

**Media professionals and armed conflict**

**PROTECTION AND RESPONSIBILITIES UNDER  
INTERNATIONAL HUMANITARIAN LAW**



In partnership with



**British Institute of  
International and  
Comparative Law**



# Foreword

International humanitarian law (IHL), the body of international law which regulates behaviour in armed conflict, is sometimes thought to be the sole purview of governments, militaries, and international lawyers. However, most modern armed conflicts involve and affect a complex range of groups and individuals across society. The fact remains that IHL applies to all who find themselves caught up in armed conflicts. Its principles and rules must therefore be understood and respected by everyone.

The role of the media in reporting on armed conflicts has a long tradition, and the activities of journalists and other media professionals in such contexts have increased over time. This being said, media professionals are, for the most part, not explicitly mentioned in the major IHL treaties. However, media professionals are generally categorised as civilians, and thereby enjoy all of the safeguards extended by IHL to this broad group. It is therefore in the interests of all media professionals reporting from conflict zones, as well as their employing organisations and those who are otherwise responsible for them, to be aware of how they are protected under IHL.

Media professionals may, owing to the nature of their activities, take a more active role in armed conflicts than other civilians. They may conduct interviews with those detained in the course of the conflict; they may engage security staff to protect them and their premises; some may even be embedded with the armed forces for the duration of their assignments. All of these scenarios give rise to different IHL obligations (for example, the obligation not to expose prisoners of war to public curiosity, discussed in Chapter 3 of this Handbook). Consequently, another primary objective of this Handbook (and its accompanying Field Guide, also published by the British Red Cross) is to ensure that media professionals are aware of their various responsibilities under IHL.

Media professionals, in reporting on armed conflicts, play a critical role in informing the public about events that may otherwise go unnoticed. While such reports often employ the language and describe the principles of IHL, the true meaning of these may not always be well understood. For example, there may be a tendency to describe any civilian death during armed conflict as a war crime (however, depending upon the facts, this may not always be legally accurate). As media reports are vital in shaping public opinion about the events that take place in times of war, and may even be used as evidence in inquiries and court proceedings, it is important that such reports are as accurate as possible. It is therefore hoped that this publication will help media professionals and organisations to have a clearer understanding of the standards of conduct required by parties to armed conflicts under IHL.

The British Red Cross, like all National Red Cross and Red Crescent Societies, has special roles, both in helping to ensure respect for IHL, and as a formally recognised auxiliary to the public authorities in the humanitarian field. In the light of these functions, the British Red Cross is very pleased to offer materials on IHL to relevant audiences, and hopes that the Handbook and its associated Field Guide will prove to be useful resources for UK media professionals and perhaps others with an interest in this subject.

Both the UK Government and the British Red Cross have taken a special interest in seeking to ensure effective implementation of the international law rules protecting journalists and associated personnel engaged in dangerous professional missions in situations of armed conflict. Both have also worked together to develop a contemporary interpretation of the prohibition against public curiosity. This Handbook and the Field Guide build upon and seek to extend previous work and commitments in promoting the protection and responsibilities of media professionals under IHL.

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The Handbook and Field Guide reflect the law as at July 2017.

# Introduction

Even in the ‘fog of war’ there are rules that regulate the conduct of parties to hostilities. International humanitarian law (IHL) – also known as ‘the law of armed conflict’ – provides that not all means and methods of warfare are open to parties and that military victory may not come at any cost. It is this area of law that is most relevant to media professionals reporting from armed conflict: it protects them from deliberate and direct targeting; indiscriminate and excessive attacks; and ensures that they are treated appropriately during detention. IHL also places responsibilities on media professionals relating to their professional activities in armed conflict. This Handbook sets out and explains those rules of IHL relevant to the work of media professionals.

## Media professionals in armed conflict

Reporting on armed conflict has always been a dangerous activity. Media professionals have had to face the risk of accidental death or injury, stray bullets, and friendly fire. In the last few decades, however, as the nature of warfare has evolved, the risks of reporting from armed conflict have also changed. There has been a significant rise in the number of deliberate attacks against media professionals.<sup>1</sup>

In the world of online reporting and 24 hour news, the ‘war of images’ is becoming an increasingly important ‘battleground’ of armed conflict.<sup>2</sup> The ‘hearts and minds’ aspect of warfare in which “images and news could have a decisive impact on the outcome of armed conflicts”<sup>3</sup> makes public opinion an essential tool for many parties to an armed conflict. The work of the media has become integral to this aspect of modern warfare. Further, developments in lightweight communication technology have meant that the media are more mobile and connected to the public than ever before<sup>4</sup> – they are witnesses to the events of war, who may potentially report on violations of IHL or human rights abuses from anywhere, and in real time, to an audience of millions. This role as witnesses to the events of armed conflict can make media professionals vulnerable to attacks. Some attacks against media professionals operate as a form of censorship:<sup>5</sup> they can result in the silencing of the particular media professional being attacked, and also have a ‘chilling effect’ on all members of the media operating in an armed conflict.

Media professionals must equip themselves with knowledge of the rules of warfare. They have a responsibility to themselves, and to others in their profession, to improve their awareness and knowledge of the rules of IHL that are set out in this Handbook. It has never been more important that media professionals are aware of their protections and responsibilities in armed conflict.

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<sup>1</sup> Annual data on attacks (fatal and non-fatal) against media professionals is collected and published by organisations such as the International News Safety Institute; Committee to Protect Journalists, Reporters Without Borders, International Federation of Journalists; and The United Nations Educational, Scientific and Cultural Organization (UNESCO).

<sup>2</sup> Human Rights Council (HRC), *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development* (UN General Assembly, UN Doc A/HRC/11/4), 30 April 2009, p. 12.

<sup>3</sup> HRC, *Summary of the Human Rights Council panel discussion on the protection of journalists in armed conflict prepared by the Office of the United Nations Commissioner for Human Rights* (United Nations General Assembly, UN Doc A/HRC/15/54), 2 August 2010 (HRC, 2 August 2010), p. 3.

<sup>4</sup> See for example discussion of this issue by James Rodgers *Reporting Conflict* (Basingstoke, Palgrave MacMillan, 2012).

<sup>5</sup> HRC, 2 August 2010 (n 3), p. 5; See also the concurring report: F. La Rue, *Report of the Special Rapporteur on the Promotion and Protection of Freedom of Opinion and Expression, Mr Frank La Rue* (United Nations General Assembly, UN Doc A/HRC/14/23), 20 April 2010, p.16.

# This Handbook

This Handbook is primarily for use by media professionals who report from conflict zones. It is a practical and accessible guide to the rules of IHL that protect media professionals and their work in armed conflict. It also considers the IHL responsibilities that media professionals (and their publishers and broadcasters) have when reporting on and from armed conflict, including their potential liability under international criminal law as individuals for violations of these rules. The Handbook is supplemented by a lighter and smaller 'Field Guide' that is designed to be used in conflict zones as a quick and easy reference to the relevant rules of IHL.

The first Chapter of this Handbook provides an overview of core concepts and legal rules, including a summary of the IHL protection given to media professionals as civilians in armed conflict. Reflecting the law as at February 2017, it provides an introduction to IHL and also sets out the definition of 'media professional' used in this Handbook. This Chapter also discusses when, where, and to whom IHL applies – essential questions that will allow media professionals to determine when the IHL protections and responsibilities set out in the rest of this Handbook will apply to them. In particular, the concepts of international and non-international armed conflict (the two types of armed conflict recognised by IHL) are discussed and the rules that apply to each are set out. Brief consideration of two other relevant areas of law – international human rights law and international criminal law – is also given in relation to IHL. This Chapter is essential reading for any person who is not familiar with international law and, in particular, IHL.

Chapter 2 sets out the rules of IHL that protect media professionals in armed conflict. It considers particular challenges faced by them, including those arising from direct and deliberate attacks, and being the victims of incidental injury from attacks on others. IHL protects media professionals from direct and deliberate attack unless and for such time as they participate directly in hostilities. The concept of 'direct participation' is explained and common professional tasks undertaken by the media in armed conflict are evaluated against this concept. Importantly, the ordinary professional work of the media does not constitute direct participation in hostilities. This means that media professionals cannot be directly and deliberately attacked by parties to an armed conflict simply for carrying out their professional tasks. Chapter 2 also considers the protection afforded by IHL to interned and detained media professionals.

Chapter 2 concludes with a brief overview of the rules of international criminal law that reinforce the protection of media professionals by IHL. In particular, those crimes that prohibit attacks and mistreatment of media professionals are set out. The procedural rules of international criminal law, applicable in international criminal courts and tribunals, also provide some protection to media professionals from having to give evidence or answer questions about particular aspects of their professional activities.

Chapter 3 examines the IHL responsibilities of media professionals in armed conflict. The Chapter explains how media professionals can be held responsible under IHL and also under international criminal law. The potential responsibility of a media professional's editor or supervisor for the actions of a media professional is also considered. Chapter 3 examines the IHL responsibilities arising from the work of media professionals during an armed conflict, in particular the gathering of information (including undertaking investigations, interviewing and taking images of persons). The responsibilities of media professionals in relation to the use and depiction of the red cross and red crescent emblems are explained.

Chapter 3 also sets out IHL responsibilities of media professionals arising from the publication or broadcast of news and events from and about an armed conflict. These include the responsibility not to identify a person in the hands of a party to an armed conflict or expose them to insult and public curiosity or to damage their reputation. The IHL responsibilities of media professionals and their employers (including broadcasters and publishers) relating to the operational elements of their activities in armed conflict are also discussed. These include responsibilities relating to the use of force in self-defence, the use of local labour and the acquisition of assets in a conflict zone.

The final part of Chapter 3 considers the responsibilities of media professionals and their editors and supervisors under international criminal law for those crimes that are most relevant to the work of the media. Particular focus is given to those crimes that might be committed through words or speech (including publication and broadcast), such as the direct and public incitement to genocide. The rules relating to 'contempt of court' are also examined, as media professionals reporting on criminal proceedings in international criminal courts and tribunals may be vulnerable to prosecution for contempt, including the publication of confidential information protected by a court order.

### ***Other available resources***

This Handbook focuses on the specific rules of IHL that address the protection and responsibilities of media professionals in armed conflict. This focus sets this Handbook apart from other guidebooks and publications in the field. There are a number of publications available to media professionals that give an overview of the broader rules of IHL and other relevant legal regimes including international human rights law, the processes and procedures of international courts and tribunals, and advice on how to stay safe in armed conflict. The International Committee of the Red Cross (ICRC) also operates a Hotline that can assist media professionals in armed conflict. This Handbook complements and builds on those other publications and services. It also includes a 'further resources' section that highlights where other relevant publications and services can be found.

**ICRC HOTLINE NUMBER: +41 79 217 32 85 (24 hours)**

**ICRC HOTLINE EMAIL: [press@icrc.org](mailto:press@icrc.org)**

**Assistance can also be obtained by getting in touch with a local ICRC delegation/office or through a National Red Cross or Red Crescent Society.**

## ***UK media professionals***

There is a special focus in the Handbook on UK media professionals reporting on armed conflicts abroad, but the rules of IHL set out here are also generally relevant to media professionals of other nationalities and any media professional reporting from an armed conflict can use this publication.

UK media professionals should be familiar with the UK Ministry of Defence's Green Book, which contains the policy of the UK armed forces regarding media professionals. It includes an outline of the services the UK armed forces will and will not provide to media professionals in armed conflict; it sets out the policy with regard to media briefings, security control and checking of publications and broadcasts from armed conflict; instructions on how to become accredited with the UK forces; and helpful information regarding safety and security in armed conflict. It is available on the UK Government website:

<https://www.gov.uk/government/publications/the-green-book>

### ***Overview***

The information in this Handbook is essential reading for all media professionals prior to deployment in armed conflict. It is also an important reference tool for those who support media professionals in armed conflict – their editors, supervisors, assistants and other staff of publishers and broadcasters – as well as anyone who is interested in the important and vital work of the media in armed conflicts.

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1.

# MEDIA PROFESSIONALS AND INTERNATIONAL HUMANITARIAN LAW



# Chapter 1: Media Professionals and International Humanitarian Law

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## Introduction to Chapter 1

Chapter 1 provides an overview of international humanitarian law (IHL) and is intended to be useful for those media professionals who may not be familiar with this area of law. This Chapter explores the general concepts of IHL – including the important fact that media professionals are protected as civilians – and explains which situations IHL addresses (for example, the conduct of hostilities) and those which it does not (such as ordinary criminal matters and immigration issues).

This Chapter also sets out the definition of ‘media professional’ used in this Handbook and the more specific, legal terms of ‘journalist’ and ‘war correspondent’ used in IHL treaties. The issues of ‘embedding’ and how media professionals are identified in armed conflicts are also addressed.

The protection and responsibilities of media professionals under IHL are only relevant in those circumstances where IHL applies; that is, to situations of armed conflict. The scope and application of IHL are set out in this first Chapter.

International human rights law and international criminal law are also applicable in situations of armed conflict and they are briefly considered in this Chapter. Their relationship with IHL is also discussed. Beyond this Chapter, this Handbook does not consider any international human rights protection or responsibilities of media professionals.

The International Red Cross and Red Crescent Movement has a special role in IHL. The International Committee of the Red Cross (ICRC) and National Red Cross and Red Crescent Societies, such as the British Red Cross, can provide direct assistance to media professionals, through technical advice and training, in order to facilitate better understanding of the rules of IHL. The ICRC provides some practical services specifically for media professionals undertaking professional activities in conflict zones. These are set out at the end of this Chapter.

## 1.1 An Introduction to International Humanitarian Law

### SUMMARY: An Introduction to International Humanitarian Law (IHL)

IHL is also known as ‘the law of armed conflict’ or ‘the law of war’. It is the body of international law that protects certain persons and objects and regulates the conduct of hostilities in **international and non-international armed conflicts**. It seeks to balance legitimate military objectives of parties to a conflict with the needs of humanity.

The core principles and rules of IHL are found in the four **Geneva Conventions of 1949**, and their two **Additional Protocols of 1977**. These are treaties. **International customary law** is also an important source of IHL.

The two fundamental rules of IHL, which will be referred to often in this Handbook, are

- > The **principle of distinction** – parties to a conflict must distinguish between civilians and combatants.<sup>1</sup>
- > The **principle of proportionality** – prohibits attacks where the expected loss of civilian life or injury to civilians outweighs the direct military advantage anticipated.

Media professionals are **not entitled to special protection** under IHL and may not use the **red cross emblem (or the red crescent or red crystal emblems)** as a symbol of protection.

IHL only regulates **conduct connected to hostilities**. It does not address all situations in armed conflict relevant to media professionals. In particular, it does not address immigration and ordinary criminal law issues, the right to freedom of expression, and other concerns such as broadcasting and publication rules and regulations.

IHL does not address the **legality and legitimacy** of an armed conflict. It focuses on the legality of the conduct of parties **during** an armed conflict.

The rules of IHL are found in a number of treaties (agreements between States) including, most importantly, the four Geneva Conventions for the Protection of War Victims of 1949 (the Geneva Conventions) and their two Additional Protocols of 1977 (Additional Protocols).<sup>2</sup> IHL is also found in **customary international law**: international rules derived from the practice of States, which they consider to be legally binding.

IHL can also be found in a number of additional treaties that regulate the use of specific weapons in armed conflict. These include conventions prohibiting, for example, the use of anti-personnel landmines<sup>3</sup> and chemical weapons.<sup>4</sup>

<sup>1</sup> The term ‘combatant’ has a special meaning under IHL, and refers to the regular members of a State’s armed forces in an international armed conflict. The term is generally not used in relation to non-international armed conflicts (as members of non-State armed groups cannot hold ‘combatant’ status). The term ‘combatant’ is used in this Handbook simply for convenience, in relation to both international and non-international armed conflict. Regardless of the type of conflict, those who do not fight (e.g. civilians) are protected from attack in accordance with the principle of distinction.

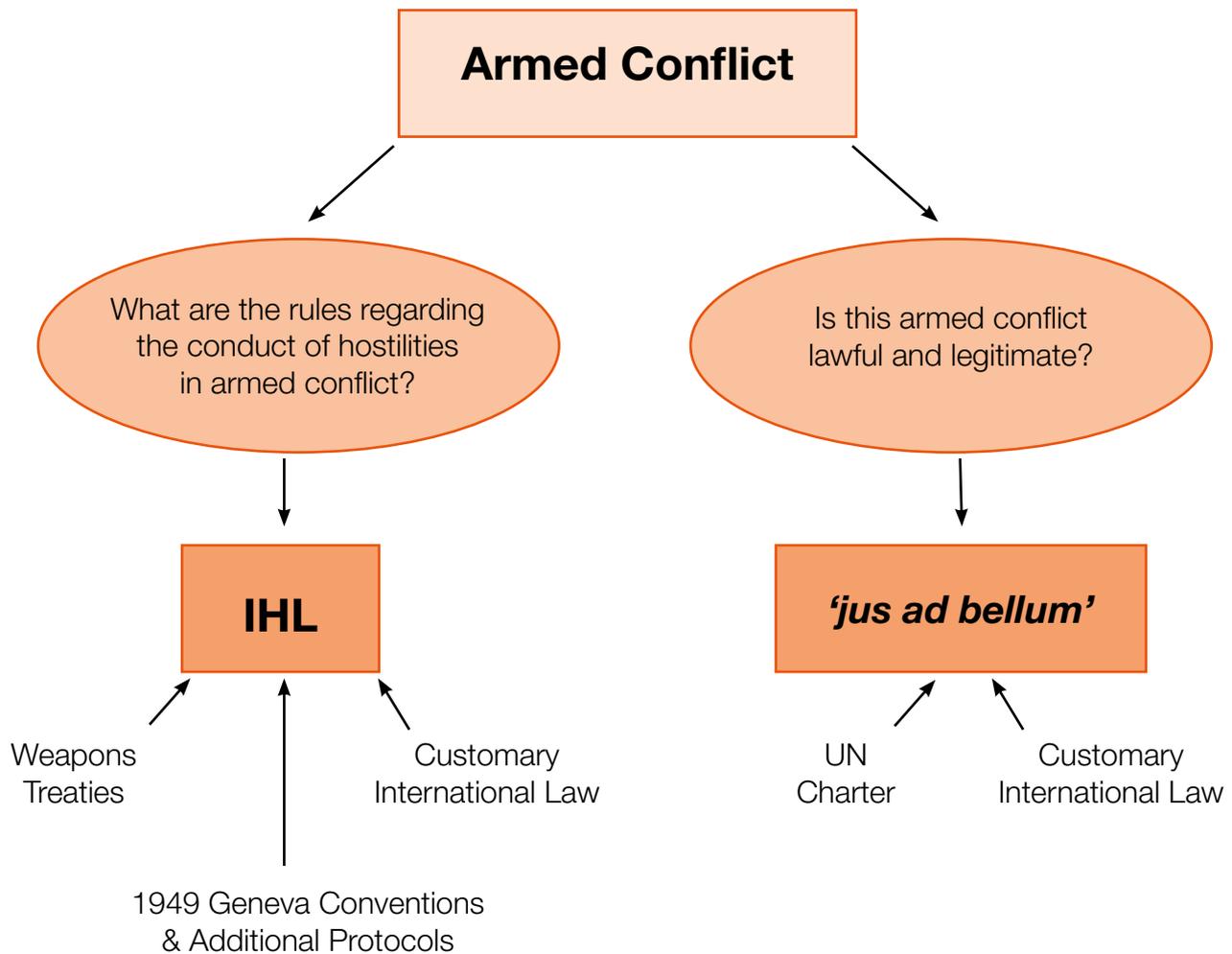
<sup>2</sup> Like Conventions, ‘Protocols’ are treaties.

<sup>3</sup> Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997 (also called the Ottawa Treaty).

<sup>4</sup> Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 13 January 1993.

IHL - also known as the *jus in bello* (law in war) - regulates the behaviour of parties to an armed conflict: it sets out what type of conduct is permitted and prohibited in hostilities. IHL does not regulate when a State may legitimately use force against another State or non-State armed group – this is a separate area of law known as the *jus ad bellum* (law on the use of force). The *jus ad bellum* is contained in the Charter of the United Nations and also in customary international law. The separation of these two areas is important, and means, in effect, that even if one State’s use of force against another is considered to be illegal or unjust, both States remain equally bound by the rules of IHL so long as the conflict persists. Parties to an armed conflict are required to ensure respect for the rules of IHL regardless of whether their adversary is complying with IHL.

**IHL and the jus ad bellum<sup>5</sup>**



<sup>5</sup> All diagrams in this Handbook are originals, designed by Nicole Urban of the British Institute of International and Comparative Law, unless otherwise stated.

## 1.1.1 An overview of important IHL concepts

### The two types of armed conflict

IHL recognises two types of armed conflict: **international armed conflict** and **non-international armed conflict**. Different rules of IHL apply to each type of conflict, although there is overlap in the substance of these rules. These two types of armed conflict, and the rules of IHL that apply to each of them, are discussed in detail below.

### The principle of distinction

The most important rule of protection in IHL is ‘the principle of distinction’. This principle requires parties to an armed conflict to distinguish, at all times, between civilians, and those who take part in the fighting (e.g. combatants). IHL also requires parties to distinguish between civilian objects (e.g. schools, homes, and broadcast facilities) and military objectives (e.g. army barracks or tanks). **Only those persons taking part in the fighting, or those objects that are military objectives, can be attacked.**<sup>6</sup>

Through the principle of distinction IHL protects:

- > civilians
- > those persons who are no longer willing or able to take part in hostilities (also referred to as *hors de combat*) including sick, wounded and shipwrecked soldiers, as well as those who have surrendered or have been captured; and
- > those whose duty it is to care for these groups, including certain medical and religious personnel.

None of these groups can be deliberately attacked, killed or wounded.

### Media professionals are civilians and protected by the principle of distinction.

As civilians media professionals may not be attacked, unless they ‘directly participate’ in the hostilities. The principle of distinction, as it applies to media professionals, is covered further in Chapter 2.

IHL bans some means and methods of warfare because they are ‘indiscriminate’ in that they fail to distinguish between civilians and civilian objects, and lawful targets. Examples of indiscriminate methods of warfare include carpet bombing an area which includes military and civilian objects, or using weapons such as anti-personnel mines that are not precise and do not distinguish between civilians and lawful targets. This is discussed in further detail in Chapter 2. **Media professionals are protected from indiscriminate attacks and weapons that cause superfluous injury or unnecessary suffering.**

### Other important rules of IHL

Media professionals may be injured or killed as an indirect result of a lawful attack against a lawful target (such as a military objective). **Such attacks are lawful only when the direct and concrete military advantage anticipated from the attack outweighs the expected loss of civilian life or injury to civilians.** This balance of civilian life against military advantage is called ‘the principle of proportionality’ and is discussed in further detail in Chapter 2.

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<sup>6</sup> Civilian objects may become legitimate military objectives through their location or use. For example, a school building could be used as a barracks or to stockpile munitions, or a bridge normally carrying only civilian traffic could be used as a thoroughfare by military transports. Some objects may be ‘dual-use’, such as a power grid used to supply both civilian and military facilities.

## Special protection under IHL

Some groups of people and objects benefit from special protection under IHL. These include medical personnel and objects (including both civilian and military hospitals, medical units and transports); civil defence personnel (authorised emergency services); cultural property; and religious personnel and objects such as churches, temples, and mosques.

Warring parties must not interfere with the work of these groups, or these objects, and they cannot be attacked. Each of these groups and objects are entitled to wear or be identified by various recognisable symbols of protection. Examples are the red cross, red crescent and red crystal emblems, which may be used by the Medical Service of national armed forces, as well as the organisations of the International Red Cross and Red Crescent Movement. For further consideration of the rules regulating the use of these 'distinctive emblems' see Chapter 3.

**Media professionals do not benefit from this special protection under IHL. They are generally protected in the same way as ordinary civilians. Media professionals must not use the red cross emblem (or any of the distinctive emblems) as protection from attack.**

### *1.1.2 Matters not regulated by IHL*

At the outset, it is important to understand that IHL will not address every issue that may arise for a media professional in armed conflict. IHL only regulates issues that are **related or closely connected** to an armed conflict. These include:

- > the conduct of hostilities in armed conflict
- > the permitted means and methods of warfare
- > the obligations of parties to the conflict in relation to the civilian population
- > the detention and treatment of nationals of an adversary, and
- > the treatment of particularly vulnerable groups during armed conflict, including children and the sick or wounded.

This list is not exhaustive.

IHL focuses on protection of the physical person of media professionals and does not address many aspects of the work of the media during armed conflict, such as:

- > gaining access to particular areas (e.g. conflict zones) or crossing national borders
- > obtaining information from sources, or
- > publishing and transmitting news from conflict zones.

These issues are generally addressed by **international human rights law** and/or **domestic laws**.

Matters that are usually addressed by ordinary **domestic laws** of the territory in which a media professional is employed, or the territory in which they are working, may include the following:

- > Immigration and visas
- > Ordinary criminal conduct, such as murders and assaults not connected to armed conflict
- > Social security fraud; the rules relating to judicial proceedings
- > Broadcast and publication, media ownership restrictions, and anti-competition rules
- > Defamation and libel
- > Decency and obscenity restrictions, and
- > Employment.

**Some matters are addressed by international human rights laws** (including regional human rights treaties such as the European Convention on Human Rights and international human rights treaties such as the International Covenant on Civil and Political Rights). They may include the following:

- > Freedom of the press, freedom of speech and expression, and other speech-based rights.<sup>7</sup>
- > Privacy regulations, including the privacy of media professionals and those that are the subject of media reporting.<sup>8</sup>
- > The right to collective action and formation of unions.<sup>9</sup>

States that are parties to these human rights treaties are required to implement their rules into domestic law. This means that often, domestic laws will also address human rights issues.

There can often be overlap between these areas of international law. The relationship between IHL and other areas of law is addressed in detail, below.

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<sup>7</sup> Art 19 of the Universal Declaration of Human Rights, 10 December 1948, 217 A (III) (UDHR); Art 19 of the International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 (ICCPR); Art 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5. The latter is also known as the European Convention on Human Rights (ECHR).

<sup>8</sup> Art 12 of the UDHR; Art 17 of the ICCPR; Art 8 of the ECHR.

<sup>9</sup> Art 23 of the UDHR; Art 22 of the ICCPR; Art 8 of the International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3 (ICESCR); Art 11 of the ECHR.

## 1.2 Who is a ‘Media Professional’?

### SUMMARY: Media Professionals

**For the purposes of this Handbook, a media professional is:**

any person who investigates, gathers, and/or reports news and information from an armed conflict, regardless of their nationality, accreditation, or medium. The reporting of news and information from an armed conflict might be done through any medium including film, television, photography, radio, printed word, or digitally (including blogs).

This definition includes the IHL categories of **‘journalist’** and **‘war correspondent’**:

- > **War correspondents** are media professionals who are specifically authorised to accompany a State’s **armed forces and benefit from prisoner of war (POW)** status if captured. War correspondents must carry an identity card identifying them as war correspondents, proving, but not creating, their POW status.
- > POWs are **entitled to different protection to civilian internees** or those arrested under national criminal laws.
- > Not all **embedded** media professionals qualify for ‘war correspondent’ status: therefore, not all media professionals embedded in UK military units qualify as ‘war correspondents’ under IHL. Special documentation and accreditation is required to receive this status.

**Article 79 of Additional Protocol I** confirms the civilian status of media professionals in situations of armed conflict. It also provides that those media professionals who are ‘journalists’ under IHL are entitled to an **identity card** identifying them as ‘journalists’, proving (but not creating) their civilian status.

It is important to understand who IHL protects, before that protection is set out in detail. This section will define the term ‘media professional’ as used by this Handbook and how this relates to the concept of ‘journalist’ under IHL.

### 1.2.1 Definition of Media Professional

This Handbook defines ‘media professional’ as **any person who investigates, gathers, and/or reports news and information from an armed conflict, regardless of their nationality, accreditation, or medium. The reporting of news and information from an armed conflict might be done through any medium including film, television, photography, radio, printed word, or digitally (including blogs).**<sup>10</sup>

This definition includes (but is not limited to):

- > The legal categories of **‘journalist’** and **‘war correspondent’** set out in IHL.
- > Reporters and photographers whether or not they are employed full-time or part-time by a publisher or broadcaster, freelance or self-employed, or make no income from their news reporting work.

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<sup>10</sup> A ‘blog’ is a website or web page on which an individual or an organisation records opinions, links to other sites, etc. on a regular basis. It can be used to report the news.

- > Full-time, part-time, and temporary support staff including technical film, television and radio assistants; translators; stringers;<sup>11</sup> and fixers.<sup>12</sup>

This definition does not include:

- > Members of the **armed forces** of a party to the conflict (regardless of whether they might work closely with the media or have similar functions).
- > **Confidential sources** or other witnesses to events.
- > Other **employees of publishers or broadcasters** (such as editors) **who are not working in the territory of an armed conflict** but who, nevertheless, may provide support or assistance to media professionals.

## Media professionals are civilians

Media professionals are a sub-group of the broader category of 'civilians'. **IHL treats media professionals the same as ordinary civilians, with only a few exceptions.**<sup>13</sup> This means that they are entitled to the same rights and subject to the same responsibilities as civilians (although some rules may be more likely to apply to media professionals because of the nature of their work).

Media Operations Staff of the UK forces, as identified in the Green Book, are not civilians.<sup>14</sup> **If someone is not a civilian (for example because they are a member of the armed forces) they cannot be a 'media professional' as defined in this Handbook.**

## Media organisations and facilities

This Handbook also utilises other, related concepts including:

- > **Media organisations:** those organisations that employ or hire media professionals including publishers of print newspapers or electronic material; and broadcasters of radio, television or online visual and audio material.
- > **Media facilities:** those physical objects necessary for the publication or broadcast of news from an armed conflict including broadcast towers or vehicles, printing facilities, offices (or headquarters) of media organisations (including temporary ones), and media centres which can be set up by parties to a conflict to facilitate the reporting of news.

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<sup>11</sup> Stringers are freelance reporters used by media organisations to supplement their network of staff reporters. See Reuters Handbook of Journalism (revision as of 24 November 2009) Section 5: Specialised Guidance, available at: <http://handbook.reuters.com/extensions/docs/pdf/handbookofjournalism.pdf>.

<sup>12</sup> Fixers are local reporters or assistants hired by foreign reporters to guide, translate, and arrange interviews. See E. Witchel, The Fixers: Special Report, (Committee to Protect Journalists, 13 October 2004) available at: <http://cpj.org/reports/2004/10/fixers.php>.

<sup>13</sup> Art 79 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (Additional Protocol I). See also the discussion on 'war correspondents' below.

<sup>14</sup> Ministry of Defence, Green Book, Version 8, 13 January 2013 (MoD Green Book), pp. 5-6.

## 1.2.2 The IHL definition of Journalist and War Correspondent

IHL does not use the term ‘media professionals’ and refers instead to ‘journalists’<sup>15</sup> and a narrower sub-category of ‘war correspondents’.<sup>16</sup> The IHL definition of ‘journalist’ is similar to this Handbook’s definition of ‘media professionals’. There are, however, some minor differences and the definition in this Handbook is slightly broader.<sup>17</sup>

Since IHL protects all media professionals in international and non-international armed conflict in the same way it protects civilians (whether they fit within the definition of ‘journalist’ or not), these minor differences do not affect the analysis of IHL protection in this Handbook. **The only time these differences are relevant is in relation to the use of identity cards to identify journalists under IHL.** This is discussed later in this section.

### ‘Journalists’

There are very few references to the media in the text of IHL treaties because media professionals are classified as civilians. Article 79 of Additional Protocol I refers to ‘journalists’ and confirms the civilian status of media personnel under IHL:

Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians... They shall be protected under the [Geneva] Conventions and this Protocol, provided that they take no action adversely affecting their status as civilians...

The term ‘journalist’ in Article 79 is not defined within the Protocol, although it was intended by the drafters that it be understood broadly. It includes those working as “correspondent, reporter, photographer, and their technical film, radio and television assistants”.<sup>19</sup> This definition includes the vast majority of the media working in, and reporting from, armed conflict.<sup>20</sup> The definition is limited, however, to those media professionals who work in the media on a full time basis. This means that many fixers, stringers, and bloggers are not covered by the definition of ‘journalist.’ However, as set out above, this does not affect the level of protection or the responsibilities of those media professionals that do not meet the definition of ‘journalist’ since IHL protects all civilians in the same way.<sup>21</sup>

This IHL reference to ‘journalists’ appears in Additional Protocol I, which applies to international armed conflict only. There is no mention of journalists or media professionals in the treaty law applicable to non-international armed conflict. Nevertheless, media professionals in non-international armed conflicts are protected as civilians.<sup>22</sup>

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<sup>15</sup> In Art 79 of Additional Protocol I.

<sup>16</sup> In Art 4(A) of the Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135 (Third Geneva Convention).

<sup>17</sup> The Handbook’s definition is broader in that it includes non-full time media workers such as stringers, as well as bloggers.

<sup>18</sup> The intention of the drafters is set out in the commentary to Additional Protocol I. This, and the commentaries to the Geneva Conventions and other Additional Protocols, can be found online on the ICRC website: <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp>.

<sup>19</sup> C. Pilloud (ed), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, 1987 (Pilloud: Commentary on the Additional Protocols), p. 921.

<sup>20</sup> The broad and inclusive nature of the definition is also supported by UN Security Council Resolution 1738 (S/RES/1738), 23 December 2006.

<sup>21</sup> Except in relation to ID cards. This is discussed below.

<sup>22</sup> The civilian status of journalists, and the inclusive definition of the term, has been identified as forming part of customary international law that applies to non-international armed conflict: Y. Dinstein, ‘The International Status, Rights and Duties of Journalists in Times of Armed Conflict’, (2009), *Annuaire de l’Institut de droit international*, Session de Naples, 11ème Commission, Vol. 73, para 18. The ICRC has identified this as a rule forming part of customary international law, see ICRC Study on customary international humanitarian law (ICRC CIHL Study), available at: <https://www.icrc.org/customary-ihl/eng/docs/home>, Rule 34.

## ‘War correspondents’

The term ‘war correspondent’ carries a specific meaning under IHL<sup>23</sup> and is a narrower sub-category of journalist or media professional. A media professional is a war correspondent only if they have been authorised by a State’s armed forces to accompany them.<sup>24</sup> This concept is different to ‘embedding’, a term that is not used in IHL, and which is discussed in the next section.

This legal category of media professional only exists in international armed conflict.<sup>25</sup> War correspondents are civilians but they are entitled to Prisoner of War (POW) status upon capture and receive some different protection to ordinary civilian internees.

War correspondents must be provided with an identity card that operates as evidence of their authorisation (accreditation). **The right of war correspondents (to civilian status generally and to POW status upon capture) is not dependant on possession of this identity card. Rather, the identity card is proof of authorisation by a State’s armed forces. It is this authorisation (and not the card itself) that gives rise to these rights.**

Media professionals who are accredited as war correspondents are usually required to comply with some military rules and regulations. For example, war correspondents with the UK armed forces are subject to any rules and orders issued by the Commander of a unit.<sup>26</sup>

Even though a war correspondent accompanies an armed force, they remain a civilian and retain their legal protection under IHL from deliberate attack by an adversary. Armed forces, however, are a legitimate military target in warfare and, despite a war correspondent’s civilian status, a lawful attack directed at the military personnel or convoy in which they are travelling may result in their incidental death or injury. The lawfulness of such attacks are subject to the application of the principle of proportionality,<sup>27</sup> which is discussed below.

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<sup>23</sup> See Art 4A(4) of the Third Geneva Convention.

<sup>24</sup> Art 4A(4) of the Third Geneva Convention.

<sup>25</sup> As it is found only in the Third Geneva Convention which applies to international armed conflict. Further, it affords those falling into this category POW rights upon capture, rights that are not recognised in the treaty law or as part of the customary international law applying to non-international armed conflict.

<sup>26</sup> MoD, Green Book, Annex F, ‘Declaration’, p. 3.

<sup>27</sup> The principle that any incidental damage to civilians (including war correspondents) caused by an attack on a military objective should not be ‘excessive’ to the military advantage anticipated by the attack: Art 51(5) of Additional Protocol I. For a fuller discussion, see below.

## **Definition of a Media Professional**

### **'Media Professionals' (This Handbook)**

Media Professionals (including 'Journalists' and 'War Correspondents') are protected as civilians by the Geneva Conventions and Additional Protocols, in both international and non-international armed conflict, provided that they take no action adversely affecting their status (by directly participating in hostilities).

### **'Journalists' (Article 79 Additional Protocol 1)**

In international armed conflict 'Journalists' are entitled to an identity card as proof (but not a condition of) their civilian status.

### **'War Correspondents' (Article 4A(4) Third Geneva Convention)**

In international armed conflict Media Professionals that are authorised to accompany a State's armed forces are 'War Correspondents' and are entitled to:

- > an identity card as proof (but not a condition of) their civilian status; and
- > to Prisoner of War (POW) status upon capture

### 1.2.3 Embedding and accreditation

The term ‘embedding’ refers to the increasingly common practice of placing a media professional (or team of media professionals) within a military unit for the duration of a military operation. Although embedding has been used since at least the Second World War, it was the 2003 Iraq war (or Second Gulf conflict) that saw its first broad implementation and popularisation of the term.<sup>28</sup>

IHL does not specifically refer to the practice of ‘embedding’. **Merely being ‘embedded’ with an armed force does not necessarily mean that a media professional is entitled to protection as a war correspondent.** As noted above, war correspondents must receive specific authorisation to receive that status. All media professionals, whether authorised war correspondents or not, who are embedded within a military unit retain their civilian status (unless they are actual members of the armed forces of a state).

The *Green Book* contains the policy of the UK Ministry of Defence regarding media professionals. According to the *Green Book* the UK forces will provide some accreditation to all media professionals on assignments with them.<sup>29</sup> However, **not all forms of accreditation provided by the UK forces amount to the ‘authorisation’ necessary to attain ‘war correspondent’ status (even if a person is ‘embedded’ with a unit).** The UK forces will usually provide ‘war correspondent’ authorisation to those media professionals that are accompanying a single unit for a protracted period of time.<sup>30</sup> Only those media professionals provided with this specific authorisation (and not the general accreditation provided to all media professionals) qualify for POW status upon capture in international armed conflict.

### 1.2.4 Identification of Media Professionals

#### Identity cards

**Where a media professional on dangerous missions in an international armed conflict meets the IHL definition of ‘journalist’ (discussed above) they are entitled to obtain an identity card.**<sup>31</sup> A model of this card can be found in the annex to Additional Protocol I. This card may be issued by the government of their State of nationality or employment and identifies them as a journalist. It is used to confirm the civilian status of a member of the media and does not afford the bearer any additional rights. There is no restriction on those media professionals that do not fall within the definition of ‘journalist’ carrying a similar card. Media professionals who do not carry such an identity card are still protected as civilians.

Those media professionals that are accredited war correspondents are also entitled to a different identity card identifying them as such.<sup>32</sup> This card is proof of their entitlement to war correspondent status, but **it is not a condition of this status.** If there is doubt as to a person’s entitlement to POW status upon capture, their status is to be determined by a competent tribunal.<sup>33</sup>

<sup>28</sup> D.W. Moore, ‘Twenty-First Century Embedded Journalists: Lawful Targets?’, (2009) *The Army Lawyer*, July, 1.

<sup>29</sup> MoD, *Green Book*, pp. 8; 11-12.

<sup>30</sup> MoD, *Green Book*, Footnote 14 on p. 8.

<sup>31</sup> Art 79 of Additional Protocol I.

<sup>32</sup> Art 4A(4) of the Third Geneva Convention; see also MoD, *Green Book*, p.12, para 37.

<sup>33</sup> Art 5 of the Third Geneva Convention.

## Press symbol

IHL provides that some groups of persons, for example medical personnel, are entitled to wear a symbol that identifies them as a member of that group and indicates that they are entitled to special protection. Media professionals do not benefit from special protection under IHL and there is no universally recognised protective symbol for them to use in armed conflict.

A number of unofficial symbols have been used by media professionals in armed conflicts to help identify them as members of the media, but these do not create any special protection under IHL. Some examples include symbols particular to a media professional's employer (for example, BBC media professionals often wear armbands or jackets that say "BBC"), as well as some symbols put forward by international organisations, including that suggested by the Press Emblem Campaign<sup>34</sup> which uses the word "PRESS" on an orange circular background.

The increasing number of deliberate attacks against media professionals means that many media professionals may prefer not to be easily identified through the use of an armband or symbol in situations of armed conflict. The decision whether or not to be identified as a member of the press in an armed conflict is a personal and practical decision to be made by a media professional and their employer: it is not regulated by any law.

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<sup>34</sup> For further information visit their website at <http://www.presseblem.ch/>.

## 1.3 The Application of International Humanitarian Law

### SUMMARY: The Application of IHL

When does IHL apply?

- > IHL applies to situations of **international and non-international armed conflict** and also to situations of belligerent occupation. It does not apply to situations falling below this threshold, including riots, internal disturbances and tensions.
- > An **international armed conflict** is where armed force is used between two or more States.
- > A **non-international armed conflict** is a situation of intense armed violence on the territory of one State either between a State and an organised non-State armed group or between organised non-State armed groups.
- > Different IHL instruments apply to each type of armed conflict.

Where does IHL apply?

- > IHL applies **throughout the territory of a party to an armed conflict and in occupied territories.**
- > IHL applies **only to those situations that are connected to an armed conflict** and not to other situations (such as ordinary crimes) even though they may occur in an area of conflict.

To whom does IHL apply?

- > IHL regulates the conduct of **States, non-State armed groups and individuals** involved in an armed conflict.

IHL can only protect media professionals where it is applicable. This section will consider when IHL applies; where IHL applies; and to whom IHL applies.

### 1.3.1 When does IHL apply?

IHL applies to situations of international and non-international armed conflict, as well as situations of belligerent occupation. It does not apply to situations falling below the threshold of armed conflict including “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature”.<sup>35</sup> Usually, an armed conflict is characterised by a high intensity of violence and organisation of the parties to the violence.<sup>36</sup>

<sup>35</sup>Art 1(2) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609 (Additional Protocol II).

<sup>36</sup>*Prosecutor v Tadić* (IT-94-1-AR72), Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 October 1995 (*Tadić Case*) para 65-70. There are, however, different thresholds for armed conflict as set out in this case and also in Additional Protocol II, addressed opposite.

## **IHL applies from the start of an armed conflict and extends beyond the cessation of hostilities<sup>37</sup> until peace is restored<sup>38</sup> or until a peaceful settlement has been reached.<sup>39</sup>**

In most cases the end of hostilities is also the end of the conflict.<sup>40</sup> However, some rules of IHL, in particular those relating to the release and repatriation of POWs, apply beyond the end of hostilities.<sup>41</sup>

Different rules of IHL apply in international and non-international armed conflict.

### **International armed conflict**

International armed conflict describes the situation where armed force is used **between two or more States**.<sup>42</sup> Where force is used between States there is no requirement for a minimum threshold of violence,<sup>43</sup> a time limit on hostilities,<sup>44</sup> or a minimum number of casualties. Further, there is no need for an official 'declaration of war'<sup>45</sup> in order for a situation to qualify as an international armed conflict.<sup>46</sup> Some examples of this type of conflict include the First and Second World Wars, and the First and Second Gulf conflicts.

Sometimes States can use force against each other **'by proxy'**, such as through non-State armed groups acting on their behalf.<sup>47</sup> Even though this type of armed conflict involves a non-State armed group, it may still be an international armed conflict. For example, the International Court of Justice found that part of the 1983-4 conflict in Nicaragua between the Government and the non-State armed group the *contras*, was international because the US Government had "effective control"<sup>48</sup> over the operations of the *contras*.

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<sup>37</sup>*Tadić Case* para 65-70.

<sup>38</sup>In the case of international armed conflict.

<sup>39</sup>In the case of non-international armed conflict.

<sup>40</sup>C. Greenwood, 'Scope of Application of Humanitarian Law' in D. Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd Edition, (Oxford University Press, 2009), p. 72.

<sup>41</sup>For example, Art 118 of the Third Geneva Convention. However, some rules of IHL do apply in peacetime, such as those relating to the dissemination of IHL by States to civilian populations; and those rules requiring States to introduce measures to regulate use of the distinctive emblems.

<sup>42</sup>Common Art 2 to the Geneva Conventions.

<sup>43</sup>J. S. Pictet (ed), *I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Commentary, Volume 1, ICRC, 1952-1960 (Pictet: Geneva Convention I Commentary), p. 32.

<sup>44</sup>See for example the case of *Abella v Argentina* (Report No 55/97, Case 11.137), Inter-American Commission on Human Rights, (IACHR), 18 November 1997, which involved a 30 hour armed conflict to which the IACHR held IHL applied.

<sup>45</sup>Common Art 2 of the Geneva Conventions.

<sup>46</sup>This broad definition of international armed conflict was confirmed by the ICTY in the *Tadić Case* and also in *Prosecutor v Mucić et al.* (IT-96-21-T), Trial Chamber Judgment, ICTY, 16 November 1998, para 184.

<sup>47</sup>However, it is not sufficient to say a State is involved in a conflict by proxy if they only finance an armed group. *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)*; *Merits*, I.C.J. Reports 1986, p. 14, ICJ, 27 June 1986 (Nicaragua Case), para. 115. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, *Merits*, I.C.J. Reports 2005, p.168, ICJ, 19 December 2005 (DRC v Uganda). See also *Tadić Case* and *The Prosecutor v Blaškić* (IT-95-14-T), Trial Chamber Judgment, ICTY, 3 March 2000.

<sup>48</sup>See *Nicaragua Case* and J. G. Stewart, *Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict*, *International Review of the Red Cross*, Vol. 85, No. 850, June 2003, pp. 313-350.

International armed conflict also includes situations of **belligerent occupation**, whether partial or total, regardless of whether such occupation meets with any armed resistance.<sup>49</sup> Belligerent occupation describes the situation where the armed forces of a State have taken effective control over part or all of the territory of another State.<sup>50</sup> This may occur in an armed conflict after the initial hostilities. Examples include the occupation of Iraq following the 2003 armed conflict,<sup>51</sup> and Israel's occupation of Palestinian territory.<sup>52</sup>

In addition, some armed conflicts involving self-determination<sup>53</sup> have been classified as conflicts to which the rules of international armed conflict apply (provided some procedural requirements are met).<sup>54</sup>

Many rules of IHL apply to situations of international armed conflict, including those rules set out in the Geneva Conventions<sup>55</sup> and in Additional Protocol I. Situations of belligerent occupation benefit from additional and more specific rules of IHL.<sup>56</sup> **The rules of the Geneva Conventions are customary international law,<sup>57</sup> which means that they apply to States even when they have not agreed to be bound by these rules.** Many provisions of Additional Protocol I are also customary international law and, therefore, also apply to all States regardless of whether they have agreed to the Protocol.<sup>58</sup>

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<sup>49</sup>Common Art 2 of the Geneva Conventions. The existence of 'international armed conflict' is a question of fact, not law: See the Committee on the Use of Force, 'Final Report on the Meaning of Armed Conflict in International Law', in *International Law Association, Report of The Hague Conference*, 2010, available at: [file:///C:/Users/j/Downloads/final\\_report.pdf](file:///C:/Users/j/Downloads/final_report.pdf). Further, the ICRC commentary to the Geneva Conventions makes it clear that not defining the concept was a deliberate decision by the drafters in order to avoid a restrictive and overly technical interpretation: Pictet: Geneva Convention I Commentary (n 44), p. 32.

<sup>50</sup>E. Benvenisti, *Belligerent Occupation*, Max Planck Encyclopedia of Public International Law, (Oxford University Publishing, online edition, 2009), para 1.

<sup>51</sup>See D. Thürer, 'Current challenges to the law of occupation', 6th Bruges Colloquium, (ICRC, 20-21 October 2005), available at: <http://www.icrc.org/eng/resources/documents/statement/occupation-statement-211105.htm>.

<sup>52</sup>See *ICRC Overview: The ICRC in Israel and the occupied territories* (ICRC, March 2012), available at: <http://www.icrc.org/eng/where-we-work/middle-east/israel-occupied-territories/overview-israel.htm>.

<sup>53</sup>As set out in Art 1(4) of Additional Protocol I: including a fight against colonial domination or alien occupation; against a racist regime; and in a struggle to exercise the right of self-determination.

<sup>54</sup>Art 96(3) of Additional Protocol I requires that the authority representing people engaged against a State in the type of conflict identified here must, by unilateral declaration, agree to be bound by the Geneva Conventions and the Protocol and the authority assumes the rights and obligations of a State under the Conventions and the Protocol. The provisions of the Conventions and the Protocol are then equally binding on all parties.

<sup>55</sup>Except for Common Art 3 of the Geneva Conventions.

<sup>56</sup>As found in Sections III and IV of Part III of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287 (Fourth Geneva Convention), and in Additional Protocol I. The fundamental rules of occupation are set out in Art 6(3) of the Fourth Geneva Convention.

<sup>57</sup>C. Greenwood, 'Historical Development and Legal Basis' in D. Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd Edition, (Oxford University Press, 2009) (Greenwood: Historical Development), p. 28.

<sup>58</sup>All States are party to the 1949 Geneva Conventions, while a number are not party to Additional Protocols I and II. A list of States Parties to the major IHL Conventions is kept on the ICRC's website at <https://www.icrc.org/ihl>.

## Non-international armed conflict

Non-international armed conflict is a situation of **intense armed violence on the territory of a single State**.<sup>59</sup> It describes the situation of violence **between an organised non-State armed group and a State, or between two or more organised non-State armed groups**.<sup>60</sup> The requirements that the armed violence be ‘protracted’<sup>61</sup> and that the non-State armed group be ‘organised’<sup>62</sup> distinguish non-international armed conflict from those situations of violence to which IHL does not apply, including internal disturbances and tensions. An example of a non-international armed conflict between a State and one or more non-State armed groups is the conflict in Syria that developed following protests in March 2011.<sup>63</sup> An example of a non-international armed conflict between two or more non-State armed groups is the conflict between Hema and Lendu ethnic groups that took place in the Democratic Republic of the Congo between 1999 and 2003.<sup>64</sup>

**Fewer rules of IHL apply to non-international armed conflict than to international armed conflict.** Parties to non-international armed conflicts are required to, at a minimum, respect the fundamental guarantees set out in **Common Article 3 of the Geneva Conventions**. This Article includes provisions requiring parties to a conflict to protect the physical and mental well-being of those persons not taking a direct part in hostilities (including media professionals). **Additional Protocol II** also applies to those non-international armed conflicts that meet its threshold criteria.<sup>65</sup>

A number of rules that apply in international armed conflict also apply in non-international armed conflict because they are **customary international law**.<sup>66</sup> These rules apply to all parties to a non-international armed conflict regardless of whether they have agreed to be bound by a treaty. For example, the principle of distinction applies, through customary international law, to both international and non-international armed conflict, as does the prohibition on superfluous injury or unnecessary suffering and the principle of proportionality.

A number of rules of international armed conflict **do not** apply in non-international armed conflict, for example, those rules relating to POW status upon capture by an adversary. Where the law of international armed conflict and non-international armed conflict is different, this will be noted in the Handbook.

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<sup>59</sup>Sometimes called ‘protracted’ armed violence: *Tadić Case*, para 70; *Prosecutor v Ramush Haradinaj et al.* (IT-04-84-T), Trial Chamber Judgment, ICTY, 3 April 2008 (*Haradinaj Case*), para 49; *The Prosecutor v Jean Paul Akayesu* (ICTR-96-4-T), Trial Chamber Judgment, 2 September 1998, para 602, 619.

<sup>60</sup>This is the customary international law definition of non-international armed conflict approved in the *Tadić Case*, para 70. IHL treaty law sets out other thresholds for non-international armed conflict (Common Art 3 of the Geneva Conventions (which is also custom) and Art 1 of Additional Protocol II).

<sup>61</sup>This refers to a number of factors (none of which is determinative) including (but not limited to) the number, intensity and duration of confrontations; the type of weapons used; the number of people involved in the fighting; the number of casualties: as identified by the *Haradinaj Case*, para 60.

<sup>62</sup>This refers to a number of factors (none of which is determinative) including (but not limited to): whether or not a non-State armed group has a command structure and disciplinary rules; is capable of implementing IHL; controls territory and the ability of the group to engage in a unified ‘military strategy’: *Tadić Case*, para 70; *Haradinaj Case*, para 60.

<sup>63</sup>See BBC, *Syria in civil war, says UN official Herve Ladsous*, 12 June 2012, available at: <http://www.bbc.co.uk/news/world-middle-east-18417952>. It should be noted that the determination as to whether a non-international armed conflict exists is a factual one, and is not the responsibility of any one organisation or authority. This means that differences of opinion may exist about whether a situation is in fact a non-international armed conflict (or, for example, at what point violence may ‘spill over’ into armed conflict).

<sup>64</sup>See, BBC, *Congo’s forgotten war*, 5 January 2001, available at: <http://news.bbc.co.uk/1/hi/world/africa/1102289.stm>.

<sup>65</sup>Additional Protocol II applies to those conflicts between a State and an organised non-State armed group which, among other things, must exercise a degree of territorial control (see Article 1). This requirement is not found in either Common Article 3 of the Geneva Conventions nor in customary law, above.

<sup>66</sup>The ICRC has identified a number of rules as forming part of customary international law, see ICRC CIHL Study; and *Tadić Case*, paras 96-127.

## IHL Applicable in Each Type of Armed Conflict

International Armed Conflict	Non-International Armed Conflict
<ul style="list-style-type: none"><li>&gt; The Four Geneva Conventions (less Common Article 3)</li><li>&gt; Additional Protocol I</li><li>&gt; Customary International Law</li></ul>	<ul style="list-style-type: none"><li>&gt; Common Article 3 of the Geneva Conventions</li><li>&gt; Additional Protocol II (where certain conditions are met)</li><li>&gt; Customary International Law</li></ul>

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### 1.3.2 Where does IHL apply?

In an international armed conflict IHL applies **throughout the entire territory of the parties to the conflict, whether or not actual combat is taking place there.**<sup>68</sup> In non-international armed conflict IHL applies to the **whole territory under the control of a party to the conflict.**<sup>69</sup> IHL is not, however, subject to territorial limitations and must be implemented 'in all circumstances'.<sup>70</sup> The rules of IHL may also serve to protect particular groups related to the conflict, regardless of where they are located, such as persons detained by the forces of an adversary outside the territory of a conflict.<sup>72</sup>

Even though IHL applies throughout the whole territory of a party to a conflict it only **regulates a person's conduct where it is closely related to hostilities.**<sup>73</sup> Its application might apply to a specific event related to hostilities, for example, the outbreak of fighting in an area or the internment of civilians for security reasons. However, it does not regulate ordinary domestic matters (as discussed above).

### 1.3.3 To whom does IHL apply?

**IHL applies to States, non-State armed groups, and also individuals.** All parties to an international or non-international armed conflict are under an obligation to respect and ensure respect for the rules of the Geneva Conventions.<sup>74</sup> The rules of IHL must be complied with regardless of whether the adversary's forces adhere to them.<sup>75</sup>

<sup>67</sup>Diagram courtesy of Dino Kritsiotis, Professor of Public International Law, University of Nottingham.

<sup>68</sup>*Tadić Case*, paras 65-70.

<sup>69</sup>*Tadić Case*, paras 65-70.

<sup>70</sup>Common Art 1 of the Geneva Conventions.

<sup>71</sup>P. Rowe, *The Impact of Human Rights Law on Armed Forces*, (Cambridge University Press, 2006), p. 121. See also K. Annan, 'Observance by United Nations forces of international humanitarian law: United Nations Secretary-General's Bulletin ST/SGB/1999/13, 6 August 1999.' (1999) *International Review of the Red Cross*, Vol. 81, No. 836, 812.

<sup>72</sup>See discussion of this protection in Chapter 2 of this Handbook.

<sup>73</sup>*Tadić Case*, paras 65-70.

<sup>74</sup>Common Art 1 of the Geneva Conventions.

<sup>75</sup>See R. Wolfrum and D. Fleck, 'Enforcement of International Humanitarian Law' in D. Fleck (ed), *The Handbook of International Humanitarian Law*, 2nd Edition, (Oxford University Press, 2009), p. 689. This has also been identified by the ICRC as a rule of customary law, see ICRC CIHL Study, Rule 140.

## States

IHL applies to all State parties to IHL treaties, and their armed forces.<sup>76</sup> In addition, **IHL rules that are customary international law bind even those States which are not a party to the relevant IHL treaty.** States are obliged to respect and ensure respect for IHL. This means that State parties to a conflict must ensure that those authorities and persons under their control (including their armed forces) comply with IHL. For example, States are obliged to implement the rules of IHL into their domestic law<sup>77</sup> and to suppress violations of the rules.

## Non-State armed groups

IHL also binds non-State armed groups involved in an international or non-international armed conflict.<sup>78</sup> In particular, Common Article 3 of the Geneva Conventions and Additional Protocol II (where it has been ratified by a State) are binding on all parties to a non-international conflict including non-State armed groups.<sup>79</sup> **Where non-State armed groups are a party to a conflict they must respect the relevant rules of IHL.**<sup>80</sup>

## Individuals

**The rules of IHL apply to every individual involved in both international and non-international armed conflict.**<sup>81</sup> Each person involved in a conflict, including media professionals, has a responsibility to conduct themselves in accordance with IHL. This is reinforced by the principle of individual criminal responsibility under national criminal laws as well as international criminal law, which arises when someone commits a serious violation of IHL.<sup>82</sup> This obligation to respect IHL applies regardless of whether a person has a right to participate in hostilities, for example as a combatant.

**It is not only persons directly involved in front line fighting that must comply with the rules of IHL; any individual may be found liable for a breach of IHL if their conduct is sufficiently connected to hostilities. This includes media professionals.**

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<sup>76</sup>Greenwood: *Historical Development* (n 59), p.39. The definition of a State's armed forces in Art 4 (A) of the Third Geneva Convention includes those non-State armed groups that form part of a State's armed forces.

<sup>77</sup>See for example Art 48 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31 (First Geneva Convention); Art 49 of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85 (Second Geneva Convention); Art 128 of the Third Geneva Convention; Art 145 of the Fourth Geneva Convention and Arts 80 and 84 of Additional Protocol I.

<sup>78</sup>G. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, (Cambridge University Press, 2010), p.157; UN Security Council Resolution 1214, (S/RES/1214), 8 December 1998, (UNSC Res. 1214) para 12.

<sup>79</sup>L. Moir, *The Law of Internal Armed Conflict*, (Cambridge University Press, 2002), pp. 52, 96-97; A. Cassese, 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflict', (1981) *International Comparative Law Quarterly*, Vol. 30, No. 2, 416, p. 424 and UNSC Res. 1214 (n 79), para 12.

<sup>80</sup>T. Pfanner, 'Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims', (2009) *International Review of the Red Cross*, Vol. 91, No. 874, 279, p. 281. See also the ICRC CIHL Study, Rule 139, which states that "[e]ach party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control."

<sup>81</sup>Greenwood: *Historical Development* (n 59), p. 39. UNSC Res 1214 (n 79), para 12.

<sup>82</sup>For discussion of this see the ICL section below and further discussion of responsibility under IHL in Chapter 3 of this Handbook. This has also been identified by the ICRC as a rule of customary law, see ICRC CIHL Study, Rule 151.

## 1.4 International Humanitarian Law and Other Areas of Law

### SUMMARY: IHL and Others Areas of Law

International Human Rights Law:

- > International human rights law and IHL are **similar but separate areas of law**. They both contain rules that seek to protect the life and dignity of persons, including media professionals.
- > International human rights law sets out the rules and protection that everyone can expect from States. **It applies equally to all persons**.
- > It applies at all times, **including during armed conflict**. However, sometimes, in limited situations, which may include armed conflict, States are permitted to derogate (depart) temporarily from some aspects of human rights. In contrast, States are unable to derogate from IHL rules.
- > International human rights law applies in **all places where a State has 'jurisdiction'**. This includes in their territory and also in some situations outside of their territory, for example, where they hold someone in detention.
- > International human rights law **binds the conduct of States**. However, States are under obligations to ensure that other entities do not violate the human rights of individuals.
- > Where there is a conflict between the two areas of law, **the rules of IHL generally take precedence**.

International Criminal Law (ICL):

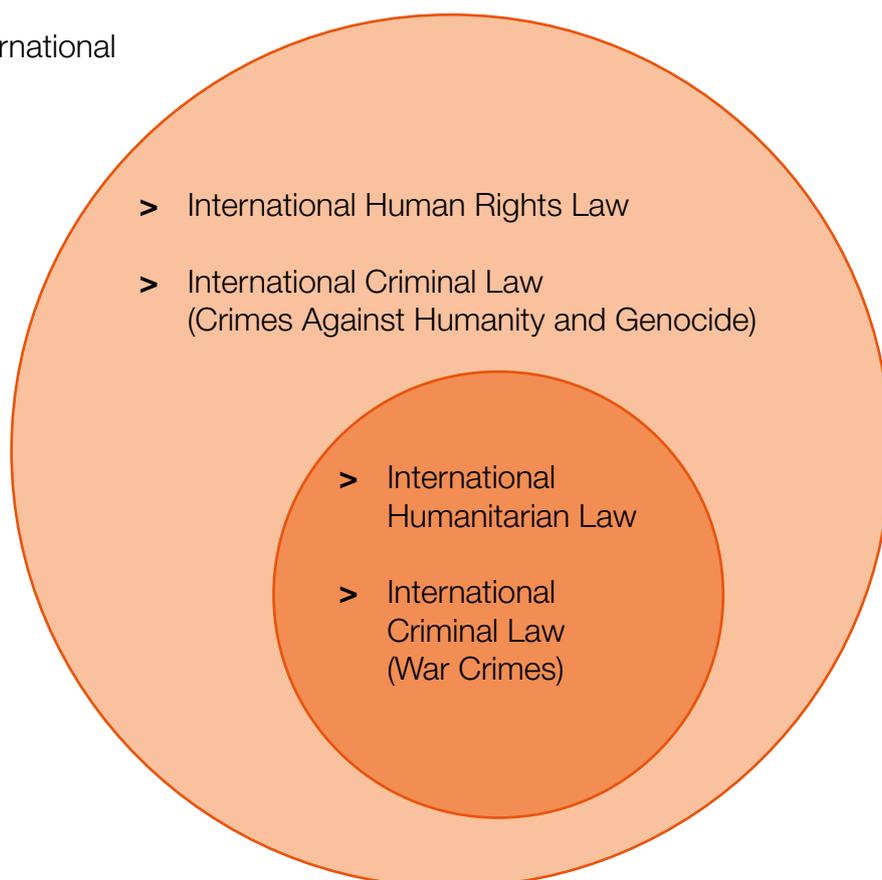
- > ICL seeks to hold persons, including media professionals, accountable for serious violations of international law, including IHL.
- > International crimes include **war crimes, genocide**, and **crimes against humanity**.
- > ICL applies in **both peacetime and armed conflict** (although war crimes can only be committed during an armed conflict). It relates not only to IHL (e.g. war crimes), but also to serious violations of, for example, human rights law (e.g. crimes against humanity).
- > ICL not only covers the substance of international crimes, it also sets out the **procedures and mechanisms** necessary for their investigation and prosecution.
- > A person can only be held to account for an international crime where a court (either international or domestic) has 'jurisdiction' to bring them to trial and sentence them. **International courts have different jurisdiction depending on the statute that created them**. The International Criminal Court has jurisdiction over crimes committed in situations of violence referred to it by States; referred to it by the UN Security Council; or committed in the territory of, or by a national of, a State that is a party to the Rome Statute of the International Criminal Court (Rome Statute).
- > ICL applies to **all individuals who commit an international crime**. Crimes can be committed in a number of ways including by assisting or encouraging another to commit a crime.

Media professionals in conflict zones are not only protected by and subject to the rules of IHL; they may also be protected by and have responsibilities under other areas of law, including international human rights law and international criminal law (ICL). This Handbook concentrates on the rules of IHL: however, it is important to understand when other areas of law might apply and how their rules relate to those of IHL.

## **The Application of IHL, International Human Rights Law and International Criminal Law**

 All situations of peace and armed conflict

 International and non-international armed conflict



### **1.4.1 International Human Rights Law**

**Human rights are rights that are inherent to all persons.**<sup>83</sup> They apply equally and without discrimination. International human rights law **sets out the rules and protection that individuals can expect from States.** These rules are found in international human rights treaties, international customary law and, often, domestic laws of States that are parties to these treaties. A number of 'guidelines' and other declarations also form part of international human rights law.<sup>84</sup> A detailed discussion of international human rights law is beyond the scope of this IHL Handbook.

<sup>83</sup>For further discussion of international human rights see the Office of the High Commissioner for Human Rights website: <http://www.ohchr.org/en/issues/Pages/WhatAreHumanRights.aspx>.

<sup>84</sup>For example the Universal Declaration of Human Rights.

Some important human rights treaties are:<sup>85</sup>

- > International Covenant on Civil and Political Rights 1966 (ICCPR)
- > International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR)
- > Convention on the Prevention and Punishment of the Crime of Genocide 1948 (CPPCG)
- > Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment 1984 (CAT)
- > Convention on the Elimination of all Forms of Discrimination against Women 1979 (CEDAW)
- > Convention on the Elimination of All Forms of Racial Discrimination 1965 (ICERD)
- > Convention on the Rights of People with Disabilities 1993 (CRPD)
- > Convention on the Rights of the Child 1989 (CRC).

There are also regional human rights treaties, including the European Convention on Human Rights (ECHR), to which the UK is a State party.

## The application of international human rights law

*When does international human rights law apply?*

**International human rights law applies at all times – including during times of peace and times of armed conflict.** This is different to IHL, which only applies when there is an international or non-international armed conflict.

States are permitted under some international human rights treaties to derogate (depart) from aspects of particular rights (including the right to freedom of speech and expression)<sup>86</sup> during an emergency situation that threatens the life of a nation (a state of emergency); this can include armed conflict. Derogations from rights must be temporary, exceptional and proportionate to the emergency. They can never be discriminatory, and cannot violate any other rule of international law, including IHL.<sup>87</sup> **Some rights can never be derogated from, even in a state of emergency.** These include the right to life;<sup>88</sup> the right to be free from torture or cruel, inhuman or degrading treatment or punishment;<sup>89</sup> the right to freedom of thought, conscience and religion;<sup>90</sup> and the prohibition on slavery.<sup>91</sup> In contrast, rules of IHL are unable to be derogated from by States.

<sup>85</sup>For a full list see the Office of the High Commissioner for Human Rights website: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments.aspx>.

<sup>86</sup>Art 19 of the ICCPR.

<sup>87</sup>See, United Nations Human Rights Committee, *General Comment 5: Article 4 (Derogation of Rights)*, HRI/GEN/1/Rev.9 (Vol. I), 31 July 1981. See also United Nations Human Rights Committee, *General Comment 29: Article 4 (Derogation during a State of Emergency)*, CCPR/C/21/Rev.1/Add.11, 24 July 2001.

<sup>88</sup>Art 6 of the ICCPR.

<sup>89</sup>Art 7 of the ICCPR.

<sup>90</sup>Art 18 of the ICCPR.

<sup>91</sup>Art 8 of the ICCPR.

## Where does international human rights law apply?

International human rights law **applies throughout the jurisdiction of those States that have ratified an international human rights treaty.**<sup>92</sup> This includes the territory of States.<sup>93</sup> An international human rights treaty protects everyone in that jurisdiction regardless of their nationality.<sup>94</sup> Under some circumstances, the protection of a particular human rights treaty might apply outside of the territory of a State, for example, where a State has ‘assumed authority and responsibility’ over a territory<sup>95</sup> or where it holds a person in detention, including during an armed conflict abroad.<sup>96</sup>

This is different to IHL, which applies throughout the territory of a State party to an armed conflict, and also, to particular groups of persons, including POWs, held in detention outside of that territory. Unlike international human rights law, the rules of IHL may not be triggered, even in the territory of a party to a conflict, unless an event is connected to an armed conflict.<sup>97</sup>

## To whom does international human rights law apply?

The rules of international human rights law **bind States and State organs (including their armed forces)** in their dealings with individuals and groups of persons, including media professionals.<sup>98</sup> These rules apply to States during peace and armed conflict.

Some human rights responsibilities of States include the obligation to make sure other organisations, such as non-State organisations or bodies, comply with human rights law.<sup>99</sup> Increasingly, it is being suggested that where a non-State actor has similar functions to a government it may also be bound by some aspects of international human rights law.<sup>100</sup>

Unlike international human rights law, which is predominantly aimed at the actions of States, IHL binds all persons in an armed conflict – both State and non-State actors (including individuals).<sup>101</sup>

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<sup>92</sup>Ratification is not, however, necessarily a requirement for jurisdiction where the international human rights treaty is customary international law. An example of this is the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force 26 June 1987 (CAT)

<sup>93</sup>See for example Art 2(1) of the ICCPR, which states that: “[E]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

<sup>94</sup>See Art 2(1) of the ICCPR (quoted above).

<sup>95</sup>See for example consideration of this issue by the European Court of Human Rights (ECtHR) in *Al-Skeini and Others v United Kingdom* (55721/07), Grand Chamber Judgment, European Court of Human Rights (ECtHR), 7 July 2011 (*Al-Skeini*), para 149.

<sup>96</sup>See for example the application of the ECtHR in these circumstances: *Al-Skeini*, paras 136-137 citing *Öcalan v Turkey* (46221/99), Grand Chamber Judgment, ECtHR, 12 May 2005, *Issa and Others v Turkey* (31821/96), Second Section Judgment, ECtHR, 16 November 2004 (final 30 March 2005), *Al-Saadoon and Mufdhi v The United Kingdom* (61498/08), Fourth Section Judgment, ECtHR, 2 March 2010 and *Medvedyev and Others v France* (3394/03), Grand Chamber Judgment, ECtHR, 29 March 2010. For consideration of jurisdiction arising from control of a military checkpoint see *Jaloud v The Netherlands* (47708/08), Grand Chamber Judgment, ECtHR, 20 November 2014.

<sup>97</sup>See discussion above.

<sup>98</sup>Art 1 of the ECHR; Art 2 of the ICCPR.

<sup>99</sup>See Art 4 of the Optional Protocol to the Convention on the Rights of the Child and Arts 2 and 7 of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa of 2009 (The Kampala Convention).

<sup>100</sup>See, for example L. Zegveld, *The Accountability of Armed Opposition Groups in International Law*, (Cambridge University Press, 2002), p. 83; N. Rodley, ‘Can armed opposition groups violate human rights?’ in K. E. Mahoney and P. Mahoney (eds), *Human Rights in the Twenty-first Century*, (Martinus Nijhoff Publishers, 1993), pp. 307–308; and A. Bellal, G. Giacca and S. Casey-Maslen, ‘International Law and Armed Non-State Actors in Afghanistan’, (2011) *International Review of the Red Cross*, Vol. 93, No. 881, p. 69.

<sup>101</sup>See discussion above.

## Relationship with IHL

**Both international human rights law and IHL apply during armed conflict. This means that media professionals in armed conflict can be protected and regulated by several legal areas (see also the discussion regarding ICL below).** Where there is a conflict between these two areas of law, the rules of IHL generally take precedence.

International human rights law and IHL have **some similar fundamental aims**: they both endeavour to protect the lives, well-being, and dignity of individuals<sup>102</sup> including media professionals. However, they also differ in a number of respects. IHL seeks to balance, on the one hand, the legitimate objectives of armed forces in conducting military operations during an armed conflict with, on the other hand, humanitarian requirements. In contrast, international human rights law seeks to secure a fuller range of rights for individuals in all situations. Some human rights relate to particular governmental processes and procedures, whereas IHL is concerned only with the conduct of hostilities by parties to a conflict, regardless of their governmental structure, political ideology, or perceived legitimacy in the international community.

IHL and international human rights law are separate legal areas that contain different rules. For example, some areas of international human rights law deal with specific issues that are not regulated by IHL. These include: participation in government; the formation of unions; and the right to freedom of speech and expression. Some aspects of armed conflict are only regulated by IHL and not by international human rights law, such as: POW status and protection; rules relating to participation in hostilities; and the protection of the distinctive emblems.

Nevertheless, some issues that arise during armed conflict are regulated by rules of both international human rights law and IHL. When this happens, the two legal areas usually operate in a way that **complements and reinforces each other**.<sup>103</sup> Normally this complementary relationship occurs where the rules of both international human rights law and IHL are very similar: for example, the rules that protect the dignity of individuals; prohibit the use of torture and other cruel and inhuman treatment; and establish certain fair trial guarantees for those in detention.

Occasionally, **there is a conflict between human rights law and IHL**. In such cases, during armed conflict situations, **the rules of IHL generally take precedence over the rules of human rights law**. This is because the rules of IHL are more specialised and specifically address the conduct of parties during a conflict.<sup>104</sup>

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<sup>102</sup>ICRC, *Fact Sheet: International Humanitarian Law and International Human Rights Law*, (ICRC, Advisory Service on International Humanitarian Law, January 2003), available at: <file:///C:/Users/j/Downloads/ihl-and-ihrl.pdf>.

<sup>103</sup>*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226, International Court of Justice (ICJ), 8 July 1996 (*Nuclear Weapons Advisory Opinion*); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004, P. 136, 9 July 2004 (*Wall Opinion*); *DRC v Uganda*; *Hassan v United Kingdom* (29750/09), Grand Chamber Judgment, ECtHR, 16 September 2014 (*Hassan v UK*).

<sup>104</sup>*Nuclear Weapons Advisory Opinion*, para 25; *Wall Opinion*, para 106; United Nations Human Rights Committee, *General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add13, 29 March 2004.

For example, the ‘right to life’ under international human rights law prohibits the arbitrary (outside the law) deprivation of a person’s life – including extra-judicial killings (e.g. when the killing of a person by a State’s security forces is not absolutely necessary for a legitimate purpose).<sup>105</sup> In contrast, IHL envisages that civilians will be killed during conflict – and it actually permits such deaths where they are ‘proportionate’ to the military advantage anticipated from an attack.<sup>106</sup> On the face of it, these two rules appear to be irreconcilable. However, as IHL rules take precedence during armed conflict, the issue is resolved by requiring the more general rules of human rights law to be interpreted in light of the more specific rules of IHL.<sup>107</sup> In other words, what is meant by ‘arbitrary’ under the right to life is supplemented by the rules of IHL relating to when a party might lawfully kill an adversary and incidentally kill a civilian. Therefore, IHL provides the relevant rules defining what is ‘arbitrary’ deprivation of life during an armed conflict, and what is not.<sup>108</sup>

## Freedom of speech, opinion and expression

International human rights law protects many rights that affect the work of media professionals, including the right to freedom of speech, opinion and expression (the right to freedom of expression). This right is a human right found in many international and regional human rights treaties.<sup>109</sup>

The right to freedom of expression includes the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers, through any medium.<sup>110</sup> The media are given special protection under this right and any restriction on the work of the media is scrutinized closely by international human rights courts and other supervisory bodies.<sup>111</sup> The safety of media professionals, especially during armed conflict, is essential to ensuring that the wider public are able to exercise their right to freedom of expression and to access information.<sup>112</sup>

**Freedom of expression does not, however, mean that all forms of speech in all circumstances are allowed.** States are permitted under international human rights law to restrict speech on some limited grounds. The following are relevant to armed conflict:<sup>113</sup>

- > Where it is necessary for **national security**. This includes issues relating to defence and the protection of the secret service. However, this limitation does not allow a State to restrict a publication or broadcast that is part of a public discourse on human rights<sup>114</sup> or to suppress information that the military finds embarrassing but otherwise does not endanger national security;<sup>115</sup>
- > Where speech constitutes **‘hate speech’**. As a result, hate and discriminatory speech and all expressions of intolerance, including incitement, harassment or threats, are prohibited;
- > Where speech constitutes **‘propaganda for war’**. This limitation does not prohibit the media from supporting the right of a State to self-defence nor the rights of people to self-determination and independence.<sup>116</sup>

<sup>105</sup>United Nations Human Rights Committee, *General Comment 6: Article 6 (Right to Life)*, HRI/GEN/1/Rev.9 (Vol.1), 30 April 1982.

<sup>106</sup>This is called the rule of proportionality and is addressed in further detail in Chapter 2 of this Handbook.

<sup>107</sup>This is known as the doctrine of ‘*lex specialis*’: *Nuclear Weapons Advisory Opinion*; *Wall Opinion*.

<sup>108</sup>*Nuclear Weapons Advisory Opinion*, para 25. See consideration by the European Court of Human Rights of the similar issue of ‘arbitrary’ deprivation of liberty in conflict under IHL and international human rights law: *Hassan v UK*.

<sup>109</sup>See for example Art 19 of the ICCPR; Art 10 of the ECHR.

<sup>110</sup>Art 19(2) of the ICCPR.

<sup>111</sup>See L. Doswald-Beck, *Human Rights in Times of Conflict and Terrorism*, (Oxford University Press, 2011), pp. 421-424.

<sup>112</sup>A Ligabo, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, A/HRC/7/14, Human Rights Council, 28 February 2008, pp. 332-334.

<sup>113</sup>See Arts 19(3) and 20 ICCPR.

<sup>114</sup>See for example *Report of the UN Special Representative on Human Rights Defenders*, A/58/380, UN General Assembly, 18 September 2003, paras 17-20.

<sup>115</sup>See for example *Usón Ramírez v Venezuela*, Judgment, Inter-American Court of Human Rights (IACtHR), 20 November 2009, para 88-90.

<sup>116</sup>See United Nations Human Rights Committee, *General Comment 11: Article 20 (Prohibition of Propaganda for war and inciting national, racial or religious hatred)*, HRI/GEN/1/Rev.9 (Vol.1), 20 July 1983

## Freedom of expression and IHL

Freedom of expression is particularly important in armed conflict. Often, the work of media professionals during conflict is the only way that the global public is able to access information about the conflict. The work of the media in armed conflict, protected by this right, is also a vital means of ensuring that the power of public scrutiny is brought to bear on the actions of parties to a conflict – including when they violate the rules of IHL.

IHL does not refer to the right to freedom of expression. This means that it is the rules of human rights law that predominantly govern when speech and expression are to be protected and when they can be restricted during an armed conflict.

However, that does not mean that IHL is irrelevant to freedom of expression. In particular, the rules of IHL have a great impact on the ability of media professionals to undertake their work in armed conflict. A central protection of media professionals in armed conflict is the protection IHL provides against deliberate attack (as long as a media professional is not directly participating in hostilities). Under IHL the ordinary professional tasks of media professionals do not amount to direct participation in hostilities and IHL, therefore, prohibits parties from attacking media professionals who are simply doing their job. This is discussed further in Chapter 2.

Similarly, many relevant rules of IHL complement those of international human rights law. For example, both areas of law prohibit types of conduct that can have a detrimental impact on free speech. These include: the arbitrary detention of media professionals in order to silence them; the deliberate and direct targeting of media professionals or their facilities with violence, because they are publishing material that is anti-government policy; and the use of torture or rape against media professionals to punish them for their work.

It is also possible that some rules of IHL could be perceived as inhibiting the work of media professionals in armed conflict. However, this cannot be considered a violation of the right to freedom of expression. For example, **IHL requires States (and media professionals) to prevent particular information being published or broadcast, including information that can identify POWs or civilian internees in armed conflict.** These restrictions on the transmission of information to the public are legitimate and protect some of the most vulnerable persons in conflict – those in detention and internment. They do not violate the right to freedom of expression.

### 1.4.2 International Criminal Law

**International criminal law (ICL) is an area of international law that identifies when a person should be held individually responsible for their conduct.** It criminalises those acts “that shock the conscience of humanity”<sup>117</sup> including the international crimes of aggression; genocide; crimes against humanity; and war crimes and other serious breaches of IHL.<sup>118</sup> ICL also sets out the rules and procedures for the prosecution and sentencing of those found guilty of these crimes. These crimes are prosecuted through international criminal courts and tribunals set up for this purpose, or domestic criminal courts.

<sup>117</sup>A phrase most recently cited in the Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90 (Rome Statute) to describe international crimes: Preamble, Rome Statute, para 2.

<sup>118</sup>See the Rome Statute. See also: A. Cassese ‘International Criminal Law’ in M. D. Evans *International Law*, 2nd Edition, (Oxford University Press, 2006) (Cassese, ICL), p. 719; K.A.A. Khan and R Dixon *Archbold: International Criminal Courts Practice, Procedure and Evidence 3rd Edition* (Sweet and Maxwell, 2009), para 21-22.

The rules of ICL are found in **customary international law** and a **variety of different international instruments** such as, most importantly, the statutes and case law of various international courts and tribunals. This includes a number of *ad hoc* regional courts and tribunals (called “courts” here for convenience). These were established to investigate and prosecute individuals for international crimes within a conflict. For example:

- > The International Military Tribunals (IMT) established to prosecute the crimes committed during the Second World War
- > The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were both established through United Nations Security Council Resolutions.<sup>119</sup>
- > The Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Tribunal for Lebanon (STL) were created by specific agreement between the United Nations and the respective States.

The most important recent development in ICL has been the creation of the International Criminal Court (ICC) in The Hague by the Rome Statute in 1998. It is the first permanent international criminal court.

Many of the statutes of these courts draw on IHL and international human rights law to define the content of those crimes they prohibit. For example, each of the above courts is able to prosecute individuals for serious breaches of IHL. This close relationship between ICL and IHL means that it is impossible to consider the enforcement of IHL (especially responsibilities under IHL) without referring to ICL. For this reason, this IHL Handbook examines, where relevant, some rules of ICL that relate to media professionals in armed conflict in the following Chapters.

## The application of international criminal law

*When does ICL apply?*

**ICL applies in both peace and armed conflict.** ‘War crimes’ can only be committed in connection with an international<sup>120</sup> or a non-international armed conflict,<sup>121</sup> and include grave breaches (the most serious violations) of the Geneva Conventions. ICL also recognises two other types of crimes not exclusive to armed conflicts, although they often are committed in such contexts: genocide and crimes against humanity. These crimes are discussed in further detail in Chapter 3.

*Where does ICL apply?*

International crimes are crimes wherever they are committed. However, **a person can only be prosecuted for a crime (and sentenced if they are guilty) where there is ‘jurisdiction’ to do so.** Any court or tribunal must have jurisdiction over a person in order to force them to appear before them to be tried for a crime.

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<sup>119</sup>UN Security Council Resolution 827 of 1993 (S/RES/827 (1993)), 25 May 1993 establishing the ICTY, and United Nations Security Council Resolution 955 of 1994 (S/RES/955 (1994)), 8 November 1994 establishing the ICTR. After these Tribunals have ceased their work the United Nations Mechanism for International Criminal Tribunals will continue to carry out a number of their functions.

<sup>120</sup>Art 8(2)(b) of the Rome Statute lists crimes in international armed conflict.

<sup>121</sup>Art 8(2)(c) and (e) of the Rome Statute list crimes in non-international armed conflict.

States have an obligation under specific treaty law, the general principles of ICL, and customary international law to bring to justice those who have committed such crimes.<sup>122</sup> Individuals, including media professionals, may be prosecuted in the State in which the alleged violation took place,<sup>123</sup> the State of their own nationality,<sup>124</sup> the State of nationality of the alleged victim,<sup>125</sup> or the State in which their employer is based. In addition, all States<sup>126</sup> are under an obligation to prosecute or extradite persons suspected of having committed particularly serious violations (so-called ‘grave breaches’) of the Geneva Conventions and their First Additional Protocol.<sup>127</sup>

Persons, including media professionals, accused of war crimes, genocide and crimes against humanity may also be prosecuted in international criminal courts or tribunals (such as the ICC), provided the jurisdictional requirements have been met. Jurisdictional requirements can be based on the geography and timeframe of a particular conflict: such as in the case of the ICTY and the ICTR. Jurisdiction for an international court can also be based on the principles outlined in a court’s statute; for example, in most cases, the ICC has jurisdiction over relevant crimes committed in the territory of, or by a national of, a State that is a party to the Rome Statute.<sup>128</sup> Situations may be referred to it by: (1) States who are party to the Rome Statute;<sup>129</sup> (2) the UN Security Council (regardless of whether the State in question is a party to the Rome Statute);<sup>130</sup> or (3) the Prosecutor of the ICC, subject to certain requirements. The ICC may not take up a case if it is to be dealt with by a State’s own courts. This is known as the principle of complementarity.

*To whom does ICL apply?*

ICL applies to all individuals. Any individual can be held responsible for an international crime that they commit either individually, jointly with a group of persons; or through another person.<sup>131</sup>

**Individual criminal responsibility also exists when someone, including a media professional, orders, solicits, induces, aides, or assists in the commission of a crime.**<sup>132</sup>

**<sup>b</sup>In some circumstances a person, for example an editor or supervisor of a media professional, can be responsible for a crime committed by their subordinate.**<sup>133</sup>

The individual criminal responsibility of media professionals is discussed below, in Chapter 3.

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<sup>122</sup>See for example Principles 19 and 20 of the UN Updated Set of principles for the protection and promotion of human rights through action to combat impunity, Commission on Human Rights, (E/CN.4/2005/102/Add.1) 8 February 2005 (UN Updated Set of Principles on Impunity). As Principles, these are not legally binding, however, they are reflective of many principles of international law.

<sup>123</sup>This is known as ‘territorial jurisdiction’: See the Permanent Court of International Justice case: *SS Lotus (France v Turkey)* 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7). See also A Cassese, *International Criminal Law 2nd Edition*, Oxford University Press, 2008, at 27; and Principles 19 and 20 of the UN Updated Set of Principles on Impunity (n 123).

<sup>124</sup>This is known as ‘active personality jurisdiction’: See discussion of this principle in R. Cryer, H. Friman, D. Robinson and E. Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 2nd Edition, Cambridge University Press, 2010 (Cryer et al: *Introduction to ICL*), p. 47-9.

<sup>125</sup>This is known as ‘passive personality jurisdiction’ and is more controversial than territorial or active personality jurisdictions: See discussion of this principle in Cryer et al (n 125), p. 50.

<sup>126</sup>Technically, this requirement applies to those States which are parties to the Geneva Conventions. However, all States have ratified them. In any event, the Geneva Conventions are considered customary law and bind all States regardless of ratification.

<sup>127</sup>This is known as ‘universal jurisdiction’: Cryer et al (n 125), p. 50. Grave breaches only apply to international armed conflicts (i.e. not to non-international armed conflicts).

<sup>128</sup>Art 12(2) of the Rome Statute.

<sup>129</sup>Art 12(3) of the Rome Statute.

<sup>130</sup>Art 13(b) of the Rome Statute.

<sup>131</sup>Art 25(3)(a) of the Rome Statute.

<sup>132</sup>For more on the scope of individual criminal responsibility see for example Art 7(1) of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY Statute), Art 6(1) of the Statute of the International Criminal Tribunal for Rwanda (ICTR Statute), and Art 25(3) of the Rome Statute. See also Cassese, *ICL* (n 124), p. 733.

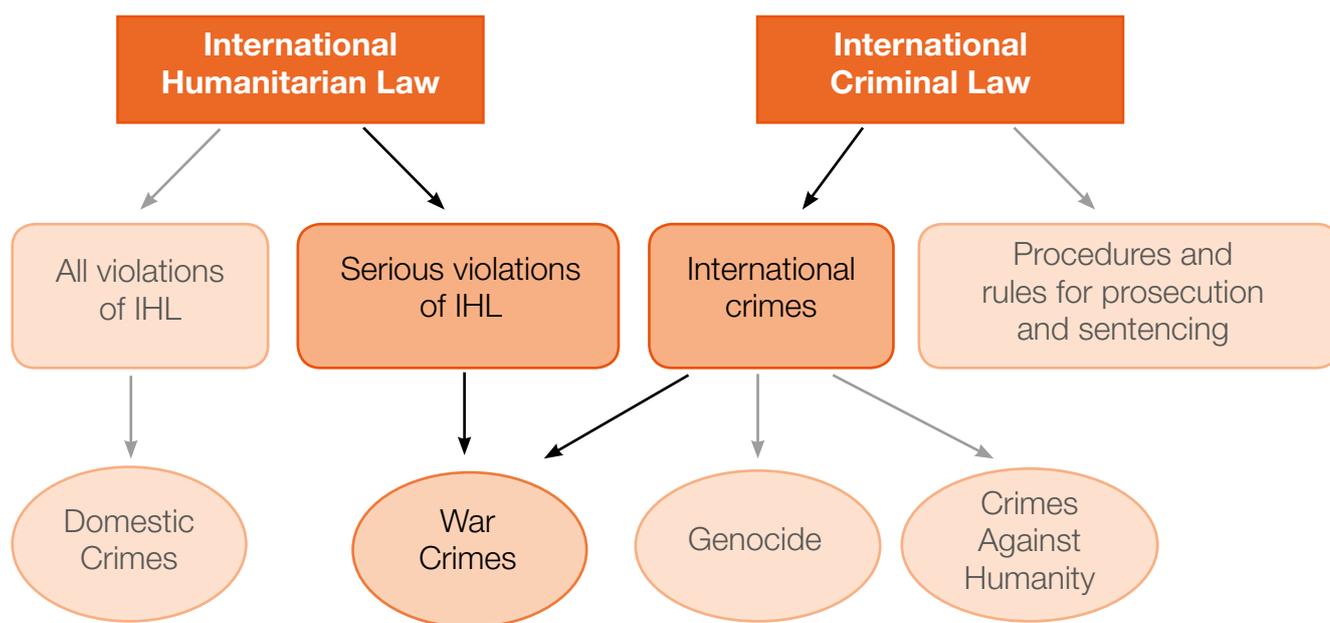
<sup>133</sup>See for example Art 28 of the Rome Statute.

Even if a person is accused of a crime (and sometimes admits to undertaking the acts of the crime) they may still not be guilty of an offence. For example, a person may have a complete defence (of the whole alleged crime) on the grounds of: mental incapacity (insanity);<sup>134</sup> involuntary intoxication;<sup>135</sup> self-defence, defence of others or defence of property;<sup>136</sup> or where they were acting under duress or out of necessity.<sup>137</sup> Alternatively, a person might be found 'not guilty' of an offence if the prosecution (the accusing party) cannot prove that the crime (or an element of it) was committed by a particular person beyond a reasonable doubt.<sup>138</sup>

## Relationship with IHL

**IHL and ICL have a very close relationship. Many of the crimes set out in the rules of ICL draw on IHL treaties and their substance.** For example, serious breaches of IHL are known as war crimes and the Rome Statute of the ICC mentions many of these expressly.<sup>139</sup> However, not all violations of IHL are war crimes, although they are normally punishable under domestic law. For discussion on individual criminal responsibility for violations of IHL see Chapter 3.

## International Humanitarian Law and International Criminal Law



<sup>134</sup>Art 31(1)(a) of the Rome Statute.

<sup>135</sup>Art 31(1)(b) of the Rome Statute. Voluntary intoxication is only a defence when the accused did not know that they were likely to commit the alleged crime.

<sup>136</sup>Art 31(1)(c) of the Rome Statute.

<sup>137</sup>Art 31(1)(d) of the Rome Statute.

<sup>138</sup>Art 66 of the Rome Statute.

<sup>139</sup>Art 8 of the Rome Statute setting out war crimes draws its entire content from IHL. See for example, Art 8(2)(c) which specifically refers to Common Art 3 of the Geneva Conventions.

## 1.5 The International Red Cross and Red Crescent Movement

The International Red Cross and Red Crescent Movement (the Movement) is the world's largest independent humanitarian network. The components of the Movement include National Red Cross and National Red Crescent Societies, the International Committee of the Red Cross (ICRC) and the International Federation of Red Cross and Red Crescent Societies (the Federation). Each of the components has somewhat different mandates and activities, although all work towards the same principles.<sup>140</sup> The Movement has its origins in, and is linked with, the development of IHL.

The ICRC is the founding organisation of the Movement. Headquartered in Geneva and with offices in many countries, its mission is to protect the lives and dignity of victims of armed conflicts and of other volatile situations, and to provide them with assistance. The ICRC also works to promote IHL and to encourage its development.

The International Federation of Red Cross and Red Crescent Societies is a membership body for the National Societies, and represents them at the international level. It coordinates international relief provided by National Societies for victims of natural disasters, and for refugees and displaced persons outside conflict zones.

Most countries around the world have a National Red Cross or National Red Crescent Society (such as the British Red Cross).<sup>141</sup> All National Societies have a responsibility to assist vulnerable people within their territories, are formally recognised as auxiliaries to their respective Governments in the humanitarian field, and have a special role in supporting the promotion of IHL.<sup>142</sup> They also have a responsibility to work in conjunction with the other organisations of the Movement to protect and support those in crisis worldwide.<sup>143</sup> Like the ICRC, the National Society of the country in which a media professional is based may be well placed to provide advice or training on IHL matters.

As part of their roles, the ICRC and National Societies provide assistance to victims of armed conflict. Some of the most important activities of the ICRC in armed conflict include:<sup>144</sup>

- > **Visiting detainees** to ensure that they are treated with dignity and humanity
- > **Protecting civilians** from armed violence (for example, by making confidential representations to the authorities)
- > **Reuniting families** separated by conflict and disasters (for example, by tracing people or clarifying the fate of missing persons), and
- > Giving people affected by conflict **access to basic medical care.**

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<sup>140</sup>The 'Fundamental Principles' of the Movement include Humanity, Impartiality, Neutrality, Independence, Voluntary Service, Unity and Universality.

<sup>141</sup>The Magen David Adom in Israel is also a recognised National Society.

<sup>142</sup>The auxiliary status and role of National Red Cross and Red Crescent Societies entails a special relationship and dialogue between a Society and its Government. A State may request the National Society to supplement its humanitarian services and the Society must seriously consider such requests (while continuing to adhere to the Fundamental Principles). States and National Societies also work together on areas of humanitarian concern (including in relation to IHL). This special status and role means that National Red Cross and Red Crescent Societies, while autonomous, are different from non-governmental organisations (NGOs).

<sup>143</sup>Text extracted from BRCS website: <http://www.redcross.org.uk/About-us/Who-we-are/The-international-Movement/The-Movement>.

<sup>144</sup>For a full list see <http://www.icrc.org/eng/what-we-do/index.jsp>.

The ICRC operates a 24-hour assistance hotline for media professionals reporting from armed conflict and other areas of violence.

**ICRC HOTLINE NUMBER: +41 79 217 32 85 (24 hours)**  
**ICRC HOTLINE EMAIL: [press@icrc.org](mailto:press@icrc.org)**

**Assistance can also be obtained by getting in touch with a local ICRC delegation/office or through a National Red Cross or Red Crescent Society.**

This hotline enables the ICRC to act rapidly to provide information and assistance, whenever possible, when media professionals are arrested, captured, detained, reported missing, wounded, or killed.<sup>145</sup> **The hotline can be contacted by a media professional, their editor/supervisor, their family, or a national or international press association.** Any assistance provided by the hotline is confidential. It is expected that those benefiting from assistance will also treat any information given to them confidentially.

The ICRC **may be able to provide the following assistance**, specifically to media professionals, in armed conflict where they have staff on the ground or where a National Society is able to assist:<sup>146</sup>

- > Seeking confirmation of a reported arrest of a media professional
- > Obtaining access to media professionals in detention (accompanied by a doctor if necessary) and assessing the conditions in which they are being held
- > Working with detaining authorities to improve detention conditions
- > Providing humanitarian assistance to detained media professionals where needed
- > Passing on information about a detained media professional to their family, employers or another professional association
- > Assisting the family of a detained media professional to make contact with them
- > Evacuating wounded professionals from conflict zones
- > Repatriating media professionals released from detention (where no other service is available), and
- > Where necessary, assisting in the recovery or transport of deceased media professionals.

The neutrality of the ICRC and the humanitarian nature of its work means that it is **not able to provide the following services or assistance** to media professionals:

- > Life or other insurance
- > Representation or advice in legal proceedings
- > Advocacy in relation to freedom of expression issues or participation in press campaigns
- > Payment of ransom for hostages
- > Demanding the release of a detained media professional, and
- > Public denunciations of particular attacks against media professionals.

<sup>145</sup>See ICRC *Hotline Assistance for Journalists on Dangerous Assignments*, 2001, (ICRC Hotline Information) available at <http://www.icrc.org/eng/resources/documents/publication/p0394.htm>. See also ICRC Interview with Dorothea Krimitsas, *When journalists' safety is at stake, the ICRC hotline can help*, 2 May 2012, available at <http://www.icrc.org/eng/resources/documents/interview/2012/protection-journalists-interview-2012-05-02.htm>.

<sup>146</sup>See ICRC Hotline Information (n 146).

The relevant National Red Cross or Red Crescent Society may also be able to offer media professionals the following services in an armed conflict, subject to its activities and capacity:

- > Assisting with family contact and tracing enquiries, in co-operation with the ICRC and other Red Cross and Red Crescent organisations
- > Providing humanitarian assistance and first aid.

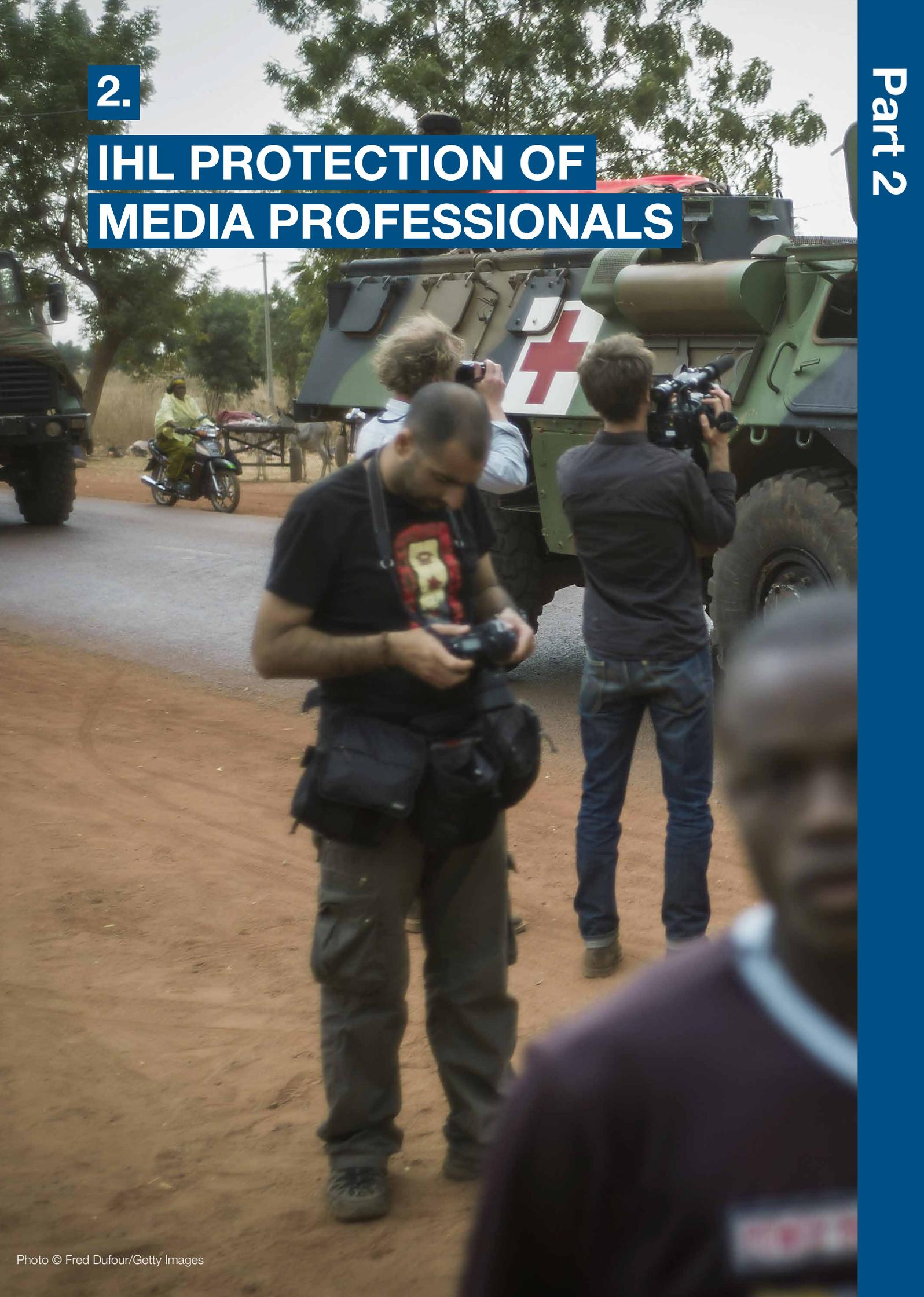
More information about the ICRC Hotline and associated services can be found on the ICRC website <http://www.icrc.org/eng/resources/documents/publication/p0394.htm>.

A directory of National Red Cross and Red Crescent Societies is located at: <http://ifrc.org/en/what-we-do/where-we-work/>. More information about their particular services may normally be found on their respective websites (accessible from the directory pages).



2.

# IHL PROTECTION OF MEDIA PROFESSIONALS



# Chapter 2:

## IHL Protection of Media Professionals

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## Introduction to Chapter 2

Chapter 2 sets out the main rules of IHL that protect media professionals and their work in armed conflict, and those that may permit interference with that work.

Media professionals may face the danger of deliberate attack in armed conflict because of the work that they do. This Chapter will consider the IHL rules regulating direct and deliberate attacks against media professions, including:

- > The prohibition on attacks against all civilians (the principle of distinction)
- > The strict prohibition on the use of sexual violence, and
- > Special protection afforded to particular groups such as the wounded and sick, which can also apply to media professionals, where relevant.

Similarly, the frequent proximity of media professionals to armed forces and military objects in armed conflict can place them at risk of injury or death as the incidental result of a lawful attack against a military target. This Chapter considers the IHL rules regulating such attacks on military objectives and the prohibition of attacks that are excessive (disproportionate) or indiscriminate.

Media professionals may be lawfully attacked by parties to a conflict if they take a direct part in hostilities. This Chapter explores the application of the rules relating to 'direct participation in hostilities' to common professional activities of the media, and identifies where particular conduct may cross over into direct participation.

In situations of armed conflict media professionals may also be at risk of being taken hostage or even subject to torture and other physical abuse. Hostage taking is expressly prohibited at all times by IHL. However, parties are permitted to intern or detain media professionals on security grounds, subject to particular procedural safeguards. IHL regulates when media professionals may be lawfully detained, although the rules relating to detention are different in international and non-international armed conflicts.

Finally, this Chapter sets out the relevant rules of international criminal law relating to:

- > the prohibition on attacks against media professionals, and
- > the procedural rules that protect media professionals from having to give evidence before international courts and tribunals.

## 2.1 Protection of Media Professionals from Direct and Deliberate Attack

### SUMMARY: Protection from Direct and Deliberate Attack

**It is prohibited to murder a media professional in armed conflict.** Murder refers to the deliberate unlawful killing of a person, including the killing of a media professional outside the rules of IHL.

IHL protects media professionals, as civilians, from deliberate and direct attack through **the principle of distinction**. The principle of distinction requires parties to a conflict to **distinguish between:**

- > **civilians;** and
- > **combatants.**

**Parties are prohibited from deliberately attacking civilians, including media professionals.**<sup>147</sup> Media professionals are protected from direct and deliberate attack as long as they do not take a 'direct part in hostilities'. This concept is discussed in detail, below.

The use of **sexual violence** is strictly prohibited by IHL at all times and must never be used against media professionals.

Parties to a conflict are also prohibited from undertaking attacks **solely designed to spread terror among the civilian population**. This prohibition includes attacking media professionals for the sole purpose of intimidating them into silence.

Some groups benefit from special protection under IHL. Women, including **female media professionals**, are subject to special protection and respect. **Those, including media professionals, who fall ill or are wounded during an armed conflict** are also entitled to **special protection and respect**, including the right to receive medical treatment and assistance, without discrimination, by any party to a conflict.

This section will set out the rules of IHL that protect media professionals from deliberate and direct attack. Media professionals are protected as civilians by the principle of distinction. However, in an armed conflict, the work of media professionals often causes them to behave differently from ordinary civilians. For example, they will head towards, rather than away from, areas of fighting; they will actively seek out participants in the conflict to interview them or follow a story; they also bear witness to the events of war, some of which may be violations of IHL, and bring these events to the attention of the public. It is the important work of media professionals that makes them vulnerable to direct and deliberate attacks against them. They can be the victims of violence intended to silence and restrict their reporting from armed conflict.

<sup>147</sup> This rule applies to individual civilians and civilian objects, as well as the 'civilian population' more generally. Arts 48 and 51 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (Additional Protocol I); Art 13(2) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609 (Additional Protocol II). This has also been identified by the International Committee of the Red Cross (ICRC) as a rule of customary law; see ICRC Study on customary international humanitarian law (ICRC CIHL Study) Rules 1 and 7, available at: <https://www.icrc.org/customary-ihl/eng/docs/home>

**IHL does not permit parties to a conflict to attack a media professional simply for carrying out their profession in armed conflict.** Unless a media professional is directly participating in hostilities, they are protected from direct and deliberate attack by the prohibition against murder and the principle of distinction.

### 2.1.1 The Prohibition of Murder in Armed Conflict

It is prohibited to murder civilians, including media professionals, in armed conflict.<sup>148</sup> ‘Murder’ refers to the deliberate unlawful killing of a person and includes the killing of a media professional by a party to a conflict because, for example, the party disagrees with what the media professional has published or broadcast, or to prevent them from reporting on a particular issue. **The prohibition against murder applies at all times.**

Not all types of killing are unlawful in conflict. IHL generally permits parties to kill and injure those against whom they are fighting. Sometimes, IHL also permits parties to a conflict to take action that can result in the death or injury of civilians, including media professionals. The circumstances in which this is permitted are regulated by, among other rules, the principle of distinction.

### 2.1.2 The Principle of Distinction

As outlined in Chapter 1, the principle of distinction protects all civilians in armed conflict, including media professionals. This fundamental principle requires that parties to a conflict **must distinguish between:**

- > **civilians**, and
- > **combatants.**<sup>149</sup>

Parties are prohibited from deliberately attacking civilians and the civilian population. Parties are permitted to attack those fighting on behalf of their adversary. The principle of distinction applies across both international and non-international armed conflicts.<sup>150</sup> It is also part of customary international law.<sup>151</sup> **Media professionals are civilians and, therefore, are protected from direct and deliberate attack by the principle of distinction.**

<sup>148</sup>Art 75 of Additional Protocol I and Art 4 of Additional Protocol II; Common Art 3 (1)(a) of the Geneva Conventions of 12 August 1949 (Geneva Conventions). This has also been identified by the ICRC as a rule of customary law; ICRC CIHL Study, Rules 89 and 90.

<sup>149</sup>As noted in Chapter 1, the term combatant is used in this Handbook for convenience to refer to those persons who are members of the armed forces of a State, as well as members of a non-State armed group fighting in a non-international armed conflict. Under IHL the term ‘combatant’ defines the status of members of States’ armed forces in international armed conflict, which comes with certain privileges. This term is not used in non-international armed conflict.

<sup>150</sup>Arts 48 and 51 of Additional Protocol I; Art 13(2) of Additional Protocol II.

<sup>151</sup>*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226, International Court of Justice (ICJ), 8 July 1996 (*Nuclear Weapons Case*), para 78; ICRC CIHL Study, Rules 1 and 7; Arts 8(2)(b)(i) and (e)(i) of the Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90 (Rome Statute); UN General Assembly Resolution 2675 (XXV), *Basic Principles for the Protection of Civilians in Armed Conflict*, 9 December 1970; *Prosecutor v Dusko Tadić* (IT-94-1) Decision on the defence motion for interlocutory appeal on jurisdiction, Appeals Chamber Judgment, International Criminal Tribunal for the Former Yugoslavia (ICTY), 2 October 1995, para 127; Report of the International Commission of Inquiry on Darfur to the Secretary General, S/2005/60, 1 February 2005, para 166; D. Kretzmer, ‘Civilian Immunity in War: Legal Aspects’ in I Primoratz (ed), *Civilian Immunity in War*, (Oxford University Press, 2007) p. 84; S Sivakumaran, *The Law of Non-International Armed Conflict*, (Oxford University Press, 2012) (Sivakumaran: *The Law of Non-International Armed Conflict*) p. 311; see also H-P Gasser, ‘The Protection of Journalists Engaged in Dangerous Professional Missions: Law Applicable in Periods of Armed Conflict’, (1983) *International Review of the Red Cross*, Volume 3, No. 232, available at <https://www.icrc.org/eng/resources/documents/article/review/review-1983-p3.htm>.

**This protection is afforded to media professionals as long as they do not take any action that “adversely affects their status as civilians”.**<sup>152</sup> Like all civilians in armed conflict, this means that they are protected from attack unless and for such time as they take a ‘direct part in hostilities’.<sup>153</sup> **Deliberately targeting a media professional who is taking a direct part in hostilities is not a violation of IHL.** What constitutes direct participation in hostilities is discussed in detail, below.

### 2.1.3 Protection from direct and deliberate attacks

The IHL principle of distinction means it is forbidden to **directly and deliberately** attack a civilian, including a media professional.<sup>154</sup> An attack is an act of violence against a person.<sup>155</sup> The phrase ‘deliberate and direct’ distinguishes intentional attacks against media professionals from those which are accidental or incidental.

#### Rape and sexual violence

Rape and other forms of sexual violence are strictly prohibited by IHL in all circumstances.<sup>156</sup> This means that **media professionals are protected from the use of rape and sexual violence even if they are directly participating in hostilities.** Sexual violence is prohibited by numerous provisions of IHL that apply in both international<sup>157</sup> and non-international armed conflict.<sup>158</sup> Women and children benefit from special protection against sexual and indecent assault.<sup>159</sup> The use of sexual violence against men and boys in armed conflict is also strictly prohibited.<sup>160</sup>

The prohibition on sexual violence includes rape, indecent assault, forced prostitution, sexual slavery, forced pregnancy, and enforced sterilization.<sup>161</sup> It can, in conjunction with other factors in armed conflict, amount to an act of genocide or torture.<sup>162</sup>

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<sup>152</sup>Art 79(2) of Additional Protocol I.

<sup>153</sup>Art 51(3) of Additional Protocol I; Common Art 3 of the Geneva Conventions; Art 13(3) of Additional Protocol II. This concept also forms part of customary international law: ICRC CIHL Study, Rule 6.

<sup>154</sup>See Arts 48 and 51 of Additional Protocol I (applicable in international armed conflict) and Art 13(2) of Additional Protocol II (applicable in non-international armed conflict). This prohibition has also been identified as customary international law: ICRC CIHL Study, Rule 6.

<sup>155</sup>Art 49(1) of Additional Protocol I. ‘Attack’ under IHL has a different meaning to that used by the law that regulates the use of force between states (the *jus ad bellum*).

<sup>156</sup>This has also been identified by the ICRC as a rule of customary law; ICRC CIHL Study, Rule 93.

<sup>157</sup>Art 27(2) of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287 (Fourth Geneva Convention), Arts 75(2)(b), 76(1), 77(1) of Additional Protocol I.

<sup>158</sup>Common Art 3(1) of the Geneva Conventions; Art 4(2)(e) of Additional Protocol II.

<sup>159</sup>Children: Art 77 of Additional Protocol I; Women: Art 27 of the Fourth Geneva Convention and Art 76 of Additional Protocol I.

<sup>160</sup>See for example the Rome Statute prohibition on rape; Art 8(2)(b)(xxii) and Art 8(2)(e)(vi). C. Pilloud (ed), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, 1987 (Pilloud: Commentary on the Additional Protocols), para 3049.

<sup>161</sup>ICRC CIHL Study, Rule 93; Art 8(2)(b)(xxii) and (e)(vi) of the Rome Statute.

<sup>162</sup>See *The Prosecutor v Jean-Paul Akayesu* (ICTR-96-4-T), Trial Chamber Judgment, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998; *Prosecutor v Musema* (ICTR-96-13-A), Trial Chamber Judgment, ICTR, 27 January 2000 and *Prosecutor v Mucić et al.* (IT-96-21-T), Trial Chamber Judgment, ICTY, 16 November 1998 (*Čelebići Camp Case*).

## Attacks designed to spread terror among the civilian population

IHL specifically **prohibits attacks, and threats of attacks, solely intended to spread terror** among the civilian population.<sup>163</sup>

Attacks prohibited by this rule include those that are designed to intimidate or coerce the civilian population into acting in a particular way.<sup>164</sup> **This prohibition may make it a violation of IHL for a party to a conflict to attack or threaten to attack media professionals in order to, for example, intimidate them into silence, discourage them from assisting another media organisation, or as retribution for not cooperating with a particular group (including the government of a State).**

### 2.1.4 Special protection for particular groups

Some groups of civilians considered especially vulnerable during conflict also benefit from additional protection under IHL. Where media professionals fall into one of these groups, they also benefit from special protection.

#### The sick and wounded

IHL provides special protection to the sick and wounded.<sup>165</sup> This protection has been identified as forming part of customary international law and applies in both international and non-international armed conflict.<sup>166</sup> This includes protection of persons with disabilities in need of medical attention.<sup>167</sup> Thus, where media professionals are sick, wounded or in need of medical attention, whether or not this is the result of a disability, they benefit from this special protection.

**Parties to a conflict are obliged to respect and protect the sick, wounded, and infirm in all circumstances.** This means that parties are under both negative obligations not to attack the wounded and sick and also positive obligations to ensure their protection, to minimise the effect of hostilities on them,<sup>168</sup> and to treat them without discrimination.<sup>169</sup>

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<sup>163</sup>Art 51 of Additional Protocol I and Art 13(2) of Additional Protocol II. This has also been identified by the ICRC as a rule of customary law; ICRC CIHL Study, Rule 2. Although terrifying, attacks not intended to spread terror among the civilian population are not covered by this provision but governed by ordinary rules of IHL relating to targeting: Y. Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, (Cambridge University Press, 2004) (Dinstein: *The Conduct of Hostilities*), p. 116. As to threats of attack see Pilloud: *Commentary on the Additional Protocols* (n 14), para 1940.

<sup>164</sup>S. Oeter gives the example of Serb attacks on civilian objects during the conflict in the Federal Republic of Yugoslavia (FRY) designed to intimidate the local population into expelling ethnic minorities from the area: S. Oeter, 'Methods and Means of Combat' in D. Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd Edition, (Oxford University Press, 2009) (Fleck: *Handbook of IHL*), p. 194.

<sup>165</sup>See, for example, the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85 (Second Geneva Convention); Art 8 of Additional Protocol I; Art 7 of Additional Protocol II.

<sup>166</sup>ICRC CIHL Study, Rule 110. See also Art 7 of Additional Protocol II.

<sup>167</sup>Art 8 of Additional Protocol I; ICRC CIHL Study, Rule 138. It is not clear, however, the extent to which persons with disabilities not in need of medical attention benefit from special protection.

<sup>168</sup>Arts 16 and 17 of the Fourth Geneva Convention.

<sup>169</sup>Art 12(2) of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31 (First Geneva Convention); Art 12 (2) of the Second Geneva Convention, Art 10(2) of Additional Protocol I and Art 7 of Additional Protocol II. For further discussion regarding this protection see Fleck: *Handbook of IHL* (n 18), Chapter 6 in particular pp. 329-332.

## Women

Women, including female media professionals, benefit from special protection under IHL.<sup>170</sup>

**Acts such as rape, enforced prostitution, or any form of indecent assault are prohibited by IHL.**<sup>171</sup> Wilful violation of this protection which causes great suffering or serious injury to body or health is a grave breach of IHL.<sup>172</sup> As set out above, the use of sexual violence is prohibited regardless of the gender of the victim.

Pregnant women, nursing women, and mothers of young children benefit from particular protection.<sup>173</sup> They are to be afforded respect and preferential treatment in the following circumstances: evacuation;<sup>174</sup> when being transported;<sup>175</sup> in consignment and distribution of medical supplies, food, clothing and other humanitarian aid;<sup>176</sup> in detention and internment;<sup>177</sup> and during belligerent occupation.<sup>178</sup>

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<sup>170</sup>Note that the protection under IHL is for 'women', and not expressed in a gender neutral way except in relation to the principle of no adverse distinction, discussed above.

<sup>171</sup>Art 27(2) of the Fourth Geneva Convention; Art 76(1) of Additional Protocol I. This has also been identified by the ICRC as a rule of customary law, see ICRC CIHL Study, Rule 134.

<sup>172</sup>Art 147 of the Fourth Geneva Convention. Note, however, that this is not limited to the special protection of women.

<sup>173</sup>Art 16 of the Fourth Geneva Convention.

<sup>174</sup>Art 17 of the Fourth Geneva Convention.

<sup>175</sup>Arts 21 and 22 of the Fourth Geneva Convention.

<sup>176</sup>Art 23 of the Fourth Geneva Convention; Art 70 of Additional Protocol I.

<sup>177</sup>Arts 82, 85, 89, 91, 132 of the Fourth Geneva Convention; Art 76 of Additional Protocol I.

<sup>178</sup>Art 50 of the Fourth Geneva Convention.

## 2.2 Protection of Media Professionals from Indirect Attack

### SUMMARY: Protection from Indirect Attack

Although IHL prohibits direct and deliberate attacks against civilians, including media professionals, not every civilian death or injury in armed conflict is prohibited. For example, IHL permits parties to a conflict to cause incidental damage to civilians (including death) where it results from a lawful attack against a military target (such as an army barracks or a munitions factory).

However, even attacks against lawful targets may violate IHL if they are:

- > **Disproportionate:** where the expected loss of civilian life or injury to civilians outweighs the direct military advantage anticipated from the attack.
- > **Indiscriminate:** where the nature of the attack or the weapons used do not distinguish between lawful and unlawful targets. For example, treating a number of separate military objectives located in an area that also includes civilians as a single target; or the use of certain weapons such as anti-personnel mines.
- > **Use weapons that cause superfluous injury or unnecessary suffering:** this means that a weapon does more damage than is 'necessary' to stop a person from fighting. This could include for example, chemical and biological weapons.

Media professionals benefit from a number of rules that require parties to a conflict to take precautions before and during an attack to minimise the accidental targeting of civilians, including media professionals. These precautions include:

- > the exercise of **constant care** to spare civilians during an attack
- > **verification** that the intended objects of the attack are not civilian
- > **cancellation or suspension** of an attack if it becomes clear that the attack is against a civilian or civilian object or is disproportionate, and
- > the issue of an **advance warning** of an attack, where circumstances permit.

Deliberate attacks against media professionals are not the only danger faced by them in armed conflict. As a result of their work, media professionals can often find themselves in close proximity to lawful targets, such as members of the armed forces, and risk getting caught in cross-fire between parties. **IHL permits the death and injury of civilians, including media professionals, where that death or injury is incidental to an otherwise lawful attack.** However, the presence of civilians close to or within lawful targets must be taken into account by parties to a conflict before they launch an attack. Two rules of IHL are relevant to this: the **principle of proportionality**, and the **prohibition on indiscriminate attacks**.

## 2.2.1 Protection from disproportionate attacks

IHL prohibits attacks, even against otherwise lawful targets (like army barracks or a munitions factory), **where the expected loss of civilian life or injury to civilians from such attacks outweighs the direct and concrete military advantage anticipated from the attack.**<sup>179</sup> This is called the principle of proportionality and it forms part of customary international law.<sup>180</sup> Attacks where the *expected* loss of civilian life is greater than the military advantage of an attack are disproportionate and, therefore, illegal.<sup>181</sup> **If it becomes clear during the course of an attack that it can no longer be considered proportionate, the attack must be stopped or postponed.**<sup>182</sup>

The presence of civilians and civilian objects, including media professionals and media installations, close to, or within, a lawful target, must therefore be taken into consideration by a party before an attack can be launched. However, **the principle of proportionality does not mean that the presence of any media professional close to a target makes an attack illegal.**

The application of the principle of proportionality has no exact formula and it can be illegitimately exploited by parties to a conflict. This occurs when parties place military targets (such as snipers or weapons) in civilian areas, such as on the roof of a hotel where media professionals are staying, in the hope that the opposing side will not attack the target because doing so would result in a disproportionate number of civilian casualties. **This practice is called using ‘human shields’ and it is strictly prohibited by IHL.**<sup>183</sup> While such practices must be taken into account by those planning an attack, they do not necessarily render a planned attack unlawful.

## 2.2.2 Protection from particular means and methods of warfare that are indiscriminate or cause superfluous injury or unnecessary suffering

**IHL always prohibits attacks that are indiscriminate.**<sup>184</sup> This rule applies in both international and non-international armed conflicts. An indiscriminate attack is one that does not distinguish between lawful and unlawful targets. An example of this is the use of particular methods of warfare, such as ‘carpet bombing’, which are imprecise and cannot be directed only against lawful targets. It is also prohibited for parties to fire blindly without an idea of the nature of the intended target.<sup>185</sup> Similarly, IHL also restricts the means of warfare that parties may use. **Parties should not use weapons that do not distinguish between civilians and military targets.**<sup>186</sup> An example of this is anti-personnel mines, which can be used indiscriminately and have a particularly negative impact on the civilian population.

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<sup>179</sup>Including Arts 51(5)(b) and 57 of Additional Protocol I.

<sup>180</sup>Art 51(5)(b) and Art 57(2)(a)(iii) of Additional Protocol I. See Dinstein: *The Conduct of Hostilities* (n 17), p. 120. See also ICRC CIHL Study, Rule 14.

<sup>181</sup>This assessment is based on the facts reasonably expected to be available at the time of the attack and not based on information that comes to light afterwards.

<sup>182</sup>Art 57 (2) of Additional Protocol I.

<sup>183</sup>Art 28 of the Fourth Geneva Convention; Art 51(7) of Additional Protocol I. This has also been identified by the ICRC as a rule of customary law; ICRC CIHL Study, Rule 97.

<sup>184</sup>Art 51 of Additional Protocol I. This has also been identified by the ICRC as a rule of customary law; ICRC CIHL Study, Rule 11.

<sup>185</sup>See further examples in Dinstein: *The Conduct of Hostilities* (n 17), p. 118.

<sup>186</sup>*Nuclear Weapons Case*, paras 78-79; ICRC CIHL Study, Rule 71.

**Parties to a conflict must also never use weapons that cause superfluous injury or unnecessary suffering.**<sup>187</sup> This general principle has, in part, led to some weapons being prohibited outright because they cause more damage than is ‘necessary’ to put a person out of combat.<sup>188</sup> Examples of prohibited weapons include biological weapons<sup>189</sup> and chemical weapons.<sup>190</sup>

### 2.2.3 Precautions that must be taken during an attack

Parties can make mistakes as to the nature of a target of an attack. Sometimes, such mistakes can result in the unintended death of civilians, including media professionals. **Media professionals can be particularly vulnerable to mistaken attacks:** professional equipment such as cameras and other types of broadcast technology might, for example, be mistaken for weapons. Similarly, proximity to lawful targets, such as soldiers and military installations, may result in the mistaken assumption that a media professional is involved in hostilities. Occasionally, parties to a conflict may attempt to disguise an unlawful and deliberate attack against a media professional as incidental (or indirect) injury. This can happen when those attacking do not want to appear as if they are deliberately targeting the media.

Some rules of IHL are designed to minimise mistaken attacks and also the opportunities for disguised unlawful attacks. In particular, **IHL places obligations on parties launching an attack to verify the lawful nature of the target and to take steps to minimise civilian casualties.**

Parties must exercise **constant care** to spare civilians during an attack<sup>191</sup> and they are obliged to do everything feasible to verify that the intended objects of the attack are not civilian.<sup>192</sup> An attack must be **cancelled or suspended** if it becomes clear that the attack is indiscriminate or disproportionate.<sup>193</sup> **Advance warning** of attacks that may affect the civilian population must be issued, where circumstances permit.<sup>194</sup>

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<sup>187</sup>Nuclear Weapons Case, paras 78-79, Art 35 of Additional Protocol I; ICRC CIHL Study, Rule 70.

<sup>188</sup>F. Kalshoven and L. Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, 4th Edition, (Cambridge University Press, 2011), p. 36.

<sup>189</sup>ICRC CIHL Study, Rule 73; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 10 April 1972.

<sup>190</sup>ICRC CIHL Study, Rule 74; Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction, 13 January 1993.

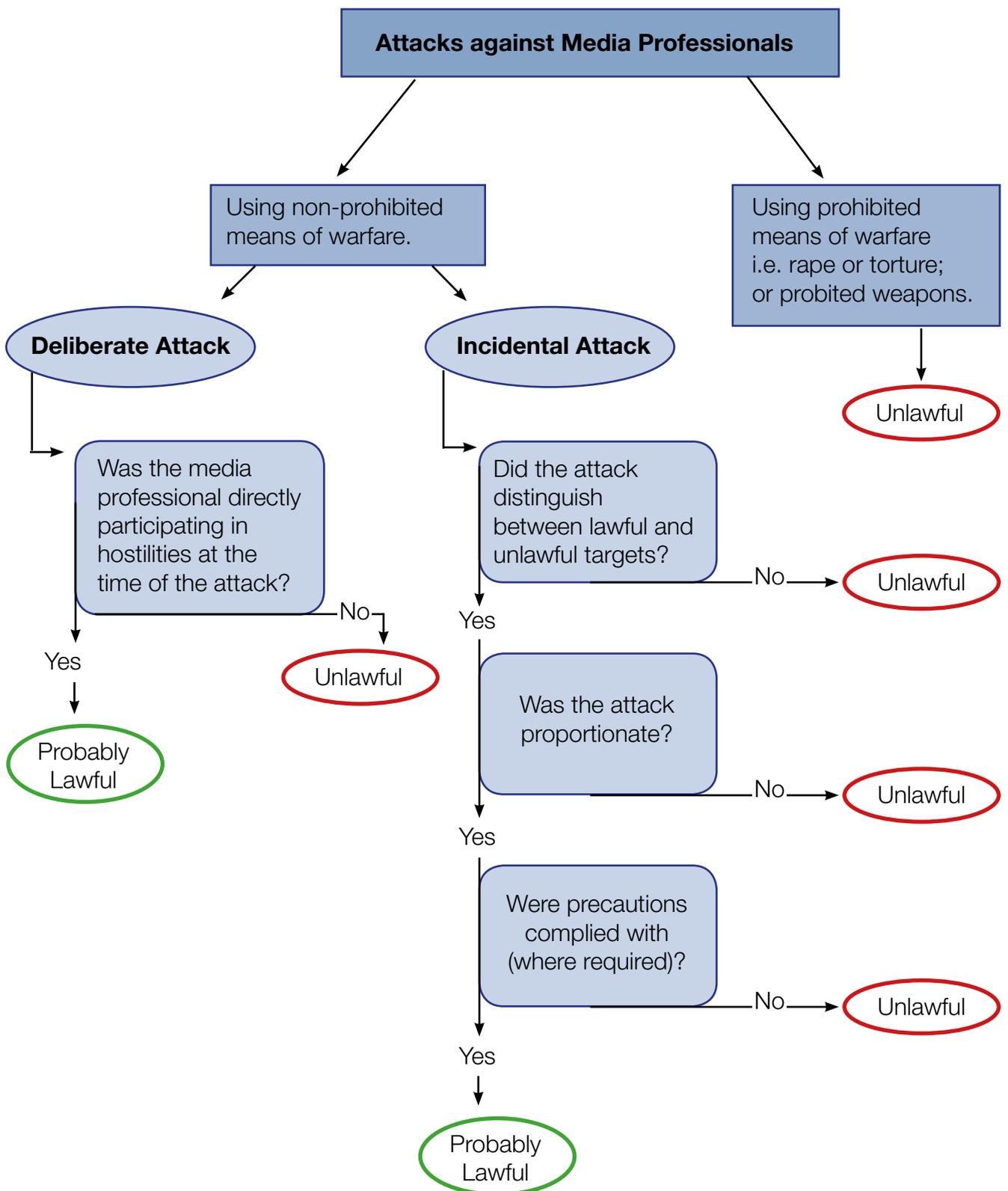
<sup>191</sup>Art 57(1) Additional Protocol I. This has also been identified by the ICRC as a rule of customary law; ICRC CIHL Study, Rule 19.

<sup>192</sup>Art 57(2)(a)(i) of Additional Protocol I. This has also been identified by the ICRC as a rule of customary law; ICRC CIHL Study, Rule 16.

<sup>193</sup>Art 57(2)(b) of Additional Protocol I. This has also been identified by the ICRC as a rule of customary law; ICRC CIHL Study, Rule 19.

<sup>194</sup>Art 57(2)(c) of Additional Protocol I. This has also been identified by the ICRC as a rule of customary law; ICRC CIHL Study, Rule 20.

## Summary of the Lawfulness of Attacks against Media Professionals under IHL



## 2.3 Common Professional Activities of the Media and Direct Participation in Hostilities

### SUMMARY: Direct Participation in Hostilities

Media professionals, as civilians, are protected from direct and deliberate attack **unless, and for the period that, they take a direct part in hostilities.**

There is no clear definition of 'direct participation in hostilities'. Whether the conduct of a civilian, including a media professional, amounts to direct participation in hostilities is normally to be assessed on a factual, case-by-case basis. It will generally include the following three elements:

**Threshold of Harm:** the conduct is likely to cause military harm or death and serious injury.

+

**Direct Causation:** there is a direct causal link between the conduct and harm.

+

**Belligerent Nexus:** the conduct is so closely related to hostilities that it forms an integral part of them.

**The ordinary professional work of media professionals will not generally amount to direct participation in hostilities.** IHL prohibits the targeting of media professionals for undertaking their ordinary work in armed conflict.

The following activities connected to the work of media professionals **are unlikely to be a direct participation in hostilities:**

- > Using force in **self-defence** and carrying small weapons (such as a handgun) for self-defensive use.
- > **Reporting on and publishing news and information** from or about a conflict.
- > **Refusing to assist** a party to a conflict.
- > Participating in **war sustaining activities** including publication of **propaganda** (provided that it is not an incitement to violence).

The following activities **are likely to be a direct participation in hostilities** and may cause a media professional to lose their protection from attack **for the duration of each specific act:**

- > Acts of war including **taking up arms** or using violence against a party to a conflict.
- > Engaging in a broadcast or publication that specifically **incites violence against civilians or a party to a conflict** (as opposed to general propaganda in support of one side).
- > **Passing on tactical information** to a party to a conflict.
- > Engaging in **spying/espionage** on behalf of and against a party to a conflict.

Media professionals are protected from direct and deliberate attack “provided they take no action adversely affecting their status as civilians”.<sup>195</sup> This means that, like all civilians, **media professionals are protected “unless and for such time as they take a direct part in hostilities”**.<sup>196</sup> This rule of IHL forms a central part of the protection afforded by the principle of distinction.

Civilians (including media professionals) do not have a right to participate in hostilities,<sup>197</sup> unlike members of the armed forces of a State. **If media professionals do take part in hostilities they may be lawfully targeted. They may also be liable to arrest and prosecution under the relevant domestic criminal law for that participation.**<sup>198</sup>

### 2.3.1 The Meaning of ‘Direct Participation in Hostilities’

Sometimes the professional activities of the media in armed conflict can be similar to conduct that is a direct participation in hostilities. Therefore, it is important for media professionals to understand the rules relating to this issue.

There is no uniform understanding of what is meant by ‘direct participation in hostilities’. The Geneva Conventions and their Additional Protocols do not contain a definition of this term and it is not always easy to determine when an act might be direct participation.<sup>199</sup> However, it is clear that direct participation in hostilities includes “acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the adversary armed forces”.<sup>200</sup> This leaves no doubt that **media professionals who take up arms against an adversary; try to kill, injure, or capture an adversary; or try to damage adversary property are directly participating in hostilities and will lose their protection from direct and deliberate attack.**

Beyond these obvious ‘acts of war’ however, it is not always clear what conduct might amount to direct participation in hostilities. Some attempts have been made to define the elements of such conduct: for example, the ICRC has published its own Interpretive Guidance on the Notion of Direct Participation in Hostilities.<sup>201</sup> While the Guidance is not a legally binding document,<sup>202</sup> parts of it may be useful in determining when certain conduct might amount to direct participation in hostilities. For example, the ICRC suggests three cumulative conditions:

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<sup>196</sup>Art 79 of Additional Protocol I.

<sup>197</sup>Art 51(3) of Additional Protocol I; Art 13(3) of Additional Protocol II. Further, Common Art 3 of the Geneva Conventions states that all persons not taking an ‘active’ part in hostilities benefit from its protection in conflicts not of an international character. This rule forms part of customary international law; ICRC CIHL Study, Rule 6. See also consideration of this issue in *Prosecutor v Strugar* (IT-01-42-T), Trial Chamber Judgment, ICTY, 31 January 2005, paras 220-222; and *The Public Committee against Torture in Israel et al v The Government of Israel et al* (HCJ 769/02) (*Targeted Killings Case*), Supreme Court of Israel sitting as the High Court of Justice, Judgment, 11 December 2005, para 30.

<sup>198</sup>Except for the very rare case of participation in a *levée en masse*. This concept describes a spontaneous civilian uprising: Art 2 of the Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907 (Hague Regulations); Art 4A(6) of the Third Geneva Convention.

<sup>199</sup>Art 45 of Additional Protocol I. See also Pilloud: Commentary on the Additional Protocols (n 14), para 1944.

<sup>200</sup>Note that ‘direct’ and ‘active’ as used throughout the Geneva Conventions and their Additional Protocols are considered to have the same meaning: ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, ICRC, May 2009 (ICRC DPH Guidance), pp. 43-44. Available at: <http://www.icrc.org/eng/resources/documents/publication/p0990.htm>; *The Prosecutor v Jean-Paul Akayesu* (ICTR-96-4-T), Trial Chamber Judgment, ICTR, 2 September 1998, para 629.

<sup>201</sup>Pilloud: Commentary on the Additional Protocols (n 14), para 1944. This was confirmed by the ICTY in *Prosecutor v Pavle Strugar* (IT-01-42-A), Appeals Chamber Judgment, ICTY, 17 July 2008.

<sup>202</sup>See ICRC DPH Guidance (n 53).

<sup>203</sup>Additionally, not all parts of the ICRC DPH Guidance are universally accepted. See further: D. Akande, ‘Clearing the Fog of War?, The ICRC’S Interpretive Guidance on Direct Participation in Hostilities’, (2010) *International and Comparative Law Quarterly*, Vol. 59, Issue No. 1, 180; W. H. Boothby, ‘Direct Participation in Hostilities – A Discussion of the ICRC Interpretive Guidance’, (2010) *Journal of International Humanitarian Legal Studies*, Vol. 1, Issue 1, 143; M. Schmitt, ‘The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis’, (2010) *Harvard National Security Journal*, Vol. 1, 5; F. J. Hampson, ‘Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law’, (2011) *International Law Studies*, Vol. 87, 187.

1. **Threshold of harm:** this is the requirement that the actions of a media professional are likely to cause harm and that this harm reaches a certain threshold. Harm that reaches this threshold includes causing death or serious injury, destruction of an object, or adversely affecting the military capacity or operations of a party.<sup>203</sup>
2. **Direct Causation:** this means that there has to be a direct causal link between the conduct of a media professional and the harm that is likely to result from it. If military operations of a party are affected indirectly by the conduct then it is not ‘direct’ participation in hostilities.<sup>204</sup>
3. **Belligerent Nexus:** means that the conduct in question must be so closely related to hostilities that it forms an integral part of them. In other words, in order to meet this requirement for direct participation in hostilities the conduct of a media professional must be “specifically designed to inflict harm in support of a party to an armed conflict and to the detriment of another.”<sup>205</sup>

**Media professionals lose their protection from direct attack “for the duration of each specific act amounting to direct participation in hostilities”.**<sup>206</sup> This means that media professionals directly participating in hostilities lose their protection:

- > For the duration of the specific hostile act
- > While they are engaged in preparations for the specific hostile act, and
- > While they are being deployed to, or returning from, the location of the specific hostile act.<sup>207</sup>

At all other times, media professionals, as civilians, are protected from deliberate and direct attack.

## Self-defence

Sometimes media professionals use armed violence to protect themselves from illegal attacks, or threats of illegal attacks, during armed conflict. For example, they may carry and use a light weapon (such as a hand gun).

IHL does not expressly prohibit the use of weapons or other means by civilians for the purposes of self-defence or the direct defence of others.<sup>208</sup> **Where the use of weapons by civilians is in defence against an *unlawful* attack, such as: looting, rape, murder or attempted abduction,**<sup>209</sup> **it does not constitute a direct participation in hostilities.** This is because such an unlawful act is not part of the legitimate fighting that takes place in a conflict. Defence from an unlawful act is, therefore, not connected to the conflict and does not involve a person in the conflict – in other words, it does not meet the ‘**belligerent nexus**’ requirement of direct participation in hostilities. **The use of armed violence in self-defence, therefore, would not normally expose media professionals to lawful attack.**

<sup>203</sup>ICRC DPIH Guidance, p. 46.

<sup>204</sup>ICRC DPIH Guidance, p. 46.

<sup>205</sup>ICRC DPIH Guidance, p. 58.

<sup>206</sup>ICRC DPIH Guidance, p. 70.

<sup>207</sup>ICRC DPIH Guidance, pp. 65-67.

<sup>208</sup>ICRC DPIH Guidance, p. 61.

<sup>209</sup>See examples given by ICRC DPIH Guidance, p. 61.

However, there is a real risk that such conduct might be mistaken for a direct participation in hostilities by a party to the conflict **and may, therefore, increase the risk of attack**. Similarly, while the use of force in self-defence is not prohibited by IHL, it may be regulated by the local criminal laws of the area in which a media professional is working. For example, many national criminal laws allow persons to use reasonable force to defend their (or someone else's) life or property.<sup>210</sup> Further discussion of these rules is beyond the scope of this Handbook.

Even though the practice of carrying light arms is not prohibited by IHL, those media professionals accredited by and embedded with the UK armed forces are prohibited by the UK Ministry of Defence from carrying a weapon.<sup>211</sup>

### **2.3.2 Work of Media Professionals**

The general rule relating to direct participation in hostilities is widely accepted. However, it can be very difficult to apply in practice, particularly to the work of media professionals. The following sections will set out how the principle of direct participation in hostilities might apply to some common practices of the media. This discussion is a guide only and is not intended to be a substitute for specific legal advice in individual cases.

The following common activities of media professionals are not direct participation in hostilities:

- > Reporting and publishing news and information about a conflict
- > Refusing to assist a party to a conflict, and
- > Participating in war sustaining activities including publication of propaganda (that is not an incitement to violence).

However, some conduct that may seem similar to, or be mistaken for, the work of media professionals is likely to be considered direct participation in hostilities, including:

- > Engaging in a broadcast or publication that specifically incites violence against civilians or a party to a conflict (as opposed to general propaganda in support of one side)
- > Passing on tactical information to a party gathered while reporting on a conflict, and
- > Espionage/spying.

Each will be considered in turn.

#### **Reporting on a conflict**

**Ordinary reporting on a conflict does not constitute direct participation in hostilities and does not expose a media professional to lawful deliberate direct targeting.** The freedom of media professionals to look for information in an armed conflict and to report news back to the public is recognised by the UK Ministry of Defence in its *Green Book*.<sup>212</sup>

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<sup>210</sup>See, for example, the right to self-defence under UK common law: *Beckford v The Queen* [1988] 1 AC 130 and under UK statute: Section 3(1) of the Criminal Law Act 1967.

<sup>211</sup>Ministry of Defence, *Green Book*, Version 8, 13 January 2013 (MoD *Green Book*), p. 11.

<sup>212</sup>MoD *Green Book*, p. 4.

The work of the media from conflict zones often results in the publication of information and news about the conflict, including death tolls resulting from particular attacks, conditions of victims of war, and, potentially, information that can identify the location of particular parties to the conflict. It is possible that, in some circumstances, this published information might be helpful to parties' military operations and may provide military advantage to one side. If reporting on particular elements of a conflict is likely to result in harm of a military nature or have an impact on the military operations or capacity of a party then it may meet the **'threshold of harm'** requirement for direct participation in hostilities. However, most published reports from a conflict are not likely to cause any military harm.

In addition, according to the cumulative criteria set out above, **reporting on a conflict is unlikely to meet the requirements of 'direct causation' and 'belligerent nexus'**. Even if parties use the information published by a media professional to assist them in their military operations, the collection and reporting of this information is, at best, indirectly assisting a party and would not, therefore, meet the 'direct causation' requirement. Similarly, the ordinary professional activities of the media – designed to collect news and information about a conflict and communicate this to the public – are not usually designed to support one party to the detriment of another.<sup>213</sup> Merely reporting on a conflict is not sufficiently closely related to hostilities to fulfil the 'belligerent nexus' requirement for direct participation.

While ordinary reporting from a conflict by a media professional would not generally be regarded as direct participation in hostilities, **such information may, nevertheless, be subject to security restrictions**. The UK Ministry of Defence may require those media professionals that are accredited and embedded with them to subject their professional work for 'security checking' before publication or broadcast.<sup>214</sup> Submitting to such security checks does not constitute a direct participation in hostilities even though it may assist a party to an armed conflict. Allowing material to be censored by an armed force prior to publication is unlikely to meet any of the three criteria for direct participation in hostilities.

### **Refusal to assist a party to a conflict**

Media professionals in conflict zones are often well placed to assist parties to a conflict: they have access to information about the conflict through their own investigations or as witnesses to events; they may have contact with people that have sensitive tactical knowledge; and they may have access to resources, such as communication technology and transport, that might be helpful to parties to a conflict. Because of this, a party to a conflict may request the assistance of a media professional in a conflict zone – even requesting assistance that is directly related to military activity, such as passing on tactical information regarding, for example, the locations of targets for attack.<sup>215</sup> **Such activities may constitute direct participation in hostilities, as set out below.**

**Media professionals who refuse to provide assistance to, or collaborate with, a party to a conflict are not directly participating in hostilities and do not lose their civilian protection from attack.** Refusing to help a party to a conflict does not meet the required **'threshold of harm'** for direct participation – failing to positively assist a party does not create the same level of harm as taking action to affect them adversely.<sup>216</sup>

<sup>213</sup>When they are designed to assist in this way, see discussion on participation in the war effort through news reporting and the issue of propaganda, below.

<sup>214</sup>MoD Green Book, pp. 13-16.

<sup>215</sup>ICRC DPIH Guidance, p. 48.

<sup>216</sup>ICRC DPIH Guidance, p. 49.

Similarly, refusing to submit professional material to an armed force for security checking prior to publication or broadcast also does not constitute a direct participation in hostilities.<sup>217</sup> However, this may be subject to the rules relating to espionage and passing on tactical information to a party to a conflict, below. **Importantly, such a refusal may have other negative consequences under domestic law and in relation to obtaining subsequent accreditation with an armed force. These consequences are not discussed in this Handbook.**

**The provision or receipt of medical assistance, including first aid, to or by, a member of a party to a conflict is not direct participation in hostilities.**

### **General support of the war effort/propaganda**

Sometimes the media may publish material with the aim of garnering support for one party to the conflict to the detriment of another. This may include the publication of propaganda that boosts morale among the population of a State party, seeks to discredit the reasons for the conflict or a party's conduct, or attempts to generate popular support for a particular conflict or a particular party to a conflict.<sup>218</sup> General support of the war effort may also include not publishing particular facts or information about a conflict in order to maintain public support for a party's involvement. For example, the Ministry of Defence requires all media professionals accredited by them to agree not to "cover events from the opposing side at any stage without prior agreement".<sup>219</sup>

**Supporting the general war effort,<sup>220</sup> including through publication and dissemination of propaganda (or by not publishing particular information), is not, by itself, (without, for example, a specific call to violence) direct participation in hostilities and does not cause media professionals to lose their civilian protection from direct and deliberate attack.<sup>221</sup> Many war-sustaining activities, including those undertaken by the media (such as the public expression of support for a party to a conflict), may result in a level of harm that meets the 'threshold of harm' requirement, and often, the nature of these activities – specifically designed to cause harm in support of one party to a conflict to the detriment of another – may also satisfy the 'belligerent nexus' requirement. Crucially, however, war-sustaining activities are too indirect to amount to 'direct participation in hostilities' and fail to meet the 'direct causation' requirement.<sup>222</sup> Merely publishing information (or failing to publish information) that supports one side of a conflict against another does not expose media professionals to lawful attack.**

### **Incitement to violence**

A clear distinction exists between activities that support the general war effort that are designed to arouse sentiment in support of a conflict and those activities which are specifically intended to cause direct harm to civilians or a party to a conflict, and are likely to result in harm.

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<sup>217</sup>Such as those set out in the MoD Green Book, pp. 13-16.

<sup>218</sup>Although there is no internationally agreed definition of propaganda, it is generally accepted that these activities fit within its scope: See further: Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 39 ILM 1278, 13 June 2000, available at: <http://www.icty.org/x/file/Press/nato061300.pdf>, paras 47 and 76; M. N. Schmitt, 'Deconstructing Direct Participation In Hostilities: The Constitutive Elements', (2010) International Law and Politics, Vol. 42, 697, pp. 708-712.

<sup>219</sup>MoD Green Book, p. 12.

<sup>220</sup>This is defined as "all activities objectively contributing to the military defeat of an adversary" For examples of non-media related 'war sustaining activities' or activities supporting the 'general war effort' see ICRC DPIH Guidance, pp. 51-2.

<sup>221</sup>See discussion of this point in the ICRC DPIH Guidance, p.51; also Targeted Killings Case, para 35. However, propaganda for war may be contrary to many international human rights treaties, discussion of which is beyond the scope of this Handbook: see for example, Art 20(1) of the International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 (ICCPR).

<sup>222</sup>ICRC DPIH Guidance, pp.51-52.

For example, a broadcast or publication that takes place during an armed conflict specifically calling for attacks on a particular group involved in the conflict, and publicly transmitting information, including the location of members of that group, in order to facilitate an attack on them, is highly likely to constitute direct participation in hostilities.<sup>223</sup> **Engaging in this type of conduct – which incites violence in an armed conflict – may expose a media professional to lawful attack for the duration of the activity.**

In addition to constituting a direct participation in hostilities, such incitement to violence may result in international criminal responsibility for the media professionals engaged in such activities. This is discussed in further detail in Chapter 3.

### **Passing on tactical information to a party to a conflict**

It is noted above that media professionals in conflict zones are often well placed to provide assistance to parties to a conflict by gathering and passing on tactical information about one party to another. This conduct is likely to cause military harm and may also be regarded as closely connected to hostilities.<sup>224</sup>

In contrast to the mere reporting on a conflict, the deliberate passing on of specific tactical information, such as the location of military targets, enemy forces, or other operational information relevant to military operations, may be considered an “integral part of a concrete and co-ordinated tactical operation” that directly causes harm.<sup>225</sup>

**Media professionals who engage in the transmission or communication of tactical information about an adversary to a party to the conflict, where such information is an integral part of a military operation likely to cause harm, may be considered as directly participating in hostilities. This may expose those media professionals to lawful and deliberate attack by parties to a conflict.**

### **Espionage/spying**

The collection and transmission of information forming part of military operations is not only likely to constitute direct participation in hostilities,<sup>226</sup> it is also likely to expose a media professional to allegations of espionage or spying.

Espionage is defined in IHL as “gathering or attempting to gather information in territory controlled by an adverse party through an act undertaken on false pretences or deliberately in a clandestine manner” **on behalf of another party to the conflict.**<sup>227</sup> The definition of espionage clearly does not include the ordinary professional activities of the media. The media do not normally collect information on behalf of a party to a conflict or another State (whether in a clandestine or undercover manner or otherwise): they collect information with the intention of publishing or broadcasting news and events to the public.

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<sup>223</sup>This example is similar to conduct undertaken by several media professionals in Rwanda during the genocide in 1994. The ICTR found that such conduct amounted to incitement to genocide – an international crime – and did not discuss whether or not this also constituted direct participation in hostilities. However, it is likely that such conduct does also satisfy the ICRC DPIH Guidance criteria.

<sup>224</sup>See discussion in ICRC DPIH Guidance, p.55.

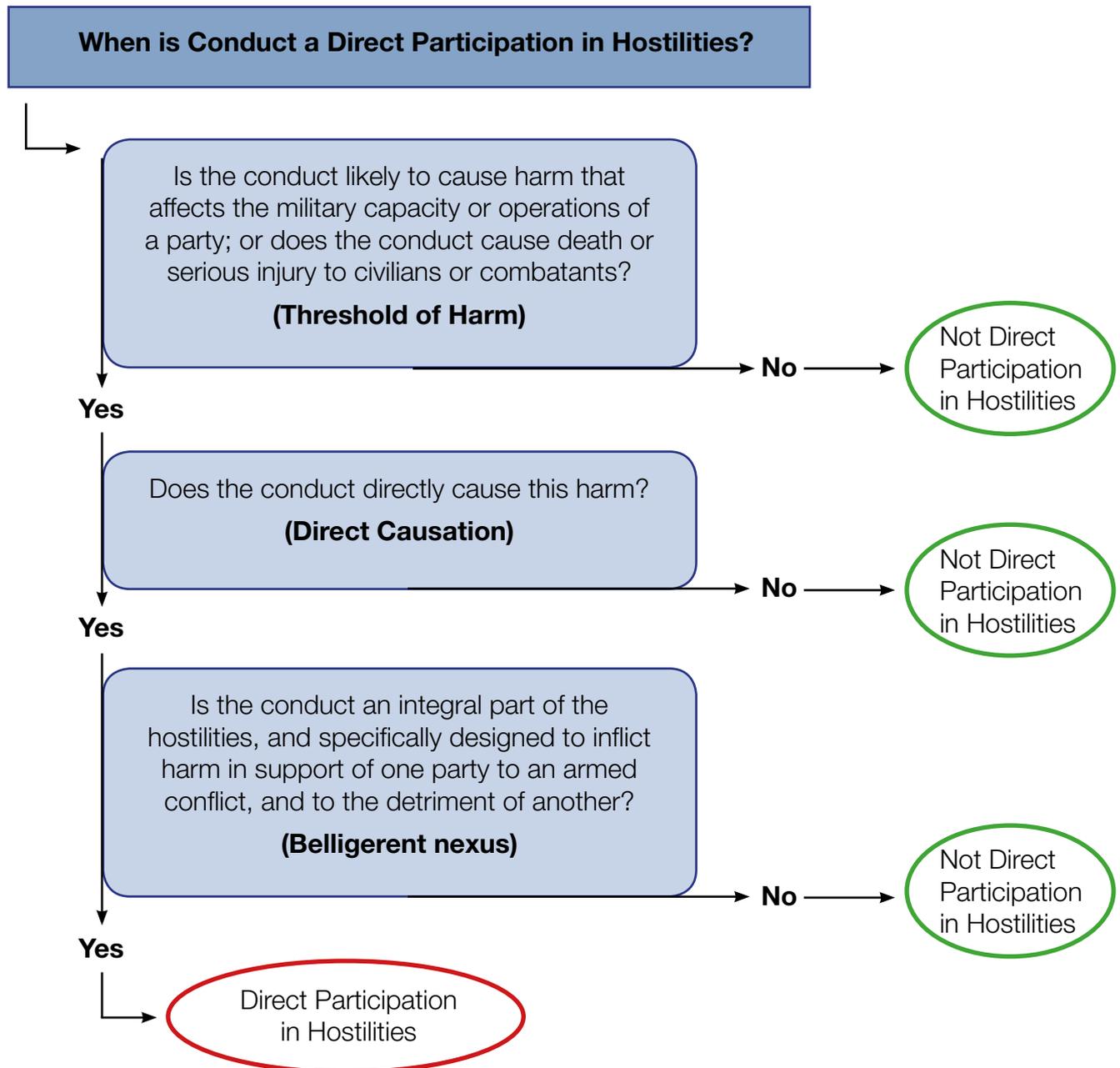
<sup>225</sup>ICRC DPIH Guidance, p.55.

<sup>226</sup>For the reasons set out above in relation to the transmission of information to a party to a conflict.

<sup>227</sup>See ICRC CIHL Study, Rule 107; Art 88 of the Instructions for the Government of Armies of the United States in the Field, 24 April 1863 (Lieber Code) available at <https://www.icrc.org/ihl/INTRO/110?OpenDocument>; Art 19 of the Project of an International Declaration concerning the Laws and Customs of War, 28 August 1874 (Brussels Declaration) available at <https://www.icrc.org/ihl/INTRO/135>; Art 29 of the Hague Regulations. This definition is now codified in Art 46 of Additional Protocol I.

**A media professional who does collect information on behalf of a party to a conflict risks being accused of engaging in espionage or spying. They may also lose their protection under IHL from deliberate attack while carrying out such activities.** A civilian, including a media professional, who is arrested or detained on suspicion of being a spy is nevertheless entitled to protection under IHL during detention. This is discussed below.

### **When is Conduct a Direct Participation in Hostilities?**



## 2.4 Protection of Media Professionals From Unlawful Detention and Internment

This section will examine the IHL rules relating to the capture, internment and detention of media professionals in armed conflict. As civilians, media professionals are protected from hostage taking and abuse of process in all circumstances. Under IHL parties to a conflict are entitled to intern or detain civilians, including media professionals, on security grounds and also on suspicion of espionage. Each of these grounds will be considered in this section. **The rules protecting civilians, including media professionals, from unlawful detention and internment on security grounds are substantially different in international and non-international armed conflict, with fewer rules applying in non-international armed conflict.** The situation is also different for war correspondents in international armed conflict, who are entitled to POW status if captured.<sup>228</sup>

It is important to note that this Handbook examines the rules of IHL that protect media professionals. However, rules of international human rights law<sup>229</sup> and domestic criminal or immigration laws may also regulate the detention of media professionals, including in armed conflict. These rules will vary depending on the State and circumstances in which media professionals find themselves. Discussion of these rules is beyond the scope of the Handbook. Specific advice as to relevant national criminal and immigration laws ought to be sought from a legal professional prior to deployment on a mission abroad.

Throughout this Handbook, the word **'internment'** is used specifically to describe civilian internment for security reasons in international armed conflict. The word **'detention'** is used for all other incidents of deprivation of liberty.

### 2.4.1 Fundamental Guarantees Protecting against Unlawful Detention

#### **SUMMARY: Fundamental Guarantees Protecting Against Unlawful Detention**

All media professionals in internment or detention (regardless of nationality) are protected by the following fundamental guarantees of IHL:

- > The prohibition on hostage taking in all circumstances; and
- > The protection from abuse of process.

The following prohibitions apply to protect all media professionals from unlawful detention or internment regardless of their nationality or whether they are detained in an international or non-international armed conflict.

<sup>228</sup>Arts 21 and 118 of the Third Geneva Convention.

<sup>229</sup>See for example Art 9 of the ICCPR; Art 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5. Also known as the European Convention on Human Rights (ECHR).

## Prohibition on hostage taking

Hostage taking and kidnapping are, regrettably, an increasingly common form of attack against media professionals. **IHL prohibits the taking of hostages in both international and non-international armed conflict.**<sup>230</sup> **This prohibition forms part of customary international law.**<sup>231</sup> International law defines hostage taking as seizing, detaining, or threatening with violence a person (hostage) in order to compel a third party to do or abstain from doing something, as a condition for the release of the hostage.<sup>232</sup> This would include, for example, demands for money or to prevent particular information being published or broadcast.

## Prohibition on abuse of process

Media professionals may be detained by a party to a conflict where they have been accused of committing a crime. The rules regulating this ground of detention are mostly found in domestic criminal law and international human rights law, both of which are beyond the scope of this Handbook. However, **IHL has some provisions that protect media professionals detained for criminal reasons from abuse of process, regardless of what crime they are accused of committing.** This protection from abuse of process applies in both international and non-international armed conflict and has been identified as customary international law.<sup>233</sup> In particular, media professionals may not be convicted or punished unless they have been found guilty of an offence as the result of a fair trial.<sup>234</sup> There are several elements to a ‘fair’ trial including (among others) that a court hearing a case against a media professional must be independent and impartial;<sup>235</sup> that a media professional is presumed to be innocent unless and until they are found guilty;<sup>236</sup> that a media professional is informed of the charges against them;<sup>237</sup> and has the necessary rights and means of making a defence.<sup>238</sup>

<sup>230</sup>Arts 34 and 147 of the Fourth Geneva Convention; Art 75(2)(c) of Additional Protocol II; Common Art 3 of the Geneva Conventions.

<sup>231</sup>See Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General, Pursuant to Security-Council Resolution 1564, 18 September 2004, para 166 (xx); Arts 8(a)(viii) and (c)(iii) of the Rome Statute; Art 4(c) of the Statute of the International Criminal Tribunal for Rwanda, 8 November 1994 (ICTR Statute); Art 3(c) of the Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council Resolution 1315 (2000) of 14 August 2000 (SCSL Statute); *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)*; *Merits*, I.C.J. Reports 1986, p. 14, ICJ, 27 June 1986 (*Nicaragua Case*), para 218; ICRC CIHL Study, Rule 96.

<sup>232</sup>Art 1 of the International Convention against the Taking of Hostages, 17 December 1979, UNGA A/RES/34/146.

<sup>233</sup>See Art 75 of Additional Protocol I; Common Art 3 of the Geneva Conventions; Arts 4 and 5 of Additional Protocol II; L. Doswald-Beck ‘*Fair Trial, Right to, International Protection*’, *Max Planck Encyclopaedia of Public International Law*, (Oxford University Press, online edition, 2008) (last updated April 2013); ICRC CIHL Study, Rule 100.

<sup>234</sup>Art 49 of the First Geneva Convention; Art 50 of the Second Geneva Convention; Arts 102-108 of the Third Geneva Convention; Arts 5 and 66-75 of the Fourth Geneva Convention; Art 75(4) of Additional Protocol I; Art 6(2) of Additional Protocol II. This has also been identified by the ICRC as a rule of customary law, see ICRC CIHL Study, Rule 100.

<sup>235</sup>Art 84 of the Third Geneva Convention; Art 75(4) of Additional Protocol I; Common Art 3 of the Geneva Conventions; Art 6(2) of Additional Protocol II.

<sup>236</sup>Art 75(4)(d) of Additional Protocol I; Art 6(2)(d) of Additional Protocol II.

<sup>237</sup>Arts 96 and 105 of the Third Geneva Convention; Arts 71 and 123 of the Fourth Geneva Convention;

<sup>238</sup>Art 75(4)(a) of Additional Protocol I; Art 6(2)(a) of Additional Protocol II.

## 2.4.2 Internment and Detention in International Armed Conflict

### SUMMARY: International Armed Conflict

#### Security Grounds

NOTE: The following rules only apply to **foreign media professionals** (those media professionals detained or interned by an adversary.) Media professionals detained by their own State, or who are from a State that is allied to the detaining State, are protected primarily by the rules of international human rights law and domestic laws, although fundamental humanitarian guarantees will still apply.

The rules that apply to **protect media professionals from unlawful internment or detention on security grounds** are different depending on whether or not a media professional is an **authorised war correspondent** under the Third Geneva Convention (see Chapter 1).

*Media Professionals (who are not ‘war correspondents’)*

- > Parties to an international armed conflict, and occupying powers, may intern a foreign media professional on security grounds **if they have a good reason to think that the media professional is a real threat to its present or future security.**
- > Foreign media professionals cannot be interned by an adversary’s forces unless it is **‘absolutely necessary’** to do so for security reasons. In occupied territory internment can only be imposed for **‘imperative reasons of security’.**
- > Interned media professionals have the right to receive prompt information about the reasons for their internment and they also have the right to immediate and periodic review of their internment by an impartial and independent body.
- > Interning authorities must inform the **State of nationality** of an interned media professional, **their family**, and the **ICRC** of the internment.
- > As soon as the reasons for the internment no longer exist, or the hostilities have ceased (whichever is the earlier), **a media professional must be released.**

*War Correspondents (entitled to POW protection)*

- > War correspondents (authorised by their authorities) are **entitled to POW status upon capture by an adversary.** However, there are fewer rules protecting POWs from detention than those protecting media professionals who are not war correspondents.
- > Under IHL parties to a conflict have the right to capture and detain war correspondents (as POWs). **They can be placed in camps and guarded against escape until the end of hostilities.**
- > At the end of hostilities, POWs must be **released and repatriated** (with consent) without delay.
- > The decision to detain a person entitled to POW status (including a war correspondent) is **not reviewable by an independent body.** However, if the POW status of a media professional is in doubt, they are assumed to be entitled to POW status until this is determined by a competent tribunal.
- > War correspondents, as POWs, are **only required to give the detaining power their name, rank, date of birth, and serial number** (as relevant).
- > War correspondents may mail a ‘capture card’ to their family from detention. Detaining authorities must also inform the **State of the war correspondent’s nationality** and the **ICRC** of the detention.

Media professionals may also be detained on suspicion of espionage.

### Internment on security grounds in international armed conflict

**Parties to an international armed conflict have the right to intern civilians, including media professionals, for safety and security reasons.**<sup>239</sup> Internment is the detention of civilians for non-criminal or non-penal grounds and it involves no criminal processes.<sup>240</sup>

IHL provides some procedural rules that safeguard media professionals in internment. These are designed to prevent ‘disappearance’ while in internment, as well as unnecessary or punitive internment during armed conflict. Unfortunately, these procedural rules are few in number and often lack substantial detail. The position of accredited war correspondents is discussed in the next section.

The rules of IHL relating to internment of civilians are often supplemented by more detailed provisions of international human rights law. Consideration of these human rights provisions is beyond the scope of this Handbook.

### *The significance of the nationality of an interned media professional*

IHL is an area of law that regulates the conduct between adversaries in an armed conflict. Generally, most of the rules of IHL establishing **the procedural rules and safeguards for internment of civilians apply only when a media professional is being interned by a State that is fighting against the State of their nationality i.e. an adversary.** The IHL rules relating to internment do not apply to a warring State’s own nationals, or those from allied States<sup>241</sup> (as they are not considered to be ‘the enemy’).<sup>242</sup>

The legality of the internment of media professionals **by their own State or an allied State is dealt with under international human rights law and the national laws of the detaining State**, which are not considered here.

Internment of media professionals by an adversary (foreign media professionals) is regulated by the following provisions of IHL (as well as rules of international human rights law and national laws, not considered here):

- > Media professionals that are **not accredited war correspondents** and are interned in the territory of a foreign State<sup>243</sup> or in occupied territory **are protected by the Fourth Geneva Convention and Additional Protocol I.**<sup>244</sup>
- > Media professionals that **are accredited war correspondents are POWs** upon capture by an adversary (in an international armed conflict) and benefit from protection under the **Third Geneva Convention.**

The fundamental humanitarian guarantees<sup>245</sup> against the use of murder, sexual violence, torture and abuse of process apply to protect all civilians in internment regardless of nationality or accreditation. These guarantees set out a minimum standard of treatment that must be ensured in all cases.

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<sup>239</sup>Arts 41 and 78 of the Fourth Geneva Convention.

<sup>240</sup>For the purposes of this Handbook, the term ‘internment’ includes the process of assigning a civilian to their residence for security reasons. See for example Arts 41, 42, and 43 of the Fourth Geneva Convention.

<sup>241</sup>A State that maintains normal diplomatic relations with the detaining State: J. S. Pictet (ed), *IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Commentary, Volume 4, ICRC, 1958 (Pictet: Geneva Convention IV Commentary), pp. 45-48.

<sup>242</sup>In addition, the relevant IHL rules do not apply to nationals of neutral States, except where they are interned in occupied territory.

<sup>243</sup>As in, those persons deemed ‘protected persons’ under Art 4 of the Fourth Geneva Convention. This includes UK nationals on the territory of a State involved in a conflict with the UK or in a State that no longer has diplomatic relations with the UK.

<sup>244</sup>Arts 41, 42 and 43 (international armed conflict) and Art 78 (occupation) of the Fourth Geneva Convention. See also Art 75 of Additional Protocol I.

<sup>245</sup>Including Art 75 of Additional Protocol I

This section applies to media professionals who are not war correspondents.

**Parties to an international armed conflict, and occupying powers, may intern a foreign media professional on security grounds<sup>246</sup> if they have a “good reason” to think that the media professional is a “real threat to its present or future security”<sup>247</sup>.** This must be more than just the fact that the media professional is a national of an adversary or of the age of military service.<sup>248</sup> Rather, it refers to more serious situations where a media professional has carried out “subversive activities” on the territory of a party to a conflict; or undertaken actions “which are of direct assistance to an enemy Power”.<sup>249</sup> This might include espionage or spying. However, internment is not intended to replace criminal proceedings.<sup>250</sup>

**Foreign media professionals (who are not war correspondents) must not be interned by an adversary’s forces unless it is “absolutely necessary” to do so for security reasons.<sup>251</sup> In occupied territory internment can only be imposed for “imperative reasons of security”<sup>252</sup>** This means that internment of professionals on security grounds is a **last resort** and only permitted by IHL where no other, less severe, measures are possible. For example, if the same security objectives can be achieved by requiring a foreign media professional to register with police periodically then internment may not be a lawful option.

The concepts of “State security” and “absolute necessity” are vague<sup>253</sup> and those provisions of the Geneva Conventions that permit internment of civilians leave the assessment of whether a person is a security risk to the State seeking to intern that person.<sup>254</sup> **This means that it is not clear whether or not aspects of the work of the media, including the publication of material about locations of potential targets that might provide an operational advantage to an adversary, might be assessed as a ‘security risk’ in a given context.** This is a separate consideration as to whether or not such activities are a direct participation in hostilities.

#### *Procedural safeguards for foreign media professionals interned by an adversary*

The decision to intern a media professional in international armed conflict is subject to some rules and procedural safeguards designed to ensure that internment does not turn into ‘disappearance’, and that it is not unnecessary or punitive. **An interned media professional has the right to receive prompt information about the reasons for his or her internment in a language that they understand.<sup>255</sup> Interned media professionals also have the right to request an immediate review of the reasons for their internment<sup>256</sup> by an independent and impartial body.<sup>257</sup>** Their internment shall also be reviewed at least twice a year.<sup>258</sup>

<sup>246</sup>The measure of internment forms part of the ‘control measures’ that Parties are allowed to implement on security grounds: Arts 27(4) and 41 of the Fourth Geneva Convention. These measures must comply with the other rules set out in the Geneva Conventions (cited in this section).

<sup>247</sup>Pictet: Geneva Convention IV Commentary (n 95), p. 258.

<sup>248</sup>Pictet: Geneva Convention IV Commentary (n 95), p. 258 (and note at the end of the section). *Čelebići Camp Case*, paras 574 and 577.

<sup>249</sup>Pictet: Geneva Convention IV Commentary (n 95), p. 257. See also ICRC CIHL Study, Rule 99.

<sup>250</sup>J. Pejić, ‘Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence’, (2005) *International Review of the Red Cross*, Vol. 87, No. 858, 375 (Pejić: Procedural Principles), p. 381.

<sup>251</sup>Arts 42 of the Fourth Geneva Convention. This has also been identified by the ICRC as a rule of customary law; ICRC CIHL Study, Rule 99.

<sup>252</sup>Art 78 of the Fourth Geneva Convention. However, for present purposes, the two terms are comparable, although arguably, a higher standard is required in occupied territories; See Pictet: Geneva Convention IV Commentary (n 95), p. 367.

<sup>253</sup>And incapable of more precise definition: see *Čelebići Camp Case*, para 328 and 574. See also *Expert Meeting on the Supervision of the Lawfulness of Detention During Armed Conflict*, organized by the University Centre for International Humanitarian Law, convened at the Graduate Institute of International Studies, Geneva, 24-25 July 2004 (Geneva Expert Meeting), Available at: [http://www.geneva-academy.ch/docs/expert-meetings/2004/4rapport\\_detention.pdf](http://www.geneva-academy.ch/docs/expert-meetings/2004/4rapport_detention.pdf), pp. 13-14.

<sup>254</sup>*Čelebići Camp Case*, para 574.

<sup>255</sup>Although this is likely to be expressed in broad terms: Art 75(3) of Additional Protocol I; see also Pilloud: Commentary on the Additional Protocols (n 14), para 3065. This has also been identified by the ICRC as a rule of customary law; ICRC CIHL Study, Rule 99.

<sup>256</sup>Art 43 and Art 78 (occupation) of the Fourth Geneva Convention. In the case of occupation this is referred to as an ‘appeal’.

<sup>257</sup>Art 43 of the Fourth Geneva Convention. In the case of occupation Art 78 specifies that this is to be reviewed in accordance with a regular procedure to be prescribed by the occupying power. See Pictet: Geneva Convention IV Commentary (n 95), p. 260; Pejić: Procedural Principles (n 104), pp. 386-387.

<sup>258</sup>Art 43 of the Fourth Geneva Convention. In cases of occupation the suggested review period is once every 6 months: Art 78 of the Fourth Geneva Convention. This has also been identified by the ICRC as a rule of customary law; ICRC CIHL Study, Rule 99.

Detaining parties must also provide an interned media professional's details<sup>259</sup> to their State of nationality,<sup>260</sup> which has the right to communicate with and, where relevant, visit the internee.<sup>261</sup> Similarly, the detaining power must notify the family of the internee<sup>262</sup> and the Central Tracing Agency at the ICRC of the internment.<sup>263</sup> The role of the ICRC, including visiting internees, is discussed below.

**Interned media professionals must be released as soon as the reason for their detention no longer exists or as soon as possible after the cessation of hostilities (whichever is the earlier).**<sup>264</sup> In addition, media professionals interned in the territory of their own State by an occupying power must not be transferred to the territory of that occupying power.<sup>265</sup>

#### *Legal basis for detention of war correspondents by an adversary*

Media professionals that are **accredited war correspondents under the Third Geneva Convention** (see discussion of this in Chapter 1) in international armed conflict are entitled to POW status upon capture by an adversary, even though they are not members of the armed forces.<sup>266</sup>

**There are significantly fewer procedural rules relating to the decision to detain POWs than there are ordinary civilians.** This is because the right of parties to do so is subject to very few qualifications. POWs are, of course, protected by many rules of IHL against inhumane treatment as well as by rules establishing minimum conditions of their detention. These are addressed in the next section.

**Under IHL, parties to a conflict have the right to capture and detain war correspondents (as POWs). They can be placed in camps and guarded against escape<sup>267</sup> until the end of hostilities.**<sup>268</sup> Unlike media professionals that are civilian internees, who must be released as soon as the reason for their detention no longer exists, war correspondents can be held as POWs for a much longer time – potentially until the conflict is over – thus preventing them from completing their professional tasks. **At the end of hostilities, POWs must be released and repatriated (with consent) without delay.**<sup>269</sup>

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<sup>259</sup>Including their name, place of birth and action taken in each case. Further details that must be provided are set out in Arts 106 and 138 of the Fourth Geneva Convention.

<sup>260</sup>If they consent to this information being passed on: Arts 43 and 136 of the Fourth Geneva Convention. This is done through the mechanisms of the Information Bureaux and the Central Tracing Agency: Arts 136-141 of the Fourth Geneva Convention.

<sup>261</sup>Art 143 of the Fourth Geneva Convention. See also Art 36 of the Vienna Convention on Consular Relations, 24 April 1963, 596 UNTS 261.

<sup>262</sup>Arts 106, 107, 137, and 138 of the Fourth Geneva Convention.

<sup>263</sup>Arts 43, 105, and 143 of the Fourth Geneva Convention.

<sup>264</sup>Arts 132 and 133 of the Fourth Geneva Convention; Art 75(3) of Additional Protocol I.

<sup>265</sup>Art 76 of the Fourth Geneva Convention. These have also been identified by the ICRC as rules of customary law; ICRC CIHL Study, Rule 128 (Release and Return) and Rule 130 (Transfer in Occupied Territory).

<sup>266</sup>Art 4A(4) of the Third Geneva Convention.

<sup>267</sup>Art 21 of the Third Geneva Convention.

<sup>268</sup>Art 118 of the Third Geneva Convention.

<sup>269</sup>Art 118 of the Third Geneva Convention.

Unlike civilian internment, capture and detention of POWs is not a measure of last resort. The purpose of detaining persons entitled to POW status is to prevent them from engaging in military operations.<sup>270</sup> It is a common and permitted means used during armed conflict to ensure enemy soldiers are no longer able to fight. For this reason, **those POWs (including war correspondents) that are seriously ill or seriously injured must be sent back to their own State (that is, repatriated), subject to their consent.**<sup>271</sup>

### *Procedural safeguards for war correspondents detained by an adversary*

The detention of a war correspondent is subject to fewer procedural safeguards than internment of civilians. The decision to detain a person entitled to POW status (including a war correspondent) is **not** reviewable by an independent body.<sup>272</sup> However, **where a media professional's status as a war correspondent is in doubt, for example because they have lost their identity card, it must be assumed that they are entitled to POW status until a competent tribunal has made a determination on this question (but not on the decision to detain).**<sup>273</sup>

**POWs (including war correspondents) are only required to give the detaining power their name, rank, date of birth, and serial number (where relevant).**<sup>274</sup> The detaining power must not threaten or disadvantage a person who refuses to give more information. Similarly, **any person who is held in POW detention (including war correspondents) must be informed in a language they understand of the reasons for their detention.**<sup>275</sup>

In addition, to ensure against disappearance, **war correspondents may mail a 'capture card' to their family and the Central Tracing Agency (at the ICRC) upon capture.**<sup>276</sup> The detaining State must also forward information about a POW to their State of nationality<sup>277</sup> and the ICRC.<sup>278</sup> The role of the ICRC, including visiting POWs, is discussed below.

## **Espionage**

**Parties may choose to intern a media professional suspected of spying on security grounds as a civilian or charge and try them for their involvement in such activities.** Media professionals tried on charges of spying in international armed conflict **are entitled to a fair trial**<sup>279</sup> and other judicial guarantees protecting them from abuse of process (set out at the start of this section), including the right to be presumed innocent until proven guilty. It is unlawful to summarily execute a person suspected of spying (i.e. to execute them without trial).

<sup>270</sup>M. Sassóli, *Internment*, Max Planck Encyclopedia of Public International Law, (Oxford University Press, online edition, 2007) (last updated April 2013), (Sassóli: Internment), para 4.

<sup>271</sup>Art 109 and Part IV generally of the Third Geneva Convention.

<sup>272</sup>Of course, there are substantial procedural safeguards for discipline and punishment of prisoners of war (POWs) while in detention and also procedural safeguards for criminal matters. See Chapter III of the Third Geneva Convention.

<sup>273</sup>Art 5 of the Third Geneva Convention; Art 45 of Additional Protocol I.

<sup>274</sup>Art 17 of the Third Geneva Convention.

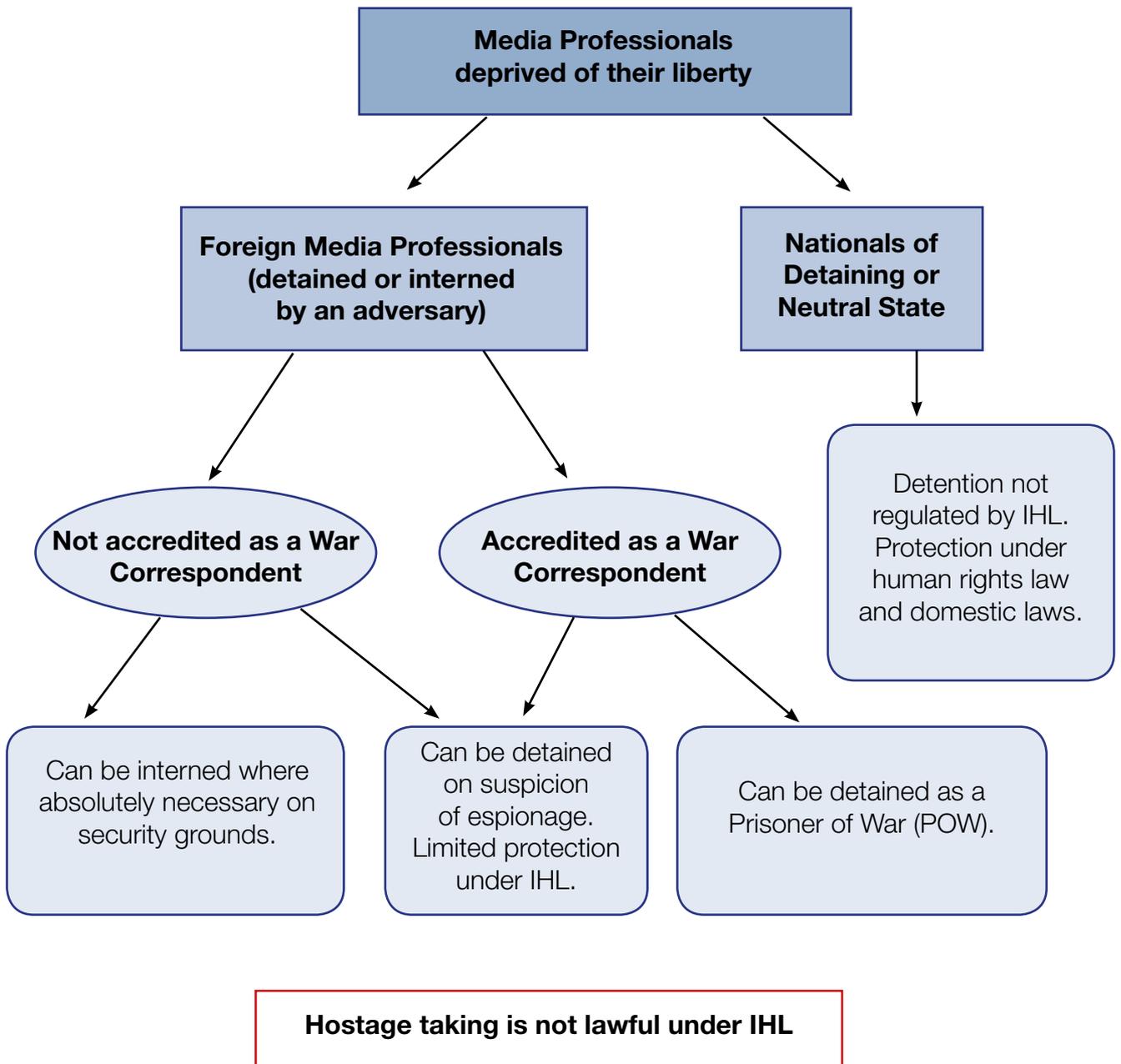
<sup>275</sup>Although this is likely to be expressed in broad terms: Art 75(3) of Additional Protocol I; see also Pilloud: Commentary on the Additional Protocols (n 14), para 3065. This has also been identified by the ICRC as a rule of customary law; ICRC CIHL Study, Rule 99.

<sup>276</sup>Arts 70 and 123 of the Third Geneva Convention.

<sup>277</sup>Art 69 of the Third Geneva Convention. This can be through the Information Bureaux established for this purpose and to gather and transmit information regarding POWs: Art 122 of the Third Geneva Convention.

<sup>278</sup>Arts 122 and 123 of the Third Geneva Convention. This has also been identified by the ICRC as a rule of customary law; ICRC CIHL Study, Rule 99.

<sup>279</sup>Art 30 of the Hague Regulations; Art 5 of the Fourth Geneva Convention. This has also been identified by the ICRC as a rule of customary law; ICRC CIHL Study, Rule 107. See also consideration of the requirement of fair trial in ICRC CIHL Study, Rule 100.



## 2.4.3 Detention in Non-International Armed Conflict

### SUMMARY: Non-International Armed Conflict

There are **significantly fewer IHL rules** protecting media professionals from unlawful detention in non-international armed conflict than in international armed conflict.

**NOTE:** The rules of IHL applicable in non-international armed conflict do not recognise ‘war correspondent’ or POW status. Therefore, all media professionals, regardless of whether they are authorised to accompany an armed force, are entitled to the same protection from detention.

- > It is not clear whether IHL gives parties to a non-international armed conflict **power to detain persons** (including media professionals) on **imperative security grounds** under IHL. Such detention is not, however, prohibited by IHL. Parties do have the power to detain media professionals pursuant to international human rights law and relevant national laws of States.
- > Detention outside those areas permitted by law is likely to be **hostage taking**, which is illegal under IHL.
- > Customary international law may also prohibit the **‘arbitrary detention’** of media professionals. This prohibits detention without a lawful ground or where legal processes have not been followed. It also prohibits indefinite detention and detention without review.
- > Detained media professionals should be **provided with general information about their detention** including the reasons for their detention and the likely duration.
- > Each decision to detain a media professional must be **based on their individual circumstances and risk** and not the result of a ‘blanket determination’ to detain all media professionals in an area.
- > There is **no explicit IHL obligation on detaining parties to inform** the family, the State of nationality or the ICRC of a media professional’s detention.

Media professionals may also be detained on suspicion of espionage.

### Detention on security grounds in non-international armed conflict

**There are significantly fewer rules of IHL that protect media professionals in detention in situations of non-international armed conflict.** Additionally, **the concepts of ‘war correspondent’ and POW are not recognised in non-international armed conflict.**

Therefore, any media professional that is captured in connection with a non-international armed conflict receives the same protection under IHL, regardless of whether they are accredited by an armed force.

There are some rules of IHL that apply to persons in detention in non-international armed conflict. These can be found in **Common Article 3 and Additional Protocol II**, which apply to non-international armed conflicts, and also rules of **customary international humanitarian law**. These rules apply to both State and non-State parties to non-international armed conflict.

Some of these rules have been clarified by expert discussions on the topic<sup>280</sup> and also the development of non-legally binding guidelines.<sup>281</sup> This additional material has been included in footnotes where relevant.

International human rights law and domestic laws are important sources of rules regulating the circumstances and conditions of detention in non-international armed conflict. Many human rights provisions address the grounds on which a person might be detained and are complementary to those rules of IHL that apply in non-international armed conflict. However, consideration of these rules is beyond the scope of this Handbook.

### *The legal basis for detention in non-international armed conflict*

There is much disagreement as to what, exactly, the law of non-international armed conflict says about detaining civilians for safety and security reasons.<sup>282</sup> **Detention of persons, including media professionals, on such grounds is not prohibited by IHL.** It is also not expressly permitted by the text of either Common Article 3 or Additional Protocol II. It is not clear whether IHL provides any legal basis on which to detain civilians, including media professionals, on imperative security grounds.

There is an argument that parties to a non-international armed conflict, including both States and non-State armed groups,<sup>283</sup> have an implied power under IHL (or inherent authorisation) to detain persons including media professionals.<sup>284</sup> It has been argued that this implied power authorises detention only on imperative security grounds.<sup>285</sup> However, the ‘implied power’ argument is not universally accepted.<sup>286</sup>

It is not clear under IHL where the limits to this purported power lie. However, IHL prohibits hostage taking in both international and non-international armed conflict,<sup>287</sup> which includes detention of a media professional for illegitimate reasons such as for financial gain or for intimidation or censorship purposes. **It is likely that any detention of a media professional in a non-international armed conflict for reasons other than criminal or security grounds is illegitimate and may amount to hostage taking.**<sup>288</sup>

<sup>280</sup>Of course, the outcomes of such discussions are not binding upon States: See for example: ‘Expert Meeting on Procedural Safeguards for Security Detention in Non-International Armed Conflict. Chatham House and ICRC, London 22-23 September 2008’ (2009) *International Review of the Red Cross*, Vol. 91, No. 876, (Chatham House and ICRC Expert Meeting), p. 859; and Geneva Expert Meeting (n 107), pp. 15-17.

<sup>281</sup>See for example, *The Copenhagen Process on the Handling of Detainees in International Military Operations, The Copenhagen Process: Principles and Guidelines*, concluded on 19 October 2012 (The Copenhagen Process), available at <http://um.dk/en/-/media/UM/English-site/Documents/Politics-and-diplomacy/Copenhagen%20Process%20Principles%20and%20Guidelines.pdf>

<sup>282</sup>Some experts argue that there is no IHL at all on this issue: Geneva Expert Meeting (n 107), pp. 15-17; Sassóli: Internment (n 124); see also *Mohammed v Ministry of Defence & Ors* [2014] EWHC 1369 (QB), (*Mohammed Case*). Some experts argue that there are applicable customary law rules: Chatham House and ICRC Expert Meeting (n 134); D. Casalin, ‘Taking prisoners: reviewing the international humanitarian law grounds for deprivation of liberty by armed opposition groups’, (2011) *International Review of the Red Cross*, Vol. 93, No. 883, 743 (Casalin: Taking prisoners). See also ICRC CIHL Study, Rule 99.

<sup>283</sup>See specific consideration of the power of non-State armed groups to intern in Chatham House and ICRC Expert Meeting (n 134), pp. 870-871. See also L. Zegveld, *The Accountability of Armed Opposition Groups in International Law*, (Cambridge University Press, 2002), p. 65; A. Clapham, *The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape and Issues Surrounding Engagement*, (Geneva Academy of International Humanitarian Law and Human Rights, 1 February 2010), pp. 15-16.

<sup>284</sup>See consideration of this issue by Pejić: Procedural Principles (n 104), pp. 375 and 377; T. Gill and D. Fleck, *The Handbook of the International Law of Military Operations*, (Oxford University Press, 2010), p.471; Chatham House and ICRC Expert Meeting (n 134), pp. 863-864; and see (with respect to ‘extraterritorial non-international armed conflicts’) ICRC *Internment in Armed Conflict Basic Rules and Challenges: Opinion Paper*, (ICRC, 25 November 2014) (ICRC Opinion Paper), p. 7, available at <https://www.icrc.org/en/document/internment-armed-conflict-basic-rules-and-challenges>.

<sup>285</sup>See ICRC Opinion Paper (n 138), p. 7 (with respect to ‘extraterritorial non-international armed conflicts’); and Chatham House and ICRC Expert Meeting (n 134), pp. 863-864 and 866-871 and ICRC CIHL Study, Rule 99.

<sup>286</sup>See for example *Mohammed Case*.

<sup>287</sup>Common Art 3 of the Geneva Conventions. This has also been identified by the ICRC as a rule of customary law, see ICRC CIHL Study, Rule 96. For example, detaining a person for intelligence reasons or as a bargaining chip in negotiations. Examples listed at Chatham House and ICRC Expert Meeting (n 134), p. 865.

<sup>288</sup>See discussion in Chatham House and ICRC Expert Meeting (n 134), p. 865.

Parties do have the power to detain media professionals pursuant to international human rights law and relevant national laws of States. Consideration of these laws is outside the scope of this Handbook.

### *Is there an additional prohibition on arbitrary detention?*

Although the rules of IHL do not expressly contain any provisions regarding the lawful grounds of detention of civilians in non-international armed conflict, there are arguments that customary international humanitarian law contains additional rules applicable in non-international armed conflict that prevent ‘arbitrary’ detention of civilians, including media professionals.<sup>289</sup> However, the existence of such rules has not been universally accepted.<sup>290</sup>

‘Arbitrary’ deprivation of liberty means detention in circumstances where there is no legal justification for it (legitimate reasons could include, for example, criminal activity or security concerns).<sup>291</sup> It can also include detention where correct procedures have not been followed (for example a fair trial or other legal requirements),<sup>292</sup> indefinite detention, and detention without a regular review process.<sup>293</sup>

### *Procedural safeguards for detained media professionals*

#### **The decision to detain a foreign media professional in non-international armed conflict is subject to some procedural safeguards, although fewer than in international armed conflict.**

The IHL rules applicable in non-international armed conflict do not expressly set out a review process for detention of media professionals.<sup>294</sup> However, some experts think that review of detention on security grounds in non-international armed conflict must be undertaken at least every six months.<sup>295</sup>

**A detained media professional should be provided with basic information about the grounds on which he or she is detained and the likely consequences, including the expected duration of the detention.**<sup>296</sup> The right to such basic information about detention forms part of the requirement to treat detainees humanely, which applies in both international and non-international armed conflict.<sup>297</sup> However, it is not expressly set out in IHL rules relevant to non-international armed conflict, as it is in those covering international armed conflict. In addition, it is not clear as to when a media professional might be entitled to receive such information and how detailed the information must be.<sup>298</sup>

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<sup>289</sup>As to this rule in IHL see Chatham House and ICRC Expert Meeting (n 134), pp. 863-864. See generally Casalin: Taking prisoners (n 136). See also ICRC CIHL Study, Rule 99.

<sup>290</sup>See *Mohammed Case*; Geneva Expert Meeting (n 107), pp. 15-17. Sassóli: Internment (n 124).

<sup>291</sup>IHL does not contain a definition of ‘arbitrary’ however, it is likely that it is similar to the international human rights law (IHRL) usage of the term: See Casalin: Taking prisoners (n 136); the practice set out in the ICRC CIHL Study by Rule 99 based in IHRL; and discussion incorporating IHRL norms applicable in non-international armed conflicts by Pejić: Procedural Principles (n 104), p. 375.

<sup>292</sup>See for example Art 9 of the ICCPR. See for example United Nations Working Group on Arbitrary Detention *Fact Sheet No 26, Annex IV: Revised methods of work*, Art 8(a), available at <http://www.ohchr.org/EN/PublicationsResources/Pages/FactSheets.aspx>.

<sup>293</sup>Pejić: Procedural Principles (n 106), pp. 383 and 386. Chatham House and ICRC Expert Meeting (n 134), p. 863.

<sup>294</sup>Although some argue that this exists: Chatham House and ICRC Expert Meeting (n 134) says there is right to initial and periodic review by an independent and impartial body, p. 878. See also Casalin: Taking Prisoners (n 136), p. 757: suggesting application by analogy of the law of international armed conflicts. Similarly, The Copenhagen Process (n 135), Guideline 12 requires parties to provide for immediate and periodic review of detention.

<sup>295</sup>Chatham House and ICRC Expert Meeting (n 134), p. 877.

<sup>296</sup>This forms part of the right to humane treatment set out in Common Art 3 of the Geneva Conventions and Arts 4 and 5 of Additional Protocol II: Pejić: Procedural Principles (n 104), p. 384. See also The Copenhagen Process (n 135), Guideline 7. See also Chatham House and ICRC Expert Meeting (n 134), p. 871.

<sup>297</sup>Common Art 3 to the Geneva Conventions: Chatham House and ICRC Expert Meeting (n 134), p. 872.

<sup>298</sup>One suggestion is that the principle “as much as possible as soon as possible” applies, however, this is complicated by the confidential nature of some information and the need to keep information classified for security reasons. See Chatham House and ICRC Expert Meeting (n 134), pp. 872-875.

The decision to detain a media professional in a non-international armed conflict must be made on an individual case-by-case basis.<sup>299</sup> **This means that this decision must be based on the individual circumstances and risk posed by each media professional in a non-international armed conflict.** The decision to detain a media professional cannot be as the result of a ‘blanket’ determination that all media professionals are to be detained. Similarly, any ongoing decisions or review of detention must also be undertaken on a case-by-case basis.<sup>300</sup>

**Detaining parties in a non-international armed conflict are not obliged to register the details of a detained media professional with an international body or to inform their families or State of nationality.** However, parties must maintain records of the details of all those detained by them.<sup>301</sup> Further, the ICRC, as well as the relevant National Red Cross or Red Crescent Society, can facilitate contact between persons in detention and their family or their State of nationality, although there is no requirement on detaining authorities to accept or to facilitate this.<sup>302</sup>

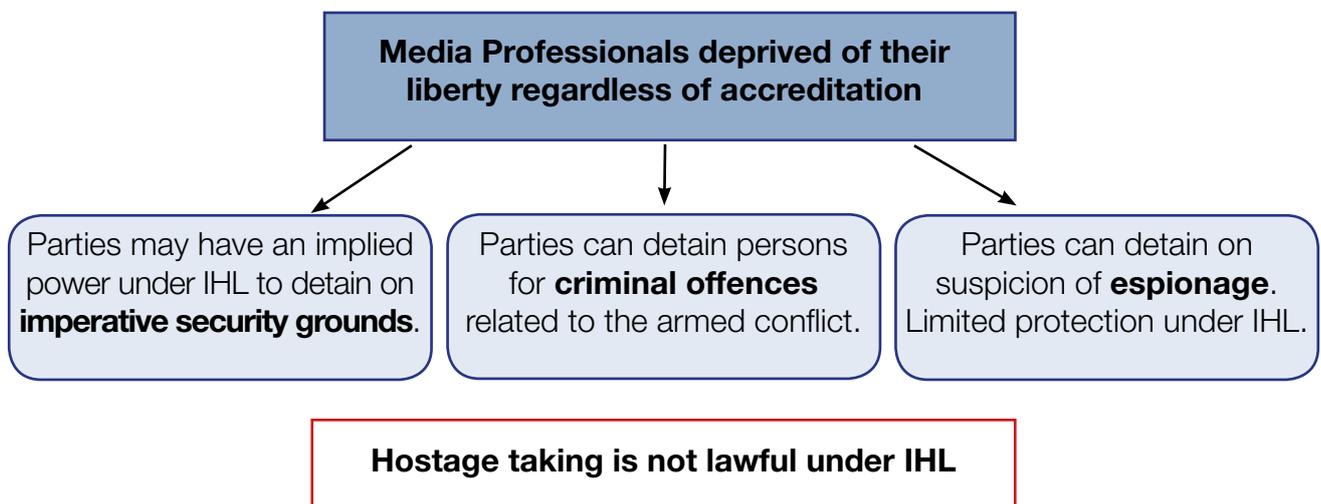
**Media professionals detained in non-international armed conflict must be released as soon as the reasons for their detention no longer exist.**<sup>303</sup> If the legitimate reasons for the detention of a media professional cease – for example, any relevant criminal charges are dropped, or they are no longer considered a security threat – then the party detaining the media professional may be engaging in hostage taking, which is prohibited by IHL in both international and non-international armed conflict.<sup>304</sup>

## Espionage

The law of non-international armed conflict does not make special provision for spies. However, **all persons in detention are entitled to the fundamental guarantees set out in Common Article 3 and Articles 4 to 6 of Additional Protocol II. This means that those persons accused of spying are entitled to a fair criminal trial** (if they are to be subject to punishment for spying) and humane treatment at all times.

The conditions under which those accused of espionage are kept in detention are discussed below.

### *IHL Grounds of Detention in Non-International Armed Conflict*



<sup>299</sup>Collective punishment is prohibited in non-international armed conflict and by customary international law: Art 4(2)(b) of Additional Protocol II. See ICRC CIHL Study, Rule 103. See also Pejčić: Procedural Principles (n 104), pp. 381-382.

<sup>300</sup>Pejčić: Procedural Principles (n 104), pp. 381-382.

<sup>301</sup>This has also been identified by the ICRC as a rule of customary law; ICRC CIHL Study, Rule 123. See also The Copenhagen Process (n 135), Guideline 8.

<sup>302</sup>Again, although no express right to do so exists, Common Art 3 of the Geneva Conventions and Art 18 of Additional Protocol II set out the rights of the ICRC to ‘offer its services’ to parties to the conflict. The ICRC has a policy of systematically requesting access to persons in internment in non-international armed conflict, which is usually granted: See ICRC CIHL Study, Rule 124. The Copenhagen Process (n 135), Guideline 11 requires parties in a non-international armed conflict to inform the ICRC and families about persons in detention.

<sup>303</sup>See The Copenhagen Process (n 135), Guideline 4. See discussion by Pejčić: Procedural Principles (n 104), p. 382. See also ICRC CIHL Study, Rule 128.

<sup>304</sup>See discussion above.

## 2.5 The Treatment of Media Professionals while in Internment or Detention

Unlike the rules relating to the decision to intern or detain a media professional, those rules setting out the minimum conditions of treatment while in the hands of a party to an armed conflict provide similar protection in international and non-international armed conflict.<sup>305</sup> There are, however, fewer rules of IHL applicable in non-international armed conflict.

Some rules of IHL apply to every person in detention or internment in armed conflict, regardless of accreditation, civilian status, reason for detention, or nationality. The most important of these rules for those in detention and internment is the absolute prohibition on torture and other forms of ill treatment.

### 2.5.1 Fundamental humanitarian guarantees relating to treatment in detention

#### **SUMMARY: Absolute Protection From Torture and Ill Treatment**

All persons, including media professionals, are **protected from torture and other forms of ill treatment** during internment and detention in both international and non-international armed conflict. This protection forms part of customary international law applicable at all times.

**All media professionals are protected from torture. IHL expressly prohibits the use of torture at all times regardless of nationality or whether an armed conflict is international or non-international.<sup>306</sup> This prohibition forms part of customary international law<sup>307</sup> and is also prohibited by the key human rights instruments<sup>308</sup> including the Convention against Torture.<sup>309</sup> The absolute prohibition of torture protects all persons in detention or internment regardless of nationality or civilian status or whether they are being held for lawful reasons.<sup>310</sup>**

<sup>305</sup>Part III of the Fourth Geneva Convention sets out the rules protecting the conditions of foreign civilian internees and the Third Geneva Convention regulates the treatment of POWs, including captured accredited war correspondents. In non-international armed conflict, the basic humanitarian guarantees in Common Art 3 of the Geneva Conventions apply to protect those media professionals in internment or detention. Further, Additional Protocol II sets out specific rules relating to their treatment.

<sup>306</sup>Art 75 of Additional Protocol I. Common Art 3 of the Geneva Conventions; Art 4 of Additional Protocol II.

<sup>307</sup>It is part of the *jus cogens* of international law: *Čelebići Camp Case*, para 454. See also ICRC CIHL Study, Rule 90; and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS, 85 (CAT).

<sup>308</sup>Art 7 of the ICCPR; Art 37(a) of the Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3 (CRC); Art 3 of the ECHR, Art 5 of the American Convention on Human Rights, 22 November 1969 (IACHR), Art 5 of the African Charter on Human and Peoples' Rights, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (ACHPR).

<sup>309</sup>The CAT is considered to be customary international law.

<sup>310</sup>See for example Arts 13 and 14 of the Third Geneva Convention and Art 100 of the Fourth Geneva Convention.

Generally, torture is defined as any act that:<sup>311</sup>

- > Causes severe pain or suffering, whether physical or mental
- > Is intentionally inflicted
- > For a prohibited purpose including the obtaining of information or a confession for punishment, intimidation, or for a discriminatory reason<sup>312</sup> and
- > Is inflicted by (or with the consent or at the instigation of) a person acting in an official or public capacity.<sup>313</sup>

Sexual assault can also be considered as torture in itself, in that rape by definition results in severe pain or suffering for the victim.<sup>314</sup>

Other forms of prohibited ill treatment, including humiliating, inhuman and degrading treatment,<sup>315</sup> are generally defined as acts which do not amount to torture as defined above, but that, nevertheless, cause a significant level of suffering or pain. Unlike torture, inhuman and degrading treatment does not have to be inflicted by or with the consent of a public official or for a particular purpose.<sup>316</sup>

## 2.5.2 Minimum Conditions of Treatment in International and Non-International Armed Conflict

### **SUMMARY: Treatment in Detention and Internment International and Non-International Armed Conflict**

**NOTE:** The following rules apply to **foreign media professionals** (those media professionals detained or interned by an adversary) and ‘war correspondents’ detained in an **international armed conflict**, as well as to media professionals detained in a **non-international armed conflict**.

<sup>311</sup>Art 1(1) of the CAT. See also M. Nowak and E. McArthur, *The United Nations Convention Against Torture: A Commentary*, Oxford University Press, 2008 (Nowak and McArthur: CAT Commentary), p. 28. IHL and human rights law contain very similar prohibitions on torture and inhuman and degrading treatment: *Prosecutor v Kunarac et al.* (IT-96-23 & IT-96-23/1), Trial Chamber Judgment, ICTY, 22 February 2001 (*Kunarac Case*), paras 467-497; confirmed by the Appeals Chamber Judgment, 12 June 2002; However, for a discussion of the differences between the two areas see: S. Sivakumaran, ‘Torture in International Human Rights and International Humanitarian Law: The Actor and the Ad Hoc Tribunals’, (2005) *Leiden Journal of International Law*, Vol. 18, Issue 03, 541. *Prosecutor v Anto Furundžija* (IT-95-17/1), Trial Chamber Judgment, ICTY, 10 December 1998.

<sup>312</sup>The ICL and IHL ‘prohibited purposes’ may be broader than that recognised by the CAT: *Kunarac Case*, paras 467-497; confirmed by the Appeals Chamber Judgment, 12 June 2002.

<sup>313</sup>This requirement is not found in ICL or IHL. Under IHL there is no need to prove the involvement of a public official: See *Kunarac Case*, paras 467-470, 497.

<sup>314</sup>The first finding of guilt for an offence of torture with sexual assault under Common Art 3 of the Geneva Conventions was the ICTY case of *Prosecutor v Furundžija* (IT-95-17/1-A), Appeals Chamber Judgment, ICTY, 21 July 2000, in which the victim was threatened with mutilation on interrogation. See also *Prosecutor v Brđanin* (IT-99-36-T), Trial Chamber Judgment, ICTY, 1 September 2004, in which the Trial Chamber stated at para 485 that rape necessarily amounts to torture.

<sup>315</sup>Art 75(b) of Additional Protocol I; Art 4 (2)(a) and (e) of Additional Protocol II; Common Art 3(1)(c) of the Geneva Conventions.; ICRC CIHL Study, Rule 90.

<sup>316</sup>Nowak and McArthur: CAT Commentary (n 165), p. 558.

The rules applying to non-international armed conflict are similar, but not identical to, the rules that protect media professionals in internment and detention in international armed conflict. Therefore, the rules applicable to each type of conflict are addressed together. However, the POW status of war correspondents does not apply in non-international armed conflict.

### Basic Necessities

Media professionals in detention and internment are entitled to **basic necessities and conditions**. These generally include:

- > Hygienic accommodation and access to sanitation facilities
- > Sufficient food and clothing
- > Medical attention
- > Access to religious, educational and recreational facilities
- > The receipt of relief consignments
- > Separate accommodation (or sanitation facilities) for female media professionals.

### Personal Property

- > Media professionals in **international armed conflict** are entitled to **keep items of personal property** with them in internment or detention including typewriters and laptops. However, many professional items, such as cameras and currency, may be removed from media professionals and returned at the end of the internment or detention.
- > The **personal property** of media professionals in detention in **non-international armed conflict** is protected from pillage (theft or plunder) by detaining authorities. This means that if it is removed it must be returned upon release.

### Correspondence and communication

- > Media professionals in international armed conflict have a **right to contact with the outside world**, including to send and receive correspondence. Any correspondence is likely to be subject to censorship by detaining authorities.
- > Detained media professionals in non-international armed conflict are allowed to **send and receive correspondence**, subject to the capabilities of the detaining authorities. This correspondence is likely to be subject to censorship.
- > Media professionals in international armed conflict have the right to **personal and confidential communication with the ICRC** including the receipt of visits by an ICRC delegate. There is **no absolute right for the ICRC** to visit with or correspond with a detained media professional in non-international armed conflict (although they can offer their services).

In **international armed conflict** those media professionals that are detained by the armed forces of their own nationality (or those of a neutral State) are protected by the rules of international human rights and domestic laws regarding treatment of detained persons. These areas of law are not addressed by this Handbook. The detention of this category of media professionals is not regulated by the rules of IHL, however, the fundamental guarantees protecting persons from murder, torture, sexual violence, hostage taking and abuse of process apply to all persons.

**Those media professionals interned or detained in international armed conflict by the armed forces of an adversary are protected by IHL, as well as international human rights law and domestic laws.** The rules providing for the treatment of foreign civilians in internment and POWs (including war correspondents) in detention in international armed conflict are very similar.<sup>317</sup>

The IHL instruments that apply to **non-international armed conflict** (Common Article 3 and Additional Protocol II) set out the legal protection and minimum conditions of detention.<sup>318</sup> These are similar (although not identical) to those applying to media professionals in international armed conflict.

## **Provision of basic necessities and conditions**

**Foreign media professionals in civilian internment (for security reasons), war correspondents detained as POWs in international armed conflict, and media professionals detained in non-international armed conflict are entitled to basic necessities and conditions during internment and detention.**<sup>319</sup> This means that the following must be provided for media professionals in internment or detention:

- > Accommodation that is hygienic (including access to sanitation facilities), healthy, and appropriate to the local climate and the dangers of the conflict.<sup>320</sup> Camps should be located in areas not exposed to the conflict.<sup>321</sup>
- > The provision of sufficient food, clean water, and appropriate clothing.<sup>322</sup> However, in non-international armed conflict the quality of the provision of these essential amenities is linked to the conditions of the local population. In other words, those in detention in non-international armed conflict are only entitled, at a minimum, to the same level of amenities as local civilians.<sup>323</sup>
- > The provision of medical attention (including access to a doctor) and regular access to medical inspections shall be provided.<sup>324</sup>

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<sup>317</sup>Section IV of Part III of the Fourth Geneva Convention and Section III of Additional Protocol I regulate the treatment and conditions of civilian internees in international armed conflict. Arts 21-108 of the Third Geneva Convention set out the protection and minimum standards of treatment of POWs (including war correspondents) in detention in international armed conflict.

<sup>318</sup>Common Art 3 of the Geneva Conventions does not refer to the conditions of treatment of those in internment. However, it does require conditions of basic humane treatment 'in all circumstances' including detention and internment. Art 5 of Additional Protocol II applies to all persons whose liberty has been restricted in connection with the conflict and also establishes minimum conditions.

<sup>319</sup>This has also been identified by the ICRC as a rule of customary law; ICRC CIHL Study, Rules 118 and 127.

<sup>320</sup>International armed conflict: Arts 22, 25 and 29 of the Third Geneva Convention and Art 85 of the Fourth Geneva Convention. Non-international armed conflict: Art 5(1)(b) of Additional Protocol II and Pilloud: Commentary on the Additional Protocols (n 14), para 4573. This has also been identified by the ICRC as a rule of customary law; ICRC CIHL Study, Rules 118 and 121.

<sup>321</sup>International armed conflict: Arts 19 and 23 of the Third Geneva Convention and Art 83 of the Fourth Geneva Convention. Non-international armed conflict: Art 5(2)(c) of Additional Protocol II; Pilloud: Commentary on the Additional Protocols (n 14), para 4573-4575. In non-international armed conflicts this obligation extends only as far as the capabilities of the detaining party permit. This has also been identified by the ICRC as a rule of customary law; ICRC CIHL Study, Rule 121.

<sup>322</sup>International armed conflict: Arts 26 and 27 of the Third Geneva Convention; Arts 89-90 of the Fourth Geneva Convention. Non-international armed conflict: Art 5(1)(b) of Additional Protocol II; Pilloud: Commentary on the Additional Protocols (n 14), para 4573. This has also been identified by the ICRC as a rule of customary law; ICRC CIHL Study, Rule 118.

<sup>323</sup>Art 5(1)(b) of Additional Protocol II.

<sup>324</sup>International armed conflict: Arts 30-31 of the Third Geneva Convention and Arts 81, 91-92 of the Fourth Geneva Convention. Non-international armed conflict: Arts 5 (1)(a); 5(2)(d) and 7 of Additional Protocol II; Pilloud: Commentary on the Additional Protocols (n 14), para 4565. This has also been identified by the ICRC as a rule of customary law; ICRC CIHL Study, Rule 118.

- > Ability to practice their religion.<sup>325</sup> In international armed conflict media professionals are also entitled to access to educational and recreational facilities and pursuits.<sup>326</sup>
- > Media professionals interned in international armed conflict can also be employed, with their consent, by the Detaining Power during internment and must be paid fairly for their work.<sup>327</sup> In non-international armed conflict media professionals, if made to work, have the right to similar working conditions and safeguards as the local population<sup>328</sup> It is “prohibited to force detainees to carry out unhealthy, humiliating or dangerous work”.<sup>329</sup>
- > Media professionals have the right to receive relief consignments while in internment.<sup>330</sup>
- > Female media professionals (who are not members of a family) shall be accommodated separately to men, or at least provided with separate sleeping and washing facilities.<sup>331</sup>
- > All interned or detained media professionals must be protected from violence, insults, and public curiosity.<sup>332</sup> This is discussed in detail in the next Chapter.

## Protection of personal property

### *International armed conflict*

**Media professionals that are interned or held in detention as POWs in international armed conflict have the right to the protection of their personal property. They may be able to retain items of personal use during internment.**<sup>333</sup> Items for ‘personal use’ include more than just the minimum items necessary to survive (i.e. sanitation items and clothing) but rather, it may include ‘everyday’ items such as books, writing implements, and possibly a typewriter<sup>334</sup> and by analogy, a laptop (although access to the internet is likely to be restricted).<sup>335</sup> Internees and POWs are also allowed to keep items of sentimental value with them, such as wedding rings.<sup>336</sup>

<sup>325</sup>International armed conflict: Art 34 of the Third Geneva Convention and Arts 86 and 93 of the Fourth Geneva Convention. Non-international armed conflict: Art 5(1)(d) of Additional Protocol II. This has also been identified by the ICRC as a rule of customary law; ICRC CIHL Study, Rule 127.

<sup>326</sup>Art 38 of the Third Geneva Convention and Art 94 of the Fourth Geneva Convention.

<sup>327</sup>In some cases a detaining power can make POWs work, subject to particular conditions, Arts 49-57 of the Third Geneva Convention and Art 95 of the Fourth Geneva Convention.

<sup>328</sup>This is clearly subject to the customary law prohibition on slavery. Art 5(1)(e) of Additional Protocol II.

<sup>329</sup>Pilloud: Commentary on the Additional Protocols (n 14), para 4579.

<sup>330</sup>International armed conflict: Arts 72 -75 of the Third Geneva Convention and Arts 108-111 of the Fourth Geneva Convention. Non-international armed conflict: Art 5(1)(c) of Additional Protocol II.

<sup>331</sup>International armed conflict: Art 25 of the Third Geneva Convention, Art 85 of the Fourth Geneva Convention, Art 75(5) of Additional Protocol I. Non-international armed conflict: Art 5(2)(a) of Additional Protocol II. In non-international armed conflicts this obligation extends only as far as the capabilities of the detaining party permit. See also Pilloud: Commentary on the Additional Protocols (n 14), paras 4583-4584. This has also been identified by the ICRC as a rule of customary law; ICRC CIHL Study, Rule 119.

<sup>332</sup>Art 13 of the Third Geneva Convention and Art 27 of the Fourth Geneva Convention; Common Art 3 of the Geneva Conventions.

<sup>333</sup>POWs are additionally entitled to retain items for their own protection, such as helmets: Art 18 of the Third Geneva Convention and Art 97 of the Fourth Geneva Convention.

<sup>334</sup>See Pictet: Geneva Convention IV Commentary (n 95), p. 420.

<sup>335</sup>See discussion of this in the next section, below.

<sup>336</sup>Art 18 of the Third Geneva Convention and Art 97 of the Fourth Geneva Convention; the Commentary mentions wedding rings: Pictet: Geneva Convention IV Commentary (n 95), p. 422.

Many items carried by media professionals are necessary for their professional work in conflict areas. This includes notes, video footage, cameras, recordings, and, as is common, large sums of currency. These items are unlikely to be considered ‘items of personal use’<sup>337</sup> which means that the detaining authorities may remove them from the possession of internees. Detaining authorities have the power to remove such items in order to prevent ‘subversive propaganda’ in internment and potential escape by internees (through bribing of guards, etc.).<sup>338</sup> In the case of POWs, currency can be removed from them, however, other valuable items can only be removed from their possession for security reasons.<sup>339</sup>

Removal in both cases must be undertaken in accordance with established procedures; the internee or POW is to receive a receipt for removed items, and they must be returned upon release.<sup>340</sup> Protection against pillage (plunder or theft) of items belonging to internees or POWs is identified as part of customary international law.<sup>341</sup>

### *Non-international armed conflict*

**The property of detainees in non-international armed conflict is protected from pillage<sup>342</sup> – in other words, from plunder or theft by detaining authorities or individual members of a detaining authority.<sup>343</sup>** This protection is identified as customary international law applicable during non-international armed conflict.<sup>344</sup>

The rules of IHL in non-international armed conflict **do not** set out particular procedures that must be followed by detaining authorities in relation to the property of internees. However, the protection against pillage protects against unlawful appropriation of personal possessions so, at the very least, any removed items including professional materials such as notes, video footage, cameras, recordings, and currency must be returned, undamaged, upon release.

## **Protection of communications during internment**

### *International armed conflict*

**Interned media professionals have a right to contact with the outside world.<sup>345</sup> War correspondents, as POWs, have similar rights but they are more limited.** Where relevant, this has been noted below.

**All media professionals (regardless of their status as war correspondents) are allowed to send and receive letters and cards<sup>346</sup> and also parcels while in internment.<sup>347</sup> This right is absolute and cannot be removed.<sup>348</sup> The right to correspond with family members is identified as customary international law.<sup>349</sup>**

<sup>337</sup>Cameras are specifically mentioned in the Commentary as items that are likely to be removed from internees for propaganda and espionage prevention reasons: Pictet: Geneva Convention IV Commentary (n 95), p. 420.

<sup>338</sup>See Pictet: Geneva Convention IV Commentary (n 95), pp. 420-421.

<sup>339</sup>In addition, currency and other bonds etc. must be retained and placed in accounts for internees in their original currency:

<sup>340</sup>Art 97 of the Fourth Geneva Convention.

<sup>341</sup>See ICRC CIHL Study, Rule 122.

<sup>342</sup>Art 4(2)(g) of Additional Protocol II.

<sup>343</sup>See Pilloud: Commentary on the Additional Protocols (n 14), para 4542.

<sup>344</sup>ICRC CIHL Study, Rule 122.

<sup>345</sup>The rules regulating communication of civilian internees are set out in Arts 105-116 of the Fourth Geneva Convention.

<sup>346</sup>Art 71 of the Third Geneva Convention and Art 107 of the Fourth Geneva Convention.

<sup>347</sup>Art 72 of the Third Geneva Convention and Art 108 of the Fourth Geneva Convention.

<sup>348</sup>See Pictet: Geneva Convention IV Commentary (n 95), p. 449. If correspondence with internees needs to be suspended for political or military reasons, such suspension can only be temporary and it must be resumed as soon as possible: Art 76 of the Third Geneva Convention, Art 112 of the Fourth Geneva Convention. Such correspondence must not be delayed or prevented for disciplinary reasons: Art 71 of the Third Geneva Convention and Art 107 of the Fourth Geneva Convention.

<sup>349</sup>See ICRC CIHL Study, Rule 125.

Media professionals in civilian internment, but not war correspondents held as POWs, have the right to receive personal visitors and to return home in urgent cases (such as death or illness of a relative).<sup>350</sup> As it applies to media professionals who are civilian internees, this right has been identified as customary international law.<sup>351</sup>

Detaining authorities have the right to censor outgoing and incoming correspondence.<sup>352</sup> This is likely to have a chilling effect on the information and material being sent and received by a media professional in internment (i.e. it makes it more likely that media professionals will not publish or send information due to their self-censorship). The Geneva Conventions require any censorship of correspondence to be undertaken as quickly as possible to avoid delays.<sup>353</sup> Further, all inspection of consignments intended for internees shall be inspected in their presence.<sup>354</sup>

Access to the internet during internment or detention (including email) is not explicitly addressed by the text of the Geneva Conventions as the internet was not in existence at the time of drafting. This means that IHL does not expressly allow or prohibit a media professional access to the internet during internment. Where internet access is provided, it is likely that the rules relating to paper correspondence (cards and letters) will apply in a similar manner to internet communications, such as email. This means that access is likely to be supervised and censored.<sup>355</sup>

**In addition, all media professionals have the right to personal communication with the ICRC and delegates of the ICRC shall be permitted to visit internees and POWs individually and without witnesses.**<sup>356</sup> The right of access to internees and POWs by the ICRC has been identified as customary international law.<sup>357</sup>

#### *Non-international armed conflict*

**Detained media professionals in non-international armed conflict are allowed to send and receive letters and cards.**<sup>358</sup> **This correspondence may be censored.**<sup>359</sup> **The right to correspond with family members is identified as customary international law applicable in non-international armed conflict.**<sup>360</sup>

However, this right to correspondence is subject to the limits of the capabilities of parties.<sup>361</sup> This means that where a detaining party lacks resources (such as postal services) to enable the sending and receipt of correspondence, an interned or detained media professional's ability to exercise their right to correspondence may be limited.

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<sup>350</sup>Art 116 of the Fourth Geneva Convention.

<sup>351</sup>See ICRC CIHL Study, Rule 126.

<sup>352</sup>Art 76 of the Third Geneva Convention and Art 112 of the Fourth Geneva Convention, see also Pictet: Geneva Convention IV Commentary (n 95), p. 449.

<sup>353</sup>Art 76 of the Third Geneva Convention and Art 112 of the Fourth Geneva Convention.

<sup>354</sup>Art 76 of the Third Geneva Convention and Art 112 of the Fourth Geneva Convention.

<sup>355</sup>In accordance with Art 112 of the Fourth Geneva Convention.

<sup>356</sup>Art 126 of the Third Geneva Convention and Arts 76 and 143 of the Fourth Geneva Convention. This also includes access by Protecting Powers. Other articles setting out the supervisory and relief powers of the ICRC are discussed below.

<sup>357</sup>ICRC CIHL Study, Rule 124.

<sup>358</sup>Art 5(2)(b) of Additional Protocol II.

<sup>359</sup>Pilloud: Commentary on the Additional Protocols (n 14), para 4585.

<sup>360</sup>See ICRC CIHL Study, Rule 125.

<sup>361</sup>This general qualification appears under Art 5(2) of Additional Protocol II.

**There is no right for the ICRC to access detained persons in non-international armed conflict.<sup>362</sup> However, the ICRC may offer to visit those deprived of their liberty,<sup>363</sup> although there is no legal obligation on the parties to the conflict to accept this offer.<sup>364</sup> Nevertheless, in practice such offers appear to be widely accepted by parties.<sup>365</sup>**

### **2.5.3 Additional Restrictions on those Detained on Suspicion of Espionage**

#### **SUMMARY: Restriction on those Detained on Suspicion of Espionage**

Media professionals detained on suspicion of espionage are entitled to fundamental rights including the **right to a fair trial and the right to be treated humanely.**

However, **parties are entitled to place additional restrictions on the ability of media professionals detained on suspicion of espionage to communicate from detention, including the right to receive and send correspondence.**

**In international and non-international armed conflict media professionals detained on suspicion of espionage or spying must be treated humanely at all times and have the right to a fair criminal trial.<sup>366</sup>**

#### *International armed conflict*

**In international armed conflict the detaining power may deny a person detained on suspicion of espionage certain rights that are prejudicial to the security of the State. This includes the right to communication and correspondence.<sup>367</sup>** This means that media professionals detained on the suspicion of espionage may be lawfully denied the ability to communicate with their family and employers during such detention.

#### *Non-international armed conflict*

The law of non-international armed conflict does not address the case of espionage specifically. However, the right of detainees to receive letters and cards is subject to limitation if deemed necessary by a competent authority.<sup>368</sup> **It is highly likely that suspicion of espionage qualifies as a legitimate reason to limit the right to correspondence of a detained media professional.**

<sup>362</sup>In contrast, the law of international armed conflict expressly sets out this right in Art 143 of the Fourth Geneva Convention and Art 126 of the Third Geneva Convention.

<sup>363</sup>Common Art 3(2) of the Geneva Conventions.

<sup>364</sup>ICRC CIHL Study, Rule 124.

<sup>365</sup>See L. Moir, *The Law of Internal Armed Conflict*, (Cambridge University Press, 2002), p. 113. Pejic also argues that the right of the ICRC to offer its services in relation to visiting detainees in NIACs is “widely accepted”: Pejic: Procedural Principles (n 104), p. 391.

<sup>366</sup>Art 5 of the Fourth Geneva Convention; Art 75 of Additional Protocol I. Common Art 3 of the Geneva Conventions and Arts 4 - 6 of Additional Protocol II. See also Pictet: Geneva Convention IV Commentary (n 95), p. 56.

<sup>367</sup>Art 5 of the Fourth Geneva Convention. Art 5 identifies this in relation to occupation but it undoubtedly applies in other situations of international armed conflict too.

<sup>368</sup>Art 5 of Additional Protocol II.

## 2.6 Enforcement of IHL Rules Protecting Media Professionals

### SUMMARY: Enforcement of IHL

Parties to the Geneva Conventions are obliged to respect and ensure respect for IHL. This obligation requires States to ensure that their own armed forces comply with IHL and also that others do as well. IHL is enforced through both domestic and international law mechanisms.

#### Domestic Enforcement of IHL

The rules of IHL generally require States to **introduce appropriate domestic measures for suppression of all violations of IHL**. The UK has criminalised grave breaches of the Geneva Conventions and Additional Protocol I under the **Geneva Conventions Act 1957**. Further, it is an offence under UK law for a person to commit a war crime, genocide, or a crime against humanity under the **International Criminal Court Act 2001** and the International Criminal Court (Scotland) Act 2001.

#### International Enforcement of IHL

Under international law IHL is enforced through judicial and non-judicial mechanisms:

- > **Non-judicial mechanisms** include the **enquiry procedure** established by the Geneva Conventions; and the **International Humanitarian Fact-Finding Commission established under Additional Protocol I. Claims commissions**, often set up by States after armed conflicts, can often hear and determine claims for breaches of international law, including IHL. These mechanisms are rarely used.
- > **International criminal law** is an international **judicial mechanism** for enforcing IHL. Serious breaches of IHL are war crimes punishable in international courts and tribunals, such as the International Criminal Court.

#### International Criminal Law Protection of Media Professionals

Media professionals are protected from **physical attack in armed conflict**. International criminal law prohibits:

- > The **murder/wilful killing** of a media professional;
- > The **launching of direct and intentional attacks** against a media professional who is not taking a direct part in hostilities;
- > The launching of **disproportionate attacks**;
- > Taking a media professional **hostage**;
- > **Torturing** a media professional;
- > Subjecting a media professional to other forms of inhumane treatment; and
- > Using **sexual violence or rape** against a media professional.

Some procedural rules of international criminal law protect aspects of the work of media professionals.

- > Media professionals can be **called to give evidence** before international courts and tribunals. Unless the rules of an international criminal court or tribunal create an exception, a media professional may be in **'contempt of court'** (see Chapter 3) for failing to give evidence. This exception is called a **'privilege.'** Some courts have granted such exceptions for media professionals.

- > The **International Criminal Tribunal for the Former Yugoslavia** (ICTY) is the first and only international court to expressly recognise a media professional's privilege. In proceedings before the ICTY **media professionals do not have to give evidence unless it can be shown that:**
  - > **the evidence sought from the media professional is of 'direct and important value' to a core issue in a case before the court, and**
  - > **that the evidence sought from the media professional cannot be obtained elsewhere.**
- > **Other international courts and tribunals, such as the International Criminal Court**, have rules protecting confidential information and sources. These rules might be applicable to protect the **identity of confidential sources or other confidential information** provided by media professionals. However, these rules have **not yet been tested** in relation to media professionals.

IHL contains many rules that protect media professionals during armed conflict. However, it is unfortunate that the rules of IHL are not always complied with and attacks against media professionals may not be followed up and investigated by parties to a conflict (sometimes referred to as 'impunity').<sup>369</sup> It is important, therefore, to consider how the IHL rules protecting media professionals (and indeed all IHL rules) are able to be enforced.

Parties to the Geneva Conventions are obliged to respect and ensure respect for their provisions.<sup>370</sup> This obligation requires States to ensure their own armed forces comply with IHL and also that others do as well. Ensuring compliance with the rules of IHL occurs through both formal and informal means.

Informal means (that is, those not involving specific legal mechanisms such as courts) can include the work of the media in exposing violations of IHL and the effect this has on public opinion; diplomatic discussions between States;<sup>371</sup> and discussions with non-State armed groups.<sup>372</sup> The organisations of the International Red Cross and Red Crescent Movement are formally mandated in both peacetime and armed conflict to promote and to encourage implementation of IHL rules; this may involve working with parties to a conflict to encourage compliance with IHL.<sup>373</sup>

The more formal legal mechanisms for ensuring compliance with and enforcement of IHL are discussed in this section. IHL is enforced through both domestic and international law mechanisms. Each will be considered here.<sup>374</sup>

<sup>369</sup>See for example consideration of this issue by the Committee to Protect Journalists, *Getting away with murder: 2014 Impunity Index*, available at <https://cpj.org/reports/2014/04/impunity-index-getting-away-with-murder.php>.

<sup>370</sup>Common Art 1 of the Geneva Conventions.

<sup>371</sup>T. Pfanner, 'Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims', (2009) *International Review of the Red Cross*, Vol. 91, No. 874, 279 (Pfanner: Implementing IHL), p. 305.

<sup>372</sup>By both States and non-government organisations such as Geneva Call. For more information about the work of Geneva Call see their website: <http://www.genevacall.org/>.

<sup>373</sup>For more information on the work of the ICRC see their website: <http://www.icrc.org/eng/what-we-do/index.jsp>. For more information on the work of National Societies in helping to promote and implement IHL, see, for example, the British Red Cross website: <http://www.redcross.org.uk/What-we-do/Protecting-people-in-conflict>.

<sup>374</sup>This Handbook does not consider the issue of State-responsibility for violations of international law.

## 2.6.1 Domestic Enforcement of IHL

The rules of IHL normally require States to introduce appropriate domestic measures for suppression of violations of IHL.<sup>375</sup> They also oblige States to investigate and implement domestic criminal penalties for grave breaches of the Geneva Conventions and Additional Protocol I (applicable in international armed conflict).<sup>376</sup> States must search for and prosecute those accused of such breaches regardless of their nationality or in whose territory the breach occurred: this is known as ‘universal jurisdiction’. This means that individuals, regardless of their nationality, who commit serious violations of IHL against media professionals, can be prosecuted under domestic law.

The UK has a number of different domestic laws addressing violations of IHL. The UK has criminalised grave breaches of the Geneva Conventions and Additional Protocol I under the Geneva Conventions Act 1957 (as amended). This Act also regulates the use of the distinctive emblems, their names and related signs, both in peacetime and during armed conflict. Further, it is an offence under UK law for a person to commit a war crime, genocide, or a crime against humanity under the International Criminal Court Act 2001 (as outlined in Chapter 3) either on the territory of the UK or on the territory of another State (if they are a UK national, UK resident or subject to UK military ‘service jurisdiction’, including members of the UK armed forces).<sup>377</sup> Members of the armed forces may also be dealt with under relevant service discipline rules. Individual responsibility for violations of IHL under domestic law is considered in further detail in Chapter 3.

## 2.6.2 International Enforcement of IHL

A number of international mechanisms for enforcement of IHL rules exist. These can be divided into non-judicial and judicial. Each will be addressed in turn.

### International non-judicial enforcement mechanisms

IHL provides for a number of international mechanisms for its enforcement beyond the obligations it places on States to take domestic legal measures. These are, however, rarely used in the international system. Some of these mechanisms are set out here:

- > The Geneva Conventions set out that at the request of a party to an international armed conflict an **enquiry procedure**<sup>378</sup> can be established to examine any alleged violations of IHL. However, this procedure has never been used successfully.<sup>379</sup>
- > The ‘Protecting Powers’ function, whereby States can appoint a neutral or other State not a party to the conflict to carry out certain supervisory functions under IHL. It has rarely been used.

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<sup>375</sup>See the grave breaches provisions of the Geneva Conventions (Art 49 of the First Geneva Convention; Art 50 of the Second Geneva Convention; Art 129 of the Third Geneva Convention; Art 146 of the Fourth Geneva Convention; Art 85 of Additional Protocol I) and, as to the obligations on States to investigate and prosecute non-grave breaches of the Geneva Conventions, see further: A. Cohen and Y. Shany, ‘Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts’, (2011) *Yearbook of International Humanitarian Law*, Vol. 14, pp. 37-84.

<sup>376</sup>‘Grave breaches’ are the most serious violations of IHL, and are set out explicitly in the relevant IHL treaties. The term is only applicable to IHL violations occurring in international armed conflict. This is discussed in further detail in Chapter 3. See Art 49 of the First Geneva Convention; Art 50 of the Second Geneva Convention; Art 129 of the Third Geneva Convention; Art 146 of the Fourth Geneva Convention; Art 85 of Additional Protocol I.

<sup>377</sup>Under the Armed Forces Act 2006 and the International Criminal Court Act 2001, discussed in further detail in Chapter 3. In Scotland, the International Criminal Court (Scotland) Act 2001 will apply.

<sup>378</sup>Art 52 of the First Geneva Convention; Art 53 of the Second Geneva Convention; Art 132 of the Third Geneva Convention; Art 149 of the Fourth Geneva Convention.

<sup>379</sup>Pfanner: Implementing IHL (n 234) p. 285; Sivakumaran: *The Law of Non-International Armed Conflict* (n 5) p. 459.

- > **The International Humanitarian Fact-Finding Commission<sup>380</sup>** is empowered to enquire into grave breaches and other serious violations of IHL at the request of States and to make factual determinations regarding these violations. It is not competent to issue a legal finding or to prosecute individuals or parties for any violations of IHL. It is only able to undertake such investigations with the consent of relevant parties. In 2017 it was activated for the first time.<sup>381</sup>
- > Although not mentioned in the text of any IHL treaty, **claims commissions** have been used to consider, among other things, violations of IHL. Claims commissions are legal mechanisms established by the international community, such as by UN resolution or by agreement between parties, which can hear and determine claims for loss or damage sustained as a result of violations of international law, including IHL, during armed conflict. Several examples exist.<sup>382</sup> The scope and procedure of these commissions is determined by the establishing body. Some claims commissions allow for individuals to receive a remedy for violations of international law.<sup>383</sup>

### **International judicial enforcement mechanisms: international criminal law**

Serious breaches of IHL committed by individuals (including members of the armed forces) are known as ‘war crimes’ under international criminal law (ICL) and can be investigated and punished in international courts and tribunals set up for this purpose, including the permanent International Criminal Court. War crimes include both:

- > grave breaches of the Geneva Conventions,<sup>384</sup> and
- > other serious breaches of IHL.<sup>385</sup>

However, it is important to note that not all violations of IHL are considered to be war crimes and cannot, therefore, be punished through the international system. See the diagram and discussion of this issue in Chapter 1. Domestic prosecution of war crimes is discussed in further detail in Chapter 3.

ICL generally operates in a complementary way with domestic criminal law. That means that if a State has adequately investigated and prosecuted a war crime committed against a media professional then international courts such as the International Criminal Court are not able to do so.<sup>386</sup> Nevertheless, attacks against media professionals may not be adequately investigated or prosecuted by States and ICL may be a useful enforcement mechanism of those rules of IHL that protect media professionals in such cases. Relevant rules of ICL are discussed in the next section.

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<sup>380</sup>Established under Art 90 of Additional Protocol I.

<sup>381</sup>See further the IHFFC website: <http://www.ihffc.org/>.

<sup>382</sup>See for example the United Nations Compensation Commission, established in 1991 by UN Security Council Resolution 687(1991), 3 April 1991 to implement Iraq’s liability for the invasion and occupation of Kuwait; and the Eritrea-Ethiopia Claims Commission established in 2000 by the Eritrea-Ethiopia Peace Agreement (Ethiopia: Peace Agreement between Ethiopia and Eritrea signed on 12 December 2000 in Algiers including terms, amnesty for deserters/evaders and or objectors to military service during the war (1998-2000), and for ethnic Eritreans detained and/or deported from Ethiopia, 16 February 2001, ert36326.E) to hear claims of loss or damage resulting from, among other things, violations of IHL related to the conflict between the two States.

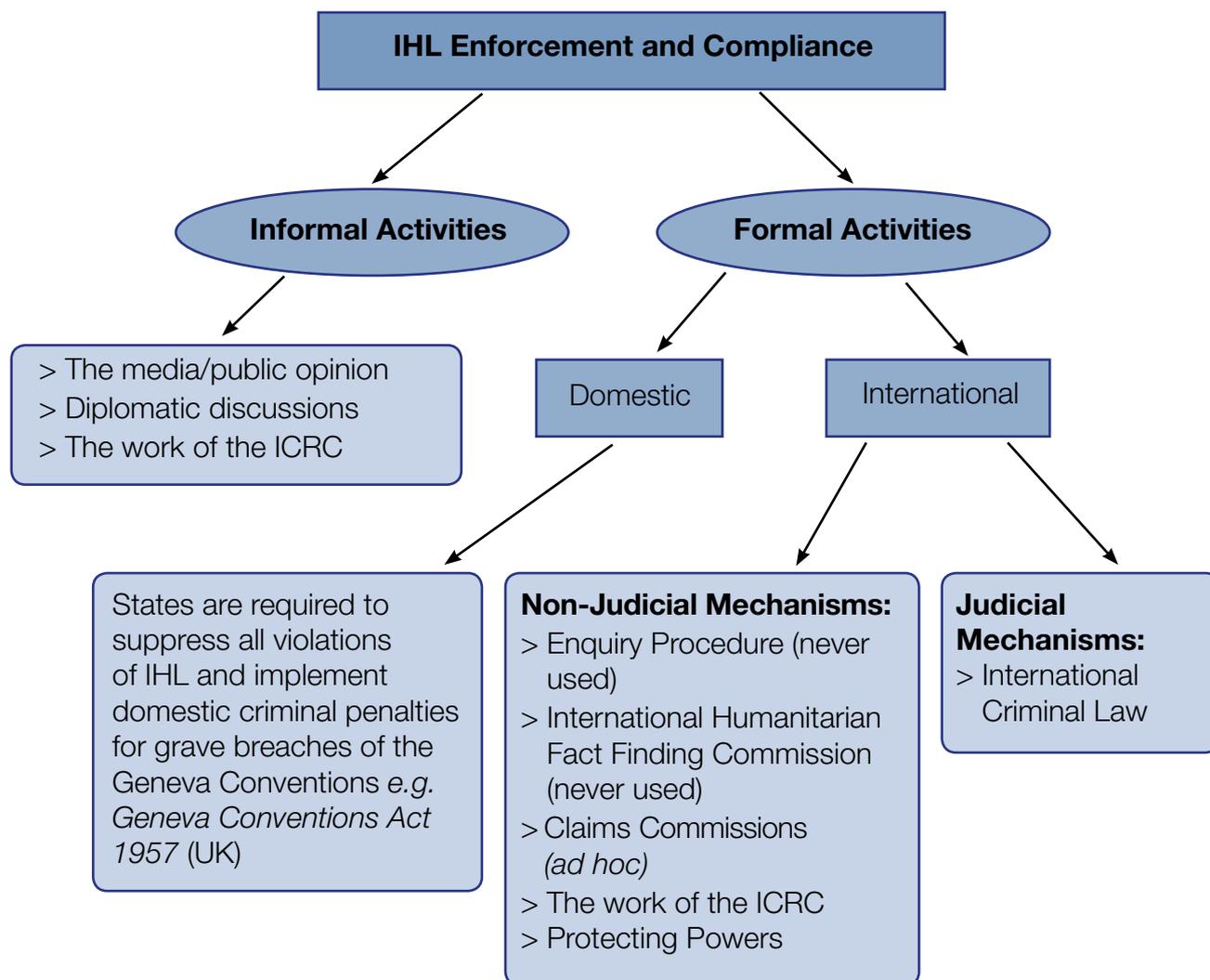
<sup>383</sup>For example the United Nations Compensation Commission (Iraq) and the Eritrea-Ethiopia Claims Commission: L. Zegveld, ‘Remedies for Victims of Violations of International Humanitarian Law’, (2003) *International Review of the Red Cross*, Vol. 85, No. 851, 497 pp. 521-523.

<sup>384</sup>See discussion of grave breaches in Chapter 3.

<sup>385</sup>See for example Art 8 of the Rome Statute.

<sup>386</sup>See for example Art 17(1)(a) of the Rome Statute.

## Enforcement of IHL



### 2.6.3 International Criminal Law protection of Media Professionals

This section will consider those rules of IHL that protect media professionals and are enforced through the mechanisms of ICL – in particular, the International Criminal Court.

#### ICL Protection from physical attack during armed conflict

*Prohibition of attacks against media professionals*

**Media professionals (as civilians) are protected by IHL in both international and non-international armed conflicts by the principle of distinction. Violation of this principle is a serious violation of IHL and, therefore, a war crime.** ICL prohibits the following acts, as war crimes:

- > The **wilful killing** or murder of media professionals<sup>387</sup>
- > The **launching of direct and intentional attacks** against media professionals not taking a direct part in hostilities,<sup>388</sup> and
- > The launching of an attack with the knowledge that such attack will cause incidental loss of life or injury to media professionals (as civilians) which would be clearly **excessive in relation to the concrete and direct overall military advantage anticipated** (a disproportionate attack).<sup>389</sup>

In each case it must be shown that the media professional who was attacked was entitled to protection under the Geneva Conventions and Additional Protocols and that the perpetrator was aware of this fact.<sup>390</sup> In addition, each of these prohibited forms of attack is only a war crime if the attack took place in the context of, and was associated with, an international or non-international armed conflict. The perpetrator must also be aware of factual circumstances that established the existence of an armed conflict.<sup>391</sup>

There have been no cases in any of the international criminal courts or tribunals where a person has been prosecuted for attacking a media professional under these rules.

#### *Prohibition of other forms of violence against media professionals*

Media professionals are also protected from other forms of violence which, if they occur during, and in association with, an armed conflict against someone who is protected by the Geneva Conventions or Additional Protocols, constitute war crimes. The perpetrator must be aware of both the armed conflict and the protection under IHL. The most relevant of these crimes are as follows:

- > **The prohibition of hostage taking**<sup>392</sup>
- > **The prohibition on torture**<sup>393</sup>
- > **The prohibition of other inhumane treatment**, including wilfully causing severe pain and suffering of a media professional,<sup>394</sup> humiliating, degrading or violating the dignity of a media professional,<sup>395</sup> and
- > **The prohibition of sexual violence and rape**,<sup>396</sup> including forcing a media professional into sexual slavery, enforced prostitution, forced pregnancy or sterilisation.<sup>397</sup>

There have been no cases in any of the international criminal courts or tribunals where a person has been prosecuted for attacking a media professional under these rules.

<sup>387</sup>Art 8(2)(a)(i) of the Rome Statute (wilful killing in international armed conflict) and Art 8(2)(c)(i) ('murder' in non-international armed conflict).

<sup>388</sup>Art 8(2)(b)(i) of the Rome Statute (in international armed conflict) and Art 8(2)(e)(i) (in non-international armed conflict).

<sup>389</sup>Art 8(2)(b)(iv) of the Rome Statute. Although the ICC Statute only lists this crime in relation to international armed conflict, the principle of proportionality (that this crime embodies) is so fundamental to IHL that it is likely to form part of the customary international criminal law and, therefore, apply to non-international armed conflict: See discussion of this in R. Cryer, H. Friman, D. Robinson and E. Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 2nd Edition, (Cambridge University Press, 2010), p. 298.

<sup>390</sup>International Criminal Court, *Elements of Crimes* (ICC Elements of Crimes): Art 8 War Crimes.

<sup>391</sup>See generally, ICC Elements of Crimes (n 244).

<sup>392</sup>Art 8(2)(a)(viii) of the Rome Statute (in international armed conflict) and Art 8(2)(c)(iii) of the Rome Statute (in non-international armed conflict.)

<sup>393</sup>Art 8(2)(a)(ii) of the Rome Statute (in international armed conflict) and Art 8(2)(c)(i) of the Rome Statute (in non-international armed conflict).

<sup>394</sup>Articles 8(2)(a)(ii) and 8(2)(a)(iii) of the Rome Statute (international armed conflict) and Art 8(2)(c)(i) of the Rome Statute (non-international armed conflict). See also ICC Elements of Crimes (n 253): Art 8 War Crimes.

<sup>395</sup>Art 8(2)(b)(xxi) of the Rome Statute (international armed conflict) and Art 8(2)(c)(ii) of the Rome Statute (non-international armed conflict). See also ICC Elements of Crimes (n 244): Art 8 War Crimes.

<sup>396</sup>Art 8(2)(b)(xxii) of the Rome Statute (international armed conflict) and Art 8(2)(e)(vi) of the Rome Statute (non-international armed conflict).

<sup>397</sup>See ICC Elements of Crimes (n 244): Art 8 War Crimes.

## Protection from giving evidence in international courts and tribunals

Media professionals in armed conflict can often be important or sole witnesses to events, including war crimes. **Sometimes media professionals can be called to appear before an international court or tribunal to give evidence of what they saw or heard during a conflict.**

**Unless the rules of the court or tribunal create an exception, if a media professional does not attend to give evidence they may be in contempt of court – this means that they may be prosecuted by the court for failing to obey its rules.** Contempt is discussed in further detail in Chapter 3.

Some international criminal courts and tribunals have rules that protect media professionals who do not want to give evidence at a trial: this is called a ‘privilege’. This section considers the issue of ‘privilege’ for media professionals in some important international criminal courts and tribunals.

### *The International Criminal Tribunal for the Former Yugoslavia (ICTY)*

The ICTY is the first and, to date, only, international court to recognise a privilege for some media professionals.<sup>398</sup> The case that established this rule of privilege was brought by Mr Jonathan Randal who, at the time, worked for the *Washington Post*. Mr Randal was called to give evidence before the ICTY about an interview he conducted during the conflict in the Former Yugoslavia with Mr Radoslav Brdjanin, who was on trial for war crimes.

The ICTY held that Mr Randal did not have to give evidence before the Court and that, in general, **media professionals<sup>399</sup> do not have to give evidence at the ICTY unless it can be shown that:**

- > **the evidence sought from the media professional is of ‘direct and important value’ to a core issue in a case before the court, and**
- > **that the evidence sought from the media professional cannot be obtained elsewhere.**

This means that if a media professional is the only source of information that is direct and important to a case, they may be forced to give evidence at the ICTY.

### *The International Criminal Court (ICC)*

The International Criminal Court (ICC) has not yet addressed the possibility of recognising a similar express privilege for media professionals in its proceedings. However, two rules of the ICC may protect media professionals from having to answer questions in court about confidential information.

<sup>398</sup>*Prosecutor v Brdjanin and Talić* (IT-99-36-AR73.9), Decision on Interlocutory Appeal, Appeals Chamber Judgment, ICTY, 11 December 2002 (*The Randal Case*).

<sup>399</sup>The phrase used by the ICTY is ‘war correspondent’ but it is defined to mean anyone reporting from (or investigating with a view to report from) an armed conflict. It is not clear, however, whether this includes technical assistants and translators etc: *The Randal Case*.

The rules of the ICC protect **communications that are made in the context of a professional or confidential relationship where such communications give rise to a reasonable expectation of confidentiality or privacy.**<sup>400</sup> This rule could be used to protect certain aspects of the work of media professionals – including the identity of their confidential sources and the nature of some information given by them.<sup>401</sup>

Similarly, the rules of the ICC also protect information that has been provided to the Prosecutor of the ICC on a confidential basis, provided such information is used only to generate further evidence (i.e. a lead or a tip) and is not actual evidence in proceedings.<sup>402</sup> The application of this rule to media professionals has not yet been tested.<sup>403</sup> However, **it may be that where a media professional provides information about an international crime to the Prosecutor on a confidential basis, this information, including the identity of sources, could be protected by this rule.**

**These rules do not provide protection to media professionals from being called to give evidence (as the ICTY privilege does); they merely protect a media professional from having to answer particular questions about confidential information, including their sources.**

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<sup>400</sup>Rule 73(2)(a) and (b) of the Rules of Procedure and Evidence of the ICC, ICC-ASP/1/3 (ICC Rules of Procedure and Evidence).

<sup>401</sup>For discussion of this possibility see S. Powles, 'To Testify or Not To Testify – Privilege from Testimony at the Ad Hoc Tribunals: The Randal Decision', (2003) *Leiden Journal of International Law*, Vol. 16, Issue 3, 511, pp. 523-524.

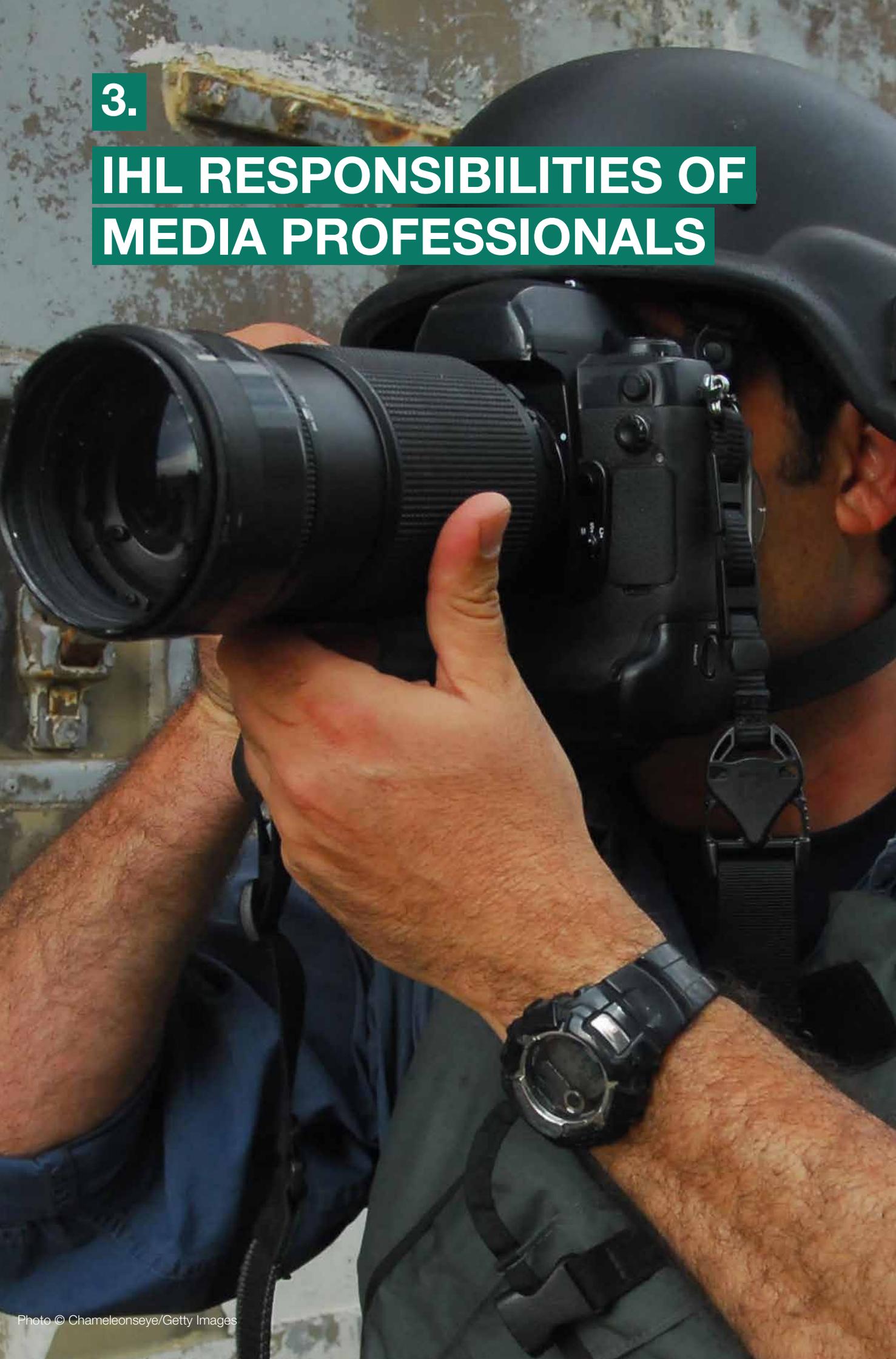
<sup>402</sup>Rule 82 of the ICC Rules of Procedure and Evidence and Art 54(3)(e) of the Rome Statute.

<sup>403</sup>Although a similar rule under Rule 70(B) of the Rules of Evidence and Procedure of the Special Court of Sierra Leone (SCSL) was held to apply to humanitarian workers and protected their confidential sources: *Prosecutor v Brima, Kamara, Kanu* (SCSL-2004-16-AR75), Appeals Chamber, Decision on Prosecution Appeal Against Decision on Oral Application for Witness TF1-150 to Testify Without being Compelled to Answer Questions on the Grounds of Confidentiality, SCSL, 26 May 2006 (AFRC Case).



3.

# IHL RESPONSIBILITIES OF MEDIA PROFESSIONALS



# Chapter 3:

## IHL Responsibilities of Media Professionals

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## Introduction to Chapter 3

Under international law media professionals not only benefit from protection, but also have obligations and responsibilities.<sup>404</sup> This is especially true under IHL: the rules and obligations of IHL apply to any person or party to a conflict who is in a position to violate them.<sup>405</sup> Parties to a conflict as well as individual persons can commit breaches of IHL and be subject to individual criminal responsibility for many of these breaches.<sup>406</sup>

Only individual responsibilities are discussed in this Chapter and, to a more limited extent, those of private actors, such as publishers and broadcasters that employ and supervise media professionals working in armed conflicts. State responsibility for violations of IHL and International Criminal Law is not discussed in this Handbook.

This Chapter briefly sets out how a person might be held responsible under both international and domestic law for any actions that violate IHL or international criminal law (ICL). This Chapter will then consider the content of specific responsibilities of media professionals in armed conflict.

The professional activities of media professionals in armed conflict give rise to a number of responsibilities under IHL. This Chapter will consider responsibilities arising for both media professionals and media organisations from the following:

- Gathering information, undertaking investigations, witnessing hostilities (including war crimes) and interviewing people, especially those in internment or detention
- Publishing and broadcasting material from situations of armed conflict, particularly that involving persons in internment or detention, and
- The use (and misuse) of the distinctive emblems, namely the red cross, red crescent and red crystal emblems. These distinctive emblems are protected by IHL and their use is strictly regulated by international and domestic law, including in the UK.

Media professionals and media organisations also have IHL responsibilities associated with the operational elements of their mission. Such responsibilities may arise where:

- Force is used in self-defence or in defence of a media organisation's assets during an armed conflict. This includes by security guards hired by media professionals
- Media professionals engage the assistance of local labour to report news and information from armed conflict, and
- Where private property is acquired, including facilities needed to broadcast or publish news, provide transport, and other logistical requirements.

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<sup>404</sup> Indeed, all individuals have obligations under international law, including the duty not to commit certain international crimes. See A. Clapham, *The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape and Issues Surrounding Engagement*, (Geneva Academy of International Humanitarian Law and Human Rights, 1 February 2010), p. 4.

<sup>405</sup> *Prosecutor v Musema* (ICTR-96-13-A), Trial Chamber Judgment, International Criminal Tribunal for Rwanda (ICTR), 27 January 2000, para 270.

<sup>406</sup> International Committee of the Red Cross (ICRC) *Brochure on Business and International Humanitarian Law (IHL): An Introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law*, (ICRC, 11 September 2006) (ICRC Brochure on Business and IHL), p. 11; E.C. Gillard, 'Business goes to war: private military/security companies', (2006), *International Review of the Red Cross*, Vol. 88, No. 863, 525 (Gillard: Business goes to war), pp. 541-542; C. Lehnardt, 'Individual Liability of Private Military Personnel under International Criminal Law', (2008) *The European Journal of International Law*, Vol. 19, No. 5, 1015 (Lehnardt: Individual Liability of PMP under ICL).

In addition to their IHL responsibilities, media professionals (and their editors/supervisors) may have responsibilities under ICL. The crime of direct and public incitement to genocide is given detailed consideration as it is highly relevant to the work of the media in armed conflict. Several media professionals have been convicted of this crime for their work in radio and in print during the 1994 Rwandan Genocide.<sup>407</sup>

This Chapter also examines the rules relating to contempt of court applicable in international criminal courts and tribunals. It identifies in what circumstances media professionals, or media organisations, can be found guilty of contempt of court when reporting on the prosecution of international crimes committed during armed conflict.

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<sup>407</sup>See *Prosecutor v Nahimana, Barayagwiza, and Ngese* (ICTR 99-52-T), Trial Chamber Judgment, ICTR, 3 December 2003 (*The Media Case*).

## 3.1 Mechanisms of Responsibility

### SUMMARY: Mechanisms of Responsibility

**All media professionals have a responsibility to comply with the rules of IHL.** Media professionals that violate any rule of IHL may be the subject of investigation and prosecution under the domestic laws of a State. The close relationship between IHL and ICL means it is also necessary to consider not only how media professionals are bound by IHL but also how they are bound by ICL.

Any **grave breaches** identified under the Geneva Conventions may be described as ‘war crimes’. ICL sets out additional conduct that amounts to **war crimes**, including violation of many rules of IHL that apply in international and non-international armed conflict. A media professional that commits a war crime can be held **individually criminally responsible** under ICL.

**Crimes against humanity** and **genocide** are also crimes under ICL although, unlike war crimes, they do not need to be committed in connection with an armed conflict. Media professionals can be held liable for the commission of these crimes, both within and outside situations of armed conflict.

Media professionals are directly responsible under international law for any international crimes that they **commit, aid or abet, induce, encourage, solicit or incite**. They can also be held liable for **attempting** to commit a crime or **ordering** someone else to commit a crime.

It is not just individual media professionals that may have responsibilities under IHL or ICL: their **editors and supervisors** (based at media organisations) may have responsibilities too. These can constitute **direct responsibilities** arising from their operational activities in an armed conflict. Editors/supervisors may also be **indirectly responsible** for the conduct of a media professional under the doctrine of ‘**superior responsibility**’.

Media professionals in armed conflicts abroad can, in some circumstances, also be found responsible for a **violation of the domestic criminal law** of their home State.

This section will set out the mechanisms through which media professionals can generally be held responsible under IHL and also under domestic law and ICL. It is important to do so before consideration is given to the substance and content of any specific responsibilities. Chapter 1 summarises the relationship between IHL and ICL.

## Individual Criminal Responsibility in Armed Conflict

	International law	Domestic law (UK)
Individual responsibility for violations of <b>international law</b> committed during armed conflict.	Individuals can be responsible under International Criminal Law (e.g. Rome Statute) for international crimes including: <ul style="list-style-type: none"> <li>&gt; Grave and serious breaches of the Geneva Conventions (war crimes)</li> <li>&gt; Genocide</li> <li>&gt; Crimes against humanity.</li> </ul>	Individuals can be responsible under UK law for international crimes, including: <ul style="list-style-type: none"> <li>&gt; grave breaches of the Geneva Conventions (<i>Geneva Conventions Act 1957</i>)</li> <li>&gt; serious breaches of IHL (war crimes), genocide and crimes against humanity (<i>International Criminal Court Act 2001</i>).</li> </ul>
Individual responsibility for violations of <b>domestic law</b> committed during armed conflict.	N/A	Individuals can be responsible for violations of UK criminal law committed abroad, during armed conflict where: <ul style="list-style-type: none"> <li>&gt; they are 'subject to service discipline' under the <i>Armed Forces Act 2006</i>, or</li> <li>&gt; they are UK citizens and have committed a serious crime, such as murder.</li> </ul>

### 3.1.1 General Responsibility to Comply with IHL

**IHL applies to all media professionals operating in armed conflict.** All entities whose activities are associated with an armed conflict, including States, non-State actors, and individuals, have a general responsibility to respect IHL.<sup>408</sup> The rules and obligations of IHL apply to all individuals who are in the territory in which there is an armed conflict.<sup>409</sup>

#### Responsibility under domestic law

State parties to the Geneva Conventions and Additional Protocol I have an obligation to suppress **any act that is a violation** of those treaties.<sup>410</sup> Similarly, States must investigate and prosecute individuals who commit grave breaches of the Geneva Conventions and, for those who are parties to it, Additional Protocol I. Media professionals that violate the rules of IHL may be the subject of investigation and prosecution under the domestic laws of a State.

<sup>408</sup> ICRC Brochure on Business and IHL (n 3), p. 11; Gillard: Business goes to war (n 3), pp. 541-542; see also Lehnardt: Individual Liability of PMP under ICL (n 3).

<sup>409</sup> L. Cameron, 'International Humanitarian Law and the Regulation of Private Military Companies', *Plenary Session 4 (Insecurity), Conference: Non-State Actors as Standard Setters: The Erosion of the Public-Private Divide*, (Basel Institute on Governance, Basel, Switzerland, 8-9 February 2007), p. 2; Gillard: Business goes to war (n 3), p. 541-542.

<sup>410</sup> See Art 49 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31 (First Geneva Convention); Art 50 of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85 (Second Geneva Convention); Art 129 of the Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135 (Third Geneva Convention); and Art 146 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287 (Fourth Geneva Convention) (together, the Geneva Conventions); and Art 85 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (Additional Protocol I).

In the UK, the Geneva Conventions Act 1957 makes it a crime under UK law to commit a grave breach of the Geneva Conventions. Under this Act, any person, including a media professional, regardless of their nationality or in which country the crime was committed, can be prosecuted under UK law in the UK court system for such violations of IHL. This is known as ‘universal jurisdiction’.

## Responsibility under international law

**In addition, any person (including a media professional) may have individual criminal responsibility under ICL** for serious violations of IHL (or any other international crime) they commit in international or non-international armed conflict, regardless of their status as civilians.<sup>411</sup> The specific content of IHL responsibilities (including those that constitute crimes under ICL) is discussed in the next section.

### 3.1.2 General Responsibility to comply with ICL

The responsibility to comply with ICL is, as with IHL, enforceable under both domestic and international law.

## Responsibility under domestic law

In the UK, the International Criminal Court Act 2001 (in Scotland, the International Criminal Court (Scotland) Act 2001) makes it a crime under UK law to commit war crimes (including serious violations of IHL), genocide, and crimes against humanity, as set out in the Rome Statute of the International Criminal Court (ICC).

Any person, regardless of nationality, can be prosecuted for such an international crime if it was committed in the territory of the UK.<sup>412</sup> Similarly, a UK national or resident, or persons subject to service jurisdiction (including the armed forces), may be prosecuted in UK courts for committing such a crime abroad (including in a situation of armed conflict).<sup>413</sup> As civilians, media professionals accompanying the UK armed forces may be ‘persons subject to service jurisdiction’<sup>414</sup> if they have been formally designated as such a person by the Ministry of Defence.<sup>415</sup>

## Responsibility under international law

Under international law, an individual, including a media professional, may be prosecuted for violations of ICL where an international court or tribunal has jurisdiction to do so. The jurisdiction of courts and tribunals is set out in their statute, for example, the Rome Statute of the ICC. The jurisdiction of the ICC is discussed in further detail in Chapter 1.

### 3.1.3 International Crimes

This section will discuss the substance of international crimes (including serious violations of IHL), which may be prosecuted in either domestic or international courts. Section 3.2 will set out some specific rules of IHL that create responsibilities for media professionals, not all of which constitute crimes under ICL.

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<sup>411</sup> See Art 49 of the First Geneva Convention; Art 50 of the Second Geneva Convention; Art 129 of the Third Geneva Convention; Art 146 of the Fourth Geneva Convention; Art 85 of Additional Protocol I: See also Art 8 of the Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90 (Rome Statute) and L. Cameron, ‘Private military companies and their status under international humanitarian law’, (2006) *International Review of the Red Cross*, Vol. 88, No. 863, 573, p. 594.

<sup>412</sup> Section 51(2)(a) of the ICC Act 2001.

<sup>413</sup> Section 51(2)(b) of the ICC Act 2001.

<sup>414</sup> Section 67: Meaning a ‘person subject to service discipline’ in accordance with the Armed Forces Act 2006 (UK) considered below.

<sup>415</sup> See para 25 of Ministry of Defence, *Green Book*, Version 8, 13 January 2013 (MoD Green Book).

## Grave breaches of the Geneva Conventions and other war crimes

Any grave breach of the Geneva Conventions or Additional Protocol I in an international armed conflict is a war crime under ICL.<sup>416</sup> Other violations of IHL in an international or non-international armed conflict are also war crimes where they are set out in the statutes and rules of international criminal courts and tribunals or in customary international law. **Any media professional who commits a war crime can be held individually criminally responsible for that crime.**

The **Rome Statute of the ICC lists war crimes that are prohibited in both international<sup>417</sup> and non-international armed conflict.**<sup>418</sup> This includes the following acts (among others), if committed in connection with a conflict:

- > Intentionally directing attacks against civilians, not taking a direct part in hostilities, or against civilian objects<sup>419</sup>
- > Wilful killing<sup>420</sup>
- > Torture or inhumane treatment<sup>421</sup>
- > Taking hostages<sup>422</sup>
- > Pillaging a town<sup>423</sup>
- > Rape and other sexual crimes<sup>424</sup>
- > Conscripting and using children under 15 as soldiers.<sup>425</sup>

**All States are required to prosecute war crimes.**<sup>426</sup> **In addition, international courts and tribunals have been set up with the power to prosecute war crimes in particular circumstances.**<sup>427</sup>

## Other international crimes

War crimes are not the only international crimes. The Rome Statute, and other sources of ICL, establish two other types of crimes that need not be committed in armed conflict, although they often are. **As with war crimes, any individual, including media professionals, may be held individually criminally responsible if they commit these acts.**

## Genocide

The commission of genocide is an international crime.<sup>428</sup> It consists of acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.

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<sup>416</sup> See Art 49 of the First Geneva Convention; Art 50 of the Second Geneva Convention; Art 129 of the Third Geneva Convention; Art 146 of the Fourth Geneva Convention; Art 85 of Additional Protocol I.

<sup>417</sup> Art 8(2)(b) of the Rome Statute lists crimes in international armed conflict.

<sup>418</sup> Arts 8(2)(c) and (e) of the Rome Statute list crimes in non-international armed conflict.

<sup>419</sup> See Arts 2(b)(i) and (ii); 2(e)(i) and (ii) of the Rome Statute.

<sup>420</sup> See Arts 2(a)(i); 2(b)(xi); 2(c)(i) of the Rome Statute.

<sup>421</sup> See Arts 2(a)(iii); 2(b)(xxi); 2(c)(ii) of the Rome Statute.

<sup>422</sup> See Arts 2(a)(viii); 2(c)(iii) of the Rome Statute.

<sup>423</sup> See Arts 2(b)(xiii) and (xvi); 2(e)(v) of the Rome Statute.

<sup>424</sup> See Arts 2(b)(xxii); 2(e)(vi) of the Rome Statute.

<sup>425</sup> See Arts 2(b)(xxvi); 2(e)(vi) of the Rome Statute.

<sup>426</sup> The Preamble to the Rome Statute; Art 49 of the First Geneva Convention; Art 50 of the Second Geneva Convention; Art 129 of the Third Geneva Convention; Art 146 of the Fourth Geneva Convention. This has also been identified by the ICRC as a rule of customary law; ICRC Study on customary international humanitarian law (ICRC CIHL Study), Rule 158, available at: <https://www.icrc.org/customary-ihl/eng/docs/home>.

<sup>427</sup> For further discussion of this see 'prosecution of international crimes' below.

<sup>428</sup> Art 1 of the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS, 277, (Genocide Convention); Art 6 of the Rome Statute.

This includes acts such as killing or causing serious bodily or mental harm to members of the group; imposing conditions of living on the group that are calculated to bring about their physical destruction; preventing births within the group; and forcibly transferring children from one group to another.<sup>429</sup> Directly and publicly inciting others to commit genocide is also a crime, even if no act of genocide takes place.<sup>430</sup>

### *Crimes against humanity*

Crimes against humanity are international crimes. They cover many different types of crimes which are committed as part of a widespread and systematic attack against the civilian population. Crimes against humanity include acts such as killing, rape, torture, persecution of a particular group, and enslavement (among others).<sup>431</sup>

**Media professionals that commit genocide or crimes against humanity can be held individually criminally responsible.** For example, a number of media professionals were found guilty of incitement to genocide during the genocide in Rwanda in 1994 for their involvement in radio broadcasts and newspaper publications in that country.<sup>432</sup> This case is discussed in more detail below.

### **Responsibility for commission of crimes by media professionals**

**Media professionals are directly responsible under international law for any international crimes that they commit, aid or abet, induce, encourage, solicit or incite,<sup>433</sup> including grave breaches of the Geneva Conventions.**

It is possible for media professionals to be responsible for crimes they order someone else to commit or crimes that are committed by a group.<sup>434</sup> Individual criminal responsibility accrues regardless of whether a person acts in a private capacity or on behalf of a State.<sup>435</sup>

### **Responsibility of editors and supervisors**

**It is not just individual media professionals that may have responsibilities under IHL or ICL: their editors and supervisors (based at media organisations) may have responsibilities too.** They may have direct responsibilities under IHL and ICL where they are engaging in activities in a conflict zone (for example, purchasing facilities or other equipment or hiring stringers and fixers).<sup>436</sup>

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<sup>429</sup> See Art 6 of the Rome Statute.

<sup>430</sup> See for example Art 25(3)(e) of the Rome Statute; and *The Media Case*.

<sup>431</sup> See Art 7 of the Rome Statute.

<sup>432</sup> See *The Media Case*.

<sup>433</sup> See R. Cryer, H. Friman, D. Robinson and E. Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 2nd Edition, (Cambridge University Press, 2010) (Cryer et al: Introduction to ICL) Chapter 15. See also Art 25 of the Rome Statute.

<sup>434</sup> Different international tribunals have different ways of assessing liability for crimes, including those committed by a group. For more on the scope of individual criminal responsibility see for example Art 7(1) of the Statute of the International Criminal Tribunal for the former Yugoslavia, 25 May 1993 (ICTY Statute), Art 6(1) of the Statute of the International Criminal Tribunal for Rwanda, 8 November 1994 (ICTR Statute) and Art 25(3) of the Rome Statute. See A. Cassese, 'International Criminal Law' in M. D. Evans, *International Law*, 2nd Edition, (Oxford University Press, 2006), p. 733.

<sup>435</sup> For the irrelevance of official capacity, see for example, Art 27 of the Rome Statute.

<sup>436</sup> The *direct* responsibilities of the employers/superiors of media professionals operate in the same way as the direct responsibilities of media professionals themselves, and is the subject of most of this Chapter.

**It is also possible that editors and supervisors might have indirect responsibilities (as a third person) for the conduct of media professionals that are their employees/ subordinates in a conflict zone** – this could be the case even if the broadcasters or publishers are not based in the conflict zone.<sup>437</sup> This type of responsibility is called **‘superior’ responsibility and is central to the enforcement of the rules of IHL in an armed conflict.**

The principle of ‘superior responsibility’ of editors or supervisors for the activities of media professionals that violate IHL or ICL is addressed in this section.<sup>438</sup> The particular issue of responsibility arising from the use of external security services to protect media professionals or media facilities during an armed conflict is discussed in further detail, below.

### *Superior responsibility*

**Superiors can be held responsible for serious violations of IHL committed by their subordinates even where they have not ordered such crimes to be committed.**<sup>439</sup> This is possible even when both the superior and subordinates are civilians (for example editors and media professionals).<sup>440</sup> This responsibility arises if all three of the below elements have been met: <sup>441</sup>

- > There is a **superior-subordinate relationship which is determined by the superior having ‘effective control’** over the subordinate <sup>442</sup>
- > The **superior knew or ‘consciously disregarded’** the fact that a subordinate was committing, had committed, or intended to commit a war crime,<sup>443</sup> and
- > The **superior failed to take steps within their power** to prevent, suppress, or report to authorities such a crime.<sup>444</sup>

**It is possible for an editor or supervisor to have a relationship of ‘effective control’ over a media professional – an important element of superior responsibility.** In the *Media Case*, discussed below, a senior media executive of a radio station was convicted of direct and public incitement to genocide as a result of broadcasts issued by reporters under his effective control.<sup>445</sup>

<sup>437</sup> There is some academic opinion to support this possibility although little practice exists. see Gillard: Business goes to war (n 3), pp. 542, 545; L. Doswald Beck, ‘Private Military Companies under International Humanitarian Law’ in S. Chesterman and C. Lehnardt (eds) *From Mercenaries to Market: The Rise and Regulation of Private Military Companies*, (Oxford University Press, 2007), pp. 134-136 (Doswald Beck: PMCs under IHL).

<sup>438</sup> For further discussion see Gillard: Business goes to war (n 3), pp. 542, 545; Doswald Beck: PMCs under IHL (n 34), p. 134-136.

<sup>439</sup> Art 86(2) of Additional Protocol I. See also the concept of superior responsibility in Art 7(3) of the ICTY Statute; Art 6(3) of the ICTR Statute; Art 28 of the Rome Statute.

<sup>440</sup> This is generally accepted provided a relationship of ‘effective control’ can be established. This is harder outside of the military command structure. See Art 28 of the Rome Statute and further Doswald-Beck: PMCs under IHL (n 34), p. 136; Gillard: Business goes to war (n 3), p. 545.

<sup>441</sup> As set out in *Mucić et al.* (IT-96-21-T), Trial Chamber, Judgment, International Criminal Tribunal for the former Yugoslavia (ICTY), 16 November 1998 (*Čelebići Camp Case*), para 346. Please note the Rome Statute has taken a different approach to the ‘knowledge’ element. See below.

<sup>442</sup> *Čelebići Camp Case* para 378. See also Lehnardt: Individual Liability of PMP under ICL (n 3), p. 1025; Gillard: Business goes to war (n 3), pp. 542, 545.

<sup>443</sup> The test is set out in Art 28 of the Rome Statute. This test is different to that imposed on superiors in military organizations under the Rome Statute and also the test (for civilians and military commanders) used by the ICTY and ICTR (as set out in *Čelebići Camp Case* paras 387-393): that test requires that a superior ‘knew or had reason to know’ of particular criminal conduct of their subordinate. This places a greater responsibility on the superior to stay informed of the conduct of their subordinate. See also Lehnardt: Individual Liability of PMP under ICL (n 3) p. 1028.

<sup>444</sup> *Čelebići Camp Case* para 395. See also Gillard: Business goes to war (n 3), pp. 545-546. ‘Punishing’ a crime includes, for example, investigating its commission and reporting it to the relevant State authority. Merely firing someone after a crime has been committed is not enough: Lehnardt: Individual Liability of PMP under ICL (n 3), p. 1028.

<sup>445</sup> See for example *Nahimana, Barayagwiza, and Ngese v Prosecutor* (ICTR 99-52-A), Appeals Chamber Judgment, ICTR, 28 November 2007 (*The Media Case AC*), para 822 regarding defendant Ferdinand Nahimana.

**Whether or not an editor or supervisor and a media professional have such a relationship is to be considered separately in each case.<sup>446</sup> A relationship of ‘effective control’ means that a superior must have the actual ability (in fact) to prevent or punish a subordinate’s criminal conduct.<sup>447</sup> This may be evidenced, for example:**

- > By the editor/superior having the power to remove a media professional from their position.<sup>448</sup>
- > By demonstrating that an editor/superior had control over the editorial policy and financial policy of the media organisation at which a media professional works.<sup>449</sup>
- > By demonstrated ability of the editor/superior to control the professional actions of a media professional, for example, by successfully requiring them to withdraw or cease a particular publication or broadcast. This is especially relevant where it is the content of the publication or broadcast that is criminal because, for example, it constitutes a direct and public incitement to genocide.<sup>450</sup> This crime is discussed below.

Importantly, the individual criminal liability of a media professional for the commission of a war crime is not affected by any additional superior responsibility of a superior for that crime. Both types of individual criminal responsibility can exist simultaneously.

### *Following orders*

It is not a defence to criminal liability under ICL that a media professional was following the orders of their superior when they committed a crime. **There is a limited defence of ‘superior orders’, however, it only applies where the subordinate (in this case a media professional) is under a legal obligation to follow the orders of their superior<sup>451</sup> and that they did not know the order was unlawful, and the order was not ‘manifestly unlawful’.**<sup>452</sup>

This means that if a media professional knew their conduct was a war crime, or should have known because of the ‘manifest unlawfulness’ of their criminal act, then the fact that they were doing what they were told does not relieve them of their individual criminal responsibility.<sup>453</sup>

## **3.1.4 Domestic Crimes committed in Armed Conflict**

During armed conflicts media professionals may have responsibilities under the domestic criminal law of the State in which the armed conflict is taking place, and also under the domestic criminal law of their home State (even though they are working abroad).

<sup>446</sup> *Čelebići Camp Case*, para 370. See also Lehnardt: Individual Liability of PMP under ICL (n 3), p. 1025-1026; Gillard: Business goes to war (n 3), p. 545; Doswald-Beck: PMCs under IHL (n 34), pp. 135-136.

<sup>447</sup> This is the key requirement: See *Čelebići Camp Case*, paras 354, 377-378; *Prosecutor v Kordić et al* (IT-95-14/2-T), Trial Chamber Judgment, ICTY, 26 February 2001 (*Kordić Case*), paras 414-415; *Prosecutor v Semanza* (ICTR-97-20-T), Trial Chamber Judgment, ICTR, 15 May 2003, para 402.

<sup>448</sup> *The Media Case AC*, para 834. Being able to remove them from their position might not, in itself, be enough to prove such a relationship if the person is not the direct supervisor of the subordinate (i.e. rather they are the director of the company for example): Lehnardt: Individual Liability of PMP under ICL (n 3), p. 1027.

<sup>449</sup> *The Media Case AC*, para 834.

<sup>450</sup> This was evidence of a relationship of effective control in the *The Media Case AC* where Mr Ferdinand Nahimana, the owner/editor of a radio station (RTL) was found guilty of direct and public incitement to genocide and persecution in relation to broadcasts made by reporters at the radio station during the Rwandan Genocide in 1994. It was found that Mr Nahimana had control over the broadcasts (evidenced by having stopped some in the past), editorial content of reporters’ shows and the ability to terminate employment: *The Media Case AC* para 822, 834.

<sup>451</sup> Art 33(1)(a) of the Rome Statute.

<sup>452</sup> Art 33(1)(b) and (c) of the Rome Statute.

<sup>453</sup> Art 33(1)(c) of the Rome Statute.

For example, media professionals who are accompanying the UK armed forces abroad, and are ‘subject to service discipline’, can be prosecuted in UK courts for conduct that is a violation of UK domestic criminal law.<sup>454</sup> In other words, the criminal law of the UK applies to some media professionals even when they are reporting from an armed conflict abroad. A media professional accompanying the UK armed forces may be a ‘person subject to service jurisdiction’ if they have been formally designated as such a person by the Ministry of Defence.<sup>455</sup> Media professionals may also request this status from the UK armed forces.<sup>456</sup>

This responsibility is for domestic crimes committed abroad and is different to criminal responsibility in the UK for international crimes committed abroad, although both can be prosecuted in the UK court system.

### **3.2 IHL Responsibilities Connected to the Media’s Professional Activities**

This section considers the content of specific responsibilities under IHL (as opposed to the mechanism that hold individuals responsible). Unlike the specific international crimes identified above, responsibilities under IHL do not always amount to international crimes. It is important to note, however, that media professionals in armed conflict are under a general obligation to respect the rules of IHL and, as set out above, may be held liable for any breach of those rules through international and domestic legal mechanisms.

IHL does not contain specific rules or responsibilities applicable to media professionals as such. However, some of the general rules of IHL, as set out in this section, have a special impact on the work of media professionals. These include responsibilities that arise under IHL relating to the gathering of information in an armed conflict; the publication and broadcast of information from and about an armed conflict; and the use and depiction of distinctive emblems, including the red cross, red crescent and red crystal emblems.

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<sup>454</sup> Section 42 of the Armed Forces Act 2006.

<sup>455</sup> See para 25 of the MoD Green Book.

<sup>456</sup> See para 25 of the MoD Green Book.

### 3.2.1 Gathering Information

#### **SUMMARY: IHL Responsibilities Connected to Gathering Information in an Armed Conflict**

Media professionals have responsibilities under IHL when gathering information in an armed conflict. In particular, they have responsibilities that apply to them when they **undertake investigations and witness events; when they interview people; and when they photograph or film people**, especially when those people are in detention or internment.

Investigating and witnessing events (including war crimes)

- > If a media professional gathers particular information for a party to a conflict and passes it on to that party they may be **engaging in espionage**, and therefore directly participating in hostilities.
- > Similarly, a media professional **must not provide direct assistance to parties to a conflict**. This includes allowing parties to use their communications equipment for military purposes and passing on messages between members of a party. Such conduct may amount to direct participation in hostilities.
- > Media professionals who **witness war crimes** are under **no IHL obligation to report the crime**, however, they may wish to for a number of reasons. Should they wish to report a crime they may do so to a military commander; local police or relevant officials of the media professional's State; investigators of a relevant international court or tribunal; or a representative of the ICRC (who may be able to assist victims of that crime but will not be able to investigate or prosecute it) or another relevant organisation.
- > If a media professional is **called before a court to give evidence of a crime they have witnessed**, and fails to attend or answer questions, they may be guilty of **contempt of court**. The rules that provide an exception to this are discussed in Chapter 2.
- > Media professionals have a **responsibility not to aid and abet the commission of an international crime**. This means that they must not provide the person who committed a crime with assistance or support before, during or after the crime is committed.

Interviewing and photographing/filming people

- > Media professionals have the responsibility to ensure that their interviewing or photographing or filming of particular persons, especially those in internment or detention, **is not part of the torture or other ill treatment** of those people.
- > Media professionals must ensure that interviewing or photographing/filming a person **respects the dignity and honour** of that person.

The primary role of any media professional in armed conflict is the gathering of news and information about the conflict. This can involve witnessing events and undertaking investigations, conducting interviews with people, some of whom might be in detention or internment, and taking photographs or film. It is important for media professionals to understand what IHL responsibilities they may have in relation to each of these elements of their professional activities.

## **Undertaking investigations and witnessing events**

### *Investigations and espionage*

Media professionals have a responsibility not to participate directly in hostilities. As Chapter 2 sets out media professionals are protected as civilians from direct and deliberate attack unless, and for such time as, they take a direct part in hostilities. Crucially, the ordinary work of the media in armed conflict, including the gathering and recording of information and speaking to witnesses, is not a direct participation in hostilities. **Media professionals do not lose their immunity from attack as the result of their ordinary professional work.**

However, **if a media professional gathers information on behalf of a party to an armed conflict and passes important military information on to them (including tactical or logistical information), then they may be engaging in espionage and directly participating in hostilities.** Media professionals will lose protection from attack for the duration of this participation and also are liable to criminal prosecution under domestic law for their involvement.

### *Witnessing hostilities*

Witnessing events is a vital part of the work of media professionals in armed conflict. **It is important that media professionals remain as witnesses to, and not participants in, hostilities.** Media professionals must not directly engage in hostilities by, for example, shooting at or attacking armed forces or members of a non-State armed group. Even action taken in self-defence (discussed in Chapter 2), although permitted by IHL, should be undertaken with extreme caution as it runs the risk of being mistaken for direct participation in hostilities and may result in a direct and deliberate attack against a media professional.

Similarly, providing (non-medical) direct assistance to parties to an armed conflict may constitute direct participation in hostilities. This is discussed in detail in Chapter 2, however, some points are worth reiterating here. **Media professionals should not allow parties to a conflict to use their communications equipment for a military purpose nor should they pass on messages between members of a party to a conflict. Such conduct may amount to direct participation in hostilities and may cause a media professional to lose their civilian immunity from attack.**

### *Witnessing war crimes*

Bearing witness to hostilities as they unfold can mean that sometimes media professionals may see and experience extremely disturbing situations, including the commission of war crimes.

**While regrettable, not every death of an unarmed civilian in armed conflict constitutes a war crime. Only those civilian deaths that are the result of a serious violation of IHL<sup>457</sup> constitute war crimes. IHL places no obligation on civilians, including media professionals, who witness war crimes to report that crime.** However, many media professionals may nevertheless want to report the crime for a number of reasons, including the following:

- > Reporting a war crime is an important part of ensuring that those who committed the crime are investigated and, where appropriate, punished for their conduct
- > Often violations of IHL go undetected and reporting a war crime helps to reduce impunity for these violations, and
- > Many media professionals feel that it is their professional duty to bring such events to the attention of the public and the appropriate authorities.

**Should a media professional witness a war crime, or any other violation of IHL, and wish to report it, there are a number of options:**

- > Reporting the violation to a **military commander**. Parties to the Geneva Conventions and Additional Protocol I have an obligation to search for persons alleged to have committed a grave breach of these treaties and to take “measures necessary” to suppress any act that is a violation of them.<sup>458</sup> States must also investigate and prosecute alleged war crimes committed by their nationals, their armed forces, or on their territory. The UK armed forces are also obliged to report particular types of offences (such as murder and other serious offences which are prohibited under UK law) committed by members of the military and those under its discipline to the Service Police;<sup>459</sup> and to investigate any deaths that occur at the hands of a person acting on behalf of the UK (where there is jurisdiction to do so).<sup>460</sup>
- > Reporting the violation to the **local police or the police of the media professional’s State**. In the UK both the civilian and military justice systems have jurisdiction over war crimes.<sup>461</sup>
- > Reporting the war crime to the **investigators of any international criminal court or tribunal that may be convened to investigate the armed conflict, or to any investigator acting on behalf of the ICC**. However, any court, including the ICC, must have ‘jurisdiction’ over a crime before it can investigate it. See Chapter 1 for further discussion about the ICC’s jurisdiction.
- > Reporting the violation to **representatives of the ICRC** present in the conflict area. **While they have no power to investigate the crime or arrest any person they may be able to provide some assistance to the victims, where necessary.** The ICRC is not able to investigate crimes nor will they make a public statement about the crime, however, they will make their own determination as to whether they are able to engage in discussions with the party to the armed conflict alleged to have committed the crime, in order to encourage adherence to IHL. Other assisting organisations or NGOs in the area may also be able to provide assistance.

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<sup>457</sup> As set out in Art 8 of the Rome Statute, for example.

<sup>458</sup> See Art 49 of the First Geneva Convention; Art 50 of the Second Geneva Convention; Art 129 of the Third Geneva Convention; and Art 146 of the Fourth Geneva Convention; and Art 85 of Additional Protocol I. This has also been identified by the ICRC as a rule of customary law; ICRC CIHL Study, Rule 158.

<sup>459</sup> See “Schedule 2 Offences” and section 113 of the Armed Forces Act 2006, as amended by the Armed Forces Act 2011.

<sup>460</sup> See *Al Skeini and Others v United Kingdom* (55721/07), Grand Chamber Judgment, European Court of Human Rights (ECtHR), 7 July 2011.

<sup>461</sup> Under the International Criminal Court Act 2001, and the International Criminal Court (Scotland) Act 2011, both the civilian and military justice systems in the UK have jurisdiction over alleged war crimes.

**Media professionals who have witnessed war crimes may be called to give evidence before an international court or tribunal. Failing to give evidence when called to do so may be contempt of court.** This is discussed below. The rules of privilege (which may provide an exception to a media professional from having to attend a court or answer particular questions) are discussed in Chapter 2.

**Media professionals have a responsibility under ICL not to aid and abet the commission of international crimes, including war crimes, prior to, during or after the criminal act.**<sup>462</sup>Aiding and abetting is the deliberate provision of assistance or encouragement to persons who commit a crime, with the knowledge of the intention to commit that crime.<sup>463</sup> Aiding and abetting is discussed below in relation to the use of words and speech. However, it can also include providing such assistance as lending a person a weapon to commit a crime;<sup>464</sup> allowing other equipment or resources to be used for the commission of a crime;<sup>465</sup> standing by and preventing the escape of victims;<sup>466</sup> and assisting a person to escape after the commission of a crime. **Media professionals that aid or abet another person in the commission of an international crime can be held individually criminally responsible for providing this assistance.**

### Interviewing people

**IHL places no specific restrictions on interviewing witnesses to or participants in hostilities. However, media professionals have a responsibility to ensure that they respect the dignity and honour of those persons that they are interviewing.**<sup>467</sup> This includes ensuring that their questioning of persons does not amount to participation in torture<sup>468</sup> or other ill treatment, including humiliating, inhuman and degrading treatment that may cause a significant level of mental or physical suffering or pain.<sup>469</sup> This is particularly relevant where a person is held in internment or detention. This section considers the IHL responsibilities relating to conducting interviews and asking questions. The responsibilities connected to the publication and broadcast of this information are set out in the next section.

Media professionals that interview persons in detention or internment may not always be aware of the circumstances and treatment of that person by the detaining authorities. Media professionals must, therefore, exercise great caution in ensuring that their questioning or interviewing of any person is consistent with and protects their dignity. **In particular, media professionals should seek to verify that the person providing the interview is doing so under their own free will and not as the result of any undue pressure or ill treatment.** Publication of information about persons held in detention and internment is discussed in the next section.

<sup>462</sup> See *Prosecutor v Tadić* (IT-94-1-A), Appeals Chamber Judgment, ICTY, 15 July 1999 (*Tadić Case AC*), para 229; *Prosecutor v Milutinović et al.* (IT-05-87-T), Trial Chamber Judgment, Vol. 1 of 4, ICTY, 26 February 2009, para 91.

<sup>463</sup> See Art 25(3)(c) of Rome Statute and *Tadić Case AC*, para 229. The *Tadić Case*'s formulation also requires that the assistance provided substantially contributed to the commission of the crime. The International Criminal Court (ICC) does not contain this additional requirement, however, in effect, the two formulations set out the same type of liability: Cryer et al: Introduction to ICL (n 30), pp. 376-377.

<sup>464</sup> *The Prosecutor v Ntakirutimana and Ntakirutimana* (ICTR-96-10-A and ICTR-96-17-A), Appeals Chamber Judgment, ICTR, 13 December 2004, para 530.

<sup>465</sup> *Prosecutor v Krstić* (IT-98-33-A), Appeals Chamber, Judgment, ICTY, 19 April 2004, para 137.

<sup>466</sup> *Prosecutor v Vasiljević* (IT-98-32-A), Appeals Chamber, Judgment, ICTY, 25 February 2004, para 134.

<sup>467</sup> This general obligation can be found in Common Art 3 of the Geneva Conventions; Art 75 of Additional Protocol I; Arts 4 and 5 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609 (Additional Protocol II). This has also been identified by the ICRC as a rule of customary law; ICRC CIHL Study, Rules 87 and 90. See also specific obligations set out in Art 13 of the Third Geneva Convention and Art 27 of the Fourth Geneva Convention.

<sup>468</sup> Art 75 of Additional Protocol I; Common Art 3 of the Geneva Conventions; Art 4 of Additional Protocol II. This has also been identified by the ICRC as a rule of customary law, see ICRC CIHL Study, Rule 90.

<sup>469</sup> Art 75(b) of Additional Protocol I; Art 4 (2)(a) and (e) of Additional Protocol II; Common Art 3(1)(c) of the Geneva Conventions. This has also been identified by the ICRC as a rule of customary law; ICRC CIHL Study, Rule 90.

The UK armed forces impose restrictions on media professionals that are accredited by them (whether they are war correspondents – as recognised under IHL – or not). These include restrictions on interviews with and publication of information about persons who are prone to capture (including military personnel).<sup>470</sup> Similarly, the **UK armed forces will not permit the media to interview POWs in their hands.**<sup>471</sup> In any event, even where media professionals are able to interview a POW, POWs are only required to provide their name, rank, date of birth, and serial number.<sup>472</sup> They cannot be compelled to provide additional information if they choose not to.

### **Taking photographs or film**

The same responsibilities apply to the taking of photographs or film by **media professionals.** **In particular, media professionals should ensure that the act of taking the image of a person, in particular a person in detention or internment, is not part of any form of torture, humiliating or degrading treatment of that person.** For example, if an internee or person in detention is being paraded in front of the press, forced to dress up in their enemy's uniform, or has clearly been subjected to abusive treatment, the taking of images of this person may contribute to their humiliation or degradation.

**Of particular relevance is the obligation to protect the honour of a person in the hands of the enemy, including their religious convictions, practices, manners and customs.**<sup>473</sup> **Media professionals have the responsibility to ensure that the taking of images of a person does not contravene this protection.** For example, photographing a person who has been forced to remove a religious garment, such as a hijab (head scarf worn by some Muslim women) or Dastar (Sikh turban) may not only constitute humiliating treatment but in addition may constitute a violation of the protection of a person's religion and culture.

**The UK armed forces do not permit the media to engage in close-up photography of POWs in their hands.**<sup>474</sup>

The responsibilities connected to the publication or broadcast of images are discussed in the next section.

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<sup>470</sup> MoD, Green Book, pp 17-18.

<sup>471</sup> MoD, Green Book, p.18.

<sup>472</sup> Art 17 of the Third Geneva Convention.

<sup>473</sup> See Art 13 of the Third Geneva Convention, Art 27 of the Fourth Geneva Convention, and requirement for humane treatment in Common Art 3 of the Geneva Conventions.

<sup>474</sup> MoD, Green Book, p.18.

## 3.2.2 Publishing and Broadcasting Information relating to an Armed Conflict

### **SUMMARY: IHL Responsibilities Connected to the Publication and Broadcast of Information relating to an Armed Conflict**

Media professionals (and media organisations) have responsibilities when publishing or broadcasting material from or about an armed conflict.

IHL protects persons in the hands of the enemy from, among other things:

- > activities which **do not respect their honour and their person**; and
- > conduct which **exposes them to insults and public curiosity**.

The UK Government and the British Red Cross have agreed a joint position on the practical interpretation of these rules of IHL:<sup>475</sup> under IHL, media professionals (and their employers) have a responsibility **normally not to publish images or report stories** about POWs or civilian internees (or any person in detention in a non-international armed conflict)<sup>476</sup> that:

- > **Individually identify** them (either in name or by recognisable image).
- > Expose them to public insults or curiosity, including by showing a person (even if they are not individually identified) being **subject to humiliating or degrading treatment** (including torture).
- > Constitute **slander or adversely affect a person's reputation**.

In **limited and exceptional cases** in the **public interest**, images identifying a person or demonstrating them being the subject of humiliating and degrading treatment may be published or broadcast. These include, for example, where it is necessary to demonstrate that a particular high profile person has been captured; or to bring **public attention to the fact that there has been a serious breach of IHL**.

Additional restrictions on publication and broadcast of particular material apply to those media professionals accredited to and embedded with the UK forces.

<sup>475</sup> See Joint Statement: "Public Curiosity" in the 1949 Geneva Conventions: The Interpretation Developed by the Government of the United Kingdom and Northern Ireland and the British Red Cross (BRCS, 26 November 2007) (UK-BRCS Joint Statement). A copy of the UK-BRCS Joint Statement can be obtained from the British Red Cross. It is also available (in archive form) at <http://webarchive.nationalarchives.gov.uk/20121212135632/http://fco.gov.uk/files/kfile/red%20cross%201.htm>.

<sup>476</sup> The obligations set out in Art 13 of the Third Geneva Convention and Art 27 of the Fourth Geneva Convention are part of the more general requirement to ensure humane treatment and protection of dignity. This general requirement is also found in the rules applicable to non-international armed conflict: Common Art 3 of the Geneva Conventions and Arts 4 and 5 of Additional Protocol II. Therefore, where they form part of this general obligation, the specific responsibilities not to identify an individual or expose them to public curiosity apply in both international and non-international armed conflict (through Common Art 3 of the Geneva Conventions and Additional Protocol II): J. S. Pictet (ed), *IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Commentary, Volume 4, ICRC, 1958 (Pictet: Geneva Convention IV Commentary), p. 204 (for content of the right to be humanely treated). See also, M Meyer and K Studds, 'Upholding human dignity and the Geneva Conventions: The role of the media in protecting prisoners of war and civilian security internees against insults and public curiosity', Paper delivered at *15th Annual Conference of the Asia Media Information and Communication Centre (AMIC) in Penang, Malaysia in July 2006* (Meyer and Studds: Upholding Human Dignity) p. 2. Available at <http://www.icrc.org/eng/resources/documents/feature/2006/amic-feature-010806.htm>.

Media professionals and media organisations reporting on armed conflict have IHL responsibilities in relation to the publication and broadcast of particular information. **A number of IHL rules restrict the publication or broadcast of certain information about and images of people in the hands of a party to an armed conflict, including persons in detention or internment in either international or non-international armed conflict, such as POWs and civilian internees.**<sup>477</sup>

Some of the rules set out here are more restrictive than those that usually apply to the domestic practices of the media (for example the IHL restriction on publication of images identifying POWs or civilian internees). However, the specific circumstances of these groups of persons – that is, their detention or internment by the adversary – render them particularly vulnerable in armed conflict. IHL endeavours to ensure that this vulnerable group are protected from mistreatment, public exposure or humiliation by, among other things, restricting what can be published about them during an armed conflict. This protection has been balanced against the important work of the media in seeking to expose violations of IHL, including violations relating to the treatment of POWs and civilian internees.

The law in this area is not always clear and often the rules do not draw a distinct line between what is prohibited and what is permitted.<sup>478</sup> This is exacerbated by the fact that technology and media practices and policies have changed considerably since the Geneva Conventions and their Additional Protocols were developed. Where relevant, this Handbook gives examples to guide media professionals and media organisations as to how they might comply with their IHL responsibilities in this area and sets out the agreed interpretation of these rules by the UK Government and the British Red Cross. However, this is not a substitute for individual legal advice in a particular case.

## Protection of honour and dignity

IHL requires that those persons in the hands of an adversary (which includes anyone detained or interned under IHL in international or non-international armed conflict) are humanely treated and that their dignity is protected.<sup>479</sup> **This means that those persons are protected from, among other things:**

- > **Actions which do not respect their honour and their person.**<sup>480</sup>
- > **Conduct which exposes them to insults and public curiosity.**<sup>481</sup>

<sup>477</sup> This protection may have a broader application – including any ‘protected person’ in armed conflict (as defined by Art 4 of the Fourth Geneva Convention). However, this Handbook will only consider the application of these, and related provisions, on those persons in detention or internment.

<sup>478</sup> G. Risius and M. Meyer, *The protection of prisoners of war against insults and public curiosity*, (1993) *International Review of the Red Cross*, Vol. 33 No. 295, 288 (Risius and Meyer: *The Protection of Prisoners*) at 292.

<sup>479</sup> Arts 13 of the Third Geneva Convention and Art 27 of the Fourth Geneva Convention; Common Art 3 of the Geneva Conventions (applicable in non-international armed conflict). For a discussion of the rules relating to detention and internment under IHL see Chapter 2 of this Handbook. The general obligation to protect dignity can be found in Common Art 3 of the Geneva Conventions; Art 75 of Additional Protocol I; Arts 4 and 5 of Additional Protocol II. This has also been identified by the ICRC as a rule of customary law; ICRC CIHL Study, Rule 87.

<sup>480</sup> Art 13 of the Third Geneva Convention and Art 27 of the Fourth Geneva Convention; Common Art 3 of the Geneva Conventions (applicable in non-international armed conflict). In relation to Art 13 of the Third Geneva Convention, protection of a POW’s honour, although not mentioned in the text, is implied in the requirement of humane treatment: J. S. Pictet (ed), *III Geneva Convention Relative to the Treatment of Prisoners of War*, Commentary, Volume 3, ICRC, 1960 (Pictet: *Geneva Convention III Commentary*), p. 141.

<sup>481</sup> Art 13 of the Third Geneva Convention and Art 27 Fourth Geneva Convention.

These rules are highly relevant to media professionals. **In particular, the UK Government and the British Red Cross agreed a joint position that, in practice, these rules create a responsibility on media professionals (and their employers) not normally to publish images or report stories about POWs or civilian internees (or any person in detention in a non-international armed conflict)<sup>482</sup> that:**

- > **Individually identifies them (either in name or by recognisable image).**
- > **Exposes them to public curiosity or insults – including showing a person (even if they are not individually identified) being subject to humiliating or degrading treatment (including torture).**
- > **Constitutes slander or adversely affects a person's reputation.**

Each of these issues is addressed here.

### **Prohibition of identification of individuals**

Media professionals and media organisations have a responsibility to respect the honour and dignity of POWs and civilian internees. This responsibility includes the obligation not to publish or broadcast information that individually identifies a POW or civilian internee.<sup>483</sup> The UK Government and British Red Cross understand this rule as **prohibiting the publication or broadcast of a POW's or civilian internee's:**

- > **name**
- > **image (where this might be used to identify them), and**
- > **aspects of their private lives.**<sup>484</sup>

The following are some examples of the type of material that **may** ordinarily be published or broadcast in compliance with IHL:

- > information or images of individual POWs or civilian internees engaged in **routine activities** (such as eating, exercise, or reading) that have been redacted/pixelated or arranged to ensure the anonymity of a POW or civilian internee.
- > images showing **groups of POWs or civilian internees** – for example from a distance or from behind are also unlikely to violate these rules provided no one individual can be clearly made out.<sup>485</sup>

This is, however, subject to the below discussion of the depiction of humiliating and degrading treatment.

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<sup>482</sup> The obligations set out in Art 13 of the Third Geneva Convention and Art 27 of the Fourth Geneva Convention are part of the more general requirement to ensure humane treatment and protection of dignity. This general requirement is also found in the rules applicable to non-international armed conflict: Common Art 3 of the Geneva Conventions and Arts 4 and 5 of Additional Protocol II. Therefore, where they form part of this general obligation, the specific responsibilities not to identify an individual or expose them to public curiosity apply in both international and non-international armed conflict (through Common Art 3 of the Geneva Conventions and Additional Protocol II). As to the meaning of 'treated humanely' see: Pictet: Geneva Convention IV Commentary (n 73), pp. 204-205. See also, Meyer and Studds: Upholding Human Dignity (n 73), p. 2.

<sup>483</sup> This requirement comes from the requirement to protect the person of POWs and civilian internees: Pictet: Geneva Convention IV Commentary (n 73), p. 201. It also forms part of the obligation to ensure that POWs and internees are not exposed to public curiosity: This is the position of the BRCS and UK government: see UK-BRCS Joint Statement (n 72). See also protection of dignity and humane treatment in Common Art 3 of the Geneva Conventions and Arts 4 and 5 of Additional Protocol II.

<sup>484</sup> UK-BRCS Joint Statement (n 72); Pictet: Geneva Convention IV Commentary (n 73), p. 201.

<sup>485</sup> Meyer and Studds: Upholding Human Dignity (n 73), p. 2. See also the examples given in the BRCS draft resolution proposed at the 26th International Conference of the Red Cross and Red Crescent in 1991 as set out in Risius and Meyer: The Protection of Prisoners (n 75), p. 298.

## Possible exceptions

Publication or broadcast of material that identifies an internee or POW is normally prohibited. **In some cases, however, it may be considered necessary and in the public interest to publish information that reveals the identity of a POW or civilian internee. These cases might include where a person is of high rank or seniority and proof of their capture is needed; or, for example, where a person is a fugitive from justice.**<sup>486</sup> In all cases, publication or broadcast of the name or image of a POW or civilian internee should be undertaken with great care and in a way that is consistent with that person's dignity and honour.

### Prohibition of exposure of persons to insults and public curiosity

Media professionals have a responsibility not to expose POWs and civilian internees to insults or public curiosity.<sup>487</sup> **This responsibility prohibits deliberate exposure of persons to public insults or as an object of public humiliation.** There are very few examples in the law of what this might mean.<sup>488</sup> It does, however, prohibit publicly identifying or parading persons **with the intention of exposing them to public humiliation or insults, even when they cannot be identified individually.** For example, the publication of images of POWs or civilian internees with the intention of inviting them to be insulted by the public, perhaps as a tool of propaganda in order to boost morale.<sup>489</sup>

In addition, **the UK Government and the British Red Cross understand that, in practice, this responsibility prohibits the publication or broadcast of images of POW or civilian internees in the following circumstances:**

- > **that identify them** (see above), or
- > **in degrading situations** such as dressed in their enemy's uniform, posed in humiliating situations, during interrogation, naked, or in a manner that is culturally offensive to them. **This prohibition applies even if the images have been redacted/pixelated or in which individuals cannot be identified** (for example, they are hooded).<sup>490</sup>

## Possible exceptions

It is possible that, **in exceptional circumstances, the publication or broadcast of images showing unidentifiable POWs or civilian internees in circumstances that undermine their dignity may not be prohibited by the rule against insults and public curiosity.**<sup>491</sup> These circumstances are limited and rare. An example might be where publication or broadcast of such images is necessary to bring public attention to serious violations of IHL.<sup>492</sup>

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<sup>486</sup> See UK-BRCS Joint Statement (n 72).

<sup>487</sup> Art 13 of the Third Geneva Convention; Art 27 of the Fourth Geneva Convention; Common Art 3 of the Geneva Conventions. Although Common Art 3 does not mention the prohibition on insults and 'public curiosity', it has been interpreted to be a central element of the right to be treated humanely: Pictet: Geneva Convention IV Commentary (n 73), p. 204. See also protection of dignity and humane treatment in Common Art 3 of the Geneva Conventions and Arts 4 and 5 of Additional Protocol II.

<sup>488</sup> Risius and Meyer: The Protection of Prisoners (n 75).

<sup>489</sup> This is analogous to the Maelzer Case before the US Military Commission in Florence in 1946, as discussed in Risius and Meyer: The Protection of Prisoners (n 76), see also R. Alford, *Private Abuse and Public Curiosity*, (Opinio Juris Blog, 30 September 2008), available at: <http://opiniojuris.org/2008/09/30/private-abuse-and-public-curiosity/>.

<sup>490</sup> UK-BRCS Joint Statement (n 72).

<sup>491</sup> See UK-BRCS Joint Statement (n 72).

<sup>492</sup> See UK-BRCS Joint Statement (n 72). See also *United States and others v Sadao Araki and others* (International Military Tribunal for the Far East, 4-12 November 1948), reprinted in, H.S. Levie (ed.), 'Documents on Prisoners of War', (1979) *International Law Studies*, Vol. 60, 437; and *American Civil Liberties Union v Department of Justice* 681 F.3d 61 (2d. Cir. 2012).

Publication or broadcast of images that show POWs or civilian internees in circumstances undermining their dignity is a serious matter and should not be undertaken lightly – even where such publication may be intended to expose and deter breaches of IHL. In such cases, **the following are relevant considerations – which are not exhaustive:**<sup>493</sup>

- > **Whether a person can be identified even with redaction/pixelation.** If so, the images should not be published or broadcast (see discussion of individual identification above).
- > **Whether the images depict a serious breach of IHL (including the Geneva Conventions and Additional Protocols).** For example showing someone who has been (or is being) subject to torture or inhumane treatment.
- > **Whether such a breach is already in the public's knowledge** – and what, if anything, this image might add to that awareness?
- > **The photographer's or cameraperson's intention in taking the images** – was the taking of the images part of the humiliating and degrading treatment suffered by the person in the images?<sup>494</sup>
- > **The intention behind publication or broadcast of the image** – is it to expose and deter a serious breach of IHL or for other reasons? In this case the context of the surrounding text or reporting is relevant.
- > **The potential impact of the publication or broadcast on the person in the images, and on their family.** Even if a person cannot be identified by their name or face, family members, or the persons who took the photographs, may be able to identify the subject. This could have ramifications for soldiers returning to their forces or on their families still located in a conflict zone.<sup>495</sup>
- > **Whether the publication or broadcast of the images can be done in a way that is sensitive to and respectful of the person's dignity and honour.**<sup>496</sup>

### Prohibition of damage to reputation

The Geneva Conventions protect the honour of POWs and civilian internees in the hands of an enemy.<sup>497</sup> Part of this protection is the responsibility not to engage in “slander, calumny, insults or any other action impugning [an internee's] honour or affecting his [or her] reputation”.<sup>498</sup> This means that, **in addition to refraining from publishing or broadcasting material that exposes these protected persons to insults or public curiosity, media professionals must not publish or broadcast material that damages their reputation.**

The law does not give examples of what type of conduct this might prohibit. However, it is clear that this provision prohibits, at the least, the publication or broadcast of untrue, unfounded, or illegitimate allegations regarding POWs or civilian internees that may wantonly damage their reputation.<sup>499</sup>

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<sup>493</sup> See Risius and Meyer: The Protection of Prisoners (n 75).

<sup>494</sup> Risius and Meyer: The Protection of Prisoners (n 75), p. 293.

<sup>495</sup> Risius and Meyer: The Protection of Prisoners (n 75), p. 293.

<sup>496</sup> Risius and Meyer: The Protection of Prisoners (n 75), p. 292.

<sup>497</sup> Art 13 of the Third Geneva Convention and Art 27 of the Fourth Geneva Convention; Common Art 3 of the Geneva Conventions (applicable in non-international armed conflict). In relation to Art 13 (POWs) protection of their honour, although not mentioned in the text, is implied in the requirement of humane treatment: Pictet: Geneva Convention III Commentary (n 77), p. 141.

<sup>498</sup> Pictet: Geneva Convention IV Commentary (n 73), p. 202.

<sup>499</sup> This is supported by the use of words such as ‘slander’ and ‘calumny’ which refer to wanton or spurious accusations. The responsibility to protect the honour of these protected persons may not necessarily restrict the publication, in good faith, of provable facts relating to their conduct, even if such reporting results in a negative public opinion of them.

In some cases, **the responsibility not to expose POWs or civilian internees to insults or public curiosity may require a media professional or organisation to refrain from publishing material, which, although truthful and provable (and not, therefore, slanderous etc), might make them an object of public humiliation and expose them to public insults.**

### **Additional restrictions on UK media professionals**

In addition to the IHL restrictions set out in this section, the UK Ministry of Defence may require those media professionals accredited by them and embedded with UK forces to submit their professional material for security checking prior to publication and broadcast.<sup>500</sup> Such security restrictions are likely to affect the freedom of media professionals to report on issues such as the composition and location of military units; details of military movements, operations and future plans; and names of individual service personnel, hostages, and casualties.<sup>501</sup>

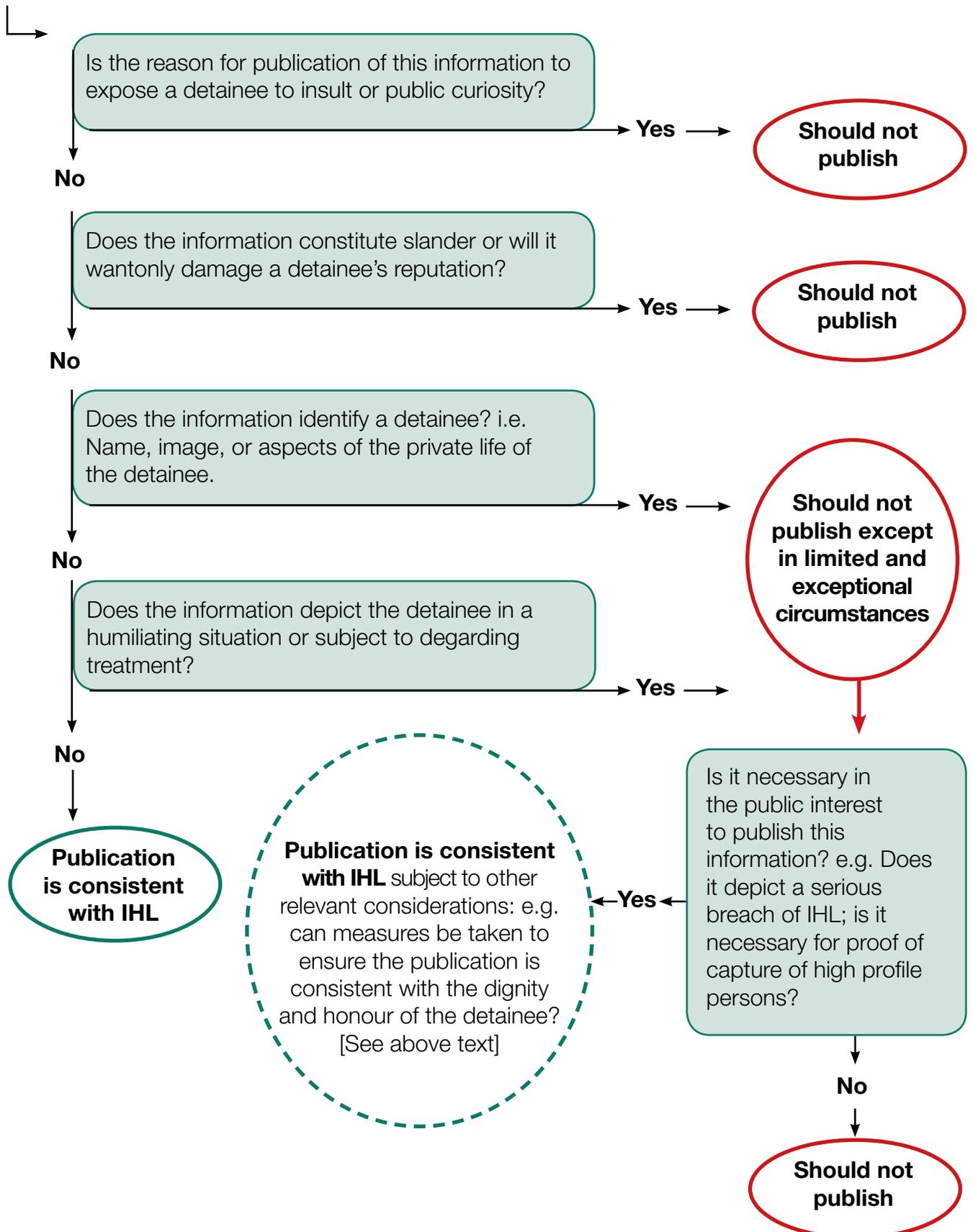
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<sup>500</sup> MoD, Green Book, pp. 13-16.

<sup>501</sup> MoD, Green Book, pp. 13-14.

## Publication of Information regarding Detained or Interned Persons

When can information regarding persons in detention or internment be published?



### 3.2.3 Use and Depiction of the distinctive emblems by Media Professionals

#### **SUMMARY: IHL Responsibilities Connected to the Use and Depiction of the Red Cross and Red Crescent Emblems by Media Professionals**

The **distinctive emblems** recognised under IHL are the red cross, the red crescent and the red crystal, each depicted on a white background. The primary purpose of the emblems is to act as **a visual indication of certain protected objects and persons** during international and non-international armed conflict (in particular, the Medical Service of armed forces). They may also be used to **indicate membership** of an organisation of the International Red Cross and Red Crescent Movement (who carry out activities in armed conflicts, as well as in peacetime).

Use of the distinctive emblems is regulated by IHL, and also by national laws in many countries.

- > A media professional **may** use or depict the emblems:
  - > In publication or broadcast of images of individuals or entities using the emblems who are permitted to display them, and are doing so in a factually correct manner.
  - > Where a media professional is also a member of an organisation authorised to use the emblems (for example, a first aid volunteer for a National Red Cross or Red Crescent Society), and is solely engaged in the work of that organisation at the time of use.
- > Media professionals may **not** otherwise:
  - > Use or wear a similar symbol to the emblems (**imitation**)
  - > Use the emblems as a sign of protection
  - > Use the emblems in a publication or broadcast in a way that undermines their special meaning or purpose
  - > Use the emblems to help to disguise military objectives such as troops, weapons, or military vehicles (**perfidy**).

Perfidious use of the distinctive emblems is a grave breach of the Geneva Conventions and is a crime in both international and non-international armed conflict.



*The red cross, red crescent and red crystal emblems*

The distinctive emblems recognised under IHL include a red cross, a red crescent and a red crystal, each on a white background, as depicted left.<sup>502</sup> **During armed conflicts these emblems are a visual indication of the neutrality and protection under the Geneva Conventions of medical personnel, units and transport** (commonly referred to as protective use of the emblems).<sup>503</sup> **The emblems may also be used to indicate membership of or affiliation with the International Red Cross and Red Crescent Movement** – including by National Red Cross and Red Crescent Societies, such as the British Red Cross, (commonly referred to as **indicative use** of the emblems).<sup>504</sup>

This section will primarily consider the use of the emblems as a protective sign in armed conflicts. Further information regarding the indicative use of the emblem may be sought from the relevant National Red Cross or Red Crescent Society (in the UK, the British Red Cross), or from the ICRC.

IHL and national laws strictly regulate the use of the distinctive emblems and generally, aside from the abovementioned persons and objects, third parties are not entitled to use them.<sup>505</sup> Media professionals and their employers need to be aware of the restrictions on depiction or use of the emblems when reporting from or about a conflict.

## Permitted use of the emblems

**The distinctive emblems are a visible sign of protected objects and persons during both international and non-international armed conflict and their use is regulated by IHL and national laws.** In armed conflict the distinctive emblems may be authorised by a State for use by: the Medical Service of the armed forces (the primary users);<sup>506</sup> by civilian hospitals and staff;<sup>507</sup> and by National Red Cross and Red Crescent Societies or other Voluntary Aid Societies providing medical assistance.<sup>508</sup>

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<sup>502</sup> A fourth distinctive emblem, the red lion and sun emblem, is still recognised under IHL although no longer in use (it was used by Iran prior to September 1980). The red crystal emblem was established by the Third Additional Protocol to the 1949 Geneva Conventions. The Protocol entered into force on 14 January 2007, six months after the first two States ratified it. A list of States that have ratified the Protocol can be found on the ICRC website: <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=615&ps=P>.

<sup>503</sup> For an overview of the use of the red cross and red crescent emblems see the website of the ICRC: <http://www.icrc.org/eng/war-and-law/emblem/index.jsp>.

<sup>504</sup> The most common form of the indicative use of the emblem is within the *marque* (logo) of a Red Cross or Red Crescent organisation. These logos use the red cross or red crescent emblems as well as additional text (normally the name or initials of the organisation, such as 'British Red Cross'). This differentiates the logos from the emblems themselves, and helps to indicate to which organisation the logo belongs. In relation to the ICRC logo see *ICRC Study on Operational and Commercial and Other Non-operational Issues Involving the Use of Emblems*, p. 155, available at <http://www.icrc.org/eng/assets/files/publications/icrc-001-4057.pdf>; for a description of the British Red Cross's logo see: 'Using our *marque*' at <http://www.redcross.org.uk/About-us/Contact-and-help/How-to-link-to-us>.

<sup>505</sup> Art 44 of the First Geneva Convention and Art 44 of the Second Geneva Convention set out the restrictions on the use of the emblem; Art 53 of the First Geneva Convention sets out the meaning of 'misuse' of the emblem; Art 54 of the First Geneva Convention and Art 45 of the Second Geneva Convention require States to prevent and repress its misuse. Art 85 of Additional Protocol I (repression of breaches of these provisions is a grave breach of the Protocol); Art 12 of Additional Protocol II (prohibits improper use of emblem). ICRC CIHL Study, Rule 59 also sets out the prohibited uses of the Emblems.

<sup>506</sup> Arts 38-43 of the First Geneva Convention (protective use of the emblem by medical personnel); Arts 41-43 of the Second Geneva Convention (protective use of the emblem by wounded, sick and shipwrecked members of the armed forces at sea). Art 18 of Additional Protocol I (medical and religious personnel and medical units and transports entitled to use emblem). Art 12 of Additional Protocol II (protective use of emblem by medical personnel, units and transports).

<sup>507</sup> Arts 18, 20 and 22 of the Fourth Geneva Convention (protective use of the emblem for civilian hospitals, staff and medical transports). Art 18 of Additional Protocol I (civilian medical and religious personnel and medical units and transports entitled to use emblem). Art 12 of Additional Protocol II (protective use of emblem by medical personnel, units and transports).

<sup>508</sup> Arts 26 and 44 of the First Geneva Convention (where a National Society or other Voluntary Aid Society is acting as an auxiliary to the medical services of its own State); Arts 27, 40, and 42-44 of the First Geneva Convention (where a National Society is acting as auxiliary to another State party to the conflict). The international organisations of the Movement (the ICRC and the International Federation of Red Cross and Red Crescent Societies) are also able to use the emblem in armed conflicts by virtue of Art 44 of the First Geneva Convention.

Certain religious personnel within the armed forces may also be authorised to use the emblems.<sup>509</sup> People and objects bearing the distinctive emblems benefit from special immunity from attack and must be protected by parties to an international or non-international armed conflict.<sup>510</sup>

In armed conflict a media professional **may** use or depict the red cross and red crescent emblems in the following circumstances:

- > **In published or broadcast images of others using the distinctive emblems in a factually correct manner, in armed conflict**, for example in the reporting of news from the conflict. Publication or broadcast of the image of the emblem by the media is not prohibited as long as it is clear that the media professional or organisation is not using the image of the emblem to claim protection, or to claim membership of or affiliation with the International Red Cross and Red Crescent Movement. The emblems should normally not be depicted in a way that may undermine their special meaning, or diminish respect for them.
- > **Where a media professional is also a member of an organisation authorised to use the distinctive emblems** and, during an armed conflict, they are engaged only in the work of that organisation (i.e. they are, at the time of use, not engaged in the work of a media professional). This could be, for example, where a media professional is engaged as a volunteer for a National Society providing first aid or distributing relief supplies.

For more information regarding the restrictions on use of the emblems during peacetime see the British Red Cross website at <http://www.redcross.org.uk/About-us/Who-we-are/The-international-Movement/The-emblem>.

### Prohibited use of the emblems

Misuse or abuse of the distinctive emblems during armed conflict can occur in a number of ways. Media professionals are not permitted to do any of the following: use or wear a similar symbol to the emblems as this may cause confusion with the emblem (**imitation**);<sup>511</sup> use the emblems as a sign of protection, except in accordance with the rules set out above;<sup>512</sup> facilitate use of the emblems to disguise military objectives such as troops, weapons, or military vehicles (**perfidy**).<sup>513</sup> Perfidious use of the distinctive emblems is a grave breach of the Geneva Conventions and is a crime in both international and non-international armed conflict.

<sup>509</sup> Art 24 of the First Geneva Convention; Arts 36 and 37 of the Second Geneva Convention Art 15 of Additional Protocol I. This has also been identified by the ICRC as a rule of customary law; ICRC CIHL Study, Rule 27.

<sup>510</sup> See Arts 24 and 25 of the First Geneva Convention; Arts 36 and 37 of the Second Geneva Convention; Art 15 of Additional Protocol I; Arts 9 and 12 of Additional Protocol II. This has also been identified by the ICRC as a rule of customary law; ICRC CIHL Study, Rules 25, 26, 28, 29, 30 and 59.

<sup>511</sup> , ICRC, 'What are the provisions of humanitarian law governing the use of the emblem?', *International humanitarian law: answers to your questions*, (ICRC 31 October 2002) (ICRC Emblem Guidance), available at <http://www.icrc.org/eng/resources/documents/misc/5kze8s.htm>.

<sup>512</sup> ICRC Emblem Guidance (n 108).

<sup>513</sup> ICRC Emblem Guidance (n 108).

The following are examples of **prohibited use** of the emblems:

- > Using the emblems in armed conflict on clothes or placing them on media facilities to **protect them from attack**. The work of media professionals does not benefit from special protection under IHL (i.e. other than those rules that apply in general to civilians) and it is prohibited to use the emblems on any media equipment, facilities, transport or persons in order to benefit from its protective meaning.
- > Using, without permission, the emblems on **promotional or other public material** (including websites) published by a media professional or organisation in order to, for example, indicate an affiliation or partnership with the International Red Cross and Red Crescent Movement or one of its organisations.
- > Using the emblems in a publication or broadcast in a way that **undermines their special meaning or purpose**.

## 3.3 IHL Responsibilities Connected to Operational Elements of the Mission

### **SUMMARY: IHL Responsibilities relating to operational elements of the media**

IHL responsibilities are not limited to the professional activities of the media in armed conflict. Media professionals and media organisations are also subject to a number of IHL responsibilities that arise from the operational (and logistical) aspects of the work of the media in conflict zones.

#### **The use of force**

IHL permits media professionals to use force in self-defence against unlawful attacks against them or media facilities; however, any use of force in armed conflict carries the risk that media professionals may get drawn into the conflict unintentionally or by using more force than is necessary for self-defence. In the event that this occurs media professionals:

- > may be **prosecuted for such involvement**
- > must also comply with **IHL rules relating to the use of offensive force** including refraining from attacking civilians who are not participating in hostilities.

**Certain weapons that are indiscriminate or cause superfluous injury or unnecessary suffering are prohibited by IHL**, whether or not they are used lawfully in self-defence or unlawfully as part of the armed conflict.

#### **The acquisition of assets in conflict zones**

Media professionals and organisations acquiring assets in conflict zones (including transport and facilities) must be careful to avoid engaging in pillage (theft and plunder), which is prohibited by IHL.

#### **The use of private security guards**

IHL does not prohibit the engagement and use of private security guards by media professionals and organisations for protection. However, security guards, as civilians, are bound by the same rules relating to the use of force and **pillage** as media professionals.

In the event that a hired security guard violates a rule of IHL media professionals are **ordinarily not held individually responsible for such a breach**. However, media professionals may be held individually criminally responsible for a violation of IHL:

- > if they **aid or abet; induce, encourage, solicit or incite**, a security guard to commit a crime, and
- > through the **doctrine of ‘superior responsibility’**, where they have a relationship of ‘effective control’ over the security guard.

Media professionals and organisations are unlikely to be held responsible under the doctrine of ‘superior responsibility’ for crimes committed by security guards that are **provided by a third party** – such as a security firm or a party to an armed conflict. However, using the **security services of a party to an armed conflict** may increase the chances of getting caught in cross-fire during a conflict and also of being mistaken for directly participating in hostilities.

Media professionals and media organisations in armed conflict zones may also have responsibilities under IHL arising from their logistical operations. This section will consider the IHL responsibilities relating to:

- > the use of force in armed conflict
- > the acquisition of assets in conflict zones, and
- > potential responsibility for the use of private security guards.

These rules are usually of particular relevance to resource companies and private military contractors, however, they may also be of relevance to the operations of media organisations.

### 3.3.1 IHL Responsibilities relating to the Use of Force in Armed Conflict

As outlined in Chapter 2, media professionals may use force in self-defence against unlawful attacks against a media professional or media equipment. Such force should, however, be used with extreme caution as parties to an armed conflict might mistake a defensive use of force (such as firing a light weapon against an attacker) as a hostile act and participation in the conflict. This can increase the chances that a media professional might be deliberately attacked by parties to a conflict who think they are acting lawfully.

Further, the use of any force during an armed conflict may result in a media professional being drawn into the conflict, for example, through unintentionally engaging with parties to an armed conflict or using more force than is required for defensive purposes. **Where a media professional is drawn into a conflict, they may be prosecuted under criminal law for their involvement and, while carrying out such acts, they lose their protection as civilians from deliberate attack.**

In the event that a media professional is drawn into the conflict, **IHL imposes a number of rules relating to the use of offensive force that are applicable in both international and non-international armed conflict** (whether a person is participating in conflict lawfully or unlawfully). These are the same rules that protect media professionals, set out in Chapter 2.

### 3.3.2 IHL Responsibilities Relating to the Acquisition of Assets

The purchase of assets in conflict zones is generally regulated by domestic contract law and, where relevant, international investment law and international human rights law. Discussion of these areas of law is outside the scope of this IHL Handbook.

However, media professionals and organisations need to be aware that **IHL prohibits the pillage of private property during armed conflict.**<sup>514</sup> Pillage comprises not only the theft of property (movable goods and real property) but also entering into contracts for sale of property made under threat or pressure resulting from the armed conflict, and can additionally include knowingly receiving property obtained through pillage.<sup>515</sup> **Pillage is a war crime in both international and non-international armed conflict.**<sup>516</sup>

Media professionals and organisations should be cautious when acquiring assets in a conflict zone (including, for example, transport and broadcast facilities). If possible, media organisations should ensure that the owner of the purchased property has given their free consent to the sale.

<sup>514</sup> Art 33 of the Fourth Geneva Convention; Art 4(2)(g) of Additional Protocol II. This has also been identified by the ICRC as a rule of customary law; ICRC CIHL Study, Rule 52.

<sup>515</sup> ICRC Brochure on Business and IHL (n 3), pp. 19, 22, 24.

<sup>516</sup> See Art 8(b)(xvi) of the Rome Statute (international armed conflict) and Art 8(e)(v) of the Rome Statute (non-international armed conflict).

### 3.3.3 IHL Responsibilities Relating to the Use of Security Services

Media professionals and organisations operating in armed conflict often employ security personnel to protect their staff and their assets. The use of security services in an armed conflict may sometimes be necessary for protection.

#### Hiring private security services to protect media professionals and media assets

**IHL does not prohibit the use of private security services during armed conflict nor does it prohibit the use of force for self-defence (or defence of media professionals) by these guards.** Security personnel are civilians, and therefore have the same IHL obligations as media professionals.

Any use of force (including in self-defence) in a conflict zone carries the same risks identified above: namely, that it might be mistaken by parties for a direct participation in hostilities; or that it might result in the person using force being drawn into the conflict accidentally or by using more force than is required for self-defence. In the event that this occurs, private security guards are bound by the same rules relating to the use of force (and other rules of IHL) as media professionals, set out above.

Media professionals and organisations are, ordinarily, not liable for any breach of IHL committed by these private security services.<sup>517</sup> However, under the principles of criminal responsibility discussed in the first part of this Chapter, **it is possible that, in some situations, media professionals and organisations might be responsible for the conduct of security services, including any breaches of IHL.** This has not yet been tested. This could include:

- > A media professional may be held individually criminally responsible where they **aid or abet; induce, encourage, solicit or incite**<sup>518</sup> a security guard to commit a crime. These types of criminal liability are discussed in more detail below. In general, this means that a media professional must not assist or encourage a security guard to commit a war crime, including a serious or grave breach of IHL.
- > A media professional might be responsible for the actions of a security guard **hired directly by them** (and not, for example, through a security service), such as where they have an agreement directly with the security guard. This can occur where the criteria for **'superior responsibility'** have been met (as set out above).<sup>519</sup> These include, among other things, that a relationship of 'effective control' between the media professional and the security guard has been established. The nature of the agreement and the actual level of control exercised by the media professional are relevant considerations.
- > Where media professionals and media organisations are **provided with security services by a third party**, such as a security firm or a party to an armed conflict, they are less likely to be held liable for any breach of IHL committed by these services.<sup>520</sup> This is because there is usually no relationship of 'effective control' – in other words, the media professional (or organisation) does not have, in fact, control over the conduct of the guards – who are likely to be under the control of their bosses at the security firm. However, each situation will be considered individually, and where a relationship of 'effective control' exists (even between a guard provided by a security service and a media professional) a person may, nevertheless, be potentially liable for another's conduct.

<sup>517</sup> See consideration of the general liability for actions of private security companies in Doswald Beck: PMCs under IHL (n 34), p. 136. The situation is different for States (see for example *Expert Meeting on Private Military Contractors: Status and State Responsibility for their Actions*, organized by The University Centre for International Humanitarian Law, Geneva, 29-30 August 2005 (Expert Meeting on PMCs), available at: [http://www.geneva-academy.ch/docs/expert-meetings/2005/2rapport\\_compagnies\\_privées.pdf](http://www.geneva-academy.ch/docs/expert-meetings/2005/2rapport_compagnies_privées.pdf)).

<sup>518</sup> See Cryer et al: Introduction to ICL (n 30), Chapter 15. See also Art 25 of the Rome Statute.

<sup>519</sup> And derived from the *Čelebići Camp Case*, para 344.

<sup>520</sup> See general consideration of this question in Doswald Beck PMCs under IHL (n 34), p. 136. The situation is different for States, see for example *Expert Meeting on PMCs* (n 114).

## Using the security services of States or parties to an armed conflict

Additional issues arise where a media professional or organisation uses the security services of a State or other party to an armed conflict. The armed forces or personnel belonging to a party to a conflict are lawful targets for attack under IHL. **Their presence can increase the risk that other parties may attack them, and cause incidental damage to media professionals or facilities caught in the cross fire.**

Similarly, **there is a risk that working closely with, and directly assisting, members of the armed forces or personnel belonging to a party to an armed conflict to defend a media facility (especially from attacks by an opposing force) might be mistaken as (or may actually be) a direct participation in hostilities.** As noted throughout this Handbook, such participation can result in a loss of civilian immunity from attack and criminal prosecution.

The proximity of the armed forces or personnel belonging to a party to a conflict may significantly endanger the safety of a media professional or facility and may be counterproductive where such services are intended to provide protection during an armed conflict.

## 3.4 Responsibilities Under International Criminal Law

### SUMMARY: Responsibilities under International Criminal Law

#### The Commission of international crimes by media professionals

Media professionals in armed conflict can be held individually criminally responsible for any international crimes they commit. Crimes can be committed through actions or words (speech) including publications and broadcasts.

**Hate speech** (speech that is discriminatory or vilifies a particular group of persons based on their race, ethnicity, religion, gender or a similar ground) is not itself an international crime. However, where hate speech forms part of a massive campaign of persecution of a group, characterized by acts of violence and destruction of property, it may constitute **a crime against humanity**.

Direct and public incitement to genocide is a specific crime under international law that can also be committed through particular broadcasts or publications.

- > A media professional may be held individually responsible for direct and public incitement to genocide where they directly and publicly prompt or provoke another to commit genocide; i.e. the destruction, in whole or in part, of a national, ethnic, racial or religious group. This responsibility can be direct as a result of their own actions or indirect through the doctrine of 'superior responsibility' (detailed below).
- > The *Media Case* in the International Criminal Tribunal for Rwanda (ICTR) (regarding the Rwandan genocide in 1994) is an example of three media professionals being found guilty of this crime.

Publications and broadcasts may also form parts of other international crimes where they:

- > Are a form of **aiding and abetting** another to commit a crime, or
- > Are a means of **inducing, soliciting, inciting, or instigating** another person to commit a crime.

#### Responsibilities when reporting on international criminal proceedings

Media professionals have the responsibility not to interfere with the proceedings of international courts and tribunals, and to comply with any orders issued by judges that affect them. Any media professional who interferes with proceedings or breaches a rule set out by a judge can be prosecuted for **contempt of court**. A charge of contempt of court can result in a fine and/or imprisonment.

This Chapter has set out the mechanisms of responsibility of media professionals under IHL and international criminal law (ICL). It is clear that both media professionals and their editors/supervisors can be held individually criminally responsible for any crimes they commit in armed conflict either directly or through another.

The full scope of criminal liability under ICL is beyond this Handbook, as is an investigation into each type of crime that might be committed by a media professional in armed conflict. Instead, this section focuses on those crimes that are most relevant to the work of media professionals – those based on speech (broadcasts and publications) and those relating to reporting on international criminal proceedings.

### 3.4.1 Commission of International Crimes by Media Professionals

Media professionals in armed conflict can be held individually criminally responsible for any international crimes they commit, including war crimes.<sup>521</sup> International crimes can be committed not only by acts such as killing or assault – but also by words or speech. Media professionals may be vulnerable to accusations of crimes based on speech and it is important for any media professional working in an armed conflict to understand when speech (including a publication or broadcast) might result in individual criminal responsibility.

Publications or broadcasts that are discriminatory or vilify a particular group of persons based on their race, ethnicity, religion, gender or a similar ground (known as ‘hate speech’) are not, in themselves, international crimes, although they are crimes under the domestic laws of many States including the UK.<sup>522</sup> Where such publications or broadcasts occur during, or as part of, a systemic campaign of persecution of a group, characterised by acts of violence and destruction of property, it may constitute **a crime against humanity**.<sup>523</sup> An example of this is the case of Julius Streicher at the International Military Tribunal (IMT) convened to prosecute crimes committed during World War Two. Mr Streicher was the founder and editor of *Der Stürmer*, an anti-Semitic newspaper published in Germany. He was found guilty of crimes against humanity for publications appearing in that paper that constituted incitement to murder and exterminate Jews. Importantly, Mr Streicher was aware that he was publishing *Der Stürmer* while the Holocaust was taking place.<sup>524</sup>

Had Mr Streicher been tried under current ICL, he may have also been prosecuted for the more specific crime of **‘direct and public incitement to genocide’**.<sup>525</sup> Several media professionals have been prosecuted in the ICTR for this crime in relation to their broadcasts and publications during the genocide in Rwanda in 1994.<sup>526</sup>

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<sup>521</sup> See discussion of this above.

<sup>522</sup> D. Saxon, ‘Propaganda as a crime under International Humanitarian Law: Theories and Strategies for Prosecutors’ in P. Dojčinović (ed), *Propaganda, war crimes trials and international law: from speakers’ corner to war crimes*, (Routledge, 2012), p. 119; See also *Kordić Case*, para 209.

<sup>523</sup> As to the possibility that this might constitute persecution: *Media Case AC*, para 988; *Streicher Judgment (1946) 22 Trial of German Major War Criminals 501 (Streicher Case)*; *The Prosecutor v Bikindi* (ICTR-01-72-T), Trial Chamber Judgment, ICTR, 2 December 2008, paras 390-395.

<sup>524</sup> *Streicher Case*, pp. 100-102.

<sup>525</sup> Art 4(3)(c) of the ICTY Statute; Art 2(3) of the ICTR Statute, Art 25(30)(e) of the Rome Statute; and Art 3(c) of the Genocide Convention. See also *Prosecutor v Akayesu* (ICTR-96-4-T), Trial Chamber Judgment, ICTR, 2 September 1998 (*Akayesu Case*).

<sup>526</sup> *Media Case*.

## Direct and public incitement to genocide

Direct and public incitement to genocide is a specific crime under international law.<sup>527</sup> A media professional may be held individually responsible for this where they **directly and publicly prompt or provoke another to commit genocide; that is, the destruction, in whole or in part, of a national, ethnic, racial or religious group.**<sup>528</sup> Whether or not anyone responds to such incitement is irrelevant.<sup>529</sup>

In 2003 three media professionals (radio and newspaper editors and executives) were prosecuted for their conduct during the Rwandan genocide. Two of them were found guilty of, among other things, direct and public incitement to genocide. Their case is known as the *Media Case* and it is important as it demonstrates not only what type of publications or broadcasts might be ‘direct and public incitement to genocide’ but also when media professionals and their editors/supervisors might be held responsible for these publications and broadcasts under ICL.

### *Impugned publications and broadcasts*

Publications and broadcasts might give rise to criminal liability where they are direct, public, and an incitement to genocide. In all cases, the purpose and context of any publication or broadcast is very important.<sup>530</sup>

An incitement to genocide is **public** where it is made to a number of individuals in a public place or to members of the general public at large by such means as mass media, for example, radio, television, newspapers and speeches.<sup>531</sup> In the *Media Case* broadcasts on radio and publications appearing in a newspaper with a circulation of around 1500-3000 were found to meet this ‘public’ requirement.

An incitement is **direct** where it actually calls for others to commit genocide – it must be more than a “vague or indirect suggestion”.<sup>532</sup> **Whether or not speech is a direct incitement to genocide must be considered in the light of the cultural and linguistic context.**<sup>533</sup> This means that what is direct in one situation may not be in another and much depends on the audience’s understanding.<sup>534</sup> A direct incitement to genocide can be implicit.<sup>535</sup> For example, an editorial ‘predicting’ that upon the departure of UN troops in Rwanda the Tutsi would be ‘exterminated’ was found to be an implicit call to undertake genocide.<sup>536</sup>

The incitement must be to **genocide – to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.** Incitement to ordinary violence or engaging in speech that encourages ethnic hatred (without violence) is not enough.<sup>537</sup>

<sup>527</sup> See Art 4(3)(c) of the ICTY Statute; Art 2(3) of the ICTR Statute, Art 25(30)(e) of the Rome Statute; and Art 3(c) of the Genocide Convention. See also *Akayesu Case*.

<sup>528</sup> *Media Case*, para 1012.

<sup>529</sup> *Media Case*, para 89. Upheld on appeal: para 678-679.

<sup>530</sup> *Media Case*, paras 1000-1010.

<sup>531</sup> *Akayesu Case*, para 556. See also Article 2(3)(f) of the Draft Code of Crimes Against the Peace and Security of Mankind, in *Report of the International Law Commission to the General Assembly*, UN doc. A/51/10 (1996), p. 26. However, this must be distinguished from mere ‘conversation’ between a group of people: *Kalimanzira v The Prosecutor* (ICTR-05-88-A), Appeals Chamber, Judgment, ICTR, 20 October 2010, paras 156-159.

<sup>532</sup> *The Media Case AC* para 692.

<sup>533</sup> *Akayesu Case* para 557.

<sup>534</sup> Cryer et al: Introduction to ICL (n 30), p. 381.

<sup>535</sup> *Akayesu Case* at 557.

<sup>536</sup> *The Media Case AC* para 773.

<sup>537</sup> *The Media Case AC* para 692.

The ICTR found that broadcasts and publications that ‘merely’ instigated ethnic hatred without a call to commit acts of genocide were insufficient to constitute ‘incitement to genocide’.<sup>538</sup>

### *The responsibility of media professionals*

**Media professionals have a responsibility to ensure that they do not publicly and directly incite genocide through their work. If they do, they can be held individually criminally liable for these incitements.** This responsibility arises whether they are the media professional who issued the incitement or a superior/editor with effective control over them.

An example of a media professional who was convicted of direct and public incitement to genocide is Georges Ruggiu, a reporter working at RTLM during the Rwandan genocide in 1994. The ICTR determined<sup>539</sup> that he could be found guilty as a result of his broadcasts even though he had no editorial control over RTLM’s content, was fairly low down in the RTLM ‘hierarchy’, and was occasionally reprimanded for not being ‘on board’ with the station’s policy.<sup>540</sup>

**The *Media Case* demonstrated that media executives, owners, and editors can also be held criminally liable for publications and broadcasts issued by other media professionals, under their effective control.** The notion of ‘superior responsibility’ is discussed in detail, above.

### **3.4.2 Liability of Media Professionals for Crimes Committed by Others**

There are other ways in which speech (including publications and broadcasts) can form part of an international crime. Media professionals may be held individually criminally responsible as the result of their speech even when they did not commit the act of a crime (e.g. a killing) themselves. While there are no cases specifically involving media professionals so far, the use of speech and the media (in particular hate speech and propaganda) have been found to constitute the following forms of participation in crimes:

- > **Speech can be a form of aiding and abetting another to commit a crime.**<sup>541</sup> A media professional aids and abets the commission of a crime where they know that their speech is assisting, encouraging, or lending moral support to the person committing it.<sup>542</sup> An example was where a senior political figure developed and disseminated a campaign of hate speech and propaganda sufficient to create an ‘atmosphere of terror’ in the Former Yugoslavia in which the population were prepared to tolerate the commission of other crimes, such as forcible transfer of a minority out of the territory.<sup>543</sup>

<sup>538</sup> *The Media Case AC* para 692.

<sup>539</sup> Mr Ruggiu pleaded guilty: *Prosecutor v Georges Ruggiu* (ICTR-97-32-I), Trial Chamber Judgement and Sentence, ICTR, 1 June 2000 (Ruggiu Case).

<sup>540</sup> *Ruggiu Case*, para 75.

<sup>541</sup> This form of criminal liability is set out in Art 7(1) of the ICTY Statute; Art 6(1) of the ICTR Statute; and Art 25(3)(c) of the Rome Statute.

<sup>542</sup> See Art 25(3)(c) of the Rome Statute and *Tadić Case AC*, para 229. The *Tadić Case* formulation also requires that the assistance provided substantially contributed to the commission of the crime. The ICC does not contain this additional requirement, however, in effect, the two formulations set out the same type of liability: Cryer et al: Introduction to ICL (n 30), pp. 376-377.

<sup>543</sup> See for example the ICTY case of *Prosecutor v Brđanin* (IT-99-36-T), Trial Chamber Judgment, ICTY, 1 September 2004

- > **Speech can be a means of inducing, soliciting, inciting, or instigating another person to commit a crime.**<sup>544</sup> A person, including a media professional, can be liable for instigating (or persuading) a person to commit a crime where they provoke or induce another to commit a crime where they know the crime is likely to be committed.<sup>545</sup> Such persuasion can take many forms including through speech or actions. For example, a campaign of propaganda and hate speech (through publication and broadcast of material, including through speeches) levied by a leading political figure was considered to be a mechanism of incitement for others to commit the crime of persecution of Bosnian Muslims in the Former Yugoslavia.<sup>546</sup>

### 3.4.3 Responsibilities of Media Professionals when Reporting on International Criminal Proceedings

**Media professionals have a responsibility not to interfere with the proceedings of international courts and tribunals, and to comply with any orders issued by judges that affect them. Any media professional who interferes with proceedings or breaches a rule set out by a judge can be prosecuted for contempt of court. A charge of contempt of court can result in a fine and/or imprisonment.**

Media professionals may be vulnerable to breaking some of these rules, often used by international criminal courts and tribunals. These include:<sup>547</sup>

- > **Failing to give evidence** or produce documents when called as a witness before a court or tribunal (subject to the issue of privilege against having to give evidence or answer particular questions, addressed in Chapter 2)
- > **Making public the identity of a witness** protected by an order of the court
- > **Breaching a non-publication order** regarding other confidential information before a court, and
- > **Intimidating a witness.**

International criminal courts and tribunals can bring criminal contempt proceedings against any media professional that knowingly violates these rules. Some recent cases of contempt against media professionals, all involving violation of a protective order of a court, include:

- > In 2013, Vojislav Šešelj,<sup>548</sup> author and website operator, was sentenced to two years' imprisonment by the ICTY for failing to comply with the ICTY Trial Chamber's orders to remove information regarding protected witnesses from his website. Mr Šešelj had two previous related convictions at the ICTY.
- > In 2009 Florence Hartmann,<sup>549</sup> author and media professional, was fined €7,000 by the ICTY for knowingly and wilfully disclosing information in violation of an order of the Appeals Chamber. Hartmann was the author of a book published in 2007 and an article published in 2008 which disclosed information relating to the decisions of the Appeal Chamber filed confidentially in the *Milosević Case*.

<sup>544</sup> These three types of liability are largely the same: Cryer et al: Introduction to ICL (n 30), p. 379. This form of criminal liability is set out in Art 35(3)(b) of the Rome Statute and the case law of ICTY and ICTR: see Cryer et al: Introduction to ICL (n 30), p. 379.

<sup>545</sup> *The Prosecutor v Blaškić* (IT-95-14-T), Trial Chamber Judgment, ICTY, 3 March 2000, para 270; *Tadić Case AC*, para 229, cited with approval in *Kordić Case* para 399.

<sup>546</sup> *Kordić Case*.

<sup>547</sup> See for example Rule 77 of the Rules of Procedure and Evidence of the ICTY; Rule 77 of the Rules of Procedure and Evidence of the ICTR; and Rule 35(2)(c) of the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (ICCC).

<sup>548</sup> *Prosecutor v Šešelj* (IT-03-67-R77.4-A), Appeals Chamber Judgment, ICTY, 30 May 2013.

<sup>549</sup> *Prosecutor v Hartman* (IT-02-54-R77.5), Specially Appointed Chamber, Judgment on allegations of contempt, ICTY, 14 September 2009.

- > In 2008 Baton Haxhiu,<sup>550</sup> former editor of a Kosovo newspaper, was fined €7,000 by the ICTY for publishing a newspaper article containing the real name of a protected witness, as well as the place of residence of the witness. This was found to jeopardise the security of the witness and his family; undermine the effectiveness of the Tribunal's protective measure orders; and dissuade the witness from cooperating with the Tribunal.
- > In 2007 Domagoj Margetić,<sup>551</sup> a freelance journalist, was sentenced to three months' imprisonment and a fine of €10,000 by the ICTY. Margetić published the complete confidential witness list from the *Blaskić Case* on his website. He also published three articles on his website; in one he acknowledged that he knew that the witness identities were protected.
- > In 2006 Josip Jović,<sup>552</sup> former editor-in-chief of a Croatian daily newspaper, was fined €20,000 by the ICTY for publishing information and material in the newspaper concerning a protected witness. The large fine was issued in this case as the result of Mr Jović's refusal to comply with an order to cease such publication. Mr Jović was found guilty of contempt even though the trial in which the witness appeared was finished and the witnesses himself publically acknowledged his identity and involvement in the *Blaskić Case*.

A media professional can be found guilty of contempt even without any intention to deliberately violate a protective order.<sup>553</sup> **A lack of awareness of the existence of a protective order preventing publication of confidential information is not a defence to a charge of contempt.** In particular, a media professional may be guilty of contempt if they 'consciously disregarded' the fact that a protective order has been made.<sup>554</sup> This is where a person has a suspicion an order is in place but deliberately does not verify this. **If a media professional is unsure about whether or not material or a witness is the subject of a protective order they should confirm this with the registry of the relevant international court or tribunal.**

## Media organisations

There is some indication that media organisations have similar responsibilities to international courts and tribunals as media professionals. In two contempt of court proceedings, on October 2014 and January 2015, the Appeals Panel for the Special Tribunal for Lebanon (SLT) held that it had jurisdiction to bring contempt and obstruction of justice charges against media corporations as well as media professionals.<sup>555</sup> Two cases of this nature have been brought before the STL: one against a television station, and the other against a newspaper.<sup>556</sup> These are the first cases brought against media organisations in an international criminal tribunal or court. Both media organisations, and two media professionals working for them, have been accused of disclosing information identifying alleged confidential witnesses before the Tribunal on their websites, and, in relation to the TV station, on its channel and on YouTube. Their trials began in April 2015.

<sup>550</sup> *Prosecutor v Haxhiu* (IT-04-84-R77.5), Trial Chamber Judgment on allegations of contempt, ICTY, 24 July 2008.

<sup>551</sup> *Prosecutor v Margetić* (IT 95-14-R77.6), Trial Chamber Judgment on allegations of contempt, ICTY, 7 February 2007.

<sup>552</sup> *Prosecutor v Jović* (IT-95-14 and 14/2-R77-A), Appeals Chamber Judgment, ICTY, 15 March 2007.

<sup>553</sup> See the case of *Prosecutor v Nobile* (IT-95-14/1-AR77), Appeals Chamber Judgment on appeal by Anto Nobile against finding of contempt, ICTY, 30 May 2001, who was eventually found not guilty of contempt as he had been told that a map given in evidence in open court was a public document.

<sup>554</sup> Art 28 of the Rome Statute.

<sup>555</sup> Pursuant to Rule 60bis (A) of the Rules of Procedure and Evidence of the Special Tribunal for Lebanon (STL).

<sup>556</sup> *In the case against New TV S.A.L. and Al Khayat* (STL-14-05/PT/AP/AR126.1), Appeals Panel, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, STL, 2 October 2014; and *In the case Against Akhbar Beirut S.A.L. and Ibrahim Mohamed Ali Al Amin* (STL-14-06/PT/AP/AR126.1), Appeals Panel, Decision on the Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, STL, 23 January 2015.

# Further Online Resources for Media Professionals in Armed Conflict

This section provides information about online resources available to assist media professionals in armed conflict. This information has been gathered from online material. While great care was taken in compiling this list, the British Red Cross cannot make any assurance as to the accuracy of the information contained here or of the stability of the link. Resources are listed in alphabetical order.

## Practical Resources

### Emergency Resources and Assistance

#### *Emergency Hotlines*

The following organisations operate 24-hour hotlines for media professionals who need urgent assistance in armed conflict and other dangerous situations:

- > ICRC Hotline: +41 79 217 32 85 (24 hours) email: [press@icrc.org](mailto:press@icrc.org)
- > Reporters Without Borders: SOS Press Hotline: +33 1 4777 7414 (24 hours)

#### *Emergency Funds*

The following organisations may provide emergency funds to media professionals in danger or their families. Please contact the relevant organisation directly to find out more information.

- > Doha Centre for Media Freedom Emergency Assistance: <http://www.dc4mf.org/en/content/urgent-assistance-journalists-need>
- > Free Press Unlimited: Reporters Respond emergency funding for the media: <https://www.freepressunlimited.org/en/projects/reporters-respond-emergency-funding-for-the-media>
- > International Federation of Journalists International Safety Fund: <http://ifj-safety.org/en/contents/ifj-international-safety-fund>
- > International Media Support Safety Fund: <http://www.mediasupport.org/about/safety-fund/>
- > Reporters Without Borders: <http://en.rsf.org/reporters-without-borders-provides-13-07-2009,27495.html>
- > Rory Peck Trust Freelance Assistance Programme - Assistance Grants: <http://rorypecktrust.org/freelance-assistance/Assistance-Grants>

### Pre-Deployment Practical Assistance

#### *Practical guides*

Many media organisations publish practical guides and online resources for media professionals in armed conflict, including tips on how to stay safe and what to do in case of an attack or hostage situation:

- > Committee to Protect Journalists: Journalists Security Guide <http://www.cpj.org/reports/2012/04/journalist-security-guide.php>
- > International Federation of Journalists: Live News: A Survival Guide for Journalists <http://ifj-safety.org/en/contents/live-news-a-survival-guide-for-journalists>

- > International News Safety Institute: Online safety advice for media professionals  
<http://www.newssafety.org/safety/advice/>
- > Reporters Without Borders: Handbook for Journalists and other publications  
<http://en.rsf.org/handbooks,1047.html>
- > Rory Peck Trust: Online Resources for Freelancers: <https://rorypecktrust.org/resources>

#### *Insurance for freelance media professionals*

- > International News Safety Institute: a list of useful resources for media professionals including insurance providers: <http://www.newssafety.org/safety/advice/insurance/>
- > Reporters Without Borders: Insurance for Freelance Journalists -  
<http://en.rsf.org/insurance-for-freelance-17-04-2007,21746.html>
- > Rory Peck Trust: List of insurance providers for freelance media professionals:  
<https://rorypecktrust.org/resources/insurance>

#### *Safety equipment and training*

- > International News Safety Institute:
  - > Provides free basic safety training to media professionals in locations around the world:  
<http://www.newssafety.org/safety/training/>
  - > A database of organisations that can provide dangerous situation training to media professionals: <http://www.newssafety.org/resources/training/>
  - > A database of organisations that offer safety equipment to media professionals:  
<http://www.newssafety.org/resources/equipment/>
  - > A database of organisations that offer other practical support to media professionals:  
<http://www.newssafety.org/resources/support/>
- > Reporters Without Borders:
  - > Loan of free safety equipment including bullet-proof vests and personal distress beacons:  
<http://en.rsf.org/loan-of-bulletproof-jackets-17-04-2007,21747.html>
  - > Safety training for media professionals:  
<http://en.rsf.org/training-for-journalists-on-17-04-2007,21750.html>
- > Rory Peck Trust Freelance Assistance Programme:
  - > Training bursaries and a list of some training providers:  
<https://rorypecktrust.org/freelance-assistance/Rory-Peck-Training-Fund>
- > British Red Cross:
  - > First aid training: <http://www.redcross.org.uk/What-we-do/First-aid/First-aid-training>

#### *Sexual violence resources*

- > Committee to Protect Journalists:  
<http://cpj.org/reports/2011/06/security-guide-addendum-sexual-aggression.php>
- > The DART Center for Journalism and Trauma: <http://dartcenter.org/topic/sexual-violence>

#### *Post-mission trauma resources*

Many organisations will provide information and assistance to media professionals returning from dangerous missions who have suffered or are suffering psychological trauma:

- > DART Center for Journalism and Trauma (Europe): <http://dartcenter.org/europe>
- > Reporters Without Borders: <http://en.rsf.org/invisible-injuries-that-threaten-10-06-2009,33366.html>

## Legal Resources

The following resources contain further information about the rules of IHL and other relevant areas of international law considered in this Handbook:

### Armed Conflict and IHL Resources

#### *Useful texts and legal materials on IHL*

- > The full text of the Geneva Conventions and their Additional Protocols can be found on the ICRC website:  
<http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp>
- > British Red Cross What is IHL?: <http://www.redcross.org.uk/What-we-do/Protecting-people-in-conflict/What-is-international-humanitarian-law>
- > ICRC War and Law is a key online IHL resource: <http://www.icrc.org/eng/war-and-law/index.jsp>
- > Crimes of War – an A-Z guide to common legal terms and issues in IHL and international criminal law: <http://www.crimesofwar.org/>
- > ICRC's page on direct participation in hostilities (including a link to the ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under IHL): <http://www.icrc.org/eng/war-and-law/contemporary-challenges-for-ihl/participation-hostilities/index.jsp>
- > ICRC's page on security detention in armed conflict <http://www.icrc.org/eng/war-and-law/contemporary-challenges-for-ihl/security-detention/index.jsp>

#### *Useful documents for media professionals in armed conflict*

- > United Kingdom Ministry of Defence Green Book – the Ministry of Defence's working arrangements with media organisations:  
<https://www.gov.uk/government/publications/the-green-book>
- > UN Resolution 1738 of 1996 condemning attacks against media professionals in armed conflict (non-binding): <http://www.un.org/News/Press/docs/2006/sc8929.doc.htm>
- > UNESCO has collated a number of useful texts including those related to recent (non-binding) initiatives of international and regional organisations addressing the protection of media professionals in dangerous situations (including armed conflict): <http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/safety-of-journalists/basic-texts/>
- > UN Plan of Action on the Safety of Journalists and the Issue of Impunity (non-binding): <http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/safety-of-journalists/un-plan-of-action/>

#### *Useful materials on reporting on IHL violations and international courts and tribunals*

- > International Center for Journalists Disaster and Crisis Coverage – tips on how to work with victims of violence in an ethical and sensitive way  
<http://www.icjf.org/resources/disaster-and-crisis-coverage-english>
- > Institute for War and Peace Reporting Reporting Justice: A Handbook on Covering War Crimes Courts: <https://iwpr.net/printed-materials/reporting-justice-handbook-covering-war-crimes-courts>
- > University of Essex Reporting Killings as Human Rights Violations – a practical guide on how to document and report potential human rights violations to international legal bodies:  
<http://www.essex.ac.uk/reportingkillingshandbook/index.htm>

## Other International Law Resources

### *The United Nations*

- > The UN website contains information about the UN and its initiatives: [www.un.org](http://www.un.org)

### *International Treaties*

- > The UN Treaty Collection contains a searchable database of all treaties deposited with the UN including the International Covenant on Civil and Political Rights and the Convention against Torture: <http://treaties.un.org/>

### *International Human Rights Law Resources*

The websites of the following organisations provide overviews of International Human Rights Law, including its application in armed conflict:

- > The Office of the High Commissioner for Human Rights is the principal United Nations office mandated to promote and protect human rights. Its website contains useful information about international human rights law including fact sheets and other publications: <http://www.ohchr.org/EN/Pages/WelcomePage.aspx>
- > The Human Rights Committee is the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its State parties. Reports from States, and other useful human rights documents, are available on the Committee's website: <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx>
- > The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression's website contains information specifically about the implementation and protection of that right: <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/OpinionIndex.aspx>
- > The ICRC's page on IHL and Human Rights Law: <http://www.icrc.org/eng/war-and-law/ihl-other-legal-regimes/ihl-human-rights/overview-ihl-and-human-rights.htm>
- > The Geneva Academy's Rule of Law in Armed Conflict Project: International Human Rights Law: [http://www.geneva-academy.ch/RULAC/international\\_human\\_rights\\_law.php](http://www.geneva-academy.ch/RULAC/international_human_rights_law.php)

### *International Criminal Law Resources*

The websites of the following organisations provide overviews of International Criminal Law, including its history and application in armed conflict:

- > The ICRC's page on International Criminal Jurisdiction: <http://www.icrc.org/eng/war-and-law/international-criminal-jurisdiction/>
- > The Geneva Academy's Rule of Law in Armed Conflicts Project: International Criminal Law: [http://www.geneva-academy.ch/RULAC/international\\_criminal\\_law.php](http://www.geneva-academy.ch/RULAC/international_criminal_law.php)

## Useful Organisations

The following is an alphabetical list of some organisations that assist media professionals directly in situations of armed conflict (or other dangerous situations), or undertake practical work or research on issues that affect the safety of media professionals:

- > Centre for Freedom of the Media : <http://www.cfom.org.uk/>
- > Committee to Protect Journalists: <https://www.cpj.org/>
- > DART Center for Journalism and Trauma: <http://dartcenter.org/>
- > International Media Support: <http://www.i-m-s.dk/>
- > International News Safety Institute: <http://www.newssafety.org/home/>
- > Institute for War and Peace Reporting: <http://iwpr.net/>
- > Media Defence Legal Initiative: <http://www.mediadefence.org/>
- > Organisation for Security and Cooperation in Europe (OSCE) Project on Media Freedom and Development: <http://www.osce.org/what/media-freedom>
- > Reporters Without Borders: <http://en.rsf.org/>
- > UNESCO: <http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/safety-of-journalists/>
- > World Press Freedom Committee: <http://www.wpfc.org/>



**Media professionals are civilians under international humanitarian law. In armed conflicts they are protected from direct attack and must be treated humanely at all times.**

Los profesionales de los medios de comunicación son civiles con arreglo al derecho internacional humanitario. En conflictos armados, ellos gozan de protección contra ataques directos y deben ser tratados con humanidad en todas las circunstancias.

Les professionnels des médias sont des civils en vertu du droit international humanitaire. En situation de conflit armé, ils sont protégés contre les attaques directes et doivent, en toutes circonstances, être traités avec humanité.

يُف نويي محم مه . يي ناسن إال يلودل نون اقلل أقفو نويي ندم مه مال خإل لئاس و يي نهم  
ة. يي ناسن! ةلم اعم اوقلي نأ تا قوالا لك يي بج يورش ابملا موجهل ا دض ةحل سمل ا تا عازنل ا

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Assistance can also be obtained by getting in touch with a local International Committee of the Red Cross (ICRC) delegation/office or through a National Red Cross or Red Crescent Society.