety and Security of Journalists and Media in Dangerous Situations, signed by a range of peak journalism bodies,⁴ invited the International News Safety Institute and the

⁴ First signatories of the Geneva declaration: International Federation of Journalists (IFJ) (9/2004); Press Emblem Campaign (9/2004); International News Safety Institute (9/2004); Reporters sans frontières (9/2004); Union européenne de radiotélévision (UER-EBU) (9/2004); Impressum (Les journalistes suisses) (9/2004); Club suisse de la presse (9/2004); Emirates Journalists' Syndicate (9/2004); Iraqi Journalists' Syndicate (9/2004); Emirates Red Crescent (9/2004); Union internationale de la presse francophone (9/2004); Commission arabe des droits de l'homme (9/2004); Conseil mondial de radiotélévision (9/2004); Jean Ziegler, rapporteur spécial de l'ONU (9/2004); Pen Club International (10/2004); Taiwanese Journalists' Association (11/2004); Association of Former international civil servants in Egypt (AFICS) (11/2004); Washington Association of Arab Journalists (12/2004); Central Asian and Southern Caucasian Freedom of Expression Network (CASCEN); Azerbaidjan, Georgia, Kirgyzstan, Uzbekistan, Tadjikistan (4/2005); Mauritius Union of Journalists (4/2005); Nepal Press Union (4/2005); National Union of Journalists of the Philippines (5/2005); Pakistan Federal Union of Journalists (5/2005); Somali Journalists Network (5/2005) Syndicat national des professionnels de presse du Congo (5/2005); Union of Press Workers (Basin Sen – Cyprus) (5/2005); National Federation of Israeli Journalists (5/2005); Japan Federation of Commercial Broadcast Workers' Union (5/2005); Association of Iranian Journalists (5/2005) Association of Journalists of Macedonia (5/2005); Nigerian Union of Journalists (5/2005) Palestinian Journalists' Syndicate (5/2005); Union des journalistes d'Afrique de l'Ouest (5/2005)

Press Emblem Campaign to establish an expert committee to report on, inter alia, “the possible need for a new international convention dealing specifically with the safety and protection of journalists, including, if required, an emblem”.

185. Journalists appear divided on the issue of markings (see, eg, *Killing Journalism*, Report, POLIS and BBC College of Journalism, where most participants opposed the idea). Many media organisations now deploy their own ad hoc markings in the field in some conflict zones, with colour schemes often featuring blue and white markings and carrying the words “Press” or “TV”.
186. The current consensus is to leave the use of markings to individual journalists or media organizations in each particular conflict: see, eg, International News Safety Institute, *Killing the Messenger*, Report of the Global Inquiry into the Protection of Journalists, March 2007,

(iv) “Embedded” Journalists

187. The practice of “embedding” journalists with allied armed forces created controversy during the first Gulf War in 1990-91,⁵ when around 14,000 journalists were placed in “press pools” by the US Department of Defense, thus regulating their access to the battlefield. It is difficult to see that “embedding” journalists creates novel problems. If “embedded” journalists are authorised to accompany armed forces, then they are “war correspondents” under the 1949 Third Geneva Convention, with civilian status and an entitlement to be treated as POWs upon capture. Such correspondents knowingly assume the risks attendant with that form of reporting. The professional ethics of such a practice (that is, concerns about journalistic independence and impartiality) does not bear on the adequacy of the protective legal framework.

Syndicat national des journalistes algériens (5/2005); Federation of Media Employees Trade Union (Sri Lanka) (5/2005); Union catholique internationale de la presse (Liban) (6/2005); Fundacion para la Libertad de Prensa (Colombia) (9/2005).

⁵ Michelle Mensore, “The First Amendment Fights Back: A Proposal for the Media to Reclaim the Battlefield after the Persian Gulf War” (1992) 49 *Washington & Lee Law Review* 1145; John Smith, “From the Front Lines to the Front Page: Media Access to War in the Persian Gulf and Beyond” (1993) 26 *Columbia Journal of Law and Social Problems* 291.

188. On the other hand, the practice of embedding does raise legal concerns if it results in armed forces forbidding other journalists from operating independently of those forces. As outlined above, certain security or control measures may be taken which impact on journalists, but a desire to exclude all reporting that is not officially-sanctioned or controlled (through embedding to the exclusion of other reporting) is not an objectively legitimate use of those security powers.
189. In practice, difficulty has also arisen because French military forces have regarded embedded journalists as “unilaterals” (that is, independent journalists) not as war correspondents entitled to POW status: Balguy-Gallois, above. Such classification is incorrect, although express clarification may be desirable.
190. Further, any suggestion by military commanders that independent journalists put themselves at risk of declared “free fire zones” is not compatible with humanitarian law. The idea of a free fire zone is not admitted under humanitarian law. Military personnel must at all times distinguish civilian from military targets, even in areas which have a high concentration of enemy forces.

191. *Safety, Training and Support*

192. The International Federation of Journalists argues it should be mandatory for all media personnel deployed to conflict situations to be given appropriate hostile environment and risk awareness training by their media organisation, as well as protective health and safety equipment (such as medical packs, helmets, respirators and flak jackets); see also International News Safety Institute Safety Code, paras 3-5, **Annex B** to this opinion).
193. The major western news organisations now have safety policies concerning conflict reporting, with some using dedicated safety advisors, although improvements can still be made: *Killing Journalism*, Report, POLIS and BBC College of Journalism. In Australia, the Australian Broadcasting Commission has comprehensive training and safety policies and procedures.

194. Media organisation should also be aware of the emotional or psychological stresses resulting from conflict reporting, and ensure journalists have adequate support: *Killing Journalism*, Report, POLIS and BBC College of Journalism. To that end, the International News Safety Institute Safety Code states that “[e]mployers must provide free access to confidential counselling for journalists” (para 7).
195. Personal injury and death insurance for foreign and local correspondents should also be provided: International News Safety Institute Safety Code, para 6.
196. Media personnel themselves should be urged not to pursue unwarranted risks in reporting to obtain competitive advantage at the expense of safety, while media personnel should never carry weapons: International News Safety Institute Safety Code, paras 1 and 8. Media assignments to dangerous mission should always be voluntary: *infra*, para 2.
197. Some independent journalists have resorted to using private security guards in conflict zones such as Iraq to guarantee their safety. However, this practice may blur the boundary between combatants and civilians, particularly when guards are not conversant with humanitarian law or are too ready to use force in response to threats.
198. Similar principles on safety, training, insurance, counselling and voluntariness are included in the recommendations of the International News Safety Institute in its *Killing the Messenger*, Report of the Global Inquiry into the Protection of Journalists, March 2007, 10-12; and in the *Charter for the Safety of Journalists Working in War Zones or Dangerous Areas* adopted by Reporters without Borders in 2005 (**Annex C**).
199. At the international level, the International New Safety Institute is a charity supported by key news organisations and journalists groups and raises money to provide basic safety training free of charge to journalists who cannot afford their own, and has trained more than 500 journalists from 10 countries.

(v) **Media-Military Relations**

200. So far as relations between the military and journalists, the revised British Ministry of Defence “Green Book” is regarded as international best practice: Ministry of Defence, *MOD Working Arrangements with the Media for Use Throughout the Full Spectrum of Military Operations* (2006) (**Annex D** to this opinion). It has been welcomed by the International News Safety Institute: News Release, 28 February 2006, after consultation between the MOD and media organisations.
201. The Green Book includes provisions concerning safety, security, media accreditation, war correspondents, embedded assignments, media briefings, pooling, restrictions on reporting for security or other reasons, control of the release of information, embargoes, casualty reporting, reporting on prisoners of war, interviews of air crew, military assistance with the travel and support of journalists, and procedures for facilitating these working arrangements between the media and the military.
202. Of particular importance is the British military’s recognition of the right of independent journalists to freely move and report in conflict areas, and its commitment not to deliberately target civilian journalists. The International News Safety Institute has urged all military forces to adopt similar protocols: International News Safety Institute, *Killing the Messenger*, Report of the Global Inquiry into the Protection of Journalists, March 2007, 11.
203. At an operational level, one issue of concern in the recent Iraq conflict concerns safety procedures at military checkpoints to avoid media casualties, and the Committee to Protect Journalists has, for example, recommended improvements to military identification procedures for distinguishing combatants from non-combatants, the use of warnings signs and non-lethal measures such as road spikes to disable vehicles (instead of firing weapons).
204. A further issue of concern has been the failure of US forces in particular to properly and promptly investigate the deaths of media personnel, including by

making inquiries public and publishing findings to improve accountability: Committee to Protect Journalists, 2005 News Alert. The International News Safety Institute has called for full and open inquiries by military and national authorities wherever a journalist is killed: *Killing the Messenger*, Report of the Global Inquiry into the Protection of Journalists, March 2007, 11.

205. Further, it has been urged that basic military training include instruction on the role and protection of the media: *Killing the Messenger* (2007), 11.

(vi) Journalist Privilege

206. In *Prosecutor v Talic* (2002), Case No IT-99-36, the ICTY recognised that journalists enjoyed a privilege against testifying about their work which could only be overridden if (i) the evidence sought would be of direct and important value in determining a core issue in a case, and (ii) the evidence could not be sought elsewhere. The Tribunal accepted that journalists serve the public interest in bringing conflicts to public attention, and that this function may be impaired if journalists are forced to testify.

207. The risk is that compelling journalists to testify in international criminal proceedings against their sources may discourage sources in future from revealing information (Nia McDonald, “Under Fire: The Fight for the War Correspondent’s Privilege” (2004) 47 *Howard Law Journal* 133 at 145), and may also make journalists targets for those who do not want the facts about atrocities to be disclosed. An absolute privilege may, however, not be desirable in light of the competing public interest in bringing perpetrators of atrocities to justice, nor would it likely be acceptable to States.



Dr Ben Saul*

Senior Lecturer and Barrister-at-law, Sydney Centre for International and Global Law
Faculty of Law, The University of Sydney

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ANNEX A

1977 Protocol II, Annex II:

Identity Card for Journalists on Dangerous Professional Missions

<p>NOTICE</p> <p>This identity card is issued to journalists on dangerous professional missions in areas of armed conflicts. The holder is entitled to be treated as a civilian under the Geneva Conventions of 12 August 1949, and their Additional Protocol I. The card must be carried at all times by the bearer. If he is detained, he shall at once hand it to the Detaining Authorities, to assist in his identification.</p> <p>ملاحظة</p> <p>تعرف هذه البطاقة للصحفيين الكثرين بمهمات مهنية خطيرة في مناطق النزاعات المسلحة ويجب لحايتها أن يحمل حاملها بطاقة جنيف الزرقاء ١٢ آب / أغسطس ١٩٤٩ ولحمايتها (بروتوكولها) الإضافي الأول. ويجب أن يحتفظ صاحب البطاقة بها دوماً وإذا اعتقل فيجب أن يسلمها فوراً إلى سلطة الاعتقال لتساعد على تحديد هويته.</p>	<p>(Name of country issuing this card) (اسم القطر الصادر لهذه البطاقة)</p> <p>(Nombre del país que expide esta tarjeta) (Nom du pays qui a délivré cette carte)</p> <p>(Название страны, выдавшей настоящее удостоверение)</p>
<p>NOTA</p> <p>La presente tarjeta de identidad se expide a los periodistas en misión profesional peligrosa en zonas de conflictos armados. Su titular tiene derecho a ser tratado como persona civil conforme a los Convenios de Ginebra del 12 de agosto de 1949 y su Protocolo adicional I. El titular debe llevar la tarjeta consigo, en todo momento. En caso de ser detenido, la entregará inmediatamente a las autoridades que lo detengan a fin de facilitar su identificación.</p>	<p>IDENTITY CARD FOR JOURNALISTS ON DANGEROUS PROFESSIONAL MISSIONS</p> <p>بطاقة الهوية الخاصة بالصحفيين الكثرين بمهمات مهنية خطيرة</p>
<p>AVIS</p> <p>La présente carte d'identité est délivrée aux journalistes en mission professionnelle périlleuse dans des zones de conflit armé. Le porteur a le droit d'être traité comme une personne civile aux termes des Conventions de Genève du 12 août 1949 et de leur Protocole additionnel I. La carte doit être portée en tout temps par son titulaire. Si celui-ci est arrêté, il la remettra immédiatement aux autorités qui le retiennent afin qu'elles puissent l'identifier.</p> <p>ПРИМЕЧАНИЕ</p> <p>Настоящее удостоверение выдается журналистам, находящимся в опасных профессиональных командировках в районах вооруженного конфликта. Его обладатель имеет право на обращение с ним как с гражданским лицом в соответствии с Женевскими Конвенциями от 12 августа 1949 г. и Дополнительным Протоколом I к ним. Владелец настоящего удостоверения должен постоянно иметь его при себе. В случае задержания он немедленно вручает его задерживающим властям для содействия установлению его личности.</p>	<p>TARJETA DE IDENTIDAD DE PERIODISTA EN MISION PELIGROSA</p> <p>CARTE D'IDENTITÉ DE JOURNALISTE EN MISSION PÉRILLEUSE</p> <p>УДОСТОВЕРЕНИЕ ЖУРНАЛИСТА, НАХОДЯЩЕГОСЯ В ОПАСНОЙ КОМАНДИРОВКЕ</p>

ANNEX B

International News Safety Institute, Safety Code

The International News Safety Institute is dedicated to the right of all journalists to exercise their profession free from persecution, physical attack and other dangers to life and limb. While recognising that some conditions under which journalists and media staff work never can be completely safe and secure, INSI will strive for the elimination of unnecessary risk, in peace and in war. It will draw on the expertise of its members and supporting organisations to lobby on behalf of working journalists everywhere who embrace the INSI Code of Practice and confront physical or psychological barriers to the free and independent gathering and dissemination of news.

1. The preservation of life and safety is paramount. Staff and freelances equally should be made aware that unwarranted risks in pursuit of a story are unacceptable and strongly discouraged. News organisations are urged to consider safety first, before competitive advantage.
2. Assignments to war and other danger zones must be voluntary and only involve experienced news gatherers and those under their direct supervision. No career should suffer as a result of refusing a dangerous assignment. Editors at base or journalists in the field may decide to terminate a dangerous assignment after proper consultation with one another.
3. All journalists and media staff must receive appropriate hostile environment and risk awareness training before being assigned to a danger zone. Employers are urged to make this mandatory.
4. 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.
5. Employers must provide efficient safety equipment and medical and health safeguards appropriate to the threat to all staff and freelances assigned to hazardous locations.

6. All journalists should be afforded personal insurance while working in hostile areas, including cover against personal injury and death. There should be no discrimination between staff and freelancers.
7. Employers should provide free access to confidential counselling for journalists involved in coverage of distressing events. They should train managers in recognition of post traumatic stress, and provide families of journalists in danger areas with timely advice on the safety of their loved-ones.
8. Journalists are neutral observers. No member of the media should carry a firearm in the course of their work.
9. Governments and all military and security forces are urged to respect the safety of journalists in their areas of operation, whether or not accompanying their own forces. They must not restrict unnecessarily freedom of movement or compromise the right of the news media to gather and disseminate information.
10. Security forces must never harass, intimidate or physically attack journalists going about their lawful business.

ANNEX C

Reporters without Borders, *Charter for the Safety of Journalists Working in War Zones or Dangerous Areas* (2005)

The safety of journalists working on dangerous assignments is not always guaranteed, even if international law provides adequate protection on paper, because warring parties these days are showing less and less respect for that law. News-gatherers cannot get assurances from belligerents that they will be fully protected.

Because of the risks they run to keep the public informed, media workers, journalists and their assistants (whether permanent staff or freelance) working in war zones or dangerous areas are entitled to basic protection, compensation and guarantees from their employers, though protection must never be taken to mean supervision by local military and governmental authorities. Media management also have their own responsibility to make every effort to prevent and reduce the risks involved. The following eight principles shall apply:

Principle 1 – Commitment

The media, public authorities and journalists themselves shall systematically seek ways to assess and reduce the risks in warzones or dangerous areas by consulting each other and exchanging all useful information. Risks to be taken by staff or freelance journalists, their assistants, local employees and support personnel require adequate preparation, information, insurance and equipment.

Principle 2 – Free will

Covering wars involves an acceptance by media workers of the risks attached and also a personal commitment which means they go on a strictly voluntary basis. Because of the risks, they should have the right to refuse such assignments without explanation and without there being any finding of unprofessional conduct. In the field, the assignment can be terminated at the request of the reporter or the editors after each side has consulted the other and taken into account their mutual responsibilities. Editors should be aware of exerting any kind of pressure on special correspondents to take additional risks.

Principal 3 – Experience

War reporting requires special skills and experience, so editors should choose staff or freelancers who are mature and used to crisis situations. Journalists covering a war for the first time should not be sent there alone, but be accompanied by a more experienced reporter. Teamwork in the field should be encouraged. Editors should systematically debrief staff when they return so as to learn from their experience.

Principle 4 – Preparation

Regular training in how to cope in warzones and dangerous areas will help reduce the risk to journalists. Editors should inform staff and freelancers of any special training offered by nationally or internationally qualified bodies and give them access to it. All journalists called upon to work in a hostile environment should have first-aid training. Every accredited journalism school should familiarise its students with these issues.

Principle 5 – Equipment

Editors should provide special correspondents working in dangerous areas with reliable safety equipment (bullet-proof jackets, helmets and, if possible, armoured vehicles), communication equipment (locator beacons) and survival and first-aid kits.

Principle 6 – Insurance

Journalists and their assistants working in warzones or dangerous areas should have insurance to cover illness, repatriation, disability and loss of life. Media management should take all necessary steps to provide this before sending or employing personnel on dangerous assignments. They should strictly comply with all applicable professional conventions and agreements.

Principle 7 – Psychological counselling

Media management should ensure that journalists and their assistants who so desire have access to psychological counselling after returning from dangerous areas or reporting on shocking events.

Principle 8 – Legal protection

Journalists on dangerous assignments are considered civilians under article 79 of Additional Protocol I of the Geneva Conventions, provided they do not do anything or behave in any way that might compromise this status, such as directly helping a war, bearing arms or spying. Any deliberate attack on a journalist that causes death or serious physical injury is a major breach of this Protocol and deemed a war crime.

Annex D

United Kingdom Ministry of Defence, *MOD Working Arrangements with the Media for Use Throughout the Full Spectrum of Military Operations* (2006), available at:

www.mod.uk/NR/rdonlyres/36DBFDCE-6739-4DB3-B589-7162FCA85B25/0/greenbook.pdf