

**Seminar and Inter-regional Dialogue on the protection of journalists
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The protection of journalists in international criminal law

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Protection of journalists under the Rome Statute

International criminal law extends the same protections to journalists as it does to civilians generally.

Journalists are civilian non-combatants and belligerent forces must treat them as such.

Targeting them, depending on the context, may constitute a war crime or a crime against humanity.

I have in mind the horrific events that have recently occurred in Syria.

I also bear in mind the tragic deaths of two Central African journalists and a French journalist in Central African Republic this year and the deaths of two French journalists in Mali last year, all in situation countries where the International Criminal Court is engaged.

Such individual murders may constitute the war crimes of wilful killing or violence to life, depending on whether the armed conflict is of an international or non-international character.

The murder of journalists may also constitute crimes against humanity, if they are committed as part of a widespread or systematic attack directed against a civilian population, pursuant to a State or organisational policy, by persons having knowledge of the attack.

Crimes against humanity targeting journalists may take other forms too: imprisonment or other severe deprivation of liberty, torture, persecution, enforced disappearance, or other inhumane acts – journalists have been the victims of such atrocities in the past and are so even today.

Returning to the law of armed conflict: under customary international law, as well as the Rome Statute, journalists are entitled to all the protections afforded to civilians – as long as they do not participate directly in hostilities and so lose their protected status.

This has been the case for many years: I would refer you to Articles 51 and 57 of Additional Protocol I to the Geneva Conventions and Geneva Convention IV, dating from 1977 and 1949, respectively.

Article 79 of Additional Protocol I specifically provides for measures of protection for journalists.

The protection of journalists, as civilians, from attacks applies in the context of both international armed conflicts and non-international armed conflicts.

In addition, Article 4 (A) (4) of Geneva Convention III confers a further level of protection to a limited category or class of journalists, namely, “war correspondents” accredited to armed forces.

This category covers such persons who accompany armed forces without actually being members of them as long as they have authorisation to do so, such official accreditation by the armed forces usually being proved by an identity card.

In addition to being entitled to all the rights granted to civilians, in case of capture, such persons are also entitled to prisoner of war status and treatment, that is, to the protections afforded by Geneva Convention III.

So-called “embedded journalists” will often fall within this special category of persons provided for under Geneva Convention III, since such journalists embedded in military units typically have the necessary authorisation and are under the protection of those military units which they accompany during operations in an armed conflict.

As a practice, this became more common during the 2003 war in Iraq.

Accordingly, under international humanitarian law, a distinction is drawn to some extent between journalists operating independently and war correspondents, a category that may include embedded journalists.

Such a distinction stems from the notion that, given the different nature of their work, which involves a close relationship with the armed forces and access to the frontlines of combat, war correspondents are generally more exposed to risks and threats of harm.

In reality, however, this may not always be the case: the daring nature of journalism today means that journalists who are not attached to armed forces or accompanying military units are also often at grave risk.

I note that the Geneva Convention provisions regarding prisoner-of-war status and treatment in case of capture or detention do not apply in situations of *non-international* armed conflict, because POW status only applies in the case of international armed conflict.

In situations of non-international armed conflict, the law treats all journalists in the same way, exclusively as civilians, and they have the same protections as do civilians.

If media facilities become legitimate military targets – for example, as centres of command and control – then the principle of proportionality comes into play to alleviate against unduly high injury to civilians.

I might also note, in passing, that journalists can themselves become the subjects of prosecution, if they incite genocide or other crimes, as happened in the so-called Media Case at the International Criminal Tribunal for Rwanda, or ICTR, which arose out of media hate speech and incitement to genocide in Rwanda leading up to and during the genocide of 1994.

My focus, however, is what provision international criminal law makes for the protection of journalists and correspondents doing their work of reporting.

In sum, there is protection for journalists in international criminal law generally, and under the Rome Statute particularly – but they are generally not treated as a special category beyond their obvious character as civilian non-combatants or as members of a civilian population under attack.

Protection really comes down to effective enforcement of international criminal law: can the perpetrators of crimes be successfully investigated and

prosecuted, either before national courts or, where national authorities are either unable or unwilling to act, before the International Criminal Court?

In the ICC Office of the Prosecutor we are striving to achieve positive results by improving the quality of our preliminary examinations, investigations and prosecutions.

This involves the intelligent application of limited resources and the development of a multi-faceted approach to investigations, so that we bring sound cases before the Chambers of the Court.

As you know, the ICC is a court of last resort, since national authorities have primary responsibility under the Rome Statute to investigate and prosecute international crimes.

Where national authorities fail to act, either because they lack the capacity to do so or because they are unwilling to assume their responsibilities, then the ICC may step in.

When the Prosecutor does act, however, she depends upon State cooperation in order to conduct her investigations.

This is how the Rome Statute is set up: we have to operate, generally speaking, through State legal mechanisms with the support of State authorities.

Generally speaking, we receive good cooperation and support from States, but this is not always the case and lack of cooperation can present us with serious challenges.

Another serious challenge we face is matching the resources we have available to the expectations victims, communities affected by mass atrocities and the international community have of us.

Journalists play an increasingly important role in the work of the ICC, from providing evidence, to explaining our work, to scrutinizing our performance.

Role of journalists in conflict zones

Journalists are the eyes and ears of the world in conflict zones: certainly for the general public, but also for government policy makers.

Reporting on mass atrocities raises awareness about the suffering of the individuals and communities affected by them.

It rouses the international community to action.

It even generates through publicity some measure of accountability for mass crimes.

In recognizing that war correspondents serve an important public interest, the ICTY Appeals Chamber observed:

In war zones, accurate information is often difficult to obtain and may be difficult to distribute or disseminate as well. The transmission of that information is essential to keeping the international public informed about matters of life and death. It may also be vital to assisting those who would prevent or punish the crimes under international humanitarian law... [See *Brdjanin*, Decision on Interlocutory Appeal, IT-99-36-AR73.9, 11 December 2002, para. 36.]

Journalists are often the first on the scene, almost in the role of “first responders”, although in most cases to observe and report rather than to become directly involved in events.

In this role, however, they record what is happening, meet witnesses, interview both victims and perpetrators, connect with affected communities, and expose atrocities and those responsible to the scrutiny of the world community.

In this way, although they may not set out to gather evidence, in the sense that investigators might do, they come into possession of evidence and information of value to later criminal investigations.

Indeed, I believe many journalists feel a responsibility to “bear witness” to events – not necessarily in the sense of becoming an eyewitness called to testify in court, but in the larger sense of reporting on events so that they cannot go unnoticed and unremembered, and with the sense that, if the public is made aware of what is happening, then it will rouse authorities within the international community to take action.

Journalists who are sensitively attuned to situations on the ground can become a sort of early warning system for the ICC – take, for example, the concern expressed by journalists that Central African Republic was on the brink of genocide.

Journalists play many other roles in relation to the ICC, of course, which I need not explore in detail here: they report on proceedings before the Court and so become interpreters of the Court's work; they sometimes offer trenchant criticisms of the Court; they also, in some situations, unfortunately, lend themselves to ill-motivated propaganda against the Court and spread misinformation – it runs the gamut.

However, my focus is upon what I might call the forensic relationship of journalists with the ICC and the question of protection for journalists under international criminal law.

The active role that journalists play in conflict zones puts them in harm's way, and may make them the target of reprisals.

This has to be a matter of concern for us all.

The protections that the Rome Statute extends to civilians in conflict zones thus become important for the security of journalists.

ICC experience with past investigations involving journalists

The ICC has had direct experience with journalists in several of its investigations.

Without getting into detail, I can say that journalists have been interviewed as eyewitnesses to events and for the photo and video records they have made.

A picture is worth a thousand words.

This was certainly the case in my experience prosecuting at the ICTR, where journalists provided invaluable testimony and a visual record of events in Rwanda in 1994 going to establish both the context and the crime base.

On occasion, journalists caught a suspect on camera and evidence of contemporaneous statements by individuals who were later accused of genocide and other crimes was highly incriminating.

As discerning eyewitnesses to events, journalists have a similar role in relation to ICC investigations.

Where journalists are targeted, violence directed against them is, of course, criminal and may form part of the broader evidence going to prove the commission of a war crime or a crime against humanity.

It may also be evidence of the intent of the perpetrators to cover up their actions, and thus be evidence of their intent to commit war crimes or crimes against humanity.

The reports journalists file may also support the crime pattern analysis that we do as part of our preliminary examination of situations and of our subsequent investigations.

Crime pattern analysis helps establish essential contextual elements of the crimes we prosecute, for example, the existence of a widespread or systematic attack against a civilian population, which is necessary to the proof of crimes against humanity.

Video and photographic material is of obvious value to us, whether broadcast to the public or unedited and unused.

Journalists can also offer practical assistance: they may provide our investigators with leads, they may offer advice on conditions based on their knowledge of the country, and so on.

In some cases, of course, we may seek to have journalists testify in court.

On occasion, we have encountered resistance from corporate media organisations to providing material to us from archives.

The concern that is behind such resistance, if I am correct in my understanding, is one I encountered in the domestic criminal law context: in that case, resistance from a national news agency to provide to the police footage of a riot on the basis that the warrant to produce infringed freedom of the press,

but essentially on the ground that their journalists and cameramen risked becoming targets when covering such events if rioters feared the images they recorded could be used to identify perpetrators and prove crimes.

In the domestic situation to which I refer the courts ruled in favour of law enforcement; we have not got so far.

If my experience with the use of journalists as witnesses at ICTR is anything to go by, the testimony of journalists, certainly to prove context and crime base, but perhaps more – some suspects love to hear the sound of their own voices! – will become a feature of the presentation of evidence in our prosecutions.

Will this increase the risk to journalists?

I expect not – but the risk is, unfortunately, already high enough.

IBA's *eyeWitness* project

We are aware of the IBA's *eyewitness* project, involving development of an app that can be installed on a smart phone and used to record events as they happen and upload them to the Internet.

We encourage the use of such technology, the only issue for us being authentication of the source and images of forensic interest to us.

Cyber investigations

This brings me now to what one might call the “democratisation” of reporting in the digital age, when all sorts of eyewitnesses to events record them and upload the images on to the Internet.

We see evidence of this every night on the television news, especially from combat zones such as those in Syria and Iraq right now.

Digital journalism – what we might call “open source” material – is of significant value for us.

Firms like Storyful have perfected methods of verifying the authenticity of video material appearing on the Internet and we have learned from them how to capture and authenticate such evidence ourselves.

Indeed, the collection, authentication, analysis, dissemination and use of such evidence fits within a larger cyber investigation project that we are successfully completing within the OTP and which now equips us to handle electronic or digital information and evidence in a highly competent and sophisticated way.

In addition, we have engaged with NGOs specialising in the analysis of information on the Internet to identify patterns of violence or crisis in the world and who are willing to assist us.

All of this is part of the effort we are making to diversify and strengthen our evidence collection and presentation in any given case.

It only serves to underscore, once again, the importance of the relationship between journalism and the ICC.

“Synergies” with UNHCHR

The Prosecutor has enjoyed a productive relationship with the High Commissioner for Human Rights and this will continue with the new incumbent, himself a former President of the ASP of the ICC, who is intimately familiar with the Court and is a strong proponent of international criminal justice.

However, the ICC and the UNHCHR have different missions and different methods of working.

UNHCHR commissions of inquiry operate differently than ICC investigations.

Investigations by the Prosecutor focus upon the questions of who did what to whom, when, where, why and by what means, with a view to determining whether there is evidence to establish that Rome Statute crimes have been committed and the identity of those most responsible for them.

This is a purely forensic mission.

We do our own investigations.

UNHCHR may have information that could help us develop leads and we communicate with them on that level.

Our relationship with UNHCHR is an important one, as is our relationship with a number of UN organisations.

Better protection for journalists?

The Rome Statute provides protection for journalists in their status as civilians and non-combatants.

Whether specific provision should be made for the protection of journalists under the Rome Statute is a debate I will leave to others.

Certainly, with adequate resources, increasing skill and experience, and the cooperation of States and others, we can make effective use of the existing provisions of the law to protect journalists.

The ICC's jurisdiction will be attracted in situations where war crimes and crimes against humanity, even genocide, are being committed.

In such cases, involving mass atrocities, the fate of journalists is for us a matter of vital concern, not only because of the special role journalists perform in upholding fundamental values of free societies, but because their victimisation fits within the broader context of violence that must be the occasion for the ICC's intervention to investigate and prosecute.

JKS