
Journalists in the Gaza War – A Neglected Issue of International Humanitarian Law?

Wolff Heintschel von Heinegg

1. Introduction

According to the International Federation of Journalists (IFJ), “at least 146 journalists and media workers” have been killed in Gaza since October 7, 2023.¹ The Committee to Protect Journalists (CPJ) claims that as of October 28, 2024, its “preliminary investigations showed that at least 131 journalists and media workers were among the more than tens of thousands killed in Gaza, the West Bank, Israel, and Lebanon since the war began, making it the deadliest period for journalists since CPJ began gathering data in 1992.”² The CPJ list³ shows that the majority of journalists have lost their lives due to “dangerous assignment,” i.e., because they had been in the vicinity of objects or persons attacked by the Israel Defense Forces (IDF). However, there have also been allegations that “Israel – which banned foreign reporters from entering Gaza – targets journalists in the Palestinian territory to obscure the truth about its war crimes there.”⁴

These and other reports seem to insinuate that the killing of journalists and media workers during the Gaza war regularly qualifies as a violation of the law of armed conflict/international humanitarian law. The present article starts from the premise that since October 7, 2023, there is a non-international armed conflict between Israel and Hamas, which is a non-State organized armed group in a situation of protracted armed violence with the IDF.⁵ The fact that the IDF applies the law of international armed conflict is a policy decision that is without prejudice to the facts on the ground. The aim of the present article is to provide a brief assessment of the status and protection of journalists under international humanitarian law, and it arrives at the conclusion that the killing of journalists during the Gaza War is only illegal under exceptional circumstances.

2. Status of Journalists under International Humanitarian Law (IHL)

Leaving aside war correspondents⁶ and so-called “embedded journalists,”⁷ the only treaty provision explicitly dealing with journalists in armed conflict is Article 79 of the 1977 Additional Protocol I (AP I),⁸

which only applies in situations of international armed conflict and to which Israel is not a State party. The 1977 Additional Protocol II⁹ does not address the status and

1. “War in Gaza: Israel must be held accountable,” IFJ, available at <https://www.ifj.org/war-in-gaza>
2. “Journalist casualties in the Israel-Gaza war,” CPJ (Nov. 20, 2024), available at <https://cpj.org/2024/10/journalist-casualties-in-the-israel-gaza-conflict/>
3. “160 Journalists and Media Workers Killed in Israel and the Occupied Palestinian Territory, Lebanon,” CPJ, available at https://cpj.org/data/killed/all/?status=Killed&motiveConfirmed%5B%5D=Confirmed&type%5B%5D=Journalist&type%5B%5D=Media%20Worker&cc_fips%5B%5D=IS&cc_fips%5B%5D=LE&start_year=2023&end_year=2024&group_by=year
4. Alice Spери, “How impunity fuels Israel’s attacks on journalists in Gaza and Lebanon,” AL JEZEERA (Oct. 25, 2024), available at <https://www.aljazeera.com/news/2024/10/25/how-impunity-fuels-israels-attacks-on-journalists-in-gaza-and-lebanon>
5. ICRC, COMMENTARY ON THE FIRST GENEVA CONVENTION 427 (Cambridge University Press, 2016).
6. According to the Third Geneva Convention, 1949, 75 U.N.T.S. 135, art. 4A(4), war correspondents and journalists authorized to accompany the armed forces in times of an international armed conflict are entitled to prisoner of war status, if they fall into the hands of the enemy.
7. “Embedded journalists,” who do not necessarily qualify as war correspondents, are persons “assigned to a unit.” See LAW OF WAR MANUAL, OFFICE OF GENERAL COUNSEL AT THE DEPARTMENT OF DEFENSE (June 2015), ¶ 4.24, available at <https://dod.defense.gov/Portals/1/Documents/pubs/Law-of-War-Manual-june-2015.pdf>
8. 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.
9. 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.

protection of journalists in non-international armed conflict. This begs the question whether Article 79 AP I is reflective of customary international law that also applies in non-international armed conflicts and to States not party to the Protocol.

According to the ICRC Customary IHL Study,¹⁰ the “immunity against attacks is based on the prohibition on attacking civilians” and that this “conclusion is borne out by practice, even before the adoption of the Additional Protocols.”¹¹ While the practice relied upon by the ICRC may not satisfy everyone for recognizing the rule on journalists as having matured into customary international law, the present article will not go into greater depth. Instead, it will start from the premise that Article 79 AP I applies as customary international law in times of non-international armed conflict.

According to Article 79(1) AP I, journalists “shall be considered as civilians.” This formulation may not be misunderstood as introducing a new category of specially protected persons under IHL.¹² Rather, civilian journalists are considered civilians under international humanitarian law (as distinguished from war correspondents who enjoy prisoner of war status when falling into the hands of the enemy).¹³ The need to address journalists in a separate provision is due to the fact that they are “engaged in dangerous professional missions in areas of armed conflict.” A journalist is an individual who “writes for newspapers or magazines or prepares news to be broadcast on radio or television.”¹⁴ This definition based on the ordinary meaning is too narrow because it does not take the technological and other developments in the media sector into account.

Article 2(a) of the Draft Articles on the Protection of Journalists Engaged in Dangerous Missions in Areas of Armed Conflict¹⁵ defines a journalist as

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 and who, in countries where such activities are assigned their particular status by virtue of laws, regulations or, in default thereof, recognized practices, have that status (by virtue of the said laws, regulations or practices).

Although this definition goes beyond the ordinary meaning of the word “journalist,” it will not necessarily cover part-time reporters (i.e., those not engaged in the

said activities as their principal occupation), freelance reporters (i.e., those without a recognized status under the applicable domestic law), or those reporting for new media, such as internet websites. According to the position taken here, the technological developments since 1975 cannot be ignored. Therefore, all those “being on the spot, doing interviews, taking notes, taking photographs or films, sound recording etc. and transmitting them”¹⁶ to outlets other than newspapers, agencies, radio or TV, including those who assist in such activities, also qualify as journalists. However, those activities must belong to their profession. The wording of Article 79(1) AP I expressly refers to “professional missions.” Accordingly, persons randomly engaged in any of the said activities and not engaged in a professional mission of a certain duration will not qualify as journalists.

3. Scope of Protection

As regards the protection afforded to journalists, it is important to distinguish between prohibited direct attacks and incidental harm inflicted upon them. Moreover, one needs to bear in mind that the professional activities of journalists do not enjoy absolute protections under IHL.

3.1 Prohibited Attacks and Incidental Harm

As demonstrated, persons qualifying as journalists by their professional mission are legally interpreted as civilians, and therefore do not belong to any category of specially protected persons under IHL. To that end, Article 79(2) AP I states that journalists “shall be protected as such under the Conventions and this Protocol,” meaning

10. Jean-Marie Henckaerts and Louise Doswald-Beck, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW*, VOL. I RULES 115 (2005).

11. *Ibid.*, at 116.

12. Claude Pilloud, Yves Sandoz, Christophe Swinarski, Bruno Zimmermann, *COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949*, ¶ 3265 (Geneva: ICRC, 1987).

13. *Ibid.*, at ¶ 3258. *See also* LAW OF WAR MANUAL, *supra* note 7, at ¶ 4.24.1.

14. *CONCISE OXFORD ENGLISH DICTIONARY* 767 (12th ed., 2011).

15. U.N. GAOR, 13th Sess., at annex 1, U.N. Doc. A/10147 (Aug. 1, 1975).

16. Pilloud, Sandoz, Swinarski, Zimmermann, and ICRC, *supra* note 12, at ¶ 3264.

they enjoy the same protections as all other civilians.¹⁷ Those protections include, but are not limited to, the prohibition of making them the primary target of an attack and attacking them directly.

However, protection against direct attack does not mean that any killing or injuring of a journalist necessarily qualifies as a violation of the journalist's protected status. Although journalists qualify as civilians, they may be incidentally killed or injured by an attack directed against a lawful target. Lawful targets include persons who, by their status or conduct, are not or no longer protected civilians. This includes, but is not limited to, members of State or non-State organized armed groups and civilians directly participating in the hostilities, or objects that by their nature, location, purpose or use make an effective contribution to the enemy's military action.

Journalists engaged in their professional activities in areas of armed conflict will often follow military units and non-State armed groups or they will get close to persons or objects qualifying as lawful targets. Thus, they risk "losing effective protection," if they expose themselves to the dangers of such lawful attacks.¹⁸ As rightly stated, "journalists who enter areas of military operations assume a significant risk that they could be injured or killed incidental to an enemy attack or from other dangers."¹⁹ In this context, it is important to note that IHL does not prohibit "collateral damage," which constitutes attacks against lawful targets that cause or are expected to cause incidental loss of life or injury to civilians, including journalists. According to Article 51(5) (b) AP I, which is reflective of customary international law,²⁰ such attacks are only prohibited if the expected collateral damage "would be excessive in relation to the concrete and direct military advantage anticipated." A journalist who is in or in the vicinity of a lawful target under attack does not enjoy a higher degree of protection than any other civilian. Accordingly, a single journalist incidentally injured or killed by a lawful attack will hardly count as prohibited excessive collateral damage. And even if the injured or killed journalist is part of a larger group of civilians expected to be incidentally harmed, this does not render the attack illegal.

The word "excessive" should not be misunderstood as being synonymous with "extensive." Even the expectation of a high number of civilian casualties does not necessarily render an attack unlawful. Moreover, the concept varies in accordance with the anticipated military advantage. The greater the military advantage anticipated from a lawful attack, the less likely any expected collateral damage will qualify as "excessive." As emphasized in

the ICRC Commentary on API, "it should not be forgotten that the appearance of a journalist on the battlefield is unlikely to have the effect of putting an end to the exchange of fire so that he can do his job."²¹

3.2 Professional Activities Protected?

The wording of Article 79 AP I does not suggest that the professional activities of journalists are specifically protected under IHL. However, according to the ICRC Customary IHL Study, practice "indicates that journalists exercising their professional activities in relation to an armed conflict must be protected."²²

The practice relied upon by the ICRC calls on the parties to the conflict to ensure the safety of media representatives and refrain from any harassment or intimidation of journalists as well as from denial of full and unhindered access.²³ Seemingly, the ICRC advocates for the protection of journalist activities. However, the practice referred to is limited to arbitrary or other unjustified interference with the professional activities of journalists, including detention and murder. This does not justify a conclusion that a journalist's professional activities enjoy special protection under IHL.

Of course, from a policy perspective, journalists may be considered to "play a vital role in free societies and in providing information about armed conflict."²⁴ Still,

under the law of war, there is no special right for journalists to access areas of military operations without the consent of the State conducting those operations. The law of war does not prohibit States

17. LAW OF WAR MANUAL, *supra* note 7, at ¶ 4.24.1, states that "Journalists do not form a distinct class of persons under the law of war, but instead receive protection through the general protections afforded civilians. Thus, in general, the rights, duties, and liabilities applicable to civilians also apply to journalists."

18. Pilloud, Sandoz, Swinarski, Zimmermann, and ICRC, *supra* note 12, at ¶ 3269.

19. LAW OF WAR MANUAL, *supra* note 7, at ¶ 4.24.2.1.

20. *Ibid.*, at ¶ 5.12.

21. Pilloud, Sandoz, Swinarski, Zimmermann, and ICRC, *supra* note 12, at ¶ 3270.

22. Henckaerts and Doswald-Beck, *supra* note 10, at 117.

23. *Ibid.*, at 117.

24. LAW OF WAR MANUAL, *supra* note 7, at ¶ 4.24.

25. *Ibid.*, at ¶ 4.24.2.2.

from taking security measures to reduce the risk of disclosure of sensitive military information, such as members of military personnel, types of on-hand equipment, unit locations, and plans for future operations.²⁵

The only legitimate conclusion that may be drawn from Article 79 AP I and the corresponding customary rule on journalists is the prohibition of arbitrarily denying them the protections afforded to civilians on the sole basis of their professional engagement. As stated in the ICRC Commentary on AP I, “the military or civil authorities may subject such activities to controls in order to ensure that they comply with the rules they have laid down.”²⁶

4. Loss of Protection

Solely gathering, transmitting, and disseminating information or otherwise engaging in the journalistic profession during an armed conflict is not sufficient to deprive journalists of their protections as civilians. This is clearly supported by the wording of Article 79(1) and (2) AP I.

However, a journalist’s own conduct may result in losing the protections afforded to civilians under the Geneva Conventions, the Additional Protocols, and customary IHL. This stems from Article 79(2) AP I, which states that a journalist’s protection ceases as soon, and as long as, they take action “adversely affecting their status as civilians.”

4.1 Journalists’ Activities as Direct Participation in Hostilities

Such action includes, but is not limited to, any activity qualifying as direct participation in the hostilities, which according to Articles 51(3) AP I, and 13(3) AP II, and customary IHL,²⁷ deprives a civilian, and thus a journalist, from their lawful protection against direct attack.²⁸ In this context it is important to bear in mind that some of the journalists in Gaza are Hamas operatives.

The interpretation of the notion of direct participation in hostilities continues to be a highly contentious issue. The ICRC Interpretive Guidance has received considerable support, but it has also been criticized by States.

This is not the right occasion for re-entering into the discussion whether the ICRC approach correctly reflects the current state of IHL or not. There should, however, be general agreement that the provision of militarily relevant information to the enemy, such as targeting data

or on the location of units, qualifies as direct participation in hostilities rendering the respective journalist liable to be attacked. Such activity will be correlated to a sufficiently high threshold of harm because it is likely to “adversely affecting the military operations or military capacity of a party to the conflict.”²⁹ Such acts will also meet the – not generally accepted – requirement of belligerent nexus, because it will be “specifically designed to directly cause the required threshold of harm [i.e., adversely affecting the military operations or military capacity] in support of a party to the conflict and to the detriment of another.”³⁰

The wording of the treaty provisions on direct participation on hostilities (“for such time”) suggests that there is a temporal element. Specifically, a journalist’s loss of protection from direct attack depends on how long the journalist participated in an act that qualifies as direct participation in hostilities.³¹ According to an opposing view, repetitive activities of direct participation in hostilities must be assessed in sum, thus closing the “revolving door” until the respective civilian unambiguously opts out through extended non-participation or an affirmative act of withdrawal.³²

These different approaches may result in far-reaching consequences. According to the ICRC, a journalist who regularly engages in an activity qualifying as direct participation would regain protection from direct attack after the completion of each specific act until they engage in such activity again. According to the opposing view, a journalist engaging “in a pattern of taking a direct part

26. Pilloud, Sandoz, Swinarski, Zimmermann, and ICRC, *supra* note 12, at ¶ 3264.

27. Nils Melzer, “Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law,” ICRC (May 2009), available at <https://www.refworld.org/policy/legalguidance/icrc/2009/en/68382>

28. Pilloud, Sandoz, Swinarski, Zimmermann, and ICRC, *supra* note 12, at ¶ 3268 (“Thus it is quite clear that in case of any direct participation in hostilities they would forfeit for the duration of such participation the immunity they enjoy as civilians”).

29. Melzer, *supra* note 27, at 47.

30. *Ibid.*, at 58.

31. *Ibid.*, at 43.

32. *See*, inter alia, LAW OF WAR MANUAL, *supra* note 7, at ¶ 5.8.4.2.

33. *Ibid.*

in hostilities” does not “regain protection from being made the object of attack in the time period between instances of taking a direct part in hostilities.”³³

Irrespective of the continuing disagreement on these and other issues related to direct participation in hostilities, “mere sympathy or moral support for a party’s cause” or “independent journalism or public advocacy (such as opinion journalists who write columns supporting or criticizing a State’s war effort)”³⁴ do not qualify as direct participation in hostilities. A fortiori, publishing, or otherwise disseminating information that reveals a party’s conduct that violates IHL or that might be embarrassing may not be considered an activity depriving the respective journalist of protection against direct attack either, even if the enemy uses that information for propaganda or strategic purposes.

4.2 Other Activities Depriving Journalists of Certain Protections Afforded to Civilians

A civilian, and thus a journalist, may lose certain protections afforded to civilians according to Article 4 of the 1949 Geneva Convention IV (GC IV).³⁵ Whereas Article 4(1) GC IV applies to civilians in the territory of a party to the conflict, Article 4(2) GC IV applies to civilians in occupied territory. Since Gaza is not an integral part of the territory of the State of Israel, it could, however, be considered to be under the military occupation of the IDF, if the arguments provided by the International Court of Justice (ICJ) were convincing.

In its Advisory Opinion of July 19, 2024,³⁶ the ICJ held that the Gaza Strip is “an integral part of the territory that was occupied by Israel in 1967,”³⁷ and that despite the withdrawal of the IDF from Gaza in 2005, Israel continues to be an occupying power. The Court starts from the wording of Article 42 of the 1907 Hague Regulations,³⁸ which requires that the territory “is actually placed under the authority of the hostile army” and then holds that “a State occupies territory that is not its own when, and to the extent that, it exercises effective control over it.”³⁹ Being satisfied with an exercise of effective control, the Court concludes that

the decisive criterion is not whether the occupying Power retains its physical military presence in the territory at all times but rather whether its authority “has been established and can be exercised” ... Where an occupying Power, having previously established its authority in the occupied territory, later withdraws its

physical presence in part or in whole, it may still bear obligations under the law of occupation to the extent that it remains capable of exercising, and continues to exercise, elements of its authority in place of the local government.⁴⁰

Accordingly, the Court

considers that Israel remained capable of exercising, and continues to exercise, certain key elements of authority over the Gaza Strip, including control of the land, sea and air borders, restrictions on movement of people and goods, collection of import and export taxes, and military control over the buffer zone, despite the withdrawal of its military presence in 2005. This is even more so since 7 October 2023.⁴¹

The present author does not share these findings. The replacement of “military authority” by “effective control” appears as a prestidigitation rather than a sound interpretation. The distinction between military occupation and siege is blurred. An exercise of effective control from outside the respective territory will make it impossible for the controlling State to act as an “administrator and usufructuary” (Article 55 of the 1907 Hague Regulations) and to “restore, and ensure, as far as possible, public order and safety” (Article 43 of the 1907 Hague Regulations), or to comply with the other

34. *Ibid.*, at ¶ 5.8.3.2.

35. Fourth Geneva Convention, 1949, 75 U.N.T.S. 287.

36. Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, 2004 I.C.J. 136 (July 9).

37. *Ibid.*, at ¶ 88.

38. Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, art. 42, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539.

39. ICJ Advisory Opinion, *supra* note 36, at ¶ 90.

40. *Ibid.*, at ¶ 92, quoting Article 42 of the 1907 Hague Regulations.

41. *Ibid.*, at ¶ 93.

obligations of an occupying power under the 1907 Hague Regulations and GC IV. Despite these criticisms, the Advisory Opinion will most likely be considered an authoritative definition of military occupation.

For the sake of the argument, this article will proceed on the premise that Gaza is under military occupation, thus making Article 4(2) GC IV applicable. According to that provision, a civilian may be detained “as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power.” Therefore, a journalist engaged in any such activities is liable to be detained, and “where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention,” specifically of the rights set forth by Articles 106-107 and 110-112 GC IV. Accordingly, journalists detained for the above reasons may be prevented from pursuing their profession. Of course, according to Article 4(3) GC IV, a detained journalist must be treated humanely and continues to enjoy the rights of fair trial.

5. Concluding Remarks

Journalists engaged in professional missions in areas of armed conflict voluntarily expose themselves to considerable risks. While such exposure may be

considered inevitable for the performance of journalistic activities, this does not bestow upon journalists a higher degree of protection than other civilians. Under IHL, journalists are civilians and, as such, they enjoy no special status or protections.

From the perspective of the media, the death of a colleague will always be a sensitive issue, but this does not justify the scandalization of the incidental killing of journalists through attacks against persons or objects qualifying as lawful targets. Decisions on attacks that are expected to cause civilian collateral damage are the most difficult and challenging tasks of military commanders, and they do not approve such attacks light-heartedly. The incidental killing or injuring of civilians is a corollary of armed hostilities that cannot be completely avoided, but in the collateral damage assessment, it does not make a difference whether “ordinary civilians” or journalists are incidentally harmed. Accordingly, the answer to the question posed in the title of this article is clearly in the negative. ■

Prof. Dr. Wolff Heintschel von Heinegg is the Chair of Public Law, in particular Public International Law, European Law and Foreign Constitutional Law at the Europa-Universität Viadrina (Germany). He also serves as President of the International Society for Military Law and the Law of War.