

## Twenty-First Century Embedded Journalists: Lawful Targets?

Major Douglas W. Moore\*

### I. Introduction

*It is now 2012 and an international armed conflict exists between Iran and Iraq. Since U.S. military forces withdrew from Iraq in early 2011, Iranian sentiment has grown increasingly hostile towards Iraq for its rejection of radical Shiite influences in the new Iraqi government. Various international intelligence sources indicate that Iran initiated a coordinated missile attack on several Iraqi towns. Nevertheless, Iran's Military Information Minister emphatically states that Iraq initiated the first strike. The security of the greater Middle East hangs in the balance.*

*As a result of this crisis, the United Nations Security Council (UNSC) passes a UNSC resolution authorizing member states to form a multinational force under a unified command to take "all necessary means" to restore international peace and security in the Middle East.<sup>1</sup> The United States will spearhead a multinational force with the intent to conduct a ground war in Iran. The UNSC is concerned with the ground invasion being perceived as a "war on Islam," resulting in a greater Middle East regional war. Additionally, the United States is concerned with maintaining public support for the conflict due to national exhaustion from the previous wars in Iraq and Afghanistan.*

*In advance of military intervention, the Secretary of Defense (SECDEF) calls a Pentagon press conference to announce the general framework for the media's involvement in the military operations. A Department of Defense (DoD) spokesperson communicates that the ultimate strategic success of this campaign is based upon winning the information war through the extensive use of media coverage. Specifically, the Joint Force Commanders (JFC) and the Public Affairs Officers (PAO) have been told to "accommodate the media whenever possible" by (1) "disseminat[ing] accurate and timely information" to inform the public and grow coalition support and (2) to "counter adversary propaganda and erroneous information in the adversary's press."<sup>2</sup> The aggressive use of military and civilian media assets are designed to garner public support for the conflict and attack Iran's current misinformation campaign so other Shiite radical groups will be deterred from joining the cause. In addition, undermining Iran's propaganda campaign will have the intended effect of creating dissent within the enemy's ranks, and accelerating their capitulation.*

*Aside from the Coalition's strategic objectives for the use of the media, the Pentagon also unveils the smaller scale details of how journalists will be involved on the battlefield. The Pentagon plans to invite hundreds of well-seasoned war correspondents to embed in frontline units for the duration of combat operations. Initially, the U.S. military will host two-week "boot camp" sessions for journalists bound for combat. The instruction, provided by U.S. Army drill sergeants at U.S. military facilities, will primarily focus on the safety of journalists. However, journalists will also be taught the basics of providing first aid to combatants, land navigation, familiarization with military equipment and weapon systems as well as techniques designed to safeguard tactical information in combat. After completion of the course, journalists will be accredited and assigned to combat units. Each war correspondent will then be issued an identity card to comply with Geneva Conventions protocol, providing notice of their civilian status, yet giving them special protections as prisoners of war (POW) in the event of enemy capture.<sup>3</sup>*

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\* Judge Advocate, U.S. Army. Presently assigned as the Brigade Judge Advocate, 506th Infantry Regiment, 101st Airborne (Air Assault) Division, Fort Campbell, Ky. LL.M., 2009, The Judge Advocate General's Sch., U.S. Army, Charlottesville, Va.; J.D., 1999, Roger Williams University School of Law, Bristol, R.I.; B.S. in Business, 1993, Miami University, Oxford, Ohio. Previous assignments include Group Judge Advocate, 202d Military Police Group (Criminal Investigative Division), Seckenheim, F.R.G., 2007–2008; Defense Counsel, Trial Defense Services Europe, Mannheim, F.R.G., 2005–2007; Trial Counsel, 3d Brigade Combat Team, 1st Infantry Division, Vilseck, F.R.G., 2003–2005; Brigade Judge Advocate, 3d Brigade Combat Team, 1st Infantry Division, Forward Operating Base Warhorse, Iraq, 2004–2005; Legal Advisor, Task Force Falcon, Camp Bondsteel, Kosovo, 2002–2003; U.S. Army Aviation & Missile Command, Redstone Arsenal, Huntsville, Ala. (Chief, Administrative Law, 2002–2003; Officer-in-Charge of Tax Center, 2002; Chief, Legal Assistance, 2001–2002); Co-author of *An Introduction to the International Criminal Court*, 46 NAVAL L. REV. 112 (1999); Member of the bars of Illinois, the U.S. Court of Appeals for the Armed Forces, and the Supreme Court of the United States. This article was submitted in partial completion of the Master of Laws requirements of the 57th Judge Advocate Officer Graduate Course.

<sup>1</sup> Chapter VII of the UN Charter, entitled "Action With Respect to Threats to Peace, Breaches of the Peace, and Acts of Aggression," provides the UNSC authority to determine what measures should be employed to address acts of aggression or other threats to international peace and security. U.N. Charter art. 42. Under Chapter VII, Article 42 allows the use of military force should non-military means in resolving a conflict prove to be inadequate. *Id.* The UNSC communicates the authority to use military measures with the language "all necessary means." *Id.*

<sup>2</sup> JOINT CHIEFS OF STAFF, JOINT PUB. 3-61, PUBLIC AFFAIRS, at I-2 (9 May 2005) [hereinafter JOINT PUB. 3-61] (citing primary reasons why JFCs and PAOs will allow media to report on military operations); see also JOINT CHIEFS OF STAFF, JOINT PUB. 3-13, INFORMATION OPERATIONS, at x (13 Feb. 2006) [hereinafter JOINT PUB. 3-13] (discussing that public affairs is a core capability of the greater military information operations mission).

<sup>3</sup> Geneva Convention Relative to the Treatment of Prisoners of War art. 4A(4), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter GC III].

*In theater, war correspondents will have unprecedented access to the battle space—from the unit planning cells at the tactical operations center (TOC) to the infantry patrolling cities and engaging the enemy in firefights. Journalists will be exposed to the same personal risks as the ground forces and experience daily life from the perspective of the servicemembers. Except for the issuance of a weapon, they will be permitted to wear military uniforms in combat and will be issued helmets and ballistic vests for protection. On the battlefield, journalists will travel by military transportation and use military communication technology to get their stories to the press. Their work product may be censored by the unit to ensure operational security. This same censorship will also be applied to military journalists who will work and live along side war correspondents covering the same events. Both military and non-military journalists will come under the command and control of the unit PAO for the duration of their embedding.*

*In response to the DoD's media policy for combat operations, Iran has declared that the Coalition's use of embedded journalists violates Article 79, Protocol I to the Geneva Conventions.<sup>4</sup> Consequently, Iran warns that it has the right to lawfully target embedded journalists as they are not being used in their professional capacity, but instead as an extension of military operations.*

Though hypothetical, this scenario illustrates how the conduct and use of war correspondents on the modern battlefield threatens their special protective status under international law. There is no doubt that the current conflicts in Iraq and Afghanistan have forced the U.S. military to make fundamental changes in the way it conducts warfare.<sup>5</sup> The United States has increasingly relied upon non-military members such as DoD civilian employees, government contractors, and non-affiliated civilians<sup>6</sup> to “accomplish tasks directly affecting the tactical success of an engagement.”<sup>7</sup> As a result of these recent changes, the role of journalists has become increasingly important to military wartime objectives.<sup>8</sup> Today's prevalent practice of embedding journalists in tactical units has established an unprecedented level of military-press relations and raises a troubling and unanswered question: does the U.S. embedded journalist program strip war correspondents of their historical protections under the laws of war and make them lawful targets?

The answer depends upon whether journalists perform activities outside the scope of their “professional mission” permitted by Article 79 of Protocol I during the course of an armed conflict.<sup>9</sup> Journalists who perform activities that are in direct support of combat operations can be viewed as taking “a direct part in hostilities” under the United States' view of

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<sup>4</sup> Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 79, June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978) [hereinafter Protocol I]. While the United States is not a ratifying party to Protocol I, it recognizes the legal effect of these provisions as being customary international law which is equally as binding on States in conducting themselves in accordance with the laws of war. See *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U.J. INT'L L. & POL'Y 416, 419–420 (1987) [hereinafter U.S. State Dep't Remarks] (transcript of remarks made by Michael Matheson, U.S. Dep't of State Deputy Legal Advisor). Customary international law results from the general and consistent practice of States followed from a sense of legal obligation. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27). Customary international law does not require full acceptance by all States to be binding, but the more States following the particular practice, the more likely it is to be binding on all States, unless one State persistently objects. *Id.*

<sup>5</sup> The Department of Defense (DoD) Quadrennial Defense Review Report (QDR) asserts that DoD must “aggressively” pursue the transfer of those functions which are “indirectly or not linked to warfighting” to the public sector. U.S. DEP'T OF DEFENSE, QUADRENNIAL DEFENSE REV. REP. 53–54 (Sept. 30, 2001) [hereinafter 2001 QDR]. The QDR calls for the DoD to more clearly identify “core” DoD functions and asserts that a “major change in the culture of the Department” is necessary to end the performance of many non-core functions by uniformed servicemembers. *Id.* It states, “any function that can be provided by the private sector is not a core government function.” *Id.*

<sup>6</sup> Unless noted, a person not a member of a uniformed armed force, also called a non-military member, is assumed to be a civilian for the purpose of this article. International law defines “civilians” in a variety of places, but just as often uses the term without definition or by exception. See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 4, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) [hereinafter GC IV]. Geneva Convention IV defines and discusses “protected persons” rather than “civilians” and does so by exclusion rather than inclusion. *Id.* Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950) [hereinafter GC I] discusses “persons who accompany the armed forces without actually being members thereof” in art. 13(5). It uses the term “civilian population” without a definition. *Id.*; see, e.g., Protocol I, *supra* note 4, arts. 43, 50 (defining “armed forces” in Article 43 and defining “civilian” by exception in Article 50). Persons who accompany the armed forces without being members thereof, such as civilian employees and most contractors, are civilians under the definition by exception since they are identified in Article 4A(4). GC III, *supra* note 3, art. 4A(4); see generally W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 75, 113 (1990) (discussing the legislative history of the definition of civilians).

<sup>7</sup> Colonel Steven J. Zamparelli, *Competitive Sourcing and Privatization: Contractors on the Battlefield, What Have We Signed Up For?*, A.F.J. LOG. 9, 10 (Fall 1999) (discussing the level of involvement non-military members have in today's military operations). See generally Major Lisa L. Turner & Major Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1 (2001) (defining the types of civilians who accompany the force and the roles they play in today's military operations).

<sup>8</sup> JOINT PUB. 3-61, *supra* note 2 (providing strategies for the use of the media in military operations).

<sup>9</sup> Protocol I, *supra* note 4, art. 79.

Article 51(3) of Protocol I.<sup>10</sup> Consequently, when embedded journalists are used as mere extensions of the military's information operations, the inappropriate use of their professional activities subjects them to a potential loss of protections and makes them a lawful target.

In order to support this contention, this paper is divided into three sections. Section II brings historical context to the use of journalism in armed conflicts in order to provide a framework for the evolution of military-press relations, which has culminated in the use of embedded journalism. Section III establishes the legal axis for conducting combat journalism under the laws of war, to specifically include the legal status and protections afforded journalists in international armed conflicts. The discussion will then turn on the interplay between what it means for a journalist to be "engaged in dangerous professional activities" and what types of circumstances could adversely affect their status as civilians under differing theories of Article 51(3)'s practical application.<sup>11</sup> Section IV provides recommended criteria to help determine what types of circumstances create a loss of Article 79 protections for embedded journalists. This section concludes that the U.S. use of embedded journalists has stripped war correspondents of their special civilian protective status when they are not "engaged in dangerous professional missions,"<sup>12</sup> and instead, embedded journalists are being used as instruments of warfare for the greater military mission.

## II. Historical Framework for Embedded Journalism

*The Pentagon officer who conceived and advanced the embedded journalist program should step forward and demand a fourth star for his epaulets. By prepping reporters in boot camps and then throwing them in harm's way with the invading force, the U.S. military has generated a bounty of positive coverage of the Iraq invasion, one that decades of spinning, bobbing, and weaving at rear-echelon briefings could never achieve.<sup>13</sup>*

The use of embedded journalism is inextricably linked to the war correspondent whose origins have been deeply rooted in military operations since the birth of journalism itself.<sup>14</sup> Understanding the role of today's war correspondent requires a historical perspective of their relationship with the military, their evolving roles, and the access and security strategies that they confront on the battlefield.<sup>15</sup> These concepts create the historical framework for the use of embedded journalism in today's combat operations.

### A. Military-Press Relations

*The first essential in military operations is that no information of value shall be given to the enemy. The first essential in newspaper work and broadcasting is wide-open publicity. It is your job and mine to try to reconcile those sometimes diverse considerations.<sup>16</sup>*

Ever since war correspondents took to the battlefield, a struggle has existed between their aim to broadcast the full story to the public and the military's goal to preserve the mission's operational security.<sup>17</sup> According to the RAND Corporation, a

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<sup>10</sup> *Id.* art. 51(3).

<sup>11</sup> Article 79 establishes the primary measures of protections specifically accorded journalists. *Id.* art. 79(1), (2).

<sup>12</sup> *Id.* art. 79(1).

<sup>13</sup> Jack Shafer, *The PR War*, SLATE, Mar. 25, 2003, available at <http://www.slate.com/id/2080699/>.

<sup>14</sup> Prior to the Mexican War, military commanders directly reported the events of battle in the form of longer written works, and resented the idea of civilian influence. See generally MITCHEL P. ROTH, HISTORICAL DICTIONARY OF WAR JOURNALISM preface (1997). Thucydides provided personal written accounts of the Peloponnesian War while serving as a military officer in command of the Greek fleet at Thasos (424 B.C.) where the Spartans met defeat. *Id.* As commanding general, Julius Caesar reported about the invasion of Britain in 55 B.C. *Id.*

<sup>15</sup> See generally CHRISTOPHER PAUL & JAMES J. KIM, REPORTERS ON THE BATTLEFIELD: THE EMBEDDED PRESS SYSTEM IN HISTORICAL CONTEXT (2004). *Reporters on the Battlefield* is the first comprehensive work that has attempted to systematically evaluate and understand the embedded press system based upon multiple research studies linked with historical analysis. ROTH, *supra* note 14, at preface.

<sup>16</sup> OFFICE OF THE SEC'Y OF DEFENSE, WASHINGTON D.C., FINAL REP. TO CONGRESS, CONDUCT OF THE PERSIAN GULF WAR 651 (Apr. 1992) [hereinafter PERSIAN GULF WAR REPORT] (quoting Dwight D. Eisenhower, 1944), available at <http://www.ndu.edu/library/epubs/cpgw.pdf>; see also PAUL & KIM, *supra* note 15, at 1. General Eisenhower's success in dealing with the competing goals of the military and media is evident by the well documented media reports forever encapsulated in a monument dedicated to him by war correspondents who reported the Normandy invasion events of 6 June 1944.

non-profit research organization in cooperation with the DoD, the mission, organizational attributes and goals of each institution are key components in understanding this relationship.<sup>18</sup> These components are also helpful in qualitatively evaluating the potential for future conflict or cooperation between these institutions.<sup>19</sup> However, analyzing these components has no context without a thorough reading of history.<sup>20</sup> Today's embedded journalist is a product of the military-press relations created from a common history of conflict and cooperation.

## B. Development of War Reporting

Aside from the ideological underpinnings of military-press relations, the development of war reporting has largely evolved due to changes in technology, public culture, and tactical considerations on the battlefield. The years between 1840 and 1945 represent the conceptual stages of organized journalism on the battlefield. The idea of an embedded journalist was wholly undeveloped and largely unregulated by the media and military. However, during the post-World War II era, more formal mechanisms for defining the war correspondent's role on the battlefield emerged from a variety of global conflicts. At the dawn of the twenty-first century, embedded journalism was born. Today, the use of the embedded journalist has been widely heralded as the future in combat reporting.<sup>21</sup>

### 1. The Early Modern War Correspondent

The modern professional war correspondent, that unarmed civilian who reported the war from the trenches on behalf of a press agency, did not officially arrive on the journalistic landscape until the 1840s.<sup>22</sup> Closely preceding the Mexican-American War (1846–1848), the invention of the telegraph, the penny printing press, and the rise in literacy helped to usher in the public's perennial appetite for war news.<sup>23</sup> For the first time, short, descriptive stories became common because events could be reported as they occurred.<sup>24</sup> These technological advances, coupled with the lack of government censorship,<sup>25</sup> fueled the public's demand for increased media coverage and the need for independent war correspondents.<sup>26</sup>

Ideologically, the real explosion of professional combat media coverage came during the U.S. Civil War (1861–1865), when correspondents were dispatched to the field on a larger scale to garner public support for the varying causes.<sup>27</sup>

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<sup>17</sup> Numerous scholars begin their discourse on press-military relations from the idea that both institutions are inherently different in their nature and goals. See, e.g., Michael D. Steger, *Slicing the Gordian Knot*, 287 U.S.F.L. REV. 957, 957–1007 (1994); Douglas Porch, *No Bad Stories*, 55 NAVAL WAR C. REV. 85 (2002); Neil Hickey, *Access Denied: Pentagon's War Reporting Rules Are Toughest Ever*, 40 COLUM. JOURNALISM REV. 26–31 (2002). Dr. Douglas Porch is a specialist in military history and professor of national security at the Naval Postgraduate School in Monterey, California.

<sup>18</sup> PAUL & KIM, *supra* note 15, at 7–34; *see infra*, App. A.

<sup>19</sup> PAUL & KIM, *supra* note 15, at 35.

<sup>20</sup> *Id.* at preface.

<sup>21</sup> Embedded journalism is the most preferred method of reporting on combat operations according to media research and top U.S. military leadership. *Id.* at xiii (quoting comments from multiple prominent war correspondents, *Assessing Media Coverage of the War in Iraq: Press Reports, Pentagon Rules, and Lessons for the Future*, A Brookings Iraq Series Briefing, Falk Auditorium, Washington, D.C. (June 17, 2003)); *see also* Interview by Tony Snow, *Fox News Sunday*, with General Tommy Franks, CENTCOM Commander, U.S. Army (Apr. 13, 2003) (transcript available at [http://www.foxnews.com/printer\\_friendly\\_story/0,3566,84055,00.html](http://www.foxnews.com/printer_friendly_story/0,3566,84055,00.html)). General Tommy Franks is a major supporter of the embedded journalism system. *Id.*

<sup>22</sup> William "Billy" Howard Russel of *The Times* of London, Edwin Lawrence Godkin of the *London Daily News*, and G.L. Gruneisen of the *Morning Post*, who reported during the Crimean War (1853–1855), are considered by historians to be the first modern independent war correspondents. See PHILLIP KNIGHTLEY, *THE FIRST CASUALTY: THE WAR CORRESPONDENT AS HERO AND MYTH-MAKER FROM THE CRIMEA TO KOSOVO* (2nd ed. 2000); ROTH, *supra* note 14, at preface.

<sup>23</sup> ROTH, *supra* note 14, at preface. On 24 May 1844, Samuel B. Morse electronically transmitted the first message via a telegraph from railway station in Baltimore, Maryland to the U.S. Supreme Court chamber in Washington, D.C. See generally *The Samuel F. B. Morse Papers* at the Library of Congress, 1793–1919, <http://lcweb2.loc.gov/ammem/sfbmhtml/sfbmhome.html> (last visited July 15, 2009).

<sup>24</sup> ROTH, *supra* note 14, at preface.

<sup>25</sup> Correspondents and sketch artists were allowed to provide both written and visual depictions of battles from the front lines without any government interference. STEPHEN L. VAUGHN, *ENCYCLOPEDIA OF AMERICAN JOURNALISM* 84 (2007).

<sup>26</sup> The Mexican-American War (1846–1848) also represents the first time U.S. reporters covered a foreign war. ROTH, *supra* note 14, at preface.

<sup>27</sup> During the U.S. Civil War (1861–1865), the Confederates relied heavily on telegrams and letters from servicemen to get their news, while at least 500 journalists covered the war for the Union in various capacities. *Id.* at 4. European press, particularly from Great Britain, tended to favor the Confederacy. *Id.* In fact, William Howard Russell, the British war correspondent of Boer War fame, was derided as "Bull Run Russell" for his criticism of the Union

However, unlike the Mexican-American War, media coverage was subject to “haphazard and arbitrary censorship” by a variety of techniques that “frequently depended upon the attitudes of individual generals and other officials” and less on issues of operational security.<sup>28</sup> Despite these imposed limitations, war correspondents played a significant role in thoroughly documenting the conflict.<sup>29</sup>

Reporters in the Indian Wars (1860–1890) were less censored than journalists in the Civil War, but the inaccessibility of technology in the remote prairie areas acted as a natural barrier to getting stories to press.<sup>30</sup> More important than the actual reporting though, was the change of the war correspondent’s role on the battlefield. Journalists were frequently required to become combatants and often participated in the full range of daily hardships experienced by Soldiers.<sup>31</sup>

During World War I (1914–1918), independent war correspondence regressed due to harsh censorship controls of American journalists at the federal, state, and local levels.<sup>32</sup> In one case, then-Major Douglas MacArthur, head of the War Department’s Bureau of Information, declared that the press should be subservient to the needs of the military in wartime.<sup>33</sup> These ideals culminated into the first known “mediated war.”<sup>34</sup> Governments controlled war correspondent reporting to gain support from their constituencies and to persuade their opponents.<sup>35</sup> This notion was exemplified in the creation of the first U.S. established “propaganda agency” which promoted pro-war materials to various media outlets.<sup>36</sup> At the ground level, war correspondents could not be accredited by the American Expeditionary Force unless they swore an allegiance to the United States.<sup>37</sup> This policy made war correspondents virtual members of the armed forces, promoting and supporting the military’s information operations.

Censorship continued to hamper war correspondent reporting during World War II (1939–1945).<sup>38</sup> However, censorship was not so readily used to support the national political agenda as much as to promote operational security.<sup>39</sup> As a result, journalists overwhelmingly cooperated in enforcing “voluntary” guidelines promulgated by the U.S. Office of Censorship established under the 1941 War Powers Act.<sup>40</sup> Every written report was subject to censorship, otherwise war correspondents were denied clearance to the war theater.<sup>41</sup> At the front, journalists joined press camps and moved and lived amongst the

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Army during the Battle of Bull Run, and was sent home to England by the Union. *Id.* Aside from public interest, war coverage was also considered by many to be the fashion of the day. *Id.*

<sup>28</sup> VAUGHN, *supra* note 25, at 84. Telegraph communication was subject to prior censorship, reporters were often barred from the field and newspapers were subject to closure for printing offensive matter. *Id.* In one instance, U.S. Secretary of War Edwin Stanton ordered the seizure of a Washington D.C. newspaper which violated censorship rules. *Id.* General Ambrose Burnside had the *Chicago Times* seized and closed for three days after it criticized him, President Abraham Lincoln, and other government officials. *Id.*

<sup>29</sup> ROTH, *supra* note 14, at 4–5.

<sup>30</sup> VAUGHN, *supra* note 25, at 85.

<sup>31</sup> In 1880, while waiting for the Sioux tribal leader Sitting Bull to surrender, a war correspondent was required to join a skirmish line to fight off the Indians. ROTH, *supra* note 14, at 7, 87. During the Indian Wars (1860–1890), reporters did not have the luxuries of ready access to towns, railroads and telegraphs as they did in the Civil War. *Id.* at 7. Instead, most journalists were required to live with the military units as they traveled to and from the battlespace. *Id.*

<sup>32</sup> Censorship of war correspondent reporting actually gained popularity with the initiation of the Boer War in South Africa (1899–1902). VAUGHN, *supra* note 25, at 85. This conflict virtually extinguished the independence of the war correspondent. *Id.* Censorship was also a similar barrier in the Russo-Japanese War (1904–1905). *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> A “mediated war” is where warfare essentially becomes conflicts and controversies between parties who indirectly exchange information and arguments via the mass media and war correspondents on the front lines in order to gain public support and persuade opponents. Hans Mathias Kepplinger et al., *Instrumental Actualization: A Theory of Mediated Conflicts*, 6 EUR. J. OF COMM., No. 3, at 263–90 (1991).

<sup>35</sup> *Id.*

<sup>36</sup> The U.S. Committee on Public Information (1917–1919), headed by George Creel distributed vast amounts of pro-war materials to newspapers and other media agencies, while also publicizing that freedom of expression could be limited in war emergencies. VAUGHN, *supra* note 25, at 85.

<sup>37</sup> *Id.* Reporters interesting in covering the war were required to take an oath of loyalty to the U.S. government and post a \$10,000 bond in order to obtain accreditation. *Id.* Many newspapers of the leftist persuasions were banned under the Espionage Act of 1917 and the Sedition Act of 1918. *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*; see also *Near v. State of Minnesota*, 283 U.S. 697 (1931) (banning forms of media censorship by government as violating the First Amendment’s right to liberty of press and speech).

<sup>40</sup> VAUGHN, *supra* note 25, at 85. The 1941 War Powers Act banned publishing material on subjects such as military plans, intelligence operations and new weapon systems. *Id.*

<sup>41</sup> *Id.*

troops.<sup>42</sup> They often accompanied units into battle, allowing the public to get a close and personal view of the war.<sup>43</sup> It was even common for war correspondents to wear the uniforms of officers.<sup>44</sup> By the war's conclusion, war correspondents had again become "the propaganda arm of [the] government" as in World War I, except this time they were more willing participants due to the patriotic fervor and belief that World War II was a war of national survival.<sup>45</sup>

## 2. Post-World War II Reporting: Access and Strategy Development

In post-World War II conflicts, the press and military "managed their interactions in a variety of ways, sometimes adhering closely to the tensions and conflicts of the past, and at other times actively seeking new ways of engagement."<sup>46</sup> At the outset of the Vietnam War (1960–1975), the U.S. military expanded the cooperative working relationship with the war correspondent that had been established in World War II and virtually eliminated censorship.<sup>47</sup> The journalist also had unprecedented access to the battlefield, "due largely to the growth of television as a popular mainstream medium for prime-time news."<sup>48</sup> War correspondents like Joe Galloway even embedded with Soldiers in battle.<sup>49</sup> The military's agenda was to use the media to garner public support for the war.<sup>50</sup> However, as the conflict prolonged and the "political consensus" viewed the U.S. military role in Vietnam as unfavorable, the "press-military relations soured."<sup>51</sup> In fact, these relations left a mutual legacy of "mistrust and skepticism" that spilled over into future U.S. military operations.<sup>52</sup>

The Vietnam experience led the U.S. military to maintain greater control of press access in times of military engagement due to mistrust of the media by many senior military leaders.<sup>53</sup> As a result, in Grenada (1983), war correspondents were not permitted to accompany the Marines during the invasion.<sup>54</sup> Instead, the U.S. military cited "operational security and the

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<sup>42</sup> Porch, *supra* note 17, at 88.

<sup>43</sup> There were 558 accredited print and radio correspondents were assigned to the Normandy Landing campaign but fewer than 30 journalists hit the beaches of Normandy, France with the troops on 6 June 1944. FREDERICK S. VOSS, REPORTING THE WAR: THE JOURNALISTIC COVERAGE OF WORLD WAR II, at 8 (1994). Correspondents filed over 700,000 words alone on D-Day, 6 June 1944. *Id.* Famed World War II correspondent, Ernie Pyle, captured the hearts of Americans as he told the personal stories of the men in battle, by following the troops to North Africa, Sicily, Italy, France and the Pacific. *See generally* JAMES TOBIN, ERNIE PYLE'S WAR: AMERICA'S EYEWITNESS TO WORLD WAR II (1997); ERNIE T. PYLE, BRAVE MEN (Henry Holt and Co., Inc., 1944) (1943).

<sup>44</sup> Porch, *supra* note 17, at 88.

<sup>45</sup> VAUGHN, *supra* note 25, at 86 (quoting a Canadian journalist for *Reuters* news agency who claimed that censorship was initially enforced, but then journalists self-imposed censorship as an act of patriotism).

<sup>46</sup> PAUL & KIM, *supra* note 15, at 36 (discussing the various legacies of combat journalism in the post World War II era).

<sup>47</sup> In contrast to World War II and other earlier conflicts, the U.S. military in Vietnam did not impose censorship techniques due to the type of combat operations. FRANK AUKOEFER & WILLIAM P. LAWRENCE, FREEDOM FORUM FIRST AMEND. CTR., AMERICA'S TEAM; THE ODD COUPLE: A REPORT ON THE RELATIONSHIP BETWEEN THE MEDIA AND THE MILITARY 43 (1995). In Vietnam, combat operations consisted of widespread small-unit actions, conducted mostly during daylight hours, as opposed to large scale combat missions. *Id.* Reporters were transported to the field via military transportation, often accompanied by public affairs personnel. *Id.* War correspondents were free to observe and report combat operations mainly because there was not a strong imperative for secrecy. *Id.* Consequently, news stories went out unimpeded by any security review. *Id.* Interestingly, it is arguable whether the strained relationship between the media and military has anything to do with censorship, as the relationship seemed better in World War II when censorship was heavily supported. Porch, *supra* note 17, at 85–86. Instead, some believe the absence of a U.S. victory in Vietnam accounts for this strained relationship. *Id.*

<sup>48</sup> PAUL & KIM, *supra* note 15, at 37.

<sup>49</sup> Beginning in early 1965, Joe Galloway served three tours in Vietnam as a war correspondent with *United Press International*. *See generally* LIEUTENANT GENERAL HAROLD G. MOORE & JOSEPH L. GALLOWAY, WE WERE SOLDIERS ONCE . . . AND YOUNG (1992). In November 1965, at Landing Zone X-ray in the Battle of Ira Drang Valley, Galloway embedded with the 1st Cavalry Division and rescued numerous wounded American Soldiers under heavy enemy fire. *Id.* Later in 1998, Galloway was awarded the Bronze Star with V device by the U.S. Army. *Id.* He was the only civilian awarded a medal of valor from the Vietnam War. *Id.*

<sup>50</sup> PAUL & KIM, *supra* note 15, at 37.

<sup>51</sup> *Id.* The media's coverage often differed drastically from the U.S. government administration's reports on war events, especially the body count. *Id.* Eventually, the press-military relations got worse after the 1968 Tet Offense, when reporters went from being skeptical to outright mistrusting the military. *Id.*

<sup>52</sup> *Id.* at 36, 38–39. While Vietnam era journalists distrusted the military, the military viewed the press as being subversive and unpatriotic. *Id.*

<sup>53</sup> Control of access meant keeping the media controlled during the opening days of an engagement and allowing the military to become the primary, if not the only, source of information during the time of war. Steger, *supra* note 17, at 987.

<sup>54</sup> PAUL & KIM, *supra* note 15, at 36, 38–39. *See generally* CHARLES C. MOSKOS, THE MEDIA AND THE MILITARY IN PEACE AND HUMANITARIAN OPERATIONS, CANTIGNY CONFERENCE SERIES (Chicago: McCormick Tribune Found., 2000) (suggesting that the U.S. press policy during the Grenada period might have been modeled by Great Britain's policy to have complete control over reporters during the 1982 Falklands War).

personal safety of the reporters” as reasons to prevent reporter access.<sup>55</sup> Moreover, planning for media involvement in combat operations was not deemed critical to the military mission.<sup>56</sup> These events led to the Sidle Commission recommending the creation of the DoD National Media Pool in 1985.<sup>57</sup> The pool was designed to contain a preselected group of reporters that could be activated in the event of late-breaking or secret operations.<sup>58</sup> However, the implementation of the press pool in the Panama invasion (1989) failed due to the lack of prior military coordination.<sup>59</sup> This failure led then Chairman of the Joint Chiefs of Staff, General Colin Powell to more acutely define the role of the war correspondent in military operations by directing that,

the media aspects of military operations are important . . . [and] media coverage and pool support must be planned simultaneously with operational plans and should address all aspects of operational activity, including direct combat, medical, prisoner of war, refugee, equipment repair, refueling and rearming, civic action, and stabilization activities. Public Affairs annexes should receive command attention when formulating and reviewing all such plans.<sup>60</sup>

Media experts believe this directive forever “changed the attitudes with the military and convinced commanders that public affairs planning was an important part of overall operational planning, not just the responsibility of public affairs officers.”<sup>61</sup> As a result, the Panama conflict spawned a new military movement to better integrate the media into military combat missions while still balancing operational security concerns.<sup>62</sup>

The First Gulf War (1990–1991) required a higher level of military-press cooperation to address the need for media integration into the combat mission. It was America’s first war where war correspondents could instantaneously broadcast their stories to the world.<sup>63</sup> The military had good intentions to increase media access, but operational secrecy still threatened media relations due to the mission.<sup>64</sup> In response, the military created an elaborate system of accreditation, press pools, and military-media escorts to be used until the conflict ceased.<sup>65</sup> While this system increased the war correspondent’s coverage of the war, censorship issues limited their reporting effectiveness.<sup>66</sup>

Censorship became an issue for two primary reasons during the First Gulf War. First, the pool system imposed blackout periods during key operational phases and limited access by requiring the review of all printed reports prior to press release.<sup>67</sup> Secondly, war correspondents became frustrated they could not report their stories alongside the military, causing some to

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<sup>55</sup> PAUL & KIM, *supra* note 15, at 39.

<sup>56</sup> Based upon the Vietnam experience, the prevailing view among commanders was that the news media should be handled only by assigned public affairs (PA) personnel, separate from the operational mission. AUKOFER & LAWRENCE, *supra* note 47, at 44–45. Consequently, in Grenada, commanders excluded PA from the operational aspects of the deployment process. *Id.*

<sup>57</sup> As a result of the Grenada debacle, the DoD appointed retired Major General Winant Sidle to review the military’s press policy after numerous news organizations accused the administration of violating their First Amendment Constitutional rights by not allowing media access to combat operations. PAUL & KIM, *supra* note 15, at 40. The Commission’s 1984 recommendations culminated in the creation of the DoD National Media Pool (DNMP). *Id.* at 40; *see also* AUKOFER & LAWRENCE, *supra* note 47, at 44 (explaining the practical effect of the Sidle Commission’s recommendations on Public Affairs).

<sup>58</sup> PAUL & KIM, *supra* note 15, at 40.

<sup>59</sup> *Id.*

<sup>60</sup> AUKOFER & LAWRENCE, *supra* note 47, at 44–45 (directing military commanders to think seriously about the coordination of media into the operational process).

<sup>61</sup> *Id.* at 45.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 11.

<sup>64</sup> The nature of the “left hook” surprise attack through southern Iraq into Kuwait with Coalition forces spread on a 300 mile front created a concern that media accessibility would cause an information leak. *Id.* at 9. Lack of press access also stemmed from Secretary Cheney’s belief that the press was irresponsible and had to be controlled. *See also* Steger, *supra* note 17, at 974.

<sup>65</sup> The military developed an ad hoc system of combat pools which the news organizations helped to set-up. Steger, *supra* note 17, at 973.

<sup>66</sup> The combination of security review and the use of the combat pool system worked together as a form of censorship to limit access. PAUL & KIM, *supra* note 15, at 42–43. Some journalists complained that the denial of access permitted under the combat pool system was actually worse than the censorship, because entire stories were never allowed to be told due to imposing military commanders in the field. AUKOFER & LAWRENCE, *supra* note 47, at 11, 17. For example, reporters could not tell the story that the famed battleship, U.S.S. *Missouri*, fired naval gunfire for the first time since World War II during Operation Desert Storm. *Id.*

<sup>67</sup> PAUL & KIM, *supra* note 15, at 42–43.

unilaterally venture off at their own peril.<sup>68</sup> After all, of the 1600 reporters approved to cover the war, only 186 accompanied combat units into action.<sup>69</sup> However, despite these limitations, journalistic output was extremely large compared to previous conflicts.<sup>70</sup> In fact, it was primarily due to a more media savvy military leadership that “some of the most extensive controls ever on information and press coverage” were implemented.<sup>71</sup> This mindset permitted the DoD to later adopt the nine *Principles for News Media Coverage of DoD Operations*.<sup>72</sup> As a guide for all future coverage of U.S. military engagements, these DoD principles were critical to the growth of embedded combat journalism, by replacing the pool system as the standard means of combat coverage with “open and independent reporting.”<sup>73</sup>

### 3. Dawn of the Modern Embedded Press System

Journalists’ objections to the pool system revived the embedded media approach first used in World War II and Vietnam, although now far more formal and planned than in the past.<sup>74</sup> The Bosnia War (1992–1995) first introduced the term “embedded press” to describe a type of press procedures.<sup>75</sup> The procedures involved a reporter “being assigned to a unit, deploying with it, and living with it throughout a lengthy period of operations.”<sup>76</sup> Furthermore, the concept of security review became less of a formal censorship mechanism imposed by higher military.<sup>77</sup> Instead, each servicemember acted as a spokesperson for the military.<sup>78</sup> At least as an informal mechanism, the military eliminated field censorship by adopting “security at the source” as its operational security strategy.<sup>79</sup> The so-called “Ricks Rule” also evolved amongst the military ranks during the Bosnia War, whereby all conversations with war correspondents were considered off the record unless specified.<sup>80</sup> Although this rule was not recognized by the media, the battlefield accessibility afforded to journalists by the embedded process encouraged them to respect Soldiers’ privacy as well as operational security concerns.<sup>81</sup> Overall, the new

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<sup>68</sup> *Id.* CBS reporter Bob Simon and several camera crew members were captured by Iraqi soldiers when they ventured outside the pool system. *Id.* CNN reporters like Peter Arnett actually reported unilaterally from Baghdad during the first wave of bombing at their own peril. *Id.*

<sup>69</sup> *Id.* at 43. The establishment of the combat pool system arose out of the large amounts of war correspondents that could not be accommodated in combat units during Operation Desert Storm. See also AUKOFER & LAWRENCE, *supra* note 47, at 45.

<sup>70</sup> During the air and ground war, 1352 pool reports were filed with photographers providing as much as 180 rolls of film per day. AUKOFER & LAWRENCE, *supra* note 47, at 10–11. Nevertheless, much of this information could not be released due to the ineffective pool system which produced delayed reporting and stories of dubious quality. *Id.*

<sup>71</sup> PAUL & KIM, *supra* note 15, at 43–44. General Norman Schwarzkopf did not want to repeat the mistakes the military made in dealing with the media in Grenada. *Id.* Instead, he was a strong proponent of conducting media briefings in order to gain the public’s support for the war effort. *Id.*

<sup>72</sup> *Id.* at 45–46; U.S. DEP’T OF DEFENSE, DIR. 5122.05, ASSISTANT SECRETARY OF DEFENSE FOR PUBLIC AFFAIRS (ASD(PA)) para. E3.1 (reissued 5 Sept. 2008) [hereinafter DoDD 5122.05] (rescinding DoDD 5122.5, 27 Sept. 2000); see *infra* App. B. The original DoD principles were introduced in 1992 and represented the first formalized adoption of written standards for media integration into combat operations created through direct military-media cooperation. DoDD 5122.5, *supra*. Intervention actions in Somalia (1992) and Haiti (1994) have shown that the standard media/military principles are less applicable during certain lower intensity operations as compared to major military operations. Porch, *supra* note 17, at 99. In humanitarian operations, unlike wartime, national survival is not at stake and the main effort is political rather than military. *Id.* Thus, censorship is seldom an issue, operational security is not as important, and the military has less control to limit media access. *Id.* These factors create different media/military relations dynamics. *Id.*

<sup>73</sup> The first principle replaced the pool system with the new open and independent reporting system. AUKOFER & LAWRENCE, *supra* note 47, at 20–21. A tenth principle was proposed requiring military review of news for operational security reasons, but neither the media nor the military could agree. *Id.* However, given today’s advances in technology, such as satellite telephones, many military leaders now agree that security review or censorship is a thing of the past. *Id.* Veteran reporter Walter Kronkite claimed that the Pentagon’s pool system severely restricted reporters and photographers from accompanying troops into action as had been permitted in all previous wars. Porch, *supra* note 17, at 96–97. Being that pools were not popular with the media, the new standard of open and independent reporting was welcomed with open arms. *Id.*

<sup>74</sup> PAUL & KIM, *supra* note 15, at 48; Porch, *supra* note 17, at 97.

<sup>75</sup> PAUL & KIM, *supra* note 15, at 48. For Task Force Eagle, thirty-three reporters were embedded in fifteen different units for approximately one month. *Id.* Some reporters were embedded in Germany with units prior to deployment. *Id.*; see also Moskos, *supra* note 54 (describing in detail the embedding of reporters for Task Force Eagle and their deployment schedules).

<sup>76</sup> PAUL & KIM, *supra* note 15, at 48; Porch, *supra* note 17, at 97.

<sup>77</sup> Porch, *supra* note 17, at 97.

<sup>78</sup> *Id.*

<sup>79</sup> Security at the source is operational strategy whereby military personnel agree to be circumspect in deciding what information to release. PAUL & KIM, *supra* note 15, at xvi, 70.

<sup>80</sup> Reporter Tom Ricks published a story concerning a U.S. battalion commander who told his African-American troops that the Croats were racists. Porch, *supra* note 17, at 98. In response, many military members feared that everything they said was suitable for reporting. *Id.* Although the “Ricks rule” is not formally recognized by the media as being binding, journalists commonly abide by this rule in practice. *Id.*

<sup>81</sup> Reporters also followed rules that prohibited reporting on intelligence collection, special operations, and casualties. *Id.* at 97.

approaches adopted by the military and the media in dealing with operational security concerns in the Bosnia War, redefined the older embedded reporting concept into a new, viable means of more formalized combat press procedures.<sup>82</sup>

The Kosovo Conflict (1998–1999) marked a new era in the U.S. military’s view of the interrelationship between information operations and embedded journalism.<sup>83</sup> Due to the nature of the air war in Kosovo, the embedded press system effectively allowed for less media access than the ground war in Bosnia.<sup>84</sup> Consequently, war correspondents felt they could not cover the ethnic cleansing story and opted to cover the war through the use of the enemy central command.<sup>85</sup> Slobodan Milosevic, then President of the Federal Republic of Yugoslavia, welcomed war correspondents as a means of promoting enemy propaganda against the NATO campaign.<sup>86</sup> When NATO failed to anticipate Milosevic’s propaganda ploys, it was put on the defensive in the battle of world opinion by a weaker military opponent.<sup>87</sup> These circumstances created a view among some military leaders that “public information is a battle space . . . that must be contested and controlled like any other.”<sup>88</sup> In fact, NATO leadership acknowledged this necessity when they targeted a Serbian television station with the intent to eliminate the “pro-government propaganda apparatus.”<sup>89</sup> Military leaders recognized that combat journalists could be used as “force multipliers” on the battlefield—developing public opinion and enhancing military morale.<sup>90</sup> A renowned military historian summed up the contribution of information operations during combat when stating that, “the view emerged [from Kosovo] that the will of a population to prosecute a conflict can be undermined by media-generated images, and that therefore, the media strategy must be an integral part of a campaign plan.”<sup>91</sup>

The terrorist attacks of 11 September 2001 thrust the U.S. military into a war against non-state actors (al Qaeda) and the regime (Taliban) that harbored them.<sup>92</sup> Interestingly, the Afghanistan War (2001–present) did not build upon the momentum

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<sup>82</sup> The Bosnia War (1992–1995) was the first military engagement to use the modern embedded press system, although on a small scale. PAUL & KIM, *supra* note 15, at 48, 58.

<sup>83</sup> Porch, *supra* note 17, at 101.

<sup>84</sup> Journalists embedded with air units during Operation Allied Force did not have the same type of access as that of ground units in Bosnia because few of the effects of high-level bombing could be witnessed from the air. PAUL & KIM, *supra* note 15, at 48–49; *see also* Porch, *supra* note 17, at 100–01 (providing the different options available to journalists in reporting the air war campaign).

<sup>85</sup> PAUL & KIM, *supra* note 15, at 49.

<sup>86</sup> The press was provided the incentive to report Serb and Russian accounts of an accidental bombing of refugees by NATO near Djakovica in April 1999, when spokespersons from NATO, the Pentagon, and the Supreme Allied Commander contradicted each other concerning the event. Porch, *supra* note 17, at 101. As a result, collateral damage then became the premier media story rather than ethnic cleansing. *Id.*; *see also* PAUL & KIM, *supra* note 15, at 49 (describing Milosevic’s pursuits to give media access to results of the allied bombing campaign).

<sup>87</sup> NATO’s lack of media specialists, unstaffed press offices, and lack of media coordination in integrating public relations/information campaign put it at a significant disadvantage from a military information operations standpoint. Porch, *supra* note 17, at 101. In addition to combating the propaganda problem, NATO grew increasingly frustrated with its inability to control press access to the battlefield due to new technology considerations. PAUL & KIM, *supra* note 15, at 50. Outright denial of access no longer worked when war correspondent’s filed directly from the field via the internet, cell phones, and remote-area network data systems sending video signals. Porch, *supra* note 17, at 103.

<sup>88</sup> Porch, *supra* note 17, at 101 (quoting Colonel Jack Ivy, Deputy Director of U.S. Air Force Public Affairs Center for Excellence, Maxwell Air Force Base, Ala.); *see infra* note 281.

<sup>89</sup> On 23 April 1999, NATO launched a cruise missile specifically targeting the headquarters of the Radio Television Serbia (RTS) broadcast station in central Belgrade which contained more than 120 civilians at the time. Richard J. Butler, *Modern War, Modern Law, and Army Doctrine: Are We in Step for the 21st Century*, 32 PARAMETERS No. 1, Spring 2002 (U.S. Army War College Quarterly), available at <http://www.carlisle.army.mil/USAWC/Parameters/02spring/butler.htm> (citing the UN, ITCY, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 8 June 2000). The bombing killed sixteen persons and injured another sixteen persons, all civilians. *Id.* In response, then British Prime Minister Tony Blair stated that NATO’s justification for targeting RTS was because “the media is the apparatus that keeps Slobodan Milosevic in power and we are entirely justified as NATO allies in damaging and taking on those targets.” *Id.* These events sparked intense international media criticism for specifically targeting the media. *Id.* NATO also argued that RTS was a government owned and controlled facility would not release intelligence documents that allegedly supported that the broadcast station was a legal target. *Id.* The UN Final Report regarding this incident claimed that NATO intentionally bombed RTS. *Id.*; *see also* Kydo News Int’l, Inc., *Thai Journalists Protect NATO Bombing of Serb TV*, ASIAN POL. NEWS, May 17, 1999, available at <http://findarticles.com> (providing a detailed account of the RTS bombing and summation of the UN Final Report).

<sup>90</sup> AUKOFER & LAWRENCE, *supra* note 47, at 4, 12. United States Marine General Walt Boomer was adept at using the media to enhance the military’s image and increase unit and family morale. *Id.* In fact, some critics believe that the Marines fared better in receiving positive combat credit than the U.S. Army due to General Boomer’s actions. *Id.*

<sup>91</sup> Porch, *supra* note 17, at 101. Porch claims that technology considerations thwarted the military’s ability to control press information disclosure where it deemed appropriate. *Id.*

<sup>92</sup> The Afghanistan War began on 7 October 2001 as the United States and United Kingdom launched Operation Enduring Freedom (OEF) in response to the 11 September 2001 attacks. PAUL & KIM, *supra* note 15, at 50. The purpose of the invasion was to capture Osama bin Laden, destroy the al-Qaeda terrorist group, and remove the Taliban regime. *Id.* The U.S. Bush Doctrine stated that it would not distinguish between al-Qaeda and nations that harbored them. *Id.*

created by the modern embedded system used in Kosovo.<sup>93</sup> Instead, the nature of the military operation called for a more restrictive press policy.<sup>94</sup> Despite stifling media access, journalists complied with these policies because of the severe national security issues posed by the U.S. terrorist attacks.<sup>95</sup>

In Afghanistan, restrictive press policies made it difficult for the military to balance operational security concerns with the need to combat the “steady purveyor[s]” of enemy propaganda as it had in Kosovo.<sup>96</sup> The popular Arab satellite television station al-Jazeera was destroyed in Kabul, Afghanistan with precision guided munitions<sup>97</sup> based upon intelligence reports that al-Jazeera routinely transmitted “calls-to-arms” videos featuring Osama bin-Laden and Saddam Hussein.<sup>98</sup> At DoD news conferences, U.S. officials denied that the media was specifically targeted.<sup>99</sup> However, Pentagon advisor Frank Gaffney, Jr. suggested the media was intentionally targeted by stating that, “It would be no more sensible for us to construe the masquerading of enemy propaganda, the communication and amplification of its call to *jihad* and the legitimacy that attends transmission of such messages . . . than it would be for us to regard bin Laden’s messages, or Saddam’s, as mere ‘news.’”<sup>100</sup> Some prominent DoD leaders then established the belief that “the enemy media [should] be taken down” when it is used as “instruments of war” against the allies.<sup>101</sup> While the Afghanistan War did not directly contribute to the improvement of the embedded system per se, it did provide a new framework for understanding military information operations and the role combat journalists would later play in the Iraq War (2003–present).

The invasion of Iraq coincided with what many journalists have called the “triumph of the embedded process.”<sup>102</sup> At the outset of the Iraq War, DoD called for a massive deployment of reporters to embed with troops, while imposing few constraints.<sup>103</sup> This event culminated in the first broad implementation of the modern embedded press system in history, allowing reporters unprecedented access to the battlefield.<sup>104</sup> Several key factors encouraged the military to take this approach: (1) the demand for more access to combat coverage, (2) the impracticability of large-scale censorship due to

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<sup>93</sup> *Id.*

<sup>94</sup> The ground war was difficult to cover due to the heavy usage of special operations forces which conducted missions covertly by using classified equipment and techniques. *Id.* at 50–51. Even the launch base for numerous special operations units was inaccessible to war reporters. *Id.*

<sup>95</sup> Press response to the restrictive media access policy is more akin to their cooperation during World War II where national survival was at stake, as compared to restrictions imposed in the Gulf War and the Kosovo War which received significant protest by the media. *Id.* at 51.

<sup>96</sup> Frank Gaffney, Jr., *Take Out al Jazeera*, FOX NEWS, Sept. 29, 2003, available at <http://www.foxnews.com/story/0,2933,98621,00.html>.

<sup>97</sup> On 13 November 2001, the United States dropped a 500 pound bomb on the al-Jazeera TV station located in the heart of Kabul during the invasion. Steve James, *Why the US Bombed al-Jazeera's TV Station in Kabul*, WORLD SOCIALIST WEB SITE, Nov. 21, 2001, <http://www.wsws.org/articles/2001/nov2001/jaz-n21.shtml>. The blast also caused damage to nearby BBC and Associated Press offices with no casualties. *Id.* Other news agencies, such as BBC World, vocalized their criticism for targeting news organizations during the Newsworld Conference of media executives held in Barcelona. *Id.* During the initial invasion, al-Jazeera had almost exclusive media access to the Taliban-held territory and the Islamic-militia itself. *Al-Jazeera Kabul Offices Hit in US Raid*, BBC News, Nov. 13, 2001, available at [http://news.bbc.co.uk/2/hi/south\\_asia/1653887.stm](http://news.bbc.co.uk/2/hi/south_asia/1653887.stm). Western governments claimed this news agency was being used to pass on coded messages to al-Qaeda supporters around the world. *Id.*

<sup>98</sup> Gaffney, *supra* note 96.

<sup>99</sup> James, *supra* note 97.

<sup>100</sup> Gaffney, *supra* note 96. Mr. Gaffney held senior DoD positions under President Reagan’s administration and was the President of the Center for Security Policy. Compare *id.*, with *Also Why NATO Bombed Serb TV*, Serbian News Network, <http://www.antic.org/Weblog/2005/12/why-nato-bombed-serb-tv.html> (citing that DoD provided conflicting reasons as to why it bombed the Kabul al-Jazeera station, to include it was an accident and it was a known al-Qaeda facility).

<sup>101</sup> Gaffney, *supra* note 96.

<sup>102</sup> PAUL & KIM, *supra* note 15, at 51; see also Jack Shafer, *Embeds and Unilaterals*, SLATE, May 1, 2003, available at <http://slate.msn.com/id/20824122> (quoting war correspondent’s who positively viewed the embedded system). Operation Iraqi Freedom (OIF) commenced on 20 March 2003 with the invasion of Iraq by U.S. and British forces.

<sup>103</sup> The formal system of embedding ended shortly after President George W. Bush declared an end to major combat operations in Iraq on 1 May 2003. PAUL & KIM, *supra* note 15, at 52. During the six week period of major combat operations, 400 journalists embedded with the U.S. Army, eighteen with the U.S. Air Force, 150 with the U.S. Marines, and 141 with the U.S. Navy. *Id.* Nearly 100 of the war correspondents were foreign reporters including a few al-Jazeera reporters (although they were attached to rear units that never left Kuwait). *Id.* The British embedded 128 journalists. *Id.* The total number of reporters (including embedded journalists) tolled 2200 and included 1445 reporters operating unilaterally. *Id.* Following 1 May 2003, many embedded reporters left their units to return to traditional reporting techniques such as unilateral reporting. *Id.* But see Shafer, *supra* note 102 (claiming that the embedded system effectively created a credentialing system among reporters where embedded reporters would get all the stories, but the military treated unilateral reporters as if they had no right to the battlefield).

<sup>104</sup> PAUL & KIM, *supra* note 15, at 51. Some commanders allowed embedded journalists access to war plans and other essential, but unclassified information. Colonel Franklin Childress, Operation Iraqi Freedom Media Embedding: Wave of the Future or Flash in the Pan 13 (Mar. 18, 2005) (unpublished manuscript, on file with the U.S. Army War College). Rick Atkinson, *Washington Post*, and Jim Dwyer, *New York Times*, had access to war plans by Major General Petraeus when he was the 101st Division commander. *Id.* (citing ALICIA C. SHEPARD, NARROWING THE GAP: MILITARY, MEDIA AND THE IRAQ WAR 32 (2004)).

technology considerations, (3) a better understanding by DoD of how media coverage supported its own military objectives, and (4) public expectations.<sup>105</sup> Of these factors, DoD's use of the media to support operational objectives was fundamental to changing the war correspondent's role on the battlefield.

In early 2001, the Assistant Secretary of Defense for Public Affairs and numerous press personnel assembled to create the ground rules for the embedded press system, culminating in the Coalition Forces Land Component Command Ground Rules Agreement.<sup>106</sup> The DoD reserved the right to select which reporters received the "choicest embed slots."<sup>107</sup> War correspondents were requested to embed with their assigned unit at the unit's home station prior to arriving in Iraq in order to facilitate the military integration process.<sup>108</sup> Upon assignment, they would remain with their unit for the duration of combat operations.<sup>109</sup> This process was designed to provide the highest level of war correspondent coverage without sacrificing operational security.<sup>110</sup>

Proper integration of this plan required that war correspondents receive the necessary tools to be successful in combat conditions. Journalists traveling with combat units were sent to "boot camps" designed to familiarize war correspondents with operating safely on the battlefield.<sup>111</sup> In theater, journalists were required to have the same equipment available to military personnel.<sup>112</sup> The training and equipment helped war correspondents cope with the austere conditions encountered during combat—from the initial invasion of Iraq and the many firefights that ensued, to the fall of Baghdad.<sup>113</sup>

Training and equipping journalists, however, was not the only ingredient for successful implementation of the embedded system. Early in the embedding planning process, DoD recognized its need to improve the communication between the public affairs system and the press.<sup>114</sup> The PAOs were directed to act as liaisons to war correspondents without interfering with reporting activities, while ensuring that commanders embraced the embedding concept and followed "security at the

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<sup>105</sup> PAUL & KIM, *supra* note 15, at 52. International News Safety Institute (INSI) and the Military Reporters and Editors (MRE) group demanded more accessibility to combat coverage. *Id.* Advanced communications and information technology made large-scale censorship impractical. *Id.* The general public's demand for news coverage of the Iraq War was partly attributable to the sheer scale of the war itself. *Id.*

<sup>106</sup> *Id.* at 53. Victoria Clarke, the ASD(PA), has been widely regarded as one of the primary architects of the modern embedded press system. *Id.* at 52–53. The agreement she employed allowed embedded journalists to consult unit commanders prior to releasing information; have free access to military personnel at all levels; report general information about troop strength, casualties, and captured enemy reports; report the information and location of military targets and objectives previously under attack; and report names and hometowns of servicemembers upon their consent. *Id.* In return, reporters could not: carry weapons, use private transportation, break-away from the unit for outside stories, take photos of defense installations and prisoners of war, use casualty name information prior to contacting the next-of-kin, or provide details of future operations. *Id.* There was no provision prohibiting reporters from wearing military uniforms during OIF. In fact most reporters were provided kevlar helmets and protective vests. *Id.* The DoD's Nine Principles of Combat Coverage would also be applicable to reporters in OIF. DoDD 5122.5, *supra* note 72.

<sup>107</sup> PAUL & KIM, *supra* note 15, at 53.

<sup>108</sup> This plan worked with mixed results and the bulk of the embedded media did not embed until they arrived in Kuwait, particularly in the case of the Third Infantry Division (3ID) and the Marine Expeditionary Force (IMEF). Childress, *supra* note 104, at 7.

<sup>109</sup> War correspondents that left their units prematurely were not allowed to return to the unit in combat. *Id.* at 3, 11.

<sup>110</sup> Security leaks during the major combat operation phases of OIF were not as much a problem as once feared by military leadership. PAUL & KIM, *supra* note 15, at 53, 56. In fact, fewer than six reporters were removed for committing security violations, and most of those reporters were reporting unilaterally, not as part of the embedded process. *Id.* Probably the most popular "disembedding" incident involved Fox News reporter Geraldo Rivera who drew a map in the sand of the 101st Airborne Division's location during combat. *Id.*

<sup>111</sup> *Id.* at 53. United States Army drill sergeants provided war correspondents basic combat survival skills at Quantico, Virginia and Fort Benning, Georgia. *Id.* It is estimated that over 300 journalists participated in the DoD initiated training. John Burnett, *Combat School for Journalists*, NPR, Jan. 15, 2003 available at <http://www.npr.org>. War correspondent's were taught combat skills on how to: provide immediate medical attention to wounded U.S. soldiers until medics arrived, operate on military helicopters, detect land mines, survive a chemical weapons attack, conduct land navigation, and low crawl. *Id.*; see also *UN to Fund Combat Zone Training for PA Journalists*, ISRAEL NAT'L NEWS, Nov. 2007, available at <http://findarticles.com> (explaining that UNESCO funded a hostile environment reporting course for Arab journalists, whom also received body armor).

<sup>112</sup> For example, war correspondents received NBC equipment to combat the acute threat of chemical and biological weapons. Childress, *supra* note 104, at 6.

<sup>113</sup> According to Colonel Gary Hovatter, Chief of the Army Public Affairs Center, approximately fifty or sixty journalists had "front row seats for combat." *Id.* at 11. During combat many war correspondents reported their stories via military means because they were prohibited from using the popular Thuraya satellite phones specifically designed to work in the Middle East. *Id.* at 8–9. These phones also had global positioning systems which posed a threat to operational security. *Id.* Nevertheless, there were inconsistent interpretations of the ban on these phones by the different military services. *Id.* The Army allowed the media to keep their phones in some instances while the Marines confiscated them. *Id.*

<sup>114</sup> PAUL & KIM *supra* note 15, at 53. On 27 January 2003 each of the military branches provided individual augmentees from their respective PAO to form the Joint Information Bureaus (JIB) to be located in Kuwait, Bahrain, Qatar and Cyprus. Childress, *supra* note 104, at 1. The JIB was under the leadership of Jim Wilkerson, Public Affairs Special Assistant to General Franks. *Id.* The Kuwait JIB executed the largest share of the DoD's Media Embedding Program and later became known as the Coalition Press Information Center (CPIC), working with the Coalition Land Forces Command (CFLCC) at Camp Doha, Kuwait. *Id.* at 2.

source” as their guiding operational security principle.<sup>115</sup> The responsibility of the PAO was also extended to solving the logistical needs of embedded journalists on the battlefield<sup>116</sup> to include their transportation,<sup>117</sup> food provisions, and shelter. Overall, the proper use of training, equipment, and communication were all elements deliberately designed to be integrated with modern maneuver warfare capabilities to make the embedded system successful.<sup>118</sup>

Focused on winning “the war of words and images,” DoD had multiple operational objectives for using the embedded press system.<sup>119</sup> First, embedded reporting would better inform the public and grow coalition support by disseminating accurate and timely information.<sup>120</sup> Second, accurate press information would “counter adversary propaganda and erroneous information in the adversary’s press.”<sup>121</sup> This strategy hinged upon having an objective war correspondent both observing and reporting, in real time, instead of relying on enemy news agencies or the Pentagon for information releases.<sup>122</sup> Third, the embedded media would provide a form of control to prevent the dissemination of inaccurate information as a result of the command’s failure to communicate.<sup>123</sup> Finally, the Operation Iraqi Freedom embedded press system would significantly contribute to the Public Affairs command strategy: “to help defeat adversary efforts to diminish national will, degrade morale, and turn world opinion against friendly operations.”<sup>124</sup> At the end of major combat operations,<sup>125</sup> DoD’s operational objectives were successfully met and the embedded system was touted as the model for future large-scale combat operations.<sup>126</sup>

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<sup>115</sup> JOINT PUB. 3-61, *supra* note 2, at III-12, III-13; The rule that PAOs will act as liaisons, but should not interfere with the reporting process is a tenant of the nine DoD Principles for News Media Coverage of DoD Operations. DoDD 5122.5, *supra* note 72, at E.3.6.

<sup>116</sup> Childress, *supra* note 104, at 2–11.

<sup>117</sup> The prohibition of private vehicle use was a heated issue between the military and the press. *Id.* at 2. The military opposed the media having their own vehicles for reasons of control, logistics (provision of fuel and maintenance) and safety (lack of armored vehicles for protection). *Id.* at 2–4. However, some units (3ID and the IMEF) ignored this DoD/CFLCC policy and allowed them to have their own vehicles. *Id.* at 4 (providing examples where reporter David Bloom cruised the battlefield in his “Bloom Mobile” and Walt Rodgers traveled in his own vehicle to report images from the initial assault on Baghdad).

<sup>118</sup> Current operations require U.S. armed forces to fight a closely coordinated sea-air-land battle employing high-speed maneuver warfare. AUKOFER & LAWRENCE, *supra* note 47, at 45–46. The only way to have effective combat coverage is to position journalists within the units themselves, as opposed to having unilateral reporting where journalists try to cover battles on their own without direct military assistance. *Id.*

<sup>119</sup> JOINT PUB. 3-61, *supra* note 2, at I-2 to I-8; *see also* Johanna Neuman, *Pentagon Plans to Deploy Journalists in Iraq*, L.A. TIMES, Dec. 4, 2002, available at <http://articles.latimes.com/2002/dec/04/world/fg-embed4> (winning the information war was of paramount concern to U.S. military strategists).

<sup>120</sup> PAUL & KIM, *supra* note 15, at 77–108 (providing data that the media had the highest public ratings for its combat coverage of any modern war); Neuman, *supra* note 119; JOINT PUB. 3-61, *supra* note 2, at I-2.

<sup>121</sup> PAUL & KIM, *supra* note 15, at 52; Neuman, *supra* note 119; JOINT PUB. 3-61, *supra* note 2, at I-2.

<sup>122</sup> The U.S. military recognized early on that properly employing the embedded system would prevent the enemy from gaining the upper hand in the information war as they had in Kosovo and Afghanistan, where reporters who were denied access went to the enemy for news coverage. PAUL & KIM, *supra* note 15, at 52 (quoting Ken Dilanian, *Seeking the Inside Story in an Iraq War*, PHILADELPHIA INQUIRER, Mar. 12, 2003). In Iraq, this concept paid dividends on multiple occasions when U.S. forces thwarted the Iraqi Minister of Information’s spread of propaganda. *Id.* at 56–57. The Iraqi Minister of Information used embedded media in the invasion of Umm Qasr to spread false claims that U.S. forces were bogged down by Iraqi resistance. *Id.* However, U.S. embedded journalists, reporting with live coverage, exposed this claim as propaganda when, in reality, the Marines were advancing quickly through the area. *Id.*; *see also* JOINT PUB. 3-61, *supra* note 2, at I-2 (recognizing the interplay between modern military operations and advances in communication technology that creates the growing need for real-time information, and thus, higher level media cooperation).

<sup>123</sup> Reporters could observe events first hand as opposed to relying upon “canned” information provided from official military sources. JOINT PUB. 3-61, *supra* note 2, at I-2.

<sup>124</sup> *Id.* at I-3 to I-4. This strategy was intended to “scare the enemy into submission.” PAUL & KIM, *supra* note 15, at 54; JOINT PUB. 3-61, *supra* note 2, at I-4, I-8 (suggesting that credible information used to undermine enemy propaganda can potentially cause dissent within adversary ranks). National security scholars recognized that the only real military advantage Saddam Hussein’s regime possessed was its ability to wage an information war. Neuman, *supra* note 106 (quoting Jon B. Alterman, a scholar at the Center for Strategic and International Studies in Washington and Captain T. McCreary, public affairs advisor to U.S. Joint Chiefs of Staff Chairman Richard B. Myers).

<sup>125</sup> *See supra* note 103.

<sup>126</sup> PAUL & KIM, *supra* note 15, at 2 (quoting ASD(PA) Victoria Clarke, regarding the success of the embedded press system in OIF); *see also* Childress, *supra* note 104, at 1, 14 (discussing that OIF is widely recognized as one of the most successful ventures between the military and the media in history). This success was attributable to the military’s willingness to integrate the embedded concept from the highest strategic level to the lowest unit on the ground. PAUL & KIM, *supra* note 15, at 52–53; *cf. id.* at 48–51 (suggesting that smaller scale conflicts are less suited to incorporating media where there are many special operations or air-sea engagements involved).

### C. Historical Analysis of Strategies for Military-Press Organization

The historical framework provides the background as to how the modern embedded journalism system evolved.<sup>127</sup> However, understanding the role war correspondents will play on the battlefield in the context of any future embedded system<sup>128</sup> must also be evaluated within the context of the information access and operational security strategies employed in any given conflict.<sup>129</sup> Each type of conflict brings new, unique technology considerations, public informational demands, and combat mission requirements and capabilities which impact the quality of the press system to meet the competing goals of both the military and press.<sup>130</sup> It is also evident that “the views and actions of individuals in the military at both the highest and lowest levels of command can have important effects on the implementation or outcomes of policies governing press-military relations.”<sup>131</sup>

While there are pure forms of press information access<sup>132</sup> and operational security strategies,<sup>133</sup> the future press system will likely be a hybrid based upon the failures and successes of past military operations. For example, the embedded system is particularly well suited for larger scale, ground combat type operations, but it may not be suitable for every combat mission.<sup>134</sup> Thus, analyzing the viability of the embedded system for use in future combat operations requires not only a historical narrative approach, but a systematic and quantitative approach to evaluating wartime military-press relations.<sup>135</sup>

### III. Legal Framework for Journalists in Combat

Understanding the implications of using the embedded press system in combat operations requires a discussion on the legal status and protections bestowed upon journalists working in the combat theater. If embedded journalism is to be viable in today’s military operations, it is critical to determine how a journalist can lose their protective status and become military targets under the laws of war.

#### A. Journalist Defined

Paramount to any discussion on combat journalism, is defining what constitutes a journalist according to the law of armed conflict. It is critical to distinguish between war correspondents and freelance journalists as they incur different protections under the Geneva Conventions.<sup>136</sup> At the most practical level, the civilian media consists of members of the profession of

<sup>127</sup> See *infra*, App. C; PAUL & KIM, *supra* note 15, at 73.

<sup>128</sup> The author does not espouse that the embedded press system represents the future press system to be used for every type of combat mission, but rather that the particular circumstances and characteristics surrounding this type of press system may create legal implications under the laws of war when employed.

<sup>129</sup> PAUL & KIM, *supra* note 15, at 63–76.

<sup>130</sup> *Id.* at 26–27 (discussing the competing interest of the military to control access of information to preserve operational security versus the press’ objective of ensuring the public is provided a complete, unfettered perspective of the military mission at hand).

<sup>131</sup> *Id.* at 4.

<sup>132</sup> Denial of access, press pools, embedded journalism, and unilateral journalism are the four generally recognized forms of press information types. *Id.* at 65–68. Depending upon which type is used, three key factors vary: (1) the number of reporters to be provided access, (2) the sources of information made available to reporters, and (3) the level of safety afforded reporters in the field. *Id.* Under denial of access, information is not available to the public or press, but only to official sources. *Id.* The press pool system is a more open system of access where a small group of reporters agree to pool their resources with each other in order to gain access to otherwise unavailable sources of information. *Id.* Embedded journalism allows full access to information during combat operations for reporters who agree to travel with specific units throughout the military campaign. *Id.* at 65–68. The unilateral journalism allows the broadest freedom of access by reporters who either freely join or leave troops in the field. *Id.* Unilateral journalism is commonly referred to as “freelance,” “cowboy” or “four-wheel-drive” journalism. *Id.* Under this method, reporters reject the constraints of traveling with military as well as any military restrictions on access of information. *Id.* This method offers the least protection from the military during combat. *Id.*

<sup>133</sup> The three generally recognized types of information operational security strategies are: censorship, credentialing, and security at the source. *Id.* at 68–70. Under censorship, the military unilaterally decides what information cannot be released to the public. *Id.* Credentialing allows reporters to agree on their professional honor not to violate the confidence of the military in disclosing information. *Id.* Security at the source exists when military personnel agree to be circumspect in deciding what information to share with reporters. *Id.* Here, military personnel at any level make the judgment call on what information to release, taking into account the positive or negative impact it may have on the military mission. *Id.*

<sup>134</sup> The press pool rather than the embedded press may be better suited for secret operations where limited coverage is warranted or where only a small number of reporters can be physically accommodated due to mission requirements. *Id.* at 66–67.

<sup>135</sup> *Id.* at 114–15.

<sup>136</sup> Turner & Norton, *supra* note 7, at 12.

journalism.<sup>137</sup> The term journalist is primarily mentioned in Article 79, Protocol I,<sup>138</sup> which “purports to protect journalists engaged on dangerous missions from the harmful effects of armed conflict.”<sup>139</sup> Although, Protocol I does not define what is meant by “journalist,” it is interpreted broadly in accordance with its everyday meaning and includes “any correspondent, reporter, photographer, and their technical film, radio and television assistants who are ordinarily engaged in any of these activities as their principal occupation.”<sup>140</sup> It also encompasses DoD civilian members of military news agencies,<sup>141</sup> but does not include any uniformed members assigned to Armed Forces Radio and Television Service.<sup>142</sup> Moreover, a separate, but related category of media representatives includes war correspondents and freelance journalists.<sup>143</sup>

War correspondents are defined as those civilian journalists “who accompany the armed forces without actually being members thereof.”<sup>144</sup> War correspondents are required to receive “authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card.”<sup>145</sup> This military “authorization” sets them apart as accredited war correspondents.<sup>146</sup> This is in contrast to freelance journalists who are not accredited by the armed forces and are not entitled to the same protections as war correspondents.<sup>147</sup> Thus, the definition of journalist under Protocol I includes both war correspondents and freelance journalists, but only war correspondents are given additional protections under Geneva Convention III.<sup>148</sup> Because embedded journalists are considered accredited journalists who “accompany the armed forces,” they are also considered to be war correspondents for purposes of Geneva Convention protections.<sup>149</sup>

## B. Legal Status of Journalists

Journalists are afforded civilian status under Article 50(1) of Protocol I which generally defines civilians and the civilian population.<sup>150</sup> According to Article 79(1), Protocol I, “journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians within the meaning of Article 50, paragraph 1.”<sup>151</sup> The fact that this provision

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<sup>137</sup> HANS-PETER GASSER, *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* 228–30 (Deiter Fleck ed., 1995).

<sup>138</sup> Protocol I, *supra* note 4, art. 79.

<sup>139</sup> CLAUDE PILLOUD ET AL., *COMMENTARY OF THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949*, at 918 (Yves Sandoz et al. eds., 1987).

<sup>140</sup> *Id.* at 921 (quoting the definition contained in draft Article 2(a) of the International Convention for the Protection of Journalists Engaged in Dangerous Missions in Areas of Armed Conflict).

<sup>141</sup> Article 79, Protocol I indirectly includes all civilians “accompanying the force” as defined in Article 4(A)(4) of Geneva Convention III. *Id.* at 921; GC III, *supra* note 3, art. 4(A)(4). Furthermore, paragraph 1, Article 50, Protocol I which defines civilians (also referred to in Article 79), includes persons defined in Article 4(A)(4) of Geneva Convention III as well. GC III, *supra* note 3, art. 4(A)(4); Protocol I, *supra* note 4, arts. 50, 79.

<sup>142</sup> Turner & Norton, *supra* note 7, at 13 (quoting PILLOUD at 921).

<sup>143</sup> GASSER, *supra* note 137, at 228–29; *see also* Hans-Peter Gasser, *The Protection of Journalists Engaged in Dangerous Professional Missions*, 232 INT’L REV. OF THE RED CROSS 3 (Jan. 1, 1983).

<sup>144</sup> GC III, *supra* note 3, art. 4(A)(4); *see generally* JEAN PREUX ET AL., *COMMENTARY OF THE THIRD GENEVA CONVENTIONS RELATIVE TO THE TREATMENT OF PRISONERS OF WAR OF 12 AUGUST 1949*, at 44, 64–65 (Jean Pictet et al., 1960). “War correspondents” is also the terminology to describe journalists who worked military campaigns in the early years of modern journalism. *See generally* ROTH, *supra* note 14.

<sup>145</sup> GC III, *supra* note 3, art. 4(A)(4). War correspondents and freelance journalists, alike, are provided with identification cards. *Id.*; *see also* Protocol I, *supra* note 3, art. 79(3) (generally establishing the identity card requirements for all journalists). The identification card will designate whether the journalist is either accredited by the armed forces or not as a means of proving his or her status. GC III, *supra* note 3, art. 4(A)(4).

<sup>146</sup> The accreditation of war correspondents through the armed forces is distinct from any accreditation that may come from the news agency that employs them. Turner & Norton, *supra* note 7, at 14; *see also* PILLOUD ET AL., *supra* note 139, at 918 (discussing that journalists with special authorization to accompany the armed forces are considered accredited correspondents).

<sup>147</sup> Turner & Norton, *supra* note 7, at 14; PILLOUD ET AL., *supra* note 139, at 918, 920. *See discussion infra* Part III.C. (discussing the different protections afforded war correspondents will be discussed further herein).

<sup>148</sup> Article 4(A)(4) accords captured war correspondents the status of prisoner of war which is not provided to non-accredited journalists. PILLOUD ET AL., *supra* note 139, at 918.

<sup>149</sup> GC III, *supra* note 3, art. 4(A)(4).

<sup>150</sup> Article 50, paragraph 1 states that “a civilian is any person who does not belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.” Protocol I, *supra* note 4, art. 50(1). Article 4(A)(4) specifically encompasses journalists as those civilian persons “who accompany the armed forces without being members thereof.” *Id.*; PILLOUD ET AL., *supra* note 139, at 920–21. Furthermore, Article 50, paragraph 2 speaks to the breadth of this civilian status by stating that “the civilian population comprises all persons who are civilians.” Protocol I, *supra* note 4, art. 50(2).

<sup>151</sup> Protocol I, *supra* note 4, art. 79(1). Article 79, paragraph 1 relates back to Article 50 of Protocol I to incorporate journalists as civilians. PILLOUD ET AL., *supra* note 139, at 920–21. Thus, Article 50 essentially is the root authority for journalists being given civilian status. *Id.* This is in part because, Article 79

states that journalists are “considered as civilians,” and not that they “are civilians,” is of little significance.<sup>152</sup> Because journalists are treated like civilians, they do not lose this status by their mere presence in an area of armed conflict while on a professional mission.<sup>153</sup> This status even extends under circumstances where journalists take advantage of military logistical support.<sup>154</sup> Regardless of whether journalists are non-accredited by the military or are “accompanying the armed force” as accredited war correspondents, they maintain their civilian status.<sup>155</sup>

While the drafters contemplated giving journalists their own special status, they determined it was not in the best interest of the international community.<sup>156</sup> Instead, Article 79 instituted special provisions to accommodate the unique nature of journalists who perform their duties in the context of armed conflict.<sup>157</sup> One such provision is Protocol I’s requirement that journalists be issued a special identity card.<sup>158</sup> Similar to a Soldier’s uniform, it creates a presumption that the person is a journalist.<sup>159</sup> Overall, Article 79 contemplates that these “special rules are required for journalists who are imperiled by their professional duties in the context of armed conflicts” because, while they are civilians, they arguably encounter a higher level of danger than other civilian counterparts.<sup>160</sup> Nevertheless, these “special rules” primarily speak to the legal protections afforded journalists under differing circumstances and does not call into question their status as civilians.<sup>161</sup>

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did not result from the original draft of Protocol I submitted to the Diplomatic Conference by the International Committee of the Red Cross (hereinafter ICRC) upon governmental expert consultation. Gasser, *supra* note 143, at 2–3. Instead, in 1970, the Human Rights Commission of the United Nations General Assembly was called upon to create a special draft convention to protect journalists on dangerous missions. *Id.*

<sup>152</sup> PILLOU ET AL., *supra* note 139, at 920. In dealing with this language issue, the Diplomatic Conference recognized that the language of Article 79(1) could be misconstrued as creating a separate status for journalists not “as civilians” but one “considered as civilians.” *Id.* (referencing the Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law (CDDH) applicable in Armed Conflicts, Geneva, 1974–1977). However, due to a compromise from all parties to the Working Group who drafted the provision, the CDDH did not wish to reopen the matter on such a finely balanced text. *Id.* Nevertheless, the “considered as civilians” language is universally treated “merely declaratory” and does not create a separate quasi-civilian status for journalists. *Id.*

<sup>153</sup> *Id.* at 920–21.

<sup>154</sup> In order to transmit information on the events during the conflict, journalists who accompany the military in combat arguably expose themselves to equivalent dangers experienced by the armed forces. *Id.* at 920. As such, journalists require logistical support such as transportation, lodging, food, access to communication networks and protection of the military in order to operate in such austere environments. *Id.* This type of military support does not violate the customary law of war principle on distinction. *Id.*

<sup>155</sup> *Id.* at 921. The distinction between the status and protections afforded journalists should not be confused. While all journalists, both accredited and non-accredited, are given civilian status, the sub-category of journalists known as “war correspondents” receive different protections than other journalists because they are accredited from the armed forces under Article 4(A)(1)(4). GC III, *supra* note 3, art. 4(A)(1)(4). Protections for journalists will be discussed later in this paper. See discussion *infra* Part III.C.

<sup>156</sup> Creating a special status is consistent with other humanitarian law efforts such as the 1949 Geneva Conventions and the 1977 Protocols which conferred special status to those assisting victims of conflict, to include: medical, religious, and civil defense staff personnel. Gasser, *supra* note 143, at 4. However, the prevailing view is that creating additional protections for non-victim assisting type groups (i.e. journalists) runs the risk of effectively diminishing the protection of the current specially protected personnel. *Id.*; see also PILLOU ET AL., *supra* note 139, at 919 (making more protective groups could endanger the greater protections afforded the civilian population).

<sup>157</sup> Gasser, *supra* note 143, at 2 (providing an extensive analysis of the legislative history of Article 79 of Protocol I).

<sup>158</sup> Article 79, paragraph 3 states that journalists “shall be issued by the government of the State of which the journalist is a national or in whose territory he resides or in which the news medium employing him is located, shall attest to his status as a journalist.” Protocol I, *supra* note 4, art. 79(3). Each State establishes its own criteria for obtaining the card. PILLOU ET AL., *supra* note 139, at 923–24. Upon issuance, the card does not create the status of the bearer, but only “attests to his status” in order to prove his status in the case of arrest or capture. *Id.*; PREUX ET AL., *supra* note 144, at 64–65. After issuance, there is no requirement that journalists carry the card and failure to carry the card does not revoke his or her status. PILLOU ET AL., *supra* note 139, at 923–24; PREUX ET AL., *supra* note 144, at 64–65. The identity card, and the required information, is based on the model provided for identity cards for persons accompanying the armed force under Article 4(A)(4) of GC III. PILLOU ET AL., *supra* note 139, at 923–24; GC III, *supra* note 3, art. 4(A)(4). Article 4(A)(4) of Geneva Convention III discusses identity card provisions related to war correspondents in the context of protective status. PILLOU ET AL., *supra* note 139, at 923–24. Deriving its historical significance from Article 81 of the 1929 Convention, the Conference on Government Experts in drafting Geneva Convention III recognized that identity cards could be problematic for protective status as well. PREUX ET AL., *supra* note 144, at 64–65. Significant problems arose during World War II where persons who were entitled to POW status were not given such protections because they did not have their identity card at the point of capture. *Id.* Under the 1929 Convention, a qualifying person, such as one accompanying the armed forces, was only granted POW if they possessed the card. *Id.* As a result, the 1949 Diplomatic Conference changed this old provision into Article 4(A)(4) and determined that holding the identity card does not grant or create these POW rights, but only acts as evidence of their status. *Id.* Today, persons accompanying the armed forces are no longer required to have an identity card in their possession in order to get POW protective status. *Id.*

<sup>159</sup> Gasser, *supra* note 143, at 2.

<sup>160</sup> PILLOU ET AL., *supra* note 139, at 918. Interestingly, while other civilians that “accompany the armed forces” such as government contractors are also exposed to dangers not encountered by other civilians, they do not have their own provision under Protocol I. See also Turner & Norton, *supra* note 7, at 3–20 (discussing that there are three primary groups of civilians encountered across the spectrum of conflict: DoD civilian employees, contractors, and non-affiliated civilians of which journalists other than war correspondents fit into). But see GC III, *supra* note 3, art. 4(A)(4) (giving protections to other groups).

<sup>161</sup> PILLOU ET AL., *supra* note 139, at 920–22.

### C. Legal Protections for Journalists

According to Article 79(2) of Protocol I, journalists enjoy all the protections afforded civilians under the Geneva Conventions and Protocol I, assuming “they take no action adversely affecting their status as civilians.”<sup>162</sup> Protocol I’s special provisions only extend to journalists in situations of international armed conflict.<sup>163</sup> These protections extend under two factual scenarios governed by law of armed conflict: those where journalists are directly exposed to dangers on the battlefield and situations where journalists fall into the hands of the enemy or upon capture during armed conflict.<sup>164</sup> Additionally, within the larger group of journalists, special protections are afforded war correspondents under the second scenario.<sup>165</sup> In the instance where journalists directly participate in hostilities, any protections generally afforded will be forfeited.<sup>166</sup>

#### 1. Protection from Attack

Journalists directly exposed to dangers on the battlefield are afforded all the protections given to civilians under the Geneva Conventions, Protocol I, and customary international law.<sup>167</sup> Article 51 of Protocol I is the primary authority that addresses what it means to “enjoy general protection against dangers arising from military operations.”<sup>168</sup> Essentially, to be a subject of this protection means not being the “object of attack.”<sup>169</sup> The basic rule is that belligerent parties to a conflict will “at all times distinguish between civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”<sup>170</sup> Similarly, while civilians cannot be specifically targeted as a military objective, they also cannot be the subject of indiscriminate attacks when there is no military objective.<sup>171</sup> Because journalists are treated as civilians in armed conflicts, they are also subject to the immunity from such

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<sup>162</sup> Protocol I, *supra* note 4, art. 79(2). Apart from the rules for war correspondents authorized to accompany armed forces under Article 4(A)(4) of Geneva Convention III, only the 1977 Protocol I addresses protections for journalists or their mission in armed conflicts. PILLOU ET AL., *supra* note 139, at 918. However, the concern for the special situation encountered by journalists on dangerous missions has an older legal tradition. *Id.*

Article 13 of the Hague Regulations Concerning the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 1907 provided prisoner of war treatment to “individuals who follow[ed] an army without directly belonging to it, such as newspaper correspondents and reporters” when they were in possession of a certificate from the military authorities of the army they were accompanying. *Id.*; Gasser, *supra* note 143, at 2. This solution was also retained by the Geneva Convention III (Article 81). PILLOU ET AL., *supra* note 139, at 918; Gasser, *supra* note 143, at 2. It was the above mentioned Geneva Convention III provision that provided war correspondents the status of prisoners of war when they accompany the armed forces. PILLOU ET AL., *supra* note 139, at 918. The requirement for certification was dropped for the purposes of actually creating the status, but retained for identifying qualifying journalists for special protection. Gasser, *supra* note 143, at 2.

<sup>163</sup> Protocol I supplements the Geneva Conventions for the protection of war victims (Geneva Convention III) and only applies to common Article 2 situations, referring to international armed conflict. Protocol I, *supra* note 4, art. 1(3); GC III, *supra* note 3, art. 2.

<sup>164</sup> PILLOU ET AL., *supra* note 139, at 922.

<sup>165</sup> GC III, *supra* note 3, art. 4(A)(4); Gasser, *supra* note 143, at 2.

<sup>166</sup> PILLOU ET AL., *supra* note 139, at 922. Article 79, paragraph 2 uses the wording “no action adversely affecting their status as civilians” as equivalent language to indicate circumstances where a protected person took “direct part in hostilities” as referenced in Article 51, paragraph 3 (provision for protection of the civilian population). Protocol I, *supra* note 4, arts. 51(3), 79(2). *See* discussion *infra* Part III.D.2.

<sup>167</sup> The customary rule is that innocent civilians must be protected from combatant activities arising in hostilities. PILLOU ET AL., *supra* note 139, at 615, 617, 922. The Hague Regulations annexed to Hague Convention IV of 1907 and the Fourth Geneva Convention of 1949 and other specific conventions addressing weapon types also address the need to protect civilians from hostilities. *Id.* at 617.

<sup>168</sup> Protocol I, *supra* note 4, art. 51(1).

<sup>169</sup> *Id.* art. 51(2). Article 51, paragraph 2’s use of the word attack is referencing Article 49 which provides the definition of attacks and scope of application. PILLOU ET AL., *supra* note 139, at 618. It is interesting to point out that a deliberate attack on a civilian such as a journalist, causing death or injury, would constitute a serious breach of Protocol I to trigger a war crime under Article 85, para. 3(e). Protocol I, *supra* note 4, art. 85(3).

<sup>170</sup> Protocol I, *supra* note 4, art. 48. Article 48’s “Basic rule” essentially forms the foundation for much of the Geneva Convention tradition of the law of war and essentially codifies the customary law principle of discrimination or distinction by establishing that military attacks should be directed at combatants and not civilians or civilian property. PILLOU ET AL., *supra* note 139, at 598–600.

<sup>171</sup> Protocol I, *supra* note 4, art. 52(2). Under paragraph 2, the object of attack includes not only being directly targeted by a military act, but also a threat of violence where the purpose is to spread terror among the civilian population. *Id.* Under paragraph 4, indiscriminate attacks includes: those not directed at a specific military objective (i.e., targeting a civilian home with no military value); those employing a method or means of combat which cannot be directed at a specific military objective (i.e., military target acquired and destroyed by a long range rocket which also destroys civilian homes due is notoriously known for its sheer inaccuracy, such as the V2 rocket in World War II); those employing a method or means of combat which cannot be limited as required by Protocol I (i.e., weapon system destroys military target, but also the civilian home because the wrong type of weapon system was chosen for the mission, such as the use of a precision guided weapon versus a more conventional bomb). *Id.* art. 52(4).

This paragraph was added as a result of military tactics, such as carpet bombing, used during World War II where entire cities were leveled for military advantage, instead of only the military targets within the cities. PILLOU ET AL., *supra* note 139, at 619. Other prohibited methods of warfare conducted on

attacks prohibited under the laws of war.<sup>172</sup> This immunity equally applies to all types of journalists working in the midst of hostilities without any required proof of their civilian status as a basis to receive this protection.<sup>173</sup>

## 2. Protection at Capture

Journalists are protected by the Geneva Conventions when they fall into the hands of the enemy or upon capture.<sup>174</sup> The level of protection depends upon whether the journalist is accredited or non-accredited.<sup>175</sup> Article 79(2) distinguishes between the protections afforded journalists generally and those designated as war correspondents.<sup>176</sup> The language, “and without prejudice to the right of war correspondents accredited to the armed forces to the status provided for Article 4(A)(4) of the Third Convention” suggests that non-accredited journalists receive civilian protections, while military accredited journalists retain prisoner-of-war (POW) status under Geneva Convention III.<sup>177</sup> The interplay between Article 4(A)(4) of Geneva Convention III and Article 79(2) of Protocol I, makes it clear that the general reference to journalist, includes freelance journalists as non-accredited journalists, while the term war correspondent refers to accredited journalists.<sup>178</sup> As such, freelance journalists get civilian protections under Geneva Convention IV upon capture and war correspondents receive enhanced protections as POWs under Geneva Convention III.<sup>179</sup> Unlike other types of journalists, the law carves out a unique situation for war correspondents who maintain the status of civilians during conflict, but who are treated as POWs when captured by the enemy. Consequently, as accredited journalists, embedded media enjoy protections afforded to civilians and combatants alike because they “accompany the armed forces.”<sup>180</sup>

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civilians include using civilians to shield military objectives or shield, favor or impede military operations. Protocol I, *supra* note 4, art. 51(2), (4), (5), (6), (7). Article 52, paragraph 2 defines military objectives as: “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time offers a definite military advantage.” *Id.* art. 52(2). Even attacks directed at military objectives are not permitted when the attack could incidentally result in loss of civilian injury, life, or property that would be “excessive in relation to the expected direct and specific military advantage.” *Id.* art. 51(5); *see also* PILLOU ET AL., *supra* note 139, at 615–17; 630–34 (discussing the legislative history and meaning behind the provisions of Articles 51 and 52).

<sup>172</sup> PILLOU ET AL., *supra* note 139, at 920, 922.

<sup>173</sup> *Id.*; Gasser, *supra* note 143, at 6. The Diplomatic Conference considered whether the protections afforded journalists during armed conflict should be predicated upon the presence of some special protective sign worn by journalists during the performance of their duties on the battlefield. PILLOU ET AL., *supra* note 139, at 919 (referencing the Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law (CDDH) applicable in Armed Conflicts, Geneva, 1974–1977). In fact, the Venezuelan delegation proposed that all journalists wear a protective emblem clearly visible from a distance in the shape of a bright orange arm band with two black triangles. *Id.* at 919. *But cf.* Gasser, *supra* note 143, at 4 (recognizing that a proposal for a protective emblem was recommended, but suggesting that the emblem involve wearing an arm-band with a large black P on a golden disk instead of the orange emblem). The proposal was rejected because it would make journalists so conspicuous to combatants that it could unnecessarily escalate the danger of their mission by drawing fire rather than averting it. PILLOU ET AL., *supra* note 139, at 919. Furthermore, there was concern the protective emblem might even endanger the surrounding civilian population. *Id.*

<sup>174</sup> Protocol I, *supra* note 4, art. 79(2); GC III, *supra* note 3, art. 4(A)(4); GC IV, *supra* note 6, art. 4.

<sup>175</sup> PILLOU ET AL., *supra* note 139, at 922–23.

<sup>176</sup> Protocol I, *supra* note 4, art. 79(2).

<sup>177</sup> *Id.* The POW protections afforded war correspondents under Geneva Convention III are not affected by the 1977 Protocol I. PILLOU ET AL., *supra* note 139, at 922–23. Article 79 acts as a cross-reference to the other articles which deal with civilian protections in general. *Id.* It should also be noted that these civilian protections are not dependent upon the nationality of the journalist or which State has accredited the journalist. Gasser, *supra* note 143, at 6. Thus, the journalist can maintain his civilian protective status regardless of whether he comes from a neutral State or one party to the conflict. *Id.*

<sup>178</sup> PILLOU ET AL., *supra* note 139, at 923. Accredited journalists are called war correspondents under Article 4(A)(4). GC III, *supra* note 3, art. 4(A)(4). Article 79(2) recognizes that journalists are given civilian protections, but excepts out war correspondents by referring to Geneva Convention III for POW protections. Protocol I, *supra* note 4, art. 79(2). Freelance journalists would then fall into the civilian protection category instead of the POW provisions. PILLOU ET AL., *supra* note 139, at 923.

<sup>179</sup> PILLOU ET AL., *supra* note 139, at 923; *see also* GC III, *supra* note 3, art. 12–16 (providing the general protections for prisoners-of-war); GC IV, *supra* note 6, arts. 13–26 (providing the general protections for civilians).

<sup>180</sup> GC III, *supra* note 7, art. 4(A)(1), (A)(4). Combatants receive POW status protections under the same Article 4(A) provision in Geneva Convention III as do journalists who “accompany the armed forces,” but it is delineated in a separate paragraph to illustrate that there are distinct groups within Article 4(A). *Id.*

## D. Loss of Legal Protections

Journalists are granted absolute immunity from military attack unless they either effectively lose their protective status<sup>181</sup> or they actually lose their protective status by taking “action adversely affecting their status as civilians.”<sup>182</sup> Any such type of loss endangers the journalist performing their mission because they can then be the object of a military attack.<sup>183</sup>

### 1. Loss of De Facto Protective Status

Civilians, who risk losing their actual physical protection, but not their actual protective rights, are said to forfeit their *de facto* protections.<sup>184</sup> These situations commonly occur when civilians either closely follow a military unit engaged in action or remain too close to a military objective, as both can be legitimately targeted by the military for attack.<sup>185</sup> Similarly, if war correspondents wear military uniforms on the battlefield or rely upon military transportation,<sup>186</sup> they incur the same risk, because the enemy “combatant cannot be asked to spare an individual whom he cannot identify as a journalist.”<sup>187</sup> In these circumstances, the customary law of distinction would not be applicable where there is no evidence to indicate that civilians may be a target.<sup>188</sup> However, where the presence of a civilian is observed, the legitimacy of a military attack is guided by the customary law principle of proportionality.<sup>189</sup> Consequently, embedded journalists’ willingness to maintain close proximity to military operations and expose themselves to the same dangers as front-line battle units, frequently jeopardizes their *de facto* protective status as civilians.<sup>190</sup>

### 2. Loss of Actual Protective Status

Three primary components of Protocol I establish the criteria by which journalists can lose their protective civilian status under the laws of war during international armed conflict. First, Article 79(2) establishes limits to the activities that

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<sup>181</sup> PILLOUD ET AL., *supra* note 139, at 922.

<sup>182</sup> Protocol I, *supra* note 4, art. 79(2).

<sup>183</sup> *Id.* art. 51(3).

<sup>184</sup> PILLOUD ET AL., *supra* note 139, at 922; Gasser, *supra* note 143, at 6.

<sup>185</sup> PILLOUD ET AL., *supra* note 139, at 922; Gasser, *supra* note 143, at 6.

<sup>186</sup> The law of war principle of distinction, codified in Article 48 of Protocol I, does not prohibit those civilians who accompany the military in the field from wearing uniforms. Memorandum of Law, W. Hays Parks, Office of The Judge Advocate General, U.S. Army, subject: Law of War Status of Civilians Accompanying Military Forces in the Field (May 6, 1999) [hereinafter Law of Mar Memo] (on file with author). This rule applies to either the same military uniforms worn by combatants or another distinct uniform. *Id.* Uniforms are one way for commanders to ensure their force protection mission (i.e. maintain camouflage integrity or to readily establish who is authorized to be in a certain location). *Id.* The mere presence of the uniform does not, in itself, designate one as a combatant. *Id.* Similarly, the customary law of war principle of distinction does not prohibit civilians who accompany the armed forces from being transported by military tactical vehicle/aircraft during times of combat. *Id.* In fact, there is a long historical precedent for war correspondents wearing military uniforms or being transported on military tactical vehicles/aircraft in the field. See *supra* note 44; see also Turner & Norton, *supra* note 7, at 22–23 (discussing media members commonly wore military uniforms during Operation Desert Storm).

<sup>187</sup> PILLOUD ET AL., *supra* note 139, at 922. Even if the combatant identifies the individual as a protected person (i.e. journalist), if he targets a legitimate military objective, he is not required under Article 79 to cease fire because the journalist happens to be too close to the action. *Id.*

<sup>188</sup> Protocol I, *supra* note 4, art. 48.

<sup>189</sup> *Id.* art. 51(5)(b). The customary law principle of proportionality is codified in Article 51(5)(b). *Id.* Once a military objective exists, and either injury, death, or destruction could result to civilians or civilian property, the military objective can only be targeted where such “incidental loss of life or injury and collateral damage is [not] excessive in relation to the concrete and direct military advantage anticipated.” *Id.*; PILLOUD ET AL., *supra* note 139, at 623–26. In judging a commander’s actions, one must view it from the perspective of the commander, in light of all circumstances. U.S. DEP’T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 4 (July 1956) [hereinafter FM 27-10]. A military commander must act “reasonably” not only to ensure that the objectives are military objectives, but also to ensure that the damage to civilians or civilian property is not disproportionate to the military advantage anticipated. *Id.*; see also Parks, *supra* note 6, at 3 (discussing the history behind the Redulic Rule derived from *United States v. List* where a commander must act reasonably to ensure objectives are military in nature).

<sup>190</sup> The Committee to Protect Journalists (CPJ) and the Freedom Forum are regarded as the most reliable sources for tracking the death statistics of journalists. CPJ *Special Report—Analysis of Journalist Deaths*, Committee to Protect Journalists, Sept. 20, 2006, available at <http://www.newssafety.com>. A 2006 CPJ study of journalists’ deaths revealed that the second overall leading cause of death for journalists is crossfire in combat operations at 18%. *Id.* The leading cause is murder at 71%, with 24% of those murders resulting from government and military officials during the course of a military conflict. *Id.* As of 31 December 2008, 252 journalists have been killed covering the Iraq war since its inception. Assoc. Press Int’l, *Iraq Journalist Deaths Match Vietnam War Killed*, CHINA DAILY, May 31, 2006, available at <http://www.newssafety.com>. In comparison, 71 journalists died in the Vietnam War, 18 in the Korean War, and 67 in World War II. *Id.* In Vietnam, most journalists were killed in combat or military air crashes, or went missing, as compared to the Iraq War where many journalists have been presumably murdered due to their editorial activities. *Id.*

journalists may engage in.<sup>191</sup> Journalists' protections are contingent upon them taking "no action adversely affecting their status as civilians."<sup>192</sup> Second, this language is essentially referencing and is consistent with Article 51(3)'s provision that civilians who "take direct part in hostilities" will lose their protective status.<sup>193</sup> Lastly, Article 79(1) creates a requirement that journalists must be "engaged" in their "professional mission" in order for the protective status to apply.<sup>194</sup> As is the case with much of legal jurisprudence, it is the differing legal interpretations of these provisions that create difficulty in their practical application on the battlefield. Nonetheless, even in this controversial area,<sup>195</sup> there are some general guiding principles which all States recognize as the definitive status of the law.

#### *a. Taking a Direct Part in Hostilities*

According to Article 51(3), civilians lose their immunity "for such time as they take direct part in hostilities."<sup>196</sup> There are two primary components to analyzing this provision. First, one must determine what types of activities constitutes taking a "direct part in hostilities."<sup>197</sup> Second, one must establish the time period in which these qualifying activities take place for purposes of understanding the loss of civilian protections. This analysis specifically applies to civilian journalists by means of Article 79(2) which is inextricably tied to the meaning of Article 51(3).<sup>198</sup> When civilian journalists are said to be directly participating in hostilities they can be treated as "unlawful combatants"<sup>199</sup> and lose any afforded civilian protections, although not the actual status itself.<sup>200</sup> Upon capture, they would be "regarded as marauders or bandits" and tried under domestic law of the adverse party for their actions.<sup>201</sup> Interestingly, it is arguable whether war correspondents and other persons accompanying the armed force, as opposed to non-accredited journalists, actually lose their protective status as prisoners-of-war when taking direct part in hostilities.<sup>202</sup> However, regardless of the outcome, the consequence of this scenario is severe for any civilian who takes a direct part in hostilities because they become legitimate military targets.<sup>203</sup>

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<sup>191</sup> Protocol I, *supra* note 4, art. 79(2).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* art. 51(3).

<sup>194</sup> *Id.* art. 79(1).

<sup>195</sup> A series of three Expert Meetings were co-organized in The Hague (2 June 2003 and 25–26 October 2004) and Geneva (23–25 October 2005) by the ICRC and the TMC Asser Institute and designed to clarify the precise meaning of the notion of "direct participation in hostilities" under Article 51(3). *Direct Participation in Hostilities*, Int'l Comm. on the Red Cross, Dec. 31, 2005 [hereinafter *Direct Participation ICRC*], available at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205?>. This terminology has never been defined in treaty law. *Id.* The importance of understanding this terminology has dramatically increased in parallel with the growing involvement of civilians in the conduct of hostilities in both international and non-international armed conflicts. *Id.* As of the beginning of 2009, the issue is still being addressed by approximately forty legal experts representing military, governmental, academic circles, as well as international and NGOs. *Id.*

<sup>196</sup> Protocol I, *supra* note 4, art. 51(3).

<sup>197</sup> *Id.*

<sup>198</sup> PILLOU ET AL., *supra* note 139, at 922. Actions "adversely affecting" a journalist's status as a civilian mentioned in Article 79(2) equates to those situations where civilians take "a direct part in hostilities" under Article 51(3). *Id.*

<sup>199</sup> The term unlawful combatant is not a term recognized by the Geneva Conventions, Protocol I, or customary international law. Pub. Comm. Against Torture in Israel v. Gov't of Israel, H CJ 769/02 (2005) (stating that "[As] far as existing law goes, the data before us are not sufficient to recognize this third category [of unlawful combatant]. That is the case according to the current state of international law, both international treaty law and customary international law"). However the United States recognizes this term to create almost a separate status for those who are neither non-combatants nor combatants. *Ex parte Quirin*, 317 U.S. 1 (1942). In the context of this article, the term "unlawful combatant" means civilians who have lost their immunity due to taking direct part in hostilities, in violation of the laws of war.

<sup>200</sup> PILLOU ET AL., *supra* note 139, at 619.

<sup>201</sup> Non-accredited journalists acting as unlawful combatants would be subject to domestic law upon capture. *Id.* at 922–23. As mentioned above, the accredited journalist may be subject to either domestic law or POW protections dependent upon the capturing party's interpretation of the laws of war. LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 105 (2d ed. 2000).

<sup>202</sup> Under Article 45 (Protection of Persons Who Have Taken Part in Hostilities), persons captured are presumed to have POW protections unless otherwise proven by a competent tribunal. Protocol I, *supra* note 4, art. 45. However, there is some question remaining as to whether or not the adverse party will still accord war correspondents, or other persons who accompany the armed forces, the same POW status they rightfully retained prior to becoming unlawful combatants. Article 45 appears to look to Articles 43 and 44 of Protocol I with the understanding that only combatants, specifically members of the armed forces, are entitled to the POW status upon capture, unless they forfeit these rights (i.e., determined to be spies). *Id.* Because this provision does not include an unlawful combatant category, it is unclear how an adverse party would treat war correspondents, or others accompanying the armed force, who took a direct part in hostilities. PILLOU ET AL., *supra* note 139, at 546–59. They might be treated as POWs or tried under domestic law with loss of POW rights. *Id.*

<sup>203</sup> PILLOU ET AL., *supra* note 139, at 618.

While the international legal community widely acknowledges the existence of Article 51(3)'s basic components which can lead to the loss of the civilian protective status, agreement on how Article 51(3)'s language is defined and implemented is, for the most part, open to wide interpretation.<sup>204</sup> The term "direct," is generally accepted as referring to participation in hostilities where "acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces."<sup>205</sup> It is settled that these contemplated, direct acts may only be committed by combatants.<sup>206</sup> There is little doubt that a journalist would be taking a direct part in hostilities if they took up arms, or in some other fashion attempted to capture, injure or kill the enemy forces, or damage or destroy enemy property.<sup>207</sup> However, aside from direct-type acts, defining and implementing the direct participation notion has been a significant point of contention in recent years due to the "increased intermingling of civilian and military activities" as required by the surge in military technology, privatization of the armed forces, and the war on terrorism.<sup>208</sup> In light of these developments, two primary theories have emerged on how Article 51(3)'s "direct part in hostilities" language is to be practically applied on the battlefield.

A majority of nations adhere to the traditional Protocol I approach of interpreting Article 51(3), while only a few countries, including the United States, hold fast to the functionality test.<sup>209</sup> The Protocol I view espouses that only those acts by civilians which cause "actual harm" to personnel and equipment where there is a "direct casual relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity occurs," qualify as direct participation in hostilities.<sup>210</sup> Protocol I also distinguishes support of the war effort from direct participation in hostilities.<sup>211</sup> It recognizes that there are numerous activities that either directly or indirectly make "a contribution to the war effort" such as participation in military transportation, weapons production, combat logistical support, and even morale of the general population.<sup>212</sup> War effort functions are among the larger group of "direct support" activities which do not trigger the direct participation standard.<sup>213</sup> Due to this narrow interpretation of Article 51(3), the Protocol I approach offers the most protection for civilians accompanying the armed forces from being intentionally and lawfully targeted.

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<sup>204</sup> Direct Participation ICRC, *supra* note 195.

<sup>205</sup> PILLOU ET AL., *supra* note 139, at 619.

<sup>206</sup> Only combatants "have the right to participate directly in hostilities" under the laws of war. Protocol I, *supra* note 4, art. 43(3). Combatants are distinguished from civilians and are largely viewed as individuals who "(1) are under the command of a person responsible for his subordinates and subject to an internal disciplinary system; (2) have fixed and distinctive emblem recognizable at a distance; (3) carry arms openly; and (4) conduct operations in accordance with the laws and customs of war." GC III, *supra* note 3, art. 4(A)(2); *Id.* arts. 43(1), 44.

<sup>207</sup> PILLOU ET AL., *supra* note 139, at 619. This rule equally applies to groups of journalists taking such action. *Id.*

<sup>208</sup> Direct Participation ICRC, *supra* note 195. Today's military technology has incorporated what was more traditionally considered more civilian concepts such as computer network attack and information operations. *Id.*; see also Law of War Memo, *supra* note 186 (discussing the significance of military technology and privatization of the military as being the two major changes that has altered the traditional role of civilians accompanying the military); see generally Turner & Norton, *supra* note 7, at 1 (suggesting that more than at any time in military history, civilians have accompanied the armed forces to assist in combat support and combat service support missions).

<sup>209</sup> 57TH GRADUATE COURSE DESKBOOK, INT'L & OPERATIONAL LAW, Vol. II, at C-7, C-8 (2008) [hereinafter DESKBOOK]. The Protocol I approach is generally referenced in the Commentary on Protocol I. PILLOU ET AL., *supra* note 139, at 612, 618-19. The United States is the primary proponent of the functionality test, also referred to as the "direct part test." DESKBOOK, *supra*, at C-8. This theory is currently being taught to U.S. military Judge Advocates at the U.S. Army Judge Advocate General's Center and School in Charlottesville, Virginia. *Id.* The functionality test was largely discussed in preparation for a new joint services law of war manual initiated by the U.S. Department of Defense Law of War Working Group, in coordination with its counterparts in Australia, Canada, Denmark, Great Britain, Israel, New Zealand, and the United Kingdom during the 1990s. Law of War Memo, *supra* note 186. The DoD Law of War Working Group consisted of representatives from DoD General Counsel, Legal Counsel to the Chairman, Joint Chief of Staff and the Judge Advocates General of the Army, Navy, and Air Force and the Staff Judge Advocate to the Commandant of the Marine Corps. *Id.* The Working Group has not published the law of war manual and last reconvened at the U.S. Army's Judge Advocate General's Legal Center and School in May 2009. *Id.*

<sup>210</sup> PILLOU ET AL., *supra* note 139, at 516.

<sup>211</sup> *Id.* at 516, 619; A.P.V. ROGERS, LAW ON THE BATTLEFIELD 8 (1996).

<sup>212</sup> PILLOU ET AL., *supra* note 139, at 516. It is against customary international law to target the civilian population merely because they are generally participating in the war effort since this is required during war to various degrees. *Id.* Such activities might include: employment in munitions factories, participation in rationing efforts, expressions of support for enemy government and provision of purely administrative and logistical support to forces not deployed in combat. DESKBOOK, *supra* note 209, at C-8, C-9. The United States did not object to the "war effort" provision, but it did object to other provisions. U.S. State Dep't Remarks, *supra* note 4, at 428.

<sup>213</sup> PILLOU ET AL., *supra* note 139, at 516, 619. "Direct support" type activities performed by civilians accompanying the force in combat might include: battlefield logistics, weapon systems maintenance, intelligence, and guarding activities. Direct Participation ICRC, *supra* note 195. Attempts to more clearly distinguish between civilians who contribute to the "war effort" and those who perform functions that allow "direct support" of military operations were rejected during the drafting of Protocol I due to the concern that a new category of civilians would be created, neither combatants nor civilians. Michael Bothe et al., *New Rules for Victims of Armed Conflicts*, HAGUE 260, 294 nn.1, 8 (1982) (citing 1 INT'L COMM. OF THE RED CROSS, CONF. OF GOV'T EXPERTS REPORT, para. 3, p. 1117, (1972)). Critics who support targeting civilians in "direct support" roles suggest that it improperly creates a quasi-combatant this is job function dependent. ROGERS, *supra* note 211, at 8-9, 132.

In contrast to the Protocol I view, the U.S. functionality test does not require actual harm to the enemy in order for a civilian to constitute taking a direct part in hostilities.<sup>214</sup> Instead, it seeks to expand the Protocol I approach to circumstances based upon the importance and level of functions carried out by civilians on the battlefield.<sup>215</sup> While it does not condone targeting civilians for general participation in the war effort, similar to Protocol I, it may allow civilians to be lawfully targeted for their “direct support” in combat operations.<sup>216</sup> There is less importance placed on the casual connection to harm in favor of evaluating the importance or function of the civilian’s contribution to the enemy’s military effort.<sup>217</sup> As a result, under this U.S. approach, “there is no clear point at which it may be said that a civilian accompanying the armed force in the field may be at risk from intentional attack.”<sup>218</sup>

In comparison to the restrictive Protocol I theory, practical application of the U.S. functionality test allows for a broad range of activities which could divest civilians of their immunity from intentional targeting during “direct support” scenarios.<sup>219</sup> A civilian who is “supplying base amenities such as trash collection, housekeeping or water” will retain their civilian protections, while a “civilian entering the theater of operations in support or operation of sensitive, high value equipment, such as a weapon system” may be subject to attack due to the importance of his/her duties.<sup>220</sup> This approach not only views the issue “from the standpoint of the individual, but also how an enemy might view that person, and whether it is likely an attacker could be prosecuted successfully for the attack if captured following the attack.”<sup>221</sup> Civilians, who hide behind their immunity, when in actuality their duties directly support combat operations, are in jeopardy of being the object of attack.<sup>222</sup> As one prominent law of war attorney endorsing this viewpoint put it, “the work of some civilians has become so critical to military success that those individuals are civilians in name and garb only.”<sup>223</sup> In other words, “war essential civilians working on a U.S. military base during a time of [international armed conflict] would be subject to direct attack”<sup>224</sup> under the functionality test. This permissive theory makes it conceivable that journalists who are in direct support of modern military operations could lose their immunity like other civilians accompanying the force.

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<sup>214</sup> Law of War Memo, *supra* note 186.

<sup>215</sup> *Id.* This test also considers geographical and remoteness in time considerations as part of its analysis. *Id.*

<sup>216</sup> *Id.*; see also Direct Participation ICRC, *supra* note 195 (recognizing that some States extend the Protocol I view that taking a “direct part hostilities” not only includes activities involving the delivery of violence, but also acts which would be considered in direct support of military operations).

<sup>217</sup> Law of War Memo, *supra* note 186.

<sup>218</sup> *Id.*

<sup>219</sup> Civilians, who directly support the war effort through combatant-like activities such as logistical support for combat forces, or intelligence gathering, lose their civilian protections and become lawful targets. Parks, *supra* note 6, at 132.

<sup>220</sup> Law of War Memo, *supra* note 186. The DoD guidance on the employment of military and civilian contractors should not be confused with the U.S. functionality test analysis. *Id.* Instead, it should be viewed as an application of the Protocol I analysis. *Id.* Thus, the U.S. can still conceivably target the enemy’s civilian contractor under the functionality test. *Id.* But see U.S. DEP’T OF DEFENSE, INSTR. 1100.22,

GUIDANCE FOR DETERMINING WORKFORCE MIX para. E2.1.3.3.2 (7 Sept. 2006) (providing that technical advice on the operation of a weapon system, or other support of a non-discretionary nature performed in direct support of combat operations, is not taking a direct part in hostilities).

<sup>221</sup> Law of War Memo, *supra* note 186.

<sup>222</sup> See discussion *supra* note 89 (targeting of the Serbian civilian RTS television station during the Kosovo War for direct support activities); *id.* (targeting of al-Jazeera (civilian) satellite television station being used as an “instrument of war” against allies during Afghanistan War).

<sup>223</sup> Parks, *supra* note 6. W. Hays Parks is currently the Senior Associate Deputy General Counsel, International Affairs, U.S. DoD and is a major advocate of the U.S. functionality test and well respected law of war expert. *Id.* He served as the Special Assistant to the The Judge Advocate General of the U.S. Army for law of war matters from 1979 to 2003. *Id.* He is a member of the DoD Law of War Working Group currently working on developing a new joint services law of war manual which will discuss, in part, the U.S. functionality test. Law of War Memo, *supra* note 186.

<sup>224</sup> Parks, *supra* note 6, at 134 (citing letter from DAJA-IA to Counselor for Defense Research and Engineering (Economics), Embassy of the Federal Republic of Germany (Jan. 22, 1988)); see also U.S. DEP’T OF AIR FORCE, PAM. 10-231, FEDERAL CIVILIAN DEPLOYMENT GUIDE, para. 6.3.3 (Apr. 1, 1999) (stating that civilians performing “duties directly supporting military operations may be subject to direct, intentional attack”). Interpretation of the Air Force policy on targeting “direct support” activities is unclear when read in conjunction with other Air Force memoranda which shift the analysis from functional proximity to physical proximity in combat. ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 484 n.14 (A.R. Thomas & James C. Duncan eds., Supp. 1999) (defining direct support as “support by civilians to those actually participating in battle or directly supporting battle action, and military work done by civilians in the midst of an ongoing engagement.” Similar to Air Force policy, the Navy has also published additional documents with unclear guidance on the issue of direct support).

### *b. Timing of Protections*

Similar to the direct participation language, there is ample legal debate about how long civilians lose their protective status when they take a direct part in hostilities.<sup>225</sup> Article 51(3) states that “civilians shall enjoy the protection . . . unless and for such time as” they participate in hostilities.<sup>226</sup> At a general level, both the Protocol I test and the U.S. functionality test recognize that civilians only lose their immunity for as long as they directly participate in the hostilities and then regain their protections upon their ceasing the prohibited activity.<sup>227</sup> However, these theories diverge in their analysis as to when civilians cease participation in hostilities because of how they determine what types of activity triggers a loss of protections under Article 51(3).

Because the Protocol I theory requires actual harm to result in order to constitute direct participation in hostilities, immunity is only lost when the harm occurs and is restored upon completion of the hostile act.<sup>228</sup> In contrast, the functionality approach considers what type of activity is being performed and cessation is dependent upon the specific function performed by the civilian, regardless of when the actual harm ensues.<sup>229</sup> Under a scenario where a civilian plans an attack on the enemy, then later executes the attack, the U.S. approach would allow the civilian to be a lawful target at the planning stage and continue until the attack is executed.<sup>230</sup> Even if an attack did not occur, but intelligence confirms that the civilian’s function qualifies as a legal target under the U.S. analysis, the civilian can be intentionally attacked.<sup>231</sup> However, the Protocol I approach would only allow the civilian to be lawfully targeted during the actual attack itself.<sup>232</sup> Thus, the U.S. approach to the “as for such time” element arguably allows for a much greater period of time for the loss of civilian immunity than the Protocol I view, albeit on a case-by-case basis.

### *c. Journalists Engaged in Dangerous Professional Missions*

Whether journalists are “engaged in a dangerous professional mission in areas of armed conflict”<sup>233</sup> is a critical, but often overlooked component in determining the protective status of journalists on the battlefield. Indeed, the *raison d’être* of Article 79 is to recognize only those journalists who are actually performing their “professional mission” in armed conflict, because of the incredible dangers they encounter while accompanying the military which can be lawfully targeted.<sup>234</sup>

According to the Commentary on Article 79, the concept of a “professional mission” covers all activities which normally form part of the journalist’s profession in a broad sense: being on the spot, doing interviews, taking notes, taking photographs or films, sound recording, and transmitting them to his newspaper or agency.”<sup>235</sup> Such activities do not result in the loss of immunity against direct attacks and do not constitute a direct participation in hostilities.<sup>236</sup> Thus, journalists who are taking notes of operational activities, photographing enemy positions, and then transmitting this information are not

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<sup>225</sup> This article will not extensively address timing considerations under Article 51(3).

<sup>226</sup> Protocol I, *supra* note 4, art. 51(3). The U.S. approach also adopts the “for such time” component of the Protocol I test. Law of War Memo, *supra* note 186; DESKBOOK, *supra* note 209, at C-8.

<sup>227</sup> PILLOU ET AL., *supra* note 139, at 619; GREEN, *supra* note 202, at 102; GASSER, *supra* note 137, at 233.

<sup>228</sup> PILLOU ET AL., *supra* note 139, at 619.

<sup>229</sup> The importance or function of the civilian’s contribution to the enemy’s military effort is critical to the U.S. functionality test. Law of War Memo, *supra* note 186.

<sup>230</sup> *Id.*; DESKBOOK, *supra* note 209, at C-8.

<sup>231</sup> This approach is heavily dependent upon gathering intelligence to determine the importance and level of a civilian’s function and contribution to the military effort. Law of War Memo, *supra* note 186. As long as intelligence confirms that a civilian is taking “a direct part in hostilities,” the civilian can remain a lawful target. *Id.*; see discussion *supra* note 98 (using NATO intelligence to target civilian media television station during Afghanistan War). It can be difficult to determine the duration for which a civilian can be legally targeted under the U.S. test. DESKBOOK, *supra* note 209, at C-8.

<sup>232</sup> Immunity is regained upon cessation of the attack, even if the civilian may later become involved in another conflict. PILLOU ET AL., *supra* note 139, at 619.

<sup>233</sup> Protocol I, *supra* note 4, art. 79(1). The “areas of armed conflict” language is not necessarily a legal qualifier as to the civilian protections afforded journalists, since they would enjoy the right as civilians in and out of armed conflict. PILLOU ET AL., *supra* note 139, at 921.

<sup>234</sup> Protocol I, *supra* note 4, art. 79(1); PILLOU ET AL., *supra* note 139, at 918.

<sup>235</sup> PILLOU ET AL., *supra* note 139, at 921.

<sup>236</sup> Knut Dörmann, *International Humanitarian Law and the Protection of Media Professionals Working in Armed Conflicts*, Int’l Comm. on the Red Cross, Jan. 12, 2007, available at <http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/media-protection-article-?>.

treated as spies subject to prosecution by the enemy's domestic laws as any other civilian might be, but instead, are "respected and protected."<sup>237</sup> This level of respect for the journalist's professional mission is taken to an even higher level of significance when one considers that war correspondents receive enhanced POW protections beyond those civilians who do not accompany the military into combat.<sup>238</sup>

To the extent that war correspondents are no longer engaged in their professional mission, their POW protections would appear to be forfeited.<sup>239</sup> What types of activities fall outside of the "professional mission" of journalists is not clearly addressed by Article 79.<sup>240</sup> On one end of the spectrum, a journalist who takes an action causing direct harm towards the enemy would lose protections and could be lawfully targeted.<sup>241</sup> In direct contrast, a war correspondent who merely suspends their usual professional activities would likewise lose their POW protections, but could not be lawfully attacked. However, Article 79 does not contemplate the scenario where journalists use their professional skills to directly support military operations against the enemy. Defining what journalistic activities constitute taking a direct part in hostilities requires a practical application of Article 79 on a case-by-case basis.

#### *d. Interplay Between Article 79(1) and Article 51(3)*

Journalists cannot be lawfully targeted unless their activities are outside the protections provided in Article 79(1)<sup>242</sup> and they rise to the level of taking "a direct part in hostilities" under Article 51(3).<sup>243</sup> Whether the activity triggers Article 51(3) is dependent upon the activity and the interpretation of Article 51(3)'s language. While the Protocol I approach is more restrictive in its interpretation of Article 51(3)'s language, the U.S. functionality test is more permissive.<sup>244</sup> Both interpretations recognize that activities causing actual harm to the enemy make the actor a lawful target.<sup>245</sup> However, the U.S. functionality test permits journalists to be lawfully attacked where their activities are directly supporting a significant military mission against the enemy.<sup>246</sup> Journalists who are not "engaged in dangerous professional missions" would be conducting activities that jeopardize their protective status under the meaning of Article 79(1).<sup>247</sup> While not all activities falling outside of Article 79(1)'s meaning would necessarily make journalists lawful targets,<sup>248</sup> direct support actions under the U.S. test could qualify.<sup>249</sup> Determining what types of direct support activities result in this outcome requires a methodology to evaluate these activities based upon the particular circumstances of each individual case.

<sup>237</sup> Respecting journalists on the battlefield who are not taking direct part in hostilities is a customary rule under the laws of war. J.M. Henckaerts, Study on Customary International Humanitarian Law, Annex. List of Customary Rules of International Humanitarian Law, 87 INT'L REV. OF THE RED CROSS, No. 857, at 201 (Mar. 2005); Gasser, *supra* note 143, at 3–18; *see generally* Jane Hall, *A 'Most Searing Experience': Bob Simon Relives His 40 Days as Iraq's Hostage During the Gulf War in New Book*, L.A. TIMES, May 11, 1992, at F12C.1 (CBS reporter Bob Simon and three other reporters, who were wearing battle dress uniforms (BDUs) and acting as freelance journalists, were captured and initially viewed as spies by the Iraqis in Operation Desert Storm for crossing the Iraqi border in the early stages of the war).

<sup>238</sup> GC III, *supra* note 3, art. 4(A)(4). It is important to note that aside from protections, the prevailing view is that civilians cannot lose their civilian status because one is either a combatant or a non-combatant under the Geneva Conventions. PILLOUD ET AL., *supra* note 139, at 610–12. However, the U.S. perspective is that civilians can become unlawful combatants dependent upon the circumstances. *Ex parte Quirin*, 317 U.S. 1 (1942).

<sup>239</sup> Non-accredited journalists who no longer perform their professional mission will always maintain their civilian protections, unless of course they take direct part in hostilities. *See* discussion *supra* Part III.C.2.a. Accredited journalists who no longer perform their professional mission and no longer accompany the armed forces would then be treated similarly to non-accredited journalists who are now no longer obliged to have POW status and are given civilian protections unless they take direct part in hostilities. *Id.* However, accredited journalists who are not performing their mission, and who then remain accompanying the military as civilians might be viewed to be in violation of the laws of war, as either some quasi-form of the military force or an unlawful combatant perhaps. *Id.* Seemingly, their POW protections would not apply because they no longer qualify to accompany the military in their professional capacity since they are not performing their mission. *Id.*

<sup>240</sup> Protocol I, *supra* note 4, art. 79(1).

<sup>241</sup> *Id.* art. 51(3).

<sup>242</sup> *Id.* art. 79(1).

<sup>243</sup> *Id.* art. 51(3).

<sup>244</sup> *See* discussion *supra* Part III.D.2.a.

<sup>245</sup> *See id.*

<sup>246</sup> Law of War Memo, *supra* note 186; DESKBOOK, *supra* note 209, at C-8. It appears that the U.S. functionality test was employed during the selected targeting of civilian media during the Kosovo and Afghanistan Wars. *See supra* notes 89, 98 and accompanying text.

<sup>247</sup> Protocol I, *supra* note 4, art. 79(1).

<sup>248</sup> It is foreseeable that a war correspondent may not be conducting their professional mission and would lose their POW status, but would remain a protected civilian assuming they were not taking a direct part in hostilities. PILLOUD ET AL., *supra* note 139, at 922.

<sup>249</sup> Law of War Memo, *supra* note 186.

#### IV. Evaluating the Embedded Journalist's Activities under Article 79(1)

Under the U.S. functionality test to Article 51(3), embedded journalists are not “engaged in dangerous professional missions”<sup>250</sup> in the meaning of Article 79(1) if their journalistic activities directly support military operations.<sup>251</sup> Defining the level of direct support required to make an embedded journalist a lawful target requires a methodology to recognize when such circumstances are apparent. Critical to this analysis is the general concept of military integration coupled with the specifics of the journalist's job function.<sup>252</sup> Enhanced military-press relations, increased levels of technology, and privatization are major factors in the decision to integrate the press in current military operations.<sup>253</sup> However, these factors are extremely broad and do not clearly illustrate when an embedded journalist's activities may trigger the loss of protections under the U.S. functionality test to Article 51(3).<sup>254</sup> To help clarify when an embedded journalist's activities will result in a loss of protections, this paper recommends three criteria to aid in this evaluation: (1) the integration of war correspondents into military information operations, (2) the eroding distinction between PAO and war correspondents, and (3) the loss of reporter objectivity on the battlefield.<sup>255</sup>

##### A. Integration of War Correspondents into the Overall Information Operations Mission

The degree to which embedded journalists are used to directly support military Information Operations (IO)<sup>256</sup> presents the single, greatest risk of creating a scenario where journalists could lose their protections and be lawfully targeted under the application of the U.S. functionality test to Article 51(3).<sup>257</sup> Information Operations serves an important military function in combat operations by using integrated capabilities<sup>258</sup> to “influence, disrupt, corrupt, or usurp adversarial human and automated decision making while protecting our own.”<sup>259</sup> The integrated nature of the embedded press system, combined with this military function, dramatically increases the likelihood that a journalist's activities will be defined as directly supporting combat operations.<sup>260</sup> Specifically, psychological operations (PSYOP), operations security (OPSEC), and public

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<sup>250</sup> Protocol I, *supra* note 4, art. 79(1).

<sup>251</sup> Law of War Memo, *supra* note 186. There is no question that journalists who perform their professional mission under Article 79 are given civilian protective status. Protocol I, *supra* note 4, art. 79(1). Thus, it would appear that every professional activity they perform is protected. However, this paper asserts that some professional activities are being used to directly support military operations instead of the journalist's mission.

<sup>252</sup> Law of War Memo, *supra* note 186. The author contends that the greater the level of integration of the embedded press system into the military fabric, the less distinguishable the civilian journalist's role becomes from the military mission.

<sup>253</sup> PAUL & KIM, *supra* note 15; *see also* Direct Participation ICRC, *supra* note 195 (discussing the challenges of high-tech warfare and privatization of the armed forces in implementing the notion of direct participation in hostilities under Article 51(3)).

<sup>254</sup> Protocol I, *supra* note 4, art. 51(3); Law of War Memo, *supra* note 186.

<sup>255</sup> Each proposed factor is designed to be evaluated in the context of other factors and does not necessarily offer a mutually exclusive answer as to whether a certain embedded journalist's activities make him a lawful target. The weight that should be given to any particular factor is dependent upon the circumstances of the individual war correspondent.

<sup>256</sup> JOINT PUB. 3-13, *supra* note 2.

<sup>257</sup> Law of War Memo, *supra* note 186; *see* DESKBOOK, *supra* note 209, Vol. III, at C-21 (discussing that civilians taking a direct part in information operations become unlawful enemy combatants under the U.S. approach to Article 51(3)); *see also* Michael N. Schmitt, *Wired Warfare: Computer Network Attack and Jus in Bello*, 846 INT'L REV. OF THE RED CROSS 365, 381(2002) (suggesting that IO operations can be targeted where it causes injury, death, damage, or destruction under *jus in bello* principles of the laws of war). Some scholars argue that open media information is a more important dimension of IO than issues such as cyber attack. Porch, *supra* note 17, at 101–02. This is a potentially dangerous development in media-military relations because it has “led enthusiasts to view information as a commodity to be manipulated for operational advantage.” *Id.*

<sup>258</sup> Information Operations is designed to provide joint force commanders (JFCs) and their staffs with the ability to achieve information superiority in strategic military missions by harnessing an array of core, supporting, and related capabilities. JOINT PUB. 3-13, *supra* note 2, at x, xi. IO core capabilities consist of psychological operations (PSYOP), military deception (MILDEC), operations security (OPSEC), computer network operations (CNO), and electronic warfare (EW). *Id.* at x. Information Operations supporting capabilities which are either directly or indirectly involved in the information environment include: information assurance (IA), physical security, physical attack, counterintelligence, and combat camera. *Id.* The related capabilities of PA, civil-military operations (CMO), and defense support to public diplomacy must always be coordinated and integrated with core and supporting IO capabilities. *Id.*

<sup>259</sup> *Id.* at ix.

<sup>260</sup> Today's war correspondents invariably come into natural, frequent contact with IO functions in a variety of meaningful ways. *See generally* PAUL & KIM, *supra* note 15 (providing numerous examples where the embedded press system has been incorporated into the overall IO mission to combat enemy propaganda or gain public trust in the military's mission).

affairs are the most logical IO capabilities where a war correspondent's skill set can be used by the military to create higher levels of embedded press involvement.<sup>261</sup>

War correspondents play a significant role in PSYOP.<sup>262</sup> Elements of PSYOP can be employed at the strategic, operational, and tactic levels and is "the only DOD asset given the authority to influence foreign target audiences (TA) directly through the use of radio, print, and other media."<sup>263</sup> The importance of this mission during combat operations cannot be underestimated.<sup>264</sup> During hostilities, PSYOP is designed to reduce the adversary's will to fight, create dissidence and disaffection within their ranks, and ultimately induce surrender.<sup>265</sup> Embedded journalists can be employed at any level, and during any point during armed conflict, by using their professional skills and work product to directly support this military function.<sup>266</sup> If this occurs, the use of their professional activities will take them outside the protections of Article 79, and expose them to direct attack from the enemy.<sup>267</sup>

Embedded journalists, who are informed components of the OPSEC process, run the risk of becoming part of the greater IO mission.<sup>268</sup> The OPSEC process is continuous and denies adversary intelligence systems the critical information needed to correctly assess friendly capabilities and intentions.<sup>269</sup> Although the military and press institutions have diametrically opposed goals with respect to OPSEC issues,<sup>270</sup> embedded journalists are largely captive audiences who comply with OPSEC due to military control.<sup>271</sup> Commanders have the ability to put reasonable conditions on access to areas of hostilities, credentialing, and/or censor information solely for the purpose of OPSEC.<sup>272</sup> As such, war correspondents actively

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<sup>261</sup> Embedded journalist involvement in PA operations will be discussed separately. See discussion *infra* Part IV.B. Involvement of journalists in MILDEC will not be addressed in this paper, except to state that journalists whose reporting activities are used as deceptive informational tools may be viewed as directly supporting this military mission and lose their protective status under a U.S. functionality test analysis. JOINT CHIEFS OF STAFF, JOINT PUB. 3-13.4, MILITARY DECEPTION, at ix (13 July 2006) [hereinafter JOINT PUB. 3-13.4]; see also PAUL & KIM, *supra* note 15, at 131 (suggesting that the use of the press in deception-based IO is dangerous because the long-term risks associated with damaging the press' credibility and military/press relations outweighs any short-term military strategic advantage).

<sup>262</sup> PAUL & KIM, *supra* note 15, at 25, 131.

<sup>263</sup> JOINT CHIEFS OF STAFF, JOINT PUB. 3-53, DOCTRINE FOR JOINT PSYCHOLOGICAL OPERATIONS, at ix-x, xii (5 Sept. 2003) [hereinafter JOINT PUB. 3-53]. PSYOP are planned operations to convey selected truthful information to foreign audiences in order to affect the behavior of targeted individuals, groups, and even governments. *Id.* at ix. The greater PSYOP mission appears to be one of providing propaganda to thwart the enemy's objectives, even if it is provided through means of selected truthful information. However, the PSYOP doctrine only employs the term propaganda when referring to the enemy's propaganda campaigns, not PSYOP activities. *Id.* at 1-5. Joint publication 3-53 defines propaganda as "any form of communication in support of national objectives designed to influence the opinions, emotions, attitudes, or behavior of any group in order to benefit the sponsor, either directly or indirectly. *Id.* at GL-7. Ironically, this is almost the exact definition provided in JP 3-53's overview section defining PSYOP, although the word propaganda is not used. *Id.* at ix.

<sup>264</sup> During the First Gulf War, the Coalition successfully used its own radio network called "Voice of the Gulf" to counter Iraqi propaganda and disinformation as well as to encourage Iraqi defection and surrender. PERSIAN GULF WAR REPORT, *supra* note 16.

<sup>265</sup> JOINT PUB. 3-53, *supra* note 263, at ix. In advance of hostilities, PSYOP can be used to "gather critical information, undermine a potential opponent's will or capacity to wage war, or enhance the capabilities of multinational forces." *Id.* at xiii.

<sup>266</sup> Tactical PSYOP presents the most realistic entry point for embedded journalist involvement because they are routinely attached to combat units at this level. See *supra* notes 106-11 and accompanying text. Nevertheless, a journalist's work product can be used to facilitate the PSYOP mission at any juncture. *Id.* There is also a recent push to use war correspondents more extensively in future counter-propaganda campaigns than have been used in the past. PAUL & KIM, *supra* note 15, at 25 (discussing further integration of the embedded press into IO as mentioned in JOHN R. MACARTHUR & BEN H. BAGDIKIAN, SECOND FRONT: CENSORSHIP AND PROPAGANDA IN THE GULF WAR (1992)). In order to measure the success of embedded press involvement in IO, some have suggested this can be done through a content analysis of news coverage focused on news reports that "debunk" enemy claims in support of IO. *Id.* at 131. Nevertheless, to date, there are no existing data bases which provide research on the extent to which press coverage has supported IO during combat operations. *Id.*

<sup>267</sup> Protocol I, *supra* note 4, arts. 51(3), 79(1). Some scholars fear that in the future, "an enemy missile could home on a reporter's signal" because their journalistic activities could be viewed as providing significant operational support. Porch, *supra* note 17, at 103.

<sup>268</sup> PAUL & KIM, *supra* note 15, at 68-70. War correspondents have historically come into contact with differing OPSEC strategies such as credentialing, censorship, and "security at the source" throughout combat operations. *Id.*; see *supra* notes 28, 32, 45, 47, 66, 73, 79, 104, 133 and accompanying text.

<sup>269</sup> JOINT CHIEFS OF STAFF, JOINT PUB. 3-13.3, OPERATIONS SECURITY, at vii, x (29 June 2006) [hereinafter JOINT PUB. 3-13.3]. OPSEC is an operations function, not a security function. *Id.* at x. "OPSEC considers the integration, coordination, deconfliction, and synchronization of all multinational information activities within the JFC's operational area." *Id.* at III-3.

<sup>270</sup> See PAUL & KIM, *supra* note 15, at 15-16, 21-22 (explaining that the press' goal is to gain as much access as possible to newsworthy information to provide it to the public, while the military has an interest in not allowing news coverage which will compromise operational security); see *infra*, App. A.

<sup>271</sup> The commander has a major interest in protecting generally unclassified evidence that is associated with sensitive operations and activities. JOINT PUB. 3-13.3, *supra* note 269, at vii, x.

<sup>272</sup> See generally JOINT PUB. 3-61, *supra* note 2. War correspondents can be restricted from access to combat locations or other information. *Id.* at III-2; U.S. DEP'T OF ARMY, FIELD MANUAL 3-61.1, PUBLIC AFFAIRS TACTICS, TECHNIQUES AND PROCEDURES Ch. 4 (1 Oct. 2000) [hereinafter FM 3-61.1].

participate in OPSEC otherwise their reporting privileges can be revoked.<sup>273</sup> At higher military levels, the control and influence of embedded journalists will usually be coordinated through the Joint Information Bureau (JIB).<sup>274</sup> At the tactical unit level, the PAO assesses the quality and type of the media coverage and coordinates OPSEC measures intended to minimize the possible effects of negative media coverage.<sup>275</sup> Because embedded journalists are more integrated into today's overall military IO mission,<sup>276</sup> as compared to freelance journalists, they are more susceptible to military control over their reporting activities.<sup>277</sup> These circumstances, in turn, can be used to directly support military operations.

Overall, IO seeks to use war correspondent news coverage to support positive public relations, build public support, and support successful information operations against the enemy.<sup>278</sup> The more a journalist's professional mission is integrated into the IO mission, the greater the potential for their activities to be used to directly support this military combat capability, and ultimately jeopardize their special protective status under Article 79.<sup>279</sup>

## B. Eroding Distinction between PAOs and War Correspondents

An eroding distinction between the use and role of the PAO<sup>280</sup> and that of the war correspondent during combat operations, jeopardizes the protective status of embedded journalists.<sup>281</sup> The mission of public affairs is to “counter[] adversary propaganda and disinformation by providing a continuous flow of credible, reliable, timely, and accurate information to military members, their families, the media, and the public.”<sup>282</sup> This mission is closely linked to overall IO goals and the two must be carefully coordinated to ensure consistent themes and messages are communicated.<sup>283</sup> In this manner, public affairs is designed to “help defeat adversary efforts to diminish national will, degrade morale, and turn world opinion against friendly operations.”<sup>284</sup> Public Affairs' target audience is the American public, international public, the

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<sup>273</sup> JOINT PUB. 3-61, *supra* note 2, at III-25; *see also* PAUL & KIM, *supra* note 15, at 123–25 (providing methods on how to measure operational security violations committed by reporters during combat).

<sup>274</sup> JOINT PUB. 3-61, *supra* note 2, at x. Joint Publication 3-61 states, “The JIB director, with supporting JIB staff, is responsible for coordinating all media operations within the operational area, and provides and coordinates support to the JFC through the joint force PAO. The JFC, with the assistance of the joint force PAO and the JIB director, directs the PA program in a manner that most efficiently contributes to the overall success of the command.” *Id.*

<sup>275</sup> *Id.* Public Affairs issues related to embedded journalists will be discussed later. *See* discussion *infra* Part IV.B.

<sup>276</sup> *See* discussion *supra* Part II (providing historical accounts of the use of embedded journalism in combat).

<sup>277</sup> The PAO can more easily control embedded journalists who are a daily part of the tactical unit as opposed to controlling the activities of freelance reporting and open-source media through traditional media coordination mechanisms such as the media pool and general media clearance procedures. JOINT PUB. 3-13.3, *supra* note 269, at III-3. In fact, embedded journalist control is evidenced by one of the criticisms of this press system, namely that unilateral reporters are treated as “second class citizens” in the combat theatre. PAUL & KIM, *supra* note 15, at 111. Freelance journalists simply were not given nearly the level of access as war correspondents during the Iraq War, and were thus not nearly as controlled by the military. *Id.* The effects of incorporating embedded journalists into the day-to-day unit activities will be discussed later. *See* discussion *infra* Part IV.C.

<sup>278</sup> PAUL & KIM, *supra* note 15, at 23–24.

<sup>279</sup> Protocol I, *supra* note 4, art. 79.

<sup>280</sup> Because PAO's are military members they are considered combatants who can be lawfully targeted based upon their status. *Id.* art. 43(2); GC III, *supra* note 3, art. 4(A)(1). However, journalists are considered civilians, not combatants and cannot be targeted due to their status unless their conduct is in violation of Article 51(3). Protocol I, *supra* note 4, arts. 51(3), 79(2); GC III, *supra* note 3, art. 4(A)(4).

<sup>281</sup> Furthermore, some scholars have argued that during war “public information is a battle space” that must be controlled like any other. Porch, *supra* note 17, at 101–02; *see also supra* note 88 and accompanying discussion. Even the defense community has argued that treating information as a “battle space” could have negative repercussions when mixing public affairs with information operations. Porch, *supra* note 17, at 102. “Treating information as a battle space confuses operational success with strategic victory.” *Id.*

<sup>282</sup> JOINT PUB. 3-61, *supra* note 2, at I-3, I-4. It is critical to provide factual, complete, and truthful information (even if the information concerns military's mistakes), in order to discredit and undermine adversary propaganda. *Id.* at I-4. Public affairs's mission is also designed to complement the DoD media principles of information. *Id.* at I-5; *see also* DoDD 5122.5, *supra* note 72.

<sup>283</sup> Careful PA and IO coordination prevents information fratricide. JOINT PUB. 3-13, *supra* note 2, at x; JOINT PUB. 3-61, *supra* note 2, at I-3 to I-4. Public Affairs is also linked to IO through close coordination with the OPSEC mission. JOINT PUB. 3-13.3, *supra* note 269, at III-3; JOINT PUB. 3-61, *supra* note 2, at III-21 to III-22, III-28. “PA activities [also] affect, and are affected by, PSYOP, and are planned and executed in coordination with PSYOP planning and operations.” JOINT PUB. 3-61, *supra* note 2, at III-21.

<sup>284</sup> JOINT PUB. 3-61, *supra* note 2, at I-4. This goal is accomplished by “putting accurate, complete information out first so that friendly forces gain the initiative and remain the preferred source of information.” *Id.* at I-4. The mission to counter adversary propaganda is arguably a higher level operational support activity directly affecting combat operations than fostering the public trust at large or increasing the morale of military families back home. Promoting public morale would not likely be seen as a “direct support” threat, but “participation in the war effort” under both the Protocol I and U.S. functionality approach to Article 51(3). PILLOU ET AL., *supra* note 139, at 619; Law of War Memo, *supra* note 186. Historically, PA has been effectively used to accomplish the greater IO counter-propaganda mission. JOINT PUB. 3-61, *supra* note 2, at I-5. In October 1994, Iraq dispatched 20,000 Republican

internal military information program, and adversary forces.<sup>285</sup> The embedded press system is used to reach these target audiences.<sup>286</sup> It is a key component of public affairs' media planning operations because it provides a more in-depth reporting tool than other media systems.<sup>287</sup> Ironically, aside from the carrying of arms, public affairs' vision for war correspondents at the tactical level is essentially the same professional mission accomplished by military journalists.<sup>288</sup> The integrated use of embedded journalists as a primary tool in accomplishing the public affairs mission eliminates distinctions between the roles of war correspondents and military journalists. This threatens the protective status of embedded journalists to the degree their activities are in concert with PAO's objectives and directly support the military's operational mission.<sup>289</sup>

### C. Loss of Reporter Objectivity on the Battlefield

*George Bush is the President, he makes the decisions, and, you know, as just one American, he wants me to line up, just tell me where.*<sup>290</sup>

The loss of reporter objectivity by embedded journalists on the battlefield is one factor that poses a direct threat to their protective status.<sup>291</sup> This loss is directly proportional to the extent to which war correspondents are integrated into combat units and maintain their level of professionalism.<sup>292</sup> Patriotic journalism is also a major contributing factor to the loss of objectivity.<sup>293</sup> The closer war correspondents remain to combat units and the less professional they are in maintaining their neutrality, the greater the risk that their professional activities can be used to directly support military operations.<sup>294</sup> Ironically, both the military and press have created this potential for the loss of objectivity through their mutual interest in promoting better public relations.<sup>295</sup> In order to tell the story of the combat Soldier, Sailor, Airman, Marine, and Coast Guardsman it is implicit that journalists closely identify themselves with these servicemembers to bring the "real" story to the general public.<sup>296</sup> During this process, the inherent nature of the embedded system<sup>297</sup> creates both the potential to provide

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Guard troops to join 50,000 regular army troops on the Kuwaiti border. *Id.* at I-5. The U.S. use of media is largely credited with the Iraqi forces standing down from their threatening position within ten days of the deployment. *Id.*

<sup>285</sup> JOINT PUB. 3-61, *supra* note 2, at I-7, I-8.

<sup>286</sup> *Id.* at III-12. In this regard, embedded journalists and PA have similar objectives of providing truthful information to the public. PAUL & KIM, *supra* note 15, at 14-15.

<sup>287</sup> JOINT PUB. 3-61, *supra* note 2, at III-12 to III-13. Public affairs doctrine establishes embedded journalism as the primary method for media planning. *Id.* at III-12 to III-13, III-24. In fact, PA doctrine specifically states that media pools are not the preferred means of covering U.S. operations. *Id.* at III-26. One drawback to the embedded system is the fact that it provides deep, detailed reporting instead of a broader perspective of combat operations. *Cf.* PAUL & KIM, *supra* note 15, at 111-12.

<sup>288</sup> Civilian media accompanying the force are subject to the same release criteria for reporting and appear to have no mentionable distinction under the PA doctrine. JOINT PUB. 3-61, *supra* note 2, at II-6, III-12. In fact, some information that is releasable to Combat Camera (COMCAM) is prohibited to civilian journalists and military journalists alike, even though COMCAM personnel are military members like military journalists and have a role in PA. *Id.* at III-13. There also appears to be little doctrinal difference between civilian PAOs who accompany the force and war correspondents. *Id.* at II-2; *see also* Jason Flanagan, *Training Military Journalists Strains Fort Meade's Barracks*, EXAMINER, June 3, 2008, available at [http://www.examiner.com/a-1421272~Training\\_military\\_journalists\\_strains\\_Fort\\_Meade\\_s\\_barracks.html](http://www.examiner.com/a-1421272~Training_military_journalists_strains_Fort_Meade_s_barracks.html) (discussing the modern role of military journalists).

<sup>289</sup> *See* discussion *supra* Part III.D.2.d.

<sup>290</sup> J. Rutenberg & Bill Carter, *Draping Newscasts with the Flag*, N.Y. TIMES, Sept. 20, 2001, at C8 (quoting CBS television anchor Dan Rather during a telecast following the September 11th terrorist attacks).

<sup>291</sup> *See also* PAUL & KIM, *supra* note 15, at 112 (suggesting that the loss of objectivity also threatens the sanctity of the overall media mission to provide impartial coverage of events).

<sup>292</sup> "Journalists can protect themselves from identifying too closely with their assigned units by relying on their professionalism." *Id.* at 112-13.

<sup>293</sup> "American reporters exhibit as much patriotism as members of the armed forces." AUKOFER & LAWRENCE, *supra* note 47, at 3. Reporters throughout the history of U.S. conflicts have been patriotic, "especially when it comes to not impairing our own military." *Id.* (quoting JOHN J. FIALKA, HOTEL WARRIORS 5, 37 (1991)); *see also* Porch, *supra* note 17, at 103-04 (providing accounts where the media became "cheerleaders" for the military and reflected a mood of patriotism rather than remaining impartial to events in the Iraq War).

<sup>294</sup> PAUL & KIM, *supra* note 15, at 112. The psychological phenomenon known as the "Stockholm syndrome" is used to illustrate the type of scenario where embedded journalists can lose their objectivity and could potentially directly support military operations. *Id.* Originally, this syndrome was designed to explain circumstances where hostages who are in direct conflict with their captors end up identifying with, excusing, and protecting their captors. *Id.* Some researchers believe that the pressures experienced by hostages that result in this behavior, are similar to the pressures embedded journalists encounter when they lose their objectivity during combat operations. *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> *Id.* One outward sign that journalists are too close to the unit members they accompany is their frequent use of the plural pronouns "we," "us," and "our" in their news stories to describe the progress of the units to whom they are attached. Shafer, *supra* note 102.

unprecedented levels of combat media coverage<sup>298</sup> and an environment where reporters can lose their objectivity and become virtual extensions of the military's IO campaign.<sup>299</sup>

## V. Conclusion

In light of the U.S. functionality test to Article 51(3), the role and use of today's embedded journalist in international armed conflicts poses a direct threat to their civilian protections under Article 79 of Protocol I. Despite the fact that embedded journalism has helped to facilitate better military-press relations and generally enhance news coverage of military conflicts, its increased level of integration in U.S. combat operations approaches the legal threshold of making the journalists themselves lawful targets. It is the U.S. military's responsibility to create new measures to ensure embedded journalists' activities are not so comingled with information operations that they become targeted. The overall integration of war correspondents into information operations, the eroding distinction between PAO and war correspondents and the loss of reporter objectivity on the battlefield are all factors that provide significant evidence that today's embedded journalists are probably not engaged in their "professional mission" within the meaning of Article 79. Embedded journalists are no longer performing their professional mission when they are in fact being used to directly support military information operations. To the extent this continues in U.S. military combat operations, war correspondents can be lawfully targeted by the enemy under the U.S. functionality test to Article 51(3).

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<sup>297</sup> Embedded coverage provides deep and detailed coverage of the events from the perspective of war correspondents that travel with single units to which they are assigned. PAUL & KIM, *supra* note 15, at 111-12. This type of news coverage is referred to as a "soda straw" view of combat operations. *Id.* The media can overcome this type of myopic reporting by assigning numerous embedded journalists to other units to provide a bigger news picture. *Id.* Nevertheless, despite the affect the "soda straw" view has on the quality of overall news coverage, the myopic nature of the embedded press system also creates the potential for war correspondents to lose their objectivity due to their complete integration into the unit.

<sup>298</sup> The embedded press system has been hailed as a "win-win proposition" for both the military and press to foster better public relations and public demand for information. *Id.* at 110.

<sup>299</sup> *Id.* at 110, 112-13 (discussing that the loss of objectivity is a shortcoming of the embedded process); *see* discussion *supra* Part IV.A (discussing the integration of the war correspondent into IO). "There's an inherent conflict built into embedding. From the military's point of view, when you embed somebody in your unit, they become family. For the reporter, that's very tricky. You want to keep objective distance from your source." Shafer, *supra* note 13 (quoting *Los Angeles Times* reporter Sam Howe Verhovek about conducting embedded journalism during Operation Iraqi Freedom); *see also* Porch, *supra* note 17, at 101-02. One journalist has even argued that the term "embed" intimates that the reporter is "in bed" with the military due to the lack of journalistic impartiality and neutrality exhibited by some war correspondents during combat operations. PAUL & KIM, *supra* note 15, at 112 (quote from PROJECT FOR EXCELLENCE IN JOURNALISM, *Embedded Reporters: What Are Americans Getting?*, (2003), available at <http://www.journalism.org>).

## Appendix A

### Comparison of Press and Military Missions and Goals<sup>300</sup>

<b>Press</b>	<b>Military</b>
<b>Mission</b>	
Reporting	Protection and defense of the United States
<b>Mission-Related Goals</b>	
Uphold obligations to the public Achieve profits	Achieve operational success Maintain operational security
<b>Organizational Attributes</b>	
Horizontal/competitive Reflexive Reactive Professional	Hierarchical/cooperative Reflexive Reactive and Proactive Professional
<b>Goals for News Coverage</b>	
Gain access to newsworthy information Provide newsworthy information to the public Fulfill obligations to the public Build market share Maintain quality of news Objectivity (tell both sides of the story) Accuracy Credibility	Do not allow news coverage to compromise operational security Fulfill legal obligations regarding press access Use news coverage to support military mission Obtain good public relations  Build credibility Support information operations

<sup>300</sup> PAUL & KIM, *supra* note 15, at xv.

## Appendix B

*DoDD 5122.05, September 5, 2008*

### ENCLOSURE 3

#### STATEMENT OF DoD PRINCIPLES FOR NEWS MEDIA COVERAGE OF DoD OPERATIONS<sup>301</sup>

1. Open and independent reporting shall be the principal means of coverage of U.S. military operations.
2. Media pools (limited number of news media who represent a larger number of news media organizations for news gatherings and sharing of material during a specified activity) are not to serve as the standard means of covering U.S. military operations. However, they sometimes may provide the only means of early access to a military operation. In this case, media pools should be as large as possible and disbanded at the earliest opportunity (in 24 to 36 hours, when possible). The arrival of early-access media pools shall not cancel the principle of independent coverage for journalists already in the area.
3. Even under conditions of open coverage, pools may be applicable for specific events, such as those at extremely remote locations or where space is limited.
4. Journalists in a combat zone shall be credentialed by the U.S. military and shall be required to abide by a clear set of military security ground rules that protect U.S. Armed Forces and their operations. Violation of the ground rules may result in suspension of credentials and expulsion from the combat zone of the journalist involved. News organizations shall make their best efforts to assign experienced journalists to combat operations and to make them familiar with U.S. military operations.
5. Journalists shall be provided access to all major military units. Special operations restrictions may limit access in some cases.
6. Military PA officers should act as liaisons, but should not interfere with the reporting process.
7. Under conditions of open coverage, field commanders should be instructed to permit journalists to ride on military vehicles and aircraft when possible. The military shall be responsible for the transportation of pools.
8. Consistent with its capabilities, the military shall supply PA officers with facilities to enable timely, secure, compatible transmission of pool material and shall make those facilities available, when possible, for filing independent coverage. If Government facilities are unavailable,

ENCLOSURE 3

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<sup>301</sup> DoDD 5122.05, *supra* note 72, at 9.

journalists, as always, shall file by any other means available. The military shall not ban communications systems operated by news organizations, but electromagnetic operational security in battlefield situations may require limited restrictions on the use of such systems.

9. Those principles in paragraph 8 shall apply as well to the operations of the standing DoD National Media Pool system.

ENCLOSURE 3

Appendix C

Major Access and Security Strategies During Significant Combat Actions<sup>302</sup>

Operations						
Variables	Grenada	Panama	1st Gulf War	Somalia	Bosnia	Iraq
Estimated number of reporters	600	800	1600 (186 in pools)	600	22 embeds in 15 units	2200 (over 600 embeds)
Access strategy						
Access denial	Y	Y	Y/N	N	N	N
Press pools	Y	Y	Y	Y	N	N
Embedded press	N	N	N	N	Y	Y
Unilateral journalism	N	Y	Y	Y	Y	Y
Security Strategy						
Credentials	Y	Y	Y	Y	Y	Y
Security reviews	N	N	Y	N	N	N

RAND MG200-4.2

<sup>302</sup> PAUL & KIM, *supra* note 15, at 73.