



**Organization for Security and Co-operation in Europe
The Representative on Freedom of the Media
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Position Paper

On attacks against journalists as war crimes during armed conflict

The Representative's previous [communiqué](#) has called for the protection of journalists and other media professionals during armed conflict in line with State obligations under international law, as repeatedly reaffirmed by authoritative international bodies, including the UN Security Council and the UN Human Rights Council, as well as in accordance with the OSCE [commitments on media freedom](#). The [safety of journalists](#) remains a long-term continuous priority of the Representative's work, as an indispensable pre-condition for enabling media to perform their important role in a democratic society. It is essential in that regard to note that individuals who engage in violence against journalists must be held accountable in order to ensure the safety of journalists and other media workers and allow them to continue working in the public interest without fear. Combating impunity is particularly important in times of armed conflict.

This paper will explain the protection that journalists are due in armed conflict under international humanitarian law (IHL, or the law of armed conflict), as well as under the relevant rules of international human rights law and international criminal law. Deliberate attacks against journalists during an armed conflict constitute war crimes for which individuals are criminally responsible, and for which they may be held accountable before an international tribunal or before domestic courts. It is particularly important to note that domestic courts applying the principle of universal jurisdiction may substantially contribute to combating impunity. Under the universal jurisdiction principle, States may prosecute individuals suspected of committing international crimes even without any direct link between the relevant State and the crime. The exercise of universal jurisdiction is essential and necessary in situations in which such crimes are committed systematically or on a large scale, when the sheer magnitude of the crimes committed means that the State on whose territory they occurred cannot reasonably be expected to successfully investigate and prosecute all such offences. Applying the universal jurisdiction principle may provide the only hope for justice in such situations.

The protection of journalists and other media workers under IHL is complementary to State obligations under international human rights law, which requires States to respect and protect, inter

alia, the right to life, liberty of person, privacy and freedom of expression of all such individuals within their jurisdiction. The continuing protection of human rights law during armed conflict is especially important for those individuals who would not otherwise benefit from the protection of IHL. For instance, this can be the case due to the nationality of the individual concerned: under Article 4 of the Fourth Geneva Convention (on the protection of civilians in time of war), that Convention applies only to individuals in the hands of a belligerent State if they are not nationals of that State¹.

The protection of journalists from attack

Journalists and other media workers qualify as civilians under IHL. Attacks must never be directed against them by the armed forces of the belligerent parties. As with other civilians, journalists and other media workers might be affected by attacks incidentally, in the pursuance of a lawful military objective, subject to the principles of proportionality and precaution. Again, journalists and other media workers can never lawfully be attacked as such, provided that they do not directly participate in hostilities.

Like other civilians, journalists and other media workers can lose their protection from attack if they directly participate in hostilities, for such time as they do so. Media activity generally cannot amount to direct participation in hostilities, even if it involves collecting information contrary to the interests of one of the parties to the conflict, and even if it is biased in favour of the other belligerent party. It is only in genuinely exceptional circumstances, in which a journalist or other media worker clandestinely gathers battlefield intelligence with the intention of communicating it to one of the belligerent parties in a way that would provide it with a military advantage, for example for targeting purposes, that such an individual could become a direct participant in the hostilities and lose protection from attack while such participation lasts.

It bears noting that this truly would be an exceptional scenario. While there have been numerous situations in which journalists have been deliberately targeted in an armed conflict, or killed incidentally, there are currently no reliable reports of a media worker being targeted and the belligerent party concerned being able to furnish evidence that the targeted media worker directly participated in hostilities and that this justified the use of lethal force against them. Any assessment of whether a journalist (or any other civilian) is a direct participant in hostilities has to be individualized and based on objective criteria regarding the individual's behaviour; it cannot be made on assumptions, such as the journalist's presence in any particular area or their possession of recording or broadcasting equipment. In cases of doubt about a person's status, IHL provides that such a person shall be considered to be a civilian, not a combatant.

¹ Thus, for example, in the context of Russia's aggression against Ukraine, an individual, who has Ukrainian nationality, and finds him/herself in Ukrainian custody, could not benefit from the protections of the Fourth Geneva Convention (on the protection of civilians in time of war), and the same would apply to a Russian national in Russian custody.

It is relevant to note here that regardless of the question under what circumstances the crimes of dissemination of hate speech, incitement to violence or, most importantly, propaganda for war could be viewed as direct participation in hostilities (and hence lead to the loss of civilian protection under IHL), it is clear that media workers can be held legally accountable for committing such crimes. It follows from Article 20 of the International Covenant on Civil and Political Rights that any propaganda for war, or any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, shall be prohibited by law.

The protection of media facilities and infrastructure from attack

The facilities from which journalists and other media workers operate, such as radio or TV stations, newspaper offices or even hotels, are generally all civilian objects. Attacks must not be directed against them. Under IHL, all objects are civilian unless they meet the definition of a military objective, confined solely to ‘those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.’ Media facilities and infrastructure generally do not meet these criteria. Even if, for example, a media outlet engages in reporting biased towards one of the parties of an armed conflict, such activity does not count as an ‘effective contribution to *military* action’ and the destruction of such an object would not offer a ‘definite *military* advantage,’ as these concepts are understood in IHL. Destroying a TV station, for example, could not be justified simply on the basis that it engages in reporting that one of the parties to the conflict dislikes, or on the basis that destroying it would undermine the adversary’s morale.

Media facilities could lose their protection from attack exceptionally, for such time as they would meet the definition of a military objective, for example, if a media outlet is in reality operating as a cover for intelligence gathering in support of one of the belligerent parties. But such situations will, again, be very rare. It will, however, be more common for media *infrastructure* to lose protection from attack, because it is simultaneously being used, or could be used, both for civilian and military purposes. This could, for instance, be the case with a broadcasting tower, which can easily be used for both civilian and military communications. That said, IHL provides that in cases of doubt whether an object which is normally dedicated to civilian purposes is being used to make an effective contribution to military action, it shall be presumed not to be so used. Any attacks against objects that are claimed to be dual-use must comply with rules on precautions in attack, including the duty to do everything feasible to verify that targets are military objectives, the duty to give effective advance warnings before an attack, and the overarching obligation to take all feasible measures so as to avoid, and in any event to minimise, incidental loss of civilian life, injury to civilians and damage to civilian objects.

Deprivation of liberty and guarantees of humane treatment

Journalists and other media workers deprived of their liberty are protected both by IHL and by international human rights law. They must be provided guarantees against arbitrariness and be treated humanely at all times.

In international armed conflicts, a particular subset of journalists – war correspondents – are provided with specific protection and prisoner of war status under the Geneva Conventions. Under the Conventions, a war correspondent is a journalist accredited as such by one of the belligerent States, authorized to accompany its armed forces (IHL does not use the term ‘embedded’ journalists), and provided with an identity card to prove this status.

But such accreditation is not necessary for journalists to do their work during armed conflict; indeed, the vast majority of journalists and other media workers will not qualify as war correspondents. As explained above, journalists are generally civilians, and need to be treated as such. The prisoner of war status granted to war correspondents does not add much to the general level of protection enjoyed by all journalists as civilians under IHL and human rights law. In particular, journalists must not be deprived of their liberty arbitrarily and must not be mistreated in any way. This is a rule of IHL in both international and non-international armed conflicts.

War crimes

Serious violations of the rules set out above amount to war crimes, for which culpable individuals can be held criminally responsible. Such responsibility exists in addition to any State responsibility for the acts of such individuals. In particular, war crimes include the following acts:

- (1) Intentionally directing attacks against civilians, including journalists and other media workers, who are not taking direct part in hostilities;
- (2) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives, including media facilities and infrastructure;
- (3) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians, including journalists and other media workers, or damage to civilian objects, including media facilities and infrastructure, which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
- (4) Killing, torturing, or subjecting to inhuman treatment any civilian in captivity, including any journalist or media worker, or depriving them of the right to a fair trial.

These war crimes generally include mental elements of knowledge and intent. In the absence of such elements, it is possible for some attacks against journalists or media facilities to violate IHL without constituting war crimes, for example, if insufficient precautions are taken to verify the identity of a target (e.g. military or civilian) or to minimize the loss of civilian life. But even in cases in which a journalist was targeted because he or she was misidentified as a combatant, the State may still incur its own legal responsibility. In other words, while the State agent, e.g. an individual who attacked a journalist or a media worker, might not have committed a war crime,

the State itself can still be responsible for violating IHL, for instance, because insufficient precautions were taken, or for violating international human rights law. In such cases the State concerned will be obliged to provide full reparation for the injury caused, pursuant to the universally accepted principles of the law of State responsibility.

International and universal criminal jurisdiction

War crimes against journalists can be prosecuted before both international and domestic courts. War crimes in general are within the jurisdiction of the International Criminal Court (ICC), and can be within the jurisdiction of any special tribunal established by the UN Security Council or in some other lawful manner. The jurisdiction of the ICC in particular is based on the place of the commission of the crime and the nationality of the offender. Thus, the Court can try any individual accused of committing a war crime against journalists if the crime was committed on the territory of a State party to the ICC Statute, or on the territory of a non-party that accepted the Court's jurisdiction (as is currently the case with Ukraine), or if the offender is a national of a State party.

The domestic courts of any belligerent States can and should try any such war crimes cases. But so can the courts of all other States on the basis of the principle of universal jurisdiction. This principle entails that States may exercise jurisdiction over individuals suspected of committing certain crimes against international law, even in the absence of any link to the offence, such as territoriality or the nationality of the offender or the victim. In international armed conflicts, the war crimes mentioned above constitute grave breaches of the Geneva Conventions and Additional Protocol I. Under the express terms of these treaties, all States not only have the right, but also the duty, to prosecute such offences. In non-international armed conflicts, States might not have an obligation, but they certainly have the right, to engage in such prosecutions.

In order to facilitate the prosecution of cases under the principle of universal jurisdiction, it is recommended that States:

- (1) Review their own substantive and procedural criminal laws to ensure that they permit the exercise of universal jurisdiction in all cases in which international law requires or allows States to investigate and prosecute such offences, including war crimes against journalists and other media workers.
- (2) Ensure that their investigative, prosecutorial and judicial organs are adequately resourced, staffed and trained for this purpose.
- (3) Ensure that such organs cooperate with other States that may be investigating related offences and may be in possession of relevant evidence.

Conclusion

Guaranteeing the safety of journalists, whether in peacetime or during an armed conflict, is a principled commitment of all OSCE participating States. The Representative has therefore repeatedly called upon all participating States to safeguard media workers in our region. States must also abide by their human rights commitments, and so enable journalists and other media workers to effectively perform their vital functions in a democratic society. In particular, restrictions on journalists' freedom of expression or freedom of movement can only be lawful if they comply with the requirements of legality, legitimacy, necessity and proportionality.

In wartime, the rules of IHL protecting journalists are crystal clear. Journalists and other media workers are normally considered as civilians, even if they engage in work that a party to the armed conflict dislikes. Attacks must not be directed against them, unless and for such time as they directly participate in hostilities. As explained above, it is highly unlikely that media workers can be qualified as direct participants in hostilities. The same applies for the protection of media facilities and infrastructure, which can only be attacked if they meet the criteria for a military objective under IHL, which again will generally not be the case. In cases of doubt, media workers shall be presumed not to have lost their protections as civilians.

It is essential that States discipline and properly train their armed forces to ensure that they are aware of, and abide by, the protections that journalists are entitled to. States must also prosecute for war crimes any individuals regarding whom there are reasonable grounds to believe that they have committed such crimes against journalists or other media workers. In doing so, States should ensure that their investigative, prosecutorial and judicial authorities have the requisite resources and training in order to perform this task.

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