

**Killing Journalists is Not Media Regulation:  
Private Rights, Collective Wrongs and the Impact of Impunity**

**ABSTRACT**

This article, somewhat against the trend in that growing body of scholarship in this area, argues that there is a role for a new international instrument targeting the harassment of and violence against journalists. It supports this position by a review of UN and regional human rights jurisprudence, with an emphasis on hitherto undiscussed weaknesses, as well as by an analysis of loopholes in international humanitarian law. It concludes with suggestions for a new instrument, providing better safeguards for both journalists and societal interests in the media, and highlights how such an instrument would tackle the problems in the existing framework.

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## 1. INTRODUCTION

Despite the international community's condemnation of intimidation campaigns and attacks against media workers, as well as of States' failure to investigate them, such incidents continue to occur.<sup>1</sup> Undoubtedly, 'the murder, kidnapping, torture or disappearance of journalists is the most radical, violent and effective form of censorship'.<sup>2</sup> Although individual journalists are the primary target of such attacks, silencing journalists additionally affects society at large. These attacks undermine the operation of democracy, which depends on the watchdog function of the media and on the free flow of ideas and information. Yet, despite the apparent ineffectiveness of current international norms protecting media workers in this regard, it has been suggested that: '[s]ignificant changes in the substantive legal provisions of international law related to the protection of journalists are not necessary; the challenge lies rather with the implementation of the existing normative framework'.<sup>3</sup> We are unable to join

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<sup>1</sup> According to 2015 UNESCO statistics, 'In the past decade 700 journalists have been killed for reporting the news and bringing information to the public: on average one death every week. In nine out of ten cases the killers go unpunished.' See <http://www.unesco.org/new/en/int-day-impunity-against-journalists> [accessed 6 April 2016]. The evidence shows that this phenomenon is not limited to war-torn or 'rogue' states but indeed includes the European Union; see <https://ipi.media/international-groups-unite-to-demand-justice-in-malta-killing/>.

<sup>2</sup> Special Rapporteur for Freedom of Expression, Inter-American Commission on Human Rights (IACmHR), *A Hemispheric Agenda for the Defense of Freedom of Expression* (2009), OEA/Ser.L/V/II, CIDH/RELE/INF.4/09, p 17.

<sup>3</sup> C Heyns and S Srinivasan, 'Protecting the Right to Life of Journalists: The Need for a Higher Level of Engagement' (2013) 35 *Human Rights Quarterly* 304, 330-31. See also I Düsterhöft, 'The

this trend of scholarship and instead argue that there is a need for targeted legal guarantees for media workers which take into account the specificities of their position both as regards their function in society (including the rights of members of society) and the risk to which they are exposed.

Our argument is as follows. First, we review the jurisprudence on freedom of expression. Our analysis is based on the recognition that freedom of expression has a distinctive societal dimension, that the media have a unique role in informing public opinion and, consequently, that the media are specifically at risk. We contend that there are three strands of weakness in the relevant jurisprudence of international human rights bodies, whether at regional (European, Inter-American, African) or UN level,<sup>4</sup> that have not been discussed in the relevant literature but which undermine the protection provided by the general human rights guarantees. First, the approach to protecting the media's freedom of expression does not, and perhaps cannot, adequately reflect the societal dimension that underpins the importance of the media. This under-explored aspect of freedom of expression is, we argue, deficient in this context. Secondly, physical harm suffered by media workers tends to be viewed solely as a matter of the right to life and personal security, rather than linking the attack to the exercise of the media worker's profession and thus to freedom of expression. Thirdly, there is insufficient recognition of the problems caused by the impunity

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Protection of Journalists in Armed Conflicts: How they can be better protected' (2013) 29 *Merkourios-Utrecht J. Int'l & Eur. L.* 4. Cf. F Foster, 'The Price of News from the Front Line: Rethinking the Protection of Media Personnel under International Humanitarian Law' (2015) 20 *Journal of Conflict and Security Law* 451.

<sup>4</sup> It is outside the scope of this work to inquire into the socio-cultural roots of the different international courts' conclusions. Rather, we focus on the outputs of these bodies as a matter of positive law.

of those who perpetrate such attacks for public discourse. The next element of our argument concerns the rules relating to armed conflict. While humanitarian law recognises media workers as civilians, it also fails to acknowledge their distinctive role and specific exposure to risk. Therefore, and finally, we suggest that the adoption of a new international instrument for the protection of journalists, including the establishment of a non-judicial enforcement mechanism, would be likely better to protect both media workers and societal interests in the media.

## **2. THE SOCIETAL ROLE OF MEDIA FREEDOM AND THE PUBLIC'S RIGHT TO RECEIVE**

While civil and political rights are individual entitlements, freedom of expression also plays a crucial role in the functioning of society as a whole.<sup>5</sup> The European Court of Human Rights (ECtHR), for example, recognised the double role of freedom of expression when describing it as 'one of the basic conditions for the progress of democratic societies and for the development of each individual'.<sup>6</sup> Similar positions have been taken in other regional fora.<sup>7</sup>

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<sup>5</sup> For theoretical arguments justifying free speech see e.g. J Milton, *Areopagitica* in *Areopagitica and other Prose Works of John Milton* (London, J M Dent, 1927); J Stuart Mill, 'Of the Liberty of Thought and Discussion' in *On Liberty* (1860), Harvard Classics Volume 25 (P.F. Collier & Son, 1909); B Williams, *In the Beginning Was the Deed* (Princeton, Princeton University Press, 2005); T Scanlon, 'A Theory of Freedom of Expression' in R Dworkin (ed), *The Philosophy of Law* (Oxford, Oxford University Press, 1977).

<sup>6</sup> *Handyside v United Kingdom*, App no 5493/72, 7 December 1976, para 49.

<sup>7</sup> Inter-American Court of Human Rights (IACtHR), *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, 13

Freedom of expression facilitates the spread and consideration of political, scientific, cultural and social ideas through the process of public discussion. It also supports transparency and accountability, essential preconditions for democracy. It is on the journalists' ability to inform the public, and the public's right to be informed, rather than journalists' self-fulfilment through the exercise of free speech that this article focusses.

While the boundaries of the 'media' may be unclear, especially with the development of new media,<sup>8</sup> media freedom has distinctive features as a particular form of free speech, which are relevant to understanding the rights of the audience and the interests of society. In the practice of international (quasi)-judicial bodies there is substantial support for the principle that, by exposing the actions of office-holders to a mass audience, bringing important matters to the attention of the citizenry, and conveying public support or dissent, the media play a prominent role in the development of democratic societies. Drawing on its previous jurisprudence,<sup>9</sup> the Human Rights Committee (HRC) characterised a free press as 'essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights' and 'one of the cornerstones of a democratic society'.<sup>10</sup> The ECtHR

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November 1985, para 70; African Commission on Human and Peoples' Rights (ACmHPR), *Media Rights Agenda and Others v Nigeria*, Comm 105/93, 31 October 1998, para 52.

<sup>8</sup> For a discussion on the difficulties surrounding the formulation of a definition of the media for the purposes of international free speech guarantees see section 7 'The Need for Another Way?' below (pages 45-63) and literature cited therein.

<sup>9</sup> *Gauthier v Canada*, Comm no 633/95, 7 April 1999; *Marques de Morais v Angola*, Comm no 1128/2002, 29 March 2005; *Mavlonov et al v Uzbekistan*, Comm no 1334/2004, 19 March 2009.

<sup>10</sup> General Comment No 34: *Article 19 (Freedoms of opinion and expression)* (2011), para 13. See also *The Declaration of Principles on Freedom of Expression in Africa* (ACmHPR, 32nd Session, Banjul, 2002) recognising the 'fundamental importance of freedom of expression [...] as a

similarly highlighted that a free press ‘affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders’,<sup>11</sup> and that it is ‘incumbent on it to impart information and ideas on political questions and on other matters of public interest’.<sup>12</sup> The human rights bodies cast the media in the role of ‘public watchdog’,<sup>13</sup> not only with reference to public abuses,<sup>14</sup> but also to private actions of legitimate public concern.<sup>15</sup> In sum, the ECtHR sees the media as being – in relation to a wide range of topics – under a duty to inform, a duty of which society in general should be the beneficiary. The other regional human rights bodies have taken similar stances.<sup>16</sup> Given that the cases in

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cornerstone of democracy’, and the ACmHPR decisions in *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria* (Comm 140/94; 141/94; 145/95, 6 November 2000) para 36, re-affirmed in *Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe* (Comm 284/03), para 92.

<sup>11</sup> *Lingens v Austria*, App no 9815/82, 8 July 1986, para 42.

<sup>12</sup> *Castells v Spain*, App no 11798/85, 23 April 1992, para 43. See also *Sunday Times v UK*, App no 6538/74, 26 April 1979; *Jersild v Denmark*, App no 15890/89, 23 September 1994 on the role of free speech for the democratic debate.

<sup>13</sup> *Goodwin v UK*, App no 17488/90, 27 March 1996, para 39. The expression was borrowed by the Inter-American system; see *Claude Reyes et al v Chile*, IACtHR Series C no 151, 19 September 2006; *Ricardo Canese v Paraguay*, IACtHR Series C No. 111, 31 August 2004.

<sup>14</sup> See, e.g., with reference to the justice system, *Prager and Oberschlick v Austria*, App no 15974/90, 26 April 1995, para 34.

<sup>15</sup> See *Goodwin v UK* (n 13); *Bergens Tidende v Norway*, App no 26132/95, 02 May 2000.

<sup>16</sup> e.g., the ACmHPR described a free press as ‘a valuable check on potential excesses by government’ (*Article 19 v Eritrea*, Comm 275/2003, 30 May 2007, para 106); according to the IACtHR (Advisory Opinion OC-5/85 (n 7) ‘freedom of expression is a cornerstone upon which the

which the ECtHR refers to this ‘duty’ have been cited in other international fora, such a duty may be recognised generally. Moreover, despite differences in wording between the various international provisions on freedom of expression,<sup>17</sup> human rights bodies support the view that a democratic society presupposes tolerance of diverse, even provocative, views.<sup>18</sup> This interpretation limits the extent to which governments can seek to justify repressive actions against commentators; politicians especially must ‘display a greater degree of tolerance’.<sup>19</sup> Behind these statements as to the importance of the media as critical friend, however, lies a risk that those in power may seek to restrain journalistic speech, with knock-on consequences for the audience. While the right to receive or the audience’s rights have been recognised in academic literature as well as in case law, they have not attracted the attention of speakers’

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very existence of a democratic society rests’ (para 70) and ‘[a] system that controls the right of expression ... can be the source of great abuse’ (para 77).

<sup>17</sup> Articles 19(2) ICCPR, 10(1) ECHR, 13(1) IACHR, 9 ACHR.

<sup>18</sup> *Handyside* (n 6) para 49; *Lingens* (n 11), para 41; *Castells* (n 12) para 42; *Ivcher Bronstein v Peru*, Series C No. 74 [2001] IACHR 4 (6 February 2001); *Kenneth Good/ Botswana*, Comm 313/05, 26 May 2010.

<sup>19</sup> *Jersild v Denmark* (n 12), para 31; *De Haes and Gijssels v Belgium* 24 February 1997, Reports of Judgments and Decisions 1997-I, pp. 233-34, para 37; *Bladet Tromso and Stensaas v Norway*, App no 21980/93, 20 May 1999, para 59; *Lingens* (n 11) para 42. As regards the Inter-American Court of Human Rights (IACtHR), see *Ivcher Bronstein* (n 18) paras 152-53 (deprivation of citizenship of television company owner criticising the authorities, where nationality was a precondition for the ownership of broadcasting companies); the IACtHR expressly recalls the Strasbourg jurisprudence on this point. More generally on the practice of inter-system borrowing see E A Bertoni, ‘The Inter-American Court of Human Rights and the European Court of Human Rights: a dialogue on freedom of expression standards’ (2009) 3 *EHRLR* 332, 348-352

rights, and in particular the difficulties of making them effective have not been examined. In this, the article addresses a gap in the literature.

### **3. UNDER-RECOGNITION OF THE COLLECTIVE DIMENSION OF FREEDOM OF EXPRESSION**

Undisputedly, freedom of expression is a compound right; it encompasses speakers' right to disseminate information and opinions as well as the audiences' right to receive information and opinions from whoever wishes to exercise the right to disseminate them. According to Article 19 ICCPR, freedom of expression includes the right 'to *seek, receive* and impart information and ideas' (emphasis added); analogous formulations can be found in the regional instruments.<sup>20</sup> The HRC has recognised that the 'public also has a corresponding right to receive media output',<sup>21</sup> an interconnectedness also stressed by regional courts. The ECtHR 'has consistently recognised that the public has a right to receive information of general interest';<sup>22</sup> subject to restrictions meeting Article 10(2) ECHR criteria, that right 'prohibits a Government from preventing a person from receiving information that others wished or were willing to impart'.<sup>23</sup> In cases concerning the seizure and ban of publications, the Inter-American Commission on Human Rights (IACmHR) noted that 'prior censorship ... violate[s] the two-fold aspects of the right to receive and impart information'<sup>24</sup> and 'society

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<sup>20</sup> See Articles 9(1) ACHR, 10(1) ECHR, 13(1) IACHR.

<sup>21</sup> General Comment No 34 (n 10) para 13. See also *Mavlonov et al v Uzbekistan* (n 9).

<sup>22</sup> *Kalda v Estonia*, App no 17429/10, 19 January 2016, para 41.

<sup>23</sup> *ibid*, para 42. See also *Leander v Sweden*, App no 9248/81, 26 March 1987, para 74; *Open Door and Dublin Well Woman v Ireland*, App nos 14234/88; 14235/88, 29 October 1992, para 55.

<sup>24</sup> IACmHR, *Steve Clark v Grenada*, Report no 2/96, Case 10.325, 1 March 1996.

was deprived of its right to access to information and opinion'.<sup>25</sup> The IACtHR, in *Compulsory Membership in an Association*, found that 'when an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to "receive" information and ideas'.<sup>26</sup> Thus, a wrong suffered by an individual may also have a collective dimension. The African approach is similar: in *Article 19 v Eritrea* the ACmHPR stated that the imprisonment of journalists 'deprives not only the journalists of their right to freely express and disseminate their opinions, but also the public, of the right to information'.<sup>27</sup> The ACmHPR took a similar approach in *Jawara*, in relation to the politically motivated harassment and intimidation of journalists.<sup>28</sup> For the ACmHPR these two aspects are indivisible.<sup>29</sup>

While all systems recognise the dual aspect of the right, the precise nature of the audience's right needs consideration. There are three points of concern.

First, does an emphasis on the rights of the audience turn freedom of expression into a group right? While international law has now accepted some instances of group rights,<sup>30</sup> they

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<sup>25</sup> IACmHR, *Alejandra Marcela Matus Acuña et al v Chile*, Report no 90/05, Case 12.142, 24 October 2005.

<sup>26</sup> IACtHR, Advisory Opinion OC-5/85 (n 7) para 30.

<sup>27</sup> *Article 19 v Eritrea* (n 16) para 105.

<sup>28</sup> *Dawda Jawara v The Gambia*, Comm 147/95 and 149/96, 11 May 2000, para 65. See also *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt*, Comm 323/06, 12 December 2011, para 152 (sexual violence against female demonstrators as a means of silencing them from expressing their political views).

<sup>29</sup> *Scanlen & Holderness v Zimbabwe*, Comm 297/05, 3 April 2009, paras 55 and 108.

<sup>30</sup> See e.g. the right of all peoples to self-determination (art 1 ICCPR); the rights of ethnic, religious or linguistic minorities (art 27 ICCPR); Vienna Declaration of the World Conference on

have been a somewhat contentious addition to human rights as legally actionable claims.<sup>31</sup> Certainly, the characteristics of group rights have been the subject of debate, though it is clear that the starting point is the subject (who holds the right) rather than the object (what the right relates to). For a group right to exist, the group must be somehow distinctive to differentiate it from the larger group of humanity to whom individual rights accrue. So, '[n]ot every plurality of persons qualifies as a group for the purpose of group rights. Rather, to be able to be holder of a right, a plurality of persons must have a certain organizational structure.'<sup>32</sup> Indeed, the group should identify itself as such,<sup>33</sup> for example indigenous peoples or minorities. Nonetheless, some have suggested that the object of the right is also relevant. While individual rights may exist to some collective goods, others 'are not simply reducible to individual interests'.<sup>34</sup> It is possible, however, for identical but separate rights to public goods to be held by many individuals. Applying these considerations in the context of freedom of expression and the media, we might suggest that the discursive space created by the media's contribution is some form of collective good. While such a space arguably can be enjoyed

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Human Rights A/CONF.157/23, 12 July 1993; Banjul Charter, right to equal enjoyment of cultural heritage: art 22(1); UN Declaration on the Rights of Indigenous Peoples (2007).

<sup>31</sup> See e.g. J Nordenfelt, 'Human Rights – What They Are and What They Are Not' (1987) 56 *Nordic Journal of International Law* 3; M Freeman 'Are There Collective Human Rights?' (1995) 43 *Pol. Stud.* 25.

<sup>32</sup> N Wenzel, 'Group Rights' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford, Oxford University Press, 2012).

<sup>33</sup> D Miller, 'Group rights, human rights and citizenship' (2002) 10 *European Journal of Philosophy* 178-195, 178; K Cronin, 'Defining Group Rights' (2004) 69 *Irish Theological Quarterly* 99, 100.

<sup>34</sup> K Cronin (n 33) 101-102.

only in the context of the group, the real difficulty is the identification of ‘the group’ by contrast to everyone else. Arguments based on ‘society’, using the terminology of Opinion OC-5/85, imply a population-wide group, not a distinctive sub-group. Seen individually, however, everybody can enjoy a right to the output of media organisations, even multiple organisations with different viewpoints. In this analysis, the position of the media remains distinctive because an attack on their rights is also an attack on the respective individual rights of multiple individuals who are the audience.

Second, even given the rhetorical references to the right of the audience to receive in international case law,<sup>35</sup> this rarely translates into a justiciable claim, at least not in relation to media content generally (as opposed to specific information of direct relevance to the claimant). *Khurshid Mustafa v Sweden*,<sup>36</sup> which appears to recognise such a right, is exceptional. It concerned a migrant whose sole means of access to audiovisual content from his home country was cut off. This case remains isolated and the ECtHR’s reasoning was perhaps driven by concerns about minorities’ rights rather than a generalised right to media content. There has been little enthusiasm for accepting an enforceable autonomous right of the audience, possibly because of apprehension about class actions. The ECtHR, for example, ruled in *Akdeniz v Turkey* that the claimant was not a ‘victim’ for the purposes of bringing an action under Article 10 ECHR when access to certain websites was blocked thereby rendering him unable to receive the material hosted on them.<sup>37</sup> His need, by contrast to the position in *Khurshid Mustafa*, was not sufficiently distinctive. Instead of assessing whether there was an interference with his access to content and whether it was ‘necessary in a

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<sup>35</sup> See e.g. *Castells* (n 12) para 43; *Canese* (n 13) para 88. See also *Mukong v Cameroon*, Comm no 458/91, 21 July 1994 on the importance of multi-party advocacy.

<sup>36</sup> *Khurshid Mustafa v Sweden*, App no 23883/06, 16 December 2008.

<sup>37</sup> *Akdeniz v Turkey*, App no 20877/10, 11 March 2014.

democratic society’, the Court dismissed the complaint for lack of *locus standi*. This approach, however, overlooks the collective aspect, ie the rights of the intended beneficiaries of the media’s information-gathering and dissemination activities that lie at the heart of the media’s ascribed value.<sup>38</sup> While the HRC links the media with participation in democracy, insofar as an individual is seen as having a justiciable claim this is characterised as the exercise of a vote, lying outside freedom of expression.<sup>39</sup> The Inter-American and African bodies go further in expressly recognising the collective nature of communication protected by freedom of expression. According to the IACtHR, freedom of expression also implies ‘a collective right to receive any information whatsoever and to have access to the thoughts expressed by others’.<sup>40</sup> This correlation between the right to impart, and the right to receive, suggests that media activities should be protected not just as interests of journalists but also as interests of their potential audience. Yet, despite the IACtHR’s strong statement of principle, even here this has not been resulted in a successful action brought by a would-be recipient.

Third, insofar as we can see a recipient’s right in the jurisprudence generally, it concerns the right to request specific information. Thus, a self-standing right of access to certain publicly held information was recognised under Article 13 IACHR (e.g. information

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<sup>38</sup> *Bladet Tromsø* (n 19), paras 59 and 62; *Axel Springer AG v Germany*, App no 39957/08, 7 February 2012, para 79.

<sup>39</sup> General Comment No 25: *Article 25 (Participation in Public Affairs and the Right to Vote)*, *The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service* (1996), para 25.

<sup>40</sup> Advisory Opinion OC-5/85 (n 7) para 30.

concerning governmental projects having an environmental impact).<sup>41</sup> The existence of a right of access to information has been acknowledged by the HRC on a number of occasions.<sup>42</sup> The Johannesburg Principles also recognise the right to ‘obtain information from public authorities’.<sup>43</sup> While Council of Europe (CoE) soft law has recognised the right of access to information in public hands,<sup>44</sup> the ECtHR has been more cautious about recognising this as an independent aspect of freedom of expression.<sup>45</sup> Initially, the ECtHR did not

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<sup>41</sup> *Claude-Reyes* (n 13), reflecting the earlier *Inter-American Declaration of Principles on Freedom of Expression*, adopted at the Commission’s 108<sup>th</sup> regular session, 19 October 2000, para 4.

<sup>42</sup> *Gauthier v Canada* Comm (n 9); *Toktakunov v Kyrgyzstan* Comm No. 1470/2006; and *Rafael Rodríguez Castañeda v Mexico* Com No. 2202/2012.

<sup>43</sup> The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information, U.N. Doc. E/CN.4/1996/39 (1996), Principle 11. Although originally the product of international non-governmental efforts, this instrument, adopted by a group of experts in 1995, has been endorsed by the UN Special Rapporteur on Freedom of Expression and the former UN Commission on Human Rights. See Article 19, *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information* available <https://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf> [accessed 23 January 2018].

<sup>44</sup> *Recommendation (2002)2 on Access to Official Documents*, 21 February 2002, para III. See also art 2(b) Convention on Access to Official Documents 2008, which provides for access to ‘official documents’ defined as ‘all information recorded in any form, drawn up or received and held by public authorities’. Access to information held by public authorities is, however, different from access to information that a private actor is willing to share, therefore the treatment of obstacles to horizontal communication, including media releases, is outside the purview of these instruments.

<sup>45</sup> *Loiseau v France*, App no 46809/99, 18 November 2003.

recognise the existence of such a right<sup>46</sup> and in this it distinguished the position from the public's right to receive information from the media that the media wished to impart.<sup>47</sup> More recently a limited right to access information has been accepted. It is constrained to (1) release of specific information of public interest upon request sought by groups acting as a forum for public debate;<sup>48</sup> and (2) protection against unnecessary restrictions on access to information arising from deprivation of liberty.<sup>49</sup>

In sum, the broader right not to be prevented 'from receiving information that others wished or were willing to impart'<sup>50</sup> has been recognised, but only as an abstract principle rather than as the basis for a decision. This is an inevitable weakness from a system which has difficulty encapsulating group rights and which is reluctant to accommodate class actions.<sup>51</sup> Consequently, notwithstanding the detriment to the members of the potential

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<sup>46</sup> *Leander v Sweden*, App no 9248/81, 10 October 1983.

<sup>47</sup> *Sîrbu and others v Moldova*, App nos 73562/01, 73565/01, 73712/01, 73744/01, 73972/01 and 73973/01, 15 June 2004.

<sup>48</sup> *Kenedi v Hungary*, App no 31475/05, 26 May 2009, para 43; *Youth Initiative for Human Rights v Serbia*, App no 48135/06, 25 June 2013; *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes (OVESSG) v Austria*, App no 39534/07, 28 November 2013; cf. *Bubon v Russia*, App no 63898/09, 7 February 2017 – statistics requested were not 'ready and available'.

<sup>49</sup> See *Kalda* (n 22).

<sup>50</sup> *ibid*, para 42.

<sup>51</sup> The ECtHR has held that the individual complaints mechanism does not allow an *actio popularis* for the protection of the general interest (*Klass v Germany*, App no 5029/71, 6 September 1978, para 33). Even where a measure potentially affects all the members of a particular (e.g. religious) group, the group as such does not have victim status for the purposes of bringing a complaint (*Savez Crkava "Riječ Života" and Others v Croatia*, App No 7798/08, 9 December 2010,

audience deprived of opportunity to receive content someone would otherwise have imparted, and despite the repeated recognition of the audience's interest in this free flow of information, the audience depends on speakers' ability and willingness to enforce their own rights. We do not propose to warp the entire corpus of human rights law for the sake of a problematic case. Rather we suggest that the interests of the audience could be better protected in a specific instrument designed with the media and its role in society in mind, to avoid opening up class actions of potentially limitless size. We discuss the outline of such an instrument below.

#### **4. DISCONNECTION BETWEEN JOURNALISTIC FREE SPEECH AND RISK OF ATTACK**

The exercise of freedom of expression by the media is distinctive in another way. The societal impact of their professional activities exposes media workers to significantly more risks stemming from actions seeking to prevent or limit their speech than does the average

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para 125); see also *Handölsdalen Sami Village v Sweden*, App no 39013/04, 30 March 2010. A similar approach with regard to the right to participate in culture can be seen under the ICCPR; see General Comment No 23: *Article 27 (Rights of Minorities)* (1994), para 3.1. Although the Banjul Charter recognises group rights, there are still problems with scope: see S A Dersso, 'The jurisprudence of the African Commission in Human and People's Rights with respect to people's rights' (2006) *AHRLJ* 358, 360. Claims to self-determination or right to cultural heritage have been brought by an individual on behalf of a group: *Kevin Mgwanga Gunme v Cameroon*, Comm 266/03, 27 May 2009. While the Inter-American System has also recognised the rights of indigenous peoples, this line of jurisprudence seems linked to natural resources. It does not indicate a wider trend to group rights.

citizen. As the HRC noted, '[j]ournalists are frequently subjected to ... threats, intimidation and attacks because of their activities'.<sup>52</sup> The Special Rapporteur on extrajudicial, summary or arbitrary executions noted that journalists are among the persons who receive the most death threats.<sup>53</sup> Despite this connection, the jurisprudence focusses on other rights engaged by attacks against journalists, such as the right to life, rather than looking at the attack's impact on freedom of expression. The extent to which freedom of expression is overlooked, however, differs significantly across jurisdictions.

The most striking example is that of the Strasbourg jurisprudence. In *Gongadze v Ukraine*,<sup>54</sup> the murder of a journalist was assessed as a question of the State's obligation to take steps to protect individuals against credible threats brought to the authorities' attention. While the Court noted that journalists covering politically sensitive topics are in a vulnerable position, the case was decided under general Article 2 principles,<sup>55</sup> which apply in the case of media workers no more and no less than other individuals. Even where Article 10 was specifically raised by the applicant, the Court has found it unnecessary to consider that aspect of the complaint if it has already found a violation of another provision, merely because it 'ar[is]e out of the same facts'.<sup>56</sup> In *Kiliç v Turkey*, the Court thus failed to address the submission that the victim 'was targeted on account of his journalistic activities' and '[t]he

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<sup>52</sup> General Comment No 34 (n 10) para 23.

<sup>53</sup> E/CN.4/2003/3 and Corr.1, para 54; see also Report of UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, 10 April 2012, A/HRC/20/22, para 25.

<sup>54</sup> *Gongadze v Ukraine*, App no 34056/02, 8 November 2005.

<sup>55</sup> *Yaşa v Turkey*, App no 63/1997/847/1054, 2 September 1998; *Najaflı v Azerbaijan*, App no 2594/07, 2 October 2012.

<sup>56</sup> *Kiliç v Turkey*, App no 22492/93, 28 March 2000, para 87.

killing was therefore an act with a dual character which should give rise to separate violations under Articles 2 and 10'.<sup>57</sup> The refusal to examine the merit of Article 10 complaints once an Article 2 violation has been established may be seen as an unwarranted abdication from the Court's role<sup>58</sup> and a missed opportunity to highlight the impact of journalists' assassination on media freedom, given that unwelcome journalistic speech is the underlying motive for the interference with the right to life.

While the ECtHR has considered Article 10 in some cases, this does not constitute sufficient recognition of the significance of expression as a risk factor. Although the Court has established a positive obligation under Article 10, as can be seen in *Özgür Gündem v Turkey*, this is described in generic terms, rather than emphasizing the specific risks relevant to journalism: '[g]enuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals'.<sup>59</sup> Moreover *Özgür Gündem*, where a violation of

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<sup>57</sup> *ibid*, para 85.

<sup>58</sup> See Dissenting Opinion of Judge Matscher, *Dudgeon v UK*, App no 7525/76, 22 October 1981: 'when the Court is called on to rule on a breach of the Convention which has been alleged by the applicant and contested by the respondent Government, it is the Court's duty ... to decide the point ... The Court cannot escape this responsibility ...'.

<sup>59</sup> See *Özgür Gündem v Turkey*, App no 23144/93, 16 March 2000, esp. paras 41, 44, 49 and 71. This stance is consistent with the ECtHR's general approach to States' positive obligations under the ECHR, stemming from their commitment to secure the effective enjoyment of the rights enshrined therein; see e.g. *Osman v UK* (App no 23452/94, 28 October 1998), *Assenov v Bulgaria* (App no 24760/94, 28 October 1998), *Costello-Roberts v UK* (App no 13134/87, 25 March 1993), *Okkali v Turkey* (App no 52067/99, 17 October 2006), *Z and others v UK* (App no 29392/95, 10 May 2001), *A v UK* (App no 25599/94, 23 September 1998), *Nielsen v Denmark* (App no 10929/84, 28 November

Article 10 was found, may be explained by the sheer scale of the campaign of attacks and harassment against numerous journalists, distributors and others associated with the applicant newspaper, as well as search-and-seizure operations at the newspaper's premises and prosecutions against the newspaper.<sup>60</sup> In *Dink v Turkey*,<sup>61</sup> the focus of the Article 10 analysis was largely on the criminal conviction of a journalist for articles allegedly denigrating Turkishness. Admittedly, there is a reference to the positive obligation to adopt measures to protect journalists against attacks by extremist holders of opposite views, but this is merely ancillary. The judgment thus reiterates the principle on positive obligations in the terms already established in *Özgür Gündem*. Nonetheless, the conclusion in the *Dink* case seems to find an interference with Article 10 based solely on Dink's criminal conviction under defamation laws rather than because of the lack of protective measures.<sup>62</sup> It therefore signals only a partial departure from the ECtHR's usual approach. The more recent *Mehdiyev v Azerbaijan* judgment suggests that cases involving ill-treatment of journalists may, in future, be considered as raising a separate Article 10 issue. Specifically, the ECtHR did not reject as inadmissible the submission that Mehdiyev's ill-treatment was a reaction to journalistic activities, a change from the general direction of the case law already noted. Nonetheless, it did not rule on the issue, merely holding that the burden of proof was not met.<sup>63</sup> This was the

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1988), *CN v UK* (App no 4239/08, 12 November 2012). On the judicial elaboration of the notion of 'positive obligations' see A Mowbray, *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights* (Oxford, Hart Publishing, 2004).

<sup>60</sup> *Özgür Gündem* (n 59) para 43.

<sup>61</sup> *Dink v Turkey*, App nos 2668/07 et al, 14 September 2010.

<sup>62</sup> *ibid*, paras 137-139.

<sup>63</sup> *Mehdiyev v Azerbaijan*, App no 59075/09, 18 June 2015.

inescapable consequence of the finding that the conduct complained of had not been substantiated. The judgment was only able to establish a breach of Article 3 procedural obligations to investigate complaints of ill-treatment in custody.<sup>64</sup> This outcome is disappointing. The ECtHR avoids the necessity of considering the links between Mehdiyev's journalism and the attacks. Moreover, it does not discuss whether a separate breach arises from a failure to investigate under Article 10.

These cases reveal that the ECtHR places insufficient emphasis on the risks stemming from the applicants' profession and the possible chilling effect on future journalism. The only noteworthy recognition thereof is the reference in *Dink* to the importance of free public debate on matters of general interest in a democratic society<sup>65</sup> and to States' obligation to create a favourable environment for participation in this debate without fear.<sup>66</sup>

By contrast, faced with comparable facts, in *Njaru v Cameroon* the HRC found that the State had violated not only Articles 7 (prohibition of torture) and Article 9 (right to security of the person), but also Article 19(3) ICCPR. The case concerned the arbitrary arrest, threats to life and torture of a journalist by police officers, in response to the publication of articles denouncing the corruption and violence of the security forces.<sup>67</sup> Significantly, the HRC accepted that the victim 'ha[d] demonstrated the relationship between the treatment

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<sup>64</sup> This obligation is well-established in the case-law. See e.g. *Aksoy v Turkey*, App no 21987/93, 18 December 1996; *Assenov v Bulgaria* (n 59).

<sup>65</sup> *Dink* (n 61) para 135.

<sup>66</sup> *ibid*, paras 106 and 137. On the obligation to protect speech on issues of general interest see also *Fuentes Bobo v Spain*, App no 39293/98, 29 February 2000, paras 48-50 (dismissal without indemnity of TV programme producer for offensive criticism of public television management).

<sup>67</sup> *Njaru v Cameroon*, Comm no 1353/2005, 19 March 2007, paras 6.1-7.

against him and his activities as journalist'.<sup>68</sup> It seems that the HRC expects that the link be proven, though it is not clear what level of proof is required. The need for proof of the link between journalism and ill-treatment constitutes a second weakness in the jurisprudence that could weaken the protection offered here, especially if a high level of proof or probability turns out to be required.

The Inter-American bodies have, similarly, acknowledged that cases of violence against journalists affect their individual right to freedom of expression in addition to their rights to physical integrity. In *Gómez López v Guatemala*, the IACmHR found that the attempt by State agents to kill a journalist was aimed at preventing the diffusion of photographs documenting abuses by the army during conflict, and hence amounted to a free speech violation.<sup>69</sup> Likewise, in *Perozo v Venezuela*, the IACtHR analysed the harassment, physical and verbal assault in the context of armed conflict committed by State agents and private individuals against journalists and supporting staff as a double violation of Articles 5(1) and 13(1) IACHR.<sup>70</sup> In this case, where the attacks included those on a TV station and on journalists while they were reporting, the link with the professional exercise of freedom of expression was very clear. The question of whether there is, in *any* case involving a media worker, a presumption of such a link has not been directly addressed, nor has the question of what level of proof (if any) would be required.

The approach of the African Charter bodies is more ambiguous. In *Egyptian Initiative for Personal Rights*,<sup>71</sup> the Commission found the assault on female journalists whilst

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<sup>68</sup> *ibid*, para 6.4.

<sup>69</sup> IACmHR, *Gómez López v Guatemala*, Report No 29/96, Case 11.303, 16 October 1996, para 92.

<sup>70</sup> *Perozo et al v Venezuela*, IACtHR Series C No 195, 28 January 2009 – see e.g. para 250.

<sup>71</sup> *Egyptian Initiative for Personal Rights and INTERIGHTS* (n 28).

reporting on a protest to be a violation of freedom of expression as well as of the right to physical security. Since the ACmHPR seems to recognise consistently the free speech dimension of attacks against media workers,<sup>72</sup> it is notable that the African Court on Human and Peoples' Rights (ACtHR) has not taken the same line. The link between attacks on journalists and the right to receive media content was raised by the applicants in *Norberg Zongo*, but the ACtHR focussed on the failure to investigate the murder, and found that it did not constitute a separate violation of freedom of expression,<sup>73</sup> a restrictive approach similar to that of the ECtHR. Even in the context of the ACmHPR decisions, questions remain as to the level of proof required to demonstrate that the exercise of the journalistic profession was a factor in exposing the journalist to ill-treatment, or whether there is a (rebuttable) presumption to this effect in the case of any media worker.

As demonstrated, there are two concerns relating to the connection between journalistic speech and the risk of ill-treatment: recognition of the risk; and the need to prove the causal relationship. While we do not claim that all the international bodies are equally poor as regards the first point, all exhibit weakness in relation to the second. Moreover, the lack of consistency suggests that international judicial practice has not fully appreciated the risk factor for journalists despite the fact that part of journalists' role is to challenge those in power.

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<sup>72</sup> ACmHPR, *Media Rights Agenda v Nigeria*, Comm 224/98, 6 November 2000, para 69: 'it was only Mr. Malaolu's publication which led to his arrest, trial and conviction and therefore finds that in violation of Article 9 of the Charter'; ACmHPR, *Huri-Laws v Nigeria*, Comm 225/98, 6 November 2000.

<sup>73</sup> *Beneficiaries of Norbert Zongo et al v Burkina Faso*, App no 013/2011, 28 March 2014. The murder itself fell outside the Court's jurisdiction *rationae temporis*.

## 5. THE CHILLING EFFECT OF IMPUNITY

The amended UN *Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*<sup>74</sup> defines impunity as ‘the impossibility, de jure or de facto, of bringing the perpetrators of violations to account – whether in criminal, civil, administrative or disciplinary proceedings’.<sup>75</sup> Impunity and a credible, independent justice system are polar opposites. Given the link between media freedom and the public sphere, impunity of violence against journalists goes beyond the failure to provide redress to the individual victim; it also has systemic implications, as it deters others from the (professional)

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<sup>74</sup> UN Commission on Human Rights, Report of independent expert Diane Orentlicher on *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, 8 February 2005, E/CN.4/2005/102/Add.1.

<sup>75</sup> For a definition emanating from a regional system see *Paniagua Morales et al v Guatemala* (‘White Van’ Case), IACtHR Series C No 37, 8 March 1998, para 173, defining impunity as ‘the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of [human rights]’; see also *Almonacid Arellano v Chile*, IACtHR Series C No 154, 26 September 2006, para 111. Silva Sanchez suggests three categories: the lack of any kind of legal intervention by the State (factual impunity); explicit limitation by operation of the law (active legal impunity); and failure by the State to repeal laws creating active legal impunity (passive legal impunity). See J-M Silva Sanchez, ‘Doctrines regarding “The Fight against Impunity” and “The Victim’s Right for the Perpetrator to be Punished”’ (2007-08) 28 *Pace L. Rev* 865, 867.

exercise of free speech, with corrosive effects for democracy.<sup>76</sup> There is thus a double concern at play as regards impunity.

Victims are entitled to redress in the form of prompt, impartial and thorough investigations, the identification, trial and punishment of the perpetrators, and non-reiteration measures.<sup>77</sup> This positive obligation arises in respect of acts carried out by private parties as well as State actors<sup>78</sup> and is recognised generally. The HRC underlined that ‘States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces’.<sup>79</sup> Further, they ‘should also take specific and effective measures to prevent the disappearance of individuals’ and to ‘investigate thoroughly cases of missing and disappeared persons’.<sup>80</sup> The regional bodies

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<sup>76</sup> See UN Commission on Human Rights, *Right to freedom of opinion and expression*, 19 April 1996, E/CN.4/RES/1996/5, para 7.

<sup>77</sup> *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (n 74), First Principle; see also HRC, *Baboeram et al v Suriname*, Comm nos 146/1983; 148-54/1983, 4 April 1985, para 16.

<sup>78</sup> Instruments such as the International Convention for the Protection of All Persons from Enforced Disappearances are predicated on the international responsibility arising for States from acts of private parties.

<sup>79</sup> See General Comment No 6: *Article 6 (The Right to life)* (1982), para 3.

<sup>80</sup> *ibid.* See also *Grioua v Algeria*, Comm no 1327/2004, 10 July 2007; *Salem Saad Ali Bashasha v Libya*, Comm no 1776/2008, 20 October 2010; *El Abani (El Ouerfeli) v Libya*, Comm no 1640/2007, 26 July 2010; *Rajapakse v Sri Lanka*, Comm no 1250/2004, 14 July 2006; *Jayawardena v Sri Lanka*, Comm no 916/2000, 26 July 2002; *Chongwe v Zambia*, Comm no 821/1998, 25 October 2000.

have adopted a similar line.<sup>81</sup> According to the IACtHR, this approach supports the victims' right to justice and to the truth.<sup>82</sup> The punishment of perpetrators also mitigates the powerlessness of victims.<sup>83</sup> Additionally, in order to recognise their responsibility for the acts committed by their personnel, but also to constitute an expression of respect for the human being,<sup>84</sup> States are under an obligation to compensate.<sup>85</sup> As Sanchez noted, this duty to punish is associated with victims' 'current' or 'effective' rights'.<sup>86</sup> It deals with the rights of the speaker. Whilst important, this emphasis on reparation for the direct victims and their immediate families is retrospective and overlooks the impact of impunity on the collective interest in freedom of expression.

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<sup>81</sup> See e.g. *Tanrikulu v Turkey*, App no 26763/94, 8 July 1999; *Osman v United Kingdom*, App no 23452/94, 28 October 1998; *Velásquez Rodríguez v Honduras*, IACtHR Series C No 4, 29 July 1988; IACmHR, *Report on Citizen Security and Human Rights*, OEA/Ser.L/V/II, 31 December 2009; IAmCHR Special Rapporteur for Freedom of Expression, *Special Study on the Status of Investigations into the Murder of Journalists during the 1995–2005 Period*, 8 March 2008, OEA/Ser.L/V/II.131; ACmHPR, Resolution on *Guidelines and measures for the prohibition and prevention of torture, cruel, inhuman or degrading treatment or punishment in Africa*, 23 October 2002 (the Robben Island Guidelines); ACmHPR, *The Constitutional Rights Project v Nigeria*, Comm 87/93, 22 March 1995, para 14; *Dawda Jawara* (n 28).

<sup>82</sup> *Almonacid Arellano* (n 75).

<sup>83</sup> C Joyner, 'Redressing Impunity' (1998) 26 *Denver J. int'l L & Pol'y* 591, 611.

<sup>84</sup> Report of the Special Rapporteur of the UN Commission on Human Rights on extrajudicial, summary or arbitrary executions, Bacre Waly Ndiaye, 7 October 1996, A/51/457, para 76. These concerns reveal a need to recognise the loss of the family in addition to the violation of the rights of the victim.

<sup>85</sup> *Plan de Sánchez Massacre v Guatemala*, IACtHR Series C No 105, 29 April 2004.

<sup>86</sup> *Silva Sanchez* (n 75) 872.

Impunity is problematic in relation to any right. It is the principal cause of the perpetuation of human rights violations, and particularly of extrajudicial, summary or arbitrary executions.<sup>87</sup> By failing to provide disincentives to future similar behaviour, impunity thus has implications beyond the immediate case, rippling out through society as a whole.<sup>88</sup> Yet, it has compound effects in relation to violations of freedom of expression. Multiple individuals (the public at large, deprived of information) have rights at stake. As noted by the Special Rapporteur on extrajudicial executions: 'Journalists deserve special concern not primarily because they perform heroic acts in the face of danger [...] but because the social role they play is so important. [...] Violence against a journalist is not only an attack on one particular victim, but on all members of the society'.<sup>89</sup> So, the individual audience-members' 'right to a communicative environment', as termed by Mukherjee,<sup>90</sup> is threatened by impunity. Yet this fact is not well-recognised in a judicial analysis which is individualistic and retrospective in form. In particular, there are two major weaknesses affecting the ability of international human rights law to accommodate the rights of the audience.

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<sup>87</sup> Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions (1996) (n 84), para 120.

<sup>88</sup> *ibid*, para 136.

<sup>89</sup> Report of UN Special Rapporteur on extrajudicial, summary or arbitrary executions (2012) (n 53), para 24.

<sup>90</sup> Mukherjee suggests the 'more comprehensive right of which journalists' rights form a part, namely the right to communicate': A Mukherjee, 'International Protection of Journalists: Problems, Practice and Prospects' (1994) 11 *Ariz. J. Int'l and Comp. L.* 339, 341 and implied in the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (n 53), para 24.

First, although it is undisputed that States have positive obligations with regard to third-party violence,<sup>91</sup> human rights bodies tend not to recognise a separate freedom of expression violation in cases concerning attacks on the physical integrity of journalists; as a result, there can be no consequent obligation to investigate alleged infringements of the right to freedom of expression. *Mehidyev* is a case in point, and in this the African Court has followed the ECtHR.<sup>92</sup> Other international bodies, however, specifically identify the obligation to investigate such infringements. For example, the IACmHR in *Héctor Félix Miranda* forcefully held that '[a] State's refusal to conduct a full investigation of the murder of a journalist is particularly serious because of its impact on society'.<sup>93</sup> To some extent, the language of Inter-American decisions is thus more receptive to the audience's or societal rights; however, in practice such references only serve as supporting arguments, whereas the applicant/victim is the individual or organisation seeking to impart information rather than the intended recipient(s). As regards the protection of any actionable rights for the audience, the inter-American model is therefore less revolutionary than it might seem at a first glance. On a related point, it could be argued that an under-recognition of the risks facing journalists

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<sup>91</sup> General Comment No 34 (n 10), para 7 and 23. For examples outside the context of freedom of expression, see e.g. the reference to the obligation to 'prevent and punish deprivation of life by criminal acts' in General Comment No 6: *Article 6 (Right to Life)* (1982), para 3.

<sup>92</sup> *Norbert Zongo* (n 73).

<sup>93</sup> IACmHR, *Héctor Félix Miranda v Mexico*, Report no 5/99, Case 11.739, 13 April, 1999, para 52. In its 2009 *Report on Citizen Security and Human Rights*, the IACmHR recalled that the State is internationally responsible for both acts and omissions in relation to the killing of journalists; see IACmHR, *Report on Citizen Security and Human Rights* (n 81). The report seems to consolidate the argument that journalists are a particular 'at risk category', and that special diligence is needed to protect the right to life of those targeted for their exercise of free speech.

as a category adversely affects the State's ability to carry out its preventative duties thoroughly.<sup>94</sup>

The second weakness concerns the chilling effect of impunity, which not all human rights bodies have fully acknowledged. The point has been recognised in the Inter-American system, which admittedly has had significant exposure to the issue. The IACmHR highlighted the 'chilling effect' of States' failure to investigate on both journalists and ordinary citizens, with its deleterious consequences on the flow of information in the public realm.<sup>95</sup> It noted that municipal authorities' lack of compliance with the positive obligation to prevent, protect, and prosecute creates a climate that is conducive to such acts.<sup>96</sup> The Inter-American bodies have also emphasised the deterring effect of killings and injuries upon journalists reporting on armed conflict.<sup>97</sup> At the UN level, the Special Rapporteur on extrajudicial, summary or arbitrary executions noted: 'The most extreme form of censorship is to kill a journalist. The

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<sup>94</sup> For example, the HRC emphasises that States should 'ensure that persons are protected from any acts of private persons or entities that would impair the enjoyment of the freedoms of opinion and expression' (see General Comment No 34 (n 10) para 7.). The IACtHR has also noted that the State is under an obligation to take steps to protect media workers (see *Perozo* (n 70), para 118), and, in particular, to prevent forced disappearances (see *Velásquez Rodríguez* (n 81)).

<sup>95</sup> See *Héctor Félix Miranda* (n 93), para 52.

<sup>96</sup> IACmHR, *Maria da Penha v Brazil*, Report no 54/01, Case 12.051, 16 April 2001, para 56. See also the *Report on the situation of human rights defenders in the Americas*, pointing out that '[o]ne of the main violations of the duty to ensure rights is impunity'. See also Report of UN Special Rapporteur Ambeyi Ligabo on access to information, safety and protection of journalists and media professionals (etc), 28 February 2008, A/HRC/7/14, para 43.

<sup>97</sup> See *Velásquez Rodríguez* (n 81); IACmHR, *Hugo Bustios Saavedra v Perú*, Report no 38/97, Case 10.548, 16 October 1997; *Héctor Félix Miranda* (n 93).

killing not only silences the voice of the particular journalist, but also intimidates other journalists and the public in general'.<sup>98</sup>

Conversely, other regional courts have failed to acknowledge the weight of these elements. While the African Court might have recognised the potential chilling effect of impunity on other journalists in the *Norbert Zongo* case,<sup>99</sup> in requiring proof of that effect in the individual case, it underestimated self-censorship and the difficulty of quantifying the hypothetical investigative journalism stifled as opposed to (restricted) stories actually written. This difficulty was emphasised in a joint separate declaration, in which the judges suggested that a high burden of proof in respect of the psychological effects of human rights violations is undesirable.<sup>100</sup> The ECtHR as a corollary of its earlier position does not address this at all. The question therefore remains whether international case law has adequately or consistently reflected the damage to public discourse and the risks of impunity, especially in the context of a member of the audience who wishes to initiate a complaint.

## 6. THE CONTEXT OF ARMED CONFLICT

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<sup>98</sup> Report of UN Special Rapporteur on extrajudicial, summary or arbitrary executions A/HRC/20/22 (n 53), para 21.

<sup>99</sup> *Norbert Zongo* (n 73).

<sup>100</sup> The Court of the Economic Community Of West African States (ECOWAS) has recognised this specific aspect in the case of *Deyda Hyndara v The Gambia*, Case no ECW/CCJ/APP/30/11, 10 June 2014, although it linked impunity and the chilling effect of impunity together; note that the ECOWAS Treaty recognises at art 66 the specific obligation on signatory states to assure a safe and conducive atmosphere for the practice of journalism.

The discussion so far has concentrated on the position of media workers in times of relative peace. Armed conflict situations (whether international or internal in character) pose increased threats to journalists' personal security and freedom to circulate information. According to the UN Special Rapporteur on freedom of expression, during many violent conflicts (Afghanistan, Iraq, the Middle East, Somalia, Sudan, Ossetia), '[l]arge numbers of journalists are either assassinated, wounded by direct armed attacks during the fighting or deliberately targeted and kidnapped by the parties to the conflict'.<sup>101</sup> By regulating the conduct of belligerents, international humanitarian law may in principle assist, but it is questionable whether it sufficiently recognises the specific position of the media and its role in informing society.

Humanitarian law instruments do not generally confer any special status to journalists involved in conflict zones, save for Article 4A(4) of the Third Geneva Convention (GCIII). According to this provision, the 'prisoner of war' (POW) status in case of capture by the enemy extends to 'war correspondents', a sub-category of 'persons who accompany the armed forces without actually being members thereof' and 'have received authorization from the armed forces which they accompany'. The attribution of POW status, however, represents a very narrow form of protection, essentially limited to the treatment afforded once they have fallen into the hands of the other party.<sup>102</sup> Further, the personal scope of this limited protection is uncertain. Arguably, the notion of 'war correspondents' has been superseded by

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<sup>101</sup> Report to the Human Rights Council of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/11/4, 30 April 2009, para. 44. See also UNSC Res 2222 (2015), Preamble, tenth paragraph.

<sup>102</sup> POWs must be treated humanely, be allowed to communicate with relatives, receive food, clothing, housing and medical attention, be released quickly after the conflict ends; they must not be compelled to give information or perform dangerous or degrading work.

that of ‘embedded journalists’, which also encompasses journalists who ‘live and work with troops on a more ad hoc basis’ without having received official accreditation.<sup>103</sup> Whether the latter are ‘war correspondents’ is unclear.<sup>104</sup> Certainly independent journalists fall outside the ambit of Article 4A(4). Moreover, rules for accreditation are determined nationally, so in the absence of an international definition of ‘war correspondents’ States can draw this category narrowly. Apart from these definitional difficulties, if the rationale for Art 4A(4) is that war correspondents accompany the troops, and therefore the treatment afforded to members of the armed forces fallen prisoners is extended to *any* non-military personnel travelling with them, it does not amount to a recognition of journalists’ special exposure to threat under humanitarian law. This lack of awareness is re-affirmed by the fact that independent journalists are not assigned any particular status (other than being protected as civilians).

It might be suggested that the protection granted to the general civilian population is sufficient to cover media-specific risks. To explain why this position is misconceived, we need to review the protection available to journalists as civilians. Common Article 3 of the four Geneva Conventions, also applicable to non-international conflicts, establishes a minimum standard of treatment of persons who do not take active part in the hostilities. Subjecting civilians to cruel treatment or outrages upon personal dignity, or using them as hostages, is prohibited, as are arbitrary killings. Similarly, protection afforded under the

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<sup>103</sup> E Levin, ‘Journalists as a Protected Category: A New Status for the Media in International Humanitarian Law’ (2013) 17 *UCLA J. Int’l L. & Foreign Affairs* 215, 227.

<sup>104</sup> Foster (n 3) 459. Whether or not the term ‘war correspondents’ extends to all individuals potentially involved in news reporting (e.g. camera operators, translators), they are covered by Article 4.A(4) GCIII to the extent that they have authorisation to accompany the troops, in fact this provision does not provide an exhaustive list of ‘[p]ersons who accompany the armed forces ...’, but a mere illustration (‘such as’).

Fourth Geneva Convention (GCIV) to civilian populations in situations of international armed conflict includes media workers. Article 79 of the 1977 Protocol I to the Geneva Conventions of 1949 (API), relating to the protection of victims of international armed conflicts, explicitly recognises journalists' civilian status 'provided that they take no action adversely affecting their status as civilians'. While the recognition in itself is a positive factor, 'journalist' is not defined and could potentially be interpreted narrowly by belligerents. The term's relationship with the notion of 'war correspondents' in GCIII also remains obscure. Although Protocol I does not bind all Geneva parties (save to the extent that it corresponds to customary law), the belligerents' obligation to treat journalists as civilians has been reiterated by UN Security Council (UNSC) Resolution 1738 (2006).<sup>105</sup>

As civilians, journalists are protected by three key tenets. First, they benefit from the principle of distinction between civilian and military objectives, which requires States to direct their operations solely against military objectives.<sup>106</sup> Established in a widely ratified instrument,<sup>107</sup> this principle has arguably attained customary status.<sup>108</sup> The practice of international tribunals has indeed elevated the principle to *jus cogens*.<sup>109</sup> Secondly, journalists *qua* civilians are covered by the principle of proportionality, prohibiting

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<sup>105</sup> UNSC Res 1738 (2006), para 2.

<sup>106</sup> See art 48 API.

<sup>107</sup> Protocol I has 174 parties and 2 signatories (United States and Pakistan); Israel, Iran, India and Turkey are amongst notable non-parties.

<sup>108</sup> See Y Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (Cambridge, Cambridge University Press, 2004) 82-112; M Roscini, 'Targeting and contemporary aerial bombardment', (2005) 54 *International & Comparative Law Quarterly* 411, 413-414.

<sup>109</sup> *Legality of the Threat or Use of Nuclear Weapons*, ICJ Advisory Opinion of 8 July 1996, para 79; *Kupreskic et al*, Case No IT-95-16-T, Trial Chamber II 14 Jan 2000, para 521.

‘indiscriminate’ attacks, likely ‘to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, ...which would be excessive in relation to the concrete and direct military advantage anticipated’.<sup>110</sup> Thirdly, belligerents are required to exercise precaution to minimise danger to civilians.<sup>111</sup>

According to the revised Commentary of the International Committee of the Red Cross (ICRC) on Common Article 1 of the Geneva Conventions,<sup>112</sup> the obligation ‘to respect and to ensure respect’ for the Conventions includes a positive obligation to adopt both preventative measures, such as ‘instruction within armed forces’, and remedial measures, notably a duty ‘to search for, prosecute or extradite alleged perpetrators of grave breaches ‘regardless of their nationality’.<sup>113</sup> These obligations are not, however, clearly established under treaty law, and the ICRC interpretation may be contested or ignored. Another way to tackle impunity in this context would be through the development of international criminal law. Although the targeting of civilians would itself amount to a war crime within the meaning of the Statute of the International Criminal Court,<sup>114</sup> establishing a separate offence of killing journalists would provide greater recognition of journalists’ distinctiveness.<sup>115</sup>

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<sup>110</sup> Article 51(5)(b) API.

<sup>111</sup> Article 57(2)(a)(iii) API.

<sup>112</sup> See Common art 1: ‘The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances’.

<sup>113</sup> International Committee of the Red Cross, Commentary of 2016 to Convention I, paras 145-46, available

<https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=72239588AFA66200C1257F7D00367DBD> [accessed 27 January 2018].

<sup>114</sup> See the definition of ‘war crimes’ in art 8 (2)(b)(iv): ‘serious violations of the laws and customs applicable in international armed conflict [including] [i]ntentionally launching an attack in

Beyond this, the contention that civilian protection suffices overlooks substantial practical differences between journalists and other civilians. First, there may be a strategic advantage from targeting journalists. Special Rapporteur Frank La Rue explained that ‘the concern [of the belligerents] to win *the war of images* worsens the situation of physical safety for civilians and media professionals’.<sup>116</sup> According to Levin, deliberate attacks on journalists and media facilities were perpetrated by armed forces and militias in many parts of the world ‘because they posed an ideological danger in their ability and mission to spread [unfavourable] information to a wide audience’.<sup>117</sup> More generally, the media have an important role in informing the public about the hostilities.<sup>118</sup> Secondly, journalists do not seek refuge away from combat zones; ‘[i]nstead of fleeing combat, they seek it out’.<sup>119</sup> Further, the location of their workplace, when their home country is the theatre of hostilities,

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the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated’.

<sup>115</sup> Geoffrey Robertson QC has forcefully suggested that art 8 of the Rome Statute ought to be amended in such a way as to include an express reference to journalists in the list of war crimes (see e.g. <http://www.internationallawbureau.com/index.php/on-the-front-line-of-accountability-should-the-killing-of-journalists-be-a-war-crime/> [accessed 16 June 2017]).

<sup>116</sup> Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 30 April 2009, A/HRC/11/4, para 44 (emphasis added).

<sup>117</sup> Levin (n 103) 216.

<sup>118</sup> Foster (n 3) 444-46.

<sup>119</sup> *How Does international humanitarian law protect journalists in armed-conflict situations?*, interview with Robin Geiss (27 July 2010), available <https://www.icrc.org/eng/resources/documents/interview/protection-journalists-interview-270710.htm> [accessed 27 January 2018].

is easily identifiable.<sup>120</sup> A further incentive to target media observers is that it makes it more difficult to ascertain whether States complied with IHL and to establish individual criminal liability.

Their close proximity to the battlefield also exposes journalists to incidental injury stemming from lawful attacks against military objectives.<sup>121</sup> Such ‘legitimate collateral damage’ is not unlimited. Article 51(5)(b) API bans attacks which may be expected to cause civilian loss which is excessive in relation to the military advantage anticipated.<sup>122</sup> In a separate opinion on the *Nuclear Weapons* case, Judge Higgins suggested that ‘even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain’.<sup>123</sup> The classification of excessive attacks as war crimes<sup>124</sup> also acknowledges the requirement of proportionality. Nevertheless, the occasional targeting of journalists,<sup>125</sup> with the consequence – and sometimes intent – of propagating a chilling effect, may well not be caught by these provisions, which seem

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<sup>120</sup> See e.g. NATO bombardment of Radio Television Serbia in Belgrade.

<sup>121</sup> See Dinstein, *The Conduct of Hostilities* (n 108) 123-125.

<sup>122</sup> On the meaning of ‘excessive’ see Dinstein (n 108) 120-121. This principle is also related to the rule on precautions. See in particular art 57 (2) (a) (iii) of Protocol I.

<sup>123</sup> *Nuclear Weapons Case* (n 109), Dissenting opinion of Judge Higgins, para 20.

<sup>124</sup> See n 114.

<sup>125</sup> For a relatively recent example see D Priest ‘War reporter Marie Colvin was tracked, targeted and killed by Assad’s forces, family says’ Washington Post, 9 July 2016, available [https://www.washingtonpost.com/world/national-security/war-reporter-marie-colvin-was-tracked-targeted-and-killed-by-assads-forces-family-says/2016/07/09/62968844-453a-11e6-88d0-6adee48be8bc\\_story.html](https://www.washingtonpost.com/world/national-security/war-reporter-marie-colvin-was-tracked-targeted-and-killed-by-assads-forces-family-says/2016/07/09/62968844-453a-11e6-88d0-6adee48be8bc_story.html) [accessed 27 January 2018].

predicated on a subjective evaluation of the relationship between the detriment knowingly caused to civilians and the military advantage gained.

Additionally, there are ambiguities in IHL rules that belligerents may exploit to suppress media reporting. Most conspicuous among these ambiguities are the scope of ‘dual-use objectives’ and the mis-categorisation of journalism as propaganda, spying or treason.

No positive norm excludes media stations expressly from the scope of ‘dual-use targets’, ie civilian facilities which also have a military function and which may therefore be a legitimate target. As a result, States may invoke military necessity to target broadcasting facilities.<sup>126</sup> A notable example is the 1999 NATO bombing campaign, which treated the Serbian TV and Radio Station as a dual-use object, purportedly because it granted control over the Yugoslav army’s communications network.<sup>127</sup> However, the 2009 Report of the UN Special Rapporteur on freedom of expression stated that ‘the media, its personnel and its equipment as long as they are not making an effective contribution to military action cannot be considered a legitimate target’.<sup>128</sup> This raises the question of what may be deemed an ‘effective contribution’. The uncertainty remains in the restatement of UNSC Resolution

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<sup>126</sup> To the contrary, the potential legitimacy of treating a broadcasting station as a military target (to the extent that ‘it makes an effective contribution to military action’) is expressly recognised in the British rules of engagement as codified in The Joint Service Manual of the Law of Armed Conflict (JSP 383, 2004 edition), para 5.4.5(h).

<sup>127</sup> See A Colangelo, ‘Manipulating International Criminal Procedure: The Decision of the ICTY Office of the Independent Prosecutor not to Investigate NATO Bombing in the Former Yugoslavia’ (2002-2003) 97 *Northwestern University Law Review* 1393, 1411-1417; M Mandel, ‘Politics and Human Rights in International Criminal Law: Our Case Against NATO and the Lessons to be Learned from It’ (2001) 25 *Fordham Int’l Law Journal* 95, 116 and 125.

<sup>128</sup> See Report of the UN Special Rapporteur on freedom of expression (2009) (n 116) para 49.

2222 (2015) that ‘media equipment and installations constitute civilian objects, and ... shall not be the object of attack or of reprisals, *unless they are military objectives*’.<sup>129</sup>

Insofar as journalism involves acquisition and dissemination of information from the zones of military operations, there is a risk that it could be treated as espionage.<sup>130</sup> The Hague Regulations define spying as seeking to obtain information ‘clandestinely, or on false pretences’ for dissemination to the hostile party.<sup>131</sup> Journalists carrying out their activity openly should not be caught by the definition, by analogy with other categories excluded from the scope of espionage by the Hague Regulations, such as ‘soldiers or civilians, carrying out their mission openly, charged with the delivery of despatches’.<sup>132</sup> Those carrying out more undercover investigations may be more at risk. In any event, an explicit exclusion of media workers along the same lines may avoid the ambiguities of domestic regulations.<sup>133</sup>

Additionally, a journalist who ‘directly participates in hostilities’ loses his or her civilian status.<sup>134</sup> This is a vague expression; the ICRC gives the example of transmitting tactical targeting intelligence for a specific attack.<sup>135</sup> The possibilities of modern live

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<sup>129</sup> UNSC Res 2222 (2015), para 10 (emphasis added).

<sup>130</sup> See CJ Dunlap, ‘The DoD Law of War Manual and Its Critics: Some Observations’ (2016) 92 *Int’L L. Stud.* 85, 110-11.

<sup>131</sup> Article 29 of the 1899 Hague Regulations concerning the Laws and Customs of War on Land.

<sup>132</sup> *ibid*, para 2.

<sup>133</sup> e.g. US Department of Defense Law of War Manual, 2015, para 4.24.4. Concerns include the level of accreditation required by belligerents to accept that a journalist is not a spy, and the fact that independent journalists may be under-protected.

<sup>134</sup> AP1, art 51(3).

<sup>135</sup> Cited by Dunlap (n 130) 109-10.

reporting mean that a journalist could inadvertently provide useful information to the other party. The required intent to support one party to the detriment of another<sup>136</sup> is also uncertain; a journalist might be intending to tell the story to the entire world, without considering that they are implicitly telling the story to the other belligerent party. Indirect support, such as favouring one side over the other, seems insufficient to meet the threshold suggested by the ICRC and should not lose media workers their civilian status.<sup>137</sup> For example, in the Report commissioned by the Prosecutor to the ICTY on the NATO bombing campaign, the broadcasting of propaganda in itself was not enough to justify regarding the station as a military object.<sup>138</sup> Nonetheless, uncertainty remains surrounding the scope of ‘direct participants’, which may leave room for States to claim that journalists were so acting.

Could it be argued that international human rights law compensates for shortfalls in protection under international humanitarian law?<sup>139</sup> Undisputedly, save for express

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<sup>136</sup> ICRC, ‘Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law’ (2009) 90 (872) *International Review of the Red Cross* 991.

<sup>137</sup> S Casey-Maslen (ed), *The War Report 2012* (Oxford, Oxford University Press, 2014) 361-62; contrast however activities such as the broadcast during the Rwandan genocide of information regarding the precise location of the Tutsis to facilitate Hutu attacks on them.

<sup>138</sup> Final Report to the Prosecutor of the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia, 2000, paras 75-6.

<sup>139</sup> There is a vast literature on the relationship between international human rights law and humanitarian law; see e.g. T Meron, ‘The Humanization of Humanitarian Law’ (2000) 94 *AJIL* 239; A Cassimatis, ‘International humanitarian law, international human rights law, and fragmentation of international law’ (2007) 56 *ICLQ* 623; A Orakhelashvili, ‘The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?’ (2008) 19 *EJIL* 161; I Scobbie, ‘Principle or Pragmatics? The Relationship between Human Rights Law and the Law of

derogations from treaty obligations,<sup>140</sup> human rights continue to apply in conflict situations alongside international humanitarian law.<sup>141</sup> Any derogation must be publicly proclaimed and notified to the human rights monitoring bodies, and observe the principle of proportionality. Therefore, the right to freedom of expression cannot be restricted arbitrarily and to an extent beyond that strictly required by the circumstances.<sup>142</sup> The ICJ confirmed in *Congo v Uganda* that human rights and humanitarian law are not mutually exclusive bodies

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Armed Conflict' (2010) 14 *Journal of Conflict & Security Law* 449; M Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (2010) 14 *Journal of Conflict & Security Law* 459; J Chevalier-Watts, 'Has human rights law become *lex specialis* for the European Court of Human Rights in right to life cases arising from internal armed conflicts?' (2010) 14 *The International Journal of Human Rights* 584; V Koutroulis, 'The application of international humanitarian law and international human rights law in situation of prolonged occupation: only a matter of time?' (2012) 94 *International Review of the Red Cross* 165; N Lubell, 'Challenges in applying human rights law to armed conflict' (2005) 87 *International Review of the Red Cross* 737; H-J Heintze, 'Theories on the relationship between international humanitarian law and human rights law' in R Kolb and G Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Cheltenham, Edward Elgar Publishing, 2013) 53-64.

<sup>140</sup> See arts 4 ICCPR, 15 ECHR, 27 IACHR. On their interpretation see *Derogation from human rights treaties in situations of emergency*, report by the The Rule of Law in Armed Conflicts Project (Geneva Academy of International Humanitarian Law and Human Rights) available [http://archive.is/2015.11.20-081355/http://www.geneva-academy.ch/RULAC/derogation\\_from\\_human\\_rights\\_treaties\\_in\\_situations\\_of\\_emergency.php](http://archive.is/2015.11.20-081355/http://www.geneva-academy.ch/RULAC/derogation_from_human_rights_treaties_in_situations_of_emergency.php)

[accessed 20 November 2015].

<sup>141</sup> For an overview of authorities see S Sivakumaran, 'Re-envisaging the International Law of Internal Armed Conflict' (2011) 22 *EJIL* 219, 234.

<sup>142</sup> *Landinelli Silva v Uruguay*, Comm no 34/1978, 8 April 1981, para 8.3.

of law and apply simultaneously during conflict.<sup>143</sup> Nevertheless, the concurrent applicability of human rights law and humanitarian law during conflict does not remove the prevalence of IHL as the operative standard.<sup>144</sup> The *Nicaragua* case suggested that a lower standard of diligence in the use of lethal force (typical of IHL) applies, due to the inherent difficulties of the war context.<sup>145</sup> Secondly, even though the right to life is non-derogable under human rights instruments, it is not framed in absolute terms.<sup>146</sup>

There is, however, a certain convergence between human rights jurisprudence and IHL in that excessive civilian casualties are not warranted under either body of law. Article 51(5)(b) API, which corresponds to customary law,<sup>147</sup> compels the occupying forces to use all necessary precautions to avoid the loss of innocent civilian life. Of the regional human

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<sup>143</sup> *Case Concerning Armed Activities on the Territory of the Congo (Congo v Uganda)*, ICJ Reports 2005, para 160. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)*, ICJ Reports 1986, para 25, confirming that the protection of the ICCPR does not cease in times of war, save for explicit derogations under Article 4. Moreover, the occupying powers have a positive obligation to act with vigilance in preventing violations of human rights (including by private actors) within their controlled areas, as they do in non-conflict situations (see *ibid*, para 179).

<sup>144</sup> *Nuclear Weapons Case* (n 109), para 25.

<sup>145</sup> *Nicaragua Case* (n 143), para 25.

<sup>146</sup> See e.g. art 2(2) ECHR: ‘Deprivation of life *shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary*: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection’ (emphasis added).

<sup>147</sup> See M Sassòli, ‘Legislation and Maintenance of Public Order and Civil Life by Occupying Powers’ (2005) 16 *EJIL* 661, 666, note 23.

rights bodies, the ECtHR has an extensive jurisprudence, which also revolves around the notion of reasonable precautions and preventing by-standers from harm.<sup>148</sup> The assessment of what is ‘necessary’, ‘sufficient’ or ‘proportionate’ is, however, a matter of fact, depending on all circumstances, and therefore may impose a lower threshold in times of war. Since different parameters apply when IHL is the operative standard, it is desirable to achieve international consensus on the recognition of safeguards for the protection of journalists, who do not benefit from the full extent of the protection available in times of peace but face different dangers when compared to ordinary civilians. Improving the normative framework does not seem to be, however, the prevailing approach in international fora.

## 7. THE NEED FOR ANOTHER WAY?

Based on the foregoing observations, it would seem that the international law regime - whether that found in international human rights instruments or in international humanitarian law - offers minimal recognition of the role of the media in informing the public, the risks the media in particular face and the consequences for the public in silencing the media. Although the position of the media was placed on the international community’s agenda as early as 1973,<sup>149</sup> specific responses have been non-binding and fragmentary, and their impact remains questionable. For example, the Human Rights Council’s Resolution 12/16 called

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<sup>148</sup> See *Ergi v Turkey*, App no 23818/94, 28 July 1998, para 79; *Khashiyev and Akayeva v Russia*, App nos 57942/00; 57945/00, 24 February 2005, paras 131-32; *Isayeva, Yusupova and Bazayeva v Russia*, App nos 57947/00; 57948/00; 57949/00, 24 February 2005, paras 168-171; *Isayeva v Russia*, App no 57950/00, 24 February 2005, paras 172-75.

<sup>149</sup> e.g. General Assembly Resolution 3058 (XXVIII) of 2 November 1973.

upon States to take all necessary measures to put an end to violations, by ensuring legislative compliance with international human rights and humanitarian obligations, effective implementation, and the availability of remedies for the victims, as well as by investigating threats and acts of violence against journalists. UNESCO has agreed a number of resolutions in the same vein,<sup>150</sup> as have the regional bodies.<sup>151</sup> Most notably, the 2016 set of guidelines adopted by CoE Recommendation on the protection of journalism acknowledges the *sui generis* nature of the exercise of freedom of expression by media workers, and it lends further support to our contention that violations of journalists' rights fall within a distinguishable category of human rights violations, requiring a category-specific response.<sup>152</sup> However, none of these awareness-raising initiatives have materialised in a coherent and authoritative legal instrument spelling out specific binding obligations.

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<sup>150</sup> e.g. UNESCO Resolution 29 *Condemnation of violence against journalists*, 12 November 1997.

<sup>151</sup> e.g. Res 1535 (2007) of the Council of Europe (CoE) Parliamentary Assembly on *Threats to the lives and freedom of expression of journalists*, 25 January 2007; Report of the IACmHR Special Rapporteur for Freedom of Expression on *Violence Against Journalists and Media Workers: Inter-American Standards and National Practices on Prevention, Protection and Prosecution of Perpetrators* (31 December 2013), paras 291-292. For a more comprehensive overview of soft law initiatives see C Draghici and L Woods, *Safety and Protection of Journalists: A Responsibility for the World* (Legal Instruments Study), available [http://www.city.ac.uk/\\_data/assets/pdf\\_file/0017/106424/CLJJ-Impunity-Report.pdf](http://www.city.ac.uk/_data/assets/pdf_file/0017/106424/CLJJ-Impunity-Report.pdf) [accessed 2 February 2018].

<sup>152</sup> See Recommendation CM/Rec(2016)4 of the Committee of Ministers, adopted on 13 April 2016, esp paras 1 (noting the increase in attacks against journalists 'because of their investigative work, opinions or reporting') and 5 (recognising the 'damaging effects on the functioning of democratic society' ensuing from such attacks).

To date, the UN Plan of Action on the Safety of Journalists and the Issue of Impunity, launched in 2011, was the most conspicuous response of the international community to concerns about violence against the media. Significantly, it did not take normative action (let alone binding initiatives) but aimed at improving coordination amongst UN agencies, providing assistance to States to develop legislation promoting freedom of expression, and awareness-raising campaigns.<sup>153</sup> It is a welcome attempt to address the implementation deficit of current international instruments, but it seems from the continuing reports of violence against journalists to have only marginal impact.

At the same time, there has been evidence of an incipient, albeit modest, shift of attention towards the distinctiveness of media workers, especially under the IHL regime, when compared to other civilians. In Resolution 2222 (2015), the UNSC recognised that the work of media professionals ‘puts them *at specific risk* of intimidation, harassment and violence in situations of armed conflict’.<sup>154</sup> This is a significant change in political discourse, insofar as, prior to 2015, the UNSC had only addressed the issue of protection of journalists in conflict under the more general concern about the safety of civilians.<sup>155</sup> The specificity of the risks facing journalists, without the narrow reference to conflict situations, has been

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<sup>153</sup> UNESCO IPDC, *UN Plan of Action on the Safety of Journalists and the Issue of Impunity*, UN Doc CI-12/CONF.202/6, 12 April 2012. For further details on the various stages of elaboration and operationalisation of the Plan see <http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/safety-of-journalists/un-plan-of-action/> [accessed 27 January 2018].

<sup>154</sup> UNSC Res 2222 (2015), Preamble, fifth paragraph (emphasis added).

<sup>155</sup> See e.g. Res 1738(2006).

reiterated in recent resolutions of the UN General Assembly and Human Rights Council.<sup>156</sup> None of these bodies have, however, law-making mandate; this acknowledgment should therefore be taken forward by an appropriate forum with a view to legal codification.

In that respect, we cannot share the perception that the formulation of specific guarantees for journalists would be redundant. The proposition that a dedicated instrument is superfluous because of the existence of the human rights and IHL regimes is weakened by the UN practice of adopting group-specific international instruments despite the existence of general instruments already covering those categories. Examples include the Convention on the Elimination of all forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities. This development was a reaction to the factual observation of the inefficacy of generally applicable rules.<sup>157</sup> Discussing the rationale for the adoption of CEDAW, Bantekas and Oette note that ‘the specificity of abuses directed towards certain vulnerable groups such as women can be most effectively addressed through particular forms of protection and remedies’.<sup>158</sup> We have argued that media workers face distinct risks arising from their duty to inform, which risks are to some degree recognised by the soft law measures from a range of bodies. We have further contended that societal interests in the media are not fully recognised in the general jurisprudence. Additionally, an express prohibition on attacks against journalists

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<sup>156</sup> See UN General Assembly Resolution 70/162 of 17 December 2015 on the safety of journalists and the issue of impunity and UN Human Rights Council Resolution 33/2 of 29 September 2016.

<sup>157</sup> R Smith, *Textbook on International Human Rights*, 4th edn (Oxford, Oxford University Press, 2010) 348.

<sup>158</sup> I Bantekas and L Oette, *International Human Rights. Law and Practice* (Cambridge, Cambridge University Press, 2013) 455.

would give further impetus to the response of the international community, which is essential in a legal context in which peer pressure is the main enforcement mechanism of international law obligations.<sup>159</sup> In IHL, ‘increased legal protections would incentivize combatants to pay particular attention to the physical safety of journalists’.<sup>160</sup>

We acknowledge the difficulties with formulating specific legal provisions for journalists, most notably the articulation of a definition of ‘journalist’ in light of developments in technology.<sup>161</sup> With the advent of the Internet, the role of ‘truth-teller’ is no longer the preserve of media companies’ employees<sup>162</sup> and there is increasing evidence to the effect that private citizens campaigning via the Internet can suffer consequences as a result of that activity.<sup>163</sup> Nonetheless, professional media are distinct from occasional ad hoc ‘citizen-

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<sup>159</sup> See *ibid*, 574: ‘unlike human rights treaty bodies vested with the adjudication of individual complaints, IHL treaties are not supported by predetermined international enforcement mechanisms...’.

<sup>160</sup> Levin (n 103) 218.

<sup>161</sup> See, *mutatis mutandis*, Foster’s considerations of ‘special treatment’ for medical personnel under IHL in Foster (n 3) 465-67.

<sup>162</sup> This new form of journalism has been recognised in General Comment No 34 (n 10) para 44; Report of the Special Rapporteur on the right to freedom of opinion and expression (A/65/284), paras 61-76.

<sup>163</sup> See e.g. IFEX, ‘Authorities Use Deportation to Quell Dissent’, 30 May 2012 available [http://www.ifex.org/united\\_arab\\_emirates/2012/05/30/al\\_khaleq\\_deportation\\_threat/](http://www.ifex.org/united_arab_emirates/2012/05/30/al_khaleq_deportation_threat/) [accessed 27 January 2018]. According to UNESCO, *World Trends in Freedom of Expression and Development of the Media: Special Digital Focus*, 2015, however, 98% of media workers killed are from the traditional media.

journalists’, or what Allan calls ‘citizen witnesses’.<sup>164</sup> What marks journalists out is their superior ability to reach a mass audience, no matter the platform; their credibility when publicising a story or idea, stemming from their professional standing and ethics (by contrast with other widely accessible sources); and their resources and privileged access to information. Thus, not every exercise of freedom of expression amounts to journalism. As the Special Rapporteur on Extra-judicial Killings noted, ‘journalist’ means any ‘person who is *regularly or professionally* engaged in the collection and dissemination of information *to the public* via any means of *mass* communication’.<sup>165</sup> In *Fontevicchia and D’Amico v Argentina*, the IACtHR also outlined this distinction by defining the ‘professional journalist’ as ‘someone who has decided to exercise freedom of expression in a continuous, regular, and paid manner’.<sup>166</sup>

At the same time, it is important not to define journalists in an overly restrictive manner. The protection should not be limited to those employed by media organisations, but should include freelancers, even those who do not make their living by journalism. Indeed, we see *Fonteccechia* as a somewhat narrow view of journalist. Further, despite the fact that the case law stresses the public interest aspect of journalistic expression, we emphasise that State authorities should not be able to limit the application of the new instrument based on their assessment of what is ‘news-worthy’. The topic of the story should not be a criterion but rather the intention to inform the public. Looking to function rather than institutional

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<sup>164</sup> S Allan, *Citizen Witnessing: Revisioning Journalism in Times of Crisis* (Cambridge, Polity Press, 2013).

<sup>165</sup> Report of UN Special Rapporteur on Extra Judicial Killings (2012) (n 53), para 26 (emphasis added).

<sup>166</sup> *Fontevicchia and D’amico v Argentina*, IACtHR Series C No. 238, 29 November 2011, para 45.

status matches the practice of international bodies on the protection of journalists.<sup>167</sup> Moreover, mass audience and professionalism are not the only fundamental distinctions between journalism and sporadic acts of dissemination of information by amateurs. The HRC has recognised the functional similarity between professional journalists and other actors exercising freedom of expression: ‘Journalism is a function shared by a wide range of actors, including professional full time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere’.<sup>168</sup> Crucially, a consistent exposure to risk exists for those who perform the journalistic function on a regular basis. Some bloggers or social media ‘influencers’, as the HRC for example suggested, may therefore also fall into this definition, even though they are not employed by a media organisation.<sup>169</sup> This does not mean, however, that an individual who retweets a news story to fifty followers is a journalist.

Having singled out the media, we need to indicate that, while the journalist is the identifiable face, voice or name, there is a range of support workers who are indispensable to the collection, production and distribution of the story,<sup>170</sup> all of whom could fall within the term ‘media worker’. In *Perozo*,<sup>171</sup> the IACtHR recognized that Article 13 safeguards extend to technical supporting staff, employees, executives and shareholders of a media company.

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<sup>167</sup> Report of UN Special Rapporteur on Extra Judicial Killings (2012) (n 53), para 26; CoE Recommendation No R (2000) 7 of the Committee of Ministers on the right of journalists not to disclose their sources of information (8 March 2000).

<sup>168</sup> General Comment 34 (n 10) para 44.

<sup>169</sup> Recommendation CM/Rec (2016) on the Protection of Journalism and the Safety of Journalists and Other Media Actors, 13 April 2016, para 4; HRC General Comment 34 (n 10).

<sup>170</sup> See e.g. *Kilic v Turkey*, App no 22492/93, 28 March 2000.

<sup>171</sup> *Perozo* (n 70).

The Special Rapporteur on Extra-judicial Killings further suggested that those who directly support the work of journalists – such as stringers and drivers – should also be protected.<sup>172</sup>

The former UN Commission on Human Rights added editors, writers, translators, publishers, broadcasters, printers and distributors.<sup>173</sup> A similarly broad approach exists in the CoE: ‘all those engaged in the collection, processing and dissemination of news and information including cameramen and photographers, as well as support staff such as drivers and interpreters’.<sup>174</sup> UNSC Resolution 1738 (2006) confirmed the comprehensive scope of the notion of ‘journalists’ for the purposes of human rights and humanitarian law.<sup>175</sup> A new instrument on the protection of media personnel could follow these precedents.

We also distinguish journalists and their associated media workers from others engaging more subtly in public debate through artistic forms of communication, from film to poetry and painting. As the Special Rapporteur in the field of cultural rights stated, ‘[a]rtistic expressions and creations come under particular attack because they can convey specific

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<sup>172</sup> Report of UN Special Rapporteur on Extra judicial Killings A/HRC/20/22 (n 58), para 26.

<sup>173</sup> UN Commission on Human Rights, *Right to freedom of opinion and expression*, 19 April 1996, E/CN.4/RES/1996/53.

<sup>174</sup> CoE Committee of Ministers Recommendation No R (96) 4 on The Protection Of Journalists in Situations of Conflict and Tension, 3 May 1996, last preambular para. In the Inter-American system, the Report of the IACmHR Special rapporteur for freedom of expression on *Violence Against Journalists and Media Workers* (n 151) also acknowledged that ‘journalists’ is a ‘term that should be understood broadly, from a functional perspective’ (para 1).

<sup>175</sup> UNSC Res 1738 (2006) condemns intentional attacks against ‘journalists, media professionals and associated personnel’ (para 1) and recalls that such categories are to be treated as civilians (para 2).

messages and articulate symbolic values in a powerful way'.<sup>176</sup> Like journalists, artists are 'at particular risk as their work depends on visibly engaging people in the public domain';<sup>177</sup> they too face harassment, intimidation, threats, and torture.<sup>178</sup> The authors of such artistic expressions can however be distinguished from those involved in journalistic activity. In our view, the framework of analysis for 'engaged' or 'politically charged' art is a different one, insofar as artistic outputs are too remote from the characteristics of journalism outlined above. As the Special Rapporteur in the field of cultural rights acknowledged,<sup>179</sup> creative expression is valuable for a range of reasons: to develop and express individuals' humanity, worldview and meanings assigned to their existence and development; to entertain; but also to contribute to social debates. Indeed, such is the nature of this form of expression that such contributions bring forward counter-discourses, challenging majority views. Yet, while artists, writers and others may engage in matters of public interest, that is not the main purpose of their activity. It is not their *duty* to inform on an ongoing basis, to investigate and to share information in a context in which an orientation towards truth and verified data is important. These elements, however, are central to the role of journalists. By contrast, '[a]rtistic expressions and creations do not always carry, and should not be reduced to

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<sup>176</sup> Report of the Special Rapporteur in the field of cultural rights, 'The right to freedom of artistic expression and creativity' (A/HRC/23/34), p 3.

<sup>177</sup> *ibid*, p 8.

<sup>178</sup> Art for Democracy campaign, *Creativity under Pressure: Artistic Freedom of Expression in Azerbaijan, Baku, Azerbaijan*, April 2014, p 9, available <http://www.indexoncensorship.org/wp-content/uploads/2014/05/AFD-Report-Creativity-Under-Pressure-2014.pdf> [accessed 2 February 2018].

<sup>179</sup> Report of the Special Rapporteur in the field of cultural rights (n 176), p 3. See also *Müller and Others v Switzerland*, App no 10737/84, 24 May 1988, para 27.

carrying, a specific message or information'<sup>180</sup> and the artist is not limited to or judged by conceptions of truth.<sup>181</sup> Naturally, the exercise of freedom of expression by persons falling outside the special regime reserved, in accordance with our proposal, to the media, would still be protected under general human rights law.

It should also be noted that other international treaties were successfully adopted despite the blurred boundaries of the categories for the benefit of which they were established. Defining a disabled person for the purposes of the protection afforded by the UN Convention on the Rights of Persons with Disabilities poses no lesser difficulties. A relatively straightforward notion such as the notion of 'child' is not susceptible of a unified definition under treaty law.<sup>182</sup> Even the seemingly unequivocal notion of 'woman' for the purposes of the dedicated UN Convention may raise issues in light of the legal phenomenon of gender reassignment. Thus, the fact that a definition is not entirely watertight does not perforce frustrate all attempts at codifying additional category-specific guarantees.

As regards the material scope of a potential new instrument, we would propose the same broad approach. It should include the obligation to protect the life of media workers (including against forced disappearance), protection against arbitrary arrest and kidnapping

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<sup>180</sup> *ibid*, para 37.

<sup>181</sup> *Alinak v Turkey*, App no 40287/98, 29 March 2005, para 45; cf. *Lindon, Otchakovsky-Laurens and July v France*, App nos 21279/02 and 36448/02, 22 October 2007 [Grand Chamber], which concerned a book based on named individuals.

<sup>182</sup> Compare art 2(3) International Labour Organisation Convention No 138 ('The minimum age ... shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years') with art 1 UNCRC: 'For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'.

(whether by state bodies or others), specific issues relating to the intimidation of women journalists,<sup>183</sup> deportation/ refusal of entry, confiscation of, and damage to, property. We also propose a rebuttable presumption that attacks against media workers are linked to their professional activity; this is not currently clear in the jurisprudence, especially as regards this wider category beyond journalists. Instead, the victim appears to have to provide proof of a link between the attack and their professional activities, even if the level of proof expected may be low. A further benefit of re-iterating these rights is that it would bring into sharper focus the preventative obligations, such as training police and prosecutors on the specific issues pertaining to cases involving media workers. The implementation of the current standards of protection would be greatly enhanced by an express treaty obligation to instruct law-enforcement personnel, the military, prosecutors and the judiciary on obligations arising under international human rights and humanitarian law and the effective fulfilment of those obligations. This would include dealing with particular areas of risk for media professionals, such as protests and public events, the legitimacy of the presence of journalists during situations of armed conflict, and practices and procedures to minimize risks to journalists. The treaty envisaged could also re-emphasise the link between media expression and the violence and intimidation, thereby ameliorating a weakness in some of the jurisprudence. The new instrument should include provisions regarding both peacetime obligations and

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<sup>183</sup> Numerous documents of international organisations draw the attention to the risks facing female journalists; see i.a. OSCE Representative on Media Freedom *Communiqué 02/2015 on the growing safety threat to female journalists* available <http://www.osce.org/fom/139186> [accessed 27 January 2018], Preamble to the UN Human Rights Council Res of 19 September 2014 on *The safety of journalists* (A/HRC/27/L.7), Preamble to the UN General Assembly Res 70/162 of 17 December 2015 on *The safety of journalists and the issue of impunity* (A/RES/70/162).

obligations arising in conflict zones, thus providing a comprehensive codification in a single instrument of all the rules applicable to the situation of journalists, both under human rights law and humanitarian law.<sup>184</sup> This would have the advantage of avoiding difficult discussions about when an internal situation of unrest has transformed into conflict, for the purposes of applying conflict rules. Significantly, a treaty along the lines proposed would allow the first formal codification of the obligation to treat journalists engaged in dangerous professional missions in areas of armed conflict as civilians, and respect and protect them as such (unless and for such time as they take a direct part in hostilities), and to take all necessary steps to ensure accountability for crimes committed against journalists in such situations, by searching for persons alleged to have committed, or to have ordered the commission of, a grave breach of the Geneva Conventions. This would supersede any controversy over which aspects of the Additional Protocols to the Vienna Convention correspond to customary law.

An intergovernmental drafting conference would also provide an opportunity for the international community to translate into law the good practices recommended in the Report of the Office of the UN High Commissioner for Human Rights on “The safety of journalists” of 1 July 2013 for the creation of a safe and enabling environment in which journalists and other media professionals may carry out their work unhindered. These include, for instance, the commitment to establish an effectively funded early warning and rapid response mechanism, in consultation with media organizations, giving journalists and media professionals, when threatened, immediate access to the relevant State authorities and material measures of protection. Specific examples of such assistance would include e.g.

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<sup>184</sup> Codification attempts have usually focused on one regime only: *Draft proposal for an International Convention to strengthen the protection of journalists in armed conflicts and other situations* (Federation of Arab Journalists, 2011); *Charter for the Safety of Journalists Working in War Zones or Dangerous Areas* (Reporters Without Borders, 2002).

providing mobile telephones and bulletproof vests, establishing safe havens and emergency evacuation or relocation to safe parts of the country or other countries through a protection programme. Another example drawing on the above-mentioned recommended best practices would be the obligation to conduct investigations into suspected attacks against journalists and other media professionals by a special investigative unit or an independent national mechanism, and to dedicate the resources necessary to prosecute such attacks through the development of specific protocols by prosecutors or the appointment of a specialised prosecutor. In addition to these measures of redress, States could also be required to take steps to mitigate the impact of such attacks, including by providing such services as free medical care, psychological support and legal services to the victims and their families. Spelling out and further developing, in light of international practice, the generic obligations of protection enshrined in current human rights and humanitarian law would give a substantially more concrete dimension to the applicable norms and foster national implementation.

A specific instrument would recognise not only the vulnerability of media workers, but also the societal value in reporting events. We have noted that the individual right to receive is limited in this regard; some aspects of the societal interest may not be well represented in such a conception so that even were efforts and resources put into compliance with the general human rights norms generally, this would remain an area where protection would be weak. Viewing attacks on journalists as presumptively being about their reporting may indirectly increase protection for audiences' rights too. In terms of enforcement, we noted that the traditional human rights mechanisms have difficulty accommodating class actions, and typically only the victim may bring a complaint, at least in contentious proceedings. This is a structural weakness in relying on the general rights based framework, which even a change in the reasoning of the respective judicial bodies to consider the

expressive issues (in relation to the audience) separately from the physical concerns (in relation to a journalist) would be hard pressed to solve entirely. It would, however, be possible to envisage an alternative mechanism which reflects the societal interest without opening the floodgates (e.g., Ombudsperson or monitoring body whose inquiry might be activated by a member of the public rather than the journalist-victim exclusively). Currently, there is a total block on these interests triggering international action; such a mechanism would remedy this lack as well as bringing them more into the focus of the enquiry.

This societal concern also suggests that the instrument should target impunity. Inspiration could be drawn from the wording of States' obligations regarding investigation, punishment of perpetrators and reparation currently present in non-binding sets of Principles on Impunity at both international<sup>185</sup> and regional level.<sup>186</sup> The latter recognise, albeit briefly, the societal impact of impunity; in a specific convention on media workers, the full threat to public discourse could be identified. Significantly, the definition of 'serious human rights violations' in the CoE Guidelines refers to Articles 2 (life), 3 (torture), 4 (slavery), 5 (liberty) and 8 (private life) ECHR; there is no reference to Article 10. While the UN Guidelines are not substantively limited in this way, the emphasis is on the personal aspect of the right to justice, rather than societal concerns. Because of the general nature of these documents, neither raises the specific issues regarding public discourse relating to freedom of speech. There is therefore benefit in including specific impunity-related provisions in a convention aimed at the protection of media workers. In addition to the general obligations to investigate and to punish following from States' positive obligations under human rights law, a

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<sup>185</sup> *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (n 74).

<sup>186</sup> Guidelines of the CoE Committee of Ministers on eradicating impunity for serious human rights violations, 30 March 2011.

requirement to create specific offences relating to the protection of media workers could be included. As with the CoE Convention on preventing and combating violence against women and domestic violence, States could be required to monitor and collate information relating to violence against journalists.<sup>187</sup> It is arguable that if the problem underlying the persisting violations of journalists' rights is political will, then a further legal norm adds nothing. However, in addition to emphasising the unacceptability of harassment of journalists and impunity therefor, it has the benefit of making it easier to identify whether States have complied with their international law obligations. The State reporting mechanism common to UN treaty-body procedures<sup>188</sup> is based on this very assumption of exposing States to specific supervision in critical areas. A targeted instrument would thus highlight the significance of the fight against impunity, and emphasise where States are failing.

The novelty of our proposal is therefore two-fold. First, it provides support for a process of codification which, without amounting to the adoption of substantially new laws, would address the loopholes and ambiguities noted in the current international framework for the protection of journalists' freedom of expression. Secondly, it proposes a more efficient mechanism for oversight of those new treaty provisions, which includes a body meeting on a more regular basis than UNESCO,<sup>189</sup> with a precise focus on the safety of media workers,

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<sup>187</sup> Article 11 CoE Convention on preventing and combating violence against women and domestic violence (2011).

<sup>188</sup> See e.g. the mechanisms established under the UN Convention on the Elimination of Discrimination Against Women, UN Convention on the Rights of the Child, UN Convention Against Torture, UN Convention on the Rights of Persons with Disabilities etc.

<sup>189</sup> The UNESCO's General Conference and the Council of UNESCO's International Programme for the Development of Communication meet every two years, and addressing violence

and upon which greater enforcement powers are bestowed. The main options in this respect include a judicial body and an Ombudsperson competent to carry out inquiries in response to individual or collective complaints, as well as to adopt reports containing the reasoned findings of investigations and any recommendations to States. The difficulty with the adoption of a tribunal-like mechanism is that it would most likely encounter the same problems of standing vis-à-vis the public interest that we have demonstrated exists in relation to the general freedom of expression guarantees. We would therefore propose the introduction of an Ombudsperson. Of course, even here there may be questions about standing; we suggest that the Ombudsperson should be afforded some margin of discretion in assessing the evidence presented to the Ombudsperson's Office in order to decide which complaints to investigate further. As a formal model in this respect, we could look *mutatis mutandis* to the competence conferred on the Prosecutor of the International Criminal Court by the Rome Statute.<sup>190</sup> Another useful precedent is the Committee recently established under the Optional Protocol to the Convention on the Rights of Persons with Disabilities, who has a dual competence: legal determinations in respect of individual complaints brought by the alleged victims, but also recommendations following investigations into grave or systematic violations reported by any credible sources, not necessarily the victims. The body monitoring conformity with the proposed convention on the safety of journalists could be similarly

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against journalists is only one aspect of their agendas. Moreover, these are both intergovernmental bodies, as opposed to bodies of independent experts.

<sup>190</sup> See in particular the references in Article 15 to the Prosecutor's competence to 'analyse the seriousness of the information received' and seek 'additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate' in order to reach a conclusion as to whether 'there is a reasonable basis to proceed with an investigation'.

entrusted with two procedures, a victim-activated mechanism and a non-victim track for grave or systematic violations.

Certainly, the design of a new instrument and its dedicated enforcement machinery presuppose additional financial resources. Any costs, however, are greatly outweighed by the advantages such developments would bring about: 1) certainty, clarity and prominence of international obligations concerning the protection of journalists in conflict and non-conflict situations, currently fragmented in a multitude of treaty provisions, pronouncements of international tribunals, and soft law instruments, largely inaccessible to political decision-makers and law-enforcement personnel; 2) enhanced international monitoring of all such obligations and specialised avenues for complaints in case of violation, including a mechanism operating with independence from the victims' ability or willingness to denounce a violation; and 3) a momentous political statement from the international community, which translates into greater peer pressure to comply with the agreed obligations. The suggestion that any financial effort would be better placed with the implementation of existing rules and mechanisms is patently belied by the reality of continued attacks perpetrated with impunity, as recently lamented in a number of authoritative international instruments, such as the UN General Assembly Resolution 70/162 of 17 December 2015 on the safety of journalists and the issue of impunity and UN Human Rights Council Resolution 33/2 of 29 September 2016. These instruments also call upon States to address the specific risks of intimidation and violence faced by journalists as a result of their professional activity. One effective way to do so would be to identify, and commit to comply with, a set of specific obligations reflecting the state of the law on media professionals' rights, as updated by the practice of States and international jurisprudence, as well as to intensify the collective oversight by means of a specialised mechanism. The merit of the solution we propose in this paper is that it allows access not only to the journalist-victim in pursuit of a remedy, but also to members of the

public – a solution which would better reflect the societal detriment caused by the violation of the individual victim’s free speech rights.

## **8. CONCLUSIONS**

Our central argument in propounding further protection for media workers is based on the specificity and vulnerability of this group, as well as on the general observation that whatever protection is available has proved insufficient. While the general human rights and humanitarian regimes in principle cover actions against media workers, they have been ineffective. Admittedly, some of the treaty-based monitoring bodies have recognised the relationship between violent attacks and journalists’ freedom of expression. Others, however, have not, and this constitutes a gap in the jurisprudence. In terms of global protection, such unevenness is problematic. Moreover, all systems have underplayed the audience’s right to be informed. These weaknesses are compounded by impunity, and international bodies, especially the ECtHR, have not always given impunity’s societal implications sufficient weight. Some change in the environment may be effected were the courts to recognise the specificity of the contribution and risks inherent in the exercise of free speech by journalists, and to allow audiences greater rights; however some aspects are difficult to fully protect within a framework of individual rights or humanitarian law, no matter how effective its mechanisms. International humanitarian law also inadequately recognises the specific risks faced by media workers in conflict zones. In the end, therefore, it seems that a specific instrument is necessary.

The substance of our proposal is hardly new – as can be seen from the ‘Montecatini project’ of the Fédération Internationale des Rédacteurs en Chef<sup>191</sup> or the Press Emblem Campaign’s Draft Proposal for an International Convention to Strengthen the Protection of Journalists in Zones of Armed Conflicts and Civil Unrest.<sup>192</sup> The failure of such previous attempts only confirms the legal difficulties surrounding the status of journalists but does not suggest the redundancy of codification. Our endeavour thus consists in articulating new arguments to support the case for dedicated international protection for the media. UNSC Resolution 2222 (2015), highlighting the need to recognise the precarious position of journalists in conflict zones, might be construed as a tardy acknowledgment by the international community, faced with the reality of unacceptable numbers of journalist casualties, that insufficient attention has been paid to this category so far.

Despite the problems of enforcement of treaty law, normative change eventually triggers behavioural change. A coherent global instrument protecting media freedom, insofar as indicative of international values, may provide leverage for legal argument before national courts and within civil society debate, which may ultimately be transformative in terms of State legislation and policy. Furthermore, such an instrument could act as a more compelling behaviour-modifier within the international society than the existing general regimes.

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<sup>191</sup> R Sapienza, ‘The International Protection of Journalists’ (1980-1981) 5 *Italian Y.B. Int’l L.* 139, 140.

<sup>192</sup> <http://www.presseblem.ch/4983.html> [accessed 29 January 2018]. For a commentary see E Crawford and K Davies, ‘The International Protection of Journalists in Times of Armed Conflict: The Campaign for a Press Emblem’ (2014) 32 *Wisconsin Int’l L.J.* 1.