General principles of international humanitarian law

and their application to interpreters serving in conflict situations

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1. Introduction

Although interpreters working in conflict situations are considered to be minor figures compared with others operating in wartime contexts there is no doubt that they exercise a number of significant functions in these theatres.

On one hand, the indispensable activity of linguistic mediation performed by competent individuals in the case of international armed conflicts is explicitly referred to in the Geneva Conventions themselves: they contain a number of significant provisions which require the presence of qualified individuals operating as interpreters in order to ensure that the persons protected by said Treaties can adequately access the safeguards envisaged therein. On the other, interpreters are a required aid for individuals and institutions present in the conflict theatre who or which are called upon to undertake actions of common interest for local communities and, in a broader sense, for the International Community. In this respect, interpreters are for example needed to facilitate the activities of (a) international organisations present in the area to provide assistance to the civilian population, (b) non-governmental organisations performing similar tasks and (c) journalists operating in conflict areas in order to report on events and alert international public opinion to the critical situation existing in the area.
In actual fact, such essential tasks performed by interpreters do not only apply in the case of conflict situations proper but also, and perhaps even more significantly, in post-conflict and peace-building situations.

Therefore, in order to outline a comprehensive legislative framework relating to the legal status of interpreters, it will be necessary to consider not only international humanitarian law, but also other areas of international law, since the applicable provisions will obviously change according to the various contexts the interpreter is operating in.

Whereas the significance of interpreters in conflict or post-conflict situations is clear, an analysis of their legal status shows that the amount of special and separate attention they are given in instruments is much less than for other categories covered. The only method by which the legal protection to be accorded to interpreters can be established is a deductive one, whereby they are placed within the scope of relevant legal principles and categories which already exist. In essence, the figure of the interpreter is not specifically covered in law. This differs from the case of a similar figure, the journalist, who as we know is explicitly and separately addressed in specific provisions contained in the 1977 Additional Protocol I to the Geneva Conventions (art. 79) [1], and who has been given special attention in legal doctrine and international practice itself, with the adoption of a number of instruments aimed at emphasising the need to provide specific safeguards for persons acting in that capacity.

The lack of specific coverage of the case of interpreters also emerges from an analysis of international documents which, while emphasising the need to safeguard journalists and media professionals working in conflict areas, do not contain any clear and specific references to the ancillary figure of interpreters, despite the fact that, in real conflict situations, direct attacks against these people often cause casualties at the same time among journalists and individuals providing linguistic mediation. An instance of the scarce attention afforded to interpreters as a specific category is for example to be found in Security Council resolution 1738 of 23 December 2006, which expressed deep concern at attacks against individuals working to report on armed conflicts. This document also fails to make any specific mention of activities performed by interpreters. A reference can only be inferred from passages in which the Security Council condemns “the frequency of acts of violence in many parts of the world against journalists, media professionals and associated personnel in armed conflict, in particular deliberate attacks in violation of international humanitarian law”. Even though the text of the resolution in no way changes the relevant legal status which we will be examining, in view of its purely exhortative nature which aims at alerting the International Community to the matters addressed, it is clear that an explicit reference to the function of interpreters, who may be deemed to be included within the mixed category of “associated personnel”, might at least have made it possible to place a more effective emphasis on the specific safeguards required by individuals acting in such a capacity in conflict situations. It is also worth remarking that these interpreters often find themselves in difficult situations, particularly with local communities, because of accusations of bias, collaborationism and espionage on behalf of international actors present in the area.

The lack of attention given to the legal status of individuals acting as interpreters in conflict zones is also shown by the fact that so far no legal analysis has focused on this specific issue. This contrasts with the wide-ranging debate on similar figures, at least in legal terms, such as war correspondents and journalists operating in conflict areas. As is well known, academic and diplomatic attention continues to focus on the latter categories with the aim of extending and consolidating the legal safeguards which they require. This is borne out, for example by: (a) the emphasis laid by several States, during the 30th International Conference of the Red Cross and Red Crescent in 2007, on the need to safeguard these categories in statements specifically addressing this issue [2]; (b) the ad hoc activities promoted by major non-governmental organisations specifically involved with this issue
which have included the proposal of new international treaties in order to provide safeguards for journalists in conflict areas [3]; (c) the ongoing theoretical debate on the issue, such as the one promoted by the Istitut de droit international, an association which includes among its members several of the world’s most eminent international legal scholars and which has set up a specific working group to address the “International status, rights and duties of duly accredited journalists in times of armed conflict” [4].

All of these activities, however, appear to be explicitly restricted to the role of journalists and media professionals in conflict areas, since they give no attention to complementary figures, such as interpreters, who nonetheless have an ancillary function in and are essential for the coverage of armed conflicts, the very activity which the promoters of these initiatives consider so important as to require the study and development of further legal standards.

The lack of attention devoted to the figure of interpreters acting in conflict zones does not however mean that they are relegated to a kind of legal vacuum, where they are denied any measure of international legal protection at all. This paper will in fact show that they can be fully accommodated within relevant and existing legal provisions and notions and will also single out the possible problem areas their activities raise for international humanitarian law and, in post-conflict situations, for international law.

Finally attention will be given to related issues which may have a specific impact on the activities of interpreters operating in conflict areas. One such issue, for instance, relates to whether they have a legal obligation to give evidence to international criminal tribunals in regard of information they may have acquired while acting as interpreters in conflict areas. It is clear that this possibility entails a contrast between professional ethics, the requirements of justice and the need to avoid exposing interpreters, particularly local ones, to any risks which might be linked to this obligation to testify.

In the conclusions we will be discussing the figure of the interpreter and the protection available within the scope of international law, also in light of the possible need to undertake special initiatives aimed at improving the safeguards currently provided.

2. References to the activities of interpreters in international humanitarian law.

The provisions of IHL do, first of all, recognise the usefulness of interpreters as persons required for the proper functioning of a number of legal safeguards. One example is provided by the references made to the presence of an interpreter, sometimes further qualified as a “competent” or “qualified interpreter”, which can be found in the Third and Fourth Geneva Conventions of 1949.

In particular in the Third Geneva Convention, art. 96 [5] and art.105 [6] outline the right of prisoners of war who are involved in disciplinary or criminal proceedings held by the Detaining Power to avail themselves of the services of an interpreter in the course of such proceedings. Similar provisions are to be found in the Fourth Geneva Convention in art.72 [7] and art.123 [8], as regards the protection of civilians detained by another State in situations of military occupation or internment who have criminal or disciplinary procedures brought against them by such detaining authorities. In this case it is again specified that such individuals are entitled to avail themselves of “qualified interpreters”.

These provisions are thus aimed at ensuring the right to a fair trial for persons protected by the Geneva Conventions. Furthermore, the crucial importance of this right has been reaffirmed in a recent study conducted by the International Committee of the Red Cross into International Humanitarian Law (2005) which, among the various guarantees highlighted, under Rule 100 [9], specifies the customary nature of the duty to provide an interpreter to persons who may be involved in criminal or disciplinary procedures, and in doing so also refers to similar provisions which have
developed over time within human rights treaties in regard of proceedings against foreign nationals.

It is also worth pointing out that this service, in view of its clear importance in ensuring the overriding right to defence for the persons involved, is given a special qualification in the relevant provisions and the Commentary thereto. In the text drafted by the International Committee of the Red Cross it is stated, in reference to art. 105 of the Third Geneva Convention, as also reiterated in the other provisions referred to, that: “The right of an accused prisoner of war to have the services of a competent interpreter "if he deems necessary" automatically results from the rights of defence if the language currently used in the detaining country is unfamiliar or unknown to the prisoner of war. In this connection, it should be noted that it is for the prisoner himself to judge whether he needs an interpreter. The word "competent" denotes an interpreter who not only knows the two necessary languages -- that of the prisoner of war and that of the detaining country -- but also is familiar with legal terminology and accustomed to acting as an interpreter during judicial proceedings. This interpreter must be supplied by the Detaining Power; if the prisoner of war prefers to have the services of one of his fellow-prisoners with the necessary qualifications, he may do so, provided that the person appointed also enjoys the confidence of the court” [10].

As noted in the Commentary, this right can only be said to be fulfilled if the person entrusted with such service has the required qualifications to perform it. These qualifications also include familiarity with legal terminology and being accustomed to acting as an interpreter in legal proceedings. An interpreter so defined must be provided by the Detaining Power or, alternatively, a fellow prisoner may be chosen, for obvious reasons of confidence. However, even in the latter instance, the condition that the interpreter be "competent" must in any case be met, which confirms that the standard established by the Convention is particularly high.

Finally, the provisions of the Geneva Conventions also envisage the use of interpreters to assist a Protecting Power, namely a State not involved in an international armed conflict but which may be supervising compliance with IHL. In this case too art.126 [11] of the Third Geneva Convention and art.143 [12] of the Fourth Geneva Convention provide that members of delegations of the Protecting Power in States involved in a conflict may avail themselves of interpreters in their work to monitor the situation, which may for example include visits to prison or internment camps.

In such cases, however, the use of interpreters is considered to be a last resort in view of the clearly expressed preference in the Commentary to avoid their use. The reason for the recommendation not to use interpreters in the performance of the activities required of the Protecting Power is due to the need for there to be direct contact without any mediation interposed between the members of the international delegation and the protected individuals, so as to avoid any fears on the part of the interviewees that the confidential nature of the information they provide might be breached. Therefore, although the Detaining Powers have the obligation to provide such interpreters, the Commentary is clear in indicating a preference for the use of members of the international delegation itself or individuals provided by the ICRC, also in order to avoid that the interpreters be seen as potential informers of the Detaining Power [13].

Thus, by scrutinising these two concise provisions, we have already been able to bring to light two aspects which are seemingly central to the debate on the issues evoked in this seminar. One being the need to ensure the, specifically technical, reliability of the services provided by interpreters, in view of the reference to the requirement that the persons used should have particularly qualified linguistic skills and, in particular, a knowledge of legal terminology. The other being the need embodied in these provisions to address the possibility that individuals acting as interpreters may act in an equivocal manner, such as to favour one of the parties to a conflict, with the further possibility that they may make use of their position as linguistic mediators for ulterior purposes such as reporting negative opinions which may have been expressed by prisoners and internees in regard to the Detaining Power.
Since these are the only provisions under international humanitarian law which directly refer to the services of interpreters in conflict situations, we must now seek to outline the legal status of individuals performing such services in the case of armed conflicts. In this connection we need to clarify their legal status: (a) in the conduct of hostilities, i.e. as to whether these individuals are protected against direct attacks from the parties at war; and (b) with regard to their situation if captured.

3. The legal status of interpreters as related to the conduct of hostilities

As relates to the conduct of hostilities the main point to be clarified is the legal status of persons acting as interpreters, both when they are acting on behalf of one of the parties to the conflict, or when they are assisting agencies or individuals which are not parties to the conflict, such as international organisations, media professionals or non-governmental organisations.

In the first case, one has to establish whether the interpreters acting on behalf of one of the parties to the conflict can be considered to be combatants, and thus legitimate targets of war, or civilians, and as such, protected against direct attack and the negative effects of conflict. The two categories are mutually exclusive, so that individuals who do not fall into the category of combatants are ipso facto civilians [14]. In this connection, it is necessary to distinguish between international armed conflicts and those which are not of an international character.

In international armed conflicts the notion of combatant can be derived from a number of rules and is substantially equivalent to that of member of the armed forces of a State which is a party to a conflict (art. 43 AP I). Interpreters are obviously excluded from this category apart from the marginal case in which they are members of the armed forces of a state, which is a possibility since armed forces may have members who are specialised in this activity.

Equally, for armed conflicts not of an international character, despite there being no notion of combatant, there has recently been developed the notion of "fighters" [15], namely individuals who, as members of non-state armed groups, are distinct from the category of civilians and can therefore be targets of attack on an ongoing basis. However, in order to be a part of this category it is necessary for the individual to have a "continuous combat function" [16]. It would obviously be hard to define the activity of interpreters as such, in view of their non-involvement in a combat function proper.

It would therefore seem possible, at first sight, to claim that interpreters, even when acting on behalf of a party to the conflict, are to be considered as belonging to the civilian population and are thus entitled to protection from direct attack, that is to say protected from the effects of hostilities [17].

The only uncertainties which might exist with regard to the activity of interpreting would apply to the case spelled out in art.51.3 of the First Additional Protocol [18] or art.13 of the Second Additional Protocol in which a civilian, (for our purposes read an interpreter), carries out activities which could be characterised as taking "a direct part in hostilities". So an important consequence which might occur if a civilian were to perform activities of fundamental support for one of the parties to the conflict which were characterized as direct participation in hostilities would be the loss of his or her immunity from direct attack, as a result of which the civilian could become the target of the other side in the conflict.

In recent years an intense debate has arisen around the notion of “direct participation in hostilities” which has led the International Committee of the Red Cross to draft a document [19] which seeks to clarify the issue. This document identifies a set of criteria which can be used to identify a number of activities as falling under this heading (e.g. acts of violence against a party to a conflict; surveillance
activities over captured personnel; tactical intelligence operations, including for example the identification of targets, etc.). However, it would seem difficult to characterise the specific activities of interpreters, which involve direct contact between two parties for mediation and to enable language communications, as direct participation in hostilities, whereas a different case could be made with regard to activities more closely related to tactical intelligence functions, such as the translation of encrypted or enciphered messages or military communications of the opposing side. In the latter case the activity involved is more specifically military in nature and is such as to confer a clear benefit to the Party availing itself of such translation services in view of subsequent tactical operations. As such it would probably entail the loss of immunity for civilians engaging in it, but we are obviously outside the normal realm of activities undertaken by interpreters.

Secondly, one can certainly dismiss the idea of qualifying interpreters as direct participants in hostilities in the case in which they provide their services not to one of the Parties to the conflict, but to other actors present in the theatre of operations, such as representatives of international organisations, non-governmental organisations or international media professionals, etc. In these cases the correct way to qualify such persons would be as civilians and there would seem to be no way in which they might be deprived of their right to be protected from direct attack.

Firstly, therefore, it is to be emphasised that interpreters are recognised as enjoying specific protection within the scope of international humanitarian law since, as far as the conduct of hostilities is concerned, they can be classified as civilians both in international and non-international armed conflicts and are thus protected from the effects of said hostilities. Furthermore, it would seem hard to claim that the activities they engage in would involve a loss of immunity against direct attack.

Obviously, when interpreters, particularly in the exercise of their functions, are present in the war area, there is a possibility that they will be indirect victims of warfare. This may, for example, occur because of their proximity to legitimate military targets (armed forces personnel, military facilities, such as military installations or barracks, etc.) but obviously these possible casualties in relation to individuals classifiable as civilians must comply with the usual legal limits of proportionality, etc. If such additional criteria are met, these actions may be considered to be legitimate in the overall perspective of international humanitarian law even though they obviously cause significant negative effects for the interpreters exposed to them.

4. The legal status of interpreters in case of capture.

The provisions mentioned above had the purpose of defining the status of interpreters in international humanitarian law in relation to the conduct of hostilities. We now need to examine such provisions as govern the case of interpreters captured during armed conflicts.

If we begin our examination from the case of international armed conflicts, the first instance to be considered is that of captured interpreters who were performing their activity on behalf of a State which is a party to an armed conflict, where the individuals were captured in the proximity of a combat zone.

In this case, interpreters could be seen to fall under a specific category envisaged by the Third Geneva Convention, under art. 4.A. (4), whereby “Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: ...(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who
shall provide them for that purpose with an identity card similar to the annexed model”.

This specific instance, which reaffirms previous regulations on the matter, tends to attribute the qualification of Prisoner of War to individuals who, while being civilians in relation to the conduct of hostilities, may find themselves captured, particularly in the event of ground operations, because of the supporting activity they have been providing to a State party to a conflict which causes them to operate in proximity to enemy lines.

The rationale of this provision, which was established as early as the Regulations annexed to the II 1899 Hague Convention, is to ensure a clearer legal status to civilian personnel acting in support of the armed forces of a State. This is important in that said civilian personnel, while not being a part of the State’s military, is involved in auxiliary activities in close contact with State armed forces, so as to expose the persons entrusted with these tasks to the risk of capture in the course of warfare. In such a case, even though the individuals thus involved in successive codifications come under the area of protection of the Fourth Geneva Convention, it should be borne in mind that in 1899 the complex system of safeguards for civilians as enshrined in the Fourth Geneva Convention of 1949 had not yet been developed, so that it was necessary to extend the status of prisoners of war to such individuals in order to be sure of affording them special protection.

It would seem plausible to be able to include individuals serving as interpreters on behalf of a State in an armed international conflict within this special category, also because of the non-exhaustive nature of the list of activities referred to in this provision. This is confirmed by the Commentary to art.4. A(4): “The list given is only by way of indication, however, and the text could therefore cover other categories of persons or services who might be called upon, in similar conditions, to follow the armed forces during any future conflict” [20]. Consequently, although interpreting as an activity is not specifically mentioned, in view of its nature it would be easily accommodated within the scope of the provision.

The only condition required in order to claim said special status would be for the individual to be acting with the authorisation of the armed force which he is providing a service to, and this required link is also attested to by the delivery on the part of authorities involved of a special document certifying that the individual belongs to the category of “person who accompany the armed force” persons who accompany the armed forces without actually being members thereof. This identity card is issued by States [21] in line with the model established in Annex IV.A of the Third Geneva Convention. It should however be noted that failing to have this document in one’s possession at the time of capture does not rule out the possibility for the individual concerned to claim this status. This is because exhibiting this special identity card has a probative function and is not a necessary condition in order to obtain such a guarantee, unlike the conditions specified in the previous system, namely the 1929 Geneva Convention on prisoners of war. Even if the captured individual does not have the identity card in his or her possession it will still be possible to claim said status even though it will of course be more difficult under such circumstances to obtain this specific protection. Obtaining the prisoner-of-war status allows the individual concerned to benefit from the guarantees provided by the Third Geneva Convention but will obviously also make them liable to be detained by the opposing State until the termination of hostilities.

Apart from this specific instance, in cases where the State making use of an interpreter has not made use of this possibility, interpreters would still be considered as belonging to the civilian population. Once captured therefore, interpreters shall be entitled to the guarantees enshrined in the Fourth Geneva Convention, supplemented where appropriate by the provisions of the First Additional Protocol as long as they can be qualified as “protected persons”.

There is one significant point to be clarified in this connection. In order to benefit from the status of “protected person” pursuant to the Fourth Geneva Convention one must not be a citizen of the
capturing State. Art. 4 of the Fourth Geneva Convention, which defines the scope of application *ratione personae* of the Treaty, states that: “*Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals*”. This may have major consequences in the case of a State which is a party to a conflict making use of local interpreters, i.e. citizens of the State against which military operations are being conducted. In this case such individuals, once captured, would no longer fall under the protective provisions of the Fourth Geneva Convention.

In the case of armed conflicts not of an international character there is, of course, no notion of prisoner of war and therefore the reasoning set out in relation to the effect of art. 4. A(4) of the Third Geneva Convention is obviously not relevant. However, even in such a case, interpreters acting on behalf of one of the parties to the conflict, i.e. the government armed forces or the organised non-state armed groups, or even on behalf of other persons operating in the area, such as journalists, governmental or non-governmental organisations, etc., who are captured by one of the parties to the conflict (legitimate government or non-governmental groups) shall benefit from the safeguards established in the relevant provisions relating to individuals who are not taking an active part in hostilities. These guarantees are set out, specifically, in the common Art.3 of the 1949 Geneva Conventions, in the Second Additional Protocol, where relevant, and in the many rules of customary law which have been developed on this matter [22]. Substantially, these rules guarantee a minimum standard of safeguards to individuals captured and in the hands of one of the parties to a conflict, the aim being to consolidate the thrust of common art.3 to the 1949 Conventions [23] which seeks to apply principles of humanity to such individuals, obviously including captured interpreters, since, for example, it prohibits torture or inhumane or degrading treatment, arbitrary deprivation of freedom and outrages upon personal dignity, etc.

5. The case of interpreters involved in post-conflict situations.

Whereas the previous previsions sought to outline the status of interpreters in the event of their being involved in armed conflicts, whether international or non-international, a further area of interest relates to the case in which interpreters may be involved in a post-conflict situation, specifically in States which are involved in difficult peace-building processes which usually see the involvement of international organisations or ad hoc coalitions of States through international missions which are entrusted with peace-keeping and reconstruction tasks. In these cases, although these operations usually take place in States where international or non-international armed conflicts had previously occurred, the international mission is often deployed when the hostilities have come to an end, and consequently international humanitarian law no longer applies. Therefore, notwithstanding the fact that international humanitarian law can no longer be used to define the status of interpreters acting in these theatres, this does not mean that other international law provisions cannot be invoked.

The first case to be considered is the one in which these individuals are employed by international organisations present in the area. In these instances one could posit the extension to these interpreters of the privileges commonly recognised for the staff members of the organisation involved. It is not, however, always easy to attribute the same status held by the staff members of the organisation, e.g. that of international civil servants, to such individuals because of the episodic and unstructured nature of the work relationship with the organisation, especially in the case of local linguistic facilitators who are not a structural part of the machinery of the international organisation.

However, there are further points of reference with regard to their status which can be derived from other international instruments, in particular the so-called SOFAs (*status of force agreements*), which are treaties defining the legal status of personnel employed to assist an international mission. In these treaties, which to some extent vary according to the specific operational situation involved,
one can pinpoint a number of provisions which can be of significance for interpreters, in view of the fact that those involved in this activity, especially where hired from the local population, can in abstract terms be equated with a category which is commonly regulated in these instruments, namely “locally recruited personnel”.

This, for example, is the case for the United Nations Model SOFA of 9 October 1990 (UN Doc. A/45/594), which is intended to be the standard SOFA which the State on whose territory a UN mission is being carried out must enter into with the UN in order to allow for correct implementation of the mission. In this document, after recalling in par. 22 that the United Nations “may recruit locally such personnel as it require”, a number of rules extending special privileges to such staff are set out. In particular, pursuant to par. 28 of the SOFA, the locally recruited staff enjoy a series of privileges set out in section 18 letters a, b, c of the 1946 Convention on Privileges and Immunities of the United Nations. The referenced text specifies that the jurisdiction of local courts shall not apply to any acts committed by such personnel in the performance of their official duties and that such personnel shall also be granted specific exemptions from local taxation.

In order to facilitate the performance of their tasks, the locally-recruited staff are also provided with a special identification document by the authorities of the UN mission, which details the holder’s basic personal information and provides information relating to the function they perform. This is to be exhibited to local authorities for identification purposes. In that they are connected with the mission, locally recruited staff are also subject to possible restrictions which apply to other members of the mission, since, for example, pursuant to par. 40, it is the responsibility of the commanders of the mission to ensure discipline and order among its members, including local staff, if necessary by making use of military police directly under the Force’s command.

The advantages of being classified as local staff attached to the United Nations mission seem obvious in view of the immunity afforded from the jurisdiction of local courts in relation to official duties. This privilege is explicitly re-affirmed in par. 46 of the SOFA, where it is established that “All members of the United nations peace-keeping operation including locally recruited personnel shall be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity”. Furthermore, and this is of particular importance for locally recruited personnel, the same paragraph establishes that this provision remains valid beyond the end of the mission, so as to ensure protection to this personnel even after they have completed their service with the mission, since it is envisaged that “Such immunity shall continue even after they cease to be members of or employed by the United Nations peace-keeping operations and after the expiration of the other provisions of the present Agreement”. Pursuant to par. 48, effective immunity from local jurisdiction is also extended to civil actions in regard to disputes relating to the performance of official duties on behalf of the mission.

Similar provisions are also to be found in SOFAs covering other international missions outside the UN system, where it is also envisaged that the State in whose territory the mission is carried out shall grant locally recruited staff working for the multi-national force (a) immunity from both criminal and civil jurisdiction in relation to any actions connected with the performance of their official duties for the contingent and (b) exemption from obligations relating to military service and (c) exemption from taxation of salaries and emoluments they may receive from the international force.

Several international treaties can be quoted in this regard such as, for example, the SOFA governing the IFOR/SFOR missions in Bosnia Herzegovina and Croatia (see par. 16 of the SOFAs drawn up with Bosnia and Croatia); par IX. 4 of the SOFA governing the Multinational Protection Force deployed in Albania in 1997; and section 4, par. 14 of Annex A to the Military Technical Agreement established for the ISAF mission in Afghanistan, etc. In these instruments the normative reference is always to the mission’s “locally recruited personnel”, which may of course include
individuals officially providing translation services for the mission and for the international contingents operating as a part of it, even though it is presumable that it would be difficult to claim such privileges if the employment relationship between the parties is not adequately structured.

Not being subject to the jurisdiction of the courts of the State in which they are providing their services does not however entail absolute immunity from criminal liability for the interpreters involved. On the one hand, we have seen that these provisions tend to restrict this privilege to the notion of functional immunity, which only covers acts carried out in the performance of the functions an individual is appointed for. They therefore have a scope which is not broad enough to cover all the possible cases which might involve interpreters and are significantly different in extent from the privileges granted to other members of the international contingent, for example members of the military forces, who are granted absolute immunity from criminal prosecution, covering any criminal action they may have committed either on or off duty.

On the other hand, these provisions do not rule out prosecution being brought by different States from the one on whose territory the activities covered are performed. Depending on national laws there may be a number of instances in which it is possible for personnel serving on these international contingents to be subject to a State's jurisdiction. One possibility would involve the application of the passive personality principle, according to which States can claim jurisdiction to prosecute offences which may have been committed against their own citizens, independently of the nationality of the author of the crime or the place in which it was committed. A second possibility would be to base the prosecution on specific provisions extending the jurisdiction of a State, in particular in relation to military offences, to civilian personnel working for its own armed forces, independently of their nationality. On this basis, there are a number of offences which might be committed by interpreters acting for an international contingent which might give rise to prosecutions against them, such as for example occurred recently in respect of the aggression committed against another worker by Alaa “Alex” Mohammad Ali [24], an interpreter with dual Iraqi and Canadian nationality operating with the United States contingent. As a result of the changes made by Congress in 2007 to the Uniform Code of Military Justice in order to subject contractors “serving with or accompanying an armed force in the field” to the jurisdiction of US military courts it was possible to bring a prosecution against this interpreter which led to a five month prison sentence.

6. Recent issues related to the performance of interpreting services: the possible obligation interpreters may incur to give evidence before international criminal courts.

A further problem which might confront interpreters operating in war zones relates to whether they are subject to an obligation to give evidence to international criminal tribunals which prosecute international crimes committed in the area they have been acting in (war crimes, crimes against humanity or genocide). It is clear that, in view of the sensitive nature of the work performed by interpreters, they may be witnesses to particularly significant events or statements, which might entail their receiving subpoenas to give evidence on activities connected with the performance of their duties from, for example, an international criminal tribunal investigating criminal offences committed in the area they were present in.

This demand might be issued by an international criminal tribunal which is endowed by its statutes with the power to compel testimony from individuals considered to be useful for the investigation [25] by issuing subpoenas or summons for compulsory appearance of witnesses which, if not complied with, could entail prosecution being brought against recalcitrants on the part of local authorities or the international criminal tribunals themselves (see, for example, art. 77 of the Rules
Furthermore these proceedings before international criminal courts can also be held with the witness in absentia and, in view of the system of judicial cooperation between States and these Institutions, it would be very possible for criminal sanctions to be brought against individuals found to be in breach.

The possibility of being summoned to testify clearly raises problems of professional ethics for interpreters and it is also difficult to balance the requirement of justice with the need to guarantee the safety of interpreters present in conflict areas, which would be further jeopardised if the parties to the conflict considered these persons as potential inconvenient witnesses to the offences being committed. Precisely in order to address the various requirements involved, these International Tribunals have in their practice developed a series of special privileges for certain professional categories, which may be exempted from the obligation to give evidence, in view of the overriding importance of the functions they perform compared with the need to obtain information which may be of use in the cases tried.

In this connection, it may be useful to refer to the practice of the International Criminal Tribunal for the former Yugoslavia, as it is the tribunal which has tackled this issue most extensively. Although the Tribunal has mainly dealt with other instances of international presence on the ground, such as ICRC delegates and journalists, etc., it is also possible to derive guidance from their rulings in defining the position of interpreters in regard of these cases.

A first case to be considered would be that of individuals directly involved in international trials and working in International Tribunals. In addition to the standard privilege recognised also in this setting to lawyer-client confidentiality, there was an extremely significant ruling made by the International Criminal Tribunal for the former Yugoslavia in the Delalic case (1997), where the defence had advanced a request for a subpoena to be issued against an interpreter working at the Tribunal. In this case, the Tribunal rejected the request to compel the interpreter to testify stating that “It is also an important consideration in the administration of justice to insulate the interpreter or other functionaries of the International Tribunal from constant apprehension of the possibility of being personally involved in the arena of the conflict, on either side, in respect of matters arising from the discharge of their duties” [26]. As one can see, this wording appears to be particularly significant since it provides a very clear account of the need to avoid exposing interpreters performing their official duties to undue pressure, in view of the importance of ensuring that they can undertake the tasks assigned to them with the requisite peace of mind.

The hypothetical referred to however relates explicitly to the work of an interpreter acting as a member of staff of the International Criminal Tribunal and the situation might be construed differently in the case of interpreters working in a conflict area who are not employed by similar International Institutions but for other individuals or organisations instead.

In this connection, as already mentioned, the Tribunal has recognised several categories of persons present in conflict areas as enjoying an exemption from the obligation to give evidence, considering as it did that there was a priority interest in ensuring the broadest possible protection to such categories of individuals, who otherwise, if subjected to the obligation to give evidence, would see their activities and their personal safety jeopardised. It is clear that a party to a conflict which was committing international crimes might simply conclude that such individuals were potentially inconvenient witnesses to the atrocities they were involved in and this would obviously endanger the safety of such individuals. With this in mind, an exemption from the obligation to give evidence was for example extended to officers of the International Committee of the Red Cross. Special discussion has also focused on the position of journalists working in conflict areas.
The latter case is of particular significance since the legal principles developed by the International Criminal Tribunal for the former Yugoslavia were discussed as part of the Randal [27] case the events of which involved to a significant extent a local interpreter hired by the journalist the case was named after. Randal, who at the time was a correspondent for the Washington Post, had in February 1993 interviewed Radoslav Brdjanin, a member of the Republika Srpska administration, through a local interpreter, since the journalist did not speak Serbo-Croatian. The published interview quoted Brdjanin as using expressions denoting feelings of open hostility towards Bosnian Muslims since he called for a migration of non-Serbs from Bosnia in order “to create an ethnically clean space through voluntary movement” (Washington Post, 11/2/1993). In 2001, during the proceedings held against Brdjanin for genocide, crimes against humanity and war crimes, the Prosecutor sought to have the article admitted as evidence against the accused but the defence invoked its right to cross-examine the author of the article to assess the truthfulness of the text. The Tribunal responded to the request by asking Randal to confirm the accuracy of the sentences attributed to Brdjanin and to this end issued a subpoena against him.

Randal, however, challenged this procedure, alleging that journalists were exonerated from the obligation to give evidence and invoking his inability to provide any value judgement on the accuracy of the statements attributed to the defendant in view of the fact that he had had to rely on the services of a local interpreter to conduct the interview.

In the case in question, the Trial Chamber refused to recognise the privilege invoked, whereas the Appeals Chamber conclusively accepted the journalist’s position and outlined a number of abstract judicial criteria to be used in deciding whether journalists working in war zones should be compelled to give evidence. In such cases, it is necessary to balance the need to obtain all possible sources of evidence with the public interest linked to the activities of correspondents in conflict situations in view of the "public watchdog role" which has been recognised for journalists working in these situations. The Appeals Chamber ruled that two criteria have to be met before one can order a witness to give evidence in such cases: “First the petitioning part must demonstrate that the evidence sought is of direct and important value in determining a core issue in the case. Second, it must demonstrate that the evidence cannot be obtained elsewhere”. In the case in question, the Chamber ruled that the two criteria had not been met, particularly in view of the fact that Randal, as a non Serbian-speaker, had had to resort to the services of an interpreter. As a result, the judges stressed that his testimony would not have been of “direct and important value to determining a core issue in the case”, in view of his inability to provide useful information on the exact content of the words which were presumed to have been spoken by the defendant, based on the translation provided by the local interpreter.

This case, therefore, can provide some points for discussion with regard to the role of interpreters in conflict areas and a basis from which to formulate a number of questions in relation to similar problems which might arise for them. On the one hand, the Randal case shows an unconditional exemption from the requirement to give evidence before international criminal tribunals does not apply even in the case of journalists, who undoubtedly have a special position among actors on the ground.

On the other hand - and this is something which has not received adequate attention - the central reason underpinning the defence’s request to hear the witness was in order to determine the accuracy of the translation provided to Randal, since the main object of discussion was not so much the definition of the circumstances under which the interview was conducted, in order to identify possible inconsistencies, but the content of the final text produced, which was inescapably channelled through the activity carried out by the interpreter. It would obviously have been interesting if, in the case in question, the interpreter used for the interview, as the only person involved who was in a position to give an account of what really happened, had been examined in
order, for example, to assess their language skills but obviously the examination might have failed to provide an accurate result since the person's language skills could have changed after more than ten years from the events.

Secondly, the interpreter, if called upon to testify, could also have made similar claims to the journalist’s, invoking a privilege from the obligation to give evidence. The position of the interpreter in claiming exemption from the obligation to testify would have been made stronger by being able to invoke the instrumental nature of the interpreter’s activity in relation to the activity of a journalist in a conflict area, such as to serve an interest which the Appeals Chamber has deemed deserving of protection. If journalism merits such protection, albeit balanced with other requirements, then activities which are connected with it, in this case a translation service, should also be encompassed within the same sphere, so as to cause an extension of privilege from testimony to cover interpreters used as well as journalists.

One could furthermore add other interests to be taken into account, such as the need to guarantee the personal safety of interpreters in conflict areas since, particularly if members of the local population, they might be more easily exposed to threats and actions against their safety if the International Criminal Tribunals developed a tendency to require them to provide evidence on events which they had been connected with because of their activity. Another criterion, which was often enunciated by the Appeals Chamber in the *Randal* case and which makes for a difficult balancing act, also needs to be met: guaranteeing access to crucial evidence which may have been acquired by journalists or interpreters in the performance of their activities in the area and which might outweigh other considerations and dictate an obligation to testify.

The uncertainty around these issues is confirmed by the Statute of the International Criminal Court, as can be inferred from the relevant rule, No. 73(2), in the *Rules of Procedure and Evidence* of the Court covering communications made “in the context of a class of professional or other confidential relationship”, which shall be considered privileged in nature and thus not subject to the obligations of testimony or disclosure. Rule 73 (2) outlines a set of criteria designed to define whether said privilege may be considered to apply to these kinds of professional relations and also provides some examples of these possible situations, even though they are characterised as non-exclusive and more importantly subject to the satisfaction of the aforementioned requirements. One thing which is worth noting is that in par. 3 some examples are provided of cases to be held in particular regard. Specific mention is made of activities carried out by delegates of the ICRC, the professional relationship between patients and physicians, psychiatrists or psychologists, between counsel and defendants and the activities of religious clergy, whereas no agreement was reached during the diplomatic negotiations on the issue of journalists present in a conflict area, so that the problem was left to be settled on a case by case basis.

However, neither during the negotiations nor later, does it appear that any specific attention was given to the case of interpreters involved in such situations; yet, in our opinion, this is a matter which requires a thorough analysis, particularly in view of the instrumental function of interpreters’ services for activities carried out by a number of categories of people who are recognised as having such a privilege, as for example ICRC delegates. It is probably correct on this point to consider that interpreters, particularly where they are providing official services related to the activity carried out by categories of professions covered by such a privilege, should also see this benefit extended to them, in view of the instrumental incorporation of the functions performed by linguistic mediators within the sphere of interest of the activity for which this benefit is recognised.

7. Conclusions.

Our discussion has enabled us to confirm that the status of interpreters cannot be considered to be
unregulated within international humanitarian law and, more generally, within international law, which would have left the persons carrying out such activity stranded in a legal vacuum of sorts with an obviously negative impact on their protection.

Conversely, it has been possible to identify a series of provisions which tend to define in an abstractly satisfactory way the legal status of interpreters operating in conflict or post-conflict areas. An analysis of existing provisions, however, needs to be accompanied by an examination of the perception of these persons in the contexts involved, which certainly goes beyond legal assessment alone and which seems to show, at least from the information provided for the purposes of this seminar, that there is a situation of uncertainty and precariousness, particularly as regards the requirements of protection for individuals working as interpreters. Such individuals, particularly if locals, in many cases are exposed to feelings of hostility, because of the contribution they provide to foreign groups present in the area, and may also be the subject of envy on the part of local communities especially because of the financial advantages they may benefit from as a result of their work. These types of perception, in addition to the ongoing contact between interpreters and foreign elements present in the area, which may also involve their coming into proximity with military targets for the purposes of their work, may increase the risks of personal injury for those undertaking these activities, with the further obvious risk of retaliation being carried out at a time subsequent to their period of employment. The precariousness of the safeguards available to persons carrying out these tasks may also require protection to be afforded to them, with the possibility for them once they have abandoned their own countries to benefit from the guarantees enshrined in the 1951 Geneva Convention on the status of refugees and in complementary instruments, such the institution of subsidiary protection which is extended to victims of generalised violence during armed conflicts and which has recently been codified in the systems of EU member states and transposed into the individual States’ domestic legislation. Obviously, the possibility of benefiting from such institutions of protection is normally subject to the person's need to physically reach the State where protection is sought and is also subject to the standard legal requirements of proof of the persecution or violence the protection-seeker may be exposed to in the State of which he or she is a citizen.

In view of these conditions, it seems necessary to explore the need to develop further activities to increase awareness in this area and to consider the possibility of outlining further legal instruments concerning this issue in order to strengthen the protection extended to interpreters in conflict areas de lege ferenda.

In this respect, some suggestions can be made based on the protection accorded by international humanitarian law to the category of journalists in conflict areas. It should be borne in mind that these individuals, apart from the explicit references made in the law, are not granted a different legal status from that of interpreters: they are considered members of the civilian population and might, in the case of accredited war correspondents, be considered prisoners of war, according to the terms of the aforementioned art. 4. A(4) of the Third Geneva Convention. However, there is considerable treatment in legal discussion of the ways in which the protection of journalists in conflict areas can be strengthened, so much so that it has been suggested that, as has been done under international humanitarian law for other categories (medical or religious personnel, a separate legal status and also a specific protective sign be established for these persons through a special international treaty.

One way of proceeding would be to promote the inclusion of interpreters operating in conflict areas within these new instruments of protection, which currently do not clearly include them in their intended scope [31]. It is clear that there are major doubts as to the real possibility of these proposals, which have been propounded by NGOs, being given substance in legally binding provisions since this would require a consensus on these issues to be achieved by States. Furthermore they would not seem to ensure special and all-inclusive protection for interpreters operating in areas of armed conflict. This is because of the obvious fact that even the extension
ratione personae of the scope of application of these hypothetical instruments would only provide protection to some categories of interpreters, namely those providing their services to journalists present in war zones and would leave out the very broad category of interpreters providing the same service and in the same area for other individuals or for international institutions. This, therefore, means that such a solution would hardly be rational.

As a consequence, even though the hypotheses outlined above are not to be rejected out of hand, it is clear that what is necessary first and foremost in order to assure greater protection for interpreters in conflict areas is to bring pressure in order to see the legal guarantees which already exist reaffirmed, through appropriate dissemination of these normative standards and building up adequate awareness in operational theatres, so as to re-affirm the neutral nature of the activities performed by interpreters in relation to parties to the conflict. It might, to this end, be appropriate to seek a synergistic action with other related initiatives, such as those conducted to further the protection of journalists, so as to bring to the attention of the International Community the need to ensure protection for individuals who are third parties in conflict situations, including those acting as interpreters, in order to achieve a recognition which specifically names interpreters as a category requiring protection in these contexts.

There are a number of international organisations which might be made a part of this process as forums for discussion, such as the United Nations, the Council of Europe, the European Union and the International Committee of the Red Cross. This should also involve lobbying activities with the States so as to bring them to take action inside relevant international organisations in order to produce an international document on this issue, such as a resolution issuing from the assembly bodies of these Institutions. Although this would not modify the existing legal framework in the area, in view of the non-binding nature of resolutions from such assemblies, it would achieve the goal of broadening the awareness of the activities carried out by interpreters in conflict areas.

[1] Article 79.-Measures of protection for journalists. 1. Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians within the meaning of Article 50, paragraph 1. 2. They shall be protected as such under the Conventions and this Protocol, provided that they take no action adversely affecting their status as civilians, and without prejudice to the right of war correspondents accredited to the armed forces to the status provided for in Article 4 A (4) of the Third Convention. 3. They may obtain an identity card similar to the model in Annex II of this Protocol. This card, which 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.

[2] See, in this connection, the proposals advanced at the Conference by Germany (www.icrc.org).

[3] See the activity undertaken by Press Emblem Campaign. This NGO developed a Draft proposal for an International Convention to strengthen the protection of journalists in armed conflicts and other situations including civil unrest and targeted killings (see www.pressemblem.ch).


[5] Art 96. Acts which constitute offences against discipline shall be investigated immediately. Without prejudice to the competence of courts and superior military authorities, disciplinary punishment may be ordered only by an officer having disciplinary powers in his capacity as camp commander, or by a responsible officer who replaces him or to whom he has delegated his disciplinary powers. In no case may such powers be delegated to a prisoner of war or be exercised by a prisoner of war. Before any disciplinary award is pronounced, the accused shall be given precise information regarding the offences of which he is accused, and given an opportunity of explaining his conduct and of defending himself. He shall be permitted, in particular, to call
witnesses and to have recourse, if necessary, to the services of a qualified interpreter. The decision shall be announced to the accused prisoner of war and to the prisoners' representative.

[6] Art 105. The prisoner of war shall be entitled to assistance by one of his prisoner comrades, to defence by a qualified advocate or counsel of his own choice, to the calling of witnesses and, if he deems necessary, to the services of a competent interpreter.

[7] Art. 72. Accused persons shall have the right to present evidence necessary to their defence and may, in particular, call witnesses. They shall have the right to be assisted by a qualified advocate or counsel of their own choice, who shall be able to visit them freely and shall enjoy the necessary facilities for preparing the defence.
Failing a choice by the accused, the Protecting Power may provide him with an advocate or counsel. When an accused person has to meet a serious charge and the Protecting Power is not functioning, the Occupying Power, subject to the consent of the accused, shall provide an advocate or counsel. Accused persons shall, unless they freely waive such assistance, be aided by an interpreter, both during preliminary investigation and during the hearing in court. They shall have the right at any time to object to the interpreter and to ask for his replacement.

[8] Art. 123. Without prejudice to the competence of courts and higher authorities, disciplinary punishment may be ordered only by the commandant of the place of internment, or by a responsible officer or official who replaces him or to whom he has delegated his disciplinary powers. Before any disciplinary punishment is awarded, the accused internee shall be given precise information regarding the offences of which he is accused, and given an opportunity of explaining his conduct and of defending himself. He shall be permitted, in particular, to call witnesses and to have recourse, if necessary, to the services of a qualified interpreter.

[9] See Henckaerts, Doswald-Beck,Customary International Humanitarian Law, vol. I, Oxford, 2005, 352, “Rule 100. No one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees”. Among these guarantees we can find the “Assistance of an interpreter” (ibidem, 365-366), with references human rights treaties.


[11] Art 126. Representatives or delegates of the Protecting Powers shall have permission to go to all places where prisoners of war may be, particularly to places of internment, imprisonment and labour, and shall have access to all premises occupied by prisoners of war; they shall also be allowed to go to the places of departure, passage and arrival of prisoners who are being transferred. They shall be able to interview the prisoners, and in particular the prisoners' representatives, without witnesses, either personally or through an interpreter.

[12] Art. 143. Representatives or delegates of the Protecting Powers shall have permission to go to all places where protected persons are, particularly to places of internment, detention and work. They shall have access to all premises occupied by protected persons and shall be able to interview the latter without witnesses, personally or through an interpreter.

[13] See Pictet (ed.). The Geneva Conventions of 12 August 1949: Commentary, Vol. III, Geneva, 1960: “It has already been stated how desirable it is that delegates should know the language of the prisoners of war they are visiting; recourse to interpreters, although authorized here, must therefore be avoided as much as possible. If it cannot be avoided, the Detaining Power must, on request, supply the delegates with the necessary interpreters. This service is, indeed, one of the facilities which the Detaining Power is bound to give to delegates under Article 8, paragraph 2. It would be preferable, however, for the interpreters themselves to form part of the staff of the Protecting Power or the International Committee of the Red Cross in order to avoid any suspicion of tendentious
interpreting. It will also be possible to choose them from among the prisoners themselves”.

[14] See art. 50 of the First Additional Protocol: “1. 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”.


[17] See art. 51.1 of the First Additional Protocol: “1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations”.

[18] See art. 51.3 of the First Additional Protocol “Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities”.


[21] For national regulations dealing with this issue see for instance U.S. Department of Defense, *Identity Cards Required by the Geneva Conventions*, Instruction Number 1000.1, 30/1/1974

[22] See rules identified in henckaerts, Doswald-beck, Customary International Humanitarian Law, cit.

[23] Common art.3 of the 1949 Geneva Conventions establishes that: “In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilized peoples. (2) The wounded and sick shall be collected and cared for”.

[24] For this case, which is of particular importance in that it was the first involving a civilian before a military tribunal after the recent amendments to United States law, see for example: www.militarytimes.com/news/2008/06/ap_contractor_court_martial_062208/


[28] See Rule 73 (2): “…communications made in the context of a class of professional or other confidential relationships shall be regarded as privileged, and consequently not subject to disclosure, under the same terms as in sub-rules 1 (a) and 1 (b) if a Chamber decides in respect of that class that: (a) Communications occurring within that class of relationship are made in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure; (b) Confidentiality is essential to the nature and type of relationship between the person and the confidant; and (c) Recognition of the privilege would further the objectives of the Statute and the Rules”.

[29] See Rule 73 (3): “In making a decision under sub-rule 2, the Court shall give particular regard to recognising as privileged those communications made in the context of the professional relationship between a person and his or her medical doctor, psychiatrist, psychologist or counsellor, in particular those related to or involving victims, or between a person and a member of a religious clergy; and in the latter case, the Court shall recognise as privileged those communications made in the context of a sacred confession where it is an integral part of the practice of that religion”. For privileges accorded to ICRC staff see paras. 4-6.


[31] For example, the current proposal for a Convention promoted by Press Emblem Campaign reads: “the term of "journalist" in this Convention covers all civilians who work as reporters, correspondents, photographers, cameramen, graphic artists, and their assistants in the fields of the print media, radio, film, television and the electronic media (Internet), who carry out their activities on a regular basis, full time or part time, whatever their nationality, gender and religion”.

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