Chapter 4

The Functional Protection of ‘Providing News’ in International Law

Chapter 1 of this book established that direct attacks, kidnapping and detention are among the main threats for news providers in contemporary armed conflicts. However, in most cases, perpetrators do not target news providers because they are common individuals or civilians. Rather, they are targeted because of their function with the indirect aim of preventing them from carrying out their work. Legally, this phenomenon is difficult to grasp. Dinah PoKempner says, for instance, that it is a little like writing about global warming: ‘The danger is real, catastrophic, accelerating, and yet almost invisible’.1 At the same time, Chapter 1 established that parties to contemporary armed conflicts increasingly also adopt methods to directly target the work of news providers, such as fake accusations, hacking, censorship, communication blackouts, destruction of media facilities or confiscation of equipment.

In Chapter 2 we have also seen that it is an immense challenge to define the actual agents of contemporary news production because war coverage is conducted by a large variety of actors. As a consequence, this study chose a functional definition of news providers that is defined by their activity. However, Chapter 3 proved that the primary legal system applicable during armed conflicts, namely IHRL, mainly focuses on the personal protection of news providers.2 This is rather unfortunate. Since the vital role of news providers is triggered by their activity, it is this activity that should be protected by international law in the first place. Despite its importance, this aspect has been largely ignored in past research on the protection of news providers in armed conflicts.3

Therefore, I examine in this chapter the extent to which international law protects this activity, namely, the functional protection of ‘providing news’.

2 IHRL consequently completed this protection.
I start with an analysis of the scope of the functional protection, which will be followed by the most frequent or disputed limitations of the functional protection in armed conflicts and an evaluation of their accordance with international law. These highlighted limitations will be: (1) restrictions on access to the territory of an armed conflict, (2) espionage, (3) the prohibition to expose protected persons to public curiosity, (4) criminal liability for speech, (5) the targeting of media facilities, and (6) testimonial privileges of news providers before international criminal tribunals. Throughout this analysis, we will see a range of emerging new concepts – especially in HRL – that offer a broad protection of the functional protection of news providers. Nevertheless, state parties to contemporary conflicts often skirt this law or interpret it very broadly.

I Scope of the Functional Protection

News providers are constantly searching for news. They collect, process, transfer and publish information. In order to conduct this work, they need to speak and write and shoot what they think is relevant (or even not so relevant) for the news story they seek. At the same time, they depend on information and its disclosure by others. HRL specifically protects such activities with different concepts: Freedom of expression protects the fundamental right to think and speak freely. In addition, the right to information ensures access to certain kinds of information.

IHL, on the other hand, does not contain any direct reference to the activity of ‘providing news’. Neither the GCS nor their APS or other IHL treaties mention news coverage or related activities. Nevertheless, it can be argued that the mere mention of journalists engaged in dangerous professional missions and war correspondents includes an underlying protection of their activity because of the provisions’ use of a professional terminology. The ICRC commentary to Article 79 AP I accordingly describes the term ‘professional’ as covering ‘all activities which normally form part of the journalist’s profession’, namely, taking notes, being on the spot of action, interviewing people, taking photographs

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4 In this context, news can be understood as information that has not yet reached the public sphere.
5 See below, pp. 208ff.
7 Sandoz et al., Commentary AP I, 1987, Nr. 3246. See further Chapter 3, pp. 121ff.