

**GIULIO BARTOLINI AND FRANCESCO FERRACCI\***

**INTERPRETERS IN CONFLICT ZONES:  
AN INTERNATIONAL LEGAL ASSESSMENT**

*ABSTRACT. This paper analyses the role of interpreters operating in conflict scenarios, with a special emphasis placed on professional and legal issues relating to their involvement in military operations. Indeed, no specific attention has been devoted by legal scholars to such individuals and only a few attempts have been made to raise awareness on such issues. However, this paper aims at demonstrating how such interpreters can be fully accommodated within relevant existing legal provisions by examining their legal status in conflict and post-conflict situations. Furthermore, the possibility for interpreters to be summoned before international criminal courts and be obliged to give evidence on activities connected with the performance of their duties will also be discussed. This paper will finally focus on the situation in Afghanistan during the years of the conflict as a test-case for legal challenges raised for such individuals once foreign actors are withdrawn, also in order to advocate for special protection programmes to be provided by involved States in order to comply with their duties of care toward local personnel involved in such risky functions.*

**CONTENT.** 1. Introduction – 2. References to the activities of interpreters in international humanitarian law – 3. The legal status of interpreters as related to the conduct of hostilities – 4. The legal status of interpreters in case of capture – 5. The case of interpreters involved in post-conflict situations – 6. The possible obligation interpreters may incur to give evidence before international criminal courts – 7. Case Study: Afghanistan and USA – 7.1 Special Immigrant Visas Programs – 8. Conclusions

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\* Giulio Bartolini is Associate Professor of International Law, Department of Law, Roma Tre University, and author of paragraphs 2-6. Francesco Ferracci, Master thesis in conference interpreting (University of International Studies in Rome) is author of paragraph 7. The introduction and conclusions are co-authored.

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## 1. Introduction

Armed conflicts raise multiple legal challenges and have been the object of extensive legal analysis, yet still some issues remain undermined and the voice of specific categories of victims in particular contexts is unheard. A prominent example is provided by the fate of interpreters and linguistic mediators contracted to work in conflict and post-conflict scenarios. Such personnel provide critical functions for very different categories of foreign actors such as (a) armed forces deployed in the area; (b) journalists operating in conflict areas to report on events and alert international public opinion to the critical situation existing in the area; (c) international organisations on the ground providing assistance to the civilian population, (d) non-governmental humanitarian organisations performing similar tasks.

However, the performance of such activities in high-risk environments and their links with foreign actors has exposed several of them to direct attacks and persecution also in the aftermath of a conflict, once foreign actors leave the concerned countries. Data emphasise a continuous trend of targeted violence against such individuals which, also from a quantitative point of view, can be equated to those involving media professionals involved in armed conflict situations.<sup>1</sup> For instance, according to data provided by Members of the U.S. Congress, more than 300 interpreters serving the U.S. Administration have been killed in Iraq during the period 2003-2008<sup>2</sup> and severe casualties have also been recorded in Afghanistan,<sup>3</sup> as increasingly emphasised by international media,<sup>4</sup> even if no official data exist on casualties, especially for interpreters

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1 See, for instance, the data available through the website of the International Association of Conference Interpreters, which has created a working group on interpreters in conflict areas <<https://aiic.net/node/2688/interpreting-in-conflict-zones/lang/1>>.

2 See the 2008 letter of several Members of Congress to the U.S. Secretary of Defence, Robert M. Gates <[http://cponefoundation.org/wp-content/themes/cponefoundation/images/Wyden\\_Letter\\_to\\_Gates\\_-\\_Mask\\_Ban\\_for\\_Iraqi\\_interpreters\\_final\\_signed.36321323.pdf](http://cponefoundation.org/wp-content/themes/cponefoundation/images/Wyden_Letter_to_Gates_-_Mask_Ban_for_Iraqi_interpreters_final_signed.36321323.pdf)>.

3 On the events concerning Afghanistan see, for instance R. NORDLAND, *Taliban Say They Killed 4 Afghan Interpreters*, in *The New York Times*, May 15, 2010 and T. BIRTLEY, *Hunted by the Taliban: Afghan interpreters renew UK asylum plea*, in *Aljazeera*, February 12, 2019.

4 See M. DUNCAN and A. AEDY, *Frozen Out: The US Interpreters Abandoned on Europe's Border*, in *The Guardian*, 12 February 2018 at <<https://www.theguardian.com/world/video/2018/feb/12/frozen-out-the-us-interpreters-abandoned-on-europes-border>>.

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who were killed after their assignments ended or after troop withdrawal. It is thus difficult to determine the exact number of interpreters who were killed, but the International Refugee Assistance Project (IRAP) estimated that in 2014 one Afghan interpreter was killed every 36 hours due to his American affiliation.<sup>5</sup> Nevertheless, the United States are not the only country that relied on local interpreters to conduct military operations in non-English speaking and foreign countries and accused of failing to provide adequate protection to them, as witnessed by the several letters of appeal that Red T, a non-profit organisation whose mission is to protect translators and interpreters in high-risk settings, sent to the relevant authorities, such as the Australian Prime Minister on behalf of a group of Iraqi interpreters who worked for the Australian Defence Force and left behind in their country<sup>6</sup> or to Chancellor Merkel for a group of Afghan interpreters who worked for the *Bundeswehr*,<sup>7</sup> but also to the Heads of State and Government of France, Italy or Canada.

Such issues are thus able to prompt a series of challenges.

First, from a professional perspective, several analyses have been devoted to such scenarios able to raise multiple challenges in terms of standards and ethics of the language profession. Working in conflict situations requires interpreters to confront their personal, political and professional beliefs and it should be borne in mind that not all interpreters working in such situations are professionals with a proper experience, a code of conduct and adequate professional skills and training which may be essential when conducting military operations.<sup>8</sup> Armed conflicts entail a set of moral and ethical challenges and interpreters are asked to take decisions that extend beyond the translation of a written text or the mediation between the military personnel and the local

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5 See A. HORTON, *Former interpreters for U.S. troops wait out the State Department – and the Taliban – as visas decline*, in *The Washington Post*, January 24, 2019.

6 See INTERPRETERS IN AREAS OF CONFLICT, *Open letter to P.M. Morrison*, February 28, 2020, aiic.net.

7 For more details about local interpreters working for German troops, see INTERPRETERS IN AREAS OF CONFLICT, *Open letter to Chancellor Angela Merkel*, July 10, 2019, aiic.net, and T.C. WALTHER, *Former Afghan Bundeswehr employees: Unsafe at home, insecure in Germany*, in *Deutsche Welle*, December 13, 2019.

8 For an exhaustive historical overview on interpreting in conflict zones throughout history, see L. RUIZ ROSENDO and C. PERSAUD, “Interpreters and Interpreting in Conflict Zones and Scenarios: A Historical Perspective”, in *Linguistica Antverpiensia, New Series – Themes in Translation Studies*, 2016, 15: 1-35.

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population, as they often need to commit to the purpose of the conflict. This is particularly relevant for locally recruited interpreters who frequently come face to face with nationals whose human rights have been violated, witness poor public and humanitarian services and security for compatriots, face crime and death as if they were combatants and it thus can be difficult for them to stick to their commitment or to be clear about to which party they owe their allegiance.<sup>9</sup> Their personal moral dilemma should be taken into account: on the one hand, they are usually seen as siding with international troops as they often wear uniforms, carry weapons, participate in raids and combat foot patrols and, above all, they depend on their employment relationship for their livelihood. On the other hand, during the period of their assignment, they are asked to ignore their allegiance to their own local community, to which they would return once the conflict is over. This conflict scenario inevitably has an impact on their work, their role, their experience of the war and, of course, on the way other parties see them in terms of interaction with their compatriots and the other members of the community in which they operate. This implies that interpreters who belong to the minority group of the local community face issues of positionality, accountability, neutrality and ethics and are vulnerable to pressure from both sides: on the one hand, from the less powerful party, expecting the interpreter to empathize with them and act as their advocate; on the other hand, from the military troops, who may be concerned that the interpreter's impartiality is compromised by proximity to their compatriots and hence tend to monitor his/her behaviour and linguistic output.

The issue of neutrality of wartime interpreters has been widely debated among scholars, with a particular emphasis on the conflicts in the Middle East and on the Bosnian war. Considered a characteristic and a virtue of the interpreting profession, neutrality is always included in the ethical guidelines for interpreters, but we already discussed how difficult it could be for unqualified civilian interpreters to be impartial. The practice of translation in the Balkan wars during the 1990s is a clear example of

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9 For an in-depth analysis on the role of interpreters and translators in conflict zones, please see L. RUIZ ROSENDO and M. BAREA MUÑOZ, "Towards a typology of interpreters in war-related scenarios in the Middle East", in *Translation Spaces* 6:2, 2017, pp. 182-208 and M. BAKER, "Interpreters and Translators in the War Zone", in *The Translator*, 2010, 16:2, pp. 197-222.

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how such prerequisite can be contravened when interpreters are personally related to one of the parties in conflict.<sup>10</sup>

In addition to the moral and ethics issues interpreters have to deal with, it is worthwhile to consider the practical difficulties inevitably linked to their work in war zones: the environment in which they operate, the different dialects used by the various social groups of the same local community, the technical language of the army (acronyms, proper names, tactics, etc.), the lack of materials for preparation and, last but not least, the unforeseeable nature of their daily routine.

Moreover, they are required to act not only as linguistic but also as cultural mediators, facilitating the communication between two or more parties belonging to different cultures and, thanks to the knowledge of the cultural context, preventing errors from arising and avoiding unsatisfactory results for one or all of the parties involved in a dialogue due to ignorance of the local traditions. In such contexts, the correct interpretation of body language and of other non-verbal communications plays a key role.<sup>11</sup>

Thus, interpreting in a conflict can be a traumatic and stressful experience, particularly for unprepared and unqualified interpreters.

Second, legal issues could also be raised, as explored in this paper. Indeed, contrariwise to other vulnerable categories in armed conflicts, such as journalists,<sup>12</sup> no

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10 Among the most relevant studies on the neutrality of conflict interpreters, see P. SNELLMAN, "Constraints on and dimensions of military interpreter neutrality", *Linguistica Antverpiensia, New Series: Themes in Translation Studies*, 2016, 15, pp. 60-281. For a detailed overview on the role of interpreters and the issue of their neutrality during the Yugoslav Wars, see M. DRAGOVIC-DROUET, "The Practice of Translation and Interpreting During the Conflicts in the Former Yugoslavia (1991-1999)", in M. SALAMA-CARR, *Translating and Interpreting Conflict*, 2007, Amsterdam: Rodopi, pp. 29-40.

11 For further information on the risks and challenges faced by interpreters in conflict zones, see M. TĂLPAȘ, "Words cut two ways: An overview of the situation of Afghan interpreters at the beginning of the 21<sup>st</sup> century", in *Linguistica Antverpiensia, New Series: Themes in Translation Studies*, 2016, 15, pp. 241-259, and M. Salama-Carr (ed.), *Translating and Interpreting Conflict*, 2007, Rodopi.

12 On this subject see, among others: L. GROSSMAN, All the News that's Worth the Risk: Improving Protection for Freelance Journalists in War Zones: *Boston College International and Comparative Law review*, 2017, p. 141; R. GEISS, *The Protection of Journalists in Armed Conflicts*, in *Germ. YB Int. Law*, 2008, p. 289 *et seq.*; H.P. GASSER, *The Journalist's Right to Information in Time of War and on Dangerous Missions*, in *Yearbook of International Humanitarian Law*, 2003, p. 366 *et seq.* See, moreover, reports of the *Institut de droit international* on «The International Status, Rights and Duties of Duly Accredited Journalists in Times of Armed Conflict» (e.g., *Annuaire de l'Institut de droit international*, vol. 73, 2009, p. 451 *et seq.*).

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specific attention has been devoted to this subject by scholars and, similarly, this topic cannot be qualified as a prominent one in current institutional or humanitarian debates regardless of attempts by transnational professional organisations to shed light on such neglected issues in light of the impressive data concerning losses among interpreters and linguistic mediators in recent armed conflicts.

For instance, in the framework of international organisations such as the Council of Europe<sup>13</sup> or the European Parliament,<sup>14</sup> only few attempts have been made to raise the attention of the International Community concerning these events. Such attempts aim to advocate for a better protection for individuals involved in interpreting activities in conflict scenarios, particularly with regard to their protection once foreign actors are withdrawn, taking into account the fundamental role of these individuals for international actors operating in such contexts and, in general terms, the possibility to link this issue to emerging and strictly-related legal concepts such as the duty of care.<sup>15</sup>

The lack of attention devoted to interpreters acting in conflict zones does not, however, mean that they are relegated to a kind of legal vacuum. This paper will in fact show that they can be fully accommodated within relevant existing legal provisions and notions, also singling out the possible problem areas their activities raise for IHL (see paras. 3-4) and, in post-conflict situations, for international law (see para. 5). Moreover, we will focus on the possible legal obligation for interpreters to give evidence before international criminal tribunals concerning information they may have acquired during their activities (see para. 6). Furthermore, this paper will use the situation in Afghanistan, examining the case study of Afghan civilian interpreters who worked for the United States during the conflict and the scarce protections offered to them, as a test-case for legal challenges raised for such individuals once foreign actors are withdrawn

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13 Council of Europe, Parliamentary Assembly, Written Declaration No. 442, *We Should Protect Interpreters in Conflict Areas*, April 29, 2010, requesting Member States to provide better protection for interpreters during and following conflicts. The text has been signed by more than 40 Parliamentarians, some of whom have also proposed the adoption of a resolution on this subject by the Assembly.

14 L. FITCHETT, *Hearing on Interpreters in Conflict Zones in the European Parliament*, February 19, 2018. Accessed June 5, 2020. <<http://aiic.net/p/8522>>.

15 See in this regard A. de Guttry, M. Frulli, E. Greppi, C. Macchi (eds.), *The Duty of Care of International Organizations Towards Their Civilian Personnel. Legal Obligations and Implementation Challenges*, The Hague, 2018.

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(see para. 7). In the conclusions we will discuss the possible need to undertake special initiatives to improve the currently provided safeguards.

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

Firstly, it is important to mention that the provisions of IHL do recognise the usefulness of interpreters as persons required for the proper functioning of a number of legal safeguards, as provided by the references made to the presence of an interpreter, sometimes further qualified as “competent” or “qualified,” found in the Third and Fourth 1949 Geneva Conventions.

Specifically, Arts. 96<sup>16</sup> and 105<sup>17</sup> of the Third GC 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 during the course of such proceedings. Similar provisions are to be found in the Fourth GC, Arts. 72<sup>18</sup> and 123,<sup>19</sup> regarding the protection of civilians detained by another State, in situations of military occupation or internment, who have criminal or disciplinary procedures brought against them. These provisions thus seek to ensure the right to a fair trial for persons protected by IHL. Furthermore, the crucial importance of this right has been recognised by the ICRC’s study on customary IHL which, under *Rule 100*,<sup>20</sup> specifies the customary nature, applicable in both international and non-international armed conflicts, of the

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16 Article 96 GC III: «... Before any disciplinary award is pronounced, the accused... shall be permitted... to call witnesses and to have recourse, if necessary, to the services of a qualified interpreter».

17 Article 105 GC III: «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».

18 Article 72 GC IV: «... 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».

19 Article 123 GC IV: «... Before any disciplinary punishment is awarded, the accused internee... shall be permitted... to call witnesses and to have recourse, if necessary, to the services of a qualified interpreter».

20 See J. HENCKAERTS-L. DOSWALD-BECK, *Customary International Humanitarian Law*, vol. I, Oxford, 2005, p. 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*, pp. 365-366), with references to human rights treaties.

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 regarding proceedings against foreign nationals.<sup>21</sup>

It is also worth pointing out that such interpretation services, in view of their clear importance in ensuring the overriding right to defence, are given a special qualification. As specified by the Commentary to Article 105 of the Third GC and reiterated in the other provisions referred to: «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».<sup>22</sup>

As noted in the Commentary, this right can only be said to be fulfilled if the person entrusted with providing the service has the necessary qualifications to do so. 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.

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21 On human rights provisions providing for the right to the assistance of an interpreter in criminal proceedings, see S. TRESCHER, *Human Rights in Criminal Proceedings*, Coll. Courses Ac. Eur. Law, Oxford, 2005, pp. 327-339.

22 J. Pictet (ed.). *The Geneva Conventions of 12 August 1949: Commentary*, vol. III, Geneva, 1960, p. 487.

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Finally, the provisions of the Geneva Conventions also envisage the use of interpreters to assist a Protecting Power. Also in this case Article 126<sup>23</sup> of the Third GC and Article 143<sup>24</sup> of the Fourth GC provide that members of delegations of the Protecting Power may avail themselves of interpreters in their monitoring activities, which may for example include visits to prisoners of war camps or internment facilities. In such cases, however, the use of interpreters is considered to be a last resort, as expressed in the Commentary.<sup>25</sup> The reason for the recommendation not to use interpreters 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 fear 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 prevent interpreters from being seen as potential informers of the Detaining Power.

Thus, by scrutinising these specific provisions, we have already been able to bring to light two aspects which are apparently central to the debate on the role of interpreters in armed conflicts. One is the need to ensure the technical reliability of the services provided by interpreters, in view of the requirement that the persons used should have qualified linguistic skills and, in particular, a knowledge of legal terminology. The other is the need embodied in these provisions to address the possibility that interpreters may act in an equivocal manner, such as to favour one of the parties to a conflict, and the further possibility that they may make use of their position as linguistic mediators for ulterior purposes, such as reporting any negative opinions expressed by prisoners and internees regarding the Detaining Power.

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23 Article 126 GC III: «Representatives or delegates of the Protecting Powers... shall be able to interview the prisoners... without witnesses, either personally or through an interpreter».

24 Article 143 GC IV: «Representatives or delegates of the Protecting Powers 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».

25 See Pictet (ed.). *The Geneva Conventions*, cit., p. 609.

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Since these are the only provisions under IHL that directly refer to the services of interpreters in conflict situations, we must now seek to outline their legal status: (a) in the conduct of hostilities; and (b) with regard to their situation if captured.

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

Concerning 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 and when they are assisting agencies or individuals which are not parties to the conflict, such as international organisations, journalists or NGOs. In the first case, it needs to be established whether interpreters can be considered as combatants or civilians. In this context, it is also necessary to distinguish between international and non-international armed conflicts.

In international armed conflicts interpreters are usually excluded from the category of combatants, apart from the marginal case in which they are members of the armed forces of a State, the so-called military interpreters. This possibility is not a remote one, as several armed forces have been enrolling members specialised in this activity for centuries. For instance in 1803, in view of the planned invasion of England, Napoleon created the military corps of “Guides interprètes”, *i.e.*, commissioned officers and soldiers responsible for translation services operating among the so-called “Army of England”.<sup>26</sup> A similar military unit, *i.e.*, the Corps of Interpreters of the African Army, was established in 1830 to facilitate operations in Algeria, and included former Mamelouks of Napoleon’s Imperial Guard.<sup>27</sup> Similarly contemporary armies rely on military interpreters for their activities. Equally, in non-international armed conflicts, in order to qualify certain members of non-State organised armed groups as distinct from the category of civilians and therefore as targets of attack on an ongoing basis it must be ascertained that the individual shall have a “continuous combat function”.<sup>28</sup> It would however be hard to define the activity of interpreters as such, in view of their

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26 J.R. ELTING, *Swords around a Throne. Napoleon’s grande armée*, New York, 1988, pp. 93-94.

27 C. FÉRAUD, *Les interprètes de l’armée d’Afrique*, Alger, 1876.

28 ICRC, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, Geneva, 2009, pp. 27-36.

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non-involvement in a proper combat function, as discussed below.

Therefore interpreters, even when acting on behalf of a party to the conflict, are usually considered civilians and thus protected against direct attacks. The only possibility may arise in cases in which an interpreter carries out activities which could be characterised as a “direct participation in hostilities”, as he would lose his immunity from direct attack. Taking into account the ICRC guidelines on this subject, which identifies criteria to classify a number of activities under this heading,<sup>29</sup> it would seem difficult to characterise the role of interpreters, which involves direct contact between two parties for mediation and to enable linguistic communication, as direct participation in hostilities.

On the contrary, 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 issued by the opposing side. In this 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 the translation services in view of subsequent tactical operations. As such, this activity would probably entail the loss of immunity for civilians engaging in it, although we are obviously outside the normal realm of activities undertaken by interpreters.

In relation to cases in which interpreters provide their services to other actors present in the area of conflict, such as representatives of international organisations, NGOs or media professionals, 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.

Obviously, when interpreters are present in the area of conflict, particularly in the exercise of their functions on behalf of a party to the conflict, there is a possibility that they will be the indirect victims of warfare. This may, for example, occur because of their proximity to legitimate military targets or of their direct participation in raids and other military operations; nonetheless these possible civilian casualties must obviously comply with the usual legal limit of proportionality.

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29 For relevant criteria, *i.e.* threshold of harm, direct causation and belligerent nexus see *ibidem*, pp. 46-64.

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

We now need to examine IHL provisions as they govern the case of interpreters captured during armed conflicts.

If we begin our examination with the case of international armed conflicts, the first instance to be considered is that of interpreters who were performing their activity on behalf of a State which was a party to hostilities when captured. In this case, interpreters would fall under a specific category envisaged by the Third GC, under Article 4.A. (4), as «persons who accompany the armed forces». This specific provision attributes 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 the supporting activity they have been providing caused them to operate in proximity to enemy lines. Since the early codifications of IHL, it has been considered possible to attribute the prisoner of war status to these contractors, under certain conditions, as their position when captured had given rise to difficulties during past conflicts.<sup>30</sup> Individuals serving as interpreters on behalf of State armed forces could be included within this special category, also because of the non-exhaustive nature of the list of activities referred to in this provision.<sup>31</sup> 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; this required link is also attested to by the delivery of a special identity card.<sup>32</sup>

Apart from this specific instance, interpreters would still be considered as belonging to the civilian population. Thus, once captured, interpreters shall be entitled to the guarantees enshrined in the Fourth GC, supplemented where appropriate by the provisions of the First Additional Protocol, as long as they can be qualified as “protected persons”. Therefore, in order to benefit from the status of “protected person” one must

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30 On this provision see: G. BARTOLINI, *Contractors as “Persons who Accompany the Armed Forces”*, in F. Francioni-N. Ronzitti (ed.), *War by Contract. Human Rights, Humanitarian Law, and Private Contractors*, Oxford, 2011, p. 219 *et seq.*; Pictet (ed.), *The Geneva Conventions*, cit., pp. 64-65.

31 Pictet (ed.), *The Geneva Conventions*, cit., p. 64.

32 See the model established in Annex IV.A of the Third GC. 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, January 30, 1974.

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not be a citizen of the capturing State, as provided under Article 4 of the Fourth GC, which defines the scope of application *ratione personae* of the Treaty. 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 GC, but would at least benefit from the protections granted in Article 75 AP I.

In the case of non-international armed conflicts there is, of course, no notion of prisoner of war. However, even in such a case, if captured by one of the parties, 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., 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 in the common Article 3 of the 1949 GCs, in the Second Additional Protocol, where relevant, and in the many rules of customary law which have been developed on this matter.

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

Whereas the above analysis sought to outline the status of interpreters in the event of their involvement in armed conflicts, a further area of interest relates to the case in which interpreters may act in a post-conflict situation. This would usually involve international organisations, or ad hoc coalitions of States, operating in international missions entrusted with peace-keeping and reconstruction tasks. In such cases, other international law provisions can be of use to define the legal status of interpreters.

Particularly relevant could be the provisions provided by the status of force agreements (SOFA), *i.e.* treaties defining the legal status of personnel employed to assist an international mission. In these conventions, a number of provisions can be significant for interpreters, especially local ones, as they can 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.<sup>33</sup> In this document, after recalling in paragraph 22 that the United Nations «may recruit locally such personnel as it requires», a number of rules are set out, clarifying privileges to such staff, usually identified with a special identification document provided by the UN authorities. In particular, paragraph 28 of the UN Model SOFA extends to locally recruited staff a series of privileges included in section 18 letters a, b, c of the 1946 Convention on Privileges and Immunities of the United Nations.<sup>34</sup> Some of these privileges are explicitly re-affirmed in para. 46 of the SOFA, where it is established that members of the UN 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». This privilege remains valid beyond the end of the mission. Moreover, pursuant to para. 48, immunity from local jurisdiction is also extended to civil actions in regard to disputes concerning the performance of official duties. Similar provisions are also to be found in SOFAs covering other international operations outside the UN system.<sup>35</sup>

However, these provisions do not rule out possible prosecution being brought by States other than the one where the interpreter is operating. Depending on national laws, there may be a number of instances in which it is possible for personnel serving in these international contingents to be subject to a State's jurisdiction. One possibility would involve the application of the passive personality principle. 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. For instance, this was the case

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33 See UN General Assembly, *Model Status-of-Forces Agreement for Peace-Keeping Operations*, October 9, 1990, UN Doc. A/45/594.

34 In particular, section 18 of the 1946 Convention 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 be granted exemptions from local taxation.

35 For references to similar privileges accorded to "locally recruited personnel" see for instance: paragraph 16 of the SOFA governing the IFOR/SFOR missions in Bosnia Herzegovina and Croatia; paragraph IX. 4 of the SOFA regulating the Multinational Protection Force deployed in Albania in 1997; and section 4, paragraph 14 of Annex A to the Military Technical Agreement established for the ISAF mission in Afghanistan.

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concerning the aggression committed against another worker by Alaa “Alex” Mohammad Ali,<sup>36</sup> an interpreter with dual Iraqi and Canadian nationality operating with the United States contingent. As a result of the changes made by the U.S. 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 U.S. military courts, it was possible to bring a prosecution against this interpreter.

### ***6. The possible obligation interpreters may incur to give evidence before international criminal courts***

A further problem might arise for interpreters operating in conflict zones. It is clear that, in view of the sensitive nature of the work performed by interpreters, they may be witness to particularly significant events or statements, which might result in their receiving subpoenas from international criminal tribunals to give evidence on activities connected with the performance of their duties. It is known that some international criminal tribunals, in particular the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), are endowed with the power to compel testimony from individuals considered to be useful for the investigation<sup>37</sup> by issuing subpoenas for the compulsory appearance of witnesses which, if not complied with, could entail criminal prosecution being brought against recalcitrant.

The possibility of being summoned to testify clearly raises problems of professional ethics for interpreters, who are usually required to act on a confidential basis, and the issue of balancing the requirement of justice with the need to guarantee the safety of interpreters present in conflict areas, which would be further jeopardised

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36 For this case, which is of particular importance since it was the first case involving a civilian before a military tribunal following the recent amendments to United States law, see for example: U.S. Central Command, Press Release, April 16, 2008 <<http://www.centcom.mil/press-releases/civilian-contractor-court-martial-pre-trial-begins>>.

37 See the Rules of Procedure and Evidence of the ICTY (rule 54) and the ICTR (rule 98). On the lack of subpoena powers for the International Criminal Court see G. SLUITER, *Appearance of Witness and Unavailability of Subpoena Powers for the Court*, in R. Bellelli (ed.), *International Criminal Justice. Law and Practice from the Rome Statute and Its Review*, Burlington, 2010, p. 459 *et seq.*

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if the parties to the conflict considered these persons as potentially inconvenient witnesses to the offences being committed. Precisely in order to address the various issues involved, 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 context, it may be useful to refer to the practice of the ICTY, as this is the tribunal that has tackled the issue most extensively. Although the Tribunal has mainly dealt with other instances of international presence on the ground, such as ICRC delegates<sup>38</sup> and journalists, it is also possible to derive guidance from its rulings in defining the position of interpreters regarding these cases.

A first hypothesis to be considered would be that of interpreters directly involved in international trials and working in International Tribunals. In this context, a significant ruling was made by the ICTY in the *Delalic* case, in which the defence had advanced a request for a subpoena to be issued to an interpreter working at the Tribunal in relation to some divergences emphasised by the defence during an interrogation.<sup>39</sup> In this case, the Trial Chamber rejected the request to compel the interpreter to testify. In particular, the Tribunal emphasised both the position of impartiality and the duty of confidentiality of interpreters and the necessity «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».<sup>40</sup> This wording appears to be

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38 See: S. JEANNET, *Recognition of the ICRC's Long-Standing Rule of Confidentiality: An Important Decision by the International Criminal Tribunal for the Former Yugoslavia*, in *International Review of the Red Cross*, 2000, p. 403 *et seq.*; J. McDOWELL, *The International Committee of the Red Cross as a Witness before International Criminal Tribunals*, in *Chinese Journal of International Law*, 2002, p. 158 *et seq.*

39 On challenges with regard to translation services at international criminal tribunals see: K. DOUGHTY, *Language and International Criminal Justice in Africa: Interpretation at the ICTR*, in *International Journal of Transitional Justice*, 2017, 239 *et seq.*; E. ELIAS-BURSAC, *Translating Evidence and Interpreting Testimony at a War Crimes Tribunal: Working in a Tug-of-War*, Plagrove, 2015.

40 See ICTY, Trial Chamber, *Prosecutor v. Delalic and Others, Decision on the Motion Ex Parte concerning the Issue of a Subpoena to an Interpreter*, July 8, 1997, paragraphs 18-20.

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particularly significant, since it underlines the need to avoid exposing interpreters to undue pressure in the performance of their official duties, in view of the importance of ensuring that they can properly undertake the tasks assigned to them.

However, the *Delalic* case relates explicitly to the work of an interpreter who was a member of staff of the ICTY; the situation might be construed differently in the case of interpreters working in a conflict area who are employed not by similar International Institutions but by other organisations or individuals, such as journalists. The latter case is particularly significant, since the legal principles developed by the ICTY concerning the possibility of compelling journalists to give evidence were discussed as part of the *Randal*<sup>41</sup> case, the events of which primarily involved a local interpreter hired by this journalist. Randal, who at the time was a correspondent for the Washington Post, had 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.<sup>42</sup> In 2001, during the proceedings held against Brdjanin, the Prosecutor sought to have the article admitted as evidence but the defence invoked its right to cross-examine the journalist 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 as he had had to rely on the services of a local interpreter. The Trial Chamber refused to recognise the privilege invoked, whereas the Appeals Chamber partly accepted the journalist's position. Even if it did not recognise an unconditional exemption for

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41 See ICTY, Appeals Chamber, *Brdjanin and Talic, Decision on Interlocutory Appeal*, 11 December 2002. On these issues see M.A. FAIRLIE, *Evidentiary Privilege of Journalists Reporting in Areas of Armed Conflict*, in *American Journal of International Law*, 2004, p. 805 *et seq.*

42 See J.C. RANDAL, *Preserving the Fruits of Ethnic Cleansing: Bosnian Serbs, Expulsion Victims See Process as Beyond Reversal*, in *The Washington Post*, February 11, 1993.

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journalists from the requirement to give evidence, the Appeals Chamber outlined a number of abstract judicial criteria to be used in deciding whether journalists working in war zones should be compelled to give evidence.<sup>43</sup> The Appeals Chamber ruled that the criteria had not been met in this case, particularly in view of the fact that his testimony would not have been of «direct and important value to determining a core issue in the case»,<sup>44</sup> in view of his inability to provide useful information on the accuracy of the translation.

This case, therefore, can provide some points for discussion with regard to the role of interpreters in conflict areas. In particular the central reason underpinning the defence's request to hear the witness was 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, 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 the interpreter, as the only person involved and able to give an account of what really happened, had been obliged to testify in the case in question, for instance in order to assess his language skills. At the same time, however, 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, invoking the privilege to be exempted from the obligation to give evidence. The position of the interpreter in claiming such exemption would have been made stronger by being able to invoke the instrumental nature of the interpreter's activity in relation to the role of a journalist in a conflict area. If journalism merits protection, albeit balanced with other requirements, then activities which are connected

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43 In particular, taking into account the fundamental role performed by journalists, the Appeals Chamber ruled that two criteria have to be met before one can order a journalist to give evidence: «First the petitioning party 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» (ICTY, *Brdjanin and Talic*, cit., par. 50).

44 *Ibidem*, paragraph 54.

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. One could add other interests to be taken into account, such as the need to guarantee the personal safety of interpreters in conflict areas; particularly if members of the local population, such interpreters 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 with which they had been connected because of their activity.

The uncertainty surrounding these issues is confirmed by the *Rules of Procedure and Evidence* of the International Criminal Court. In this case Rule No. 73 (2), concerns 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, emphasising in particular the confidential nature of the relationship;<sup>45</sup> it also provides, in paragraph 3,<sup>46</sup> 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. A specific mention is made of activities carried out by delegates of the ICRC, as well as the professional relationship between: patients and physicians; psychiatrists or psychologists; counsel and defendants and the activities of

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45 According to 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... 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».

46 See Rule 73 (3): «In making a decision under sub-rule 2, the Court shall give particular regard to recognizing 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 recognize 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 the ICRC staff see paragraphs 4-6. On this latter subject see S. JEANNET, *Testimony of ICRC Delegates before the International Criminal Court*, in *International Review of the Red Cross*, 2000, p. 993 *et seq.*

religious clergy, whereas no agreement was reached on the issue of journalists present in a conflict area, leaving the problem to be settled on a case by case basis.<sup>47</sup>

However, neither during the negotiations nor at any later stage does any specific attention appear to have been dedicated to the case of interpreters involved in such situations, even if, for instance, they are usually obliged to perform their activities on a confidential basis. In our opinion, this is a matter that requires thorough analysis, particularly in view of the instrumental function of interpreters' services concerning activities carried out by a number of categories of people who are recognised as having such a privilege, such as ICRC delegates. On this point, it is probably correct to consider that interpreters, particularly when 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. Case Study: Afghanistan and USA***<sup>48</sup>

After discussing the position of conflict interpreters, their legal status and the relevant legal principles and obligations, special emphasis is now placed on a test-case, namely the situation in Afghanistan and on Afghan civilian interpreters who worked for the United States. The bulk of these interpreters are not professionals contracted by the local administration but by private companies pursuing their own political and economic agendas and that do not offer them regular work contracts or any kind of protection.

It is worth noting that the U.S. military has come to rely more and more on private contractors to provide linguistic services to function effectively in non-English speaking regions, especially in the Middle East and Central Asia where U.S. troops were actively engaged. Contractors are often seen as providing operational benefits to the

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<sup>47</sup> See on this subject R.S. Lee (ed.), *The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence*, New York, 2001, p. 360.

<sup>48</sup> I owe this insight to F. FERRACCI, *Gli interpreti in zone di conflitto: il caso dei civili afgani al servizio degli Stati Uniti*, MA Degree final thesis, 2017, Università degli Studi Internazionali di Roma.

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Department of Defense (DOD), which can also have great economic advantages since local nationals can be hired when a specific need arises and be discharged when their services are no longer needed. Contractors are also hired to perform non-combat activities and to provide critical support capabilities in specialized fields that DOD may not possess, *e.g.*, transportation, engineering services, construction and, of course, linguistics.

According to a report of the Office of the Assistant Secretary of Defense for Sustainment, the principal logistics official within the senior management of the DOD, in 2009-2010 and 2012-2013 the number of contractors exceeded 100,000 units. From 2014 there was a gradual decrease of the number of contractors due to the official conclusion of the main military operations in the country: the second quarter of 2020 registered 27,641 contractors actively engaged in Afghanistan, of which 5,853 were local nationals and 1,774 worked as interpreters and translators representing 6.4% of the total.<sup>49</sup>

The type of services interpreters were required to provide include performing oral interpretation, providing interpretation support at military traffic control points, assisting security personnel in screening the local population at military checkpoints. Private contractors provided three different categories of interpreters: *Category 1* included local nationals with security screening but no clearance and a salary between 10 and 45 dollars per day; *Category 2* was for US citizens with a salary between 70,000 and 140,000 dollars per year; *Category 3* included a restricted number of US citizens working as interpreters with top secret clearance.

It should be borne in mind that, aside from braving the usual dangers associated with war such as roadside bombs, ambushes, or sniper fire, local nationals are high-priority targets for the Taliban too and this contributes to increase the – unknown – number of local interpreters who died because of their work. Indeed, American contractors are under no obligation to publicly report the deaths of their employees and they often notify only family members. This means that the great majority of the local

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<sup>49</sup> See Office of the Assistant Secretary of Defense for Logistics & Materiel Readiness, *Contractor Support of U.S. Operation in the USCENTCOM Area of Responsibility, 2nd quarter FY2020*, April 2020. Available at <[https://www.acq.osd.mil/log/PS/.CENTCOM\\_reports.html/5A\\_April\\_2020.pdf](https://www.acq.osd.mil/log/PS/.CENTCOM_reports.html/5A_April_2020.pdf)>.

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nationals hired on site die uncounted. There are no official records neither of the number of local nationals hired as interpreters or translators nor of the number of deaths.

Afghan interpreters find themselves in an extremely dangerous situation. On the one hand, the U.S. army considers them as potential threats because of the assumptions that all members of a local ethnic group would share the aspirations of their leaders or could (voluntary or under duress) be leaking information. In fact, civilian interpreters may become the target of violent pressure from insurgent groups (death threats, kidnappings or reasons of personal revenge) and therefore may be persuaded to betray the military unit they work for. In a nutshell, Afghan interpreters can be tainted by the mere fact that they speak Dari or Pashto, that is the very skill for which they are recruited in the first place. On the other hand, the Taliban see them as infidels to put to death. Once the occupying forces and humanitarian organizations on the field have left, the interpreters are vulnerable and without protection because of their collaboration with their former employers or with the enemy. Civilian linguists contracted by U.S. military troops were, and continue to be, denounced as traitors by insurgent groups and singled out for kidnapping and slaughter in retaliation for their collaboration. This is also due to the order issued in 2009 by the *mullah* Omar, the Taliban's supreme leader at the time, to capture and kill any Afghan supporting the coalition forces: «Our policy is that, whoever protects and supports foreigners as translators, they are national traitors for us and the people of Afghanistan. Like the foreign soldiers and other foreign occupiers, they too will be put to death».<sup>50</sup>

Threats against them are delivered in a variety of ways: some interpreters are terrorized over the phone, others receive anonymous “night letters” warning them and their families of their impending fate. The following text is an extract of a letter received by an Afghan interpreter, published by Al Jazeera: «We know you have been working with the U.S. special forces, and you must stop working and helping these infidels. You must know we have spared and have forgiven those ones who did surrender and obeyed us. So like others, you must also obey and surrender yourself to us. But if you reject

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50 See B. ANDERSON, *The Afghan interpreters (Full-Length)*. Vice News, 2014. Available at <[https://www.vice.com/en\\_us/article/qbewvb/afghan-interpreters-full-length-122](https://www.vice.com/en_us/article/qbewvb/afghan-interpreters-full-length-122)>.

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and do not obey our directions and rules, your death will be eligible to us according to Islamic Sharia, and we will never let you live in peace in any part of Afghanistan».<sup>51</sup>

These threats are often carried out quickly and with utter brutality, *e.g.*, shootings, explosive devices placed in their vehicles. For these reasons, Afghan interpreters often wear face masks during their assignments with the U.S. troops in the effort to hide their identities, often to no avail. More frequently, they even choose not to reveal their collaboration with the coalition forces to their relatives. Any contact with them is forbidden, since relatives are often targeted, taken hostages and tortured to disclose the position of the traitor, and interpreters are thus forced to leave their homes and hide in an always different secret location.

Despite threats and intimidation, the protections offered by the United States during and after the conflict are scarce: the names of the interpreters are often added to the *Blacklist*, a U.S. database of troublemakers and terrorists who have committed crimes. Therefore, they cannot get a visa and can easily fall into the hands of criminals.

### ***7.1 Special Immigrant Visas Programs***

In 2006 the United States established a series of legal dispositions to provide a pathway to safety for Afghan and Iraqi nationals who met certain requirements and who were employed in Afghanistan or Iraq to enter the United States and become lawful permanent residents, authorizing the issuance of Special Immigrant Visas (SIVs). There are three SIV programs: (i) Special Immigrant Visas for Iraqis Who Were Employed by/on Behalf of the U.S. Government; (ii) Special Immigrant Visas for Afghans Who Were Employed by/on Behalf of the U.S. Government; (iii) Special Immigrant Visas for Iraqi and Afghan Translators/Interpreters.

The SIV programs for Afghans and Iraqis employed by/on behalf of the U.S. government requires applicants to have been employed for a minimum of two years, between October 2001 and December 2020, and they must also have experienced or be experiencing an ongoing serious threat as a consequence of their employment. The

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51 See FAULT LINES, *Afghan interpreter: 'Taliban don't wait to kill you'*, in *Al Jazeera*, April 16, 2016. Available at <<http://www.aljazeera.com/indepth/features/2016/04/afghan-interpreter-taliban-don-wait-kill160403131005408.html>>.

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SIV program for Iraqi and Afghan translators/interpreters authorizes the issuance of up to 50 Special Immigrant Visas annually for nationals who have worked for a period of at least 12 months and have obtained a favorable written recommendation from a General or from the Chief of Mission from the embassy they worked for.

However, due to security review slowdowns and President Donald Trump's travel ban, hundreds of thousands of interpreters are left behind in dangerous and even deadly situations. In fact, according to the official records made available by the U.S. Department of State – Bureau of Consular Affairs, only 1,606 visas were issued to Afghan and Iraqi translators/interpreters under the third program in the period 2007-2020.<sup>52</sup>

It is worth noting that most of the visa applications are denied for unknown reasons and the applicant is often added to the so-called Blacklist, a database where the U.S. put fingerprints, iris scans and personal details of troublemakers, terrorists and of Taliban people who have committed crimes. The vast majority of such interpreters have been put on that list, which means when they try to apply for a visa or when they try to get a job or a flight out of Afghanistan, they are marked and their visa is denied, leaving them trapped in their country with no hope, safety and future.

For these reasons on 8 March 2019 some senior members of the U.S. Congress addressed an official letter to the Department of State, the Department of Homeland Security, the Department of Defense and the Federal Bureau of Investigation to express their concern and ask for further information about the slow processing of visas for Iraqi and Afghan allies, stating that under the second program «1,649 Afghan SIVs were issued in 2018, a 60% decrease from the 4,120 visas issued in 2017» and that «the Iraqi program has a backlog of more than 100,000 people due to slowdowns in the Direct Access Program, where only 48 individuals were admitted in a 10-month period in Fiscal Year 2018».<sup>53</sup>

One possible way out of the impasse was reached on 20 December 2019, when

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52 See U.S. DEPARTMENT OF STATE, *Special Immigrant Visas Statistics, Iraqi or Afghan Translators (SI)*, available at <[https://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/SIV/SINumbers\\_12312019.pdf](https://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/SIV/SINumbers_12312019.pdf)>.

53 See CONGRESS OF THE UNITED STATES, March 8, 2019, <<https://blumenauer.house.gov/sites/blumenauer.house.gov/files/Afghan%20SIV%20Processing%20Letter.pdf>>.

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President Trump signed the National Defense Authorization Act for Fiscal Year 2020, providing additional 4,000 more visas to the Afghan Special Immigrant Visa Program, increasing the total number of visas available for Afghan interpreters who worked with the U.S. military from 18,500 to 22,500.<sup>54</sup> However, under this program, only 12,000 Afghan interpreters have been granted visas since 2008, while other 9,000 are still having their application considered. Therefore, following a lawsuit filed by a refugee advocacy group of the International Refugee Assistance Project (IRAP),<sup>55</sup> the White House submitted a new plan to clear the backlog of interpreters waiting for visas and fix the long delays in the Program.<sup>56</sup>

## **8. Conclusions**

This analysis has enabled us to identify a series of provisions which tend to define the legal status of interpreters operating in conflict or post-conflict areas. An analysis of the existing provisions, however, needs to be accompanied by an examination of the concrete reality, which shows that there is a situation of precariousness, particularly regarding the requirements of protection. In view of this context, it seems necessary to consider the possibility of outlining further legal instruments for the protection of interpreters.

In this respect, some suggestions can be made based on the protection currently accorded by IHL to journalists in conflict areas. Currently, there is considerable debate concerning the ways in which the protection of such journalists can be strengthened, to the extent that it has been suggested that a separate legal status and also a specific protective emblem be established for these persons, through a specific international

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54 See AMERICAN IMMIGRATION LAWYERS ASSOCIATION, *P.L. 116-92: National Defense Authorization Act (NDAA) for Fiscal Year 2020*, AILA Doc. No. 19121731, December 20, 2019 <<https://www.aila.org/infonet/s1790-national-defense-authorization-act-ndaa>>.

55 For more details, see J.P. LAWRENCE, *US plan to fix visa delays for interpreters who helped troops deemed 'offensive'*, in *Stars and Stripes*, March 12, 2020 <<https://www.stripes.com/news/us-plan-to-fix-visa-delays-for-interpreters-who-helped-troops-deemed-offensive-1.622149>>.

56 See J.P. LAWRENCE, *US submits new plan to fix visa delays for interpreters who helped troops*, in *Stars and Stripes*, May 23, 2020 <<https://www.stripes.com/news/us-submits-new-plan-to-fix-visa-delays-for-interpreters-who-helped-troops-1.630974>>.

treaty.<sup>57</sup> One way of proceeding would be to promote the inclusion of interpreters operating in conflict areas within these new treaties, which do not currently clearly include them in their intended scope.<sup>58</sup> Aside from the fact that there are major doubts as to the real feasibility of such proposals, 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, and would leave out the very broad category of interpreters providing the same service and in the same war area for other individuals or for international institutions.

A second proposal is linked with duties of care to be imposed on entities taking advantages of such personnel. It is self-evident how such personnel – if and when they abandon their own countries – might be entitled to benefit from the guarantees enshrined in the 1951 Geneva Convention on refugees, as well as in complementary instruments, such the subsidiary protection system provided by the EU legislation on asylum, which is extended to victims of generalised violence during armed conflicts, and national legislations adopting such approaches. Obviously, the possibility of benefitting from such protection is first subject to legal requirements of proof of the persecution or violence that the individual may be exposed to in the national State, as normally recognised by the UNHCR's guidelines on asylum-seekers with regard to interpreters cooperating with foreign entities, particularly armed forces.<sup>59</sup> However, this

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57 Apart from previous drafts of conventions proposed within the UN system in the 1970s (see C. ZANGHÌ, *The Protection of Journalists in Armed Conflicts*, in P.A. Fernández Sánchez (ed.), *The New Challenges of Humanitarian Law in Armed Conflict: in Honour of Professor Juan Antonio Carrillo-Salcedo*, Leiden, 2005, pp. 146-150; H.P. GASSER, *The Journalist's Right*, pp. 370-371), a draft text has been proposed by the NGO "Press Emblem Campaign" <[www.pressemblem.ch/4983.html](http://www.pressemblem.ch/4983.html)>. For a discussion of this initiative, see the report of Y. DINSTEIN in *Annuaire de l'Institut de droit international*, vol. 73, 2009, pp. 465-467.

58 For example, the preamble of the abovementioned proposed convention reads: «the term "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». For a discussion on the opportuneness of including associated personnel or logistical staff support (including interpreters) in the definition of "journalist" see by DINSTEIN, *ibidem*, pp. 461, 471-472.

59 For risks faced by interpreters and their families see: UNCHR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Iraq*, 31 May 2012, pp. 16-17, <<https://www.refworld.org/pdfid/4fc77d522.pdf>>; UNCHR, *Eligibility Guidelines for Assessing the International Protection Needs*

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possibility is related to the person's capacity to physically reach a third State and in this regard a claim could be made to identify a positive duty for such entities, particularly States, to facilitate this possibility through privileged channels of access to their territory and special visa programmes in order to comply with their human rights obligations related to the right to life.

On such basis it could be recognised how, in recent conflict scenarios, such as Iraq and Afghanistan, in order to protect local personnel acting as interpreters, the hiring States themselves have transferred such contractors to their territories in order to attribute refugee status to them. For instance, apart from the U.S. case analysed above, once Denmark left Iraq, it decided to transfer and attribute international protection to more than 200 local Iraqi interpreters and their families, taking into account previous acts of violence by armed groups against such individuals due to their collaboration with foreign troops.<sup>60</sup> Similarly, Australia launched in 2013 a special federal programme finally permitting 900 interpreters from Afghanistan and Iraq to benefit of visas. However, also in this case, shortcomings have been recorded in the management process, also due to lack of transparency.<sup>61</sup> Same can be said for France, which has granted less than 250 visas to Afghan interpreters recruited between 2002 and 2014, according to the Association of the French Army's Afghan Interpreters.<sup>62</sup>

As a consequence, it is clear that in order to assure greater protection for interpreters in conflict areas, it is necessary first and foremost to bring pressure in order to see the legal guarantees which already exist reaffirmed and advocate for some innovative solutions. This could be achieved through the appropriate dissemination of

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*of Asylum-Seekers from Afghanistan*, 30 August 2018, pp. 39, 43, <<https://www.refworld.org/pdfile/5b8900109.pdf>>.

60 See REUTERS, *Denmark Airlifts 200 Iraqis Translators and Relatives*, July 20, 2007, <[www.reuters.com/article/idUSL2031209220070720](http://www.reuters.com/article/idUSL2031209220070720)>.

61 See ABC, *Veterans fighting for protection visas for Afghan interpreters*, 10 September 2018, <<https://www.abc.net.au/news/2018-09-10/veterans-fight-peter-dutton-over-visas-for-afghan-interpreters/10221716>>; THE GUARDIAN, *Australia urged to give visas to Iraqi translators who worked for ADF*, 11 December 2019, <<https://www.theguardian.com/australia-news/2019/dec/12/australia-urged-to-give-visas-to-iraqi-translators-who-worked-for-adf>>.

62 For further details about the situation of Afghan interpreters employed by the French government, see Q. MÜLLER, *Les interprètes afghans de l'armée française attendent toujours un geste*, in *L'Express*, March 3, 2020; O. TALLÈS, *Lâché par la France, un ex-interprète afghan de l'armée échappe à la mort*, in *La Croix*, December 9, 2019 and B. MAKOOL, *Afghan employees for French army left to fend for themselves*, in *InfoMigrants*, September 20, 2019.

these normative standards and by building up adequate awareness in theatres of operations and in relevant fora. In this respect, proposals such as those presented to the Council of Europe should be supported in order to bring attention to the need to ensure protection for individuals who, as neutral parties in conflict situations, perform indispensable functions of common interest for local communities and, in a broader sense, for the International Community.