French original, « Protection des journalistes et des médias en période de conflit armé »,
International Review of the Red Cross, Vol. 86, No. 853, March 2004, pp. 37-67.

The protection of journalists and news media personnel in armed conflict

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Résumé

The recent war in Iraq is a perfect illustration of the growing risks faced by journalists working in conflict zones. It is therefore important to call renewed attention to the fact that attacks against journalists and media equipment are illegal under international humanitarian law, which protects civilian persons and objects, as long as they are not making an effective contribution to military action. The media cannot be considered a legitimate target, even if they are being used for propaganda purposes, unless they are being exploited to instigate grave breaches of humanitarian law. Journalists and media personnel also benefit from precautionary measures – not confined to them alone – such as the principle of proportionality and the obligation to give advance warning. There is nonetheless an evident need for the adoption of a new instrument, on the one hand to reaffirm those elements of humanitarian law that apply to journalists and media personnel, and thus to re-establish the authority of certain basic rules that are all too often flouted, and, on the other hand, to improve existing law and adapt it to the requirements of today, for instance the phenomenon of "embedded" journalists. Such is the goal of the "Declaration on the safety of journalists and media personnel in situations involving armed conflict," drawn up in 2003 by Reporters without Borders.

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In 2003 more journalists were killed worldwide – 42 – than at any time since 1995.[1] The recent conflict in Iraq is in large part responsible for that toll. During the military campaign there, the proportion of casualties was higher among journalists than among the ranks of the coalition armed forces. Fourteen reporters and media staff lost their lives, two disappeared and about fifteen were wounded while covering the war and post-war situation in Iraq. Other incidents spring to mind: the deliberate targeting of journalists in occupied territories in the Middle East, the NATO bombardment of Radio Television Serbia (RTS) in Belgrade in 1999 and the American army bombing in Kabul and Baghdad of Al Jazeera television. The general trend is towards a worsening of the conditions in which journalists exercise their profession during armed conflicts: "covering a war is becoming more and more dangerous for journalists. Added to the traditional dangers of war, are the unpredictable hazards of bomb

[1] See Reporters Without Borders, *2003 Round-Up*, 8 p., at: <http://www.rsf.org>.

attacks, the use of more sophisticated weapons - against which even the training and protection of journalists is ineffective - and belligerents who care more about winning the war of images than respecting the safety of media staff. So many factors increase the risks of war reporting."[2]

It is this particularly worrisome state of affairs that prompted Reporters Without Borders to draw up the *Declaration on the safety of journalists and media personnel in situations involving armed conflict*.[3] The Declaration has been open for signature since 20 January 2003 and was amended on 8 January 2004 in the light of events in Iraq. Its aim is to recall the principles and rules of international humanitarian law protecting journalists and the news media during armed conflicts and to propose improvements to the law in line with present-day requirements. In this respect, there is a need to reaffirm that attacks against journalists and the media are unlawful and to recall that the authorities preparing or deciding on an attack that may affect journalists or the media have an obligation to take all possible precautions.

The unlawfulness of attacks against journalists and the news media

Attacks against journalists and the news media are unlawful because, under international humanitarian law, civilians and civilian objects are protected and, with few exceptions, not even the propaganda media can be considered military objectives. In other words, while journalists and the equipment they use have no special status, they benefit from the general protection enjoyed by civilian persons and objects, unless they make an effective contribution to military action.

The protection of journalists as civilians

International humanitarian law distinguishes between but does not specifically define two categories of journalists working in war zones: war correspondents accredited to the armed forces and "independent" journalists. According to the *Dictionnaire de droit international public*, the first category covers any "specialized journalist who is present, with the authorization and under the protection of the armed forces of a belligerent, on the theatre of operations and whose mission is to provide information on events relating to ongoing hostilities."[4] This definition reflects practice during the Second World War and the Korean War in particular. War correspondents wore uniforms, had officer status and answered to the

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2 *Ibid*., p. 3.

3 The Declaration was drafted following a workshop held on 20 January 2003 and attended by representatives of the International Committee of the Red Cross (ICRC), NGOs such as Amnesty International, Lawyers Without Borders and Doctors Without Borders, the *Groupe de recherche et d'information sur la paix and la sécurité*, international humanitarian law experts, press organizations, and the spokespersons for NATO and the United States Department of Defense. The text is available at: <http://www.reseau-damocles.org/article.php3?id_article=7879>.

4 Jean Salmon (dir.), *Dictionnaire de droit international public*, Bruylant, Brussels, 2001, p. 275 (translated from the French). See also International Criminal Tribunal for the Former Yugoslavia (hereinafter ICTY), *Prosecutor v. Radoslav Brdjanin and Momir Talic* (IT-99-36), Decision on interlocutory appeal, 11 December 2002 (hereinafter *Randal* case), para. 29: "[b]y 'war correspondents,' the Appeals Chamber means individuals who, for any period of time, report (or investigate for the purposes of reporting) from a conflict zone on issues relating to the conflict. This decision concerns only this group." Paragraph 29 does not mention the requirement to have the authorization of or to be under the protection of the armed forces of a belligerent. The Tribunal's definition is therefore broader than that of war correspondent and covers all journalists.

person heading the armed forces unit they were part of. The term "journalist," for its part, is used to designate, according to a 1975 draft United Nations convention, "[…] 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 […]."[5]

- Protection of war correspondents

"War correspondents" belong to that ill-defined category of "persons who follow armed forces without actually being members thereof."[6] As they are not part of the armed forces, they have civilian status and therefore benefit from the corresponding protection.[7] In addition, because they are, in a way, associated with the war effort, war correspondents benefit from prisoner-of-war status if they fall into enemy hands, provided they have been authorized to follow the armed forces.[8]

- Protection of journalists engaged in dangerous professional missions

The participants at the 1974-1977 Diplomatic Conference in Geneva wished to supplement Article 4.A (4) of the Third Geneva Convention in order to meet the requirements of the time, by including a special provision in Protocol I on "measures of protection for journalists." The result, Article 79, does not change the regime governing war correspondents. The article reads as follows:

"Article 79 – Measures of protection for journalists

1. Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians within the meaning of Article 50, paragraph 1.
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 4 (A) (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."

Article 79 stipulates that journalists engaged in dangerous professional missions in areas of armed conflict[9] "are" civilians[10] within the meaning of Article 50 (1) and thereby

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5 Art. 2 (a) of the draft United Nations Convention on the Protection of Journalists Engaged in Dangerous Missions in Areas of Armed Conflict, 1 August 1975, UN document A/10147, Annex I.

6 Art. 4.A (4) of the Third Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949 (hereinafter Third Geneva Convention, or GC III).

7 Confirmation of this status is to be found in Art. 50 (1) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (hereinafter Protocol I, or P I), which indirectly includes the personnel covered by the definition of civilian persons contained in Art. 4.A (4) of the Third Geneva Convention.

8 GC III, Art. 4.A (4). According to the Regulations annexed to the 1907 Hague Convention (IV) concerning the Laws and Customs of War on Land (hereinafter the 1907 Hague Regulations) and the 1929 Geneva Convention on the Treatment of Prisoners of War, newspaper correspondents and reporters are "entitled to be treated as prisoners of war" but do not actually have prisoner-of-war status.

9 "[…A]ny professional activity exercised in an area affected by hostilities is dangerous by its very nature and is thus covered by the rule. It is not necessary to give a precise geographical delimitation of such 'areas of armed conflict' from either a legal or a practical point of view." See: Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff Publishers, Geneva, 1987, para. 3263.

benefit from all the protection conferred by international humanitarian law on civilians. Journalists are thus protected against the effects of the hostilities[11] and against arbitrary conduct on the part of a party to the conflict if they are captured or arrested by it.[12] The authors of Protocol I did not wish to establish a special status for journalists, on the grounds that "[…] any increase in the number of persons with a special status, necessarily accompanied by an increase of protective signs, tends to weaken the protective value of each protected status already accepted […]."[13] Moreover, the identity card referred to in paragraph 3 of Article 79 does not create a special status; it simply "[…] attests to [the bearer's] status as a journalist." Being in possession of such a card is therefore not a prerequisite for entitlement to civilian status.[14] In addition, although journalists are formally protected only in the context of international armed conflicts (Protocol I), they also benefit from the protection granted to civilians in non-international armed conflicts.[15]

In the *Randal* case, the ICTY Appeals Chamber considered that journalists working in war zones served "a public interest" because they "play a vital role in bringing to the attention of the international community the horrors and reality of conflict." According to the Appeals Chamber, recognition of that public interest does not rest on a perception of war correspondents as occupying some special professional category. Rather, it exists because investigation and reporting by war correspondents enables citizens of the international community to receive vital information from war zones. In order to protect the ability of journalists to carry out their functions, the Chamber granted them testimonial privilege in respect of events relating to their work. Journalists can only be obliged to testify if a two-pronged test is satisfied: first, the evidence sought must be of direct and important value in determining a core issue in the case; second, the evidence sought cannot reasonably be obtained elsewhere.[16]

- Protection of "embedded" journalists

There is currently some doubt as to the status of what are known as "embedded" journalists, i.e. those who move around with the troops during the war. There have been embedded journalists in the past, but never as many as during the 2003 Iraq conflict.[17] Because these

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10 As the Diplomatic Conference pointed out, the wording of Article 79 (1) is not satisfactory. Under the terms of Article 50 (1), to which Article 79 refers, a journalist is not just "considered as", he "is" a civilian.

11 See, for example, P I, Arts 48, 51, 57 and 85 (3).

12 In application *inter alia* of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (hereinafter Fourth Geneva Convention, or GC IV). See: Hans-Peter Gasser, "The protection of journalists engaged in dangerous professional mission", *International Review of the Red Cross*, No. 232, January-February 1983, pp. 14-16; Sylvie Boiton-Malherbe, *La protection des journalists en mission périlleuse dans les zones de conflit armé*, Bruylant/Éd. de l'Université de Bruxelles, Brussels, 1989, pp. 155-158.

13 Sandoz, Swinarski and Zimmerman (eds.), *op. cit. (*note 9), para. 3265.

14 In this respect, Art. 79 adopts the 1949 solution. The 1929 Geneva Convention, however, made the right to be treated as a prisoner of war conditional on possession of the identity card issued by the military authorities.

15 See Article 3 common to the Geneva Conventions and the Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-international Armed Conflicts, 8 June 1977 (hereinafter Protocol II, or P II), in particular Art. 13.

16 ICTY, *Randal* case, *op. cit.* (note 4), paras. 36, 38 and 50.

17 There were about 700 embedded journalists in Iraq, including 500 Americans. Among the American armed forces, 80% of embedded journalists were American and 20% foreign, whereas the British forces only took along British citizens. See *inter alia: Too Close for Comfort? The role of embedded reporting during the 2003 Iraq war: Summary report*, prepared by a team of researchers from the Cardiff School of Journalism for the BBC, November 2003; Jean-François Bureau (Director of Information and Communication,

journalists were "inserted" into American and British military units and agreed to a number of ground rules[18] obliging them to remain with the unit to which they were attached and which ensured their protection, they tend to be equated with war correspondents within the meaning of the Third Geneva Convention. For example, the media guidelines of the British Ministry of Defence[19] grant embedded journalists prisoner-of-war status if they are captured.[20] However, according to unofficial sources, the French military authorities consider that embedded and "unilateral" journalists[21] are only entitled to civilian status, as provided in Article 79 of Protocol I. This point must be clarified, especially since the prisoner-of-war status granted to war correspondents has practical consequences, notably in terms of interrogation and confiscation of personal belongings (Arts 17 and 18 of the Third Geneva Convention).

On several occasions during the Iraq war, Pentagon officials alerted journalists who were not embedded to the risks they ran by remaining outside the military accompaniment system. The facilities granted journalists embedded in army units were apparently associated with greater indifference towards the well being and security of "unilateral" reporters, in particular on the part of the American forces.[22] The fact that so many unilateral reporters were killed or wounded in the Iraq war has led to fears that the practice of embedding will be expanded in future conflicts of this kind. This is a source of concern to both journalists and the public, who believe that multiple sources and perspectives are key to objective and balanced coverage.[23] It is why the *Declaration on the safety of journalists and media personnel in situations involving armed conflict* considers it useful to specify that "journalists have a right to identical protection regardless of their professional status (freelance journalists or those who belong to an agency or to other media), of their nationality, and of whether or not they are taken off into an accompaniment system." In addition, the practice adopted by "unilateral" journalists of surrounding themselves with armed bodyguards can be dangerous for all journalists. On 13 April 2003, an agent from a private security company accompanying a CNN team to Tikrit, in northern Iraq, responded with automatic weapons fire after the convoy of several vehicles in which they were travelling was shot at on the outskirts of the town. Some journalists are worried about such conduct, which heralds a new practice that is contrary to the rules of the profession. According to Robert Ménard, Secretary-General of Reporters Without Borders, "[s]uch a practice sets a dangerous precedent that could jeopardize all other journalists covering this war as well as others in the future […] There is a real risk that combatants will henceforth assume that all press vehicles are armed […] Journalists can and must try to protect themselves by such methods as traveling in bulletproof vehicles and wearing bulletproof vests, but employing private security firms that do not

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Ministry of Defence spokesperson), "Embedded: war reporting", in Jean-Marie Charon and Arnaud Mercier (eds), *Weapons of Mass Communication. War reporting from Iraq: 1991-2003*, The CNRS Communication Series, Paris, 2004.

18 See the *Ground Rules Agreement* established by the Coalition Forces Land Component Command (CFLCC) for the media, at <http://www.rsf.org/article.php3?id_article=5334>.

19 The "Green Book" – *Working arrangements with the media in times of emergency, tension, conflict or war*, published after the Falklands War in 1982 and revised in 1992. See *The role of embedded reporting during the 2003 Iraq war, op. cit.* (note 17), para. 34, note 1.

20 *The role of embedded reporting during the 2003 Iraq war, op. cit.* (note 17), para. 57; Joel Simon, "Journalists are owed protection in wartime", at <http://www.cpj.org/Briefings/2003/gulf03/gulf03.html>.

21 The term used during the conflict in Iraq to describe "free" journalists who were not embedded.

22 See "Coalition accused of showing 'contempt' for journalists covering the war in Iraq", press release of 31 March 2003, and "Reporters Without Borders calls on the US to guarantee that the media can work freely and in safety", press release of 19 March 2003; available at <http://www.rsf.org/archives_me03.php3>.

23 The role of embedded reporting during the 2003 Iraq war, op. cit. (note 17), paras. 10, 11, 27, 33 and 55-58.

hesitate to use their firearms just increases the confusion between reporters and combatants."[24]

- Suspension of protection

Article 79 (2) of Protocol I, read together with Article 51 (3), grants journalists the legal protection conferred by international humanitarian law, unless they participate directly in the hostilities and for as long as they so participate. The term "participation" applies not to their routine activities – traveling to the spot, conducting interviews, taking notes and pictures, shooting films, making audio recordings, etc., and transmitting back to their paper or agency – but to any uncustomary act that makes a direct and effective contribution to the military action. The term "direct" makes it harder to withdraw protection by requiring that there be a close link between the journalist's conduct and its effects on the conduct of hostilities.[25] According to the ICRC Commentary on the draft of Article 51 (3), "hostile acts (or direct participation in hostilities) […] means acts of war that by their nature or purpose struck at the personnel and *matériel* of enemy armed forces."[26] The fact that a journalist is spreading propaganda cannot be considered direct participation (see below).

It is only for as long as he is participating directly in the hostilities that the journalist loses his immunity and becomes a legitimate target. Once that participation has ended, he recovers his right to protection against the effects of the hostilities. The authorities capturing a journalist while he is committing acts of hostility or subsequently may take measures of repression or security against him, in application of Article 45 ("Protection of persons who have taken part in hostilities") of Protocol I or of the provisions of the Fourth Geneva Convention (internment, assigned residence, etc.). In addition, since journalists are not members of the armed forces, they may charge him with perfidy under Article 37 (1) (c) of Protocol I.

The protection of media equipment as civilian objects

Items of radio and television equipment are civilian objects and, as such, benefit from general protection. The prohibition of attacks on civilian objects was firmly established in international humanitarian law in the early 20th century and reaffirmed in the 1977 Protocols and in the Rome Statute of the International Criminal Court.[27]

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24 "CNN crew's bodyguard fires back with automatic weapon when crew comes under fire", press release of 13 April 2003, at <http://www.rsf.org/article.php3?id_article=6078>.

25 See Jean Mirimanoff-Chilikine, "Protection de la population and des personnes civiles contre les dangers résultant des opérations militaires", *Revue belge de droit international*, Vol. VII, 1971-1972, pp. 634 and 639.

26 Commentary on the Draft Additional Protocol to the Geneva Conventions of 12 August 1949, cited in *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977)* (hereinafter *Official Records*), Vol. XIV, p. 14, para. 8, ICRC, CDDH/III/SR.2. For an analysis of the notion of "direct participation" in hostilities, see *International humanitarian law and the challenges of contemporary armed conflicts*, report prepared by the ICRC for the 28th International Conference of the Red Cross and Red Crescent, Geneva, December 2003, Annex 1, pp. 27-30.

27 See: Arts 23 (g), 25 and 27 of the 1907 Hague Regulations; Arts 1 and 5 of the 1907 Hague Convention (IX) concerning Bombardment by Naval Forces in Time of War; GC IV, Arts 33 (2, 3 and 5) and 147; the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict and its two Protocols; P I, Arts 48, 52-54, 56, 85 (3c-d and 4d); P II, Arts 11, 14, 15 and 16; Art. 3 (7) of the Protocol on Prohibitions or Restrictions of the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996 (Protocol II to the 1980 Convention on Certain Conventional Weapons); Art. 8 (2) of the Rome Statute of the International Criminal Court, 17 July 1998, UN document A/CONF.183/9; Art. 20 (a) (iv) and (e) (ii) of the International Law Commission's Draft Code of Crimes Against the Peace and Security of

In particular, the dual obligation stipulated in Article 48 of Protocol I – to distinguish at all times between civilian objects and military objectives and accordingly to direct operations only against the latter – entails that civilian objects, like the civilian population, benefit from general protection, the terms of which are set down in Article 52.[28] Although Article 85 of Protocol I provides that attacks on the civilian population or civilians shall be considered war crimes, there is no similar provision on civilian objects in general. It is a war crime, however, to attack certain objects granted special protection, such as works or installations containing dangerous forces, undefended localities, demilitarized zones, historic monuments, works of art and places of worship. Protocol II contains no such general protection for civilian objects; only some objects, of special importance for civilians, are granted specific protection, namely medical units and means of transport, objects that are indispensable to the survival of the civilian population and cultural property.

- Definition of a civilian object

As is the case for "civilians," Protocol I defines "civilian objects" by default: anything that is not a military objective is considered a civilian object (Art. 52 (1)). Paragraph 3 of Article 52 goes so far as to give three examples of civilian objects, namely a place of worship, a house and a school. In the same way, when the ICTY Trial Chamber handed down its first convictions for illegal attacks, in the *Blaskic* case, it defined a civilian object as "any property that could not be legitimately considered a military objective."[29] This method of defining things by the negative at least has the advantage of avoiding overlap and covering all objects. Media equipment and facilities that are not used for military purposes and that do not meet the conditions set out in Article 52 (2) (see below) fall into the category of civilian objects, which " […] shall not be the object of attack or reprisals […] (Art. 52 (1)).

- Presumption of civilian use in case of doubt

In the light of Article 52 (3) of Protocol I, objects generally recognized as being civilian in nature, such as television and radio broadcasting facilities, benefit from a "presumption of civilian use" in case of doubt, even if they are situated in contact zones.[30] Obviously, the presumption can be set aside, but again, the armed forces must act in accordance with the measures of precaution set down in Article 57 ("Precautions in attack") of Protocol I and take into account the general aim of the Protocol, which is to protect the civilian population and civilian objects.

The presumption of civilian use, like that applying to civilians under Article 50 (1), was a new rule in 1977 and not the codification of a customary norm; [31] if it were to be genuinely respected, it would make a significant contribution to the protection of objects and persons.

Mankind, UN document A/51/10.

28 At the request of the representative of France, Article 52 of Protocol I was put to the vote. It was adopted by 79 votes to none, with 7 abstentions; *Official Records*, Vol. VI, p. 168, para. 149, ICRC, CDDH/SR.41.

29 ICTY, *The Prosecutor v. Tihomir Blaskic* (IT-95-14), Judgment of 3 March 2000 (hereinafter *Blaskic* case), para. 180.

30 Sandoz, Swinarski and Zimmerman (eds.), *op. cit.* (note 9), paras. 2031-2034.

31 The United States State Department clearly stated, in its report to Congress on the conduct of hostilities during the 1991 Gulf War, that it considered paragraph 3 of Article 52 to be a treaty-based rule alone, and not the codification of a customary practice of States; see "Report to Congress on the Conduct of the Persian Gulf War, Appendix O: The Role of the Law of War", United States Department of Defense, 10 April 1992, published in *International Legal Materials*, Vol. 31, May 1992, p. 627.

- The customary nature of the rule prohibiting attacks on civilian objects

Most legal scholars confirm that the general protection afforded civilian objects under Article 52 of Protocol I corresponds to a customary rule of international humanitarian law.[32] According to the Commentary on the Protocol, "[…]States in general recognized that attacks should only be directed against military objectives […]."[33] What is more, numerous elements of international practice confirm that the prohibition of attacks on civilian objects is a customary rule of international humanitarian law applicable both in international and internal armed conflicts.[34]

- Cessation of protection for civilian objects

The above-mentioned instruments of international humanitarian law make it clear that the immunity of protected civilians and objects is not absolute and indeed ceases if those objects are used for hostile purposes. Civilian objects (ships, aircraft, vehicles, buildings) holding military personnel, equipment or supplies or making, in any way whatsoever, an effective contribution to the war effort that is incompatible with their status are legitimate targets. This is confirmed by elements of international practice and by *opinio juris*, in particular as relates to loss of the immunity conferred on certain protected objects.[35] Thus, in the case of the RTS, if the RTS installations were indeed being used as radio transmitters and relays for the armed and special police forces of the Federal Republic of Yugoslavia, the ICTY committee of review was justified in concluding that they constituted legitimate military targets for NATO.[36]

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[32] For example, Philippe Bretton, "Remarques sur le *jus in bello* dans la guerre du Golfe (1991)", *Annuaire français de droit international*, Vol. 37, 1991, p. 151; Henri Meyrowitz, "La guerre du Golfe and le droit des conflits armés", *Revue générale de droit international public*, Vol. 96, 1992, p. 574; Waldemar A. Solf, "Protection of civilians against the effects of hostilities under customary international law and under Protocol I", *American University Journal of International Law and Policy*, Vol. 1, 1986, pp. 129-130.

[33] Sandoz, Swinarski and Zimmerman (eds.), *op. cit.* (note 9), para. 2000.

[34] For a detailed list of the relevant elements of international practice, see the author's doctoral dissertation: Alexandre Balguy-Gallois, *Droit international et protection de l'individu dans les situations de troubles intérieurs and de tensions internes*, thesis, Université Paris I Panthéon-Sorbonne, Paris, 2003, pp. 610-622.

[35] See, *inter alia:* Institute of International Law, "La distinction entre les objectifs militaires and non militaires en général and notamment les problèmes que pose l'existence des armes de destruction massive", para. 4, *Annuaire de l'Institut de droit international*, Vol. 53, Tome II, 1969, p. 360; Secretary-General's Bulletin, *Observance by United Nations forces of international humanitarian law*, 6 August 1999, para. 9.3, UN document ST/SGB/1999/13. Concerning the United States, see "Report to Congress on the Conduct of the Persian Gulf War", *op. cit.* (note 31), pp. 622 and 626; United States Department of the Army, Headquarters, *Field Manual, FM 27-10, The Law of Land and Warfare*, 18 July 1956, Change No. 1, 15 July 1976, para. 45 a) (hereinafter *US Army Field Manual*). Concerning the United Kingdom, see the declaration relative to Article 53 ("Protection of cultural property and places of worship") made by the United Kingdom on signing Protocol I and reiterated by it in 1998 on ratification: United Kingdom War Office, WO Code No. 12333, The Law of War on Land", being Part III of the *Manual of Military Law*, 1958, paras. 300-303 (hereinafter *UK Manual of Military Law*). With regard to France, see the reservations and declarations made by France when it acceded to Protocol I on 11 April 2001, para. 13, and Article 9 bis of Decree No. 75-675, *Règlement de discipline générale dans les armées*, 28 July 1975, *Journal officiel, Lois and décrets (J.O.)*, 30 July 1975, pp. 7732-7738, amended by Decree No. 82-598 of 12 July 1982, *J.O.*, 13 July 1982, pp. 2229-2231. State reservations and declarations concerning the Geneva Conventions and their Additional Protocols can be consulted on the ICRC web site: <http://www.icrc.org/ihl.nsf/WebNORM?OpenView&Start=1&Count=150&Expand=52.1#52.1>.

[36] ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 8 June 2000, paras. 55, 75 and 76, at: <http://www.un.org/icty/pressreal/nato061300.htm> (hereinafter Final Report NATO Bombing). On 23 April 1999, at 2.20 a.m., NATO planes deliberately bombed the headquarters and studios of Serbian State radio-television (Radio Televisija Srbije, or RTS), in the heart of Belgrade; of the civilians working in the

Can the media be military objectives?

International humanitarian law requires that attacks be strictly limited to "military objectives."[37] Although the political doctrine of "limited war" has now replaced that of "total war," sharply reducing the categories of "military objectives," there are still countless objects likely to be considered as such. According to the ICRC,[38] legal scholars[39] and the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict,[40] this includes, in certain circumstances, radio and television facilities.

- Definition of "military objective"

For such facilities to be lawful targets, they must be "military objectives" as defined in Article 52 (2) of Protocol I:

– they must, by their nature, location, purpose or use make an effective contribution to military action (constant factor);
– their total or partial destruction, capture or neutralization, in the circumstances ruling at the time, must offer a definite military advantage (variable factor).

The two factors established by Article 52 (2) are cumulative. If they obtain, the objective is a military one within the meaning of Protocol I. An attack on a target that does not meet these two conditions is unlawful.[41]

The first part of the definition comprises a list of decisive factors – nature, location, purpose or use – which, were it not for the second criterion, would give military commanders great leeway in deciding whether an objective was military or not. The requirement of "an effective contribution to military action" dictates that the civilian or military nature of an object depends on the effect it has or does not have on the conduct of hostilities.

The second part of the definition limits military objectives to objects whose destruction offers, in the circumstances ruling at the time, a "definite military advantage." In other words, attacks that offer only indeterminate or possible advantages are unlawful.[42] The rule that there must be a definite military advantage implies that it is unlawful to destroy any objects that serve no military purpose whatsoever.[43] It constitutes, from both the theoretical

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building at the time of the attack (technicians and other production staff), at least 16 died and another 16 were wounded. On the basis of the information available, the committee established by the ICTY Prosecutor to review the NATO bombing campaign against the Federal Republic of Yugoslavia recommended, in its final report of 8 June 2000, that the Office of the Prosecutor open no investigation into the RTS bombing (see, for example, Reporters Without Borders, Serbia Broadcasting: Chronicle of Martyrdom Foretold, Report, November 2000, 28 p.).

37 P I, Art. 52 (2).

38 *Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War*, ICRC, Geneva, 1956, List of Categories of Military Objectives according to Article 7, para. 2, see p. 72, point I. 7); the Draft Rules can be consulted at: <http://www.icrc.org/ihl.nsf/0/8001130e7d3fbfbcc125641e004ad313?OpenDocument>.

39 For example, Anthony P.V. Rogers, *Law on the Battlefield*, Manchester University Press, Manchester, 1996, p. 37.

40 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, Art. 8 (1) (a).

41 As concluded in ICTY, *Final Report NATO Bombing*, para. 55.

42 Sandoz, Swinarski and Zimmerman (eds.), *op. cit.* (note 9), para. 2024; compare with W. Hays Parks, "Air war and the law of war", *Air Force Law Review*, Vol. 32, No. 1, 1990, pp. 141-145.

43 On this point, see: Éric David, *Principes de droit des conflits armés*, Bruylant, Brussels, 2002, p. 270;

and the practical points of view, the simultaneous application of the principle of military necessity and that of superfluous injury and unnecessary suffering.[44] The expression "in the circumstances ruling at the time" is intended to ensure that military commanders do not have recourse to pre-established and abstract categorizations of military objectives ("a railway junction is a military objective," "a television station is a military objective," etc.). Instead, they must determine whether the railway junction or television station in question, whose destruction offered a definite military advantage some time previously, still offers, at the time of the attack, the same advantage; if not, it is no longer an attackable military objective.[45]

For most legal scholars, the definition of military objective given in Article 52 of Protocol I is drawn from customary law.[46] In June 2000, the committee reviewing NATO bombing in the former Yugoslavia reached the same conclusion.[47] Significantly, in 1976 the United States, which has yet to ratify Protocol I, officially endorsed the content of Article 52 (2), in anticipation of the fact, when it incorporated into its *Army Field Manual* an amendment that is a faithful reproduction of the text of the paragraph in question.[48]

- Dual use – civilian and military – of media equipment and facilities

Our highly technological societies often make dual use – civilian and military – of objects and resources, a habit that is not without consequence in terms of protection. Civilian objects (roads, schools, the railway network, etc.) temporarily used for military purposes or employed to both civilian and military ends are legitimate targets.[49] Thus, on 27 March 2003, the Information Ministry in Baghdad was bombed twice by the Coalition forces, even though it was known to house international media offices as well. On 8 April 2003, after an American tank shelled the Hotel Palestine, the gathering spot for the foreign press in Baghdad, a spokesman for the US Defense Department postulated that the hotel had been a military objective for the 48 hours that it had been a meeting place for Iraqi officials.[50] During NATO's air campaign in Yugoslavia, representatives of the organization justified the RTS bombing on the grounds that the facilities were being used for two purposes: not only were they being employed for civilian purposes, they were part of the C3 network (the Serbian

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Henri Meyrowitz, "Les juristes devant l'arme nucléaire", *Revue générale de droit international public*, Vol. 68, 1963, p. 844.

44 Henri Meyrowitz, "The principle of superfluous injury or unnecessary suffering: From the Declaration of St. Petersburg of 1868 to Additional Protocol I of 1977", *International Review of the Red Cross*, No. 299, March-April 1994, p. 113.

45 *Ibid.*, p. 112; Frits Kalshoven, "Reaffirmation and Development of Humanitarian International Law Applicable in Armed Conflicts: the Diplomatic Conference, Geneva, 1974-1977", *Netherlands Yearbook of International*, Vol. 9, 1978, p. 111.

46 For example, ICRC, International humanitarian law and the challenges of contemporary armed conflicts, op. cit. (note 26), p. 14; Judith Gail Gardam, Non-combatant immunity as a norm of international humanitarian law, Martinus Nijhoff Publishers, Dordrecht, 1993, p. 155; William J. Fenrick, "Targeting and proportionality during the NATO bombing campaign against Yugoslavia", European Journal of International Law, Vol. 12, 2001, p. 494.

47 ICTY, Final Report NATO Bombing, para. 42.

48 US Army Field Manual, para. 40 (c).

49 On this point, see: Sandoz, Swinarski and Zimmerman, *op. cit.* (note 9), para. 2196; *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, annex to the Letter dated 24 May 1994 from the Secretary-General to the President of the Security Council, UN document S/1994/674, 27 May 1994, para. 206; "Report to Congress on the Conduct of the Persian Gulf War", *op. cit.* (note 31), p. 623; *US Army Field Manual*, paras 401, 403, 404 and in particular 410.

50 See Reporters Without Borders, *Two Murders and a Lie*, inquiry by Jean-Paul Mari, January 2004, p. 14, at <http://www.rsf.org>.

army Command, Control and Communications network).[51] In its final report, the ICTY committee of review considered that if the RTS facilities were indeed also being used as an armed forces transmitter, they constituted a military objective.[52] That conclusion would appear to be in keeping with the spirit and the letter of Protocol I: it is lawful to attack a dual-purpose object when the criteria set down in Article 52 (2) of Protocol I have been met. By the same token, if the premises of the Arab television station Al-Jazeera in Kabul also held – as alleged by an American spokesperson to justify the bombing of 12 November 2002 – offices belonging to the Taliban and Al-Qaeda elements, then they were a legitimate target.[53] In any event, the parties to the conflict must meet a higher requirement of precaution when the objective has two uses.

- Does use of the media for propaganda purposes make them a military objective?

During the Iraq conflict in 2003, the British media were verbally attacked by ministers and members of parliament accusing them of playing the Iraqi propaganda game.[54] Four years earlier, certain NATO representatives[55] had publicly justified the bombing of RTS in Belgrade on the grounds that NATO wanted to neutralize a propaganda tool.[56] While there is no doubt that the RTS was being used for that purpose, a reasoned interpretation of Article 52 of Protocol I precludes propaganda as the sole justification for a military attack against the media.

On this point, the ICTY committee adopted a firm and clear position: the media are not "a legitimate target" merely because they spread propaganda, even though that activity constitutes support for the war effort,[57] and the morale of the population as such is not a "legitimate military objective."[58] The British Defence Doctrine, issued in 1996,[59] and the report submitted by Volker Kröning to the NATO Parliamentary Assembly in November

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51 The relevant statements by NATO representatives are reported in: ICTY, *Final Report NATO Bombing*, paras. 72, 73 and 75; *Kosovo/Operation Allied Force After-Action Report*, US Department of Defense, report submitted to Congress on 31 January 2000, p. 83, available at <http://www.defenselink.mil/pubs/kaar02072000.pdf>; *NATO/Federal Republic of Yugoslavia. "Collateral Damage" or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force*, Amnesty International, London, June 2000, p. 39, available at: <http://www.amnesty.org/ailib/intcam/kosovo/docs/nato_all.pdf>.

52 ICTY, *Final Report NATO Bombing*, paras 55, 75 and 76.

53 On the events in Afghanistan, see Reporters Without Borders, *Annual Report 2002, at:* <http://www.rsf.org/rubrique.php3?id_rubrique=144> .

54 "United Kingdom (8 April 2003). Media attacked by ministers and MPS for Iraq war coverage", press release from Reporters Without Borders, available at: <http://www.rsf.org/article.php3?id_article=5903>.

55 The NATO representatives' declarations are cited in: ICTY, *Final Report NATO Bombing*, para. 74; Amnesty International, *op. cit*. (note 51), pp. 39-40; *Civilian Deaths in the NATO Air Campaign*, Human Rights Watch, New York, February 2000, <http://www.hrw.org/reports/2000/nato/index.htm>; Claudio Cordone and Ayner Gidron, "Kosovo et droit de la guerre. L'attaque contre les studios de la télévision serbe", *Le Monde diplomatique*, July 2000, pp. 18-19.

56 *Webster's New World College Dictionary* defines "propaganda" as "any systematic, widespread dissemination or promotion of particular ideas, doctrines, practices, etc. to further one's own cause or to damage an opposing one".

57 ICTY, *Final Report NATO Bombing*, paras 47, 55, 74 and 76. The ICTY committee nevertheless considered that NATO's targeting of the RTS building to inflict damages on its propaganda machine was an incidental (albeit complementary) aim of its primary goal of disabling the C3 network (para. 76).

58 *Ibid*., paras 55 and 76.

59 *British Defence Doctrine* (JWP 0-01), 1996: "*Targeting* […] the morale of an enemy's civilian population is not a legitimate target", cited by Anthony P.V. Rogers, "Zero-casualty warfare, *International Review of the Red Cross*, No. 837, March 2000, p. 177.

1999,[60] assert likewise. This represents a break from the doctrine of "absolute" or "total" war – described for the first time, most lucidly, by Prussian General von Clausewitz in his treatise *On War*[61] – according to which "enemy morale is also a military target," in Winston Churchill's famous words.[62] Recognition of psychological harassment of the population as a legitimate aim of war would remove all remaining constraints on the violence, as witness the Second World War. One can therefore but concur with Amnesty International's declaration that:

> "Amnesty International recognizes that disrupting government propaganda may help to undermine the morale of the population and the armed forces, but believes that justifying an attack on a civilian facility on such grounds stretches the meaning of 'effective contribution to military action' and 'definite military advantage' [Art. 52 (2) of Protocol I] beyond the acceptable bounds of interpretation."[63]

Not all forms of propaganda are authorized, however. Propaganda that incites people to commit grave breaches of international humanitarian law, or acts of genocide or violence, is prohibited, and the media spreading such messages can be made a legitimate target: "Whether the media constitutes a legitimate target group is a debatable issue. If the media is used to incite crimes, as in Rwanda, then it is a legitimate target […]."[64] It is not clearly established to what extent media inciting to genocide, such as *Radio-télévision libre des mille collines* and the paper *Kangura* in Rwanda in 1994,[65] are a legitimate target. Article 52 (2) of Protocol I and the principle that protection is suspended in the case of participation in the hostilities would seem to indicate that they are, an interpretation shared by the ICTY committee: "[i]f the media is used to incite crimes, as in Rwanda, it can become a legitimate military objective."[66] The "hate media" can also be construed as legitimate targets within the framework of the implementation of repression of breaches of the Geneva Conventions (Art. 49/50/129/146 respectively of the four Conventions) and of Protocol I (Art. 85). No need to recall that in Article 1 of the four 1949 Conventions and of Protocol I the States Parties undertake to respect and "ensure respect for" those instruments.

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60 *Kosovo and international humanitarian law*, NATO Parliamentary Committee Assembly Reports, Civilian Affairs Committee, 45th annual session, Volker Kröning (Germany), Special Rapporteur, Amsterdam, November 1999, p. 9, para. 18.

61 Karl von Clausewitz, *On War*, Princeton University Press, Princeton, New Jersey, 1976, pp. 591-592.

62 This concept of total war was totally rejected by the Nuremberg Military Tribunal on the grounds that in "this conception of 'total war', the moral ideas underlying the conventions which seek to make war more humane are no longer regarded as having force or validity"; Trial of the Major War Criminals before the International Military Tribunal, Judgment of 30 September-1 October 1946, at <http://www.yale.edu/lawweb/avalon/imt/proc/judwarcr.htm>.

63 Amnesty International, *op. cit.* (note 51), p. 49.

64 ICTY, *Final Report NATO Bombing*, para. 47, see also paras 55 and 76. For a concurring point of view: Canada, Office of the Judge Advocate General, *Law of Armed Conflict at the Operational and Tactical Level* (B-GJ-005-104/FP-021), 2004, pp. 7-4 ("Psychological Operations") (hereinafter *Canadian Military Handbook*): "2. […] not all forms of propaganda are lawful. Propaganda which would incite illegal acts of warfare, as for example killing civilians, killing or wounding by treachery or the use of poison or poisonous weapons, is prohibited"; see also Human Rights Watch, *op. cit*. (note 55).

65 See the judgment of the International Criminal Tribunal for Rwanda (ICTR) in the "media case", ICTR, *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze* (ICTR-99-52-T), judgment and sentence, 3 December 2003, and ICTR, *Prosecutor v. Georges Ruggiu* (ICTR-97-32-I), decision of 1 June 2000. Neither case discusses the notion of "military objective". See also Alexandre Balguy-Gallois, "Tribunal pénal international pour le Rwanda. Jugement du 3 décembre 2003 (CPI I). *Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze"*, *Revue générale de droit international public*, Chronique de jurisprudence international, Vol. 108/2004/2, pp. 517-524.

66 ICTY, Final Report NATO Bombing, para. 55.

The obligations of precaution in attacks liable to affect journalists and the media

The lawfulness of an attack depends not only on the nature of the target - a military objective - but also on whether or not the attack conforms to the obligation of precaution in attack, in particular the principle of proportionality and the obligation of warning. In this respect, journalists and the media benefit, not from a specific status, but from the general protection conferred by Protocol I on civilians and civilian objects against the effects of the hostilities.

The principle of proportionality: a measure mitigating the immunity of journalists and the media

In June 1999, at least 16 people died and 16 were wounded (electricians, a make-up artist, an editor, guards) when NATO bombed the RTS in Belgrade. The news report being broadcast was interrupted; RTS resumed broadcasting about three hours after the bombing, leading some observers to conclude that the human toll was too high when weighed against the advantage obtained by the attack. This prompts the question of whether the principle of proportionality was violated.

This principle was first explicitly stated in a convention in 1977, in Articles 51 (5) (b) and 57 (2) (a) (iii) of Protocol I.[67] It represents an attempt to limit to a minimum the "collateral damage" caused by military operations. It provides the criterion for determining to what extent collateral damage can be justified under international humanitarian law: a reasonable balance must be struck between the effects of legitimate destruction and undesirable collateral effects. Indeed, it is clear from the above articles that, under the principle of proportionality, the accidental collateral effects ("[…]an attack which may be expected to cause *incidental* […]") (our italics) of the attack, i.e. the incidental harmful effects affecting protected persons and objects, must not be excessive in relation to the military advantage anticipated.

- "Excessive" loss and damages

The adjective "excessive" in the above-mentioned articles is the key word in the definition of proportionality. Those who prepare, decide on and execute an attack must distinguish between what is excessive and what is not. They must assess the attack in terms of its military value and the cost in civilian losses, and if the latter are excessive, decide against the attack. The assessment is made by military commanders and is highly subjective, as it involves comparing apples and oranges, or establishing a relation between two entirely different things: military advantage and the suffering of the civilian population.[68] Obviously, the greater the military advantage, the higher the level of tolerance for civilian loss of life and damages.

- "Anticipated" loss and damages

The principle of proportionality is applied on the basis of how the belligerents perceive and anticipate the effects of their attacks ("[…] an attack which may be expected to cause […]"), and not of actual civilian losses. The test consists, however, in knowing not whether those

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67 It also figures, in identical wording, in Article 3 (3) (c) of Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, to the 1980 Convention on Certain Conventional Weapons, and in Article 3 (8) (c) of the same Protocol as amended on 3 May 1996.

68 On this point, ICTY, *Final Report NATO Bombing*, para. 48.

who prepare or decide on an attack expected it to cause excessive losses and damages, but whether they "should have expected" such disproportionate losses.[69] The ICTY committee suggests that the yardstick should be the determination of a "reasonable military commander."[70] If such a commander should have expected excessive losses, the attacker's responsibility is engaged under Article 85 (3) (b) and (c) of Protocol I and Article 8 (2) (b) (iv) of the Rome Statute. Admittedly, though, by combining the Protocol I requirement that the attack cause excessive losses (Art. 85 (3)) and that the perpetrator knew it would do so (Art. 85 (3) (b) and (c)), the scope of war crimes for violation of the principle of proportionality is considerably reduced.

- The attack considered as a whole

Loss of civilian lives and damages to civilian objects must be weighed against the "direct military advantage anticipated." The declarations of interpretation formulated by the States when they ratified Protocol I suggest that the term "military advantage anticipated" refers to the anticipated advantage of the attack as a whole and not of isolated or specific components of it.[71] The States' declarations thus give precedence to medium over short or long-term considerations: military advantage and proportionality are to be measured in relation to each attack considered in its totality; they are to be measured neither in terms of an isolated phase of the attack when the attack is conducted in a concerted fashion and comprises many elements, nor in terms of the military campaign as a whole.

This is the approach adopted by the ICTY committee in its review of NATO's air campaign in Yugoslavia. Following the bombing of the RTS, the committee evaluated whether the civilian damages (the civilians killed in the RTS building) were in proportion to the direct military advantage anticipated, considering the attack as one phase of the operation to disable the C3 network and not on its own;[72] it found that the collateral damages, while high, were not disproportionate.[73]

The Rome Statute confirms this widely accepted interpretation when it refers to the "concrete and direct overall military advantage anticipated" (Art. 8 (2) (b) (iv)) (our italics). According to the Commentary on Protocol I, the term "concrete and direct" is intended to show "that the advantage concerned should be substantial and relatively close, and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded."[74]

- Customary nature of the principle of proportionality

Most, if not all, legal scholars agree that the principle of proportionality was a customary rule of humanitarian law even before it was codified in Protocol I.[75]

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69 Antonio Cassese, "Means of warfare: the traditional and the new law", in Antonio Cassese (ed.), *The New Humanitarian Law of Armed Conflict*, Editoriale Scientifica s.r.l., Naples, 1979, p. 176; Kalshoven, *op. cit.* (note 45), p. 118.

70 ICTY, Final Report NATO Bombing, para. 50.

71 Reservations and declarations made by France when it ratified Protocol I on 11 April 2001, para. 10. See the corresponding declarations made by Germany (para. 5), Belgium (para. 5), Canada ("Military advantage"), Spain ("Articles 51, 52 and 57"), Italy (para. 6), New Zealand (para. 3), the Netherlands (para. 5) and the United Kingdom (i). No State party to Protocol I formulated an objection to those declarations. Reservations and declarations may be consulted on the ICRC web site: <http://www.icrc.org/ihl.nsf/WebNORM?OpenView&Start=1&Count=150&Expand=52.1#52.1>.

72 ICTY, Final Report NATO Bombing, para. 78.

73 *Ibid*., para. 77.

74 Sandoz, Swinarski and Zimmerman (eds.), *op. cit.* (note 9), para. 2209.

75 For example, Jost Delbrück, "Proportionality ", in Rudolf Bernhardt (ed.), *Encyclopedia of Public*

The case can be made, however, that the formulation of the principle in Protocol I does more than merely codify the existing custom and indeed develops and expands on it.[76] The principle of proportionality is said to have become a customary rule relatively late, undoubtedly after the Second World War and its litany of horrors against the civilian population.[77] The opinion of most legal scholars is corroborated by a number of State declarations and by other, non-State elements (ICRC appeals, UN reports, UN Secretary-General Bulletins, etc.) in respect of both international and non-international armed conflicts.[78] International case-law also acknowledges that the requirement of proportionality in attack corresponds to a principle of customary law.[79]

The report by the ICTY committee refers to the "customary rule of proportionality," to the obligation to avoid excessive long-term damage to the economic infrastructure and the natural environment, and to the prohibition of attacks that would cause collateral damage that is excessive in relation to the military advantage the attack is expected to produce.[80] Before the NATO campaign, the Security Council had expressed grave concern about the use of excessive and indiscriminate force by Serbian security forces and the Yugoslav Army against civilians and peaceful demonstrators in Kosovo, said force having resulted in numerous civilian casualties.[81]

The principle of proportionality provides guidance: it does not lay down a specific rule of conduct but rather indicates the direction to take. This flexibility in humanitarian law is both a strength and a weakness. It is a strength, because a doctrine prohibiting any use of force involving civilian losses would be incompatible with the requirements of military necessity and hence inapplicable. It is a weakness, because the rule is so subjective that it allows the party resorting to force ample leeway for interpretation. At the very least, the principle of proportionality sets a standard by which to measure the most flagrant cases, such as the blanket bombing of insignificant military targets in densely populated areas. In more ambiguous situations, it would be hard to judge what was out of proportion; however, "[i]n

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International Law, Vol. III, Elsevier North-Holland, Amsterdam, 1997, p. 1142; Fenrick, *op. cit.* (note 46), pp. 96 and 125; Judith Gail Gardam, "Necessity and proportionality in *jus ad bellum* and *jus in bello* in the General Assembly Advisory Opinion", in Laurence Boissons de Chazournes and Philippe Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons*, Cambridge University Press, Cambridge, 1999, p. 284; Kalshoven, *op. cit.* (note 45), p. 116; Stephan Oeter, "Methods and means of combat", in Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford, 1999, pp. 178, 180 and 183; Rogers, *op. cit.* (note 59), p. 176.

76 See Hans-Peter Gasser and Theodore Meron, in "Customary Law and Additional Protocol I to the Geneva Conventions for Protection of War Victims: Future Directions in Light of the US Decision Not to Ratify", American Society of International Law, *Proceedings of the 81st Annual Meeting*, Boston, Massachusetts, 8-11 April 1987, pp. 33 and 34.

77 On this point, see Judith Gail Gardam, "Proportionality and force in international law ", *American Journal of International Law*, Vol. 87, 1993, p. 401 and note 59.

78 For a detailed discussion thereof, see Balguy-Gallois, *op. cit.* (note 34), pp. 494-500 and 502-506. Proportionately is not explicitly mentioned in Protocol II, Article 3 common to the Geneva Conventions, or the Rome Statute, although some articles can be said to allude to it indirectly (Art. 15 of Protocol II and Art. 8 (2) (e) (xii) of the Rome Statute).

79 For example, ICTY, *Prosecutor v. Milan Martic* (IT- 95-11-R61), Decision of 8 March 1996, para. 18; ICTY, *Prosecutor v. Zoran Kupreskic et al* (IT-95-16-T), Judgment of 14 January 2000, paras. 524 and 526; ICTY, *Prosecutor v. Dragoljub Kunarac et al* (IT-96-23-T and IT-96-23/1-T), Judgment of 22 February 2001, para. 426.

80 ICTY, Final Report NATO Bombing, paras 18-20.

81 Security Council resolution 1160, 31 March 1998, UN document S/RES/1160 (1998), third preambular paragraph; Security Council resolution 1199, 23 September 1998, UN document S/RES/1199 (1998), sixth preambular paragraph.

such situations the interests of the civilian population should prevail […].”[82]

The obligation of advance warning

Although NATO said that it made “every possible effort to avoid civilian casualties and collateral damage” when it bombed the RTS building,[83] doubts were expressed in that case about whether it had respected the obligation to provide advance warning to the civilian population, as stipulated in Article 57 (2) (c) of Protocol I in these terms: “effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.” In the case of the American bombing, on 8 April 2003, of the offices of Al-Jazeera and Abu Dhabi TV in Baghdad, in which one journalist was killed and another injured, it also appears that the journalists received no warning that an attack was imminent.[84]

The rule of warning existed long before Protocol I was adopted and also figures in certain later instruments.[85] The chief aim is to give non-combatants the chance to seek refuge from the effects of a planned attack and to give the enemy authorities the opportunity to evacuate civilians or to take them to protected places such as shelters. While the goal is a noble one, the rule is weak in terms of general protection of civilians persons and objects, because it is vaguely worded and allows for the limits inherent in military necessity. It is much more narrowly worded in the provisions on the special protection afforded certain categories of civilian persons and objects (civilian hospitals, civilian medical units and civilian civil defence units). If the military authorities observe that specially protected goods or persons commit or are used to commit hostile acts, they can immediately withdraw the immunity from which those people or goods benefit; “[p]rotection may, however, cease only after due warning has been given, naming, in all appropriate cases, a reasonable time limit, and after such warning has remained unheeded.”[86] This “heightened” obligation to provide advance warning does not apply to journalists, who nevertheless benefit, as civilians, from the protection granted by Article 57 (2) (c) of Protocol I.

- Limits and exceptions to the obligation to provide advance warning

In the provisions dealing with the general protection of civilian persons and objects, earlier instruments of the law of war make the duty to provide advance warning an obligation of means, not of outcome, as it requires the officer in command to “[…] do all in his power to warn the authorities” before starting the bombardment.[87] This expression disappeared in the

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82 Sandoz, Swinarski and Zimmerman (eds.), *op. cit.* (note 9), para. 1979.

83 Amnesty International, *op. cit.* (note 51), p. 59.

84 “Reporters Without Borders outraged at bombing of Al-Jazeera office in Baghdad”, available at <http://www.rsf.org/article.php3?id_article=5945>.

85 Art. 19 of the Instruction for the Government of Armies of the United States in the Field, prepared by Francis Lieber and proclaimed by President Lincoln as General Order No. 100 on 24 April 1863 (hereinafter the Lieber Code); Art. 16 of the Project of an International Declaration concerning the Laws and Customs of War, Brussels, 27 August 1874 (hereinafter the Brussels Declaration); Art. 33 of the Laws of War on Land, adopted by the Institute of International Law in Oxford on 9 September 1880 (hereinafter the Oxford Manual); Art. 26 of the 1907 Hague Regulations; Art. 6 of the 1907 Hague Convention (IX) concerning Bombardment by Naval Forces in Time of War; Art. 19 of the Fourth Geneva Convention; Art. 5 (2) of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II to the 1980 Convention on Certain Conventional Weapons); Art. 3 (11) and Art. 6 of Protocol II to the 1980 Convention on Certain Conventional Weapons, as amended on 3 May 1996.

86 GC IV, Art. 19; see also P I, Arts. 13 (1) and 65 (1).

87 Brussels Declaration, Art. 16; the 1907 Hague Regulations, Art. 26; 1907 Hague Convention (IX), Art. 6.

relevant provisions of contemporary treaties such as Protocol I or the 1980 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps or Other Devices.

The duty of the commanding officer to ensure the safety of the combatants placed under his command constitutes a loophole in the rule on advance warning.[88] For instance, NATO representatives declared that no specific advance warning had been given of the bombing of the RTS headquarters and studios on 23 April 1999, so as not to imperil the lives of the pilots.[89] Once again, military necessity has to be balanced against humanitarian requirements, a balance that must be struck first and foremost by military commanders, whose decisions are evaluated *a posteriori* in the light of the determination of a "reasonable military commander."[90]

Two further exceptions to the rule of advance warning are explicitly provided for in certain instruments or codes: the obligation does not apply in the case of an assault ("[…] except in assault […]")[91] or when the element of surprise is a condition of the success of an attack.[92] In the latter case, there is no point in providing a warning because it would counterproductive from the military point of view to do so.[93] However, in the case of the NATO air campaign in Yugoslavia, one would be hard put to invoke "surprise" or the risks to the combatants when the attackers have complete supremacy of the air and are virtually immune to the defensive measures engaged by those being attacked.[94]

Article 57 (2) (c) of Protocol I requires that advance warning be given "[…] unless circumstances do not permit," a concession to the principle of military necessity without which the rule of advance warning would never have been inserted into the Protocol.[95] The fact that a negative formulation ("unless circumstances do not permit") was preferred to a positive one ("whenever circumstances permit," "if the requirements of military necessity so permit" or "if possible") somewhat strengthens the obligation to provide warning. The protection of civilians in general and journalists in particular would be enhanced if a warning were required "unless the circumstances made it impossible to give one." The word "circumstances" refers to those circumstances relating to the success of the military operation and the security of the combatants, which covers the scenarios considered above.

Under the terms of paragraph 2 (c) of Article 57, the rule of warning does not apply when the attack does not affect the civilian population, either because there are no civilians near the military objective (there is no requirement to warn combatants) or because the means of combat used ensure that civilians will be spared (so-called "surgical strikes" whose effects are limited to the military objective).

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88 Certain declarations of interpretation relating to Article 50 (1) of Protocol I, made when the Protocol was ratified, refer to "a commander's duty to protect the safety of troops under his command" (e.g. France, reservations and declarations made on the ratification of Protocol I (11 April 2001), para. 9; United Kingdom, reservations and declarations made on the ratification of the Protocols (28 January 1998), para. h). See also: "Report to Congress on the Conduct of the Persian Gulf War", *op. cit.* (note 31), pp. 622 and 625; *British Defence Doctrine* (JWP 0-01), issued in 1996 by the British Department of Defence.

89 Amnesty International, *op. cit.* (note 51), p. 44.

90 ICTY, Final Report NATO Bombing, para. 50.

91 Brussels Declaration, Art. 16; Oxford Manual, Art. 33; 1907 Hague Regulations, Art. 26.

92 Lieber Code, Art. 19; UK Manual of Military Law, para. 291; Canadian Military Manual, para. 29; US Army Field Manual, para. 43.

93 See Sandoz, Swinarski and Zimmerman (eds), *op. cit.*. (note 9), para. 2223.

94 On this point, see Peter Rowe, "Kosovo 1999: The air campaign. Have the provisions of Protocol I withstood the test?", *International Review of the Red Cross*, No. 837, March 2000, p. 154.

95 At the 1974-1977 Geneva Diplomatic Conference, twenty delegations were in favour of the expression "whenever circumstances permit" and 37 in favour of "unless circumstances do not permit"; eight delegations were in favour of eliminating both expressions.

- The obligation to give "effective" and "advance" warning

Protocol I requires that the warning be "effective" and given in "advance." According to Doswald-Beck, "the possibility of warning and how this could be done must be guided by common sense which will inevitably include the safety of the attacker."[96] The rule set down in Article 57 (2) (c) certainly does not require that the warning be provided to the authorities concerned; a direct warning to the population – leaflets dropped from the air, radio messages, loudspeaker announcements, etc., asking civilians to stay at home or away from certain military objectives – is deemed sufficient to be effective.

In general, the warning is given shortly before the attack, so as not to allow the adversary time to remove the equipment targeted. Sometimes the alert consists of a simple general statement of warning or threat that mentions the possibility of strikes against certain zones or types of facilities, without much detail, so as to keep the advantage of surprise. It is doubtful, however, that a warning given long before the attack takes place or in allusive or contradictory terms meets the requirements of Article 57: it may not be taken seriously by the civilian population. This is why it would be best if the requirement were that the warning be "effective and specific." In the case of the RTS bombing, various people had apparently been alerted: the President of CNN, Western journalists working at RTS headquarters, Yugoslav officials.[97] According to RTS employees and representatives of the Yugoslav government, by the time the attack was launched the authorities had ceased to take the threat seriously, because of the time that had elapsed since the initial warnings.[98] For Amnesty International, there had been no clear and genuine warning,[99] whereas for the ICTY committee the advance warning given by NATO may have been sufficient under the circumstances.[100]

Is the attacker relieved of the duty of precaution in respect of civilians because the warning has been given, even when the population has paid no heed? Were this to be the case, it would be contrary to the letter and the spirit of the Geneva Conventions and Protocol I.

Both Lieutenant-Colonel Carnaham[101] and Michael J. Matheson,[102] respectively a member of the American Joint Chiefs of Staff and Deputy Legal Adviser to the American Defense Department, stated, in 1987, that in their opinion the requirement of warning was a customary rule. These expressions of *opinio juris* are backed by relatively consistent State practice in international and internal armed conflicts.[103]

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96 Louise Doswald-Beck, "The value of the 1977 Geneva Protocols for the protection of civilians", in Michael A. Meyer (ed.), *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention*, The Chameleon Press Ltd, London, 1989, p. 170, note 72.

97 Amnesty International, *op. cit*. (note 51), pp. 43-44; Natalie Nougayrede, "Des victimes du bombardement de la Télévision serbe par l'OTAN se retournent contre Slobodan Milosevic", *Le Monde*, 2 November 1999.

98 Human Rights Watch, *op. cit.* (note 55).

99 Amnesty International, *op. cit.* (note 51), p. 44.

100 ICTY, Final Report NATO Bombing, para. 77.

101 Lieutenant-Colonel Burrus M. Carnaham, in "Customary Law and Additional Protocol I to the Geneva Conventions for the Protection of War Victims: Future Directions in Light of the US Decision not to Ratify", American Society of International Law, *Proceedings of the 81st Annual Meeting*, Boston, Massachusetts, 8-11 April 1987, p. 37.

102 Michael J. Matheson, in "The Sixth Annual American Red Cross – Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions", *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 427.

103 The duty of warning was implemented notably during the Spanish Civil War (1936-1939), the Second World War, the Iraq-Iran conflict (1980-1989), the Falklands War (1982), the Israeli operation "Peace in Galilee" (1982), the Gulf War (1991) and the civil war in Rwanda (1993). For further details, see Balguy-Gallois, *op. cit*. (note 34), pp. 449-452.

It also appears that the rule of warning applies to United Nations and other multinational forces. The United States, under whose authority the Unified Command was placed during the Korean War (1950-1953), stated that it warned civilians every day, by means of radio broadcasts and leaflets dropped from the air, to keep away from military objectives that were to be bombarded.[104] By the same token, the rules of engagement of the United Nations Mission in Haiti (UNMIH, 1993-1995) comprised an instruction that "if possible, warnings should be provided prior to the use of force," and Doctors Without Borders has reported that United Nations Operation in Somalia II forces (UNOSOM II, 1993-1995) warned NGOs and sometimes the civilian population before attacking inhabited localities.[105]

Means that are commensurate with the goal

In a message sent to Amnesty International on 17 May, NATO asserted, on the subject of the RTS, that it had made "every possible effort to avoid civilian casualties and collateral damage […],"[106] in accordance with the provisions of Article 57 ("Precautions in attack") of Protocol I. Beyond the specific cases of the RTS in Yugoslavia, Al-Jazeera in Afghanistan and Baghdad and Palestinian radio and television in Ramallah,[107] there is the more general issue of whether the bombing of radio and television facilities is the most adequate means of attaining the goal sought. According to Article 52 (2) of Protocol I, the destruction of a military objective is not the only possible solution; it may suffice to control or neutralize it. This is a sound move first from the military point of view, as it allows the attacker to spare or concentrate its means (the destruction of a military objective implies the destruction of *matériel* and munitions). Above all, however, it makes sense from the humanitarian point of view, as it enables the attacker to "[minimize] incidental loss of civilian life" (Art. 57 (2) (a) (ii) of Protocol I).

For all these reasons, is it not preferable, whenever possible, to opt for something other than bombardment? In the case of *Radio-télévision libre des mille collines* (RTLM) and Radio Rwanda, which incited the population to commit acts of genocide after 6 April 1994, the proposals made by human rights groups and humanitarian organizations that steps be taken to stop or jam the broadcasts were not favourably met because, it was said, of the technical and legal difficulties.[108] However, according to Human Rights Watch and the International Federation for Human Rights (FIDH), the broadcasts of both stations could have been interrupted without a military operation on the ground.[109] The Report of the Belgian Senate's parliamentary commission of inquiry regarding the events in Rwanda (1997) concurs.[110] The report also refers to the jamming, in Somalia, of radio broadcasts inciting people to attack United Nations personnel.[111]

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104 Note dated 2 September 1950 to the President of the Security Council by the Permanent Representative of the United States of America to the United Nations, enclosing, in accordance with the resolution adopted by the Security Council on 7 July 1950 (S/1588), the third report of the United Nations Command in Korea, UN document S/1756, official records, supplement of September-December 1950, p. 18.

105 Communications and declarations by Doctors Without Borders, 1993 (archives).

106 Amnesty International, *op. cit.* (note 51), p. 39.

107 On 12 December 2001, Palestinian radio and television in Ramallah were bombed by the Israeli armed forces (on the subject of these events, see the 2002 Annual Report of Reporters Without Borders at: <http://www.rsf.org/article.php3?id_article=1486)>.

108 CTR, *Prosecutor v. Georges Ruggiu* (IT-97-32-I), Amended indictment of 10 December 1998, para. 1.25.

109 *Aucun témoin ne doit survivre. Le génocide au Rwanda*, Human Rights Watch and International Federation for Human Rights, Ed. Karthala, Paris, 1999, pp. 33-34.

110 According to Lieutenant-General Romeo Dallaire, commander of the United Nations peace-keeping force in Kigali, countless lives could have been saved in Rwanda if he had had the right jamming equipment (see ICTR, *Prosecutor v. Georges Ruggiu*, *op. cit.* (note 108).

111 Para. 3.11.4.2 ("Military actions") of the report.

Conclusions

As demonstrated above, journalists and media equipment benefit from immunity, the former as civilians, the latter by virtue of the general protection humanitarian law grants civilian objects. That immunity is not total, however. Journalists are protected unless they participate directly in the hostilities for as long as they participate. The media, even if they are used for propaganda purposes, are immune from attack unless they are used for military purposes or to incite people to commit grave breaches of international humanitarian law, acts of genocide or acts of violence. However, even when those conditions are met, the media cannot be attacked unless all precautions practically possible have been taken to prevent, and in any case to limit, civilian casualties and damage to civilian objects. In particular, those who prepare or decide on an attack must ensure that they abide by the principle of proportionality – the incidental collateral effects must not be excessive in relation to the military advantage anticipated – and must give effective advance warning, unless the circumstances do not permit. In the light of recent events in Iraq and elsewhere, the idea of adopting a new instrument is starting to gain ground. The aim of the instrument would be first to reaffirm the international humanitarian law applicable to journalists and the news media in time of armed conflict. The instrument would give renewed authority to certain fundamental rules and counteract contrary practices by solemnly reaffirming the binding nature of those rules. It would also serve to review and develop existing law in the light of present requirements. For example, it could stipulate that the parties to a conflict are obliged to establish the facts when an attack causes losses and damages to journalists and media equipment and installations,[112] in particular by exchanging views with the persons concerned and by rapidly providing them with complete information and the relevant available facts. It would also provide an opportunity to strengthen the obligation of warning set out in Article 57 of Protocol I. The law would also benefit from the clarification of certain points: the concept of "direct participation in the hostilities," the status of embedded journalists who have been captured, the protection of the "propaganda" media and its limits, the equal rights and protection to which all journalists are entitled, no matter what their professional status or nationality and whether or not they are part of a military accompaniment system, etc. Lastly, at issue is not just the reaffirmation and development of the law applicable to journalists and the news media in time of armed conflict, but also, again, the crucial problem of implementation and repression. In this respect, it would be useful if any future instrument contained a forceful reminder of the parties' obligation, under Article 49/50/129/146 respectively of the Geneva Conventions and Article 85 of Protocol I, to repress grave breaches of the above rules against journalists and the civilian objects they use in the course of their work. The new instrument could take the form of an agreement between States or of a unilateral act on the part of an international organization (United Nations General Assembly resolution, code of conduct adopted by the relevant NATO bodies, etc.).

[112] The attitude of States sometimes obliges associations to conduct their own inquiries into the facts relating to events of which journalists are victims; see, for instance, on the subject of the American armed forces shelling of the Hotel Palestine in Baghdad on 8 April 2003, Reporters Without Borders, *Two murders and a lie*, *op. cit.* (note 50).