Note

The Pen and the Sword[1]: International Humanitarian Law Protections for Journalism

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INTRODUCTION 416

I. THE RELEVANT LAW PROTECTING JOURNALISTS 418
A. Treaty-Based IHL 419
1. 1949 Geneva Conventions 419
2. Additional Protocol I 420
B. Customary IHL 421
C. Human Rights Law as Lex Generalis 421

II. THE SHIFTING PURPOSE OF PROTECTING JOURNALISTS IN WARTIME 423
A. A Brief History of Pre-1949 IHL Governing Journalists 423
B. The 1949 Geneva Conventions and the Rise of Human Rights Law 427
C. Additional Protocol I 429
D. Post-1977 431

III. IMPLICATIONS 434
A. Citizen Journalism 434
B. Limiting Journalist Access 439
C. Distinction 441
D. Proportionality 445
E. Internet Shutdown 448

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1. With apologies to Edward Bulwer-Lyon:
True, This!—
Beneath the rule of men entirely great
The pen is mightier than the sword. Behold
The arch-enchanter's wand!—itself is nothing!—
But taking sorcery from the master-hand
To paralyse the Caesars, and to strike
The loud earth breathless!—Take away the sword—
States can be saved without it!

EDWARD BULWER-LYON, RICHELIEU: OR THE CONSPIRACY act 2, sc. 2 (1839), *reprinted in* 1 NEW YORK DRAMA: A CHOICE COLLECTION OF TRAGEDIES, COMEDIES, AND FARCES, ETC. (1876).

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IV. MECHANISMS FOR IMPLEMENTATION 449
A. A New Treaty 450
B. Interpreting Existing Law 450
C. A System of Notification and Derogation 455

CONCLUSION 456

"The right of belligerents to exercise full control over news transmitted from the seat of war is one which neither we nor, we imagine, our readers desire to call into question. In time of war military considerations must take precedence over the legitimate claim of the public to be informed . . . ." —*London Times* Editorial Board, 1904[2]

"As in every war zone, reporting by journalists—and human rights monitors as well—can discourage abuse and is essential to full public understanding of the conflict." —*New York Times* Editorial Board, 2008[3]

INTRODUCTION

Barrels of ink have been spilled on the discussion about how to better protect journalists working in warzones.[4] Understandably so; throughout the world, journalists covering armed conflicts have been harassed, threatened, denied access, and even killed.[5] Scholars have written on the issue of how international humanitarian law (IHL)—the legal framework governing warfare—can better protect journalists and have put forth important and welcome suggestions.[6] In doing so, they have documented the expansion of legal protections for wartime journalists. However, few have closely interrogated the underlying question of *why* IHL protections for journalists have expanded.

This Note fills that gap. It documents a shift in international public discourse about the role of wartime journalists and why they warrant protection. It suggests that there are two reasons underlying IHL protection of

2. *London Times Replies to Russia's Threat*, N.Y. TIMES, Apr. 18, 1904 (quoting a *London Times* editorial).

3. Editorial, *Incursion into Gaza*, N.Y. TIMES, Jan. 5, 2009, http://www.nytimes.com/2009/01/06/opinion/06tue1.html.

4. *See, e.g.*, NINA BURRI, BRAVERY OR BRAVADO?: THE PROTECTION OF NEWS PROVIDERS IN ARMED CONFLICT (2015); Alexandre Balguy-Gallois, *The Protection of Journalists and News Media Personnel in Armed Conflict*, 86 INT'L REV. RED CROSS 37 (2004); Kayt Davies & Emily Crawford, *Legal Avenues for Ending Impunity for the Death of Journalists in Conflict Zones: Current and Proposed International Agreements*, 7 INT'L J. OF COMM. 2157 (2013); Isabel Düsterhöft, *The Protection of Journalists in Armed Conflicts: How Can They Be Better Safeguarded?*, 29 MERKOURIOS 4 (2013); Freya Foster, *The Price of News from the Front Line: Rethinking the Protection of Media Personnel under International Humanitarian Law*, 20 J. CONFLICT & SECURITY L. 451 (2015); Christof Heyns & Sharath Srinivasan, *Protecting the Right to Life of Journalists: The Need for a Higher Level of Engagement*, 36 HUM. RTS. Q. 304 (2013).

5. *See* Letter from Raimonda Murmokaitė, Lithuanian Amb. to U.N., to U.N. Secretary General, Annex 2, U.N. Doc. No. S/2015/307 (May 1, 2015) [hereinafter UNSC Res. 2222 Concept Note].

6. *See* sources cited *supra* note 4.

journalists. The first emphasizes the importance of protecting journalists as civilians who pose no military threat and are thus not legitimate targets of warfare. Throughout the Note, I refer to this purpose as "individual humanitarianism." The second, mutually inclusive purpose suggests that journalists must be protected not only because they are civilians who deserve individual humanitarian protections, but also because of the function they perform in transmitting news from the battlefield. Throughout the Note, I refer to this as the "public-informing" role of journalists.

This Note argues that early IHL protections for journalists were motivated exclusively by individual humanitarianism. Now, however, IHL protections for journalists are also motivated by the mutually inclusive public-informing function of journalists. Because of this shift, this Note argues that IHL can—and should—be understood not only as protecting journal*ists* as individuals, but also as protecting journal*ism* as a field.

The importance of this distinction is not purely academic. In June 2015, the United States Department of Defense published an updated manual on the laws of war.[7] The manual suggested that some journalists might be targeted as belligerents,[8] that states had authority to censor journalists' work,[9] that there is no journalistic right of access in IHL,[10] and that "journalists should act openly and with the permission of relevant authorities" to avoid being mistaken for spies.[11] The manual set off a maelstrom of debate[12] that led a Department of Defense lawyer to announce that Pentagon officials would take public comments on potential revisions to this portion of the manual.[13] Pushback to the manual's section on targeting journalists as belligerents closely implicates their personal safety, reflecting individual humanitarianism. Concerns about the manual's sections on censorship and access, however, do not implicate journalists' personal safety and are better understood as reflecting concerns about journalism's public-informing role. The shift described in this Note contextualizes the debate about the manual and demonstrates that the question of *why* IHL protects journalism might clarify the scope of those protections.

A preliminary aside is necessary to better define what this Note refers to as journalism. There is serious debate about precisely what constitutes

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7. OFFICE OF THE GEN. COUNSEL, DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL (2015) [hereinafter DOD LAW OF WAR MANUAL].

8. *Id.* § 4.24, at 173.

9. *Id.* § 4.24.5, at 175.

10. *Id.*

11. *Id.*, § 4.24.4, at 175.

12. *See, e.g.*, Charles J. Dunlap, Jr., *The DoD* Law of War Manual *and Its Critics: Some Observations*, 92 INT'L L. STUD. 85, 107-12 (2016); Alan Yuhas, *Pentagon Needs to Rethink Calling War Journalists 'Belligerents', Says Watchdog*, GUARDIAN, Aug. 11, 2015, http://www.theguardian.com/media/2015/aug/11/pentagon-war-reporters-unprivileged-belligerents-spies; Editorial, *The Pentagon's Dangerous Views on the Wartime Press*, N.Y. TIMES, Aug. 10, 2015, http://www.nytimes.com/2015/08/10/opinion/the-pentagons-dangerous-views-on-the-wartime-press.html; Alex Loomis, *The New York Times Is Confused About the Law of War Manual*, LAWFARE (Aug. 12, 2015, 10:58 AM), https://www.lawfareblog.com/new-york-times-confused-about-law-war-manual.

13. *See* Ernesto Londoño, Opinion, *Will the Pentagon Change Its Manual on the Law of War?*, N.Y. TIMES, Aug. 18, 2015, http://takingnote.blogs.nytimes.com/2015/08/18/will-the-pentagon-change-its-manual-on-the-law-of-war.

journalism. Indeed, as this Note discusses,[14] the precise contours of this debate might have critical consequences for IHL, regardless of whether or not one embraces the view that IHL protects journalism as well as journalists. One recommendation this Note makes is for expert consideration and consultation of what constitutes a "journalist" and "journalism" under IHL. In this regard, it would be self-defeating to put forth too precise a definition of my own. Generally, however, this Note takes "journalism" to refer broadly to the practice of gathering and disseminating of news in a way that informs the public.

The Note proceeds in four parts. First, it briefly explains the current law governing protections of journalists in wartime. Next, it examines the development of that law and examines how—and more importantly, *why*—it came to be. It argues that initial efforts to protect journalists were rooted in individual humanitarianism, whereas modern efforts also reflect the desire to protect the public-informing function of journalists. As such, the Note argues, a purposive reading of IHL might suggest that it protects journal*ism* as a field in addition to journal*ists* as individuals. The Note next discusses several implications of reading IHL in this manner. This interpretation of IHL can be conceptualized as reflecting a shift from a negative state duty to refrain from intentionally harming journalists to a positive state duty to protect journalism. The protections might be understood as affecting both journalists' personal safety and their ability to engage in journalism (in effect, their ability to seek and transmit information). This conceptualization of the shift has import on several debates, which Part III discusses. First, it implicates the question of whether to expand the definition of journalist to better account for citizen journalists, who often play an important public-informing role. Second, it implicates questions about increasing journalists' physical access in wartime. If IHL is indeed understood to confer positive rights of information-seeking on journalists, states might have an obligation to ensure access to protect the public-informing value of journalism. Third, it closely implicates questions of targeting, in terms of distinction and proportionality, both with regard to journalists as individuals and media infrastructure. If IHL does indeed seek to protect journalism's public-informing purpose, then this value necessarily affects tradeoffs that inhere in questions of targeting. Part III of the Note also considers the effect of reading IHL to protect journalism on the legality of total or partial Internet shutdown, an issue that closely implicates questions of defining journalism and targeting. In Part IV, this Note considers some potential mechanisms of realizing a journalism-protecting interpretation of IHL.

I. THE RELEVANT LAW PROTECTING JOURNALISTS

Before charting the history of legal protections for wartime journalists and interrogating the purpose behind their development, it is important to briefly introduce the law as it stands.

14. *See infra* Part III.A.

A. Treaty-Based IHL

1. 1949 Geneva Conventions

The 1949 Geneva Conventions are comprised of four treaties[15] written in the aftermath of World War II, to which all nations have now acceded.[16] Article 4(A)(4) of the Third Geneva Convention states that among those persons guaranteed treatment as prisoners of war (POWs) are

> [p]ersons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card.[17]

Similarly, the First and Second Geneva Conventions, governing the treatment of the sick and wounded on the battlefield and at sea, respectively, extend their protections to war correspondents.[18]

These provisions limit their protection to a specialized type of journalist: the war correspondent. War correspondents receive formal authorization from a state to accompany its armed forces into conflict.[19] Unlike other journalists, war correspondents "are accredited to the armed forces command whose movements they are reporting."[20] Consequently, the Geneva Conventions require that the war correspondent receive an identity card conferring the necessary permission.[21] As the International Committee of the Red Cross (ICRC) Commentary to the Conventions notes, the 1949 provisions make POW status dependent on military authorization to accompany armed forces, with the identity card merely serving as proof of this authorization.[22]

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15. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

16. *See Summary of the Geneva Conventions of 1949 and Their Additional Protocols*, AM. RED CROSS 1 (Apr. 2011), http://www.redcross.org/images/MEDIA_CustomProductCatalog/m3640104_IHL_SummaryGenevaConv.pdf.

17. Geneva Convention III, *supra* note 15, art. 4(A)(4).

18. Geneva Convention I, *supra* note 15, art. 13(4); Geneva Convention II, *supra* note 15, art. 13(4).

19. *See* Düsterhöft, *supra* note 4, at 8; *How Does International Humanitarian Law Protect Journalists in Armed-Conflict Situations?*, INT'L COMMITTEE OF RED CROSS (Jul. 27, 2010), https://www.icrc.org/eng/resources/documents/interview/protection-journalists-interview-270710.htm [hereinafter Interview with Geiss].

20. C. Pilloud, *Protection of Journalists on Dangerous Missions in Areas of Armed Conflict*, 118 INT'L REV. RED CROSS 3, 4-5 (1971).

21. *Cf.* Interview with Geiss, *supra* note 19 ("In order to become a war correspondent within the meaning of international humanitarian law, official accreditation by the armed forces is mandatory.").

22. INT'L COMM. RED CROSS, COMMENTARY: III GENEVA CONVENTION RELATIVE TO TREATMENT OF PRISONERS OF WAR 64-65 (Jean S. Pictet et al. eds., 1960).

2. *Additional Protocol I*

Article 79 of the 1977 first Protocol Additional to the Geneva Conventions[23] (Additional Protocol I) is the most comprehensive IHL treaty provision protecting journalists:

> 1. Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians . . . .
>
> 2. They shall be protected as such under the Conventions and this Protocol, provided that they take no action adversely affecting their status as civilians, and without prejudice to the right of war correspondents accredited to the armed forces to the status provided for in Article 4A(4) of the Third Convention.
>
> 3. They may obtain an identity card similar to the model in Annex II of this Protocol. This card, which shall be issued by the government of the State of which the journalist is a national or in whose territory he resides or in which the news medium employing him is located, shall attest to his status as a journalist.[24]

The ICRC Commentary to the Protocol sheds light on how this definition of "journalist" might be interpreted.[25] It suggests that "the term 'journalist,' is understood in a broad sense,"[26] and might be read in light of the definition contained in a draft International Convention for the Protection of Journalists engaged in Dangerous Missions in Areas of Armed Conflict.[27] That draft defines "journalist" to mean "any correspondent, reporter, photographer, and their technical film, radio and television assistants who are ordinarily engaged in any of these activities as their principal occupation."[28] To be sure, the Commentary does not deem this definition authoritative, but rather suggests that it is a "guide for the interpretation of Article 79."[29] As the Commentary notes, while "the etymology [of the word 'journalist'] calls to mind correspondents and reporters writing for a daily newspaper, the present use of the word covers a much wider circle of people working for the press and other media."[30]

The Commentary offers further guidance for interpreting the criterion of "dangerous professional missions in areas of armed conflict." It suggests that

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23. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

24. *Id.* art. 79.

25. It is important to note that while the Commentary is influential, it is not legally dispositive. *See Commentary of 2016 Introduction*, INT'L COMM. RED CROSS, https://www.icrc.org/applic/ihl/ihl.nsf /Comment.xsp?action=openDocument&documentId=5087F3472575591CC1257F150049C80B [hereinafter *ICRC 2016 Commentary*].

26. INT'L COMM. RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 921 (Yves Sandoz, Christophe Swinarski & Bruno Zimmerman, eds. 1987) [hereinafter ADDITIONAL PROTOCOLS COMMENTARY].

27. Id.

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

29. *Id.*

30. *Id.*

"[t]he concept of a 'professional mission' covers all activities which normally form part of the journalist's profession in a broad sense: being on the spot, doing interviews, taking notes, taking photographs or films, sound recording etc. and transmitting them to his newspaper or agency."[31] It also deems it "clear" that "any professional activity exercised in an area affected by hostilities is dangerous by its very nature and is thus covered by the rule."[32]

B. Customary IHL

In addition to treaty-based IHL, customary IHL recognizes certain protections for journalists. In 2005, the ICRC published a compendium of customary IHL,[33] including a rule regarding journalism: that "[c]ivilian journalists engaged in professional missions in areas of armed conflict must be respected and protected as long as they are not taking a direct part in hostilities."[34] The presence of this rule is especially important for two reasons. First, while all countries have ratified the four 1949 Geneva Conventions,[35] not all countries have acceded to Additional Protocol I.[36] Those countries that have not acceded to the Protocol are nevertheless bound by customary IHL. Second, the customary rule applies to non-international armed conflicts,[37] while Additional Protocol I does not.[38] Additionally, the main treaty-based law governing non-international armed conflicts does not explicitly protect journalists.[39] Consequently, the presence of a customary IHL rule protecting journalists expands the scope of protection to non-international armed conflicts.

C. *Human Rights Law as* Lex Generalis

While treaty-based and customary IHL are the only international humanitarian legal regimes that govern during wartime, international human rights law might apply as well. The International Court of Justice has held that IHL operates as *lex specialis* during wartime, while human rights law applies as *lex generalis*, meaning that IHL does not wholly displace human rights law.[40]

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31. *Id.*

32. *Id.*

33. It is worth noting that this study's findings were controversial. *See infra* notes 231-232 and accompanying text.

34. 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: THE RULES 115 (2005).

35. *See Summary of the Geneva Conventions of 1949 and Their Additional Protocols*, *supra* note 16.

36. *See State Parties,* INT'L COMM. RED CROSS, https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470 (last visited Apr. 7, 2016).

37. *See* HENCKAERTS & DOSWALD-BECK, *supra* note 34, at 115-16.

38. *See* Additional Protocol I, *supra* note 23, art. 2(3).

39. For the treaty-based IHL governing non-international armed conflicts, see Geneva Convention IV, *supra* note 15, art. 3; Geneva Convention III, *supra* note 15, art. 3; Geneva Convention II, *supra* note 15, art. 3; Geneva Convention I, *supra* note 15, art. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

40. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 25 (July 8).

While the majority of states appear to accept this view, some have explicitly rejected it, arguing that once IHL applies, human rights law does not.[41] Even if one accepts the view that international human rights law sometimes applies in armed conflict, the question of where it applies remains unsettled. The United Nations Human Rights Committee takes the view that the International Covenant on Civil and Political Rights[42] (ICCPR) applies to "anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."[43] The United States, though, has rejected the notion that the ICCPR has extraterritorial reach.[44] Moreover, defining when one state has "effective control" over citizens or territories of another state is a nuanced and sometimes difficult endeavor.[45] In short, even if human rights law applies, it is not always easy to ascertain where and when it does.

The difficulty of ascertaining the applicability of human rights law notwithstanding, the ICCPR includes several provisions that are relevant to wartime journalism. Most directly, it guarantees that "[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."[46] This right is derogable under certain conditions.[47] Moreover, the ICCPR article protecting freedom of expression has within it a limitation that allows "certain restrictions . . . as are provided by law and are necessary . . . [f]or the protection of national security or of public order,"[48] though the Human Rights Committee has made clear that such restrictions "must conform to . . . strict tests."[49]

The upshot here is that, while international human rights law applies as *lex generalis* in wartime, the nuances of precisely what this means remain

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41. Françoise J. Hampson, *The Relationship Between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body*, 90 INT'L REV. RED CROSS 549, 550-51 (2008); *cf.* Oona A. Hathaway, Rebecca Crootof, Philip Levitz, Haley Nix, William Perdue, Chelsea Purvis & Julia Spiegel, *Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law*, 96 MINN. L. REV. 1883, 1896-97 (2012).

42. International Covenant on Civil and Political Rights, Dec. 9, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

43. Human Rights Comm., General Comment No. 31: The Nature of the General Legal Obligation on States Parties to the Covenant, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

44. Human Rights Comm., Consideration of Reports Submitted by State Parties Under Article 40 of the Covenant: United States of America, U.N. Doc. CCPR/C/USA/CO/3/Rev.1/Add.1, at 2 (Feb. 12, 2008) ("The United States takes this opportunity to reaffirm its long-standing position that the Covenant does not apply extraterritorially . . . . Accordingly, the United States respectfully disagrees with the view of the Committee . . . .").

45. For an especially good discussion about the sometimes convoluted nature of determining effective control (in the context of the European Convention on Human Rights, not the ICCPR), see Marko Milanovic, *European Court Decides Al-Skeini and Al-Jedda*, EJIL: TALK! (July 7, 2011), http://www.ejiltalk.org/european-court-decides-al-skeini-and-al-jedda.

46. ICCPR, *supra* note 42, art. 19(1).

47. *Id.* art. 4.

48. *Id.* art. 19.

49. Human Rights Comm., General Comment No. 34 to the International Covenant on Civil and Political Rights, Article 19: Freedoms of Opinion and Expression, ¶ 22, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011) [hereinafter General Comment 34].

heavily debated, including in the context of free expression and press.[50] Consequently, IHL protections for journalism remain uniquely important during wartime.

II. THE SHIFTING PURPOSE OF PROTECTING JOURNALISTS IN WARTIME

Part I offered an abbreviated overview of the current law protecting journalists during wartime. This Part of the Note tracks the history of the law and considers the impetus and motivations for its development. In doing so, it argues that the reasons for which IHL protects wartime journalists have changed. Whereas in the past, the purpose of protecting wartime journalists was exclusively individual humanitarianism, there is now a second reason for doing so: their public-informing function. As this Part shows, when states expanded IHL protections for journalists, they were motivated in part by an understanding that journalism is an important tool in enforcing IHL more generally, both by ensuring compliance and punishing noncompliance. The public-informing function thus reflects the notion that protecting journalists is not only an important value and end in and of itself, but also a means to another end: the protection of civilians more broadly.

A. A Brief History of Pre-1949 IHL Governing Journalists

Although laws and customs have regulated warfare for centuries, it is only in the last century and a half that the laws of war have been codified into centralized governing documents.[51] To the extent that these early documents protected journalists, it was exclusively because of individual humanitarian concerns and not because of the public-informing value of journalism.

Wartime legal protections for journalists date to 1863, when Abraham Lincoln issued General Orders Number 100: Instructions for the Government of Armies of the United States in the Field, a set of regulations governing the behavior of the Union Army on the Civil War battlefield.[52] General Orders Number 100—commonly known as the Lieber Code after its principal drafter, Francis Lieber—regulated a wide array of military conduct, including the treatment of journalists.[53] The Lieber Code's Article 50 specified that "citizens who accompany an army for whatever purpose, such as . . . editors, or reporters of journals, . . . if captured, may be made prisoners of war, and be detained as

50. For a detailed discussion of the interplay between Article 19 and IHL, see Hathaway et al., *supra* note 41, at 1939-42.

51. *Development of Modern International Humanitarian Law*, INT'L COMM. RED CROSS (2010), https://www.icrc.org/eng/who-we-are/history/since-1945/history-ihl/overview-development-modern-international-humanitarian-law.htm.

52. For a comprehensive history of General Orders 100, see generally JOHN FABIAN WITT, LINCOLN'S WAR: THE LAWS OF WAR IN AMERICAN HISTORY (2012).

53. The Lieber Code itself was based on treatises authored by scholars of international custom, which had served as detailed compendiums of international practice. Very few of these treatises addressed wartime protection of journalists. Amos S. Hershey, *War Correspondents, Wireless Telegraphy and Submarine Mines*, 16 GREEN BAG 595, 597 (1904) ("[T]he status of war correspondents is one which is seldom ever touched upon by publicists on International Law."). This is not altogether surprising, given the relative novelty of war correspondents. *See infra* note 60 and accompanying text.

such."[54] Article 50 allowed states to detain journalists, but ensured that captured journalists were entitled to POW status, which conferred important benefits.[55] Moreover, it clearly identified journalists as *citizens* accompanying an army, ensuring that journalists would be viewed not as enemy belligerents, but as ordinary civilians performing a specific task.

While the first major *international* convention on the laws of war—the 1864 Geneva Convention—did not offer any specific protections for journalists,[56] its more robust successor conventions did include some protections. The 1899 Hague Convention and its 1907 expansion both guaranteed certain protections to journalists. In some ways, the 1899 and 1907 Hague Conventions mirrored the protections of the Lieber Code, guaranteeing that "[i]ndividuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, . . . who fall into the enemy's hands, and whom the latter thinks expedient to detain, are entitled to be treated as prisoners of war."[57] This mirrors the guarantee of POW status, yet makes explicit another requirement left implicit in the Lieber Code: armies may only detain reporters if they think doing so is "expedient." While this capacious standard leaves the decision to detain to the discretion of the capturing army, it still serves as something of a bulwark by ensuring that detention is not automatic. Unlike the Lieber Code, however, the 1899 and 1907 Hague Conventions required that reporters could benefit from POW status only if they possessed a certificate from the military they accompanied.[58] The 1929 Convention Relative to the Treatment of Prisoners of War largely mirrored the language of the Hague Conventions in its Article 81.[59]

Relative to the post-World War II Conventions, there is little primary source information that elucidates why these documents encompassed specific protections for journalists. The Reports to the Hague Conferences of 1899 and 1907 discuss changes made to those Conventions that clarified the meaning of previous documents.[60] It noted that while "these persons [could not] really be

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54. Instructions for the Government of Armies of the United States in the Field, General Order No. 100, art. 50 (Apr. 24, 1863), http://avalon.law.yale.edu/19th_century/lieber.asp.

55. For example, the Lieber Code guaranteed that "[a] prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity." *Id.* art. 56. The Code also set certain minimum standards for POW conditions of confinement and regulated prisoner swaps. *Id.* arts. 105-10.

56. Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter 1864 Geneva Convention].

57. Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, art. 13 [hereinafter 1907 Hague Convention]; Convention (II) with Respect to the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, July 29, 1899, art. 13 [hereinafter 1899 Hague Convention].

58. *Id.*

59. Convention Relative to the Treatment of Prisoners of War art. 81, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343 [hereinafter 1929 Geneva Convention].

60. The Brussels Declaration of 1874 provided, "Individuals in the vicinity of armies but not directly forming part of them, such as correspondents, newspaper reporters, sutlers, contractors, etc., can also be made prisoners. These prisoners should however be in possession of a permit issued by the competent authority and of a certificate of identity." Project of an International Declaration Concerning the Laws and Customs of War art. 34, Aug. 27, 1874, *reprinted in* THE LAWS OF ARMED CONFLICT: A

considered as prisoners of war at all . . . . it may be necessary to detain them either temporarily or until the end of the war."[61] In such situations, it was preferable that they be entitled to POW treatment.[62]

This Report confirms a tension that the provisional text revealed: that war correspondents accompanying an army should not be considered legitimate military targets but that, at times, it may be militarily expedient to detain them. In this regard, early texts privileged military expediency over any public-informing function of journalists' work. As such, the underlying motivation for protecting the correspondents appears to stem from individual humanitarian concerns, allowing detention when expedient, but ensuring fair treatment for detained war correspondents.

The fact that the relevant provisions protecting war correspondents safeguarded various other professionals accompanying militaries further indicates this individual humanitarian purpose to the exclusion of other purposes. The relevant provisions lumped war correspondents with sutlers and contractors, for example.[63] Sutlers and contractors have no public-facing role, let alone a public-informing role. This suggests that the provision was not primarily concerned with the import of the information that war correspondents provided to public. Rather, it was motivated by individual humanitarianism: to ensure that, to the extent possible, civilians officially authorized to accompany a military could benefit from POW privileges or avoid imprisonment altogether.

Early IHL documents protected only official war correspondents, rather than all journalists and reporters. War correspondents have official permission to accompany militaries and thus, unlike independent journalists, cannot completely "operate 'independently' of these influences."[64] Correspondents were subject to limitations that a military might impose, including censorship. Consider, for example, the first modern war correspondent, William Howard Russell of the *London Times*. Russell began reporting from the Crimean War in 1854 and his reports were subject to strict censorship.[65]

To the extent that military necessity and expediency trumped any public-informing purpose of journalism, states may not have had the desire to offer

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COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS 21, 26 (Dietrich Schindler & Jiri Toman eds., 4th rev. & completed ed. 2004). The Institute of International Law appointed a committee to study the Brussels Declaration and adopted what came to be known as the Oxford Manual in 1880. THE LAWS OF ARMED CONFLICT, *supra*, at 21. The Oxford Manual provided, "Individuals who accompany an army, but who are not part of the regular armed force of the State, such as correspondents, traders, sutlers, etc., and who fall into the hands of the enemy, may be detained for such length of time only as is warranted by strict military necessity." Manual of the Laws and Customs of War art. 22, Sept. 9, 1880, *reprinted in* THE LAWS OF ARMED CONFLICT, *supra*, at 29, 33. Both the Brussels Declaration of 1874 and the Oxford Manual of 1880 became the basis of the 1899 and 1907 Hague Conventions and Regulations annexed to them. THE LAWS OF ARMED CONFLICT, *supra*, at 21.

[61] Edouard Rolin, Report to the Conference from the Second Commission on the Laws and Customs of War on Land, *reprinted in* THE REPORTS TO THE HAGUE CONFERENCES OF 1899 AND 1907, at 137, 144 (James Brown Scott ed., 1916).

62. *Id.*

63. 1907 Hague Convention, *supra* note 57, art. 13; 1899 Hague Convention, *supra* note 57, art. 13.

64. Düsterhöft, *supra* note 4, at 7-8.

65. BURRI, *supra* note 4, at 6.

explicit protections to independent journalists by giving them POW status. Indeed, the very reason early IHL specially protected war correspondents is because of this close relationship.[66] Moreover, governments had incentive to try to maintain control over the flow of information. Through advances in media technology, journalists upended government monopolies on battlefield information and brought home the horrors of war, to which "the public reacted with furor."[67]

To be sure, war correspondents' work did have some public-informing impact that was not necessarily favorable to armies in the field and had tremendous domestic effects.[68] They were not mere stenographers for military propaganda. At the same time, they depended on military consent and support in a way that independent journalists did not.

Structurally, protecting only war correspondents made sense. Unlike modern IHL, early IHL instruments were enforced through reciprocity: if two signatories to an IHL instrument engaged in warfare and one side breached its obligations, the other was entitled to do so as well. If a signatory to an IHL instrument engaged in warfare against a non-signatory, the signatory had no obligation to respect the rules of that instrument.[69] In short, it was a system that relied on states' strategic or normative desire to protect their own troops and civilians. In this regard, states were understandably more concerned with respecting the rights of war correspondents that their counterparts had authorized, rather than independent journalists. In doing so, they could ensure that the war correspondents they themselves had authorized would be protected.

An illuminating historical incident demonstrates the extent to which the public-informing function of journalism was subverted to military expediency. In 1904, during the Russo-Japanese War, the Russians announced that they would treat war correspondents found to be using wireless telegraph technology in neutral waters as spies.[70] Wireless telegraphy was a new technological advancement and the Russians were ostensibly concerned that the Japanese could intercept it. The Russian threat was especially concerning to the British and the Americans: the *London Times* and the *New York Times* had partnered to place a correspondent on a ship operating in neutral waters and transmitting messages to a neutral land-based station, which subsequently transmitted them

66. Interview with Geiss, *supra* note 19. To be sure, one way of interpreting early IHL's protection of war correspondents to the exclusion of other journalists is that they were simply more likely to be captured because war correspondents traveled with armed forces. While this is a reasonable interpretation, states were aware of the nearly simultaneous emergence of both war correspondence and independent wartime journalism. *See* BURRI, *supra* note 4, at 7-8.

67. Eyal Benvenisti & Amichai Cohen, *War Is Governance: Explaining the Logic of the Laws of War from a Principal-Agent Perspective*, 112 MICH. L. REV. 1363, 1390 (2014) (quoting JOHN F. HUTCHINSON, CHAMPIONS OF CHARITY 26 (1996)).

68. *See* BURRI, *supra* note 4, at 6-8.

69. *See, e.g.*, 1907 Hague Convention, *supra* note 57, art. 2 ("The provisions contained in the Regulations . . . are only binding on the Contracting Powers, in case of war between two or more of them. These provisions shall cease to be binding from the time when, in a war between Contracting Powers, a non-Contracting Power joins one of the belligerents."); 1899 Hague Convention, *supra* note 57, art. 2 (same).

70. *See Russia Puts Ban on Wireless News*, N.Y. TIMES, April 16, 1904.

to London and New York.[71] The British and American governments vociferously protested, as did both newspapers.[72] The nature of their protest is revealing. The *London Times* acknowledged that it "ha[d] never questioned the absolute right of belligerents to subordinate the activity of newspaper correspondents to the paramount exigencies of warfare."[73] Its editorial board wrote: "The right of belligerents to exercise full control over news transmitted from the seat of war is one which neither we nor, we imagine, our readers desire to call into question. In times of war military considerations must take precedence over the legitimate claim of the public to be informed . . . ."[74] The *New York Times* freely conceded that, per international law, if its correspondent were not in neutral territory, it would submit itself to censorship as required for military necessity.[75] While the public-informing function of journalism was mentioned, it was subordinated to military necessity. Overall, little emphasis was placed on the public-informing role of journalists and the crux of the controversy was the individual humanitarian fate of journalists as civilians and the violation of neutrality principles in war.

B. The 1949 Geneva Conventions and the Rise of Human Rights Law

The 1949 Geneva Conventions did not greatly expand protections for journalists, reflecting a continuation of individual humanitarianism as the sole purpose for protecting journalists. The Conventions' protections still covered only war correspondents,[76] although they did move the needle forward in a subtle, yet important, way. While some delegates to the preparatory Conference initially proposed that the requirement that war correspondents actually *possess* a formal identity card authorizing them to accompany the army—mirroring previous conventions—the Conventions abandoned this requirement.[77] Instead, they allowed for POW status for those authorized to accompany militaries even if they did not have an identity card in their possession (for example, because they lost it, as had happened in World War II).[78] As the Commentary to the Conventions notes, the 1949 Conventions modified language that:

> made possession of an identity card an absolute condition of the right to be treated as a prisoner of war . . . and the resulting text included in the Convention is more flexible. [POW status] is therefore dependent on authorization to accompany the armed forces, and the identity card merely serves as proof.[79]

Notwithstanding the subtlety of this change, the Geneva Conventions reflected two watershed moments in IHL. First, the reciprocity-based system

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71. *See How the* Times *Gets War News by "Wireless,"* N.Y. TIMES, Apr. 24, 1904.
72. *Russia Puts Ban on Wireless News*, *supra* note 70.
73. *London Times Declares Russia's Course Illogical*, N.Y. TIMES, Apr. 25, 1904.
74. *London Times Replies to Russia's Threat*, *supra* note 2.
75. Editorial, *The New Russian Doctrine*, N.Y. TIMES, Apr. 18, 1904.
76. *See supra* note 17 and accompanying text; *see also* Geneva Convention IV, *supra* note 15, art. 4(A)(4).
77. *See supra* note 22 and accompanying text.
78. *Id.*
79. *Id.* at 65.

was abandoned. Unlike most[80] of their IHL predecessors, the 1949 Conventions imposed their obligations on states in all circumstances.[81] If two signatories fought against one another, one could not violate the Geneva Conventions simply because the other did. Likewise, if a signatory fought a non-signatory, it would still be bound. Second, Common Article 3 of the Conventions governed non-international (or internal) conflicts.[82] Although its protections were limited, Common Article 3 nevertheless represented a "revolutionary inroad into traditional notions of State sovereignty."[83] Though neither of these two shifts implicated the rights of journalists, they each represented important examples of states constraining their behavior to principles of humanity[84] and were, in this regard, both harbingers.

If Common Article 3 cracked the door of traditional state sovereignty, international human rights law flung it open. In the years following the 1949 Conventions, states acceded to a variety of international human rights instruments in which they constrained their behavior in order to further principles of humanity and dignity. As Theodor Meron has noted:

> [I]t is the Universal Declaration of Human Rights and other post-Charter human rights treaties and declarations that explain the focus of the Geneva Conventions and Additional Protocols on individuals and populations . . . . The fact that the law of war and human rights law stem from different historical and doctrinal roots has not prevented the principle of humanity from becoming the common denominator of both systems.[85]

The rise of human rights law reveals at least two important insights when interrogating subsequent expansion of IHL protections for journalists. First, human rights law, in ICCPR Article 19, protects freedom of expression and access to information.[86] Along with the other guarantees of the human rights

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80. The 1929 Geneva Convention had a similar clause to the 1949 Conventions' Common Article 1. 1929 Geneva Convention, *supra* note 59, art. 82(1). Nevertheless, the 1949 Conventions made the point more prominently. *See supra* note 81.

81. *See* Geneva Convention IV, *supra* note 15, art. 1 ("The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances."); Geneva Convention III, *supra* note 15, art. 1 (same); Geneva Convention II, *supra* note 15, art. 1 (same); Geneva Convention I, *supra* note 15, art. 1 (same). Collectively, these provisions are known as Common Article 1. The 1952 Commentary to Common Article 1 explains that

> [b]y undertaking at the very outset to respect the clauses of the Convention, the Contracting Parties draw attention to the special character of that instrument. It is not an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations. It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties.

COMMENTARY: I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 25 (Jean S. Pictet ed., 1952). *But see* Sean Watts, *Reciprocity and the Law of War*, 50 HARV. INT'L L.J. 365, 386 (2009) ("Even after the most important and humanitarian-focused revision of the law of war in 1949, reciprocity was never entirely eliminated in a positivist sense. Rather, conditions of reciprocity merely changed form.").

82. Geneva Convention I, *supra* note 15, art. 3; Geneva Convention II, *supra* note 15, art. 3; Geneva Convention III, *supra* note 15, art. 3; Geneva Convention IV, *supra* note 15, art. 3.

83. Gabor Rona, *Is There a Way out of the Non-International Armed Conflict Detention Dilemma?*, 91 INT'L L. STUD. 32, 36 (2015).

84. *Cf.* Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000) (discussing the process through which the rise of human rights law and principles of humanity and dignity affected IHL).

85. *Id.* at 245.

86. ICCPR, *supra* note 42, art. 19(1).

revolution, these freedoms were elevated in an important way. Second, the rise of human rights law reveals broader concern with principles of humanity and individual dignity and affirms their inviolability; at least under ordinary circumstances, states could no longer rely on a sovereignty defense to infringe on basic rights. Moreover, states could no longer simply argue that they were entitled to violate such rights as reciprocity for others violating them.

C. Additional Protocol I

The rise of human rights law serves as crucial context in understanding Additional Protocol I and helps inform how the purpose of protecting journalists changed during this period. Meron has noted that "[t]he renaissance of the law of war in the early 1970s was triggered by human rights . . . . Law of war experts have recognized that the development of international humanitarian law had approached stagnation before the influence of the human rights movement was brought to bear."[87] The purpose of the Additional Protocols was to strengthen IHL protections for civilians in both international and non-international armed conflict and advance what Meron has called the "humanization of humanitarian law."[88] It is against this backdrop that protections for journalists were expanded. To be sure, this expansion was motivated in part by the individual humanitarian concern for journalist safety. But an examination of the history of Additional Protocol I reveals an understanding that journalists must be protected not only because of their own civilian status, but also because their public-informing function helps protect other civilians.

Key documents reflect the public-informing motivator, including those that set the stage for Additional Protocol Article 79. Article 79 has a distinct history from other articles of Additional Protocols I and II. While most provisions originated in a pair of Diplomatic Conferences convened by the ICRC in 1971 and 1972, protections for journalists originated elsewhere. On France's initiative,[89] the United Nations General Assembly in 1970 invited the Economic and Social Council to request that the Commission on Human Rights consider preparing a draft international agreement to strengthen protections of journalists in wartime.[90] The Resolution emphasized both journalists' personal sacrifice and their public role, "[n]ot[ing] with regret that journalists engaged in missions in areas where an armed conflict is taking place sometimes suffer as a result of their professional duty, which is to inform world public opinion objectively . . ."[91] Moreover, the Resolution was clear in asserting journalists' public-informing role: "Considering that it is essential for the United Nations to obtain complete information concerning armed conflicts and that journalists, whatever their nationality, have an important role to play in that regard . . . ."[92]

87. Meron, *supra* note 84, at 247.
88. *Id.*
89. ADDITIONAL PROTOCOLS COMMENTARY, *supra* note 26, at 919.
90. G.A. Res. 2673 (XXV) (Dec. 9, 1970).
91. *Id.*
92. *Id.*

The Human Rights Commission took up the issue at its next session and some of its findings were memorialized by the General Assembly, including the Commission's "conviction that there was an urgent need to examine the question of the protection of journalists engaged in dangerous missions, both on humanitarian grounds and in order to enable journalists with due respect for the law to seek, receive and impart information fully, objectively and faithfully."[93]

Meanwhile, the ICRC's Conference of Government Experts, which was working towards expanding IHL protections generally, took up the issue at the invitation of the U.N. Secretary-General.[94] The report from the Conference demonstrates that the government experts considered both the individual humanitarian purpose and public-informing purpose of expanding protections for journalists. At the Conference, "[s]everal experts pointed out the need for adequate protection of journalists on dangerous missions, both for the journalists' own safety and for the freedom of the press, which could not but contribute to the respect and development of humanitarian law."[95]

A second Conference of the Government Experts convened in 1972 following the Human Rights Commission's suggestions and the second aforementioned U.N. General Assembly Resolution. The second Conference was perhaps even clearer than its predecessor in articulating the value of journalism:

> Of the experts who spoke on this subject, the majority were . . . in favour of granting special protection to journalists engaged in dangerous missions and thought that this should be done by means of a special Convention. They put forward two arguments in support of this opinion: in the first place, it was in the interest of world public opinion that the events connected with armed conflicts should be the subject of the widest possible news dissemination and reporting; and, secondly, that the spread of information and the presence of journalists on the spot could contribute to a more effective implementation of humanitarian law in armed conflicts. It was therefore in the interest of the international community that journalists should run risks . . . .[96]

The historical record of Article 79—which is the most recent and robust treaty-based law governing IHL protections of journalists—clearly demonstrates a concern with a protection of journalism as well as journalists. To be sure, the individual humanitarian protection of journalist life and limb was an important motivating end unto itself. Nevertheless, it was also a means to another end: ensuring that the public and relevant institutions had the benefit of robust, detailed, and objective reports from war zones.

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93. G.A. Res. 2854 (XXVI), at 92 (Dec. 20, 1971).

94. *Report on the Work of the Conference, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, INT'L COMM. RED CROSS ¶ 507 (1971), http://www.loc.gov/rr/frd/Military_Law/pdf/RC-Report-conf-of-gov-experts-1971.pdf [hereinafter *1971 Conference Report*].

95. *Id.*

96. 1 *Report on the Work of the Conference, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, INT'L COMMITTEE RED CROSS ¶ 3.78 (1972), https://www.loc.gov/rr/frd/Military_Law/pdf/RC-Report-conf-of-gov-experts-1972_V-1.pdf [hereinafter *1972 Conference Report*].

D. Post-1977

In the years since the adoption of Additional Protocol I, evidence suggests that the dual purposes of protecting journalists—the individual humanitarian purpose and the public-informing purpose—prevail. If anything, emphasis on the latter purpose has grown.

The United Nations has continued its focus on protecting wartime journalists and, in doing so, has continued to emphasize the crucial public-informing role these journalists play. Most recently, in 2015, the United Nations Security Council unanimously approved a resolution in which it "[r]ecogniz[ed] that journalists, media professionals and associated personnel can play an important role in protection of civilians and conflict prevention by acting as an early warning mechanism in identifying and reporting potential situations that could result in genocide, war crimes, ethnic cleansing and crimes against humanity,"[97] and "[a]ffirm[ed] that the work of a free, independent and impartial media constitutes one of the essential foundations of a democratic society, and thereby can contribute to the protection of civilians."[98] The Resolution also highlighted the relevance of ICCPR Article 19 and its corresponding article in the Universal Declaration of Human Rights, affirming the view that these instruments apply in wartime.[99] In this regard, the Resolution reflected a strong protection of wartime freedom of expression and information. The concept note behind the Resolution announced that "[t]oday's world is highly dependent on swift, even real-time, access to information."[100] This view stands in stark contrast to, for example, the concessions made by the *London Times* Editorial Board during the Russo-Japanese War, and reflects the broader trend toward protecting journalism due to its public-informing purpose. Moreover, the notion of dependence on real-time access to information reflects a growing understanding of the role of social media in journalism.[101] The concept note also explicitly referred to access issues:

> To carry out their work and inform the public and the international community of unfolding crises, journalists need access. The availability of credible information from conflict zones to the local population and the international community can have an important lifesaving aspect because it is often instrumental in mobilizing international attention and, eventually, assistance and action aimed at protecting civilians in conflict zones. Freedom of information legislation is, however, most often lacking in conflict and immediate post-conflict situations and there are few, if any, measures to protect journalists.[102]

In a similar vein, a report by the Secretary-General on the protection of civilians in armed conflict addressed dangers to journalists specifically. In doing so, it reaffirmed journalists' civilian status and also noted their role in protecting other civilians: "Journalists play a crucial role by reporting on the treatment and suffering endured by civilians in situations of conflict and on

97. S.C. Res. 2222, ¶ 13 (May 27, 2015).
98. *Id.* ¶ 24.
99. *See id.* ¶ 9.
100. UNSC Res. 2222 Concept Note, *supra* note 5, at 2.
101. *See infra* Part III.A.
102. UNSC Res. 2222 Concept Note, *supra* note 5, at 4.

violations of humanitarian law and human rights."[103]

In a 2013 report, the Human Rights Committee explicitly referenced the importance of journalist access in wartime and "[c]all[ed] on all parties to armed conflict to respect their obligations under international human rights law and international humanitarian law . . . to allow, within the framework of applicable rules and procedures, media access and coverage, as appropriate, in situations of international and non-international armed conflict."[104]

The understanding that journalism plays a uniquely important role in protecting against abuses has been acknowledged beyond the U.N. system. The United Kingdom's law of armed conflict manual, for example, notes that media publicity about alleged war crimes is an important IHL enforcement tool and often leads to further action to protect civilians.[105] Germany's manual reflects a similar sentiment:

> Public reporting of violations of international law can support the enforcement of international law. With a global information network, the media (such as the press, radio, television, [I]nternet, [T]witter) and their means of transmission (such as radio communication and satellites) are today able to do so in a comparably better, faster and therefore more effective way than in past armed conflicts.[106]

Prominently, in the so-called *Randal* case, the International Criminal Tribunal for the Former Yugoslavia (ICTY) offered a detailed explanation of the importance of wartime journalism.[107] In that case, the ICTY considered the legality of subpoenaing war correspondents to testify in cases before the tribunal. The Trial Chamber ruled that the subpoena was appropriate, but it acknowledged that "journalists reporting on conflict areas play a vital role in bringing to the attention of the international community the horrors and reality of the conflict."[108] On appeal, the Appeals Chamber reversed the decision. It offered a robust defense of the importance of journalists' work, concluding that because "vigorous investigation and reporting by war correspondents enables citizens of the international community to receive vital information from war zones . . . adequate weight must be given to protecting the ability of war correspondents to carry out their functions."[109] Moreover, the Appeals Chamber held that forcing journalists to testify at war crimes tribunals could negatively affect their work, finding "that compelling war correspondents to testify before the International Tribunal on a routine basis may have a significant impact upon their ability to obtain information and thus their ability to inform the public on issues of general concern."[110]

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103. U.N. Secretary-General, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, ¶ 14, U.N. Doc. No. S/2012/376 (May 22, 2012).

104. Rep. of the H.R.C., 21st Sess. 40, U.N. Doc. A/HRC/21/2 (Aug. 26, 2013).

105. MINISTRY OF DEF., THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT § 16.1 (2004) (United Kingdom).

106. FED. MINISTRY OF DEF., LAW OF ARMED CONFLICT MANUAL § 1541 (2013) (Germany).

107. Prosecutor v. Brdjanin & Talić, Case No. IT-99-36-T, Decision on Motion to Set Aside Confidential Subpoena to Give Evidence (Int'l Crim. Trib. for the Former Yugoslavia June 7, 2002).

108. *Id.* ¶ 25

109. Prosecutor v. Brdjanin & Talić, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, ¶ 38 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 11, 2002) [hereinafter "Randal Appeal"].

110. *Id.* ¶ 41.

Crucially, the Appellate Chamber discussed the consequences of forcing journalists to testify as both affecting their personal safety and their public-informing function. "First," the Chamber noted, journalists "may have difficulties in gathering significant information because the interviewed persons, particularly those committing human rights violations."[111] Additionally, the Chamber expressed concern that, if forced to testify, "war correspondents may shift from being observers of those committing human rights violations to being their targets, thereby putting their own lives at risk."[112]

The ICTY recognized one of the benefits of this information as the ability to punish war crimes. The court noted that information gathered and publicized by journalists had helped the court in its own work in identifying and punishing violations of international humanitarian law.[113]

As the ICTY's *Randal* discussion demonstrates, the work of journalists can provide crucial assistance to the investigation and prosecution of war crimes in instances in which a government or international body is seeking to punish perpetrators. The theme of journalism's role in effective IHL implementation was discussed in the process leading to Additional Protocol I. Recall that the U.N. Resolution that set the Article 79 process in motion recognized journalism's role in fulfilling the "essential [need] for the United Nations to obtain complete information concerning armed conflicts,"[114] and that government experts at the second ICRC Conference acknowledged that "the presence of journalists on the spot could contribute to a more effective implementation of humanitarian law in armed conflicts."[115] Also at that Conference, some experts noted that "control of the application of the Geneva Conventions of 1949 would be strengthened if journalists—who were able to inform the public on the conduct of military operations—would enjoy greater protection."[116] In this regard, in addition to recognizing the ex ante role journalism can play in preventing war crimes, the international discourse surrounding protection of journalists has also acknowledged the *jus post bellum* role they play in identifying and punishing war crimes.

In short, as IHL protections for journalists have expanded, so too has the public discourse about *why* they should be expanded. Whereas at the dawn of IHL, the purpose of protecting journalists was purely individual humanitarianism and their public-informing role was subverted to military expediency, this is no longer the case. From the advent of the international human rights system until today, the international discourse about why we protect journalists reveals that there is now a premium placed on the public information they provide. Journalists have been credited for helping to prevent war crimes[117] and have a crucial role to play in punishing war crimes when they

111. *Id.* ¶ 43.
112. *Id.*
113. *Id.* ¶ 36.
114. *See supra* note 92 and accompanying text.
115. *See supra* note 96 and accompanying text.
116. *1971 Conference Report*, *supra* note 94, ¶ 509.
117. BURRI, *supra* note 4, at 327.

happen.[118] In this regard, IHL has increasingly moved towards implicitly protecting both wartime journalists as individuals and wartime journalism as a field, rather than only protecting the former.

III. IMPLICATIONS

The previous Part demonstrated that there is strong evidence to suggest that the laws of war can—and should—be read to support the notion that journalists' work is protected. This shift from the individual humanitarian to the public-informing purposes for protecting journalists can be conceptualized as a shift from negative to positive rights. Under early IHL instruments, states were prohibited from targeting journalists for harm; nevertheless, if expedient, they were entitled to hold journalists as POWs. Now, states might be understood to have certain positive obligations in order to protect the public-informing role of journalism. Specifically, these might be conceptualized as affirmative obligations related to physical protection and protection of access. Indeed, the ICRC's compendium on customary international law already suggests as much, noting that journalists must be "respected and protected,"[119] which implies an affirmative obligation. This Part of the Note considers several possible implications. As a preliminary matter, the notion that states have affirmative duties to protect journalism has implications for who might benefit from expanded protections, especially in the context of citizen journalism and social media. An affirmative obligation to protect journalism also implicates issues of journalist access, reflecting journalists' positive right to seek information and impart it to the public. A positive obligation to protect journalism also implicates the interrelated targeting questions of distinction and proportionality, both in terms of journalists themselves and the media infrastructure that journalists use. The question of infrastructure targeting is especially relevant in the context of total or partial Internet shutdown, since such shutdown occurs through non-violent means and is thus distinct from, say, the bombing of a television station. To be sure, some of these questions are implicated even if one understands IHL as protecting journalists for purely individual humanitarian reasons. Nevertheless, understanding IHL as protecting journalism because of its public-informing role brings into relief the importance of the values at stake. Tradeoffs inhere in questions of distinction and proportionality. A better understanding of the values at stake—whether the individual humanitarian values alone or both the individual humanitarian and public-informing values—would affect the calculus of how to approach such issues.

A. Citizen Journalism

If one understands IHL to protect journalism in addition to journalists, there is a crucial question of what counts as journalism. This question persists even if one focuses on the individual humanitarian purpose of protecting

118. *Id.* at 316-17.

119. *See supra* note 34 and accompanying text.

journalists,[120] but its stakes are augmented and better defined by a focus on the public-informing role of journalists. The nature of journalism has changed substantially since Additional Protocol I was drafted. Social media has transformed the ways in which news is transmitted and received.[121] Today, anyone with a smartphone and Internet connection can record any event and transmit it across the world. Indeed, some phone-based applications were developed precisely because of this potential. Consider Periscope, an application that allows users to live stream video to global viewers. Kayvon Beykpour, a Periscope co-founder, conceived of the application in early 2014 after traveling to Istanbul during the Taksim Square protests and being unable to remotely watch what was occurring.[122] Social media postings transmit news, but their impact is more far-reaching. In some instances, they replace traditional media apparatuses in "a fluid and participatory information platform."[123]

Like more traditional journalism, social media posts can be early warning signs for war crimes.[124] Moreover, as a recent article demonstrates, they can help detect and punish these crimes.[125]

In some instances, the news-breaking nature is a matter of happenstance. Consider the case of Sohaib Athar. In May 2011, Athar was a thirty-three-year-old information technology consultant based in Abbottabad, Pakistan. Early one morning, he tweeted, "Helicopter hovering above Abbottabad at 1AM (is a rare event)," [126] and followed up with several related tweets.[127] Athar had unknowingly live-tweeted the U.S. Navy Seals' raid on Osama bin Laden's compound.[128] Athar's accidental reporting is a somewhat amusing illustration of the power of social media users to break news, but other instances of citizens breaking news are less accidental and far less amusing. Ahmed Mohamed al-Mousa's story is one such example. In 2014, as the Islamic State of Iraq and Levant (ISIS) declared Raqqa its capital, traditional news media fled. Al-Mousa and several other Syrian activists formed Raqqa Is Being Slaughtered Silently (RBSS) in order to document the abuses of ISIS.[129] The Committee to Protect

120. Others have considered the breadth of IHL protections for citizen journalists. *See, e.g.*, BURRI, *supra* note 4, at 103-11.

121. For one thoughtful examination of the relationship between wartime journalism and social media, see Vittoria Sacco & Diana Bossio, *Using Social Media in the News Reportage of War & Conflict: Opportunities and Challenges*, 2 J. MEDIA INNOVATIONS 59 (2015).

122. Alyson Shontell, *What It's Like to Sell Your Startup for ~$120 Million Before It's Even Launched: Meet Twitter's New Prized Possession, Periscope*, BUSINESS INSIDER (Mar. 26, 2015, 9:44 AM), http://www.businessinsider.com/what-is-periscope-and-why-twitter-bought-it-2015-3.

123. Andrés Monroy-Hernández et al., *Narcotweets: Social Media in Wartime*, *in* PROCEEDINGS OF THE SIXTH INTERNATIONAL CONFERENCE ON WEBLOGS AND SOCIAL MEDIA OF THE AMERICAN ASSOCIATION FOR ARTIFICIAL INTELLIGENCE 515, 515 (2012), http://www.research.microsoft.com/pubs/160380/ICWSM12-093.pdf.

124. *See supra* note 117 and accompanying text.

125. Keith Hiatt, *Open Source Evidence on Trial*, 125 YALE L.J. F. 323 (2016), http://www.yalelawjournal.org/forum/open-source-evidence-on-trial.

126. *See* VALERIE BELAIR-GAGNON, SOCIAL MEDIA AT BBC NEWS: THE RE-MAKING OF CRISIS REPORTING 68 (2015).

127. *Id.* at 69.

128. *Id.*

129. *International Press Freedom Awards: Raqqa is Being Slaughtered Silently, Syria*, COMM.

Journalists gave RBSS the International Press Freedom Award, noting:

> [RBSS] is one of the few reliable and independent sources of news left in the Islamic State stronghold. The group's Raqqa-based members secretly film and report from within the city and send the information to members outside of Syria, who transfer the news to local and international media. Since its inception, RBSS has publicized public lashings, crucifixions, beheadings, and draconian social rules, thus providing the world with a counter-narrative to Islamic State's slickly produced version of events.[130]

On December 16, 2015, al-Mousa was fatally shot by a masked gunman in front of his family home in Abu al-Duhur, a town in Syria's Idlib province.[131]

Al-Mousa was not a professional journalist in the commonly understood meaning of the word "professional."[132] Indeed, the Commentary to Additional Protocol I, while acknowledging that the term "journalist" should be defined broadly, references the draft International Convention for the Protection of Journalists engaged in Dangerous Missions in Areas of Armed Conflict. This draft Convention defines "journalist" to mean "any correspondent, reporter, photographer, and their technical film, radio and television assistants who are ordinarily engaged in any of these activities as their principal occupation."[133] If one uses this definition, by a plain reading of its terms, Additional Protocol I's Article 79 does not include al-Mousa. Yet, by other definitions that have been put forward, al-Mousa would be considered a journalist. The Human Rights Committee has issued a General Comment on International Covenant on Civil and Political Rights Article 19 (on freedoms of opinion and expression) that defined journalism as "a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere."[134] A 2012 Report by the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions defined "'journalist' [as] any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication," and specifically included the "'new media' or citizen and 'online journalists'."[135] Either of these definitions would appear to include

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TO PROTECT JOURNALISTS (2015), https://cpj.org/awards/2015/raqqa-is-being-slaughtered-silently-syria.php.

130. *Id.*

131. *Ahmed Mohamed al-Mousa: Raqqa is Being Slaughtered Silently December 16, 2015, in Idlib, Syria*, COMM. TO PROTECT JOURNALISTS, https://cpj.org/killed/2015/ahmed-mohamed-al-mousa.php (last visited Apr. 6, 2016).

132. The Oxford English Dictionary defines "professional" in several ways. One definition is "[r]elating to or connected with a profession," where "profession" is defined as "[a] paid occupation, especially one that involves prolonged training and a formal qualification." Another is "([o]f a person) engaged in a specified activity as one's main paid occupation rather than as a pastime." Another, as "[h]aving or showing the skill appropriate to a professional person; competent or skillful." Finally as "[w]orthy of or appropriate to a professional person." The first and second definitions require the activity in question to be a paid occupation, while the third and fourth do not. OXFORD ENGLISH DICTIONARY (3d ed. 2007).

133. ADDITIONAL PROTOCOLS COMMENTARY, *supra* note 26, at 921.

134. General Comment 34, *supra* note 49, ¶ 44.

135. Christof Heyns (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions),

al-Mousa and his colleagues.

To be sure, determining who can benefit from expanding the definition of journalist is not an easy process. At a high level of generality, there is an intuitive distinction to be drawn between a random citizen who happens to be near an important event and records the moment with her phone and a citizen journalist who actively seeks stories on which to report objectively and attempts to disseminate those stories widely. Christof Heyns and Sharath Srinivasan have argued in this context that "there is no point in saying that everyone who uses the internet or social media is a journalist who deserves special protection . . . [because i]f everyone is a journalist and therefore worthy of special protection, then in effect no one is."[136]

Under this framework, Athar's tweets about the bin Laden raid would probably not qualify as journalism, notwithstanding their noteworthiness. Nevertheless, it is worth considering that significant news is often reported by random passers-by with cameras or smartphones. Recently, a video showed an Israeli Defense Forces soldier shooting and killing an incapacitated Palestinian assailant; the soldier is being investigated for murder and some NGOs have called for a war crimes prosecution.[137] There is no indication that the person who filmed the incident generally acts as a journalist, for pay or otherwise, but the impact of his or her video demonstrates how a random passerby can record and publicize important international incidents in a way that resembles a journalistic function.

Al-Mousa, in his work for RBSS, would likely be considered a journalist under the definition adopted by the Human Rights Committee or the Special Rapporteur on extrajudicial, summary or arbitrary executions. Defining who counts as a journalist—or what counts as journalism—is far more complicated than placing a dividing line somewhere between Athar's tweets and al-Mousa's work. For example, one might wonder whether human rights NGOs count. One media sociologist has noted that their function is increasingly journalistic.[138] An international humanitarian law historian, discussing human rights NGOs role in reporting from conflict zones, has suggested that their product is "[m]ore reliably truth-telling" than some modern media journalism.[139] What about when NGOs promote citizen documentation of abuses? B'Tselem, an Israeli NGO, distributes video cameras to Palestinians. According to its website, citizen footage is often broadcast by more traditional media, exposing incidents that were previously concealed, which can then be used in criminal

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Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, ¶ 26, U.N. Doc A/HRC/20/22 (Apr. 10, 2012) (quoting Council of Europe, recommendation No. R (2000) 7 of the Committee of Ministers to member States on the right of journalists not to disclose their sources of information, adopted on 8 March 2000) (some internal marks omitted).

136. Heyns & Srinivasan, *supra* note 4, at 307. Heyns is the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions who authored the report discussed *supra* note 135 and accompanying text.

137. Peter Beaumont, *Israeli Soldier Is Filmed Shooting Dead Wounded Palestinian Attacker*, GUARDIAN (Mar. 24, 2016), http://www.theguardian.com/world/2016/mar/24/israeli-soldier-filmed-shoot-dead-wounded-palestinian-attacker-hebron.

138. Matthew Powers, *Contemporary NGO-Journalist Relations: Reviewing and Evaluating an Emergent Area of Research*, 9 SOC. COMPASS 427 (2015).

139. GEOFFREY BEST, WAR AND LAW SINCE 1945, at 383 (1994).

complaints.[140] The project was given a Special Award at the British One World Media Awards in the field of citizen journalism.[141]

To be sure, even if he was not a journalist, al-Mousa was a civilian (as is the random bystander who records an event on her phone). Civilians are entitled to myriad IHL protections, of course, and one way of reading Article 79 would not add anything to those protections. Nevertheless, Article 79's history acknowledges that journalists, for public benefit, often run *towards* what others run *from*. This is an apt description of what al-Mousa did and what his RBSS colleagues continue to do. Indeed, for this reason, many government experts at the ICRC conferences advocated for greater protections for journalists than other civilians.[142] While Article 79's text does not readily grant these protections, it does grant to journalists some benefits to which other civilians are not entitled, precisely because journalists are more likely to find themselves in dangerous situations.[143] For example, Article 79 requires states to issue and recognize identification cards for journalists.[144] Recent articles have put forth suggestions for how to expand protections for journalists, including further promulgation of official identity cards.[145] These suggestions are welcome, important, and useful, but are only half the battle. A citizen journalist who resembles a *New York Times* reporter in everything but pay grade could not benefit from these protections.

The stakes of how to define a journalist are even more apparent if one takes seriously the argument that journalists should be entitled to greater access during wartime, or if one takes seriously the suggestions others have made about how to protect journalists.[146] As the nature of wartime reporting changes, IHL protections should be read in a manner that encompasses citizen journalists. Such a reading would accord with the ICRC's mandate to develop IHL to comport with realities on the ground.[147] Either way, whether one is inclined to read into IHL a protection for journal*ism* or whether one desires implementation of the existing proposals to make protections for journal*ists* more effective, determining who may benefit is a crucial question. As some have suggested, "the journalist is no longer defined by his background, schooling, and salary, but by his practice and contribution to the expanding body of reliable information about the world . . . ."[148] A recognition of this

140. *B'Tselem's Camera Project*, B'TSELEM, http://www.btselem.org/video/cdp_background (last visited Apr. 6, 2016).

141. Pini Pavel Miretski & Sascha-Dominik Vladimir Oliver Bachmann, *The Panopticon of International Law: B'Tselem's Camera Project and the Enforcement of International Law in a Transnational Society*, 52 OSGOODE HALL L.J. 235, 243 (2014).

142. *1972 Conference Report*, *supra* note 96, ¶ 3.78 ("Of the experts who spoke on this subject, the majority were, however, in favour of granting special protection to journalists engaged in dangerous missions.").

143. Additional Protocol I, *supra* note 23, art. 79(3) ("[A journalist] may obtain an identity card . . . [which] shall attest to his status as a journalist.").

144. *Id.*

145. *See, e.g.*, Düsterhöft, *supra* note 4, at 18-20.

146. For example, improved methods for identifying journalists would have to account for who can benefit from these methods.

147. *See supra* notes 233-234 and accompanying text.

148. Bregtje van der Haak, Michael Parks & Manuel Castells, *The Future of Journalism:*

reality would be useful whether or not one believes IHL should be understood to protect journalism, but especially so if one holds this belief.

All of this is closely related to the question of objectivity. Recall that the General Assembly Resolution that helped set in motion the Additional Protocol I process described the role of journalists as "inform[ing] world public opinion *objectively*,"[149] and there was some concern with journalist objectivity among government experts at the ICRC. Citizen journalism may not always be as objective as more traditional institutional journalism, but it might nevertheless serve a crucial public-informing function. There may be a tradeoff in how one approaches IHL protections for journalism in the social media context. Whether in the context of press emblems or journalist access, an expansion of who can benefit from these protections in order to increase the amount of information available to the public might also decrease objectivity. To be sure, not all citizen journalism is biased, just as not all institutional journalism is objective. For better or worse, institutional affiliation might be treated as a heuristic for objectivity, a benefit that citizen journalists do not enjoy. Nevertheless, as the B'Tselem camera project demonstrates, the tradeoff between objectivity and information-generation may be especially relevant to citizen journalism. Examining such questions through a lens that acknowledges IHL protection of journalists' public-informing function can help clarify the tradeoff at stake.

B. Limiting Journalist Access

Beyond the question of who benefits from IHL's protections for journalists, there are questions of how they benefit. If IHL is indeed properly understood to protect journalism, there might be implications for journalists' access. The reaction to the Pentagon's law of war manual demonstrates just one instance in which the issue of journalist access has generated controversy.[150] During its 2006 war with Lebanon, the Israeli military prevented journalists from accessing certain areas in southern Lebanon.[151] Likewise, both Israel and Hamas have limited journalist access to certain parts of Gaza during conflict in the region.[152] Israel has justified such blockades by citing an inability to guarantee the safety of journalists.[153] In each instance, civil society groups and

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Networked Journalism, 6 INT'L J. COMM. 2923, 2926 (2013).

149. G.A. Res. 2673 (XXV), *supra* note 90 (emphasis added).

150. *See supra* notes 13-13.

151. Press Release, Int'l Fed'n of Journalists, IFJ Condemns Israeli Restrictions on Journalist Access to Conflict Zones, (Aug. 9, 2006), http://english.wafa.ps/page.aspx?id=6cvRT8a8036602332a6cvRT8.

152. William Booth, *Palestinians Curb Israeli Reporters' Access to West Bank*, WASH. POST, May 15, 2013, https://www.washingtonpost.com/world/palestinians-curb-israeli-reporters-access-to-occupied-territories/2013/05/15/b26da86e-bd7c-11e2-b537-ab47f0325f7c_story.html; *Journalists in Israel, West Bank, and Gaza Face Tightening Restrictions on Access*, GLOBAL JOURNALIST, May 23, 2013, http://globaljournalist.jour.missouri.edu/freepresswatch/2013/05/israel/journalists-in-israel-west-bank-and-gaza-face-tightening-restrictions-on-access. In the instance of Israel blocking access to Gaza, the Foreign Press Association prevailed in a lawsuit before the Israeli Supreme Court. Nevertheless, Israeli maintained tight control over which journalists could enter. *See* Toni O'Loughlin, *Israel To Allow Small Number of Foreign Journalists into Gaza*, GUARDIAN, Jan. 2, 2009, http://www.theguardian.com/world/2009/jan/02/israel-gaza-media-access.

153. *See, e.g.*, O'Loughlin, *supra* note 151.

media outlets have objected.

There are several competing issues at hand. On the one side, there is the journalists' ability to perform their duty. On the other is the state's right to exercise a certain amount of discretion in limiting access both for journalist safety and because of military necessity. The Human Rights Commission's initial draft convention recognized that the military has *some* authority to circumscribe journalist movement, at the very least to protect their own safety: "Possession of a [proposed journalists ID] card . . . implies that the journalist to whom the card is issued shall . . . not . . . interfere in the domestic affairs of States to which he proceeds, and not to engage in any activities which may involve a direct or indirect participation in the conduct of hostilities in the area where the dangerous mission is being undertaken."[154] At the Conference, some government experts "stressed that the Draft International Convention should define better the obligation on journalists to conform to the instructions of the military authorities . . . ."[155]

This issue is closely related to international human rights law. Article 19 of the International Covenant on Civil and Political Rights (ICCPR) guarantees that "[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."[156]

The same article allows the state to subject this right "to certain restrictions, but these shall only be such as are provided by law and are necessary: . . . For the protection of national security or of public order (*ordre public*), or of public health or morals."[157] The Human Rights Committee has announced that, as a general matter, Article 19 prohibits states from restricting journalists' freedom of movement, including to areas affected by conflict.[158] The text of the Human Rights Committee comment suggests that it is directed at a state's behavior within its own territory. As noted, it is debated when, if ever, a state exercises sufficient control in foreign territory for the ICCPR to apply extraterritorially (let alone whether the ICCPR ever applies in wartime).[159] In this regard, it is important to distinguish between human rights law and IHL on the issue of journalist access. If indeed IHL can be read to protect journalism, as this Note suggests, then reading a principle of journalistic access into IHL would not necessarily be redundant vis-à-vis human rights law.

The current Commentary to Additional Protocol I indicates that "[n]either the right to seek information nor the right to obtain information are at issue" in Article 79.[160] Needless to say, this presents a problem for the argument that

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154. The Commission on Human Rights, Draft Articles of the International Convention on the Protection of Journalists Engaged In Dangerous Proffessional (sic) Missions in Areas of Armed Conflict, art. 13, *reprinted in 1972 Conference Report*, *supra* note 96, at 138.

155. *1972 Conference Report*, *supra* note 96, at ¶ 3.89.

156. ICCPR, *supra* note 42, art. 19(2). Article 19 is a derogable right. *Id.* art. 4.

157. *Id.* art. 19(3)(b).

158. General Comment 34, *supra* note 49, at ¶ 45.

159. *See supra* note 50 and accompanying text.

160. ADDITIONAL PROTOCOLS COMMENTARY, *supra* note 26, at 918.

IHL guarantees some right of access. Nevertheless, like other treaties, Additional Protocol I must be read in light of its object and purpose.[161] The preceding section demonstrated the extent to which Additional Protocol I's protection of journalists reflected an appreciation of their public-informing role, especially as it pertains to preventing and punishing war crimes. Subsequent evidence further confirms this. A purposive read of Additional Protocol I that acknowledges a protection of journal*ism* might then have implications for issues of access, even if these are not explicitly found in Article 79. To the extent that one understands IHL as acknowledging, if not explicitly protecting, journalists' public-informing role, there is good reason to be skeptical of circumscription of access. If nothing else, the reaction to the Pentagon's law of war manual and recent limitations of access demonstrate that this debate is currently ongoing and would benefit from a clearer articulation of the public-informing function that IHL seeks to protect.

C. Distinction

The question of distinction and the legitimate targeting of journalism is closely related to the question of what counts as journalism. Additional Protocol I extends protections to journalists as civilians "provided that they take no action adversely affecting their status as civilians."[162] This brings to bear the question of when journalists and journalistic infrastructure become legitimate military targets through direct participation in hostilities.[163]

The Commentary to Additional Protocol I defines "direct participation of hostilities" as "acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces"[164] to suggest that "[t]he fact that a journalist engages in propaganda cannot be considered as direct participation."[165]

State practice has in the past strayed from this view, largely evident in the context of media infrastructure. Media infrastructure is protected by a separate provision of Additional Protocol I, but the intricacies of the targeting question have important parallels. Additional Protocol I's Article 52 prohibits wartime attacks on civilian objects, while permitting certain attacks on military objects.

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161. Vienna Convention on the Law of Treaties art. 31(1), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter VCLT].

162. Additional Protocol I, *supra* note 23, art. 79(2).

163. There are at least three potential statuses implicated by this question: "journalist," "civilian," and "civilian directly participating in hostilities." Only the third category is a legitimate military target in IHL. *See generally* Nils Melzer, Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law, INT'L COMM. RED CROSS (2009), https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf (interpreting which kinds of conduct by civilians constitute direct participation in hostilities). In other words, a journalist does not become a legitimate military target simply because she is stripped of, or never granted, "journalist" status. Indeed, the substantive protections are ostensibly unchanged.

164. ADDITIONAL PROTOCOLS COMMENTARY, *supra* note 26, at 619.

165. 2 HOW DOES LAW PROTECT IN WAR? PART II: CASES AND DOCUMENTS 590 (Marco Sassòli et al. eds., 3d ed. 2011); *cf.* Düsterhöft, *supra* note 4, at 13 ("Concerning propaganda, it appears that it can generally not amount to direct participation, warranting attacks on or arrests of journalists."); Heyns & Srinivasan, *supra* note 4, at 325 ("The spreading of propaganda for the enemy in itself does not make a journalist a legitimate target . . . .").

Its relevant portion reads:

> Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.[166]

A seminal example of the difficult contours of Article 52 is NATO's bombing of the Radio Television of Serbia (RTS) headquarters during its 1999 Kosovo campaign. RTS was a state-owned entity that broadcast across several radio and television frequencies.[167] At least one of these frequencies was used for military purposes, broadcasting military orders. NATO claimed that the RTS facilities, including a large, multi-purpose satellite antenna, were used "as radio relay stations and transmitters to support the activities of the [Federal Republic of Yugoslavia] military and special police forces, and therefore they represent legitimate military targets."[168] At the same time, the RTS facilities were used for civilian broadcasts across both television and radio media. To be sure, these civilian broadcasts were very much under state control and the civilian broadcasts perpetuated propaganda. There was no contention that RTS's civilian broadcasts played a role similar to, for example, certain Rwandan radio stations during that country's genocide; it did not encourage its listeners to take genocidal actions, though it did engender support for Milosevic's regime.[169] In striking RTS, NATO officials highlighted this propaganda role, saying that "[s]trikes against TV transmitters and broadcast facilities are part of our campaign to dismantle the FRY propaganda machinery which is a vital part of President Milosevic's control mechanism."[170] Prior to the attack, NATO suggested that RTS presented a legitimate target because of its propaganda role and suggested it could absolve itself by providing equal time for Western broadcasts.[171] In assessing these arguments, a committee advising the Special Prosecutor for the International Criminal Tribunal for the former Yugoslavia (ICTY) noted that "[w]hile stopping such propaganda may serve to demoralize the Yugoslav population and undermine the government's political support, it is unlikely that either of these purposes would offer the 'concrete and direct' military advantage necessary to make them a legitimate military objective."[172] At the same time, it recommended against charges. The Department of Defense's law of war manual now cites the special committee's report for the proposition that "[i]f [the media] is merely disseminating

166. Additional Protocol I, *supra* note 23, art. 52(2).

167. INT'L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA ¶¶ 71-75 (2000) [hereinafter NATO BOMBING REPORT].

168. *Id.* ¶ 73.

169. *Id.* ¶¶ 47, 72.

170. *Id.* ¶ 74 (quoting NATO spokesman).

171. *Id.* (quoting NATO statement: "If President Milosevic would provide equal time for Western news broadcasts in its programmes without censorship 3 hours a day between noon and 1800 and 3 hours a day between 1800 and midnight, then his TV could be an acceptable instrument of public information.").

172. *Id.* ¶ 76.

propaganda to generate support for the war effort, it is not a legitimate target" and makes clear that independent journalists—including those engaged in public advocacy—are not subject to attack.[173] This suggests greater convergence between academics, interpretive bodies, and states with regards to the legal standards of media targeting.

Media that incites crimes is considered a legitimate target, per the ICTY committee's report,[174] the Department of Defense's law of War manual,[175] and several academic commentaries.[176] But what about journalists who encourage—explicitly or implicitly—participation in hostilities without themselves participating? The ICRC's Interpretive Guidelines suggest that "war-sustaining" activities such as recruiting and propaganda are, if anything, "indirect" participation in hostilities and thus not targetable,[177] though they also note "both the general war effort and war-sustaining activities may ultimately result in harm reaching the threshold required for a qualification as direct participation in hostilities."[178] Likewise, while the report on the RTS bombing suggested that propaganda output is not a sufficient reason to target media infrastructure, it also suggested that "[i]f the media is the nerve system that keeps a war-monger in power and thus perpetuates the war effort, it may fall within the definition of a legitimate military objective."[179]

Notwithstanding some agreement on the relevant legal standards, the application of these standards still might suffer from dissonance, as there have been instances in which states have unapologetically targeted journalists. In its Libyan campaign, NATO bombed the Al-Jamahiriya, the state television station, on the grounds that it "was clearly used, not only to disseminate [a] message of propaganda or hated [sic], but specifically used to *incite acts of violence*."[180] While NATO defended the bombing, some NGOs and non-NATO states expressed concern and even called for an investigation.[181] After an Israeli strike on a car carrying journalists working for a Hamas-run television station, an Israeli Defense Forces spokesman noted that "[t]he targets [were] people who have relevance to terror activity."[182] The U.S. Department of Defense's law of war manual sparked significant controversy when it noted that, under some circumstances, journalists might be "unprivileged belligerents," and that "the relaying of information (such as providing information of immediate use

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173. DOD LAW OF WAR MANUAL, *supra* note 7, § 5.9.3.2 n.241, at 229 (quoting NATO Bombing Report, *supra* note 167, ¶ 47).

174. *Id.* ¶ 47; *cf.* U.N. Secretary-General, *Rep. of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, ¶ 48, U.N. Doc. No. S/1999/957 (Sept. 8, 1999) ("I recommend that the Security Council . . . [i]n situations of ongoing conflict, ensure that, whenever required, appropriate measures are adopted to control or close down hate media assets.").

175. DOD LAW OF WAR MANUAL, *supra* note 7, § 5.9.3.2 n.241, at 229.

176. *See, e.g.*, 2 HOW DOES LAW PROTECT IN WAR?, *supra* note 165, at 593; Düsterhöft, *supra* note 4, at 13.

177. *See* MELZER, *supra* note 163, at 51-55.

178. *Id.* at 52.

179. NATO BOMBING REPORT, *supra* note 167, ¶ 55.

180. BURRI, *supra* note 5, at 301 (quoting NATO press briefing).

181. *Id.*

182. David Carr, *Using War as Cover to Target Journalists*, N.Y. TIMES (Nov. 25, 2012), http://www.nytimes.com/2012/11/26/business/media/using-war-as-cover-to-target-journalists.html.

in combat operations) could constitute taking a direct part in hostilities."[183]

State practice demonstrates that these legal standards are hardly exemplars of clarity. Moreover, their application is complicated by the rise of social media. Consider recent responses to the rise of social media usage by ISIS and its supporters. The Iraqi government ordered Internet service providers to block Facebook, Twitter, and YouTube in an attempt to fight ISIS recruitment and propaganda and prepared a directive to shut down all Internet access in five provinces.[184] Western governments, too, have pressured social media platforms to suspend accounts sympathetic to ISIS, which some have questioned. In the past, Twitter has removed accounts belonging to other groups, including al-Shabaab, the Islamic Jihad Union, the Indian Mujahideen, and al-Qaida.[185] To be sure, these examples are not perfect parallels in two important ways. First, there is an obvious and important distinction between suspending Internet access and targeting with military weaponry. Second, Twitter is a private entity with its own rules and guidelines (though the Iraqi government is, of course, not private). Nevertheless, it is clear that U.S. government officials supported and encouraged Twitter's actions. In viewing such shutdowns through an IHL lens, is there a legal distinction to be made between a citizen (or professional) journalist's tweet that reads "Thousands of people protesting the enemy army!" and one that reads "Thousands of people protesting the enemy army! Come join us!"? What if the tweet says "Citizens should take up arms and join the fight against the enemy, provided they follow the laws of war!"? The upshot here is simply to point out that, as the ICRC's Interpretative Guidelines intimate, the precise contours of where "war-sustaining" recruitment and propaganda ends and where "participation in hostilities" begins have yet to be settled, especially in the social media context. Likewise, it is not easy to determine the line between "merely disseminating propaganda to generate support for the war effort" and being "the nerve system that keeps a war-monger in power," to borrow the language of the ICTY Special Prosecutor committee report.

If one takes seriously the notion that IHL protects journalism in addition to journalists, there might be an inclination to adjust the distinction analysis accordingly, reflecting the view that, at times, a propagandist or recruiter who aids one side in battle might *also* provide an informative purpose. I do not mean to suggest that, by virtue of having a Twitter account or performing journalistic functions, combatants can insulate themselves from targeting. However, when interrogating targeting choices and attempting to distinguish between legitimate and illegitimate targets—both persons and infrastructure—

183. *The Pentagon's Dangerous Views on the Wartime Press*, *supra* note 12. For a Department of Defense response, see *The Law of War Manual: The Pentagon Responds*, AL JAZEERA (Aug. 29, 2015, 11:51 PM), http://www.aljazeera.com/programmes/listeningpost/2015/08/law-war-manual-pentagon-responds-150829095950357.html. For a defense of the Pentagon's position, see, for example, Loomis, *supra* note 12.

184. *See* Jill C. York, *Terrorists on Twitter*, SLATE (June 25, 2014, 12:07 P.M.), http://www.slate.com/articles/technology/future_tense/2014/06/isis_twitter_suspended_how_attempts_to_silence_terrorists_online_could_backfire.html.

185. *Id.*

there is room to be more demanding or skeptical of decisions that impact journalism. This is especially relevant in the context of civilian journalists, who do not have the institutional legitimacy and support of professionals and who therefore might be more vulnerable to decisions at the margins. Understanding why IHL protects journalists might help inform the nuances of these distinction decisions.

D. Proportionality

The principle of proportionality is closely related to the principle of distinction in IHL. Once a military answers the distinction question, it must employ proportionality analysis to determine whether the collateral civilian damage of an attack on a legitimate military target is proportional to its military advantage. If "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof . . . would be excessive in relation to the concrete and direct military advantage anticipated," then it violates IHL.[186] In general, the question of what is "excessive" (and thus not proportional) is not especially well defined.[187] The ICRC Commentary to a related provision describes this standard as "relatively imprecise and . . . open to a fairly broad margin of judgment."[188] The ICRC's study of customary IHL "does not present a direct rule or standard for determining what amounts to excessive collateral damage."[189] A manual by the Harvard Program on Humanitarian Policy and Conflict Research, written by experts in IHL, suggests that "[t]he concept of excessiveness is not an absolute one . . . [but, rather,] measured in light of the military advantage that the attacker anticipates to attain through the attack."[190] So, "[i]f the military advantage anticipated is marginal, the collateral damage expected need not be substantial in order to be excessive . . . [and c]onversely, extensive collateral damage may be legally justified by the military value of the target struck, because of the high military advantage anticipated by the attack."[191] The majority of scholars seem to agree that excessiveness cannot be precisely defined.[192]

Some have suggested that journalists could receive specific status under IHL.[193] Currently, the Geneva Conventions and their Additional Protocols grant

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186. Additional Protocol I, *supra* note 23, art. 51(5)(b); *see also id.* art. 57(2)(a)(iii).

187. *See generally* Jason D. Wright, *"Excessive" Ambiguity: Analysing and Refining the Proportionality Standard*, 94 INT'L REV. RED CROSS 819 (2012); *see also* Gabriella Blum, *On a Differential Law of War*, 52 HARV. INT'L L.J. 163, 189 ("Much has been written on the indeterminacy of the principle of proportionality and on the unworkable test of comparing the incommensurable values of military advantage and civilian lives.").

188. ADDITIONAL PROTOCOLS COMMENTARY, *supra* note 26, at 679.

189. Wright, *supra* note 187, at 837.

190. PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH AT HARVARD UNIVERSITY, COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE 92 (2010).

191. *Id.*

192. *See* Wright, *supra* note 187, at 839-40. For a thoughtful discussion of the issue, see Joshua Andresen, *Challenging the Perplexity Over* Jus in Bello *Proportionality*, 7 EUR. J. LEG. STUD. 19 (2014).

193. *See, e.g.*, Düsterhöft, *supra* note 4, at 18; Foster, *supra* note 4, at 479.

such status to women,[194] children,[195] medical personnel,[196] civil defense staff,[197] and by implication ICRC delegates and religious personnel.[198] Such status reflects either (or both) the particular vulnerability of the group and/or the functions they perform.[199] Likewise, IHL contains special status for certain infrastructure including, for example, cultural property and religious sites.[200]

Humanitarian workers and military medical and religious personnel, who receive special status, fulfill an individual, humanitarian role, while journalists play a more public-informing role. At least one commentator has noted this distinction to suggest that "[e]ven though journalists are in fact essential to armed conflicts, their role in protecting and saving individuals cannot be compared to that of humanitarian aid personnel."[201] To the extent that one shares this view, this might militate against granting journalists special status. At the same time, one might argue that the public-informing role of journalists, especially to the extent that they serve as crucial early warning systems against war crimes or crucial means of ex post accountability, is sufficiently important to warrant such status.[202]

Even if such status is created, there might be unanswered questions about its functional protections. Yoam Dinstein has described existing special statuses as "merely the icing on the cake: it adds some flavor but it does not really affect the core."[203]

Moreover, the recent Pentagon law of war manual has called into question the nature of special status protections. The manual notes that "[b]ecause medical and religious personnel are deemed to have accepted the risk of death or further injury due to proximity to military operations, they need not be considered as incidental harm in assessing proportionality in conducting attacks."[204] This portion of the manual has generated significant debate, with some suggesting that it dangerously upends traditional proportionality rules.[205]

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194. Geneva Convention IV, *supra* note 15, art. 27; Geneva Convention III, *supra* note 15, art. 14; Geneva Convention II, *supra* note 15, art. 12; Geneva Convention I, *supra* note 15, art. 12; *see also* HENCKAERTS & DOSWALD-BECK, *supra* note 34, at 475-79.

195. Additional Protocol II, *supra* note 39, art. 4(3)(c); Additional Protocol I, *supra* note 23, art. 77(2); *see also* HENCKAERTS & DOSWALD-BECK, *supra* note 34, at 479-88.

196. Additional Protocol I, *supra* note 23, art. 15; Geneva Convention IV, *supra* note 15, art. 20; Geneva Convention II, *supra* note 15, art. 36; Geneva Convention I, *supra* note 15, arts. 24-26; *see also* HENCKAERTS & DOSWALD-BECK, *supra* note 34, at 79-86.

197. Additional Protocol I, *supra* note 23, art. 61.

198. *See* Düsterhöft, *supra* note 4, at 18; *see also* HENCKAERTS & DOSWALD-BECK, *supra* note 34, at 88-91, 105-09.

199. Yoram Dinstein, *Distinction and Loss of Civilian Protection in International Armed Conflicts*, 84 INT'L L. STUD. 183, 188 (2008).

200. *Id.*

201. Düsterhöft, *supra* note 4, at 18.

202. *Cf.* Foster, *supra* note 4, at 479 (arguing for granting to journalists special status comparable to that which medial personnel receive).

203. Dinstein, *supra* note 199, at 188.

204. DOD LAW OF WAR MANUAL, *supra* note 7, § 7.8.2.1, at 436.

205 *See, e.g.*, Oona Hathaway, *The Law of War Manual's Threat to the Principle of Proportionality*, JUST SECURITY (June 23, 2016, 10:06 AM), https://www.justsecurity.org/31631/lowm-threat-principle-proportionality; Marty Lederman, *Troubling Proportionality and Rule-of-Distinction Provisions in the Law of War Manual*, JUST SECURITY (June 27, 2016, 10:57 AM), https://www.justsecurity.org/31661/law-war-manual-distinction-proportionality.

Others have indicated that the manual's position is defensible because it implicitly refers only to medical and religious personnel who are part of the armed forces and are thus do not fall neatly into either combatant or civilian categories.[206]

Whether or not journalists gain special status, the manual's underlying logic might have significant consequence for journalists. The implication of the manual's logic for journalists depends in large part on whether it stands for proposition that proportionality analyses can discount any medical and religious personnel because they knowingly accept risks, or whether it refers only to those personnel affiliated with militaries. If the latter, there are likely few implications for journalists. If, however, the manual suggests that any personnel who knowingly run towards, rather than from, war zones, do not affect proportionality analyses, the implications for journalists are severe. Journalists, like medical and religious personnel, accept certain risks and knowingly enter war zones. In this regard, if state practice begins to reflect the notion that proportionality need not consider civilians—whether or not they have special status—who place themselves in danger, journalists would lose protections in proportionality analyses.

Consequently, a commitment to protecting wartime journalism might at the very least require a clarification of the Pentagon's position. Moreover, there may be some room to create a different system for protecting journalists that grants them special status and commits to providing more that mere "icing on the cake."[207] An especially aggressive—though surely controversial—system would tip the balance of the proportionality analysis that states must undertake when launching attacks. It would not preclude attacks against journalists or media infrastructure but would require states to factor their special status into its proportionality analyses; functionally, this means that an action causing incidental damage against journalists or media infrastructure would have to confer a greater military advantage than it would under the current regime, in which journalists and media infrastructure have no special status.

In short, granting such status to journalists would, in instances in which the military must weight costs and benefits of an attack, increase the weight of the costs side when journalists might be injured. This system need not be limited to journalists as individuals. Imagine a hypothetical in which the RTS headquarters broadcast objective reporting rather than propaganda. Under this proposed system, were it understood that this qualified it for special protections, the proportionality analysis would be affected.

It should be noted that, during the history of Article 79, some government experts expressed concern over *any* special discussion of journalists for fear that expanding their protection would implicitly weaken protection for other civilians.[208] In this regard, any attempt to affect the proportionality analysis—

206. *See, e.g.*, John Merriam, *Must Military Medical and Religious Personnel Be Accounted for in a Proportionality Analysis?*, JUST SECURITY (July 8, 2016, 10:37 AM), https://www.justsecurity.org/31905/military-medical-religious-personnel-accounted-proportionality-analysis.

207. *See supra* note 203.

208. *1972 Conference Report*, *supra* note 96, ¶ 3.76 ("[S]ome experts expressed doubts as to

whether for journalists relative to other civilians or for journalistic infrastructure relative to other civilian infrastructure—would be highly controversial. Nevertheless, it is not a foregone conclusion that expanding the state's proportionality limitations vis-à-vis journalists and journalistic infrastructure would necessarily weaken protection for other civilians. There is no evidence to suggest that the special status for ambulances and medics, for example, weakens protections for school buses and teachers, and there is no logical reason why it should. If anything, such special status might be protective of civilians, as it would limit certain strikes that might kill not just journalists but other civilians.

E. Internet Shutdown

The preceding discussions of distinction and proportionality bring to bear a specific concern implicated by protection of journalism. As noted, states have at times shut down Internet sites, Internet accounts, and, in some instances, the entire Internet. The use of social media by professional journalists and citizen journalists alike to transmit news raises questions about total and partial Internet shutdown.

The RTS bombing is particularly relevant to the issue of Internet shutdown for several reasons. First, there are clear analogies between the purposes for which the RTS was used and the purposes for which the Internet is used. Like the RTS, the Internet can provide both a means of communicating offensive military orders and a means of presenting propaganda—state-sponsored or otherwise—that provides a civilian basis of support for the military army. Moreover, because states still maintain the ability to censor content in a widespread way, it is certainly possible that the Internet provides a civilian communications structure that does not provide equal time for all sides. Rather, there are myriad examples in which dissent is silenced and only pro-government websites and news sources are accessible to the civilian populations of certain countries.

To this end, an argument that international humanitarian law protects journalists' work might be useful as a supporting mechanism for a prohibition on Internet shutdown. This argument would rely on the notion that the Internet is a critical tool for journalists—professional journalists and citizen journalists alike—to disseminate their reporting. Of course, a counterargument would suggest that journalism existed long before the Internet and that it does not require the Internet to be effective. A more compelling case may be made by reference to citizen journalists, who use blogging platforms and social media to disseminate information from war theatres in unprecedented ways. To the extent that a protection of journalists' work would extend to citizen journalists,

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the necessity of granting special protection to journalists engaged in dangerous missions. In their opinion, the granting of special protection to an increasing number of categories weakened the general protection due to the civilian population from which journalists also benefited."); *1971 Conference Report*, *supra* note 94, ¶ 509 ("Several experts . . . argued that it was not necessary to create another category of persons to enjoy special protection from the dangers of military operations and that this would weaken the concept of general protection which applied to all civilians including journalists.").

an Internet shutdown might be understood to make their work impossible. This is true in the context of a total shutdown, but would also extend to the more probable possibility of a partial shutdown of sites such as Twitter, Facebook, and blogging platforms, and certainly to targeted shutdowns of specific accounts. Consider, once again, RBSS. If the relevant authorities could successfully shut down their social media accounts, their work would be significantly handicapped.

When Syrian President Bashar al-Assad shut down parts of the Internet during the country's ongoing civil war, human rights groups expressed concern about what the shutdown meant for the ability to monitor war crimes. Amnesty International's Middle East and North Africa Deputy Director, for example, stated:

> As fighting intensifies, particularly around Damascus, we are extremely worried that the news that internet and mobile phone services appear to have been cut throughout Syria may herald the intention of the Syrian authorities to shield the truth of what is happening in the country from the outside world.
>
> Once again, we call on all sides to the conflict to make the protection of civilians their top priority, and to respect international humanitarian law.
>
> It is time to stop war crimes and crimes against humanity, not to commit them behind a wall of silence. Anyone committing such acts should know that they will be held accountable in the future.[209]

This statement reflected a concern about what the Syrian Internet shutdown meant for the ability to expose war crimes to the outside world. It provides substantial evidence that, from the perspective of NGOs that monitor war crimes, some observers are of the opinion that Internet shutdowns are problematic not just in their own right, but also because of their effect on the ability to expose the world to the truths of war.

On the distinction front, a mechanism that imposes a higher burden on labeling professional or citizen journalists as legitimate targets for censorship would thus impact Internet freedom and make it harder for states to shut down specific accounts, specific sites, or the entire Internet in some regions. On the proportionality front, a system that places greater weight on protecting journalism would make it more difficult for the state to shut down particular sites or the entire Internet when those entities serve a dual purpose.

IV. MECHANISMS FOR IMPLEMENTATION

The preceding sections have made the case that there has been a shift in the reasoning underlying wartime legal protection of journalism, and have considered some possible implications. This section considers some potential ways of implementing the suggested changes. This list of mechanisms is not exhaustive: many others have explored ways of making changes to how IHL protects journalists, though not necessarily through an explicit framework of protecting journalism.

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209. Press Release, Amnesty International, Syria's Internet and Mobile Networks Shutdown is Alarming Development (Nov. 29, 2012), http://www.amnesty.org.uk/press-releases/syrias-internet-and-mobile-networks-shutdown-alarming-development.

A. A New Treaty

Several commentators have suggested development of a new treaty to govern protections for journalists.[210] Likewise, several NGOs have drafted guidelines or proposed conventions on protections for journalists.[211] As others have noted, there are several ways in which a new treaty could come to fruition. If focused exclusively on wartime protections, it could operate as an Additional Protocol to the Geneva Conventions under the guidance of the ICRC. If focused on general protections that include wartime provisions, the United Nations might be a more appropriate institutional framework in which to operate (to be sure, the U.N. could promote a treaty exclusively focused on IHL).

A new treaty would, of course, be able to explicitly announce protection for journalism and journalists and clarify the underlying purposes of such protections. In this regard, it could both cement and build on existing IHL protections for journalism. It could be a means of clarifying each of the implications discussed in Part III, among other implications. It might also have the benefit of clarifying the protections applicable in non-international armed conflicts. The tradeoff of working from a blank slate is a potential loss of feasibility; several scholars have expressed doubt that states would sign on to such a convention.[212]

B. Interpreting Existing Law

To the extent that one embraces the views espoused in Part I of this Note (that the purpose underlying protections for journalists reflects a desire to protect public access to information), a new convention might be superfluous. Instead, one might be inclined to advocate that the ICRC act aggressively in reinterpreting existing law. The ICRC has been described as "among the most unusual of international institutions."[213] The 1949 Geneva Conventions grant the ICRC a unique role in monitoring compliance and promoting compliance with IHL. The Statutes of the ICRC, to which states have acceded, reflect the dual role of the ICRC. They reaffirm that the ICRC is "an independent humanitarian organization having a status of its own."[214] At the same time, the Statutes acknowledge the unique role granted to the ICRC by the Geneva

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210. *See, e.g.*, Balguy-Gallois, *supra* note 4, at 67.

211. *See, e.g.*, *International Declaration on the Protection of Journalists*, INT'L PRESS INST. (Mar. 20, 2016), http://www.freemedia.at/international-declaration-on-the-protection-of-journalists; *Draft Proposal for an International Convention to Strengthen the Protection of Journalists in Armed Conflicts and Other Situations Including Civil Unrest and Targeted Killings*, PRESS EMBLEM CAMPAIGN (Dec., 2007), http://www.pressemblem.ch/4983.html.

212. *See, e.g.*, Davies & Crawford, *supra* note 4, at 2173 ("The value of the existing laws should not be underestimated . . . . Promotion of these existing laws . . . may well be more constructive than calling for a new treaty . . . ."); Düsterhöft, *supra* note 4, at 17 ("It is questionable whether States would sign and ratify yet another legal instrument . . . .").

213. Rotem Giladi & Steven Ratner, *The Role of the International Committee of the Red Cross, in* THE 1949 GENEVA CONVENTIONS: A COMMENTARY 525, 546 (Andrew Clapham, Paola Gaeta & Marco Sassòli eds., 2015).

214. Statutes of the International Red Cross and Red Crescent Movement, art. 5(1) (1986), https://www.icrc.org/eng/assets/files/other/statutes-en-a5.pdf.

Conventions, including its mandate "to work for the faithful application of international humanitarian law applicable in armed conflicts and to take cognizance of any complaints based on alleged breaches of that law."[215] The Statutes also recognize that the ICRC's mandate includes more than monitoring and compliance-promotion. It includes working with states to "prepare any development" in IHL.[216] A recent meeting of the International Conference of the Red Cross and Red Crescent, for example, gave the ICRC the mandate to "strengthen international humanitarian law" through both reaffirming IHL in situations when it is improperly implemented *and* through "its clarification or development when it does not sufficiently meet the needs of the victims of armed conflict,"[217] while still acknowledging states' primary role in developing IHL.

As one commentator has explained, the ICRC's function includes a "constant reappraisal of humanitarian rules to ensure that they are geared to the reality of conflict situations, and preparing for their adaptation and development when necessary."[218]

In this regard, the ICRC plays an important role in putting forth an honest, but perhaps forward-leaning, view of IHL in order to comport with state practice and ensure its efficacy. Functionally, it does this in several ways, including through private contact with parties to armed conflict. More publically, the ICRC publishes analyses of the sources of IHL. First, it interprets the provisions of treaty-based IHL, a process that brings to bear the role of the Commentary to Additional Protocol I, which contrasts with this Note's argument. The Commentary to Additional Protocol I is one of several official International Committee of the Red Cross (ICRC) commentaries to the Geneva Conventions and their Additional Protocols. While these Commentaries are highly influential and persuasive, they are not dispositive.[219] The Commentaries are an important interpretive tool for these purposes, but are not chiseled in stone. Indeed, the ICRC is currently updating the Commentaries to both the original four Geneva Conventions and their 1977 Additional Protocols.[220]

The first of the new Commentaries has recently been published, and the ICRC's explanation if its role and methodology is instructive. The ICRC's stated purpose in the project "is to ensure that the new editions reflect contemporary practice and legal interpretation . . . . [with] the benefit of . . . years of application of the Conventions . . . and their interpretation by States,

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215. *Id.* art 5(2)(c).

216. *Id.* art 5(2)(g).

217. 31st Int'l Conference of the Red Cross and Red Crescent, Strengthening Legal Protection for Victims of Armed Conflicts (Jan. 12, 2011), https://www.icrc.org/eng/resources/documents/resolution/31-international-conference-resolution-1-2011.htm.

218. Yves Sandoz, *The International Committee of the Red Cross as Guardian of International Humanitarian Law* (1998), https://www.icrc.org/eng/resources/documents/misc/about-the-icrc-311298.htm.

219. *See supra* note 25.

220. *Bringing the Commentaries on the Geneva Conventions and their Additional Protocols into the 21st Century*, INT'L COMM. RED CROSS (2012), https://www.icrc.org/eng/resources/documents/interview/2012/geneva-conventions-commentaries-interview-2012-07-12.htm (interview with Jean-Marie Henckaerts, ICRC legal adviser) (last visited Apr. 7, 2016).

courts and scholars."[221]

The ICRC notes that it follows the interpretive rules of the Vienna Convention on the Law of Treaties[222] (VCLT) in examining contemporary practice and interpretation. These include the mandate that treaties be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[223] The ICRC notes that "the terms 'object and purpose' are used as 'a combined whole'. Thus, a treaty's object and purpose is said to refer to its 'raison d'être', its 'fundamental core', or 'its essential content'."[224] Further, the ICRC cites Article 31(3) of the VCLT for the mandate to account for:

> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.[225]

An application of this methodology to Additional Protocol I might well lead to the conclusion that IHL protects journalism. The 1987 Commentary rejects the view that Article 79 reflects anything more than an affirmation of journalists' civilian status, but the ICRC need not explicitly reject this view in order to interpret IHL to protect journalism. There is little doubt that the "object and purpose," "raison d'être" and "fundamental core" of Additional Protocol I was to strengthen protections for civilians in wartime. As this Note has shown, there is ample evidence to suggest that the motivation behind expanding protections for journalists was not only to affirm their status as civilians. Rather, states were also motivated to protect journal*ists* because they understood journal*ism* as playing a critical role in informing the world when the wartime rights of civilians were violated. Protecting journalists was not only an end in itself, but also a means to another end: the effective application of the IHL system.

In terms of subsequent "application of the Conventions . . . and their interpretation by States, courts and scholars,"[226] the evidence is something of a mixed bag. The underlying legal standards of when media entities—both individuals and infrastructure—are targetable appear to be moving towards some consensus even if, in practice, the application of these standards is somewhat disputed. While it may not always be clear when media crosses the line from propaganda to incitement, for example, it is clearer that curbing propaganda does not constitute sufficient military advantage to justify targeting. The ICRC and others must acknowledge the consequences of dissonance in application and treat them with appropriate nuance. Nevertheless,

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221. *See ICRC 2016 Commentary, supra* note 25, ¶ 5.

222. VCLT, *supra* note 161.

223. *ICRC 2016 Commentary, supra* note 25 (quoting VCLT, art. 31(1)).

224. *Id.*

225. *Id.* (quoting VCLT art. 31(3)).

226. *ICRC 2016 Commentary, supra* note 25, ¶ 5; *see also supra* note 221 and accompanying text.

the uncertain application of the legal standards should not be viewed as a deterrent to ICRC articulation of the broader principle; instead it should be an invitation for articulating underlying principles and clarifying the applicable standards.

On a more general level, the ICRC methodology embraces the ICJ's mandate that "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation."[227] To be sure, this is not *carte blanche* to impose international human rights law doctrine on IHL. Indeed, the ICRC makes clear that the complicated relationship between IHL and human rights law requires nuanced treatment. Nevertheless, as the preceding discussion has shown, the decision to adopt Additional Protocol I and expand IHL protections for civilians was at least partially inspired by the rise of human rights law. In this regard, while the ICRC cannot read human rights law into IHL, it must read IHL against the backdrop of human rights law. Thus, even if the ICCPR may not apply in wartime, the broader understanding that journalists play a critical role in guaranteeing principles of humanity and identifying violations of human rights law and humanitarian law is relevant to understanding Additional Protocol I as a whole.

The ICRC will soon publish an updated Commentary on Additional Protocol I, based on this methodology. Whether or not the Commentary reflects an understanding that IHL protects journal*ism* in addition to journal*ists*, the ICRC should continue its interpretative process and embrace the dual purposes of protecting journalists.

In addition to interpreting IHL treaties, the ICRC publishes and promotes interpretations of customary IHL.[228] Customary IHL is distinct from treaty-based IHL, but it has the same force of law as treaty-based law. Customary IHL forms from "a general practice accepted as law"[229] and has two requisite components. First, for a rule to rise to the level of customary IHL, it must be reflected in state practice. Second, that state practice must come from a sense of *opinio juris*—in other words, that it is legally required, rather than simply prudent or politically expedient.[230] Some have accused the ICRC of blurring the line between *lex lata* (the law as it exists) and *lex ferenda* (the law as it should be) in its interpretation of customary IHL.[231] Indeed, in response to the most recent compendium of customary IHL, the U.S. Department of State's Legal Adviser and the Department of Defense's General Counsel jointly authored a response raising concerns.[232] I highlight this response not as an accusation or

227. *ICRC 2016 Commentary*, *supra* note 25, ¶ 36 (quoting Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 53 (June 21)).

228. *See generally* HENCKAERTS & DOSWALD-BECK, *supra* note 34.

229. Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

230. *See Introduction* to HENCKAERTS & DOSWALD-BECK, *supra* note 34, at xxxvii-xxxviii.

231. *See, e.g.*, J. Jeremy Marsh, Lex Lata *or* Lex Ferenda*? Rule 45 of the ICRC Study on Customary International Humanitarian Law*, 198 MIL. L. REV. 116 (2008).

232. John B. Bellinger, III & William J. Haynes II, *A US Government Response to the International Committee of the Red Cross Study* Customary International Humanitarian Law, 89 INT'L.

defense of the ICRC; rather, I raise it to make the relatively modest point that, at times, the ICRC has been assertive in fulfilling its mandate to "develop" IHL.

The ICRC must, of course, be judicious in its actions to protect its unique role and ensure its ability to protect its mandate. Consequently, it could not impose upon states every implication discussed in Part II. The notion that states must afford journalists special status in proportionality analyses is likely too extreme to constitute *lex lata,* whether or not one thinks it is *lex ferenda.* Nevertheless, the ICRC does have room to acknowledge the notion that public access to wartime information was a driving force behind Additional Protocol I and remains an important value in international discussion on improving protections for journalists and media infrastructure. It can engage in purposive interpretation to clarify, publically or privately, its opinions on proportionality and distinction in the media context, for example. In the proportionality context, the ICRC can clarify what constitutes excessive collateral damage in the context of media personnel and infrastructure that serve a public purpose. In the distinction context, as noted, the lines between journalistic function, war-sustaining activities, and participation in hostilities are not especially sharply drawn. State practice has at times made this reality abundantly clear. The ICRC certainly has a role to play in better defining these contours.

Greater definition of these contours is especially important with regard to citizen journalists. The ICRC sometimes plays what has been called a "catalyst" function. When existing legal frameworks are insufficient, the ICRC seeks to go beyond "simply . . . tak[ing] note of problems of application of international humanitarian law" and works to ensure that "those concerned must be encouraged to think about ways of dealing with them."[233] As one scholar has explained:

> When a real problem crops up on the ground it is not enough to say that it cannot be resolved by revising the law. It is essential to go a step further and seek possible remedies, not—and this is important—in isolation, but drawing on the widest possible range of expert knowledge and experience. In short, international humanitarian law must be transformed into a dynamic force so that it can better serve the interests of those it is designed to assist and protect.[234]

The ICRC regularly meets with government officials in an iterative process to help define, implement, and advance IHL. It would be wise for some of these meetings to include media experts who could contribute to the dialogue and help define and expand precisely whom Article 79 protects. Relatedly, it should make efforts to encourage states that issue press credentials to consider expanding the type of journalist to whom such credentials are issued. This work is especially important in light of suggestions that have been made to grant journalists special emblems to better identify them as civilians. To the extent that such emblems would assist states in making targeting decisions or otherwise protect journalists (a notion some have questioned), for example, it is

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REV. RED CROSS 443 (2007).

233. Sandoz, *supra* note 218.

234. *Id.*

crucial that these emblems are made available to all who qualify as journalists, and not only to those with institutional support from major news outlets.

C. *A System of Notification and Derogation*[235]

One possible mechanism for developing the law and practice of protecting journalism in wartime would be the creation of a system of notification and derogation. Such a system would be especially relevant when states attempt to block journalist access or shut down specific Internet sites.

In short, a system of notification and derogation would be based on similar systems in human rights treaties. Many human rights treaties have derogation clauses, which—under certain circumstances—permit states to derogate from some of the protections guaranteed by the treaties. The ICCPR, for example, "[i]n time of public emergency which threatens the life of the nation," allows states to "take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation."[236] When a state derogates, it must notify other ICCPR signatories through the U.N. Secretary-General and provide clear justification for the derogation.[237] While not all rights in the ICCPR are derogable,[238] Article 19, which protects free expression, access to information, and press,[239] is derogable.

A similar system could be used in the IHL context, especially when states limit journalist access to certain sites or attempt to shut down the Internet, certain websites, or certain social media accounts. Under such a system, blocking journalist access would be acceptable, but only in times of true necessity, and the limitation of access would be registered to an international body such as a U.N. outfit, or an NGO such as the ICRC. This system could be made obligatory in a treaty but could also simply operate on a voluntary basis. Such a system would allow states to limit access for journalists' own safety and for military necessity and expediency but would still respect wartime protection of journalism by mirroring the derogation processes of international human rights law. It would have at least two clear desirable benefits from the perspective of protecting journalist access. First, it would force states to justify blocking access or total or partial Internet shutdown and to define the military expediency that ostensibly excused it. Ex ante, this process might make states less likely to block access or take shutdown action in an arbitrary manner. Second, this justification, when blocked access or shutdown occurs, would help develop the law by allowing for an ex post assessment of the validity of the shutdown. This ex post assessment would help adjudicatory bodies define the contours of the treaty-based law and help develop state practice that informs

235. This system would complement and supplement the process that exists under the ICCPR. As discussed *supra* notes 40-50, not all states recognize the ICCPR's applicability in wartime and even those that do are not bound in situations where they lack effective control over the territory.

236. ICCPR, *supra* note 42, art. 4(1).

237. *Id.* art 4(3).

238. *See id.* art 4(2).

239. *Id.* art. 19. Indeed, Article 19 has a caveat written into it, allowing certain restrictions "[f]or the protection of national security or of public order," but only as "necessary." *Id.* at 19(3).

customary IHL.

It would allow the relevant body to conduct an ex post examination of the decision and help develop the law governing wartime journalist access by articulating standards during which such access may be justifiably limited and studying specific factual scenarios to give depth to these standards. Such a system would also require states to enunciate the reasons for preventing journalist access, thus helping develop state practice, which, in turn, informs customary IHL.

Such a system would be more state-friendly than some alternatives of ensuring journalistic access. Perhaps the most journalism-friendly means of doing so is to require militaries to inform journalists of potential dangers but prevent them from blocking access. Under such a system, it would be incumbent on the military to describe in the greatest detail possible why it is dangerous to access a specific location, but it would be left to the journalist's discretion whether to heed the warning. Portions of the initial Human Rights Commission draft convention reflect this view. It made incumbent on the state the responsibility to "[i]nform [the journalist] to the extent compatible with military requirements of the areas and circumstances in which he may be exposed to danger."[240] Moreover, it stated that "[w]hen undertaking dangerous professional missions in an area where there is a conflict . . . journalists have the right to protection from an immediate danger resulting from hostilities only to the extent that they shall not expose themselves to danger without needing to do so for professional reasons."[241] This might imply that, when journalists feel the need to do so for professional reasons, they have the right to expose themselves to danger without losing protection. Given the international pressure that some states have received when blocking journalist access, they might have an incentive to participate in the relatively more state-friendly derogation system.

CONCLUSION

This Note has presented an analysis of the purposes underlying the expansion of IHL protections for wartime journalists. It has argued that those purposes were twofold. As others have noted, past expansions of IHL protections for journalists reflected what this Note has called individual humanitarianism: a desire to protect journalists from harm due to their status as civilians. But, as this Note has shown, the expansion of IHL protections for journalists also reflected a desire to protect their unique, public-informing function. In this regard, the expansion was both an end in itself and a means of achieving another end: the protection of other civilians through a spotlight on wartime actions. Consequently, this Note has argued, IHL is most appropriately understood as protecting journal*ism* in addition to journal*ists*.

As this Note has highlighted, the notion that IHL protects journalism has consequences for elements of both *lex lata* and *lex ferenda*. Tradeoffs inhere in

240. Commission on Human Rights Res. 6, *supra* note 154, at 137.

241. *Id.*

each of these elements, but viewing IHL's protections of journalists through a lens that emphasizes their public-informing role helps clarify the relative value of each side of these tradeoffs. Indeed, it helps explain the reaction to the Department of Defense's recent law of war manual as well as the reaction to recent efforts at censorship and blocked access. Such issues are unlikely to diminish in frequency or importance. As states, scholars, international institutions, the ICRC, and other NGOs consider how to apply IHL to such scenarios, they should acknowledge that both journalists and journalism are protected.