

THE INTERNATIONAL PROTECTION OF JOURNALISTS IN TIMES OF ARMED CONFLICT: THE CAMPAIGN FOR A PRESS EMBLEM

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ABSTRACT:

War correspondents have long been vulnerable to violence. Embedded amongst military units, or else unilaterally venturing into war zones, journalists who seek to cover events in conflict areas knowingly place themselves at risk of injury or death by their acts. The Geneva Conventions and Additional Protocol I – both of which regulate international armed conflicts – offer some protections for journalists during times of international armed conflict, but some journalist advocacy organizations, such as the Press Emblem Campaign (PEC), have argued that they existing protections need to be expanded and developed. To that end, the PEC have argued for the introduction of an internationally protected and recognized emblem, similar to the Red Cross emblem, as a means by which journalists can be identified as persons deserving special protection. The Press Emblem would be part of a larger convention geared towards the protection of journalists in armed conflict situations. This article will analyze the current legal protections for journalists, and the perceived deficiencies of those protections for media personnel who operate in conflict zones. This article will also examine the substance of the prototype convention for the protection of journalists and analyze whether such a convention is a necessary and useful addition to the law of armed conflict.

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INTRODUCTION

In November 2012, the journalists’ advocacy organization, the Press Emblem Campaign (PEC), was awarded the Nicholas Bouvier Award for Journalism, for its work advocating for the protection of journalists and the adoption of an international treaty to protect journalists from acts of violence.¹ The treaty – the ‘Press Covenant’ – has

¹ The Press Emblem Campaign claims the support of 50 professional media associations globally. *See Remise du Prix Nicolas Bouvier de Journalisme - 3e edition*, CLUB SUISSE DE LA PRESSE

been a central part of the PEC platform since its drafting in 2004;² one of the provisions of the draft covenant calls for the adoption of an internationally protected and recognized emblem, similar to the Red Cross emblem, as a means by which journalists can be identified as persons deserving special protection.³

Journalists play an important role in civil society, especially in times of armed conflict – they are frequently the means by which vital information regarding the conflict is collected, recorded and disseminated to the world at large.⁴ Unfortunately, 2012 was a particularly deadly year for journalists. According to the Committee to Protect Journalists (CPJ) 70 journalists and two other media workers were killed in direct relation to their work in 2012, an increase of 42% on the same period in 2011.⁵ Given such a record of violence against journalists, the idea of a new treaty that specifically relates to journalists seems a good idea. There is currently no ‘stand-alone’ treaty that relates to the status of journalists in times of armed conflict - the major armed conflict treaties, the Geneva Conventions⁶ and their Additional Protocols⁷

(Nov. 27, 2012, 5:17 PM), <http://www.pressclub.ch/conference/remise-du-prix-nicolas-bouvier-de-journalisme-3e-edition>.

² See *PEC Latest News*, PRESS EMBLEM CAMPAIGN, <http://www.presseblem.ch/10399.html> (last visited Feb. 7, 2014).

³ Press Emblem Campaign, *Draft proposal for an International Convention to strengthen the protection of journalists in armed conflicts and other situations including civil unrest and targeted killings* art. 7, (December 2007) [hereinafter *Press Covenant*], available at <http://www.presseblem.ch/4983.html>.

⁴ Yoram Dinstein, *The International Status, Rights and Duties of Duly Accredited Journalists in Times of Armed Conflict*, 73 *Annuaire de l'Inst. de Droit Int'l* 451, 459 (2009) [hereinafter *IDI Report*], available at <http://www.idi-iil.org/idiE/annuaireE/2009/Dinstein.pdf>.

⁵ See COMM. TO PROTECT JOURNALISTS, *Journalists Killed in 2012*, <http://www.cpj.org/killed/2012/> (last visited Feb. 8, 2014); *CPJ Special Report: Journalist deaths spike in 2012 due to Syria, Somalia*, COMM. TO PROTECT JOURNALISTS (Dec. 18, 2012, 12:01 AM), <http://www.cpj.org/reports/2012/12/journalist-deaths-spike-in-2012-due-to-syria-somal.php>.

⁶ See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter *Geneva Convention I*]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85 [hereinafter *Geneva Convention II*]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter *Geneva Convention III*]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter *Geneva Convention IV*].

⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter *Additional Protocol I*]; Protocol additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter *Additional Protocol II*].

- contain only a few provisions that single out journalists specifically. Indeed, the issue of protecting journalists from violence in times of unrest and conflict has been the focus of attention of a number of international institutions and organizations of late, including the Institut de Droit International (IDI),⁸ the International Red Cross and Red Crescent Movement,⁹ the UN Security Council,¹⁰ and the UN Human Rights Council.¹¹

However, it must be queried whether a new treaty would add anything of substance to the current law relating to the protection of journalists in armed conflicts. Under the law of armed conflict, journalists are classified as civilians and thus entitled to all the protections that attach to civilian status. In addition, certain kinds of journalists are entitled to classification as war correspondents, and are thus afforded prisoner of war (POW) protections if they are captured. Under the Geneva Conventions and the Additional Protocols, there are comprehensive rules protecting these categories of persons. That acts of violence are committed against press workers in times of armed conflict is arguably due more to a lack of respect for the existing law, rather than an absence of relevant or meaningful law in the first instance. Indeed, it can be argued that some of the provisions in the draft press covenant, namely those on the proposed press emblem, could potentially cause, rather than prevent, harm to journalists.

In light of these developments, this article will examine the current legal protections that exist for journalists and analyze whether the introduction of a Press Convention and Emblem would actually serve or hinder attempts to provide better protection for journalists in situations of armed conflict. Part One of this article will analyze the current legal protections for journalists examining how the law protecting journalists has evolved in the laws of armed conflict. This section will also look at

⁸ See generally *IDI Report*, *supra* note 4. The Institute, at its eleventh meeting in Naples in 2009, specifically examined the question of the place of journalists in times of armed conflict. See *Id.* at 469–71.

⁹ Int'l Comm. of the Red Cross, *4-Year Action Plan for the Implementation of International Humanitarian Law*, Doc. 311C/11/5.1.3DR (Oct. 2011).

¹⁰ S.C. Res. 1738, U.N. Doc. S/RES/1738 (Dec. 23, 2006).

¹¹ See Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, Human Rights Council, U.N. Doc. A/HRC/20/22 (Apr. 10, 2012) [hereinafter Heyns], available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/20/22. This most recent report by Christof Heyns, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, focused on the protection of journalists under international law. See *id.*

the perceived lacunae in the law protecting media personnel who operate in conflict zones. Part Two will examine the substance of the prototype convention for the protection of journalists, analyzing where the convention builds on the current law and where the convention diverges, or introduces new laws for journalists in conflict zones. Part Three will then examine whether such a convention is indeed necessary (and the extent to which it could increase risks to journalists and other citizens); specifically whether the Convention and the Press Emblem would actually help or hinder journalists in the field. The final section of this paper will look at a complication to the parameters of the debate on the protection of journalists - the ‘fragmenting’ of the concept of the journalist - in the wake of the emergence of so-called ‘citizen journalism’ and the rise in more varied forms of content creation that involve input from eyewitnesses, fixers, stringers, freelancers and local reporters. This section will explore whether these new categories of ‘reporters’ are fairly dealt with in the aims and objectives of both the existing law and the proposed Press Convention. This paper will argue that, despite the good intentions of organizations like PEC, efforts to introduce additional international law relating to the press in times of armed conflict are perhaps better directed towards educating the international community on the existing protections, and encouraging compliance with the laws of armed conflict as they currently stand.

I. JOURNALISTS IN TIMES OF ARMED CONFLICT – THE RATIONALE FOR SPECIAL PROTECTIONS

Journalists serve an important function in civil society. As noted by Christof Heyns, the Special Rapporteur on Extra-judicial, Summary or Arbitrary Executions:

Because of the power of information, news and journalism is a heavily contested domain. . . Journalists deserve special concern. . . because the social role they play is so important. . . an attack on a journalist represents an assault on the foundations of the human rights project and on informed society as a whole. Violence against a journalist is not only an attack on one particular victim, but on members of the society.¹²

¹² Id. at 5-6.

Controlling the flow of information, especially during times of armed conflict and internal tensions, is of paramount importance to States, especially when public opinion is at stake. As noted by Cooke:

Civil liberties are rarely more endangered than in wartime, and none is more at risk than freedom of the press. The press is called on to rally patriotic fervor. It is expected to be the voice of the government and the voice of the people – the voice of the country at war. If instead it challenges the government, it is questions the rationale for war, it provokes the government's impulse, already strong in times of crisis, to repress liberties in the name of security.¹³

This resistance to dissent from the media is evident with the most cursory of examinations of recent conflicts and internal tensions. In April of 2011, a number of journalists were captured and detained by governmental forces in Libya – this followed on from the detention and alleged abductions of four *New York Times* journalists in March of 2011;¹⁴ fifteen foreign journalists were detained in Shanghai in March 2011 after attempting to report on anti-government protests in China¹⁵; in the first four months of 2011, journalists were detained and threatened numerous countries, including Bahrain,¹⁶ Syria,¹⁷ Egypt,¹⁸ Yemen,¹⁹ Turkey,²⁰ and Kazakhstan.²¹ The official explanation for such detentions is often the claim that the journalists were filming in a public space

¹³ JOHN COOKE, REPORTING THE WAR: FREEDOM OF THE PRESS FROM THE AMERICAN REVOLUTION TO THE WAR ON TERRORISM 1 (2007).

¹⁴ *Journalists Missing in Libya*, AUSTL. BROAD. CORP. (Mar. 21, 2011, 4:17 PM), <http://www.abc.net.au/news/stories/2011/03/21/3169596.htm>.

¹⁵ *Over 15 foreign Journalists Detained for Protest Reports*, CHINA POST (Mar. 7, 2011), <http://www.chinapost.com.tw/china/national-news/2011/03/07/293606/Over-15.htm>.

¹⁶ *Journalists Detained in Bahrain, Egypt*, COMM. TO PROTECT JOURNALISTS (Mar. 30, 2011 3:00 PM), <http://www.cpj.org/2011/03/journalists-detained-in-bahrain-egypt.php>.

¹⁷ *Reuters Journalists Freed in Syria*, REUTERS (Mar. 28, 2011), <http://www.reuters.com/article/2011/03/28/syria-reuters-idUSLDE72R14F20110328>.

¹⁸ *Journalists Attacked By Mobs Detained in Cairo, U.S. Presses Egypt on Violence, Warns on Friday Protest*, NBCNEWS.COM, http://www.nbcnews.com/id/41404872/ns/world_news-mideast/n_africa/#.UwTJE0JdXso (Last visited Feb. 19, 2014).

¹⁹ *Mohammed Hatem, Two Journalists Detained in Yemen, U.K. Embassy Says*, BLOOMBERG (Mar. 14, 2011, 1:38 PM), <http://www.bloomberg.com/news/2011-03-14/two-journalists-detained-in-yemen-u-k-embassy-says-1-.html>.

²⁰ *Sebnem Arsu, 7 More Journalists Detained in Turkey*, N.Y. TIMES (Mar. 3, 2011), available at http://www.nytimes.com/2011/03/04/world/europe/04turkey.html?_r=0.

²¹ *Al-Jazeera Journalists Detained In Kazakhstan*, RADIO FREE EUROPE RADIO LIBERTY (Feb. 5, 2011), http://www.rferl.org/content/kazakhstan_al_jazeera_journalists/2298648.html.

without special permission.²² However, it is noteworthy that these journalists were reporting on issues or events that the governments in question attempting to conceal from public scrutiny. Indeed, a top secret 2001 UK Ministry of Defence ‘Manual of Security’ listed investigative journalists as a ‘nontraditional threat’ to security, including journalists in a category along with “criminal elements, disaffected staff, dishonest staff and computer hackers”.²³ As Ungar notes “. . . that [the press] has traditionally been one of the first liberties to be denied by totalitarian governments demonstrates the significance and power of a free press”.²⁴

Indeed, the power of media reportage in times of armed conflict was affirmed by the International Criminal Tribunal for the Former Yugoslavia, in the *Brđanin and Talić* case.²⁵ In that instance, the Appeals Chamber affirmed that:²⁶

. . . journalists reporting on conflict areas play a vital role in bringing to the attention of the international community the horrors and realities of the conflict. . . [indeed]. . . it was the brave efforts and reporting of journalists in the former Yugoslavia that, in part, contributed to the establishment of the [Tribunal].

When journalists are deliberately attacked, it serves as an “ultimate, brutal, form censorship.”²⁷ Unfortunately, the deliberate targeting of press workers in an increasingly common occurrence; journalists were once valued for their ability to report a particular story or issue that might not be getting attention. Indeed, this was the plea made to Daniel Pearl’s captors by his editor, Paul Steiger of *The Wall Street Journal*:

²² *UPDATED: Warning on Reporting this Weekend*, FOREIGN CORRESPONDENTS’ CLUB OF CHINA (Feb. 26, 2011), <http://www.fccchina.org/2011/02/26/updated-warning-on-reporting-this-weekend/> (Discussing the carrying of permits).

²³ Ironically, this top-secret report came to light after being released by Wikileaks in 2009. See *UK MoD Manual of Security Volumes 1, 2 and 3 Issue 2, JSP-440, RESTRICTED*, 2389 pages, 2001, WIKILEAKS.ORG, http://wikileaks.org/wiki/UK_MoD_Manual_of_Security_Volumes_1,_2_and_3_Issue_2,_JSP-440,_RESTRICTED,_2389_pages,_2001.

²⁴ Sanford Ungar, *The Role of the Free Press in Strengthening Democracy*, in *DEMOCRACY AND THE MASS MEDIA* 368, 372 (Judith Lichtenberg ed., 1990).

²⁵ Prosecutor v. Brđanin & Talić, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, ¶¶ 36, 38, 50 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 11, 2002), available at <http://www.icty.org/x/cases/brdanin/acdec/en/randall021211.htm>.

²⁶ Prosecutor v. Brđanin & Talić, Case No. IT-99-36-T, Decision on Motion to Set Aside Confidential Subpoena to Give Evidence, ¶ 25 (Int’l Crim. Trib. for the Former Yugoslavia June 7, 2002), available at <http://www.icty.org/x/cases/brdanin/tdec/en/t020612.htm>.

²⁷ *IDI Report*, supra note 4, at 466.

The world now knows, and you seem to know, that Danny is a journalist, nothing more or less. Journalists are, by definition, trained messengers. Danny can be your messenger. . . a captive or killed Danny cannot speak for you, cannot help you or your cause.²⁸

The advent of the internet and the availability of relatively cheap broadcasting technology have, to some degree, eliminated the need for a third party intercessor like a journalist. Indeed, for some, the publicity gained by the act of kidnapping a journalist is more valuable than whatever avenues of communication that journalist offers. As noted by Philip Bennett, Assistant Managing Editor for Foreign Affairs for *The Washington Post*:

. . . for journalists, the familiar rules of engagement have been stripped away. Gone is the assumption that correspondents are more valuable as witnesses than as targets, and that they share only the risks that all civilians face in wartime. To insurgents, foreign journalists are foreigners first, just another element of an occupying force.²⁹

Intentional violence against journalists has risen sharply over the past few decades. Unlike the more sporadic incidents of abduction of journalists during the 1970s and 1980s,³⁰ intentional violence against journalists has become a weekly occurrence.³¹ Such a landscape of violence against journalists would seem to suggest that the law is

²⁸ *U.S., Pakistani Police Work to Find, Free Kidnapped Reporter*, FOX NEWS (Feb. 2, 2002), <http://www.foxnews.com/story/0,2933,44491,00.html>.

²⁹ Phillip Bennet, *The Press: Too Far from the Story?*, WASHINGTON POST (June 6, 2004), available at <http://www.washingtonpost.com/wp-dyn/articles/A17420-2004Jun5.html>.

³⁰ Philip Caputo of the Chicago Tribune was abducted by the Fedayeen in Lebanon, CNN's Jerry Levin was abducted by Hezbollah in Lebanon, and Terry Anderson of Associated Press was held hostage for 7 years in Pakistan. See HERBERT N. FOERSTEL, *KILLING THE MESSENGER: JOURNALISTS AT RISK IN MODERN WARFARE* 23 (2006).

³¹ The Press Emblem Campaign is one of a number of NGOs that keep tabs on the numbers of journalists killed in the line of duty. Their statistics as of 14 August 2012 include 90 journalists killed (so far) in 2012; 107 in 2011; 110 in 2010; 122 in 2009; 91 in 2008; 115 in 2007 and 96 in 2006, with a total of 545 journalists killed in five years from January 2007 to December 2011. As noted on their website, "The PEC includes in its statistics suspected work-related deaths among journalists, correspondents, freelancers, cameramen, sound recordists, technicians, photographers, producers, administrators, cyber-reporters. The figures do not register casualties among other media employees like drivers, guards, security staff and translators. Sources are PEC members, news agencies, national press associations, IFEX, IFJ, RSF, CPI, UNESCO (at least two sources). We differentiate casualties between four categories: (T) for journalists intentionally targeted, (A) for journalists killed accidentally, i.e. in a terrorist blast or in fightings - private circumstances and road accidents are excluded - (C) for criminal causes (i.e. killed by drug traffickers) and (O) for other or unknown causes. The category changes when there are new findings." See *Media Casualties*, PRESS EMBLEM CAMPAIGN, <http://www.pressembem.ch/5037.html> (last viewed Feb. 8, 2014).

insufficient to protect its subjects. With this background in mind, the next section of this paper will examine the laws of armed conflict as they relate to journalists, to see whether this is indeed the case.

II. THE INTERNATIONAL LAWS PROTECTING JOURNALISTS

The idea that journalists would require some form of special recognition under the laws of armed conflict was recognized as far back as one of the first documents to regulate the conduct of parties engaged in armed conflict - the 1863 Lieber Code regulations drawn up on the international law of armed conflict for use by the Union Armies in the American Civil War.³² Article 50 of the Lieber Code provided that “citizens who accompany an army for whatever purpose, such as sutlers, editors, or reporters of journals, or contractors, if captured, may be made prisoners of war, and be detained as such”.³³ When the international laws of armed conflict were being debated in The Hague at the 1899 Peace Conferences, a similar provision regarding journalists was included in Article 13,³⁴ and it was reiterated in the 1907 Hague Regulations concerning the Laws and Custom of War on Land, annexed to the fourth Hague Convention of 1907. Article 13 of the Regulations provides that “individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters” are entitled, in case of capture, to treatment on par with that extended to prisoners-of-war, on the condition that they are in possession of suitable accreditation - a certificate “from the military authorities of the army which they were accompanying.”³⁵ This provision was included in the 1929 Geneva Convention relative to the Treatment of Prisoners of War, in Article 81.³⁶ This practice, known as ‘embedding’, meant that accredited journalists

³² FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD 18 (1863).

³³ The term ‘sutler’ refers to a civilian merchant who follows the armed forces, selling them goods; they traditionally had storefronts that would be based in military encampments. MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/sutler> (last visited Feb. 8, 2014).

³⁴ Hague Convention (II) Regarding the Laws and Customs of War on Land, July 29, 1899, 187 C.T.S. 429 [hereinafter Hague Convention II].

³⁵ International Convention Respecting the Law and Customs of War on Land, art. 13, Oct. 18, 1907, 205 Stat. 277 [hereinafter Hague Convention IV].

³⁶ Geneva Convention Relative to the Treatment of Prisoners of War, art. 81, July 27, 1929, 75 U.N.T.S. 135, 118 L.N.T.S. 343.

would enjoy certain benefits due to their connection to the armed forces.³⁷

When the Geneva Conventions were updated following the Second World War, the provision regarding war correspondents was retained and expanded. Geneva Convention III relative to the Treatment of Prisoners of War, Article 4A provides that:³⁸

Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy. . .

(4) 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.³⁹

Thus, embedded war correspondents captured while reporting on international conflicts would be afforded prisoner of war treatment – an expansion of the Hague protections and those of the 1929 Geneva Convention.⁴⁰ However, it should be noted that war correspondents, despite their inclusion in the Article 4A(4) section on POWs, are considered ‘attached non-combatants’ and as such are, fundamentally, civilians.⁴¹ Though not explicitly stated in either Article 4A(4), nor its commentary, the commentary to Article 79 of Additional Protocol I, which relates to journalists, clarifies the situation:

³⁷ See Int’l Comm. of the Red Cross (ICRC), *Additional Protocol I Commentary – Measures of the Protection of Journalists*, ¶¶ 3247-3256 (1987)[hereinafter *AP Commentary*].

³⁸ See Geneva Convention III, *supra* note 6.

³⁹ *Id.* at art. 4A(4) (emphasis added).

⁴⁰ As defined in *Dictionnaire de droit international public* (Jean Salmon (dir), Brussels, 2001 at 275; translated from the French) a war correspondent is a ‘specialized journalist who is present, with the authorization and under the protection of the armed forces of a belligerent, on the theatre of operations and whose mission is to provide information on events relating to the ongoing hostilities’.

⁴¹ *IDI Report, supra* note 4, at 456–57. This is confirmed by the IDI in their Naples Session report: “all ‘war correspondents’ are civilians who merely accompany the armed forces but are not members thereof. . . ‘embedding’ in a military unit does not mean induction into the armed forces. . . [or] deprive a ‘war correspondent’ of his or her civilian status.” *Id.* at 457. See also S.C. Res. 1738, U.N. Doc. S/RES/1738 (2006) (affirming that journalists are civilians under IHL)..

This paragraph. . . clarifies the status of war correspondents protected by Article 4A(4) of the Third Convention: they are civilians. In fact, Article 50 [of Protocol I] includes the categories of persons mentioned in Article 4A(4) of the Third Convention in its definition of civilians.⁴²

Journalists in war zones on their own recognizance, and not authorised or accredited with an armed forces unit, receive no ‘additional’ special protection under the Conventions, in that they are not singled out for special mention. However, they are categorised as ‘civilians’. As such, they are entitled to a raft of protections and rights regarding their treatment.⁴³

When the laws of war were re-examined in the 1970s, the special position for journalists in times of armed conflict was reaffirmed. Under Article 79 of Additional Protocol I,⁴⁴ ‘[j]ournalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians within the meaning of Article 50, paragraph 1’. Article 50(1) defines civilians as “any person who does not belong to one of the categories of persons referred to in Article 4A(1),(2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered a civilian.” In essence, anyone who is not classified as a combatant under Convention III or Protocol I is a civilian. Journalists also benefit from the broad protections outlined in Article 75 of Protocol I, which ensures that any persons “in the power of a Party to the conflict. . . who do not benefit from more favourable treatment under the Conventions”⁴⁵ are entitled to numerous protections and rights, including humane treatment,⁴⁶ protection from various acts of violence⁴⁷ and a raft of protections if they are detained.⁴⁸

Under the Protocol, journalists are entitled to obtain a government-issued identity card, attesting to his or her status as a journalist, identifying details of the news medium to which the journalist belongs, and the nationality or residence of the journalist.⁴⁹ However, it

⁴² *AP Commentary*, *supra* note 37, ¶ 3259.

⁴³ *See infra* notes 48, 82 and accompanying text.

⁴⁴ Additional Protocol I, *supra* note 7, at art. 79.

⁴⁵ *Id.* at art. 75(1).

⁴⁶ *Id.*

⁴⁷ *Id.* at art. 75(2)..

⁴⁸ *Id.* at art 75(3)-(8).

⁴⁹ *Id.* at art. 79(3); *see also id.* at Annex II (giving an example of the identity card)

is not necessary for journalists to be in possession of the card in order to be protected as a civilian.⁵⁰ Like Article 4A before it, Article 79 of Protocol I (AP 1, 1977) does not define ‘journalist’; however, the ICRC, in the commentary to the Protocols, stated that the word should be understood according to the “ordinary meaning of the term”⁵¹ with reference to the definition in draft Article 2(a) of the 1975 Draft International Conventions for the Protection of Journalists Engaged in Dangerous Missions in Areas of Armed Conflict:⁵²

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.⁵³

Article 79 does not create new law or a new status; it simply affirms that journalists are ‘civilians’, under the Conventions and Protocol I, and thus entitled to all the protections afforded to civilians.⁵⁴

Journalists will lose any special protection if they take direct part in hostilities, for as long as they take direct part.⁵⁵ What constitutes direct participation in hostilities has been debated for some time now. The idea is explicitly contained in Article 51(3) of Additional Protocol I. However, when debating Article 51 of Protocol I, delegates at the Diplomatic Conferences did not settle on a precise definition of what that term meant.⁵⁶ Likewise, the ICRC Study on the Customary Status of

⁵⁰ See *AP Commentary*, *supra* note 37, ¶¶ 3272–73.

⁵¹ *Id.* ¶ 3260.

⁵² U.N. Secretary-General, *Human Rights in Armed Conflicts: Protection of Journalists Engaged in Dangerous Missions in Areas of Armed Conflict*, Annex 1, art. 2(a), U.N. Doc. A/10147 (Aug. 1, 1975).

⁵³ *AP Commentary*, *supra* note 37, ¶ 3260.

⁵⁴ See INT’L COMM. OF THE RED CROSS (ICRC), *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I: RULES 115–17* (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter *ICRC CUSTOMARY INT’L HUMANITARIAN L.*]; see also *Customary International Humanitarian Law, Rule 34*, ICRC.ORG, http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule34 (last visited Feb. 19, 2014) (including updated State practice on Article 79).

⁵⁵ See Additional Protocol I, *supra* note 7, at art. 79(2); see also *id.* art. 51(3) (regarding “direct participation in hostilities”).

⁵⁶ See *Report to the Committee III on the Work of the Working Group*, DOC. CDDH/III/224, in *Official Records Of The Diplomatic Conference On The Reaffirmation And Development Of International Humanitarian Law Applicable In Armed Conflicts*, Vol. XV 327, 330 (1974–1977); see also *AP Commentary*, *supra* note 37, at 618–19; MICHAEL BOTHE, KARL JOSEF PARTSCH & WALDEMAR A. SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949* 301-04 (1982).

International Humanitarian Law stated that “a precise definition of the term ‘direct participation in hostilities’ does not exist.”⁵⁷

The past few years has seen a number of endeavours at defining the parameters of direct participation. The International Criminal Tribunal for the Former Yugoslavia looked at the question of direct participation in the case of *Strugar*; the Chamber defined direct participation as “acts of war which by their nature or purpose are intended to cause actual harm to the personnel or equipment of the enemy’s armed forces”⁵⁸ and elaborated on possible examples of direct participation as including:

bearing, using or taking up arms, taking part in military or hostile acts, activities, conduct or operations, armed fighting or combat, participating in attacks against enemy personnel, property or equipment, transmitting military information for the immediate use of a belligerent, transporting weapons in proximity to combat operations, and serving as guards, intelligence agents, lookouts, or observers on behalf of military forces.⁵⁹

The Israeli Supreme Court case of *The Public Committee Against Torture in Israel v The Government of Israel*, known colloquially as the ‘*Targeted Killings*’ case⁶⁰ also examined what constitutes direct participation in hostilities. In that case, the Court took a functional approach,⁶¹ outlining certain categories of persons who could be considered as taking direct part in hostilities. These included (a) persons collecting intelligence on the armed forces; (b) persons transporting unlawful combatants to or from the place where hostilities are occurring and (c) persons who operate weapons that unlawful

⁵⁷ ICRC CUSTOMARY INT’L HUMANITARIAN L., *supra* note 54, at 22.

⁵⁸ Prosecutor v. Strugar, Case No, IT-01-42-A, Appeals Chamber Judgment, ¶¶ 176–79 (Int’l Crim. Trib. for the Former Yugoslavia July 17, 2008) [Hereinafter *Strugar*]. The Chamber drew on numerous sources in support of its statement, including military manuals from numerous countries, international tribunal judgments, U.S. Military Commission decisions, State practice and reports and decisions of human rights bodies, such as the Inter-American Commission on Human Rights. See Inter-Am. Comm. H.R., *Third Report on the Human Rights Situation in Columbia*, OEA/Ser.L/V/II.102, doc. 9 rev. 1 ch. 4, ¶ 53 (Feb. 26, 1999) (“It is generally understood in humanitarian law that the phrase ‘direct participation in hostilities’ means acts which, by their nature or purpose, are intended to cause actual harm to enemy personnel and material.”).

⁵⁹ *Strugar*, *supra* note 58, ¶ 177.

⁶⁰ HCJ 769/02 *The Public Committee Against Torture in Israel v. The Government of Israel*, §§ 6–7 [2006] (Isr.), available at http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf.

⁶¹ *Id.* § 31.

combatants use, or supervise their operation, or provide service to them.⁶² The Court also considered civilians involved in transporting ammunition to places for use in hostilities, as well as persons acting as voluntary human shields could be considered as taking direct part in hostilities.⁶³ The Court explained:

[the] direct character of the part taken should not be narrowed merely to the person committing the physical act of attack, those who have sent him, as well, take 'a direct part'. The same goes for the person who decided upon the act, and the person who planned it. It is not to be said about them that they are taking an indirect part in hostilities.⁶⁴

The Court went on, however, to exclude certain persons and acts from the scope of direct participation, including the selling of food and medicine to unlawful combatants; providing general strategic analysis, logistical and other general support, including monetary aid; and the distribution of propaganda.⁶⁵

Finally, the International Committee of the Red Cross undertook a comprehensive, though ultimately controversial study into direct participation. Their Interpretive Guidance defined direct participation as:

All persons who are not members of State armed forces or organised armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function is to take a direct part in hostilities ('continuous combat function').⁶⁶

The Interpretive Guidance states that, in order to qualify as direct participation:

A specific act must meet the following cumulative criteria: (1) the act must be likely to adversely affect the military operations of military capacity of a party to an armed conflict or alternatively to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm); (2) there must be a direct causal link between the act and the harm likely to result from that act, or from a coordinated military operation of which that act constitutes an

⁶² *Id.* § 35.

⁶³ *Id.* §§ 35–36.

⁶⁴ *Id.* § 37.

⁶⁵ *Id.* § 35.

⁶⁶ ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, at 1002 (Feb. 26, 2009).

integral part (direct causation); and (3) the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).⁶⁷

These elements are designed to ensure that persons who might supply subsidiary or tangential support – such as essentially administrative or support function – are excluded from being targeted, reserving targeting for the more serious levels of involvement.

With regards to journalists, participation does not include such activities as conducting interviews with civilians or combatants, taking still or moving pictures, making audio recordings or any other of the usual tasks involved in journalistic practice.⁶⁸ Even the dissemination of propaganda by a journalist does not amount to direct participation. Indeed, the ICTY noted this in its final report on the NATO bombing, stating that “[w]hether the media constitutes a legitimate target group is a debatable issue. If the media is used to incite crimes, as in Rwanda, then it is a legitimate target. If it is merely disseminating propaganda to generate support for the war effort, it is not a legitimate target.”⁶⁹

Under IHL in international armed conflicts, the substance of the protections for war correspondents and journalists varies. War correspondents, properly designated, are entitled to prisoner of war treatment. Thus, while they may be detained if captured during hostilities, they are afforded fundamental rights including humane treatment,⁷⁰ protection from acts of violence,⁷¹ including torture,⁷²

⁶⁷ *Id.* at 1016.

⁶⁸ See *AP Commentary*, *supra* note 37, ¶¶ 1942–1945, at 618-619.

⁶⁹ See INT’L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA, ¶ 47, available at <http://www.icty.org/x/file/Press/nato061300.pdf>. The NATO bombing of the RTS (Serbian Radio and Television Station) in 1999 was justified on the grounds of, among other things, the need to dismantle the propaganda-generating capability of the Milosevic government. *Id.* ¶ 74. While in this instance, the ICTY found that the attack on the RTS was justifiable, and a legitimate military target (for reasons other than its use as a propaganda tool), the ICTY nonetheless reaffirmed that propaganda dissemination is not in itself enough to warrant direct participation in hostilities for the purposes of rendering the media a legitimate military target. *Id.* ¶ 47; see also *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, Case No ICTR-99-52-A, Appeals Judgment, ¶¶ 672–774 (Int’l Crim. Trib. for Rwanda Nov. 28, 2007) (regarding “incitement”).

⁷⁰ Geneva Convention III, *supra* note 6, at art. 13.

⁷¹ *Id.*

⁷² *Id.* at art. 17.

medical and scientific experimentation,⁷³ insults and public curiosity⁷⁴; access to medical care,⁷⁵ minimum standards regarding conditions of captivity,⁷⁶ the right to have contact with their families,⁷⁷ the right to relief from organizations like the Red Cross,⁷⁸ and the right to fundamental judicial guarantees, if they are subject to trial.⁷⁹ This right to POW treatment is without prejudice to their fundamental status as civilians.

Non-embedded journalists are covered by all the protections extended to civilians.⁸⁰ As civilians, they are protected from the effects of the armed conflict, and are immune from being targeted or attacked, provided they take no active part in hostilities.⁸¹ There is a raft of protections if they are interned in relation to the armed conflict, similar to the protections contained in the POW Convention.⁸² Media equipment will also be considered to be civilian objects, and is therefore not to be made the object of attack.⁸³ Non-embedded journalists as civilians, and war correspondents - embedded journalists - as POWs, are currently protected persons under international humanitarian law; serious violations of the laws of armed conflict constitute war crimes if perpetrated against protected persons or property.⁸⁴

A. IHL RELATING TO JOURNALISTS IN NON-INTERNATIONAL ARMED CONFLICT

The laws that regulate non-international armed conflict are considerably more limited than those for international armed conflict.⁸⁵

⁷³ *Id.* at art. 13.

⁷⁴ *Id.*

⁷⁵ *Id.* at arts. 15, 17, 29–33.

⁷⁶ *Id.* at arts. 17–81.

⁷⁷ *Id.* at arts. 70–77.

⁷⁸ *Id.* at arts. 72–77.

⁷⁹ *Id.* at arts. 82–108.

⁸⁰ *See generally* Geneva Convention IV, *supra* note 6; *see generally also* Additional Protocol, *supra* note 7 (regarding the protection of the civilian population during war).

⁸¹ Additional Protocol I, *supra* note 7, at arts. 48–58.

⁸² *See* Geneva Convention III, *supra* note 6, at arts. 79–127; *see also* Additional Protocol I, *supra* note 7, at art. 75.

⁸³ *See* Additional Protocol I, *supra* note 7, at art. 52.

⁸⁴ *See* GCIV, *supra* note 6, at art. 146; Additional Protocol I, *supra* note 7, at art. 85.

⁸⁵ There is a wealth of commentary on the disparity of laws between international and non-international armed conflicts. *See* Rogier Bartels, *Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide between International and Non-International Armed*

The relevant instruments that regulate non-international armed conflict are Common Article 3 to the Geneva Conventions, and Additional Protocol II. These instruments provide some basic regulation of conduct in armed conflict, and lay down some basic fundamental protections for those most vulnerable in times of armed conflict – civilians, those detained in connection with the conflict, the wounded, sick and shipwrecked.

In neither Common Article 3 nor Additional Protocol II are journalists or war correspondents specifically mentioned, they are thus afforded the same protections as civilians in non-international armed conflicts.⁸⁶ The relevant provisions for protections in non-international armed conflicts are contained in Common Article 3 to the Geneva Conventions, which provides:

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

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

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Conflicts, 91 INT'L REV. RED CROSS 35 (2009); Emily Crawford, *Unequal Before the Law: The Case for the Elimination of the Distinction between International and Non-International Armed Conflict*, 20 LEIDEN J. INT'L L. 441(2007); Christine Byron, *Armed Conflicts: International or Non-International?*, 6 J. CONFLICT & SECURITY L. 63 (2001)..

⁸⁶ In this respect, the term 'civilian' is being used to describe all persons who are not members of the armed forces of the State, or of organized armed groups, or who otherwise take direct part in hostilities. Additional Protocol I, *supra* note 7, at art. 50.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

Under Additional Protocol II, civilians are to be protected from the effects of the armed conflict⁸⁷ and are not to be subject to acts of violence to life and health,⁸⁸ such as torture,⁸⁹ mutilation,⁹⁰ corporal punishment,⁹¹ hostage taking,⁹² sexual violence,⁹³ terrorism,⁹⁴ humiliating and degrading treatment,⁹⁵ slavery,⁹⁶ pillage⁹⁷ or collective punishment.⁹⁸ Any civilian interned in relation to the armed conflict is to be afforded protections with regards to the internment, in a similar (but limited) manner to those protections afforded to civilian internees in international armed conflicts.⁹⁹ Should civilians in non-international armed conflicts face penal prosecution in relation to the armed conflict, they are also to be afforded considerable legal protections, similar to those of civilian internees and POWs in international armed conflicts.¹⁰⁰ Civilians in non-international armed conflicts should have access to relief societies and relief actions.¹⁰¹

Given these broad protections, it would appear that journalists, as civilians and/or war correspondents, are comprehensively covered by the laws relating to armed conflict. However, the progenitors of the campaign for a press covenant seem to find the law lacking. This next section of the paper will examine the campaign and address its concerns and arguments.

⁸⁷ Additional Protocol II, *supra* note 7, at arts. 13-17.

⁸⁸ *Id.* at art. 4(2)(a).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at art. 4(2)(c).

⁹³ *Id.* at art. 4(2)(e).

⁹⁴ *Id.* at art. 4(2)(d).

⁹⁵ *Id.* at art. 4(2)(e).

⁹⁶ *Id.* at art. 4(2)(f).

⁹⁷ *Id.* at art. 4(2)(g).

⁹⁸ *Id.* at art. 4(2)(b).

⁹⁹ *Id.* at art. 5.

¹⁰⁰ *Id.* at art. 6; *see also* EMILY CRAWFORD, THE TREATMENT OF COMBATANTS AND INSURGENTS UNDER THE LAW OF ARMED CONFLICT 99-147 (2010).

¹⁰¹ Additional Protocol II, *supra* note 7, at art. 18.

III. THE CAMPAIGN FOR A PRESS CONVENTION

The International Committee of the Red Cross has flagged the need to better protect journalists. At the 31st International Conference of the Red Cross and Red Crescent, held in 2011, the ICRC outlined its “Four Year Action Plan for the Implementation of International Humanitarian Law”. Objective 3, entitled “Enhanced protection of journalists and the role of the media with regard to international humanitarian law”, outlines the key objectives that the ICRC wishes to further in this regard, reaffirming that journalists are civilians and should be protected as such; that State armed forces IHL training include specific components on the protection of journalists; that States engage in IHL and security training for journalists; and that States enact adequate domestic legislation to prevent and sanction serious violations of IHL against civilians – including journalists.¹⁰²

No mention was included in the ICRC resolution of enhancing protection for journalists by adopting a new, specific treaty for the protection of journalists. Acceptance and ratification of such a convention has been the aim of a campaign for a new, specific treaty for the protection of journalists, including provision for a press emblem.¹⁰³ This campaign has been spearheaded by a number of non-governmental organizations, including the Press Emblem Campaign,¹⁰⁴ the Committee to Protect Journalists,¹⁰⁵ and Reporters Without Borders.¹⁰⁶ The campaign centers on the draft “International Covenant for the Protection of Journalists”¹⁰⁷ of 2006, which draws attention to:

the growing attacks against journalists, targeted killings, kidnapping [which] have changed the dangerous mission of the media profession which makes Article 79 [of Protocol I] inadequate to deal with the

¹⁰² Int’l Comm. of the Red Cross & Red Crescent [ICRC], *Four Year Action Plan for the Implementation of International Humanitarian Law*, ICRC Doc. 3IIC/11/5.1.3DR, at 7-8 (Dec. 1, 2011).

¹⁰³ Indeed, Reporters Without Borders was integral to the adoption of Security Council Resolution 1738 in 2006, which condemned the deliberate targeting of journalists. *See* S.C. Res. 1738, para. 1, U.N. Doc. S/RES/1738 (Dec. 23, 2006).

¹⁰⁴ *See generally* PRESS EMBLEM CAMPAIGN (PEC), <http://www.pressemblem.ch/4597.html> (last visited Feb. 8, 2014).

¹⁰⁵ COMM. PROTECT JOURNALISTS (CPJ), <http://www.cpj.org> (last visited Feb. 7, 2014).

¹⁰⁶ *See Who We Are*, REPORTERS WITHOUT BORDERS, <http://en.rsf.org/who-we-are-12-09-2012,32617.html> (last visited Feb. 7, 2014).

¹⁰⁷ *See Draft Int’l Covenant for the Protection of Journalists*, PRESS EMBLEM CAMPAIGN (PEC), <http://www.pressemblem.ch/4983.html> (last visited Feb. 7, 2014)[hereinafter Draft Covenant].

current circumstances that have amplified the problem into a global problem with journalists killed in different regions of the world.¹⁰⁸

The draft covenant comprises twelve articles and reaffirms the protections afforded to journalists as civilians under international humanitarian law.¹⁰⁹ Opening with a twenty-six paragraph preamble, drawing heavily on international human rights law, the draft Covenant affirms the protections outlined in the Universal Declaration of Human Rights¹¹⁰ and the International Covenant on Civil and Political Rights,¹¹¹ and highlights that:

Journalists and media professionals have an essential role to play in order to testify and to make public the violations of human rights and humanitarian law, to denounce those who committed them and ensure the respect by all parties of the rights of civilians . . . [and] that the freedom of the press and the free exercise of journalism are essential to ensure the right of the public to information in all circumstances.¹¹²

A. SCOPE OF APPLICATION OF THE DRAFT COVENANT

The scope of application of the covenant, outlined in Article 1, covers all times of “war and peace, during international armed conflicts. . . non-international armed conflicts. . . and in cases of serious internal violence, which includes local conflicts, civil unrest, targeted killings, kidnapping, authorized and unauthorized demonstrations.”¹¹³ The applicable scope of the Covenant would already seem to be broader than existing international humanitarian law. The lowest threshold for the applicability of IHL is Common Article 3, which is deemed apply in situations “not of an international character.” The vagueness of the threshold was intentional; the idea being to ensure that any “open hostilities between armed forces which are organized to a greater or lesser degree”¹¹⁴ would fall within the scope of Common Article 3, but that any

¹⁰⁸ *Id.* at Preamble.

¹⁰⁹ *Id.* at art. 2.

¹¹⁰ Draft Convention, *supra* note 107, at Preamble; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

¹¹¹ Int’l Covenant on Civil & Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316, 999 U.N.T.S. 171 (Dec. 16, 1966) [hereinafter ICCPR] (signed by 160 States Parties as of Feb. 17, 2008).

¹¹² Draft Covenant, *supra* note 107, at Preamble.

¹¹³ *Id.*

¹¹⁴ AP Commentary, *supra* note 37, ¶ 4341, at 1319.

internal disturbances and tensions, characterized by isolated or sporadic acts of violence, do not therefore constitute armed conflict in a legal sense, even if the government is forced to resort to police forces or even to armed units for the purpose of restoring law and order. Within these limits, non-international armed conflict seems to be a situation in which hostilities break out between armed forces or organized armed groups within the territory of a single State.¹¹⁵

The key element for triggering the applicability of Common Article 3 seems to be the degree of organization of the armed forces;¹¹⁶ this is reaffirmed in Protocol II, which includes the organizational element of the armed forces in its threshold of applicability. However, Protocol II is more restrictive in its applicability, including a territorial control element in its applicability threshold, stating that in order for the Protocol to apply, the conflict must:

Take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized groups which, under responsible command, exercise such control over a party of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.¹¹⁷

The Protocol goes on to specifically exclude “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.” Protocol II is thus considerably more restrictive in its scope of application than Common Article 3. The threshold for the application of the Press Covenant is thus noticeably broader than both Common Article 3 and Protocol II, as it includes serious violence in the context of riots and demonstrations. The Covenant is applicable to “all authorities representing a State as well as all representatives and so-called non-State actors of the civil society, such as criminal networks.” Again, the Covenant seems to have a broader scope of applicability, in that is

¹¹⁵ *Id.* This definition of non-international armed conflict has been affirmed by the ICTY in the Tadić decision, where the Appeals Chamber stated that an “armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.” Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Deference Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). See, e.g., ANTHONY CULLEN, THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW 117-158 (2010) (giving a detailed analysis of the Tadić decision and the threshold requirements for non-international armed conflict under Common Article 3 and Protocol II).

¹¹⁶ CULLEN, *supra* note 115, at 119.

¹¹⁷ Additional Protocol II, *supra* note 7, at art. 1(1).

specifically refers to criminal networks as being bound; no such reference exists to criminal networks in the Geneva Conventions or Additional Protocols.

B. DEFINITION OF JOURNALIST

The draft covenant includes an expansive definition of journalist, encompassing:

... all civilians who work as reporters, correspondents, photographers, cameramen, graphic artists, and their assistants in the fields of the print media, radio, film, television and the electronic media (Internet), who carry out their activities on a regular basis, full time or part time, whatever their nationality, gender and religion.

This definition is found in the preamble to the Covenant, rather than the Covenant proper.

C. GENERAL PROVISIONS FOR THE PROTECTION OF JOURNALISTS

Article 2 of the draft Covenant reaffirms the statements of the preamble, prohibiting any “deliberate attack or aggression, threats, kidnapping or detention directed against a journalist while carrying out his or her functions”, provided that the journalist does not directly contribute to the military operations. Article 2 reaffirms the IHL prohibition on targeting civilian installations and objects – in this case, media installations and equipment, and reaffirms that any “attack against the life and physical and moral integrity, notably killing, cruel and inhuman treatments, torture, hostage taking involving journalists” are prohibited at all times, and constitute a war crime.¹¹⁸ This echoes the provisions of the Rome Statute of the International Criminal Court, which criminalizes violations of Common Article 3 as war crimes.¹¹⁹ The Covenant also obliges journalists not to take any action which may adversely affect his or her status as a civilian,¹²⁰ must not be armed or contribute in any way to the hostilities,¹²¹ and must not use their position

¹¹⁸ Draft Convention, *supra* note 107, at art. 2(3).

¹¹⁹ Rome Statute of the International Criminal Court, art. 8(c)(i)-(iv), July 17, 1998, 2187 UNTS 90.

¹²⁰ Draft Convention; *supra* note 107, at art. 2(1).

¹²¹ *Id.* at art. 2(6).

as a media professional to incite “violence, genocide, crimes against humanity, and serious violations of humanitarian law.”¹²²

One curious contradiction in the Covenant is the provision that calls for journalists as defined under the covenant to be afforded POW status if captured.¹²³ While this is not an inherently problematic inclusion, echoing as it does the rights of embedded journalists in Geneva Convention III, it seems at odds with Article 2 of the Covenant, which *prohibits* detention of journalists – this will be discussed in more detail in the section below critiquing the Press Covenant.

D. IMPLEMENTATION AND ENFORCEMENT OF THE COVENANT

The remainder of the Covenant covers issues such as assistance to be rendered to journalists by parties to the Covenant, and measures for the implementation and enforcement of the Covenant, such as undertaking inquiries into alleged violations of IHL and of the Covenant, the repression of breaches of IHL and the Covenant, training to be given to military personnel, and to and by journalism associations and media organizations and employers. Integral to the implementation and enforcement of the Covenant is the instrument’s provision for the creation of an International Media Committee (IMC). Under Article 10, the IMC would serve to ensure the implementation and enforcement of the Covenant, and would comprise independent experts, from both media and other institutions of civil society, charged with collecting “all relevant information on the protection of journalists world-wide.” States would thus have to report on their compliance with the Covenant to the IMC.

The Covenant also provides that the IMC is capable of hearing a request, submitted by an ‘injured’ journalist, his or her family and/or legal representative, for further consideration. If considered necessary, the IMC may establish an independent commission of enquiry, for the purposes of “establishing the facts and identifying the perpetrators.” In this respect, the proposed IMC is similar to the International Humanitarian Fact Finding Commission, the permanent international body established under Article 90 of Additional Protocol I, “whose main purpose is to investigate allegations of grave breaches and serious

¹²² *Id.* at art. 2(5).

¹²³ *Id.* at art. 4.

violations of international humanitarian law.”¹²⁴ Under the Protocol the IHFFC is tasked with the ability to “enquire into any facts alleged to be a grave breach as defined in the Conventions and the Protocol or other serious violations of the Conventions or the Protocol” and “facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and the Protocol.”¹²⁵

E. A PRESS EMBLEM

Along with the expanded scope of applicability and the protections for journalists as outlined in the Covenant, the new treaty proposes to also introduce an internationally protected emblem. Article 7 outlines the scope for a new emblem:¹²⁶

1. In order to strengthen the protection of journalists and facilitate their identification in zones of fighting, the States Parties decide to adopt a distinctive international emblem and commit themselves to respect it and ensure that it is respected in all circumstances.
2. This international distinctive emblem for the media is composed of five capital letters, PRESS, in black on a circular orange background (orange disk).
3. A journalist wearing the distinctive emblem should be able to prove his or her identity by showing his or her press card or equivalent identity document, when it is requested by an officer on duty. The right to wear this emblem for the press is exclusively reserved to journalists.
4. The distinctive emblem shall be worn in a clearly visible manner, either on an arm band on the upper left or right arm, or on a cloth covering the chest or back. Vehicles, professional equipment and media installations may also be marked with the distinctive emblem.

There are clearly two parts to the notion of a distinctive emblem for journalists. One element is that journalists who are *accidentally*

¹²⁴ *The IHFFC in a Few Words*, INTERNATIONAL HUMANITARIAN FACT-FINDING COMMISSION (IHFFC), http://www.ihffc.org/index.asp?Language=EN&page=aboutus_general (last visited Jan. 30, 2014).

¹²⁵ *Id.* Established in 1992, the IHFFC has yet to be called upon to examine an issue.

¹²⁶ *Draft Convention*, *supra* note 107, at Preamble.

targeted, being mistaken for persons taking direct part in hostilities, would potentially benefit from wearing a distinctive emblem visible at a distance. In such cases, much like the accidental targeting of the Reuters journalists by American troops in 2007,¹²⁷ a distinctive emblem would help identify such persons as civilian journalists; cameras and tripods would not be mistaken for rocket launchers or AK-47s. In addition, the wearing of a distinctive emblem may help in targeting decisions – the presence of a journalist in a large crowd may ‘tip the balance’ in favor of the presumption of a civilian designation, rather than the crowd or gathering being identified as hostile. Indeed, this is one of the stated aims of the Covenant, which asserts that the “general protection accorded to the civilian population by humanitarian law would be reinforced by a more frequent presence of journalists on the ground alongside the victims”.¹²⁸

However, it is equally possible that the obvious presence of journalists in a crowd of civilians could tip the balance the *other* way - wearing the emblem would not only make journalists more clearly identifiable (and therefore targetable), it could also make it easier to identify the people who are speaking to journalists, who may as a result be deemed to be civil resistance operatives and therefore targeted, as has occurred in some oppressive regime situations.¹²⁹ It is here that one of the complications regarding the Emblem arises. While the Emblem may serve to protect journalists from being accidentally targeted, the issue of journalists who are *deliberately* targeted is less clear. In February 2012 veteran war journalist Marie Colvin and photographer Remi Ochlik were killed in Syria when more than 10 rockets hit the house/makeshift media centre they were staying in, in November that year, another media house in Syria was bombed and three more journalists were killed.¹³⁰ These and other similar incidents point to the deliberate targeting of journalists

¹²⁷ Elizabeth Bulmiller, *Video Shows US Killing of Reuters Employees*, N.Y. TIMES (April 5, 2010), <http://www.nytimes.com/2010/04/06/world/middleeast/06baghdad.html>.

¹²⁸ Draft Convention, *supra* note 107, at Preamble; In the 2009 IDI Naples Session, both Judge Fausto Pocar and Hisakazu Fujita come out in support of a press emblem, though they were divided over whether the emblem should be mandatory. See IDI REPORT, *supra* note 4, at 478-79.

¹²⁹ Kayt Davies, *Safety vs. Credibility: West Papua Media and the Challenge of Protecting Sources in Dangerous Places*, 18 PAC. JOURNALISM REV. 69, 76-77 (2012).

¹³⁰ See, Roy Greenslade, *Marie Colvin Killed in Syria*, GUARDIAN (Feb. 22, 2012), available at <http://www.guardian.co.uk/media/greenslade/2012/feb/22/sundaytimes-syria> (regarding the death of Marie Colvin); see also, *Bloodiest month for journalists in Syria*, DAILY STAR (Nov. 30, 2012), available at <http://www.dailystar.com.lb/News/Middle-East/2012/Nov-30/196744-bloodiest-month-for-journalists-in-syria.ashx#axzz2HMLCLiPR..>

because of their status; thus, compelling such persons to wear identification that is highly visible may be detrimental. It is this issue, along with other potential problems regarding the Convention, which will be examined in the next section of this paper.

IV. LEGAL AND POLICY PROBLEMS WITH THE CAMPAIGN AND EMBLEM

While endeavours to ensure the protection of journalists in times of armed conflict are admirable, it should be assessed whether a journalists' convention – and a press emblem specifically – would actually further such endeavours. This section of the paper thus examines some of the concerns raised and problems inherent in a dedicated Press Convention, and a Press Emblem.

A. THE PERCEIVED 'GAPS' IN THE LAW

The motivation behind the introduction of a new system of special protection seems to be that, somehow, the existing law that protects journalists – the law that protect civilians – is somehow inadequate, and that journalists are in need of a special regime of protection, tailored just to them.¹³¹ While the deliberate targeting of journalists is indeed problematic – “an ultimate, brutal, form of censorship”¹³² – one has to question whether such acts are due to a failure in the law, or, more likely, down to a failure to respect the law. As UN Special Rapporteur Christof Heyns has noted,

the most immediate problem does not lie with gaps in the international legal framework. The challenge is rather to ensure that the established international framework is fully used, and that its norms are reflected in domestic laws and practices.¹³³

Indeed, it is noteworthy that the origins of Article 79, and the idea of singling out journalists for special consideration, came not from discussions in the lead up to the adoption of the Additional Protocols¹³⁴ but rather from initiatives in the UN General Assembly. In 1970, France had asked the Economic and Social Council, through the General

¹³¹ See IDI Report, *supra* note 4 at 469.

¹³² *Id.* at 466.

¹³³ Heyns, *supra* note 11, at 1.

¹³⁴ See *infra* note 136.

Assembly, to draft a convention with regards to protecting journalists on dangerous missions.¹³⁵ Draft conventions were then submitted for consideration to the Conference of Government Experts.¹³⁶ It was eventually decided that the protection of journalists engaged in dangerous missions would be better dealt with in an international humanitarian law instrument, rather than an individual treaty; thus, Article 79 (stating that journalists are civilians unless they participate) was included in Protocol I.

The Preamble to the draft press covenant states, in paragraph 8, that the covenant has been drafted partially in response to the failure of States to adequately implement and enforce the provisions of Article 79 of Protocol I:

... experience has shown that, generally speaking, since the adoption of Protocol I, the provisions of Article 79 are rarely respected and that the protection and that the protection they are supposed to provide is for the most part ineffective

Given such a dismissal of the existing law, one has to question whether additional laws, ones that essentially reconfirm existing law, would actually fare any better. This is especially concerning when one considers some of the other provisions in the Covenant, which seem to impose onerous, if not outright unrealistic, obligations on States parties, including giving journalists “free access to information and all relevant documents and to facilitate their movements”;¹³⁷ ensuring that journalists are, “without exception” given advance warning of military attacks,¹³⁸ and that “media corridors, like those applied to humanitarian workers”¹³⁹ shall be established to facilitate the movement of journalists; that States provide financially for the training of military and civil personnel, and “all persons who may be involved”, to ensure that all are aware of the

¹³⁵ G.A. Res. 2673 (XXV), U.N. Doc. A/8178 (Dec. 9, 1970).

¹³⁶ G.A. Res. 2854 (XXVI), U.N. Doc. A/2854 (Dec. 20, 1971); ICRCRC, *Conference of the Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Report on the Work of the Conference, ¶¶ 507-15 (Aug. 1971); ICRCRC, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Report on the Work of the Conference, Vol. 1, ¶¶ 3.73-3.93 (July 1972); see also G.A. Res. 3958 (XXVIII) U.N. Doc. A/3958 (Nov. 2, 1973); G.A. Res. 3245 (XXIX), U.N. Doc. A/3245 (Nov. 29, 1974). See U.N. Doc A/10147 (Aug. 1, 1975), for the final version of the draft UN Convention.

¹³⁷ Draft Convention, *supra* note 107, at art. 3(3).

¹³⁸ *Id.* at art. 6(1).

¹³⁹ *Id.* at 6(2).

Covenant; and that States ensure that a compensation fund is established to ensure that victims and their families can seek reparation.

However, if one accepts that the law is deficient, and that new laws would somehow fill the lacunae, is the draft press covenant sufficient to that task? Despite the good intentions of the draft covenant, there are some serious failings in the document, both from a legal and a policy perspective.

B. THE EMBLEM AS A 'BULLS-EYE'

Some journalists have rejected outright the idea of an internationally mandated press emblem, seeing a 'Press' armband as something akin to a 'bullseye', marking them out as a visible target.¹⁴⁰ Mark Willacy,¹⁴¹ journalist and foreign correspondent with the Australian Broadcasting Corporation (ABC), currently serves as the ABC's North Asia correspondent, and reported from Iraq during the 2003 invasion. Regarding the emblem, Willacy summed up three concerns: firstly, the targeting issue and journalists' resistance to wearing it; secondly that, like flak jackets, special protection would make it harder to establish empathetic connections with sources and therefore harder to get stories; and thirdly the risk of emblem abuse by parties to the conflict. In his words:¹⁴²

I wouldn't wear it. In conflicts like Iraq, highlighting the fact you're a journalist was like painting a target on your forehead. While conflicts have always been messy, I think modern insurgency/uprising-styled brawls are notable for the high death-toll amongst the press - due largely to the fact we have been specifically targeted (as in, Iraq, Afghanistan, Lebanon... and most recently in Syria). I just don't think there's enough uniform respect or understanding for or about what we do. We're seen by many sides as partisan combatants aligned with the ideology of one side or the other

Wearing that emblem would make me feel less safe. In fact, in 4 years in the Middle East I only wore a flak jacket a handful of times

¹⁴⁰ See, Charlie Beckett, *Killing Journalism*, POLIS JOURNALISM & SOC. 15 (Oct. 6, 2006), www2.lse.ac.uk/media@lse/POLIS/Files/killingjournal.pdf. See also Ben Saul, *The international Protection of Journalists in Armed Conflict and Other Violent Situations*, 14 AUSTL. J. HUM. RTS. 99, 125 (2008).

¹⁴¹ Mark Willacy, ABC NEWS, <http://www.abc.net.au/news/mark-willacy/166888> (last visited Feb. 9, 2014).

¹⁴² Interview with Mark Willacy, on file with Emily Crawford.

(usually in situations where I didn't stand out, like in the car). Wearing a flak jacket makes you stand out, can make people suspicious and limits your movement . . . Wearing this emblem would also say to our talent that we somehow should be immune from being shot, when they - civilians, mostly - tend to be the biggest victims of conflict (like the one in Syria now). It doesn't engender empathy. And who's to say one side in a conflict doesn't get a heap of PRESS badges made up in an attempt to launch a strike? The whole credibility of the scheme would be shot down instantly.

Indeed, his first concern was noted during the Diplomatic Conference leading up to the adoption of the Additional Protocols. Regarding the Article 79 provision on journalists, a proposal was forwarded to require all journalists seeking the protection of the Protocol to wear a distinctive armband, similar to the one being proposed by the Press Emblem Campaign.¹⁴³ However, as noted in the Commentary to the Protocols:¹⁴⁴

this proposal was rejected primarily on the basis of the following argument: by making the wearer of the armband conspicuous to combatants, such means of identification might make the journalists' mission even more dangerous; similarly it was argued that in this way the journalists would be likely to endanger the surrounding civilian population.¹⁴⁵

Thus, a protective emblem for journalists might actually undermine the intentions of those promoting its adoption – by making journalists more easily identifiable at a distance. Indeed, this was noted by the IDI in 2009 who rejected the idea of a new regime of special protection for journalists:

no special protection of journalists can work in practice unless armed units in the field can tell them apart from other civilians (and, of course, combatants). Hence, the crux of the issue is that a new regime of special protection of journalists is contingent on: (i) the establishment of a credible system of identification/accreditation of

¹⁴³ Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vol. III, at 303, CDDH/I/242 (Geneva 1974-1977).

¹⁴⁴ Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vol. VIII, ¶¶ 8-23, at 368-71, CDDH/I/SR.35 (Geneva 1974-1977). See *AP Commentary*, *supra* note 37, ¶ 3254, at 919.

¹⁴⁵ Rapporteur Yoram Dinstein, who also opposes the introduction of a special protection regime, finds this argument unconvincing, arguing that the “relatively new special protection . . . conferred on civil defence personnel in AP/I . . . has not detracted one iota from the time honoured regime of special protection of medical and religious personnel.” See IDI Report, *supra* note 4, at 470.

all those entitled to enjoy the special protection, and (ii) the adoption of a distinct recognizable emblem of protection. In view of the opposition of most journalists to both the mandatory identification/accreditation and to a new emblem of protection. . . it appeared. . . unrealistic to recommend the creation of a new category of protection of journalists.¹⁴⁶

As accounts noted in this paper suggest, journalists are now becoming a target of belligerents; as such, it is counter-intuitive to make identification of them an easier process. In addition to being targeted for reasons related to the conflict and their reporting of it, foreign journalists are also at risk of kidnap by opportunistic parties seeking ransom money. Recent media kidnap victims include Nigel Brennan and Amanda Lindhout kidnapped in Somalia in 2008 and released in 2009;¹⁴⁷ Melissa Fung kidnapped and released in Afghanistan in 2008;¹⁴⁸ and Stephanie Taponier and Herve Ghesquiere kidnapped in Afghanistan in 2009 and freed in 2011.¹⁴⁹ Given such practices, it would seem self-defeating to make identification of journalists an easier process.

C. POLICING THE USE OF THE EMBLEM AND CONCERNS ABOUT THE PROLIFERATION OF DISTINCTIVE PROTECTIVE EMBLEMS

It was argued during the Additional Protocols Diplomatic Conferences that creating an additional protective emblem for journalists to be used during times of armed conflict would contribute to ‘emblem fatigue’ – that to increase the number of protective emblems would “weaken the protective value of each protected status already accepted, particularly that of medical personnel. . . . [if such an emblem were adopted]. . . the efficacy of protection and the credibility of the whole system of protection would have suffered.”¹⁵⁰ Attempts to introduce a protected journalist emblem during the 1970s were unsuccessful in part due a resistance to introduce any more international protected emblems. This was highlighted by the ICRC in their Commentary to the Additional

¹⁴⁶ *Id.*

¹⁴⁷ See NIGEL BRENNAN, ET AL., *THE PRICE OF LIFE: A TRUE STORY OF KIDNAP & RANSOM* (2011).

¹⁴⁸ *Melissa Fung Discusses Her Abduction in Afghanistan*, CBC TELEVISION NEWS SOURCE (Nov. 13, 2008), available at <http://www.cbc.ca/archives/categories/arts-entertainment/media/bringing-the-world-home-international-correspondents/abducted-in-afghanistan.html>.

¹⁴⁹ *French Journalist Held Hostage by Taliban Return Home*, BBC NEWS.COM, June, 30 2011, <http://www.bbc.co.uk/news/world-europe-13985354>.

¹⁵⁰ AP Commentary, *supra* note 37, ¶ 3265, at 922.

Protocols,¹⁵¹ and remains a concern today with regards to the proposed Press Emblem.

However, if a Press Emblem were to gain support internationally, additional problems are foreseeable, likely arising from the policing of such emblem.¹⁵² Under international law, the emblems of the Red Cross and Red Crescent are specially protected;¹⁵³ misuse of the protected emblems is a war crime,¹⁵⁴ and State parties to the Geneva Conventions¹⁵⁵ are obliged to pursue domestic criminal prosecution for people who misuse the emblem.¹⁵⁶ If a citizen journalist sought to protect themselves through use of the proposed press emblem, they would, potentially, be liable for misuse of an internationally protected emblem. Indeed, general problems with policing such a system of registration and identification were noted by the IDI:

accreditation of 'war correspondents' is indispensable: it is, in fact, an integral part of the definition of this category of journalists. However, as far as other journalists are concerned... any requirement of accreditations may diminish from the protection of non-accredited journalists... in non-international armed conflicts, a mandatory accreditation requirement may in fact imperil journalists if they seek accreditation from the central Government (which the insurgents are rebelling against).¹⁵⁷

The IDI also notes the general reluctance of most journalists to seek accreditation from any Government, including their own, as well as reluctance on the part of any non-governmental organization, such as the International Federation of Journalists, to step in to act as an accrediting authority.¹⁵⁸ Given such widespread resistance to such a process of

¹⁵¹ *Id.*

¹⁵² See Willacy, *supra* note 142.

¹⁵³ See GCI, *supra* note 6, at arts. 38 – 44, 53; GCII, *supra* note 6, at arts. 41-45; GCIV, *supra* note 6, at arts. 18, 20; Additional Protocol I, *supra* note 7, at arts. 18, 37, 38, 85(3)(f); Additional Protocol II, *supra* note 7, at art. 12; Additional Protocol III, *supra* note 7 (adding a third protective emblem – the Red Crystal – to the protected emblems of the Red Cross and Red Crescent).

¹⁵⁴ Rome Statute, *supra* note 115, at art. 8(2)(b)(vii).

¹⁵⁵ Currently, every State in the world is party to the Geneva Conventions – South Sudan became one on 16 July 2012. See, ICRC, *South Sudan: World's Newest Country Signs up to the Geneva Conventions*, News Release 12/154 (July 19, 2012), available at <http://www.icrc.org/eng/resources/documents/news-release/2012/south-sudan-news-2012-07-09.htm>.

¹⁵⁶ In Australia, misuse of the emblem is regulated. *Geneva Conventions Act 1957* (Cth) s 15 (Austl.).

¹⁵⁷ IDI Report, *supra* note 4 at 472.

¹⁵⁸ *Id.*

accreditation and monitoring that would be integral to the introduction of a press emblem, it seems unrealistic to thus advocate for the introduction of such an emblem.

It would seem that the draft covenant attempts to counter such concerns, by not obligating journalists to wear the emblem. As noted in Article 7:

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

However, this provision raises an additional issue: if wearing the emblem is voluntary, it seems reasonable to ask why an emblem should be adopted in the first place. If the covenant does not intend to introduce the press emblem as an internationally protected and mandated symbol, why is the specific introduction - in treaty form - of such an emblem necessary?

D. POW TREATMENT FOR JOURNALISTS

Another area of concern comes with Article 4 of the draft covenant, entitled 'Media POWs', which states that:¹⁵⁹

Journalists detained during an armed conflict have the right to the same treatment as that accorded to the prisoners of war (POWs) by the third Geneva Convention of 12 August 1949, in particular its article 4 paragraph 4 which states that war prisoners are "persons who followed the armed forces without directly taking part to them, such as (. . .) the war correspondents.

It seems curious that the covenant would want to introduce the POW schema for journalists, given the intent behind the granting of POW status is as preventative detention for persons taking active part in hostilities. POW status and detention is as a means by which combatants are removed from active hostilities and prevented from further participation in the armed conflict. As such, POWs can be detained until the cessation of active hostilities. It seems odd that the covenant would implicitly sanction detention of journalists. Arguably, administrative detention under Geneva Convention IV would be a more appropriate

¹⁵⁹ Draft Convention, *supra* note 107, at art. 4.

mechanism, as, in international armed conflict at least, it offers the same kinds of protections and rights afforded to POWs, and includes the possibility to challenge one's detention and gain release from captivity if one is deemed not to pose a threat to one's captors. This right to challenge one's detention is contained in Article 78 of Geneva Convention IV.¹⁶⁰

If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment. . . This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power.

Thus, the granting of POW status to journalists may be somewhat meaningless. As noted by Saul:¹⁶¹

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

E. THE LIMITATIONS OF THE PRESS COVENANT DEFINITION OF JOURNALIST

In addition to concerns regarding the efficacy of an emblem in enhancing the safety of journalists, the definition of 'journalist' under the proposed covenant also raises questions, from a policy perspective. The covenant sets out an expansive list of persons who would be covered by its provisions.¹⁶² However, the definition does not adequately address the emerging phenomenon of 'citizen journalism', a term used to describe:

. . . a range of web-based practices whereby 'ordinary' users engage in journalistic practices. Citizen journalism includes practices such as current affairs-based blogging, photo and video sharing, and posting eyewitness commentary on current events. Sometimes the term is

¹⁶⁰ See GCIV, *supra* note 6, at art. 78.

¹⁶¹ Saul, *supra* note 140, at 104.

¹⁶² Draft Convention, *supra* note 107, at Preamble para. 25.

used quite broadly to include activities such as re-posting, linking, ‘tagging’ (labeling with keywords), rating, modifying or commenting upon news materials posted by others users or by professional news outlets, whereby citizens participate in the news process without necessarily acting as ‘content creators’.¹⁶³

A more succinct definition offered Jay Rosen and, before him, Dan Gillmor, notes “when the people formerly known as the audience employ the press tools they have in their possession to inform one another, that’s citizen journalism.”¹⁶⁴ For the purposes of this paper, it is only necessary to consider those instances where civilians are involved in ‘content creation’; where civilians report directly on events they are witnessing or have witnessed such as when Iranian protestors took to Twitter to report on protests against the Ahmadinejad regime following reputedly corrupt election results.¹⁶⁵

On June 13, when protests started to escalate, and the Iranian government moved to suppress dissent both on- and off-line, the Twittersverse exploded with tweets from people who weren’t having it, both in English and in Farsi. While the front pages of Iranian newspapers were full of blank space where censors had whited-out news stories, Twitter was delivering information from street level, in real time.

Such examples of citizen journalism arguably do not sit easily with the definitions outlined in the draft covenant. People who do not ‘work’ as journalists, in the sense of it being their profession, but who still might find themselves in a unique position to report on current events – especially in a war zone – would likely find themselves excluded from the protections of the draft covenant. The use of the word ‘work’ in the covenant also leaves room for debate about whether it would cover unsalaried journalists, such as freelancers and stringers, who are paid after publication and can’t guarantee at the point of newsgathering whether their piece will be published in a commercial news outlet or elsewhere online on a blog or via social media without payment.

¹⁶³ Luke Goode, *Social News, Citizen Journalism and Democracy*, 11 NEWS MEDIA & SOC’Y 1287, 1288 (2009).

¹⁶⁴ Jay Ronsen, *A Most Useful Definition of Citizen Journalism*, PRESSTHINK (July 14, 2008, 1:37 AM), http://archive.pressthink.org/2008/07/14/a_most_useful_d.html; see, e.g., DAN GILLMOR, WE THE MEDIA: GRASSROOTS JOURNALISM BY THE PEOPLE, FOR THE PEOPLE, at ch. 7 (2004), available at <http://www.authorama.com/we-the-media-8.html>.

¹⁶⁵ Lev Grossman, *Iran Protests: Twitter, the Medium of the Movement*, TIME, June 17, 2009, available at <http://content.time.com/time/world/article/0,8599,1905125,00.html>.

V. CONCLUSIONS

Whether we get our information from newspapers, television, the internet, or Twitter, whether that information comes from a professional journalist or from a bystander capturing footage on their smart phone, or tweeting 140 characters, we rely on intercessors to communicate information to us, which helps us make informed decisions about our world and our governmental, economic, and societal structures. That journalists serve an important function – one that can frequently put them in dangerous situations – is recognized in international law, and journalists are specifically acknowledged and protected under the laws of armed conflict. However, some have argued that such protections need to be expanded, due to the fact that journalists are frequently subject to violence, either unintentionally or deliberately, especially during times of armed conflict.

However, the fact that journalists are subject to such violence is a result of a failure to observe the law, rather than a failure of the law itself. The laws of armed conflict comprise comprehensive rules regarding the protection of journalists as civilians and war correspondents as civilians and POWs. While attempts by journalism organizations to remind the international community of the importance of protecting journalists are admirable, the introduction of a new treaty would arguably not change the current situation.

The Press Emblem Campaign could undermine efforts for the implementation and respect of existing IHL provisions.¹⁶⁶ The value of the existing laws should not be underestimated as there is widespread international support, both amongst States parties to the Geneva Conventions, Additional Protocols and the Rome Statute, and in the practice of States that have included Article 79 in their laws of Armed Combat. Promotion of these existing laws may well be more constructive than calling for a new treaty, given that some of the articles in the Draft Convention render it unlikely to garner many national signatories. For example, Article 9 requires State Parties to establish “a compensation fund with substantial financial resources” and Article 3.3 states: “Any State, whether party or not to an armed conflict, has the obligation to assist journalists in the line of duty giving them free access to information and all relevant documents and to facilitate their

¹⁶⁶ Draft Convention, *supra* note 107, at Preamble para. 8 (denouncing Art. 79 as ineffective).

movements.” These provisions may well prove to be onerous obligations that States may not wish to adopt.

People who find themselves in proximity to armed conflicts will always be vulnerable to violence; administrations, regimes and groups that deliberately target journalists will arguably not be deterred by a new treaty that affirms that journalists, like all civilians not taking direct part in hostilities, should not be made the object of attack. Therefore, energies would be better spent promoting more thorough understanding of the existing laws through media campaigns to support their enforcement, giving more coverage to IHL breaches, and better training for journalists in IHL and ICC processes.