

11^{ème} Commission*

Le statut, les droits et les devoirs internationaux
des journalistes dûment accrédités, dans un
contexte de conflit armé

*The International Status, Rights and Duties of
Duly Accredited Journalists in Times of Armed
Conflict*

Rapporteur : **Yoram Dinstein**

| | |
|----------------------------|-----|
| Travaux préparatoires..... | 451 |
| Délibérations..... | 531 |

*Membres / Membership : MM Broms, Ferrari Bravo, Lady Fox, M. Fugita, Sir
Kenneth Keith, MM. Lee, Pocar, Ress

I. TRAVAUX PREPARATOIRES

Table of contents

| | |
|---|-----|
| Rapport final / Final Report | 452 |
| A. Preface..... | 452 |
| B. The Setting..... | 454 |
| C. The Present Legal Regime..... | 455 |
| (a) Members of the Armed Forces..... | 455 |
| (b) « War Correspondents »..... | 456 |
| (c) « Journalists engaged in Dangerous Professional Missions in Areas of Armed Conflict »..... | 458 |
| D. Central Issues | 459 |
| E. The Definition of « Journalists » | 460 |
| F. Loss of Protection | 462 |
| G. Accreditation of an ID Card | 463 |
| H. A Special Emblem ? | 465 |
| I. Denial of Access to the Contact Zone..... | 467 |
| J. Non-International Armed Conflicts | 468 |
| K. Replies to Questionnaire | 469 |
| Question 1 | 469 |
| Question 2 | 471 |
| Question 3 | 472 |
| Question 4..... | 473 |
| Question 5..... | 474 |
| Question 6..... | 475 |
| Question 7..... | 475 |
| Question 8..... | 476 |
| Question 9..... | 476 |
| Question 10..... | 477 |
| Question 11..... | 478 |
| Question 12..... | 478 |
| Question 13..... | 479 |
| Question 14..... | 479 |

| | | |
|-----|---|-----|
| 452 | Institute of International Law - Session of Naples (2009) | |
| | Question 15 | 480 |
| | Question 16 | 480 |
| | Question 17 | 481 |
| | Question 18 | 482 |
| | Question 19 | 482 |
| | Question 20 | 482 |
| | L. Additional Questions | 483 |
| | M. General Conclusions | 483 |
| | Replies to Questionnaire | 484 |
| | Reply by Lady Fox (21.12.2006) | 484 |
| | Réponse de M. Hisakazu Fujita (3 février 2007) | 494 |
| | Reply by Judge Kenneth Keith (1 February 2007)..... | 502 |
| | Reply by Judge Fausto Pocar | 508 |
| | Remarks by M.V.K. Doermann | 513 |

RAPPORT FINAL / FINAL REPORT

A. Preface

1. The 11th Commission on the “International Status, Rights and Duties of Duly Accredited Journalists in Times of Armed Conflict” was set up by the *Institut de Droit International* in its Bruges Session of 2003. In the course of the final discussion preceding the establishment of the Commission, Professor P. Lalive raised the idea of possible collaboration with external experts, such as associations of journalists (70-II Annuaire 72). He was supported by the President (Professor G. van Hecke) and myself (*ibid.*). No one challenged this line of thought.

2. Upon being designated as Rapporteur by the Bureau, early in 2004, I met the Secretary-General (Professor J. Voerhoven) and suggested that – before the Commission commenced its actual work – it might be useful to establish a dialogue both with the International Committee of the Red Cross (ICRC) and the International Federation of Journalists (IFJ), in order to find out what they thought of the directions in which International Humanitarian Law (IHL) should develop in this field *de lege ferenda*. The Secretary-General approved of the move *en principe*, although he reminded me that the 11th Commission – like all other commissions – must, of course, conduct its work in compliance with the procedures laid down in the Statutes and the Rules of the *Institut*.

3. Accordingly, I wrote to then Head of the Legal Division of the ICRC (J.-P. Lavoyer) in March 2004 and, in May of that year, had a meeting in Geneva with him and with several other officers (notably, A. Notari, Head of Press). Following the meeting, Knut Dörmann, then Deputy Head – now Head - of the Legal Division of the ICRC, was identified as the key contact person in charge. In October 2004, Dörmann and I went together to Brussels for consultation with Aidan White, General Secretary of the IFJ, and Rodney Pinder, the Director of the International News Safety Institute (INSI). It turned out that INSI was planning to launch a fact-finding “Global Inquiry into the Killing of Journalists” (actually initiated in May 2005 under the chairmanship of Richard Sambrook, Director of Global News for the BBC). Dörmann and I were requested to assist – in our personal capacities – by offering INSI advice about the international legal repercussions of the Inquiry.

4. Following the Brussels consultation, I have attended two informal colloquia with INSI people and others in London. The first session took place in December 2005, as part of a Human Rights Forum sponsored by the European Union ; and the second was especially convened in April 2006 in the Open Society Foundation. Three other members of the 11th Commission – Judge B. Broms, Lady H. Fox and Judge G. Ress - had been personally invited (at my suggestion) to the latter gathering, but in the event only one (Broms) was able to join us.

5. In September 2006 I sent the members of the 11th Commission my Preliminary Exposé to which a specific Questionnaire was attached, as required by Article 4(1) of the Rules of the *Institut*. Replies came from the following members of the Commission : Lady Fox (see Annex I of this Report), Professor H. Fujita (see Annex II), Judge K. Keith (see Annex III), and Judge F. Pocar (see Annex IV). Informal meetings with members of the Commission took place during the session of the *Institut* in Santiago de Chile, in October 2007, where it was agreed that I should proceed to writing a Provisional Report based on the replies listed. I am glad to add that, in the meantime, I have also received detailed replies to the Questionnaire from Dörmann on behalf of the ICRC (see Annex V). I am exceedingly grateful to the ICRC in general – and to Dörmann in particular – for having taken the time required to address every aspect of the Questionnaire.

454 Institute of International Law - Session of Naples (2009)

B. The Setting

6. The setting of the remit of the 11th Commission is armed conflict. The law of armed conflict (LOAC) is often called international humanitarian law (IHL), and this is how it will be referred to in this Report. IHL has always been perceived as covering the “Geneva Law”. It is now understood to cover both the “Geneva Law” and the “Hague Law”, *i.e.* the entire gamut of LOAC (see the 1996 Advisory Opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*, para. 75). Traditionally, the “Geneva Law” (the four Geneva Conventions of 1949) related to protection of the victims of war, whereas the “Hague Law” (chiefly, the Hague Regulations of 1899/1907) dealt with the conduct of hostilities. But the two strands of the law are now interwoven, as displayed in Protocol (I) of 1977 Additional to the Geneva Conventions (AP/I).

7. IHL consists of two sets of rules, governing respectively international and non-international armed conflicts. This division is epitomized in the two separate 1977 Additional Protocols to the Geneva Convention. AP/I is devoted to international armed conflicts and AP/II deals with non-international armed conflicts. Many IHL norms pertaining to international and non-international armed conflicts today coincide, but by no means all. It must be appreciated that there are intrinsic dissimilarities between the two types of armed conflicts. Primarily, captured insurgents in a non-international armed conflict can be prosecuted by the central Government for treason (as well as other crimes), under the domestic penal law of the State concerned, and they are not entitled to the privileged status of prisoners of war. For the most part, this Report will cover international armed conflicts. Non-international armed conflicts will come up for special mention only in Section J of the Report.

8. In principle, there is a big difference between the 1949 Geneva Conventions and AP/I. The Geneva Conventions are now universally binding, inasmuch as every State in the world – bar none – has expressed its consent to become a Contracting Party. Contrarily, AP/I – although binding a great majority of States - is not universally applicable. In fact, quite a few of its provisions are hotly contested by a number of countries, led by the United States. Having said that, it should be accentuated that the provisions of AP/I cited in this Report do not constitute bones of

contention, since they are generally conceded to reflect customary international law.

9. IHL is not the sole branch of international law germane to armed conflicts. Human rights law is also applicable, although (unlike IHL) most human rights can be derogated in time of war and they are also subject to built-in limitations. When there is an apparent disharmony between the two branches of international law, IHL has to be regarded as the *lex specialis* in time of armed conflict (see the *Nuclear Weapons* Advisory Opinion, para. 25).

C. The Present Legal Regime

10. There is a basic distinction in IHL between three categories of persons involved in the gathering and transmittal of news : (a) members of the armed forces ; (b) “war correspondents” who accompany the armed forces ; and (c) “journalists engaged in dangerous professional missions in areas of armed conflict”.

a) Members of the Armed Forces

11. The first category relates to members of the armed forces who are assigned by their superiors to cover the hostilities on behalf of news organs belonging to the armed forces (military newspapers and journals, military radio and TV stations, and the like). As members of the armed forces, these persons are combatants, although their mission does not entail combat *per se*. They are no different in principle from sundry other members of the armed forces whose functions do not entail fighting - such as computer technicians, veterinarians or cooks - but they can still be considered combatants. These persons are serving in the armed forces, carrying military ID cards and wearing uniforms. As members of the armed forces, they can be targeted by the enemy at all times within the limits of IHL (which, for instance, forbids the employment of weapons causing superfluous injury or unnecessary suffering). If captured by enemy, they are of course entitled to the status of prisoners of war.

12. It is obvious that this category of journalists who are members of the armed forces does not invite any particular protection under IHL, and it was not meant for study by the 11th Commission. The category is listed here only for reasons of completion, and it will not be brought up again in this Report.

456 Institute of International Law - Session of Naples (2009)

b) “War Correspondents”

13. The second category consists of “war correspondents”. “War correspondents” are listed in Article 4(A)(4) of Geneva Convention (III) of 1949 Relative to the Treatment of Prisoners of War as an illustration of the broader group of “persons who accompany the armed forces without actually being members thereof” (a group which ranges from supply contractors to welfare workers and labour units). Pursuant to the Convention, such persons – inclusive of “war correspondents” - must receive authorization from the armed forces which they accompany. As we shall see (*infra* 21), Article 79(2) of AP/I adverts to “war correspondents accredited to the armed forces”. In the language of the mandate of the 11th Commission, “war correspondents” would evidently be “duly accredited”.

14. It is true that, in 2002, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) – in the *Randal Case (Prosecutor v. Brdjanin)* (Decision on Interlocutory Appeal) – held that “war correspondents” (while a smaller group, compared to journalists in general) are characterized by the “work done and the risks faced by those who report from conflict zones”, adding: “By ‘war correspondents,’ the Appeals Chambers means individuals who, for any period of time, report (or investigate for the purposes of reporting) from a conflict zone on issues relating to the conflict” (para. 29). With respect, I believe that this definition of “war correspondents” is wrong. “War correspondent” is a term of art, and not every journalist reporting from an armed conflict zone comes within its compass. To qualify as a “war correspondent”, a journalist must – as stated - be “accredited to the armed forces”.

15. Resolution 1738 (2006) of the Security Council - which is appended to this Report (Annex VI) - also alludes specifically to the accreditation of “war correspondents”.

16. The status of “war correspondents” is further clarified by the Green Book, issued by the United Kingdom Ministry of Defence (MOD) - after consultation with media organizations - as a general guide to procedures adopted in military operations. The Green Book says expressly (in para. 26) that war correspondents accompanying UK forces in armed conflicts need to be accredited in order to attain the special protection under Article 4(A)(4) of Geneva Convention (III).

17. In more recent international armed conflicts, “war correspondents” have usually been “embedded” in specific units in the armed forces. According to the Green Book, once assigned, “embedded” war correspondents are not normally permitted to move between units (para. 31).

18. Whether or not “war correspondents” are “embedded” in particular units, all “war correspondents” are civilians who merely accompany the armed forces but are not members thereof. In other words, “embedding” in a military unit does not mean induction into the armed forces: “embedding” does not deprive a “war correspondent” of his or her civilian status.

19. I shall summarize (*infra* 24) the benefits of civilian status for journalists. But, of course, “war correspondents” are running palpable risks consequent upon their constant intermingling with members of the armed forces. That is to say, there is a price to pay for the prolonged presence of “war correspondents” in close proximity to combatants, fulfilling their functions either within or near military objectives. The price tag is that, when combatants and military objectives are attacked, “war correspondents” easily become victims of what is euphemistically called “collateral damage”. However, under the proportionality principle of IHL, the “collateral damage” to civilians (including “war correspondents”) must be weighed by the attacker: the attack must not be expected to cause “collateral damage” that would be excessive in relation to the concrete and direct military advantage anticipated (Article 51(5) of AP/I).

20. Geneva Convention (III) decrees that – if captured by the enemy – “war correspondents” are entitled to prisoners of war status, notwithstanding the fact that they are civilians and not members of the armed forces. This is a guarantee against ill-treatment when in custody, inasmuch as prisoners of war benefit from a regime of high-level protection during captivity (the details of the regime are articulated in Geneva Convention (III)). On the other hand, it must be remembered that prisoners of war need not be released until “the cessation of active hostilities” (Article 118 of Geneva Convention (III)), so that captured “war correspondents” can be effectively denied the opportunity of covering the unfolding armed conflict.

458 Institute of International Law - Session of Naples (2009)

(c) “Journalists Engaged in Dangerous Professional Missions in Areas of Armed Conflict”

21. The third category is comprised of “journalists engaged in dangerous professional missions in areas of armed conflict”. This is the category that was the main concern of the 11th Commission. The quotation is from Article 79(1) of AP/I, which sets forth that such journalists “shall be considered as civilians within the meaning of article 50, paragraph 1”. Article 79(2) adds that this is without prejudice to the status of “war correspondents accredited to the armed forces” dealt with in Geneva Convention (III).

22. The *renvoi* in Article 79(1) is only to Article 50(1) of AP/I, which in essence defines civilians as an antonym to combatants. But, by being classified as civilians, “journalists engaged in dangerous professional missions in areas of armed conflict” automatically benefit from an entire spectrum of protection against dangers arising from military operations (Article 51(1) of AP/I). This protection can be enjoyed by civilians “unless and for such time as they take a direct part in hostilities” (Article 51(3)).

23. Article 79(1) is clearly non-innovative, inasmuch as it does not create a special status for “journalists engaged in dangerous professional missions in areas of armed conflict”. All that Article 79(1) does is underscore that “journalists engaged in dangerous professional missions in areas of armed conflict” enjoy exactly the same protection as ordinary civilians who are placed in similar circumstances : no more but no less. *De lege lata*, this is also the legal position pursuant to customary international law.

24. The foremost aspects of the generic protection of civilians – affecting *inter alia* “journalists engaged in dangerous professional missions in areas of armed conflict” - are :

I. Civilians (not directly participating in hostilities) (i) must not be the object of direct attacks (Article 51(2) of AP/I) ; (ii) must not be exposed to indiscriminate attacks (*viz.* attacks that strike without distinction between combatants/military objectives and civilians/civilian objects) (Article 51(4) of AP/I) ; and (iii) they benefit from the obligation incurred by Belligerent Parties to exercise precautions in attack, in order to avoid excessive “collateral damage” to civilians (Article 51(5) of AP/I).

II. If civilians are captured and interned by a Belligerent Party, they are entitled to fundamental guarantees of humane treatment (spelt out in Article 75 of AP/I).

III. In conformity with Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, a Belligerent Party cannot intern civilians (including journalists) except for imperative reasons of security (Articles 42, 78). However, this safeguard (which is very important to journalists who may otherwise be precluded from discharging their duties) is only available to “protected persons” (see *infra* 35).

25. It ought to be mentioned that, under Article 8(2)(b)(i) of the 1998 Rome Statute of the International Criminal Court, intentionally directing attacks against civilians not taking direct part of hostilities in international armed conflicts is a war crime.

D. The Central Issue

26. It is incontestable that, *de lege lata* (under both customary IHL and treaty law (AP/I)), “journalists engaged in dangerous professional missions in areas of armed conflict” enjoy protection as civilians. This is clearly enunciated in Security Council Resolution 1738.

27. The salient issue regarding “journalists engaged in dangerous professional missions in areas of armed conflict” arises *de lege ferenda*. The question is whether the present protection of such journalists is adequate, given the importance of the societal role that they play in the gathering and the dissemination of information about what is really going on in the course of armed conflict. In other words, should journalists not profit from a higher level of protection, compared to ordinary civilians ?

28. This crucial dilemma must be understood against the backdrop of an alarming numbers of casualties sustained by members of the media and associated personnel in armed conflicts in recent years. Altogether, INSI - using a broad definition of journalists (see Section F) and not limiting itself to armed conflicts - reports a record number of no less than 172 media workers who died worldwide while pursuing their vocations in 2007, compared to 168 in 2006, 146 in 2005 and 117 in 2004. In 2008, the number dropped to 109, but that is still a disturbing figure. According to INSI itself, out of approximately 1,000 media workers killed over a period of 10 years ending in 2006, only one in four was killed in

460 Institute of International Law - Session of Naples (2009)

situations of armed conflict. Although less egregious, these data mean that every year dozens of journalists and associated personnel lose their lives covering (either international or non-international) armed conflicts. Indubitably, journalists in areas of armed conflict are engaged in exceedingly dangerous professional missions.

29. It must be constantly borne in mind that “journalists engaged in dangerous professional missions in areas of armed conflict” (as well as “war correspondents”) are civilians. Yet, journalists are not ordinary civilians in situations of armed conflicts. What is unique about journalists – compared to ordinary civilians – is that they have a *bona fide* mission to accomplish in the “contact zone” (the front-line). Ordinary civilians, as far as possible, should not be present in the contact zone (*cf.* Article 58 of AP/I, which instructs that Belligerent Parties should endeavour to remove civilians under their control from the vicinity of military objectives and to protect them against dangers resulting from military operations). Even if ordinary civilians remain in the contact zone (and not always do they have much choice in the matter), they have no lawful role to play in the on-going hostilities. By contrast, journalists are placed in harm's way with a purpose : they are tasked with news-gathering and close coverage of unfolding events. Empirically speaking, these activities expose them to great danger.

30. It is true that the presence of journalists in the contact zone complicates battleground assessment by military commanders, inasmuch as the latter would prefer to assume that whoever is present in the contact zone is a targetable combatant. But such a sweeping assumption would anyhow be wrong. Apart from the fact that it hardly ever happens that all ordinary civilians have actually moved away from the contact zone, medical and religious personnel are entitled to special protection despite the fact that they perform their crucial mission under fire. Journalists also deserve protection under similar circumstances.

E. The Definition of “Journalists”

31. A preliminary question relates to the definition of the term “journalists”. It cannot be disputed that the expression “journalists” must embrace all full-time members of the media, printed as well as electronic. These include not only correspondents and reporters, but also editors and producers, commentators and columnists, anchor persons and news analysts, TV cameramen and still photographers, illustrators and

cartoonists, and so forth. Furthermore, logic dictates that - given the technical constraints and complexity of electronic journalism - the definition must be stretched to incorporate full-time members of diverse indispensable crafts, such as TV satellite-linkup engineers or broadcasting and sound technicians. However, there are three definitional problems :

32. The first definitional problem is whether the expression “journalists” comprises solely full-time media persons – employed by news-gathering organizations - or it covers in a sweeping manner local stringers (recruited on the spot on part-time contracts) ; free-lance personnel (who are not currently employed by any specific news agency, but have a certain record of publication and can reasonably expect to sell their stories or pictures at a later stage) ; persons representing Internet blogs and private news bulletins circulated through e-mail or SMS ; etc. It must be grasped that these people are civilians no less than full-time journalists. As long as the protection of “journalists” is conterminous with the protection of civilians, there is no real point in drawing a distinction between full-time and part-time journalists.

33. The second definitional problem relates to associated personnel or logistical support staff, primarily drivers, interpreters and security guards. It must be accentuated that Security Council Resolution 1738 explicitly uses the phrase “journalists, media professionals and associated personnel engaged in dangerous professional missions in areas of armed conflict”, thus extending the language of Article 79(1) of AP/I from “journalists” proper to cover also “media professionals” (an extension which is largely semantic and covers all the persons mentioned *supra* 31) and, more significantly, “associated personnel” (who are not, strictly speaking, journalists). This is very much in keeping with the wishes of the media industry. INSI fervently believes that the “associated personnel” fulfill a vital role in making the modern newsgathering process feasible. It actually counts associated personnel as “journalists” in the tally of casualties, a large percentage of whom happen to be members of the logistical support staff.

34. The third problem is whether any distinction can be lawfully made by a Belligerent Party between foreign journalists and its own nationals. The question arises most pungently with respect to associated personnel : is it permissible to render a preferential treatment to a foreign driver,

462 Institute of International Law - Session of Naples (2009)

interpreter or security guard compared to a local one? Insofar as protection from attack under AP/I is concerned, there is no question that it is equally bestowed on all civilians (not directly participating in hostilities), irrespective of their nationality.

35. However, it cannot be ignored that the status of “protected persons” under Geneva Convention (IV) (as per Article 4 (first paragraph) of the Convention) is not conferred on nationals of a Party to the conflict. For that matter, such protection is also excluded in the case of nationals of co-belligerent or neutral States (in occupied territories, this is limited to nationals of co-belligerent States) that maintain normal diplomatic relations with the Belligerent Party concerned. Since most foreign journalists covering an international armed conflict are likely to come from countries maintaining full diplomatic relations with the Belligerent Party, they may share with local nationals the disadvantage of not being “protected persons” under Geneva Convention (IV).

F. Loss of Protection

36. A cardinal proviso to the protection granted to “journalists engaged in dangerous professional missions in areas of armed conflict”, in accordance with Article 79(2) of AP/I, is that it is premised on a condition that they “take no action adversely affecting their status as civilians”. In principle, the same proviso should apply to “war correspondents”.

37. Article 79(2) does not specify the scope of action that would be considered as adversely affecting a journalist’s status as a civilian. It is clear that – like all other civilians – journalists would lose their protection (and expose themselves to attack) only if, and for such time as, they are directly participating in hostilities (as per Article 51(3) of AP/I; see *supra* 22).

38. According to the British MOD Green Book, “war correspondents” are not permitted to carry arms (para. 26). However, IHL does not expressly forbid journalists to carry light weapons (such as hand guns) for self-defence purposes. They may also be escorted by armed security guards. Still, when journalists are accompanied by armed guards, there is always the risk that they will get embroiled in direct participation in hostilities. Should that transpire, and for such time as they do so, journalists would lose their protection from attack.

39. It may be useful to draft guidelines for journalists – in the form of a "code of conduct" to be issued by media organizations or by the IFJ – making sure that journalists carry out their societal responsibilities in armed conflict in a responsible way.

40. A principal apprehension as regards journalists relates to their commission of acts harmful to a Belligerent Party in an international armed conflict not by opening fire but by using (or abusing) their vantage point as an opportunity - either for an economic inducement or for reasons of ideological conviction - to indulge in espionage. It is virtually impossible to guarantee that no journalist would ever abuse his or her protection as a civilian in order to collate – under false pretences - information of military value, designed for transmittal to the enemy.

41. Undeniably, should a journalist act as a spy on behalf of the enemy, he or she would lose the protection conferred by IHL. Espionage is not a war crime, but any person (including a journalist) charged with espionage can be arrested and prosecuted under the domestic legal system of the Belligerent Party. The only guarantee that IHL imposes is that of due process of law in the course of the trial. The punishment meted out to spies caught in the act in armed conflict may be severe. Regrettably, the line of distinction between (lawful) news-gathering and (unlawful) espionage is sometimes rather blurred.

42. Espionage is not the only charge that can be leveled against a journalist in connection with the performance of his or her news-gathering functions. There are diverse other acts that may contravene domestic legislation or regulations. It may prove useful to clarify in what circumstances journalists can be lawfully imprisoned or (in the case of foreign journalists) expelled. It is also desirable to clarify when a journalist's film, tape, notes, etc., can be confiscated. Does it all exclusively depend on the vagaries of domestic legislation/regulations or should there be international legal standards establishing barriers that curb the discretionary powers of the local State ?

G. Accreditation and an ID Card

43. As mentioned (*supra* 21), "war correspondents" are expressly referred to in Article 79(2) of AP/I as "accredited to the armed forces", and Resolution 1738 of the Security Council also alludes specifically to the accreditation of "war correspondents".

464 Institute of International Law - Session of Naples (2009)

44. Furthermore, under Geneva Convention (III), “war correspondents” have to be provided with an identity card. The Notice in the model card - as it appears in Annex IV(A) of the Convention - says that the card “must be carried at all times”, and a similar obligation appears in the Green Book (para. 26). This should not be understood to mean that the card – as and of itself - is constitutive of protection. The card only serves as proof that the bearer is authorized to accompany the armed forces. The availability of the card for purposes of identification is primarily important as a means to establish entitlement to a prisoner of war status after capture.

45. Article 79(3) of AP/I lays down that “journalists engaged in dangerous professional missions in areas of armed conflict” may – but are not compelled to – obtain an identity card (a model of which appears in an Annex to AP/I), to be issued by the Government of the State of either nationality or residence or in which the employing news medium is located. The purpose of the optional ID card, according to Article 79(3), is to attest to the status of a person as a journalist.

46. The issue of the optional ID card that may – or may not – be obtained by “journalists engaged in dangerous professional missions in areas of armed conflict” under Article 79(3) is a matter of practical import and controversy. It is inter-linked with the question whether journalists (to quote again the 11th Commission’s mandate) are “duly accredited”. Many journalists are reluctant to apply to their own or to any other Government, in order to obtain an ID card or get accredited, since they do not put their trust in governmental regulatory bodies in this field, and they are apprehensive of vesting any particular governmental agency with a “licensing” authority that would determine (in any context) who is and who is not a journalist. Additionally, there is a widespread conviction among journalists that being identified as such would not really enhance their protection, since on many occasions journalists are attacked deliberately (see *infra* 53). In any event, the availability of the ID card on the battlefield is practically irrelevant when an attack is launched from a distance. The utility of the ID card comes into play only after capture, as proof of entitlement to a certain status (especially in the case of “war correspondents”, who are entitled to prisoner of war status (*supra* 20)).

47. The reluctance of “journalists engaged in dangerous professional missions in areas of armed conflict” to turn to governmental agencies for

ID cards raises the question whether an authority to register and identify (in a sense, accredit) journalists can be vested in a central, impartial, non-governmental international organization (such as the ICRC or the IFJ). The trouble is that, just as journalists are not keen on seeking accreditation, there is little enthusiasm on the part of either the ICRC or the IFJ to burden itself with this sensitive responsibility. Some form of identification/accreditation is usually provided by media networks and large newspapers to the members of their own staff. However, it hardly needs saying that free-lancers, blog-writers etc. may be left without any form of identification/accreditation.

48. There is also some doubt regarding the data recorded in the two existing ID cards and their format. Both the mandatory card for “war correspondents” (annexed to Geneva Convention (III)) and the optional card for “journalists engaged in dangerous professional missions in areas of armed conflict” (annexed to AP/ I) include the rubric “religion” (although, in the optional card, it is expressly mentioned that filling this rubric is also optional). Is this advisable in present circumstances of inter-religious armed conflicts, when journalists are known to have been killed because they are viewed as “infidels”? Other queries may be added regarding, e.g., the current inclusion of a rubric (admittedly optional) of fingerprints. In the era of exponential electronic advances, there are many ways to update the format of the card and make it more user-friendly.

H. A Special Emblem

49. A highly controversial issue is whether journalists should be provided with their own fixed distinctive special protective emblem in armed conflict, to be emplaced on vehicles, armlets, etc. (parallel to the special protective emblem of medical and religious personnel). Such an emblem does not exist today, but it has been proposed already in a UN draft convention of the 1970s (Doc. UN A/10147). Needless to say, the introduction of a new special emblem for journalists would be contingent on the adoption by States of an Additional Protocol to the Geneva Conventions (similar to Additional Protocol (III) of 2005 inaugurating the Red Crystal). The purpose of the projected emblem is to be distinctive, *i.e.* to distinguish journalists both from combatants and from ordinary civilians.

50. A Press Emblem Campaign (PEC) – launched in Geneva in 2004 - is supported by some journalists, although the goal of the campaign is not

466 Institute of International Law - Session of Naples (2009)

shared by either INSI or the IFJ. The special emblem envisaged by PEC is in the shape of an orange circle (disk) with the word PRESS emblazoned in black capital letters. The hope of PEC is that the use of the emblem may augment protection by making it easier to identify the user/wearer as a journalist.

51. Patently, even today many journalists carry signs (e.g., on vehicles) marked with either the word PRESS or the initials TV, although some big news organizations employ their own individual badges stamped with their respective corporate name and/or logo. Still, the orange circle (intended to bring the word PRESS into relief as well as establish a fixed distinctive emblem) is novel.

52. The most telling argument in favour of a new special emblem for journalists is that those who open fire from a distance are otherwise prone to contend that the incident occurred inadvertently, simply because the a journalist happened to be in harm's way, often citing mistaken identity as the cause (a mistake stemming, for instance, from the fact that the lens of a camera may appear from a distance to look like the scope of a sniper's rifle).

53. The paramount argument put forth against the introduction of a special emblem is that there is evidence that some journalists have been killed or wounded not by mistake but – having been identified as journalists - in a premeditated fashion. Many journalists believe that they are deliberately targeted in armed conflicts because (rather than notwithstanding the fact that) they are journalists. If so, the projected emblem is liable to prove counter-productive by attracting fire instead of staving it off.

54. Why would journalists be deliberately attacked ? The answer is that this is done as an ultimate, brutal, form of censorship - attacking journalists with the intention of preventing the gathering or reporting of information deemed confidential or simply embarrassing – and, perhaps, with a view to creating a chilling effect on journalists other than the direct victims.

55. Even if a special emblem were to become a reality, the protection of journalists will continue to emanate from their general status as civilians (or any new special status as journalists) – and not, in and of itself, from the new emblem (just as the protection of medical and religious personnel

is not generated by the emblem *per se*) – so that failure to wear the new emblem would not diminish from the protection.

56. Assuming that a new special emblem for journalists were to be adopted, it would clearly not be compulsory, so that the choice whether or not to resort to the emblem would be made by each journalist individually.

57. A complementary question arises in case of the deliberate misuse of the new protective emblem (had it been adopted) or, for that matter, either an existing or a new ID card. Should an attempt by a combatant to pass himself or herself off as a journalist - especially by resorting to the misuse of the new protective emblem (assuming that it is adopted) or by forging the appropriate ID card - be regarded as perfidious activity ?

I. Denial of Access to the Contact Zone

58. A critical issue, underlying the entire debate about the functioning of journalists in armed conflict, is access to the contact zone. The general public tends in this day and age to take for granted the flow of news in real time from battlefields around the world. However, Belligerent Parties frequently have concerns about such a free flow of information. The reasons may be operational : it is only natural that a Belligerent Party would worry about, e.g., a media report alerting the enemy to impending attacks before they are launched. But, in an era in which the perception is that wars may be won or lost in the media, Belligerent Parties may equally be motivated by a desire to prevent leakages of embarrassing information concerning malfeasance and breaches of IHL from reaching the outside world. The question, therefore, is two-fold. First, can access be denied to the media altogether in the contact zone ? Secondly, can access be granted to journalists on a discriminatory basis, to wit, allowed to some while denied to others in the same frame of time and space (discrimination being practiced, perhaps, on the ground of nationality, politics or ideology) ?

59. IHL does not expressly address the issue of access by journalists to the contact zone. The issue may be examined from the standpoint of the general law of human rights. Article 19 of the 1948 Universal Declaration of Human Rights and Article 19(2) of the 1966 International Covenant on Civil and Political Rights both proclaim the right “to seek, receive and impart information” as an indispensable component of freedom of expression. Similar provisions appear in regional human rights treaties

468 Institute of International Law - Session of Naples (2009)

(see, in particular, Article 10(1) of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms).

60. Freedom of information is subject both to (i) limitations, *inter alia* the exigencies of national security (Article 19(3)(b)) of the Covenant); and to (ii) derogation in time of public emergency (Article 4(1) of the Covenant), which clearly includes war (see Article 15 of the European Convention). It stands to reason that access of journalists to some strategic areas during wartime may, therefore, be denied over stretches of time for justifiable reasons of national security or following a duly proclaimed derogation.

61. Additionally, the imposition of military censorship on the media under certain circumstances cannot be ruled out in wartime. Yet, with the vast potentialities of instant communications in the present world, how can censorship be pragmatically enforced as regards foreign journalists ?

62. Arguably, if access to certain areas is denied to journalists – or censorship is imposed - at certain times in the course of an armed conflict, this cannot be done on the basis of discriminatory treatment of journalists. The Universal Declaration (Article 2) pronounces that entitlement to all the rights set forth in the Declaration is “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. However, in the derogations clause of the Covenant, the only illicit grounds mentioned are race, colour, sex, language, religion or social origin. This raises, not for the first time in this Report, the issue of discrimination on the ground of nationality (between foreign and local members of the media).

J. Non-International Armed Conflicts

63. Both Article 4 of Geneva Convention (III) and Article 79 of AP/I are confined to international armed conflicts. There is no treaty in force at this time that deals expressly with the protection of journalists in non-international armed conflicts, *i.e.* intra-State insurgencies against the central Government or violent clashes between competing armed groups in the absence of such Government. It is particularly noteworthy that a clause parallel to Article 79 of AP/I is conspicuously absent from Additional Protocol (II) of 1977 relating to non-international armed conflicts. This is a most unsatisfactory situation when it is recalled that a large proportion of journalists and associated staff who lose their lives or

get wounded do so in non-international armed conflicts (which constitute today the majority of armed conflicts).

64. Despite the non-reference to journalists in instruments governing non-international armed conflicts, it is irrefutable that journalists in such conflicts – as much as in international armed conflicts - are still civilians (unless and for such time as they are directly participating in hostilities). Journalists therefore ought to be protected like all other civilians. The upshot is that there is no real distinction between the status of journalists in non-international and international armed conflicts. The only differences are that (i) there are no “war correspondents” in non-international armed conflicts ; and (ii) for “journalists engaged in dangerous professional missions in areas of armed conflict” there is no ID card similar to the optional one available pursuant to Article 79(3) of AP/I.

65. It may as well be mentioned that, under Article 8(2)(e)(i) of the Rome Statute of the International Criminal Court, intentionally directing attacks against civilians not taking direct part of hostilities in non-international armed conflicts is a war crime.

66. Non-international armed conflicts are still armed conflicts. They must be set apart from situations of internal riots and other disturbances that do not cross the threshold of an armed conflict and are not covered by IHL. The threshold is important, inasmuch as journalists often come under attack not only during armed conflict (whether international or non-international), but also at other times : such attacks have been launched by terrorist or extremist organizations, drug lords, mafia-type crime syndicates, etc. Although journalists clearly require protection even in situations below the bar of armed conflict, it was understood that the subject-matter exceeded the mandate of the 11th Commission.

K. Replies to Questionnaire

67. Since the full Replies to the Questionnaire appear in Annexes to this Report, there is no need to reproduce them here. What is proposed to be done in this Section of the Report is summarize the Replies to each Question and then offer the Rapporteur’s Comments :

Question 1 : *Is the overall protection of ordinary civilians in armed conflict adequate for journalists or should journalists benefit from a special status of protection ?*

470 Institute of International Law - Session of Naples (2009)

Replies :

(a) Manifestly, this is a *de lege ferenda* Question. Nobody contests that, under the *lex lata*, journalists enjoy the general protection of civilians under IHL.

(b) As far as the *lex ferenda* is concerned, Fox, Keith and ICRC give a clear-cut negative answer to the Question. They believe that the current protection of journalists – based on their status as civilians – is, on the whole, adequate. Therefore, they think that establishing a new special regime of protection for journalists is not warranted.

(c) Fujita is in favour of setting up a new regime of special protection for journalists. Pocar is also in favour, although in a less emphatic way.

The Rapporteur's Comments :

(a) When the 11th Commission started our work, I was tentatively inclined to support the view that the present protection of journalists in armed conflict is inadequate, and that consequently a new regime of special protection - exceeding that of ordinary civilians – ought to be established (*de lege ferenda*). I was never impressed by the argument (made in the ICRC Commentary on AP/I, para. 3265) that granting special protection to journalists might somehow weaken the special protection of those benefiting from preferential treatment today (principally, medical and religious personnel). After all, a relatively new special protection was conferred on civil defence personnel in AP/I (in 1977), and it has not detracted one iota from the time-honoured regime of special protection of medical and religious personnel.

(b) However, the 11th Commission reached the conclusion that no special protection of journalists can work in practice unless armed units in the field can tell them apart from other civilians (and, of course, combatants). Hence, the crux of the issue is that a new regime of special protection of journalists is contingent on : (i) the establishment of a credible system of identification/accreditation of all those entitled to enjoy the special protection, and (ii) the adoption of a distinct recognizable emblem of protection. In view of the opposition of most journalists both to mandatory identification/accreditation (except for “war correspondents”) and to a new emblem of protection – see Questions 5 and 12 - it appeared to the 11th Commission unrealistic to recommend the creation of a new special category of protection for journalists.

(c) Since the 11th Commission did not endorse the construct of special protection of journalists in armed conflicts, the Commission never got to the stage of trying to trace the actual contours of such protection and the concrete advantages that it might provide over the ordinary protection of all civilians.

Question 2: *Who are “duly accredited journalists” for purposes of protection in armed conflicts? In particular:*

(a) *Does protection extend to free-lancers and stringers?*

(b) *Does protection cover logistical support staff (drivers, translators, security guards, etc.)?*

(c) *Does protection apply equally to nationals and foreigners?*

Replies:

(a) There is a consensus that, for purposes of existing protection in armed conflict (a protection afforded to all civilians), the expression “journalists” should be construed in a broad manner, covering all three categories specified in the Question.

(b) As far as protection under Geneva Convention (IV) is concerned, the distinction between nationals and foreigners is built into the system (ICRC).

The Rapporteur’s Comments:

(a) Surely, existing protection of journalists – in the words of Security Council Resolution 1738 - should be granted not only to “journalists” proper and to “media professionals”, but also to “associated personnel”. Any other solution (i) is likely to undermine the core protection of journalists by depriving them of indispensable services; and (ii) it ignores the fact that associated personnel are also civilians.

(b) Nationals of a Belligerent Party do not benefit from the protection of Geneva Convention (IV). But (i) this does not affect protection from attack, and (ii) it is important to remember that foreign journalists who come from co-belligerent States - or (outside of occupied territories) neutral States – not maintaining normal diplomatic relations with the Belligerent Party are also disentitled to protection under the Convention.

(c) Had the 11th Commission recommended a new special status of protection for journalists – presumably, through the adoption of a new Protocol Additional to the Geneva Conventions - it might have been possible to use that opportunity as an avenue to broaden the definition of

472 Institute of International Law - Session of Naples (2009)

“protected persons”, so as to cover journalists who are currently not entitled to protection under Geneva Convention (IV) (just as Article 73 of AP/I broadens the definition of “protected persons” in the case of prewar refugees). As long as this is not the case, the 11th Commission had no alternative but to remain within the ambit of the present Geneva scheme of protection.

(d) It should be recalled that foreign journalists who are not deemed “protected persons” under Geneva Convention (IV) are still entitled to any protection available under the general law of human rights.

Question 3 : *Should the words “duly accredited” be retained in the mandate of the 11th Commission ?*

Replies :

(a) Accreditation of “war correspondents” is indispensable : it is, in fact, an integral part of the definition of this category of journalists.

(b) However, as far as other journalists are concerned, there is no point in accreditation unless a special protection regime is set up. The ICRC rightly points out that any requirement of accreditation may diminish from the protection of non-accredited journalists (who remain civilians, despite the lack of accreditation).

(c) The ICRC also notes that, in non-international armed conflicts, a mandatory accreditation requirement may in fact imperil journalists if they seek accreditation from the central Government (which the insurgents are rebelling against).

(d) Note ought to be taken of the provision of AP/I Article 79(3), which creates an option of obtaining an ID card. However, in practice, this provision has not had much practical impact.

The Rapporteur’s Comments :

(a) The words “duly accredited” in the mandate of the 11th Commission currently fit only “war correspondents”.

(b) In light of the reluctance of most journalists to seek accreditation from any Government (including their own), and the counterpart reluctance of non-governmental organizations to assume responsibility for such sensitive accreditation, it is hard to insist that all journalists (and not solely “war correspondents”) must obtain accreditation.

(c) A cognate topic is that of getting an ID card issued, attesting to the status of a journalist (the availability of which has practical consequence

chiefly after capture). Again, the present legal regime appears to be satisfactory: “war correspondents” require an ID card, but for “journalists engaged in dangerous professional missions in areas of armed conflict” this is a mere option.

Question 4: *Is the current distinction (under Geneva Convention (III) and AP/I) between “war correspondents” and other “journalists engaged in dangerous professional missions in areas of armed conflict” satisfactory?*

Replies :

(a) *De lege lata*, notwithstanding some confusion created by the existence of two categories of journalists, the distinction between “war correspondents” and “journalists engaged in dangerous professional missions in areas of armed conflict” is corroborated by State practice.

(b) Only those contemplating a new special regime of protection for journalists (Fujita and, to a lesser extent, Pocar) actually support (*de lege ferenda*) the idea of any transformation (“minimizing” the distinction, according to Pocar) in this respect as well.

(c) As far as Fox, Keith and the ICRC are concerned, inasmuch as they do not support a change in the overall system of protection of journalists, any attempt to eliminate the distinction between the two categories is unnecessary and unrealistic.

(d) To quote Keith, “The distinction arises from the choice made by the individual correspondent under long established law, and appears to have the consequence only of POW [prisoners of war] status on capture. There appears to be no problem with the distinction”.

(e) The choice between the two categories is a matter of option for the individual journalist (although the Government has to approve accreditation of “war correspondents”), and – irrespective of the choice made – journalists of both classes retain their civilian status.

(f) It is interesting that Pocar would like journalists other than “war correspondents” to benefit from the entitlement to the status of prisoners of war. The ICRC seems to think that - in cost/benefit terms - this privilege is overrated, since prisoners of war are detained until the active cessation of hostilities while other interned journalists are not left without protection (thanks to AP/I Article 75).

474 Institute of International Law - Session of Naples (2009)

The Rapporteur's Comments :

(a) The recent tendency to accredit "embedded" journalists shows that the special category of "war correspondents" has not lost its *raison d'être*.

(b) There is no point in trying to alter the present bifurcation between "war correspondents" and other journalists as long as no new special regime of protection of journalists is recommended.

Question 5 : *Should a journalist's ID card, now an option (other than for "war correspondents"), become a mandatory requirement ?*

Replies :

(a) Fujita supports a mandatory ID card (within the context of a new special regime of protection for journalists), it being understood that a journalist not carrying the card does not lose his status as a civilian.

(b) Pocar would like a new "world-wide ID card for journalists issued by a central, impartial, and international body (probably, the IFJ)" – on a voluntary basis - supplementing the optional ID cards issued by Governments.

(c) Fox, Keith and the ICRC think that the current optional ID cards (other than for "war correspondents") should remain optional.

(d) The ICRC maintains that even for "war correspondents", the ID card is in reality optional.

The Rapporteur's Comments :

(a) I cannot accept the ICRC contention that the ID card of "war correspondents" is optional. This is not borne out by the text of the Notice in the model card of Geneva Convention (III). State practice confirms that "war correspondents" are required to carry the card (see the British MOD Green Book, para. 26). That being said, I agree with the ICRC (and the Green Book) that the card is merely a means of proof of identification, and it is not a *conditio sine qua non* of protection (see *supra* 44).

(b) It is necessary to remember that, in the final analysis, an ID card gains real

importance only after capture. An ID card does not really help its bearer where protection is most needed, namely, during combat.

(c) There is a great deal of opposition by journalists to accept any system of mandatory identification/accreditation, inasmuch as it is liable to be

conducive to more regulatory powers by Governments over the media industry.

Question 6 : *If so, who should be in charge of issuing an ID cards for a journalist :*

(a) *National governmental agencies ; or*

(b) *The media themselves ; or*

(c) *A central, impartial, international non-governmental authority (as a minimum, as a supervisory body, to ensure that there is no abuse).*

Replies :

(a) Nobody disagrees with the proposition that it would be best if a central, impartial, international non-governmental authority were to issue an ID card to journalists. On this there is agreement between respondents who take different positions *vis-à-vis* the question of establishing a new special regime of protection for journalists.

(b) However, since this Question is an add-on to the previous one, a negative answer to Question 5 turns the issue moot for those opposed to the creation of a new protection regime.

The Rapporteur's Comments :

(a) It might have been beneficial if the IFJ or the ICRC were to issue ID cards to journalists – on a voluntary basis - thereby facilitating especially the identification of free-lancers and other journalists (and associated personnel) who are not affiliated with well-known news agencies.

(b) Nevertheless, at the moment, it is not readily apparent that there is any real enthusiasm for such a project, either on the “supply” or on the “demand” side.

Question 7 : *Should the ID cards of journalists (including “war correspondents”) contain information about the religion of the bearer ?*

Replies :

(a) The majority is under the impression that filling the rubric of religion is optional, and it does not believe that keeping the rubric is harmful.

(b) All the same, some doubts have been expressed about retaining the rubric in conditions of inter-religious fighting (Fujita).

(c) Pocar would delete the rubric from the new ID card that he supports (see Question 5).

476 Institute of International Law - Session of Naples (2009)

The Rapporteur's Comments :

(a) The optional nature of filling the rubric "religion" is true of the optional ID card prescribed by Article 79(3) of AP/I (in other words, there is a double option : one relating to the card itself and the other to the specific rubric). Yet, no similar option is indicated in the model card for "war correspondents", which is not optional (see Question 5).

(b) If I could, I would delete altogether the rubric of religion from both existing ID cards (for reasons explained *supra* 48). If the cards are not going to be revised, I would urge journalists simply to refrain from filling in the information regarding religious affiliation in either card.

Question 8 : *Should the present format of journalists' ID cards be altered in any other way ?*

Replies :

(a) No real change of format is felt to be urgently necessary (even Fujita responds negatively).

(b) Naturally, if a new voluntary card were to be issued (Pocar's proposal), its format would be updated.

The Rapporteur's Comments :

If there is no drastic change in the status of the ID card, there is no real point in offering suggestions for a new format.

Question 9 : *Is it useful to list in a non-exhaustive manner circumstances and conditions in which journalists will be regarded as having lost their protection (perhaps in the form of a "code of conduct" issued by the media themselves) ?*

Replies :

(a) It is agreed that loss of protection derived from civilian status is linked to direct participation in hostilities (at such time as it takes place). Of course, this loss of protection affects all civilians and not only journalists.

(b) Pocar thinks that there is merit in the idea of listing ways in which protection is lost by journalists and, in particular, associated security staff.

(c) Conversely, the ICRC maintains that "the notion of direct participation in hostilities is a general notion of IHL and does not admit of a group- or function specific interpretation". It also believes that any

list of activities not constituting direct participation in hostilities might be construed counter-productively as excluding other activities.

(d) Are journalists allowed to bear light arms for self-defence purposes ? Pocar is afraid of a “slippery slope”, but reserves judgment.

The Rapporteur’s Comments :

(a) In my opinion, it would be useful for the media industry to adopt a “code of conduct” that is self-imposed. But there is no point in the *Institut* pursuing such a mission.

(b) I believe that journalists are entitled to carry light arms for self-defence purposes. They can also be escorted by armed guards.

Question 10 : *Can a clear-cut line of distinction be drawn between lawful news-gathering and espionage or does it all depend on mens rea ?*

Replies :

(a) As the ICRC put it : “Espionage is not prohibited under international (humanitarian) law and it does not amount to a war crime. Criminalizing espionage and defining the notion of espionage is first of all an internal matter of States”.

(b) One suggestion (Fox) is that some objective evidence can be used to establish criminal conduct, such as financial incentives.

The Rapporteur’s Comments :

(a) Although espionage is not a breach of IHL *per se*, it entails exposure to prosecution before domestic courts in accordance with the domestic penal law. It is no accident that Hague Regulations (Articles 29-31) and even AP/I (Article 46, which admittedly is limited to members of armed forces) deal directly with espionage.

(b) The subject-matter of espionage is of immense practical consequence as far as journalists are concerned. Since journalism like espionage is all about gathering information, the borderline between the two activities is not always unambiguous. Yet, the hallmark of espionage is that the activity is carried out “clandestinely” (the Hague formula). By contrast, a journalist is expected to be gathering information openly. All the same, it cannot be denied that some journalists may betray their professional duty by acting “on false pretences” (again, the Hague formula) for the benefit of the enemy.

478 Institute of International Law - Session of Naples (2009)

(c) It therefore appears that the acid test is whether the information is obtained by a journalist “with the intention of communicating it to the hostile party” (once more, the Hague formula). Needless to say, perhaps, intentions are liable to be misinterpreted. That is why reliance on objective criteria (like financial incentives, as suggested by Fox) is of major significance in establishing *mens rea*.

Question 11 : *Should there be international standards clarifying when journalists who infringe domestic legislation or regulations – in circumstances other than espionage – be imprisoned or (in the case of foreign journalists) expelled*

(or when a journalist’s film, tape, notes, etc., can be confiscated) ?

Replies :

(a) There are no clear international standards applicable specifically to journalists in such situations.

(b) Settlement of the matter must be left to the domestic legal system, subject to general human rights law.

The Rapporteur’s Comments :

(a) It is far from easy to set out rules that apply exclusively to the imprisonment or expulsion of foreign journalists when they are charged with transgressing the penal law of a Belligerent Party.

(b) General human rights law comes into the picture, subject however to derogation in time of war and built-in limitations.

(c) As far as the equipment of a journalist is concerned, it is noteworthy that Security Council Resolution 1738 states that “media equipment and installations constitute civilian objects, and in this respect shall not be the object of attack or of reprisals, unless they are military objectives”. However, the Resolution is exclusively devoted to the IHL issue of attack, and it does not pertain to law enforcement.

Question 12 : *Is there an advantage in introducing (through an Additional Protocol to the Geneva Conventions) a new special emblem for use by journalists ?*

Replies :

(a) Fujita supports the introduction of a new fixed distinctive emblem of protection for journalists. Pocar is in favour of an optional emblem. Since any protective emblem is intrinsically optional (even medical and

religious personnel may choose not to use their protective emblem, and take the consequences), this is a qualified yes.

(b) Fox, Keith and the ICRC do not support this idea, since “a special emblem is likely to increase rather than reduce vulnerability to attack” (to quote Fox). The vulnerability is spawned by the fact that, according to the ICRC, “empirical data seems to suggest that journalists are often targeted/killed precisely because they are journalists, in which case the adoption of a press-specific emblem would be counterproductive, in fact attract fire”.

(c) It is noteworthy that, where this is deemed useful by journalists, they can always use their own (or their agency's) signs marked with the word PRESS or the initials TV (ICRC).

The Rapporteur's Comments :

(a) The main issue, in the view of the 11th Commission, was the perspective of the potential end-users of any new protective emblem for journalists. As long as most journalists (with the notable exception of PEC) believe that the adoption of such an emblem is not helpful – in fact, that its use may aggravate (rather than attenuate) their hazardous position in conflict zones – the 11th Commission saw no reason for recommending the adoption of a new Protocol, introducing an emblem which may largely be in disuse. As pointed out (Question 1), a new emblem and a mandatory identification/accreditation lie at the root of any new special regime of protection of journalists in armed conflict.

(b) Obviously, perceptions change over time. It is entirely possible that media opponents of a new emblem will in the years ahead come around to the view that adoption of a new protective emblem may be helpful to journalists in armed conflict. If and when that happens, the whole issue can be reopened. But, in the meantime, the 11th Commission saw no reason for the *Institut* to rush where most journalists fear to tread.

Question 13 : *If so, who should be entitled to use the proposed emblem ?*

Replies :

For those opposed to a new special regime of protection for journalists, the question does not arise. For Fujita and Pocar the issue is related to the definition of journalists (*See* Question 2) and to the issue of accreditation/identification.

480 Institute of International Law - Session of Naples (2009)

The Rapporteur's Comments :

The question is moot in view of the response to Question 12.

Question 14 : *Should use of the proposed emblem be tied in to availability of the ID card ?*

Replies :

See Replies to Question 13.

The Rapporteur's Comments :

See Comments on Question 12.

Question 15 : *Should an attempt by a combatant to pass himself/herself off as a journalist - especially by forging the appropriate ID card or by resorting to the use of the proposed emblem (assuming that it is adopted) - be regarded as a war crime ?*

Replies :

(a) It must be recalled that (if no special regime of protection for journalists is introduced), journalists are simply civilians. Hence, "the present position relating to combatants passing themselves off as civilians should apply to passing off as a journalist" (Fox).

(b) As the ICRC reminds us, "Art. 8 2 b (xi), 2 e (ix) ICC-Statute are fulfilled. According to these provisions, 'killing or wounding treacherously individuals belonging to the hostile nation or army' amounts to a war crime in international armed conflict and 'killing or wounding treacherously a combatant adversary' amounts to a war crime in non-international armed conflict".

(c) Fujita thinks that the definition of the war crime should be extended to cover the new special regime of protection, which he supports.

(d) It is also necessary to take into account the prohibition of perfidy under Article 37 of AP/I (Keith).

The Rapporteur's Comments :

(a) At bottom, Question 15 might have raised special issues had it been resolved to recommend establishing a special protection of journalists and creating a new distinctive emblem.

(b) With the present system intact, journalists are no different from other civilians. There is no need to get at length in this Report into the consequences of feigning of the status of civilians.

Question 16 : *Can access to the contact zone (or parts thereof) be lawfully denied to the media at large ?*

Replies :

(a) The provisions of IHL on the subject are not clear-cut (see details in the ICRC Reply).

(b) This is, therefore, an issue relating to the interaction between the domestic law of the Belligerent Party and human rights law.

(c) The human right directly concerned is freedom of information. This right is subject to derogation and built-in limitations.

The Rapporteur's Comments :

(a) There is no doubt that, *de lege lata*, a Belligerent Party can deny journalists access to the contact zone for security reasons, when the exigencies of the situation so require. This is true both under IHL and under human rights law.

(b) *De lege ferenda*, it may be possible to “draw up a set of guidelines on the procedures that States should adopt when deciding to ‘close off’ combat zones for military use only”, it being understood that the guidelines are not binding (Pocar). But the 11th Commission was not of the opinion that the *Institut* should engage in the preparation of such non-binding guidelines.

Question 17 : *Can travel restrictions on foreign journalists in the contact zone be applied on a discriminatory basis (e.g., on the ground of nationality) ?*

Replies :

(a) Generally speaking, discrimination cannot be practiced on illicit grounds (as set forth in relevant treaties).

(b) However, since discrimination on the ground of nationality is omitted (deliberately) from Article 4 of the Civil and Political Rights Covenant, a derogation from freedom of information issued in wartime may involve such discrimination (ICRC).

The Rapporteur's Comments :

(a) Insofar as discriminatory measures are concerned, it is necessary to differentiate between discrimination on the ground of nationality (which is not ruled out in wartime) and other grounds of discrimination (race,

482 Institute of International Law - Session of Naples (2009)

colour, sex, language, religion or social origin) which are proscribed even in case of derogation of human rights.

(b) Nationality in wartime is a legitimate consideration, and therefore a distinction may be made between journalists on this ground, even if a derogation is proclaimed. This can work either in favour or against foreign journalists as compared to local ones.

Question 18 : *Can a Belligerent Party lawfully and effectively impose censorship requirements on foreign journalists ?*

Replies :

The consensus answer is affirmative, subject to the issue of discrimination (see Question 17).

The Rapporteur's Comments :

Nobody in the 11th Commission questioned this consensus.

Question 19 : *How can the protection of journalists in non-international armed conflicts be enhanced ?*

Replies :

(a) Journalists in non-international armed conflicts – as much as in international armed conflicts – are civilians, and they benefit from the overall protection of civilians.

(b) If a new special protection of journalists were to be introduced, it ought to apply both to international and to non-international armed conflicts.

The Rapporteur's Comments :

(a) It must be appreciated that the category of “war correspondents” is entirely irrelevant to non-international armed conflicts.

(b) As far as journalists in general are concerned, their protection as civilians in non-international armed conflicts is derived from customary international law.

(c) There is not much that can be done to enhance the protection of journalists in non-international armed conflicts, unless a new special regime of protection is introduced.

(d) The ICRC speaks about the need to improve compliance, but palpably there is nothing that the *Institut* can do about it.

Question 20 : *Is it agreed that internal disturbances below the threshold of an armed conflict do not come within the mandate of the 11th Commission ?*

Replies :

(a) Only Fujita has some doubts in the matter. Everybody else is agreed that internal disturbances below the threshold of an armed conflict do not come within the mandate of the 11th Commission.

(b) Evidently, in below-the-threshold situation, where IHL is silent, human rights law is particularly pertinent (see Fujita's Reply).

The Rapporteur's Comments :

The 11th Commission thought that below-the-threshold situations do not come within its remit.

L. Additional Questions

68. The Replies to the Questionnaire have raised at least one major issue not dwelt upon by the Rapporteur. This relates to the alleged duty of a journalist to testify in court (especially an international court or tribunal) and disclose sources (see the replies by Keith and Pocar, as well as Fox). Ultimately, the 11th Commission did not think that this question (important as it is) came within its mandate, since it relates to an alleged duty that arises for a journalist only at a post-conflict stage (post-conflict, that is, as far as the journalist is concerned).

M. General Conclusions

69. Following informal consultations among members of the 11th Commission – in the course of the Santiago de Chile Session and thereafter – it was agreed not to recommend to the *Institut* the creation of a special regime of protection for journalists, which the end-users by and large did not favour. In Santiago, members of the 11th Commission felt, nevertheless, that it might be advantageous to await possible further developments in the interval before the Naples Session. During the Naples Session, when it became abundantly clear that most journalists were satisfied with the present legal protection regime – as civilians – in armed conflicts, the Commission (in a meeting attended also by the Secretary-General) formally arrived at the conclusion that it would not be useful to submit any draft resolution on this topic for approval by the *Institut*. The Commission decided that the Rapporteur's Provisional Report - in a slightly revised and updated form – may be viewed as the

484 Institute of International Law - Session of Naples (2009)

Final Report for circulation (together with its Annexes) to the *Institut* following the Naples Session.

70. The Bureau then decided that the Rapporteur should give an oral presentation to the Plenary – already in Naples - with an overview of the Final Report prior to its circulation. This was done, and the 11th Commission considers its mandate as terminated (it being understood that, should conditions be ripe in the future, the *Institut* may opt to return to the topic of protection of journalists in one form or another).

Replies to Questionnaire

Reply by Lady Fox (21 December 2006)

A. General comment

1. The Questionnaire is primarily concerned with international humanitarian law (IHL) relating to the protection of journalists in time of armed conflict. So far as 'war correspondents' are concerned, the obligation set out in 1949 Geneva convention III article 4 (A) to treat them as civilians is spelt out in further detail in the regulations of States who provide 'embedment' facilities for journalists who accompany their armed forces. Whilst these may differ in some respects, these regulations broadly provide solutions to answer the queries raised in the Questionnaire. Where they do not, and where journalists who fail to obtain or do not wish to prejudice their perceived independence by obtaining embedment, the 1977 Geneva Protocol I, article 79 provides an alternative method by which journalists may engage 'in dangerous missions in areas of armed conflict', and enjoy the status of civilians with opportunity to obtain an identity card, which may be issued by either the State of the journalist's nationality or place of residence or location of the news medium which employs the journalist.

2. Unfortunately not all States are parties to Geneva Protocol I and where they are, its provisions are little known and even less used by members of the press and other news media seeking to report on events in the theatre of armed conflict. A first requirement, then, is to inform more widely the public generally and the media in particular, as to the protection offered by Article 79 to journalists, and to promote the ratification, observance and enforcement of Geneva Protocol I. The above provisions are stated to apply to international armed conflict. The Preliminary Exposé states that 'by extrapolation' they apply to non-

international armed conflict. Some public acknowledgment that they do so apply should be sought.

3. IHL is concerned mainly with the physical protection of journalists when present in areas of armed conflict and imposes obligations on States and combatants with respect to such protection. Given the diversity in situations of international and non international armed conflict and the widespread use of 'embedment', some further elaboration of these obligations might usefully be made distinguishing between :

i.) the obligation to protect which falls on all belligerent states or parties engaged in armed conflict whether of an international or non-international nature, including the obligations to search and investigate where an attack on journalists or their equipment has occurred, and

ii.) the more specific obligations arising on the State which authorises embedment or authorisation as a war correspondent such as training, obtaining of adequate insurance, access to the combat area, medical care, reporting and investigation of death or injury and

iii.) the obligations which fall on the State which has territorial sovereignty or control of the territory in which the journalist carries out his reporting and transmission of facts relating to the armed conflict (such obligations being in part derived from general international law and human rights rather than IHL see paras.8 to 10 below).

Such a differentiation in obligations would seem necessary when one takes into account that the majority of journalists suffering attack do not die in cross fire. According to CPJ statistics, since 1993 -2002 only 60 journalists (16 percent) died in cross fire, while 277 (76 percent) were murdered in retribution for their work.

4. The Commission's Report might also usefully elaborate the application of the general rules including Geneva Protocol I, 51, relating to protection of civilians with regard to journalists as to such aspects as a presumption of civilian status, the protection of media equipment and facilities as 'civilian objects', the extent to which requirements of proportionality and advance warning are included in the obligation to protect. Useful formulation of aspects of the general obligation to protect are to be found in *Basic Principles concerning the protection of journalists in situations of conflict and tension* in The Council of Europe, Recommendation No R(96) 4 of the Committee of Ministers to member States on the protection of journalists in situations of armed conflict and tension, 3 May 1996. See also the

486 Institute of International Law - Session of Naples (2009)

Reporters beyond Borders' Declaration and the Institut's own Resolution of 1969 Edinburgh on The Distinction Between Military Objectives and Non-Military Objects in General. For proportionality of attack on a dual use means of communication, see the prosecutor's report re NATO bombing of the Serbian TV station June 2000.

5. The Rapporteur rightly, in my view, sees that the 11th Commission should consider not only the *lex lata* but also *lex ferenda*. This requires, over and above the provisions of IHL relating to physical safety of journalists, a consideration whether the professional activities of journalists enjoy or require additional safeguards in international law.

6. International law recognises a value in the newsgathering function of the journalist. The ICTY Appeals Chamber in *Randall's case* was of the view that :

society's interest in protecting the integrity of the newsgathering process is particularly clear and weighty in the case of war correspondents... In war zones, accurate information is often difficult to obtain and may be difficult to distribute or disseminate as well. The transmission of that information is essential to keeping the international public informed about matters of life and death...The Appeals Chamber readily agrees with the Trial Chamber that war correspondents "play a vital role in bringing to the attention of the international community the horrors and reality of conflict."

Randall's Case IT-99-36-T Decision on interlocutory appeal 11 Dec.2002,36.

7. This suggest that, in addition to physical protection, regard should be had to legal obligations relating to respect and protection of the exercise of a journalist's professional activities. It is not suggested, by reason of the greater risks to which a reporter of facts exposes him/or herself, that any special status be conferred on the journalist, over and above the civilian status which under IHL is enjoyed along with other civilians. The ICJ's conclusion in the *Palestine Wall* case that ' the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in exercise of its jurisdiction outside its own territory' may be too extreme and unsupported by State practice. In so far as rights are created from non compliance with the obligations contained in the Hague and Geneva conventions and customary international law they are exercisable only by States and combatants. Although under common

article 3 a journalist, even in respect of non-international armed conflict, might be made individually criminally responsible for grave breaches, failure to accord protection in accordance with the Geneva Conventions does not give rise to individual rights on the part of the journalist.

8. Nonetheless, although military considerations prevail where combatants are engaged in armed conflict, in situations of military occupation or peace-keeping some degree of respect for human rights may be called for. A distinction may reasonably be drawn between the standard of protection enjoyed in situations of actual combat engagement and of military occupation. As Roberts states 'For a territory that is indeed occupied - i.e. under the control of the occupying power - a stronger prima facie case that human rights should apply can be made than for situations of armed conflict,' Adam Roberts 'Transformative Military Occupation' 100 AJIL (2006) 580 at 594. Currently in *Al-Skeini & Ors, R (on the application of) v Secretary of State for Defence* [2005] EWCA Civ 1609 (21 December 2005), on appeal to the House of Lords, the English court has drawn such a distinction, in reliance on the European Convention on Human Rights in a case where a military force in occupation had complete control of a prison.

9. On the other hand, it may be argued that international humanitarian law is designed to permit military occupation for the minimum possible period of time so as to facilitate as rapid a return to local administration as possible. To impose an additional structure of respect for human rights may involve the occupying power having to amend the local penal regime, thereby breaching article 64, and perpetuating an interim regime rather than a return to conditions of peace and respect for freedom of expression.

10. The starting point might be the general international law relating to freedom of expression and its threefold nature :

- the right to freedom of expression : of the journalist 'to seek, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or print, in the form of art , or through any other media of his choice', (UNCCPR, article 19.2) ;
- the right of the public at large 'to receive' such information and ideas ;
and
- the obligation of States and international organisations to respect and protect such freedom of expression.

488 Institute of International Law - Session of Naples (2009)

11. It is suggested that the 11th Commission in the course of its work should examine the extent to which general international law and in particular human rights law introduces rights and duties in relation to the journalist's particular task of news-gathering. This would seem particularly relevant in the answers to Question 3,4, use of accreditation ; Question 11, expulsion and confiscation ; Questions 16 and 17, access and travel restrictions, and Question 18, censorship, as suggested below.

B. Specific replies to the Questionnaire

In answering I have made use of the information in the UK MOD Green Book of Working Arrangements with the media, revised November 2005.

1. Is the overall protection of ordinary civilians in armed conflict adequate for journalists or should journalists benefit from a special status of protection ?

No special status should be conferred on journalists- One reason being as stated by Hans-Peter Gasser 'it is not in the interest of the international community to weaken the protection of ...[medical religious and civil defense staff] by extending it to a group which is not directly working on behalf of war victims.' But the 11th Commission should use the present opportunity to emphasize the obligations set out in Geneva Protocol I as they apply to journalists in time of armed conflict and military occupation and to make specific proposals for clarification of the law where necessary.

2. Who are "duly accredited journalists" for purposes of protection in armed conflicts ?

The MOD Green Book includes within the term 'correspondent' 'reporters, photographers, cameramen, technicians, media support staff (e.g. drivers, logisticians, translators and security)' and offers such persons embedded assignments, centralized assignments and individual assignments (the last being journalists 'who are working independently but participate in individual [armed forces]arranged facilities.' All categories, however, have to obtain media accreditation with the military authorities.

In particular :

(a) Does protection extend to free-lancers and stringers ?

Free-lancers and stringers are included within the protection covered by accreditation, which under the MOD regulations may be carried out through MOD, Media Ops Staff in theatre or by host nations.

Journalists on individual assignments are included as stated above in MOD regulations. See Geneva Declaration of the Press Emblem Campaign of September 2004, preamble : 'that journalists have a right to identical protection regardless of their professional status (freelance journalists or those who belong to an agency or to other media), of their nationality, and of whether or not they are taken off into an accompaniment system'.

(b) Does protection cover logistical support staff (drivers, translators, security guards, etc.) ?

Yes, see 1.a)

(c) Does protection apply equally to nationals and foreigners ?

Gasser points out that the protection granted to civilians is not linked to the nationality of the person concerned. 'In this respect any journalist, be he a national of a State involved in the conflict or a national of a neutral state, is protected, '23 ICRR (1983) 15.

The MOD Green Book's form requires a journalist applying to be embedded as a 'war correspondent' to state his/her nationality and whether parents or spouse (if married) have ever held nationality other than British.

3. Should the words "duly accredited" be retained in the mandate of the 11th Commission ?

The scope of the word requires analysis. It should be compared to 'licensing' which if it entails defining who is a journalist and making the grant of identity cards subject to conditions, (as the MacBride Commission seems to have considered was envisaged in the system put forward in the UNESCO proposals), it would seem to conflict with a journalists' right to freedom of expression. On the other hand some system of identification-particularly in the event of injury or disappearance- is unavoidable for 'war correspondents accompanying armed forces without actually being members thereof', 1949 Geneva Convention III 4 A(4) . The UK MOD considers accreditation of war correspondents necessary (a) so as to identify them when they are

490 Institute of International Law - Session of Naples (2009)

embedded with the forces, and (b) so they can prove their entitlement to POW status should that be necessary.

The present optional system for identity cards for journalists relying on Geneva Protocol I. 79 is sufficiently liberal by identifying three different sources of registration (State of nationality, residence or of employment of media agency) so as not to restrict unreasonably freedom of access.

See The Council of Europe, Recommendation No R(96) 4 of the Committee of Ministers to member States on the protection of journalists in situations of armed conflict and tension, 3 May 1996.

Principle 11-Use of accreditation systems

Systems for the accreditation of journalists should be introduced only to the extent necessary in particular situations. When accreditation systems are in place, accreditation should normally be granted. Member states shall ensure that :

a. accreditation operates to facilitate the exercise of journalism in situations of conflict and tension ;

b. the exercise of journalism and journalistic freedoms is not made dependent on accreditation ;

c. accreditation is not used for the purpose of restricting the journalist's liberty of movement or access to information ; to the extent that refusal of accreditation may have the effect of restricting these rights, such restrictions must be strictly in accordance with the conditions set out in Principle 7 above ;

d. the granting of accreditation is not made dependent on concessions on the part of journalists which would limit their rights and freedoms to a greater extent than is provided for in Principle 7 above ;

e. any refusal of accreditation having the effect of restricting a journalist's liberty of movement or access to information is reasoned.

4. Is the current distinction (under Geneva Convention III and Additional Protocol I) between "war correspondents" and other "journalists engaged in dangerous professional missions in areas of armed conflict" satisfactory ?

Whilst not satisfactory because it is not immediately obvious what are the differences between the two, in practice it probably reflects the main distinction observed in the Iraq war between 'embedded' journalists i.e those who are actually on media assignments with military forces, treated

by the UK MOD as 'war correspondents', and those in areas of armed conflict, acting on their own devices, not accompanying military forces. Unless there is a realistic prospect of a new international convention, there seems little alternative but to accept the current distinction and to promote its full observance.

5. *Should a journalist's ID card, now an option (other than for "war correspondents"), become a mandatory requirement ?*

6. *If so, who should be in charge of issuing an ID card for a journalist :*

(a) *National governmental agencies ; or*

(b) *The media themselves ; or*

(c) *A central, impartial, international non-governmental authority (as a minimum, as a supervisory body, to ensure that there is no abuse).*

These questions were extensively debated with regard to the UNESCO proposals for a draft convention on protection of journalists ; there are dangers of abuse of powers of issuing and regulation whether left solely to a national government or an international organization. Some combination of press nominees, responsible to the press but whose appointment was approved by the UN Secretary General, with States giving effect might be an ideal, if difficult to achieve, solution. On balance the present system should be left in place.

7. *Should the ID cards of journalists (including "war correspondents") contain information about the religion of the bearer ?*

Possibly the requirement to state religion should be optional but it might be in the interest of protection for the journalist's religion to be disclosed.

8. *Should the present format of journalists' ID cards be altered in any other way ?*

No.

9. *Is it useful to list in a non-exhaustive manner circumstances and conditions in which journalists will be regarded as having lost their protection (perhaps in the form of a "code of conduct" issued by the media themselves) ?*

There are two obvious ways in which protection may be lost by engaging actively as a combatant or in espionage. Geneva Protocol I 46.2 identifies spying as gathering or attempting to gather information of military value on behalf of one party while in the territory by the adverse party and 46.3

492 Institute of International Law - Session of Naples (2009)

adds the elements of doing so through false pretences or deliberately in a clandestine manner.

10. Can a clear-cut line of distinction be drawn between lawful news-gathering and espionage or does it all depend on mens rea ?

Other evidence, used to establish criminal conduct by association such as systematic contact, financial incentive etc should also be taken into account.

11. Should there be international standards clarifying when journalists who infringe domestic legislation or regulations – in circumstances other than espionage – be imprisoned or (in the case of foreign journalists) expelled (or when a journalist's film, tape, notes, etc., can be confiscated) ?

Basic requirements as to rights of a person accused of a criminal charge derived from human law should apply. See Principles 4 to 7 in Basic Principles concerning the protection of journalists in situations of conflict and tension in The Council of Europe, Recommendation No R(96) 4 of the Committee of Ministers to member States on the protection of journalists in situations of armed conflict and tension, 3 May 1996.

12. Is there an advantage in introducing (through an Additional Protocol to the Geneva Conventions) a new special emblem for use by journalists ?

13. If so, who should be entitled to use the proposed emblem ?

14. Should use of the proposed emblem be tied in to availability of the ID card ?

No: a special emblem is likely to increase rather than reduce vulnerability to attack.

15. Should an attempt by a combatant to pass himself/herself off as a journalist - especially by forging the appropriate ID card or by resorting to the use of the proposed emblem (assuming that it is adopted) - be regarded as a war crime ?

The present position relating to combatants passing themselves off as civilians should apply to passing off as a journalist. Geneva Protocol I, 37 defines perfidy which includes such an act.

16. Can access to the contact zone (or parts thereof) be lawfully denied to the media at large ?

17. Can travel restrictions on foreign journalists in the contact zone be applied on a discriminatory basis (e.g., on the ground of nationality) ?

Whether placed under obligation or not, access will be refused if military advantage is thereby gained or the safety of civilians requires it. But parties should be placed under obligation to afford access to enable journalists to carry out their newsgathering function and in situations of armed conflict should only impose restrictions to the extent that such measures are strictly required by the exigencies of the situation, provided that they are not inconsistent with other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Principle 7 of the Council of Europe Recommendation referred to in the Reply to Question 11. States should facilitate the access of journalists to the territory of destination by promptly issuing visas and other necessary documents and the importation and exportation of professional equipment.

18. Can a belligerent party lawfully and effectively impose censorship requirements on foreign journalists ?

Yes. IHL does not restrict a combatant's power of censorship but there are certain minimum facts relating to POWs which IHL requires to be made available to the adversary or other State. The MOD Green Book states that 'the operational commander has the right to restrict what operational information can be reported and when'. Matters which may be restricted include composition of the force and its location, details of military movements, orders, tactics and separate sections in the Green Book deal with information relating to casualties and POWs.

19. How can the protection of journalists in non-international armed conflicts be enhanced ?

See above.

20. Is it agreed that internal disturbances below the threshold of an armed conflict do not come within the mandate of the 11th Commission ?

Yes.

Another aspect is the role of the journalist as a witness of war crimes and the extent to which he may be entitled to refuse to give evidence. See the ruling of the International Criminal Tribunal for Former Yugoslavia in *Randall's Case* IT-99-36-T Decision on interlocutory appeal 11 Dec 2002.

494 Institute of International Law - Session of Naples (2009)

Réponse de M. Hisakazu Fujita au Questionnaire (3 février 2007)

Question 1.

On peut affirmer que le droit international humanitaire(DIH) (notamment, les Conventions de Genève de 1949 et les Protocoles additionnels de 1977) classifie généralement les personnes protégées dans les conflits armés en deux catégories : les combattants(les prisonniers de guerre) et les civils. Les journalistes en question appartiennent à la catégorie des civils sauf dans le cas où ils sont « correspondants de guerre » accrédités auprès d'une force armée (dans la condition de l'article 4A(4)) de la IIIème Convention de Genève de 1949) qui eux appartiennent la catégorie des prisonniers de guerre. Il va donc de soi de considérer que les journalistes sont inclus dans le cadre de la protection des civils dans le DIH.

Il est vrai que le DIH ne donne pas un statut spécial aux journalistes en mission professionnelle périlleuse dans les conflits armés ou une protection supérieure à celle des civils ordinaires, comme par exemple la protection des personnels sanitaires ou religieux qui sont eux sous une protection spéciale dans les Conventions de Genève. Ainsi, la question de donner un statut spécial aux journalistes ou non est celle *de lege ferenda*. Il est donc important de définir pourquoi le statut spécial *de lege ferenda* est demandé. C'est parce que les journalistes ne sont pas suffisamment protégés par les règles en vigueur dans le DIH concernant la protection des civils ordinaires et aussi parce qu'il y a de plus en plus de victimes parmi eux à cause de la violation fréquente et grave de ces règles elles-mêmes dans les conflits armés contemporains. Si ceci est la cause principale de l'augmentation des victimes parmi les journalistes dans les conflits armés récents, il est nécessaire de penser plutôt un moyen d'appliquer ou de mettre en oeuvre des règles humanitaires pour la protection des civils. Si la protection des civils non assurés est la cause principale, il est alors nécessaire de penser une possibilité de règles nouvelles comme *de lege ferenda*. En observant les cas récents, en particulier le conflit en Irak dans lequel de nombreux journalistes ont été détenus, torturés ou tués sur le champ de bataille et ailleurs, nous pouvons confirmer ce qui a été dit ci-dessus. Le caractère particulier du « terrorisme » ou de la « guerre contre le terrorisme » depuis le 11/9 a suscité quelque doute ou quelque ambiguïté sur l'applicabilité du DIH. De nombreux journalistes sont détenus par des groupes privés (terroristes ou résistants) non-parties aux Conventions de Genève aussi bien qu'arrêtés par les troupes des États

parties au conflit dans la guerre anti-terroriste. Nombre d'entre eux n'ont pas été traités ou protégés par l'application des règles du DIH concernant la protection des civils. D'autre part, les objectifs militaires et les objets civils sur le champ de bataille ou même dans le quartier où les civils vivent ne sont pas facilement distingués par les combattants dans la guerre contre le terrorisme. Les journalistes en mission professionnelle périlleuse peuvent être considérés comme des objets d'attaque aux yeux des combattants. Ainsi, il est préférable pour la protection des journalistes dans le cadre du DIH que ceux-ci bénéficient d'un statut spécial aux journalistes comparable à celui des CIVILS dans le DIH.

Par conséquent, à la question n° 1, je réponds oui pour donner un statut spécial de protection aux journalistes.

Question 2. L'expression : « duly accredited journalists » semble correspondre à celle de « correspondants de guerre » utilisée dans l'article 4A(3) de la III^{ème} Convention de Genève de 1949. Ils sont « embedded » et par conséquent protégés en fait par leurs armes contre une attaque directe. En plus, ils sont obligés de porter leur carte d'identité et, donc, ils sont protégés plus facilement que d'autres journalistes libres (free lancers) n'ayant pas toujours leur carte d'identité en cas de capture. Dans la guerre en Irak, des « free-lancers and stringers » bien plus que les correspondants de guerre sont les principales victimes non seulement comme détenus en tombant dans le pouvoir de l'ennemi mais aussi pris comme objectifs d'attaque dans la zone de combat. Donc, je réponds oui aux questions (a), (b) et (c).

Question 3. A mon avis, il est mieux de ne pas retenir les mots « duly accredited » dans le mandat de la Onzième Commission. Le système d'accréditation pourrait comporter des dangers pour la liberté de l'information. Parce que, dans ce système, la protection ne serait accordée qu'aux journalistes accrédités et souvent soumis une réglementation restrictive régissant leurs activités.

Question 4. Admettant les stipulations actuelles en question de la III^{ème} Convention de Genève et du Protocole Additionnel I, il est mieux à mon avis de donner une nouvelle protection aux journalistes sans aucune distinction entre correspondants de guerre et autres journalistes, en ce compris les professionnels des médias et le personnel associé ès qualité (voir la résolution 1738(2006) du Conseil de Sécurité) engagés en missions professionnelles périlleuses.

496 Institute of International Law - Session of Naples (2009)

Question 5. Pour donner une protection spéciale aux journalistes, il est préférable de leur faire porter une carte d'identité, surtout en cas de capture. La carte d'identité doit être obligatoirement requise. Mais cela ne signifie pas que les journalistes ne portant pas la carte perdent leur statut de civil.

Question 6. Des agents chargés de donner des cartes d'identité aux journalistes ne peuvent pas être en réalité unifiés, mais sont choisis par des journalistes demandant de telles cartes. Diverses catégories de journalistes peuvent demander une carte d'agent attiré selon leur choix parmi (a),(b), ou (c). Surtout, des journalistes indépendants ou libres peuvent choisir (c) parce que (a) et (b) ne peuvent pas toujours leur convenir.

Question 7. Il est douteux de croire que l'indication de la religion d'un porteur dans sa carte est un avantage pour sa protection. Surtout dans des cas de conflits armés entre des sectes ou des groupes appartenant à la même religion, une telle information pourrait être utilisée par son détenteur dans le but de ne pas donner une protection adéquate à cause de sa religion ou de sa secte.

Question 8. Le contenu actuel de la carte d'identité de journaliste en mission professionnelle périlleuse dans l'Annexe II du Protocole additionnel I mentionne « Religion (facultatif) ». Mais, il n'est pas indispensable de le supprimer parce que c'est seulement facultatif et non obligatoire. Le contenu actuel peut être maintenu sans changement important. Je réponds non cette question n° 8.

Question 9. Je ne peux pas juger sur le champ s'il est utile ou inutile de donner la liste des circonstances et des conditions par lesquelles des journalistes perdent la protection établie par leur carte d'identité. Il est préférable de donner une telle liste dans un « code of conduct » publié par les médias elles-mêmes. D'autre part, dans le présent contenu de la carte d'identité, l'Avis précise que « [l]e porteur a le droit d'être traité comme une personne civile aux termes des Conventions de Genève du 12 août 1949 et de leur Protocole additionnel I ». Mais, il est mieux d'ajouter, comme exemples importants des actes interdits tels que la torture, la maltraitance, etc. contre des journalistes détenus (en tant que personnes civiles), par ces instruments juridiques.

Question 10. Recueillir des nouvelles fait partie du travail des journalistes ; cela est donc permis lors de conflits armés dans une zone de

combat aussi bien que dans d'autre territoire d'une partie au conflit selon le DIH. L'espionnage étant le comportement d'une personne civile (ici le journaliste), il n'est pas interdit selon le DIH mais l'espion arrêté par cette partie au conflit peut être puni selon sa loi (nationale) pénale. La punition de l'espion par l'Etat qui le détient n'est pas interdite par le DIH. Il n'est pas possible alors de comparer ou de distinguer catégoriquement l'acte légal de recueillir des nouvelles selon le droit humanitaire et l'espionnage puni par le droit national. Autrement dit, recueillir des nouvelles comme acte légal selon le droit humanitaire peut être un acte d'espionnage prohibé par la loi nationale en question. Si le comportement d'un journaliste comme personne civile est considéré comme correspondant à celui de l'espionnage tel qu'il est par le droit humanitaire, il est permis, selon le droit humanitaire, de le punir comme crime d'espionnage selon la loi nationale devant le tribunal de la partie au conflit en question. Ainsi, en ce qui concerne la question n° 10, je réponds que faire une distinction n'est pas approprié. L'existence de *mens rea* d'un journaliste détenu doit être prouvée devant le tribunal concerné.

Question 11. Le droit humanitaire (Règlement concernant les lois et coutumes de la guerre sur terre, annexé à la IVème Convention de La Haye de 1907, IVème Convention de Genève de 1949 et Protocoles additionnels de 1977 et droit humanitaire coutumier) aussi bien que le droit international de l'homme (Pacte international relatif aux droits civils et politiques de 1966) peuvent être appliqués au cas en question. La IVème Convention de Genève (Section II : Étrangers sur le territoire d'une Partie au conflit, Articles 35, 36) sera appliquée aux journalistes étrangers dans le territoire (et/ou sous la juridiction de la partie au conflit, et la même Convention (Section III : Territoires occupés, Arts.47 ss) sera appliquée aux journalistes (étrangers) dans le territoire occupé.

Selon l'Article 79 du Protocole I, les journalistes qui accomplissent des missions professionnelles périlleuses dans des zones de conflit armé seront protégés en tant que tels conformément aux Conventions et au présent Protocole, « à condition de n'entreprendre aucune action qui porte atteinte leur statut de personnes civiles (et sans préjudice du droit des correspondants de guerre accrédités) ». Par conséquent, si les journalistes « libres » entreprennent des actions qui portent atteinte à leur statut de personnes civiles, ne peuvent-ils pas être protégés conformément aux Conventions et au Protocole ? Selon le *Commentaire de Protocoles*

498 Institute of International Law - Session of Naples (2009)

additionnels (par le CICR), « il est ainsi bien clair que toute participation directe aux hostilités leur enlèverait leur immunité de personne civile, pour la durée de cette participation (article 51 - Protection de la population civile, paragraphe 3) ». (par.3268) et, dans ce contexte, « un journaliste risquerait de perdre la protection effective (même s'il ne perd pas le *droit* à la protection qui est due au civil) s'il devait suivre de près une unité militaire dans l'action ou s'approcher trop d'un objectif militaire ». (par.3269).

Il semble, cependant, qu'un journaliste ne perd pas tous les droits des personnes civiles affirmés dans la Convention IV, et le droit coutumier (Règlement de La Haye de 1907). En plus, le Pacte international relatif aux droits civils et politiques (des articles non dérogués même dans le cas o un danger public exceptionnel menace l'existence de la nation) doit lui être appliqué. Mais, on ne trouve pas clairement quelques « international standards » en cas d'« emprisonnement » ou d'« expulsion » du journaliste. Il est important, cependant, d'assurer le droit de tout individu à la liberté d'opinion et d'expression (proclamé dans l'article 19 de la Déclaration universelle des droits de l'homme de 1948), ce qui implique le droit de chercher, de recevoir et de répandre, sans considération de frontière, les informations par quelque moyen d'expression que ce soit.(voir premier préambule de l'*Avant-Projet de Convention internationale sur la protection des journalistes en mission périlleuse*, Résolution 1597(L), Annexe, du Conseil économique et social des Nations Unies). Cette liberté d'opinion et d'expression est aussi reconnue dans l'article 19 du Pacte international et pour cela, elle peut être considérée comme une sorte de « international standards », ce qui pourrait peut-être interdire la confiscation des « film, bandes, notes, etc. » du journaliste « libre » détenu par l'autorité compétente du territoire (des zones de conflit armé) où il accomplit des missions professionnelles périlleuses. Mais, il peut être dérogué à l'article 19 en question en cas d'un danger public exceptionnel.

Question 12. Je réponds oui. L'« emblème spécial » ou le signe distinctif et aisément reconnaissable peut être utile pour la protection des journalistes dans la zone de conflit armé. Comme le cas de l'emblème du personnel sanitaire, l'emblème peut figurer sur les drapeaux, les brassards du journaliste en mission périlleuse ainsi que sur tout le matériel se

rattachant au service de presse (transports ou véhicules) ; (voir l'article 39, Convention I).

Il est sans doute possible que « toute augmentation du nombre de statuts particuliers, accompagnée forcément d'une prolifération de signes protecteurs, tend à affaiblir la valeur protectrice de statuts protégés déjà acceptés, notamment celui du personnel sanitaire ». (Commentaire cité ci-dessus, par. 3265 ; Conférence diplomatique sur la réaffirmation et le développement du droit international humanitaire dans les conflits armés, *Actes*, Vol.VIII, p. 316, CDDH/I/242, et p.379, CDDH/I/SR.35.). Il est certain que les journalistes ne sont pas directement au service des victimes de la guerre comme le personnel sanitaire. Cependant, après la Chambre d'appel du TPIY dans l'affaire *Randal*, ils servent « un intérêt général » parce qu'ils jouent un rôle capital dans la mesure où ils attirent l'attention de la communauté internationale sur les horreurs et les réalités des conflits. La reconnaissance de cet intérêt général repose sur le fait que le travail d'investigation et de diffusion des informations qu'ils réalisent permet aux citoyens de la communauté internationale de recevoir des informations cruciales provenant des zones de conflit (voir Tribunal pénal international pour l'ex-Yougoslavie, *Procureur c. Radoslav Brajanin et Momir Talic* (IT-99-36), Décision relative à l'appel interlocutoire, 11 décembre 2002 (« affaire *Randal* »), paras.36,38 et 50.) Ce rôle capital des journalistes en mission professionnelle périlleuse pourrait leur donner le droit de porter un emblème spécial.

Question 13. Il peut être recommandé aux journalistes libres, mais aussi aux correspondants de guerre (*embedded*) de porter l'emblème en question. Parce que les correspondants de guerre aussi bien que des journalistes libres dans les zones de conflits armés peuvent être considérés comme combattants ou objectifs militaires dans des véhicules des forces armées.

Question 14. Il est mieux de concilier en général l'emploi de l'emblème des journalistes avec le port de la carte d'identité. Si le port de la carte des journalistes n'est pas requis pour avoir le statut de civil, il y aura des cas où des journalistes ne portant pas la carte mais ayant l'emblème ne bénéficieront pas de l'immunité en tant que civils, mais seront quand-même épargnés d'attaques directes contre eux. D'autre part, même si des journalistes portent la carte d'identité sans avoir l'emblème, ils seront considérés comme des cibles d'attaque par l'adversaire. Pour éviter ce cas,

500 Institute of International Law - Session of Naples (2009)

il est fortement recommandé de porter la fois la carte d'identité et l'emblème.

Question 15. C'est le cas du fait d'utiliser indûment les signes distinctifs (l'emblème ou la carte falsifiée) par des combattants. Cela correspond, dans la catégorie des crimes de guerre, au cas de l'article 8,2(b)vii, si ce combattant cause la perte de vies humaines ou occasionne des blessures graves. Cela n'est pas limité aux combattants ; c'est vrai pour les civils aussi.

En général, tout statut particulier (non seulement pour les journalistes mais aussi pour les personnes sanitaires ou religieuses), avec les privilèges qu'il accorde, exige un contrôle strict pour éviter les usages abusifs. Ce contrôle doit être rigoureux. Tout abus du signe peut compromettre sa valeur protectrice pour toute la durée du conflit, et un grave abus peut être un crime de guerre (voir article 85, para.3 f) du Protocole 1).

Question 16 . Dans le DIH, il n'existe aucune règle interdisant aux journalistes l'accès aux zones des conflits armés (*contact zone*). Mais des parties au conflit interdisent souvent par leurs codes de conduite (« codes of conduct » des médias) l'accès aux zones où elles déploient des opérations militaires pour des raisons liées aux risques encourus (dangers pour les journalistes et aussi souvent pour ne pas rendre public les méthodes ou les moyens d'hostilité utilisés). On ordonne souvent aux correspondants de guerre (*embedded*) de ne pas informer de ce qui se passe, selon les codes des journalistes ou les contrats passés entre eux et leurs organes d'un côté et les parties au conflit de l'autre et, même dans le cas où ils peuvent entrer dans ces zones. D'autre part, les journalistes libres ont l'interdiction d'entrer dans ces zones par ordres des autorités militaires des parties au conflit. Mais, les journalistes veulent bénéficier d'un libre accès dans ces zones pour accomplir leur devoir et leur métier.

Question 17. Le DIH ne fait pas directement de restrictions en ce qui concerne l'accès des civils y compris les journalistes aux zones de conflits armés, et, ainsi, les autorités des parties au conflit par leurs lois peuvent porter des restrictions exceptionnelles à la liberté de mouvement du journaliste sur leur propre territoire. Mais, il ne peut pas être permis de prohiber cet accès seulement aux journalistes ressortissants d'un Etat tiers non belligérant, parce que ceux-ci sont égaux devant la loi (des parties au conflit) et ont droit sans discrimination (notamment d'origine nationale) à

une égale protection de la loi (cf. Déclaration universelle des droits de l'homme, art.2, ; Pacte international relatif aux droits civils et politiques, arts.2 et 26).

Question 18. Il est très douteux que les autorités des parties au conflit puissent imposer une censure seulement aux journalistes étrangers, quoi que la censure ne soit pas totalement interdite vis-à-vis de tous les journalistes sans distinction de nationalité, dans certaines situations de conflits armés, par les lois nationales. De toute façon, on doit affirmer que les journalistes ont droit à une protection identique quel que soit leur statut professionnel (journalistes indépendants ou appartenant à une agence ou un média), leur nationalité, qu'ils soient ou non intégrés dans un dispositif d'encadrement (par les unités militaires des parties au conflit) (cf. la *Déclaration sur la sécurité des journalistes et des médias en situation de conflit armé*, élaborée par *Reporters sans frontière*, 20 janvier 2003 et révisée le 8 janvier 2004 à la lumière des événements en Irak.)

Question 19. Le DIH des conflits armés non internationaux (l'article 3 commun aux conventions de Genève de 1949 et le Protocole additionnel II de 1977) est beaucoup moins explicite en ce qui concerne la protection des journalistes. Il reconnaît uniquement des garanties de traitement : toutes les personnes détenues doivent être, en toute circonstance, traitées avec humanité, sans aucune distinction de caractère défavorable (article 3 commun). Le Protocole II développe ce noyau de l'article 3 commun. Mais le DIH en ce cas n'offre guère de recours contre une détention des journalistes au pouvoir de la partie au conflit. Le gouvernement aux prises avec des insurgés appliquera son propre droit, à moins qu'il ne juge préférable d'expulser un journaliste ressortissant d'un État tiers. Les insurgés procéderont de la même manière.

Mais les deux parties dans les conflits armés non internationaux seront toujours tenues de respecter les règles de procédure en vigueur et au moins le standard minimum de traitement des détenus que les considérations humanitaires exigent. Et les prises en otage de journalistes sont interdites en toutes circonstances. Le journaliste doit bénéficier également de la protection accordée aux personnes civiles en situation de conflit armé non international.

Pendant, on peut attirer l'attention sur le Statut de Rome : comme les (autres) violations graves des lois et coutumes applicables aux conflits armés ne présentant pas un caractère international, dans le cadre établi du

502 Institute of International Law - Session of Naples (2009)

droit international, le fait de lancer des attaques délibérées contre le personnel utilisant les signes distinctifs des Conventions de Genève ou contre le personnel ou les véhicules employés dans le cadre d'une mission d'aide humanitaire, pour autant qu'ils aient droit à la protection que le droit international des conflits armés garantit aux civils (et aux biens de caractère civil) est considéré comme crime de guerre [(article 8,2) e)ii,iii)]. Si l'emblème des journalistes pourra être admis comme établi, le fait de lancer des attaques délibérées contre eux ou sur leurs véhicules pourra être considéré comme un crime de guerre dans le cadre du droit pénal international.

Question 20. Les situations de troubles intérieurs ou de tensions internes (qui n'atteignent pas le niveau du conflit armé) semblent être en dehors du mandat de la 11^{ème} Commission. Cependant, il n'est pas toujours facile de faire une distinction claire entre ces situations et les conflits armés surtout dans le contexte récent de la « guerre contre le terrorisme ». Il est donc recommandable, pour assurer la protection des journalistes en mission professionnelle périlleuse, de faire inclure l'examen des cas de troubles intérieurs. Mais, l'application du droit humanitaire tel que le Protocole II (article 1,2)) et le droit pénal international tel que le Statut de Rome (article 8 (crime de guerre),2)d,f)) échappent à de telles situations. Il y a donc lieu d'examiner l'applicabilité des droits de l'homme internationaux tel que le Pacte international relatif aux droits civils et politiques pour la protection des journalistes dans les cas des troubles intérieurs.

Reply by Judge Kenneth Keith (1 February 2007)

As the early part of your exposé demonstrates there is much related activity, in the professional bodies you mention and also in various United Nations bodies, recently for instance in the Security Council resolution of 23 December 2006 (adopted of course after you had completed your paper). The IFJ was one of those pushing for that resolution sponsored by Greece and France which had also taken the initiative in the early 1970s and I see that INSI has also welcomed it. As you say, the Commission will need to continue to monitor those activities.

My broad sense from looking at the history since the 1970s and more recently at some of the material coming from the two professional organizations that you have been in touch with and related United Nations activity is that the problems are not so much with the substantive

law (subject to one qualification) as with implementation (including under that second head the emblem issue). The possible qualification relates to non international armed conflicts. But the principle of distinction applies to them and as you say the need is ever more pressing at the moment : see your paragraphs 39 and 40, common article 3 of the 1949 Conventions and article 13 of the Second Additional Protocol.

In support of that sense I could discuss in turn the events of the mid-1970s leading to article 79 of Additional Protocol I of 1977, the ICRC customary law study and its sources, the proposals from the bodies of journalists, and the Security Council resolution.

I mention article 79, Rule 34 of the Customary Law Study, the December resolution and the emblem campaign.

Article 79 does no more than repeat the status which journalists have as civilians and give them the option of having an identity card. (The phrase in paragraph 1 “shall be considered as” is unfortunate.) In terms of article 51(3) they will lose the protection if they “take a direct part in hostilities” – the expression which the Customary Law Study carries over into Rule 34.

One aspect of the drafting history of article 79 which may be seen as significant is the action taken by the Diplomatic Conference in 1975 to respond to the draft Convention which was before the General Assembly in 1973 and 1974 by adopting the article. While the draft had somewhat more substance in it (it would for instance have applied expressly to internal armed conflicts), the General Assembly did no more than “[take] note with appreciation of the decision of the Diplomatic Conference on the protection of journalists engaged in dangerous missions in areas of armed conflict” (GA Resolution 3500 (XXX), para. 4). We may take it that the sponsors of the draft were not willing to seek a more substantive result.

Although Rule 34 of the Customary Law Study does not expressly use the civilian status as its basis that that is its underpinning appears from the reason the commentary gives for including non international armed conflicts within the rule’s scope (p. 115) and from the reasons included in the national military manuals cited in support (pp. 661-662).

The December Security Council resolution 1738 (2006) adopted unanimously is the fourth in a series of resolutions on the protection of civilians in armed conflict. It is in that broader context that it condemns

504 Institute of International Law - Session of Naples (2009)

intentional attacks against journalists in situations of armed conflict and recalls the terms of article 79 (without any express limitation to international armed conflicts). It also

“6. *Urges* States and all other parties to an armed conflict to do their utmost to prevent violations of international humanitarian law against civilians, including journalists, media professionals and associated personnel ;

7. *Emphasizes* the responsibility of States to comply with the relevant obligations under international law to end impunity and to prosecute those responsible for serious violations of international humanitarian law[.]”

Further it

“10. *Invites* States which have not yet done so to consider becoming parties to the Additional Protocols I and II of 1977 to the Geneva Conventions at the earliest possible date[.]”

There is nothing in the resolution about the need for a new instrument or emblem ; just better compliance and enforcement. The welcome accorded to the resolution by IFJ, CPJ and INSI may also be seen as significant.

I have only a very limited understanding of the emblem and related campaigns by the journalists bodies, but, as you indicate, I have noticed the sharp differences about the value of an emblem. A press release by INSI and the Committee to Protect Journalists said on 23 May 2005 for instance

“A universal press emblem is also undesirable because it would require a licensing entity to determine who is and who is not a journalist. It would open the way to restrictions on the press by encouraging governments to establish regulatory controls on journalists within their own nations. An emblem could actually worsen security by identifying journalists to all those who might target them for violence.

The Coordinating Committee of Press Freedom Organizations, a consortium of press freedom groups, declared last year in Toronto that the emblem initiative is a ‘well-intentioned response to the appallingly large number of journalists killed’ in conflict zones in Afghanistan and Iraq. But the committee said the effort ‘ignores the reality that nearly all those journalists who have been killed were either deliberately targeted or caught up in violence where no emblem would have helped them.’

‘What is needed now . . . is universal respect for existing rights and protections, and an end to the culture of impunity in which those who kill journalists are very rarely pursued by justice authorities.’”

It also opposed as unworkable the proposals that the Conventions and Protocols be amended to make the targeting of journalists a specific war crime :

“It is already a grave breach of the Geneva Conventions and Additional Protocols to intentionally target any civilians, including journalists, so any specific provision would be redundant. It would also send the misleading message that journalists value their own lives more than those of other civilians. Combating impunity on the battlefield is clearly a major concern. The Committee of Inquiry should consider initiating discussions with the International Criminal Court in the Hague to gain a better understanding of what kinds of cases can be referred for prosecution.”

The Press Emblem Campaign has of course the opposite view on the emblem proposal.

On the above basis (which may well turn out to have shaky foundations), the real issue for me (as with much of international humanitarian law) is not the substantive law (with the possible exception of the application of the protection to non-international armed conflict) but its better implementation. Obviously, there are other practical steps in which journalists, their employers, the belligerents and others involved can take to help ensure protection. In some contexts better signage may help – but, sadly, as just indicated, it may also attract attacks. For one instance welcomed by INSI see e.g. the new edition of the British Ministry of Defence *Green Book* of working arrangements with the media (2006) ; and for another chapter 9 (on safety in war zones. . .) of the UNESCO/Reporters without Borders *Practical Guide for Journalists*.

I accept as you do the importance of the role that journalists play in gathering and disseminating information about what is really going on in armed conflict (paragraph 8). That role raises questions (touched on by your questions 9 to 11 and 15 to 18) which fall largely or completely outside international humanitarian law but which probably fall within “rights and duties” of journalists to come back to the title of the Commission. One of those questions is about the obligation to disclose sources. There may be a question of how far the Commission should go

506 Institute of International Law - Session of Naples (2009)

in pursuing such questions which for me are more interesting than those arising under the rules and principles reflected in article 79 and related provisions.

That comment informs my answer to your first question and has consequences for questions 2 to 8.

Question 1 : Is the overall protection of ordinary civilians in armed conflict adequate for journalists or should journalists benefit from a special status of protection ?

I do not think there should be a distinction between journalists, who do not come within your first and second categories in paragraph 14 (members of the armed forces and war correspondents), and other civilians so far as the basic requirements of protection under IHL are concerned. It may be otherwise for their rights and duties beyond that area.

Questions 2 and 3 on definitions :

Because of my answer to 1, the scope of “duly accredited journalists” does not arise for me. Nor does a system of accreditation – which was not accepted in the early 1970s and is rejected by many journalists now.

Question 4 : Is the current distinction (under Geneva Convention III and Additional Protocol I) between “war correspondents” and other “journalists engaged in dangerous professional missions in areas of armed conflict” satisfactory ?

The distinction arises from the choice made by the individual correspondent under long established law, and appears to have the consequence only of POW status on capture. There appears to be no problem with the distinction.

Question 5 : Should a journalist’s ID card, now an option (other than for “war correspondents”), become a mandatory requirement ?

No.

Question 6 :

Does not arise.

Question 7 : Should the ID cards of journalists (including “war correspondents”) contain information about the religion of the bearer ?

Question 8 : Should the present format of journalists’ ID cards be altered in any way ?

What is the current practice? Are those being issued with the cards obliged to include their religion and do the cards now have other identifying information? May of those covered would presumably have other identity papers.

Question 9 : Is it useful to list in a non-exhaustive manner circumstances and conditions in which journalists will be regarded as having lost their protection (perhaps in the form of a “code of conduct” issued by the media themselves) ?

As indicated above I think that article 51 (3) of the First Additional Protocol and Rule 34 state how the basic protection under IHL is lost. Other constraints on their persons – about the subject of questions 10 and 11 and 16 to 18 raise a wider set of issues (which I mention near the foot of page 3 above).

Question 12 : Is there an advantage in introducing (through an Additional Protocol to the Geneva Conventions) a new special emblem for use by journalists ?

No.

Question 13 and 14 do not arise for me.

Question 15 : Should an attempt by a combatant to pass himself/herself off as a journalist – especially by forging the appropriate ID card or by resorting to the use of the proposed emblem (assuming that it is adopted) – be regarded as a war crime ?

Such acts if accompanied by force would appear to fall within perfidy as defined in article 37 of Protocol I.

Questions 16 to 18 : See question 11 above.

Question 19 : How can the protection of journalists in non-international armed conflicts be enhanced ?

By making it clear as a matter of law that the same protection applies to them as in international armed conflict.

Question 20 : Is it agreed that internal disturbances below the threshold of an armed conflict do not come within the mandate of the 11th Commission ?

Yes.

508 Institute of International Law - Session of Naples (2009)

Reply by Judge Fausto Pocar

A. Introduction

I wish first of all to congratulate Confrère Yoram Dinstein on his excellent Preliminary Exposé (PE), which aptly describes the limited protection available to journalists in time of armed conflict, essentially the same protection bestowed upon civilians, and appropriately starts elaborating *de lege ferenda* various proposals aimed at strengthening the degree of protection afforded to journalists during hostilities.

B. Remarks on the Scope of the PE

At the outset, I would like to note that, despite the somewhat limited scope of the title of the mandate of the 11th Commission, which is correctly reflected in the PE, I would prefer not to disregard issues dealing with the status, rights and duties of journalists during armed conflicts that might extend *beyond* the hostilities as such. I am primarily thinking about the role of journalists in recounting, even years after the events, what they have witnessed while performing their tasks before international judicial institutions. In this area, recent developments in the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) provide interesting insights in the dilemmas facing, on one hand, journalists who witnessed dramatic events but fear for their own safety and the security of other journalists in similar circumstances and, on the other hand, international tribunals acting under the mandate of hearing witnesses to ascertain individual responsibility for crimes committed during armed conflicts.

First, it is relevant – also for other purposes discussed below – that the ICTY Appeals Chamber in the *Randall* Decision¹ defined ‘war correspondents’ all ‘individuals who, for any period of time, report (or investigate for the purposes of reporting) from a conflict zone on issues relating to the conflict’. In the same decision, the ICTY further found that ‘[b]oth international and national authorities support the [proposition] that a vigorous press is essential to the functioning of open societies and that a too frequent and easy resort to compelled production of evidence by journalists may, in certain circumstances, hinder their ability to gather and report the news’ and that ‘society’s interest in protecting the integrity

¹ *Prosecutor v. Radoslav Brdjanin*, Case No. 99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002.

of the newsgathering process is particularly clear and weighty in the case of war correspondents.' Considering, among other factors, that 'the amount of protection that should be given to war correspondents from testifying before the International Tribunal is directly proportional to the harm that it may cause to the newsgathering function' and that 'war correspondents must be perceived as independent observers rather than as potential witnesses for the Prosecution', the Appeals Chamber decided that a war correspondent can be obliged to testify at trial if (i) the evidence sought is of direct and important value to the core of the case ; and (ii) the evidence in question cannot be reasonably obtained in other ways.

Regardless of the reasoning of the ICTY and of the result reached in the present case, I believe that this issue poses interesting and live questions related to the effectiveness of the protection of war correspondents and of the balancing of competing interests. In my view, the issue of testimony by war correspondents related to armed conflicts does fall under the 'status' of journalists in times of armed conflict.

C. Issues Raised by the Questionnaire

1. Considering the state of the law, I think that the overall protection of ordinary civilians in armed conflict should be more specifically tailored to the needs of journalists. Such a 'special status', as the PE posits, would specify the enhanced guarantees necessary to protect the valuable function journalists perform during hostilities.

2-4. With respect to the definition of 'duly accredited journalists', and taking into account the aims of the guarantees in question, there is no doubt that the definition should be as wide as possible, encompassing free-lancers or even 'stringers'. I do not think the equivalence between 'full-time media persons' and 'employed by reputable organizations' (see PE, at 11) is tenable. The general interest of receiving news should not depend on the medium used or on the name of the company (if any) *behind* the journalist. Thus, logistical support and other staff (with the caveat below *sub* C.9) would also be included, regardless of their nationality. This, despite appearances, would not lead to a situation of anarchy and chaos : the journalists and staff in question must be in any event 'duly accredited' so that an appropriate balance is struck between guarantees, on the one hand, and duties, on the other.

510 Institute of International Law - Session of Naples (2009)

In this respect, the issue of 'duly accredited' should be maintained, making of course clear that this in no way prejudices the status of other (non-accredited) journalists. However desirable, it seems unrealistic to try and eliminate the distinction between 'war correspondents' and 'journalists engaged in dangerous professional missions...', but it would be helpful to attempt to minimize the differences. Apart from journalists falling under Article 4(A)(4) of GCIII ('embedded journalists' as 'persons who accompany the armed forces without actually being members thereof'), any journalist with a special ID card is to be considered 'duly accredited'. All these 'duly accredited' journalists would enjoy the same status of prisoners of war, in particular when captured by enemy forces.⁵

5-8. With regard to the issue of a journalist's card, I believe the time has come for a world-wide ID card for journalists issued by a central, impartial, and international body (probably, the IFJ).² This international body would be tasked with issuing ID cards containing only the most relevant information of the journalist in question and disregard that individual's association with political, religious, or other sensitive affiliations. Thus, the present format of the ID card would probably serve only as a model. While the ID would not be a requirement – it would merely be the natural way to ensure this enhanced status of protection. The many problems associated with the procedure for issuing these ID cards would have to be discussed by the IFJ, or the other identified body, with domestic stakeholders as well as international organizations, both governmental and non-governmental, dealing with the protection of journalists in armed conflict and freedom of press. In any event, the advantage of having one general procedure would be consistency, transparency, avoidance of undue pressure from governments and enhancement of perceived independence of accredited journalists.

The ID card would be linked to a set of guidelines setting forth the rights and duties of journalists during armed conflicts, with a 'pedagogical' purpose. Moreover, this procedure could be a way, however indirect, to

² This ID would of course only supplement, and not replace, similar cards issued by an authorized body within a State (a Federation of Journalists, for example, or the media – depending on a State's legislation), by a State itself, or even by an intergovernmental organization (*e.g.*, UN staff members working in the press offices of the UN or its agencies).

pressure governments to respect the freedom of movement and of press. The ID card would also be one of the 'objective' criteria for a court to consider granting immunity from compelled testimony in the instances addressed above, sub (B). Finally, I think the ID card could be issued in principle to ancillary staff working for accredited journalists, thus granting them protection. While this might be impractical for instances where the staff is hired on an *ad hoc* basis for limited periods of time, I think that there must be some 'objective' basis for staff to be protected on the field, or else the guarantees will soon become meaningless. This type of procedure would also tend to ensure that journalists exercise due diligence in hiring local staff.

With respect to other (non-accredited) journalists, who will generally be without ID card, Article 79 of AP1 properly equates them to ordinary civilians. Here, however, the issue of post-conflict treatment in relation to testimony related to the hostilities outlined above might come into play, due to the general interests related to their activities, regardless of whether they are 'duly accredited' or not. While the ID card would not be mandatory in a legal sense, the protection it will aim to ensure should be a powerful incentive.

9. The provision according to which journalists – just like anybody else – lose their protection if they engage in hostilities is even more fundamental if the distinction between 'war correspondents' and other 'duly accredited' journalists is blurred. It would certainly be useful to list the ways in which protection is lost, and I would highlight not only the active participation in hostilities of journalists themselves (which probably is a rather rare occurrence), but in particular by security staff that they might have hired to reach the conflict areas. This information should actually be a required pre-requisite for obtaining the ID card from the IFJ (or other body). As it happens, journalists that are not 'embedded' often surround themselves of armed bodyguards from private security companies, who in turn may easily lose their protection if they begin engaging in hostilities. On the other hand, it should be reiterated to governments and armed group that 'spreading propaganda' never rises to the level of 'active participation in the hostilities' under current international law (unless, arguably, the propaganda in question can be characterized as incitement to commit international crimes). Despite the position taken in the PE, I would hesitate to admit the possibility for duly

512 Institute of International Law - Session of Naples (2009)

accredited journalists to bear light arms for self-defence purpose : this may only lead to opposed 'slippery slope' arguments and counter-arguments, which may in turn diminish the effectiveness of protection of journalists. I believe this question deserves a further reflection and I would prefer to reserve my position.

11. Unfortunately, I do not think it would be feasible to set out international standards on imprisonment or expulsion of journalists other than the normal guarantees foreseen by international and local laws on the treatment of civilians during armed conflict. Both this issue and the issue of the protection of the journalists' property (including films, tapes and other recording material) should be considered in light of the laws on the protection from destruction or seizure of property, the exceptions thereof, and the principle of proportionality in light of military necessity on part of the party to the conflict. Seizure of property not necessitated by military necessity may, in some instances, constitute the war crime of plunder, for example.

12-15. I do not believe that a *mandatory* special emblem for journalists would be useful in the circumstances of many contemporary conflicts, where the side that has the most interest in killing journalists is often not troubled by the possibility of facing justice for intentionally targeting them. On the contrary, if devised in coordination with the above-mentioned ID, an *optional* emblem would be functional in identifying journalists in situations of combat between 'regular' armies and might potentially be welcomed by the military itself as a way to avoid needless targeting mistakes. The emblem should be neutral, so as not to identify the journalists in relation to their provenance, affiliation, or background. The misuse of both the ID card and the protective emblem should then be equated to the misuse of ICRC emblems and declared as a war crime. It is essential that these protective marks and documents are used within the rules so as to foster, rather than prejudice, the respect of journalists and of their mission. I agree with the PE that the question of the emblem should be considered taking into account the views that will be expressed by the IFJ and other associations of journalists.

16-18. In respect to the access of journalists to the contact zone, the relationship between international humanitarian law and international human rights law should be carefully studied, especially in light of the latest judgements of the International Court of Justice applying a

pragmatic '*lex specialis*' principle. In this respect, military necessity and derogations for reasons of national security should be understood as exceptions (and consequently interpreted in a restrictive way) and subject to the principle of proportionality. Discriminatory refusal of access and imposition of censorship are arguably illegal. Such a legal analysis would also greatly benefit from a review of existing practice during recent conflicts.

Finally, in my view, the international body charged with issuing the ID card or, even better, the ICRC and other relevant bodies, might wish to draw up a set of guidelines on the procedures that States should adopt when deciding to 'close off' combat zones for military use only (Is a written order by the commanding officer necessary? Should reasons beyond mere 'military necessity' be mentioned in the order in question? Can the order be challenged in some type of judicial or quasi-judicial forum?). These guidelines, while not binding, would at least offer a benchmark to assess domestic practice in armed conflict and its adherence with the evolving international law of armed conflict.

20. I agree that the mandate of the 11th Commission is limited to armed conflicts; internal disturbances below the threshold of an armed conflict are therefore excluded from its mandate.

Remarks by M. V. K. Doermann – ICRC

1. Is the overall protection of ordinary civilians in armed conflict adequate for journalists or should journalists benefit from a special status of protection?

The overall protection of ordinary civilians in armed conflict is adequate for journalists³. The nature of the threats journalists currently face in armed conflicts does not seem to warrant the creation of a special status of protection, but rather a better respect for and enforcement of existing law. It is not at all sure that more rules mean better protection in times where even the most basic rules are often not respected.

According to Article 79 AP I, a journalist is entitled to all rights granted to civilians. The same holds true with regard to non-international armed

³ The term is understood in a broad sense, including to all the categories of people enumerated in our answer to question 2, i.e. also support staff and stringers/freelancers.

514 Institute of International Law - Session of Naples (2009)

conflicts in which journalists, absent specific treaty provisions, are considered to be civilians by virtue of customary law.

1) Protection against dangers emanating from combat operations

IHL protects journalists as civilians against direct attack. This protection is reinforced by virtue of Article 8 2 b (i) ; e (i) of the Rome-Statute according to which intentionally directing an attack against a journalist amounts to a war crime in international as well as in non-international armed conflict. According to Article 50, paragraph 1 of AP I, journalists – like all other civilians - benefit from the presumption that in case of doubt whether a person is a civilian, that person shall be considered to be a civilian. Moreover, IHL obligates parties to an armed conflict to take all feasible precautions to ensure that attacks are only directed against military objectives.

If legitimate military targets are attacked, the attacker must take into consideration the presence of journalists, i.e. of civilians in general, as potential so-called "collateral-damage". Under IHL, *such an attack is only lawful*, if the expected civilian death or injury is not excessive in relation to the military advantage anticipated from the attack (proportionality rule).

Like other civilians, *journalists lose their protection only if* and for as long as they take a direct part in hostilities. In this regard, Article 79 AP I already heeds the special role and function of journalists in that it clarifies that a journalist does not lose this status by entering an area of armed conflict on a professional mission, even if he is accompanying the armed forces or if he takes advantage of their logistic support. It is difficult to see how a stronger protection could realistically be achieved in a battle zone.

2) Protection in the case of capture or arrest

The differentiation IHL entails with regard to war correspondents and other journalists only becomes relevant in cases of capture or arrest in the case of an international armed conflict.

War correspondents, i.e. representatives of the media who, in case of an international armed conflict are accredited to and accompany the armed forces without being members thereof, are entitled to the status and treatment of a prisoner of war in case of capture. Thus, war correspondents benefit from all the protections of the Third Geneva

Convention as supplemented by Additional Protocol I and customary international law.

All other journalists who fall into the hands of a party to an armed conflict benefit from the protections granted in Art. 75 AP I. Moreover, journalists in the hands of a Party to the conflict or Occupying Power of which they are not nationals (Art. 4 GC IV) benefit from the protections granted by the Fourth Geneva Convention.⁴

In the case of non-international armed conflicts, protection for journalists emanates from common Art. 3 GC I-IV, Additional Protocol II, namely Arts. 4, 5, 6 AP II and customary law.

It bears emphasis that violations of most of these provisions are sanctioned as war crimes.

3) Conclusion

The authors of Protocol I did not wish to establish a special status for journalists, because “[...] any increase in the number of persons with a special status, necessarily accompanied by an increase of protective signs, tends to weaken the protective value of each protected status already accepted [...]”⁵ However, a significant increase in or a changing nature of the dangers journalists are facing on the battlefield could eventually warrant a different decision in this regard.

Undoubtedly, journalists are imperilled by their professional duties in the context of armed conflict and they are frequently exposed to dangers, which may exceed the level of danger normally encountered by civilians. Still, the legal protection granted to journalists by virtue of IHL appears to be adequate. Empirical data seems to suggest that the gravest threat journalists are currently facing stems from the fact that they are journalists rather than from the fact that they have mistakenly been perceived as combatants or as persons directly participating in hostilities.

⁴ However, it bears emphasis that according to Art. 4 sentence 3 GC IV nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

⁵ Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff Publishers, Geneva, 1987, para. 3265.

516 Institute of International Law - Session of Naples (2009)

Undeniably, a notable deficiency persists with regard to compliance with and effective implementation of existing rules of humanitarian law. However, there is little indication that the protective legal framework as such contains significant loopholes to the detriment of an efficient legal protection of journalists. In order to better perceive the scope of protection granted to journalists one would only have to substitute the words "civilian", "persons taking no active part in the hostilities" or "persons who are in the power of a Party to the conflict" used in the Geneva Conventions and their Additional Protocols by "journalist".

For an analysis of customary international law see also Jean-Marie Henckaerts, Louise Doswald-Beck, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I : RULES (2005), p. 115-118.⁶

2. Who are "duly accredited journalists" for purposes of protection in armed conflicts ? In particular :

(a) Does protection extend to free-lancers and stringers ?

(b) Does protection cover logistical support staff (drivers, translators, security guards, etc.) ?

(c) Does protection apply equally to nationals and foreigners ?

In our view, there should be no distinction between the categories mentioned in a) and b) concerning the protection granted. With regard to c) it bears mentioning that persons protected by GC IV according to Art. 4 GC IV are only those persons 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*. Therefore, in this regard the protection of GC IV does not equally apply to nationals and foreigners. There may be other bodies of law providing protection (human rights law and domestic law)

Please see also the answer to question 3.

Based on the approach we have taken, the words "duly accredited" should be dropped from the mandate of the 11th Commission and thus do not deserve of further reflection.

⁶ **Rule 34** : "Civilian journalists engaged in professional missions in areas of armed conflict must be respected and protected as long as they are not taking a direct part in hostilities" ; a rule found applicable in international and non-international armed conflicts.

3. Should the words "duly accredited" be retained in the mandate of the 11th Commission ?

The term journalist in Article 79 AP I is to be understood in a broad sense and in any case, *de lege lata* all of the above-mentioned persons (question 2) enjoy protection as civilians, irrespective of their nationality, unless and for such time as they take a direct part in hostilities. IHL prescribes the requirement of official authorization only for war correspondents, who accompany the armed forces. IHL does not, however, foresee a general accreditation requirement. Rather all journalists' benefit from the protections granted to civilians. The qualification of being "duly accredited" thus could be understood to have a narrowing effect on the protection granted. What would or should be the consequences of a missing accreditation ?

Moreover, recent incidents have shown that in situations especially of non-international armed conflict – the majority of armed conflicts today – information is often transmitted by people who are virtually barred from obtaining official accreditation from any entity (national government, media or an independent organization) whatsoever. Indeed, these people would put themselves at grave risk if they tried to receive official accreditation. Establishing a mandatory requirement of being duly accredited could thus provide certain regimes with a welcome avenue for censorship.

4. Is the current distinction (under Geneva Convention III and Additional Protocol I) between "war correspondents" and other "journalists engaged in dangerous professional missions in areas of armed conflict" satisfactory ?

War correspondents are commonly, albeit not necessarily in all cases, to be equated with so-called "embedded journalists". Throughout their professional mission they accompany the armed forces. Indeed their mission by definition aims at keeping the closest possible contact with the armed forces. By virtue of this close connection, war correspondents in many regards inevitably share the fate of the armed forces. At the time of drafting Art. 4, para. A, sub-para. 4 GC III⁷ the underlying rationale of

⁷ This provision is an up-to-date version of Article 81 of the 1929 Convention, which in turn was based on Article 13 of the Hague Regulations .

518 Institute of International Law - Session of Naples (2009)

according people who accompany the armed forces prisoner of war status was that these people had often been perceived to be more or less part of the armed forces and that upon capture their position had often given rise to difficulties, especially during the Second World War. While prisoner-of-war status carries certain privileges it needs to be kept in mind that it also entails a significant disadvantage, namely that prisoners-of-war can be detained until the end of hostilities.

While other journalists engaged in dangerous professional missions in areas of armed conflict may on occasion also temporarily accompany the armed forces or at least come within their vicinity, war correspondents by definition share a closer and more permanent relationship with the armed forces. Whether or not this difference indeed justifies a different legal protection today seems questionable. Nevertheless, it should be kept in mind that if other journalists intended to accompany the armed forces on a more permanent basis it would be in their hands to seek the required authorization and thus to be able to benefit from the protection accorded to war correspondents. Yet, in light of the fact that "war correspondents" upon capture can be detained until the end of hostilities it is questionable whether this would enhance their protection/in their interest. It bears emphasis that other journalists upon arrest would not be unprotected. They would benefit from the general protections accorded to civilians in case of arrest : the protections granted in the Fourth Geneva Convention (subject to the requirements laid out in Art. 4 GC IV, namely the nationality criterion) and Art. 75 AP I.

N.B. No such distinction exists in non-international armed conflicts.

5. Should a journalist's ID card, now an option (other than for "war correspondents"), become a mandatory requirement ?

A journalist's ID card should only be made a mandatory requirement if journalist's were to be accorded a special status. This, however, as already mentioned above in the answer to question 1 would not be our avenue of preference.

Otherwise, journalist's ID cards should remain an option. It bears emphasis that under IHL *de lege lata* carrying an ID card is optional for all journalists, including war correspondents⁸.

⁸ See Jean S. Pictet (ed.), *Commentary III on the Geneva Convention Relative to The Treatment of Prisoners of war*, Article 4, p. p. 65 : "The application of this

IHL currently grants journalists a considerable degree of flexibility with regard to the utilization of an ID card. Neither Article 79 AP I nor Art. 4 A 4 GC III requires journalists/war correspondents to carry such a card. The ID card is not constitutive for the protection granted to journalists/war correspondents by virtue of IHL. It only serves as proof that a person is a journalist and thus must be treated like a civilian or that a person is a war correspondent and thus must be accorded prisoner of war status upon capture. IHL foresees no direct detrimental consequences, least of all sanctions, if a person does not carry such a card. For such a person it might simply be more difficult to prove the status as a journalist or war correspondent. However, even in the absence of a valid ID card war correspondents would benefit from Article 5, paragraph 2 GC III. Thus, in the case of doubt with regard to the status of a person as a war correspondent entitled to prisoner of war status, this person would enjoy the protection of GC III until such time as a competent tribunal has determined his or her status. Moreover, it needs to be kept in mind that such a status determination is not necessarily always in the interest of the person concerned because as a "war correspondent" the person could be kept in detention until the end of hostilities.

The flexibility IHL provides is beneficial also in those situations in which governments aim to constrain the freedom of the press and are thus reluctant to issue identity cards. IHL does not oblige journalists to rely on the determination of their government as to who is and who is not a journalist.

Finally, empirical data indicates that the majority of journalists are attacked precisely because they are journalists. In light of these findings, a mandatory ID card may be detrimental to the protection of journalists. In any case, an ID card is hardly suitable to foster enhanced protection throughout the conduct of actual hostilities given that the reality on the battlefield does not permit actors to check ID cards.

What should be the consequences of not carrying a mandatory ID card ?

6. If so, who should be in charge of issuing an ID card for a journalist ?

(a) National governmental agencies ; or

(b) The media themselves ; or

provision is therefore dependent on authorization to accompany the armed forces, and the identity card merely serves as proof".

520 Institute of International Law - Session of Naples (2009)

(c) A central, impartial, international non-governmental authority (as a minimum, as a supervisor body, to ensure that there is no abuse).

As stated above mandatory ID cards would not be our favoured option. Issuing mandatory ID cards would open possibilities for abuse and censorship. However, if participants were to opt for a mandatory ID card in combination with a special status of protection for journalists, risks of abuse and censorship would probably best be avoided if c) a central, impartial, international non-governmental authority would issue these ID cards.

7. Should the ID cards of journalists (including "war correspondents") contain information about the religion of the bearer ?

The decision whether or not information about religious affiliation is given should be optional.

As is the case with regard to most passports distributed throughout the world, the model ID cards for journalists and war correspondents contain a rubric "religion". In the case of the model-ID card for journalists engaged in dangerous missions, which is displayed in Annex II to AP I, the rubric "religion" is explicitly designated as optional whereas in the case of the ID card for war correspondents displayed in Annex IV to GC III such an explicit designation is absent. However, it should be borne in mind that the ID card for war correspondents is in and of itself an optional card. In light of this general optional character and given that the purpose and aim of this card is the facilitated identification of its bearer as an authorized war correspondent, it can be deduced that giving information regarding ones religious affiliation constitutes an optional rather than a mandatory requirement also with regard to the ID card for war correspondents. The decision whether or not information about religious affiliation is given should remain to be optional. In any case, why would the information be relevant ?

8. Should the present format of journalists' ID cards be altered in any other way ?

The present format of journalists' ID cards is not in urgent need of alteration.

Undoubtedly, there are numerous possibilities to update the design and format of the current ID cards. However, the information they contain serves the purpose of these cards, i.e. the identification of a given person

as either a journalist or a war correspondent. Consequently, there is no urgent need to alter the present format of these ID cards.

9. Is it useful to list in a non-exhaustive manner circumstances and conditions in which journalists will be regarded as having lost their protection (perhaps in the form of a "code of conduct" issued by the media themselves) ?

The loss of protection for journalists is a question of the general rule relating to the loss of protection of civilians contained in Article 51, paragraph 3 AP I.

It is true that Article 79 AP I does not specify what actions would be considered as adversely affecting a journalist's status as a civilian. However, it follows from the wording of Article 79 AP I that it refers to the loss of protection as regulated in Article 51, paragraph 3 AP I. The precise meaning of Article 51, paragraph 3 AP I, namely of the wording "unless and for such time as they take a direct part in hostilities" remains the subject of controversial debate. The ICRC is in the process of clarifying this complex notion. It bears emphasis that the precise meaning of this notion does not only have repercussions in relation to journalists but to civilians in general. Indeed, the notion of direct participation in hostilities is a general notion of IHL and does not admit of a group- or function specific interpretation.

If a list was to be drawn up for media purposes it would seem to be more feasible to come up with examples of behaviour that would not constitute direct participation in hostilities – as IHL has done for medical personnel. The advantage of providing some clarity must be balanced against the danger that anything not mentioned on such a list could be interpreted as direct participation in hostilities by a journalist (even if the list clearly indicates its non-exhaustive nature).

What would be the purpose of drawing up such a non-exhaustive list ? Should it be regarded as an authoritative interpretation of IHL provisions or should it serve as a source of information for journalists ? Moreover, what would be the legitimacy of such a code established by representatives of the media in a state-centric system ?

10. Can a clear-cut line of distinction be drawn between lawful newsgathering and espionage or does it all depend on mens rea ?

522 Institute of International Law - Session of Naples (2009)

It can be deduced from Article 46 AP I in combination with Article 29 of the Hague Regulations that a spy today is generally understood as "a person who secretly, in disguise or under false pretence, seeks information with the intention of communicating it to the enemy".

Thus, the elements of crime contain two objective elements. Apart from the element of information seeking this definition requires a second objective element, namely that information is sought in disguise or under false pretence. Still, given that information gathering generally amounts to legal behaviour the definition of a crime that criminalizes information gathering in certain instances naturally heavily depends on the *mens rea*. In the case of espionage, the *mens rea* must comprise the "intention of communicating the information sought to the enemy". It might be helpful to clarify this notion with regard to journalists who process information in a variety of different ways.

The question remains whether this is indeed a problem predominantly to be solved from an international (law) perspective. Already at the time of negotiating Additional Protocol I the view was entertained that a definition of a spy does not belong in a text of humanitarian law and Article 46 AP I does not provide such a definition. Espionage is not prohibited under international (humanitarian) law and it does not amount to a war crime. Criminalizing espionage and defining the notion of espionage is first of all an internal matter of States. Safeguarding their national security interests clearly falls within their *domaine réservé*. States throughout the world have criminal laws that define the notion of espionage and sanction it accordingly.

Is there empirical data that indicates how often journalists have been accused of espionage in recent conflicts ?

11. Should there be international standards clarifying when journalists who infringe domestic legislation or regulations – in circumstances other than espionage – be imprisoned or (in the case of foreign journalists) expelled (or when a journalist's film, tape, notes, etc., can be confiscated) ?

It is our understanding that this question does not refer to detentions for security reasons but merely to detention in relation to the sanctioning of infringements of domestic legislation. In this regard, human rights law provides the relevant international standards.

It seems only logical that if journalists infringe domestic legislation the infringed provision also prescribes the sanction for this infringement. Nevertheless, the consequential treatment of journalists no longer exclusively depends on the vagaries of the local State. International human rights law provides universal standards, which guide and confine States in their power to restrict the freedom of journalists and members of the press or to detain people.

12. Is there an advantage in introducing (through an Additional Protocol to the Geneva Conventions) a new special emblem for use by journalists ?

The introduction of a new special emblem for journalists would have detrimental effects on the protective value of the existing emblems and at least in part – as seems to be suggested by empirical data – on the protection of journalists themselves.

Undeniably, in some instances a journalist specific emblem could enhance the protection of journalists. However, given that the protection of journalists emanates from their status as civilians the object and purpose of such an emblem would be to facilitate a journalist's identification as a civilian against whom direct attacks are prohibited. It seems that in practice this aim can often already be achieved by virtue of the signs and symbols that are currently employed by the press. In this regard it should be kept in mind that according to Article 50, paragraph 1 AP I journalists – like all other civilians - benefit from the presumption that in case of doubt whether a person is a civilian, that person shall be considered to be a civilian. In light of the means currently used for indication of media affiliation (signs marked with the word PRESS or the initials TV), it seems that there would regularly be a case of doubt in which the respective journalist would have to be considered to be a civilian. While admittedly a rule of similar clarity has not yet developed in the realm of non-international armed conflict, here as well, one cannot automatically attack anyone whose status as a civilian appears dubious.

The drafters of the Geneva Conventions and their Additional Protocols decided to facilitate the identification of journalists/war correspondents merely in case of capture/arrest by virtue of a facultative ID card. It is not excluded that facilitated identification directly in the combat zone may have added protective value for journalists. However, empirical data seems to suggest that journalists are often targeted/killed precisely

524 Institute of International Law - Session of Naples (2009)

because they are journalists, in which case the adoption of a press-specific emblem would be counterproductive, in fact attract fire.

Finally, enlarging the number of protective emblems always risks the mitigation of the protective value of the existing emblems. From this point of view, the list of protective emblems should not be extended any further. Specifically with regard to journalists, the current situation and the particular dangers they are facing in armed conflicts do not seem to warrant such an extension. (Is there any empirical data indicating how often journalists have been attacked because they have been mistakenly regarded as combatants in comparison to those specifically targeted/the normal risk that persons run in the vicinity of actual hostilities?). In fact, a large number of journalists would seem to regard it as an impediment. Moreover, if an additional journalist- or press-specific emblem was to be adopted, other groups could validly demand an emblem that corresponds with their specific needs.

13. If so, who should be entitled to use the proposed emblem ?

See answer to question 12.

14. Should use of the proposed emblem be tied in to availability of the ID card ?

See answers to questions 5, 12. If another approach than ours is taken, the answer should be yes.

15. Should an attempt by a combatant to pass himself/herself off as a journalist – especially by forging the appropriate ID card or by resorting to the use of the proposed emblem (assuming that it is adopted) – be regarded as a war crime ?

Simply feigning protected status without further actions or consequences does not reach the gravity of a war crime. Nevertheless, it constitutes a violation of IHL.

Evidently, if such behaviour would qualify as treacherous behaviour it could amount to a war crime if the additional conditions of Art. 8 2 b (xi), 2 e (ix) ICC-Statute are fulfilled. According to these provisions, "killing or wounding treacherously individuals belonging to the hostile nation or army" amounts to a war crime in international armed conflict and "killing or wounding treacherously a combatant adversary" amounts to a war crime in non-international armed conflict. Simply feigning civilian or for that matter journalist status without any further actions or consequences

would *de lege lata* not amount to a war crime nor should such behaviour *de lege ferenda* be regarded as such, given that simply feigning status does not reach the threshold of gravity that warrants the definition as a war crime.

This is also reflected in Art. 8 2 b (vii) according to which : Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury ;

16. Can access to the contact zone (or parts thereof) be lawfully denied to the media at large ?

Access of the media to the contact zone can be denied if certain preconditions are met.

IHL does not contain any provisions that specifically regulate the access by journalists to the actual contact zone. However, journalists have the status of civilians and IHL contains provisions regarding the removal of civilians from the contact zone.

According to Article 58 a), c) AP I the parties to the conflict, shall, to the maximum extent feasible, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives. More generally, they shall take the other necessary precautions to protect the civilian population and individual civilians under their control against the dangers resulting from military operations. Clearly, the object and purpose of this provision is the protection of civilians. In as much as this objective is pursued Article 58 AP I generally grants the State a right to deny access to the contact zone to individual civilians or groups of civilians. It is not entirely clear whether this particular right – to deny access to the contact zone for reasons of protection – also comprises journalists who have been specifically recognized in Article 79 AP I and who, in view of the very nature of their mission, generally operate in the contact zone. In light of their voluntary decision to remain in the contact zone, it can be argued, that Article 58 AP I does not grant a right of access-denial vis-à-vis journalists who based on a free-will decision wish to be in the contact zone. It bears mentioning, that Article 49 GC IV is broader in this regard in that it allows the occupying power to undertake total or partial

526 Institute of International Law - Session of Naples (2009)

evacuation of a given area not only if the security of the population so demands but also for imperative military reasons.

In the absence of further specific provisions within the framework of IHL, the question whether and in how far access to the contact zone may be denied to journalists or the media is to be answered in view of domestic law in conformity with international human rights law.

The right to actively seek information, which goes beyond mere passive reception, is found in Art. 19 (2) ICCPR, Art. 19 UDHR, Art. 13 (1) ACHR, but not in Art. 10 (1) ECHR or Art. 9 (1) of the ACHPR. However, this right is subject to limitations, namely for reasons of national security (Art. 19 (3) ICCPR) as well as to derogations in time of a public emergency (Art. 4 ICCPR, Art. 27 ACHR). Under the preconditions of these provisions, a State party to an armed conflict could thus deny individual journalists or the media at large access to the contact zone or parts thereof.

17. Can travel restriction on foreign journalists in the contact zone be applied on a discriminatory basis (e.g., on the ground of nationality) ?

Under certain conditions, differential treatment on the grounds of nationality is justified by human rights law.

According to Article 2 ICCPR parties to the Covenant, undertake to respect and to ensure the rights recognized in the Covenant, without distinction of any kind, such as race, colour, sex..., national or social origin, property, birth or other status. In general, a differentiation on the grounds of nationality is thus not permitted. However, the measures Article 4 ICCPR allows in time of public emergency must not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin and must be consistent with a State's other obligations under international law. The omission of nationality as a prohibited criterion for differentiation in this enumeration was intentional. Initially, a more general prohibition of discrimination had been endorsed by some delegations. However, since in time of war, nationals of enemy States are often discriminated against out of genuine security interests the criterion of nationality was left out.

18. Can a belligerent party lawfully and effectively impose censorship requirements on foreign journalists ?

Yes, see answer to question 17.

19. How can the protection of journalists in non-international armed conflicts be enhanced ?

In non-international armed conflicts, the greatest deficiency stems from a lack of compliance with existing rules. Thus, the protection of journalists could be enhanced by improving compliance with existing rules through systematic investigation, prosecution and sanction of violations. In addition, training in and dissemination of IHL will be crucial.

Journalists, although they are not specifically mentioned in any treaty applicable to non-international armed conflicts, are considered to be civilians by virtue of customary law and thus benefit from the full protection IHL grants to civilians in non-international armed conflicts (esp. Art. 3 GC I-IV, Arts. 4, 5, 6, 13 AP II). From a purely legal perspective, journalists are thus sufficiently protected. However, given that these rules are in many instances not respected, improving compliance with existing rules constitutes the gist of enhancing the protection of journalists especially in non-international armed conflicts.

20. Is it agreed that internal disturbances below the threshold of an armed conflict do not come within the mandate of the 11th Commission ?

Yes.

Annexe : Security Council Resolution 1738 (2006)

“The Security Council,

“Bearing in mind its primary responsibility under the Charter of the United Nations for the maintenance of international peace and security, and underlining the importance of taking measures aimed at conflict prevention and resolution,

“Reaffirming its resolutions 1265 (1999), 1296 (2000) and 1674 (2006) on the protection of civilians in armed conflict and its resolution 1502 (2003) on protection of United Nations personnel, associated personnel and humanitarian personnel in conflict zones, as well as other relevant resolutions and presidential statements,

“Reaffirming its commitment to the Purposes of the Charter of the United Nations as set out in Article 1 (1-4) of the Charter, and to the Principles of the Charter as set out in Article 2 (1-7) of the Charter, including its commitment to the principles of the political independence, sovereign equality and territorial integrity of all States, and respect for the sovereignty of all States,

528 Institute of International Law - Session of Naples (2009)

“Reaffirming that parties to an armed conflict bear the primary responsibility to take all feasible steps to ensure the protection of affected civilians,

“Recalling the Geneva Conventions of 12 August 1949, in particular the Third Geneva Convention of 12 August 1949 on the treatment of prisoners of war, and the Additional Protocols of 8 June 1977, in particular article 79 of the Additional Protocol I regarding the protection of journalists engaged in dangerous professional missions in areas of armed conflict,

“Emphasizing that there are existing prohibitions under international humanitarian law against attacks intentionally directed against civilians, as such, which in situations of armed conflict constitute war crimes, and *recalling* the need for States to end impunity for such criminal acts,

“Recalling that the States Parties to the Geneva Conventions have an obligation to search for persons alleged to have committed, or to have ordered to be committed a grave breach of these Conventions, and an obligation to try them before their own courts, regardless of their nationality, or may hand them over for trial to another concerned State provided this State has made out a prima facie case against the said persons,

“Drawing the attention of all States to the full range of justice and reconciliation mechanisms, including national, international and “mixed” criminal courts and tribunals and truth and reconciliation commissions, and *noting* that such mechanisms can promote not only individual responsibility for serious crimes, but also peace, truth, reconciliation and the rights of the victims,

“Recognizing the importance of a comprehensive, coherent and action-oriented approach, including in early planning, of protection of civilians in situations of armed conflict. *Stressing*, in this regard, the need to adopt a broad strategy of conflict prevention, which addresses the root causes of armed conflict in a comprehensive manner in order to enhance the protection of civilians on a long-term basis, including by promoting sustainable development, poverty eradication, national reconciliation, good governance, democracy, the rule of law and respect for and protection of human rights,

“Deeply concerned at 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,

“*Recognizing* that the consideration of the issue of protection of journalists in armed conflict by the Security Council is based on the urgency and importance of this issue, and recognizing the valuable role that the Secretary-General can play in providing more information on this issue,

“1. *Condemns* intentional attacks against journalists, media professionals and associated personnel, as such, in situations of armed conflict, and calls upon all parties to put an end to such practices ;

“2. *Recalls* in this regard that journalists, media professionals and associated personnel engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians and shall be respected and protected as such, provided that they take no action adversely affecting their status as civilians. This is without prejudice to the right of war correspondents accredited to the armed forces to the status of prisoners of war provided for in article 4.A.4 of the Third Geneva Convention ;

“3. *Recalls also* that media equipment and installations constitute civilian objects, and in this respect shall not be the object of attack or of reprisals, unless they are military objectives ;

“4. *Reaffirms* its condemnation of all incitements to violence against civilians in situations of armed conflict, further reaffirms the need to bring to justice, in accordance with applicable international law, individuals who incite such violence, and indicates its willingness, when authorizing missions, to consider, where appropriate, steps in response to media broadcast inciting genocide, crimes against humanity and serious violations of international humanitarian law ;

“5. *Recalls its demand* that all parties to an armed conflict comply fully with the obligations applicable to them under international law related to the protection of civilians in armed conflict, including journalists, media professionals and associated personnel ;

“6. *Urges* States and all other parties to an armed conflict to do their utmost to prevent violations of international humanitarian law against civilians, including journalists, media professionals and associated personnel ;

530 Institute of International Law - Session of Naples (2009)

“7. *Emphasizes* the responsibility of States to comply with the relevant obligations under international law to end impunity and to prosecute those responsible for serious violations of international humanitarian law ;

“8. *Urges* all parties involved in situations of armed conflict to respect the professional independence and rights of journalists, media professionals and associated personnel as civilians ;

“9. *Recalls* that the deliberate targeting of civilians and other protected persons, and the commission of systematic, flagrant and widespread violations of international humanitarian and human rights law in situations of armed conflict may constitute a threat to international peace and security, and *reaffirms in this regard its readiness* to consider such situations and, where necessary, to adopt appropriate steps ;

“10. *Invites* States which have not yet done so to consider becoming parties to the Additional Protocols I and II of 1977 to the Geneva Conventions at the earliest possible date ;

“11. *Affirms* that it will address the issue of protection of journalists in armed conflict strictly under the agenda item “protection of civilians in armed conflict” ;

“12. *Requests* the Secretary-General to include as a sub-item in his next reports on the protection of civilians in armed conflict the issue of the safety and security of journalists, media professionals and associated personnel.”

DELIBERATIONS DE L'INSTITUT

Sixième séance plénière Lundi 7 septembre 2009 (après-midi)

La séance est ouverte à 17 h 45 sous la présidence de M. *Degan*, 3^{ème} vice-président.

The *President* introduced Mr Dinstein, Rapporteur of the 11th Commission on the International Status, Rights and Duties of Duly Accredited Journalists in Times of Armed Conflict.

The *Rapporteur* apologized that the Commission's Report was not yet ready for distribution and suggested that he would give an overview of the content. He pointed out that, even though the results of the work of the Commission might appear to be minimal, a maximum of energy had been invested in its task.

He began by mentioning that the 11th Commission was small, comprised of only nine Members. He also noted that, as will be explained, the Secretary General had a role to play in the Commission's outcome. Finally, he extended his apologies to two Members who joined the Commission subsequent to its formation and did not really have an opportunity to fully participate in its work.

The Rapporteur drew attention to the fact that he was not responsible for the wording of the Commission's formal mandate, which he found somewhat misleading for reasons that would become apparent, and that he was not sure who was the original proponent of the setting up of the Commission.

The Rapporteur pointed out that when the Commission was established, in the Bruges Session of 2003, some Members suggested that possible collaboration with external experts, such as associations of journalists, might prove useful. Since collaboration of this nature was not common in the Institut, the Rapporteur consulted the Secretary General about the latitude allowed to the Commission. The Secretary General advised the Rapporteur that the Commission must abide by the Institut's Statutes, but – subject to these constraints - he agreed that the Rapporteur might consult external experts. Consequently, the International Committee of

532 Institute of International Law - Session of Naples (2009)

the Red Cross (ICRC) was approached by the Rapporteur. The ICRC identified Mr Knut Dörmann, currently Head of the Legal Division, as the key contact person in charge. In 2004, Mr Dörmann accompanied the Rapporteur to Brussels where they met with the General Secretary of the International Federation of Journalists (IFJ) and the Director of the International News Safety Institute (INSI). The timing was perfect since INSI was then planning to launch a fact-finding “Global Inquiry into the Killing of Journalists” (initiated in 2005 under the chairmanship of the Director of Global News for the BBC). At the same time (2004) a Press Emblem Campaign (PEC) was mounted in Geneva. Two informal colloquia organized by INSI in London were attended by the Rapporteur in 2005/6 (other members of the Commission were also invited to one of these meetings, and in the event Mr. Broms joined the Rapporteur). In 2006, on the initiative of media organizations, the Security Council adopted a special Resolution (No. 1738) on the subject. The reason for the intensive activities was that the number of media workers killed worldwide was steadily growing, reaching a record of 172 in 2007, with a large proportion of casualties sustained in international and non-international armed conflicts. Plainly, the mission of journalists in armed conflict had become very dangerous.

Precisely because of all the contemporaneous activities focusing on the subject, the 11th Commission realized by 2007 that no practicable new legal regime could be devised for the protection of journalists. Hence, it was informally decided in Santiago de Chile that, should there be no major change in the situation over the following two years, it might be best to terminate the Commission’s work. There being no such change, the tentative conclusion was formally adopted by the Commission in Naples, in a meeting held jointly with the Secretary General.

The Rapporteur then went into the substance of the Commission’s work. He explained that there were two major categories of journalists under existing treaties. The first category consisted of “war correspondents” whose status was enshrined in the Third Geneva Convention of 1949, and he recalled that the Geneva Conventions were the only treaties which were truly universal at the present time. “War correspondents” were civilians who merely accompanied the armed forces without being members thereof, but they had to be “duly accredited” in the words of the mandate of the 11th Commission. It was true that, in the *Randal* case of

2002, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) defined “war correspondents” as a category including all journalists reporting from a conflict zone. Still, with respect, the Rapporteur maintained that this was clearly an error. To qualify as a “war correspondent” under the Third Geneva Convention, a journalist had to be accredited to the armed forces. In recent armed conflicts, “war correspondents” were usually “embedded” in specific units of the armed forces. Embedded “war correspondents” remained civilians, although they patently ran considerable risks owing to their proximity to combatants and military objectives. The legal position of “war correspondents” was unusual in that - under the Third Geneva Convention - if captured, they were entitled to prisoners-of-war status. This was exceptional because normally to become a prisoner-of-war it was necessary to be a combatant.

The second category of journalists, existing under Article 79 of Additional Protocol I of 1977 to the Geneva Conventions, was that of “journalists engaged in dangerous professional missions in areas of armed conflict”. Unlike the original Geneva Conventions, Additional Protocol I was not universally applicable and some of its provisions were highly controversial. Nevertheless, the Rapporteur stressed that nobody contested Article 79. Indeed, there was not much to contest, inasmuch as the thrust of the text was that such journalists must be considered civilians and thus afforded the general protection to which civilians were entitled in conformity with customary international law.

This second category of journalists had a wide gamut. It covered not only reporters and correspondents, but also editors and columnists, TV cameramen and radio announcers, photographers and cartoonists, and even freelancers or Internet bloggers. Moreover, as the journalists’ professional associations insisted, the category was understood to include media workers in support or logistical roles - such as interpreters, drivers or even security guards - without whom the work of the journalists proper might not be carried out effectively in the field. The idea of treating support staff as journalists was approved in Security Council Resolution 1738, to be quoted later. Indeed, the statistical data indicated that many if not most of the casualties sustained by the journalistic profession were among support personnel.

534 Institute of International Law - Session of Naples (2009)

The Rapporteur reminded Members that, as civilians, journalists were not to be the object of either direct or indiscriminate attacks. They benefited from the obligation incurred by Belligerent Parties to exercise precautions, with a view to avoiding excessive collateral damage to civilians as a result of lawful attacks against combatants and military objectives. However, the protection from attack was lost if civilians directly participated in hostilities, for such time as they did so. This meant that journalists wishing to enjoy the benefits accruing from the status of civilians had to be careful not to engage in activities that might bring about loss of protection.

From the beginning, the 11th Commission wrestled with the question whether journalists – who, unlike other civilians, had to discharge important duties in the conflict zone, in order to report what was going on, notwithstanding the attendant dangers - deserved (*de lege ferenda*) additional protection, exceeding that of ordinary civilians. When the Commission started its work, several members were inclined to the preliminary view that the present protection of journalists in armed conflict was inadequate, and that a new regime of special protection - transcending that of ordinary civilians – might perhaps be called for. The problem with this approach was that a new regime of special protection was contingent on (i) the establishment of a system of mandatory identification of all those entitled to the special protection, as well as (ii) the adoption of a distinct recognizable emblem of protection. Absent a mode of identification and a distinct emblem, there could be insuperable obstacles on the road to special protection, since armed units in the field might fail to recognize journalist for what they were, suspecting persons gathering information near the front-line of being engaged in espionage.

While the 11th Commission was debating these and other issues, it turned out that both the ICRC and INSI (dissociating themselves from the goals of PEC) had come to a firm conclusion that it would be preferable to avoid creating any special regime of protection for journalists beyond the general protection of civilians. The objections of journalists to mandatory identification and to the acceptance of a new emblem were governed by several considerations. Above all, these were : (i) a general reluctance to vest any governmental agency with a “licensing” authority that would determine, in any context, who was and who was not to be deemed a journalist ; (ii) a belief by many journalists that they were deliberately

(rather than accidentally) targeted in armed conflicts as an ultimate form of censorship ; if so, a projected emblem might be counter-productive by attracting fire instead of averting it ; (iii) the sense that those journalists who wished to identify themselves could, even today, carry appropriate signs (e.g., on vehicles) marked clearly with either the word PRESS or the initials TV ; and (iv) the fact that those journalists desirous to obtain official ID were able to do so even under Article 79 of Additional Protocol I.

The fact that journalists did not really opt to go beyond the regime of protection available to all civilians became manifest upon the adoption of Security Council Resolution 1738, which the media had assiduously lobbied for. The Resolution clearly “*Recalls ... that journalists, media professionals and associated personnel engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians and shall be respected and protected as such, provided that they take no action adversely affecting their status as civilians. This is without prejudice to the right of war correspondents accredited to the armed forces to the status of prisoners of war provided for in article 4.A.4 of the Third Geneva Convention*”. Thus, the media sought and obtained a bland resolution, preferring it over a text that might call for the grant of special protection to journalists.

In light of the indications that most journalists were opposed both to mandatory identification and to a new distinct emblem of protection, the 11th Commission ultimately arrived at the unanimous conclusion that there was no real point in attempting to create a special protection regime which the end-users by and large did not welcome. The Commission therefore felt that it would on the whole be better to avoid the adoption of any resolution by the Institut. The Commission thought that it was sufficient to publish the Report, written by the Rapporteur, dealing in detail with all the issues and reflecting in full the replies given by members of the Commission to the original Questionnaire. It was noteworthy that the ICRC too agreed to respond to the Questionnaire, in the same manner as members of the Commission. As the Report will show, the ICRC replies were given with great care and were illuminating. The Rapporteur expressed his gratitude to the ICRC, INSI and the IFJ for their assistance in the work of the Commission. In conclusion, he thanked all the members of the Commission. They had done good work, and if no resolution was forthcoming that was not a reflection on their contributions.

536 Institute of International Law - Session of Naples (2009)

The *President* thanked the Rapporteur.

Mr *Ferrari-Bravo* asked why he had not been mentioned as a Member of the Commission.

The *Rapporteur* answered that he had not been notified early enough of the fact that Mr Ferrari-Bravo and another Member had wished to join the Commission. He sincerely apologized to Mr Ferrari-Bravo, and to the other Member, for the misunderstanding that had ensued.

The *President* indicated that if Mr Ferrari-Bravo were willing to accept the apology, he would be co-opted into the Commission's final work. He indicated that the report was very interesting even if no resolution resulted from the Commission's work.

M. *Lalive* félicite le Rapporteur pour son excellent rapport et soulève une question pratique. Lorsque le Rapporteur fait allusion au fait qu'un blogger individuel pourrait être considéré comme journaliste, que se passe-t-il lorsque surgit un litige dans lequel on mettrait en cause la responsabilité des forces armées d'un Etat qui élimineraient ce blogger se prétendant journaliste ? Il pose la question de la distinction entre le blogger individuel se prétendant journaliste et le *freelance journalist*. Il se demande s'il faut qu'il existe un certain contact ou lien entre le blogger et une agence de presse pour qu'il soit considéré comme journaliste. Si la nécessité d'un tel lien est supprimée ou la définition est étendue de manière excessive, quelle sera la position de l'arbitre ou du juge international dans un tel cas ?

The *Rapporteur* stated that, had the Commission proceeded with substantive work towards the initiation of a special regime of protection for journalists, this would have been a central question to be addressed. In other words, had there been mandatory registration of journalists – as beneficiaries of special protection – the question of who in fact qualified to be recognized as a journalist would have become a major issue. At one point, the Rapporteur explored the possibility of ID cards being issued to journalists not by governmental agencies (an idea that the journalists staunchly rejected) but by the ICRC. However, the ICRC was unwilling to undertake such a sensitive mission, perceiving the pressures that would be brought to bear in order to identify an Internet blogger or a freelancer as entitled to special protection. But, as explained, the 11th Commission never got to the point of seriously stitching together a special regime of protection for journalists. Since at the present time journalists were

simply entitled to the general regime of protection of civilians, and since a blogger and a freelance journalist were civilians, it did not matter whether such persons were considered to be journalists. As long as they were not members of the armed forces and did not directly participate in hostilities, they would enjoy the same protection as ordinary civilians, irrespective of any standing as journalists.

Mr *Lee* welcomed the report and stated that he was not disturbed by the fact that the Institut would not be adopting a resolution on this matter, indicating that this sometimes resulted in a text reflecting a lowest common denominator.

The *Rapporteur* thanked Mr Lee for his words of consolation, suggesting that they might constitute the Commission's epitaph.

M. *Bucher* se prononce pour la consultation de la Fédération internationale des journalistes et soutient que, sur d'autres questions aussi, une Commission doit pouvoir consulter des entités extérieures à l'Institut.

The *President* indicated that one had to be careful not to create through such consultations a *de facto* Member status of the Institut.

Le *Secrétaire général* déclare que chacun est libre en principe de consulter les sources qui lui paraissent les plus appropriées. Mais c'est une autre question que déterminer si une Commission particulière peut, en tant que telle, contacter officiellement un tiers.

Mrs *Bastid-Burdeau* stated that she understood that the Commission faced extremely difficult issues but underlined that even if it was very hard to arrive at a definition of journalist, some extensions to the concept were nonetheless unacceptable. For instance Mrs Bastid-Burdeau did not believe that a blogger was a journalist. Rather a journalist was someone whose professional activity was the gathering and diffusion of information. On this basis, those participating in logistics such as interpreters and drivers were journalists. Second, Mrs Bastid-Burdeau wondered whether in addition to protecting journalists as persons, the activity itself and the information gathered should be protected. This was very important in times of conflict. Finally, Mrs Bastid-Burdeau noted that although the *Rapporteur* stressed that the Conventions provided for accreditation, she was not convinced that these were particularly effective. She concluded by congratulating the Commission for its excellent work.

538 Institute of International Law - Session of Naples (2009)

The *Rapporteur* recalled that the present requirement of accreditation of journalists was limited to “war correspondents”. It was precisely because there was no need for accreditation for other journalists that the Internet blogger could be considered as a journalist. It was a fact of life that many journalists were not willing to seek any accreditation or even official identification. The *Rapporteur* added that, counter-intuitively perhaps, even the media “establishment” was opposed to accreditation and identification of journalists. As for Mrs Bastid-Burdeau’s other point, he agreed. He conceded that most journalists killed in armed conflict were not embedded in military units. The casualties were usually among those journalists who roamed around the conflict zone independently and were killed accidentally because they happened to be in harm’s way. A well-known illustration was that of several journalists killed in Iraq in 2003, in the no man’s land between Coalition and Iraqi forces. It was noteworthy, however, that the prevailing opinion among journalists was that the victims were killed deliberately. This assessment of the incident was symptomatic, even though it was not corroborated by any hard evidence.

Mr *Pocar* stated that as a member of the Commission he would not go into details, as the *Rapporteur*’s report fully covered the Commission’s position. He also expressed agreement with Mr Bucher’s comments and the reply given to them by the Secretary General. The question which remained was whether the report should be published and if so, whether the answers to the questionnaire given by external bodies should be included.

The *Rapporteur* pointed out that the ICRC was an extraordinary institution and could not be equated with a typical NGO. The ICRC had a special and formal status under the Geneva Conventions, and it had a highly skilled and professional staff (not least in the Legal Division). To answer Mr Bucher’s question, the *Rapporteur* was of the view that the advisability and the degree of consultation or collaboration with external bodies should be addressed on a case-by-case basis. Once the Report was published, Members could themselves form an opinion of the high quality of the ICRC replies to the 11th Commission’s Questionnaire. The Questionnaire was not sent, however, to the IFJ and INSI. The reason was that, although they were the potential end-users of the Commission’s work, they (unlike the ICRC) did not have access to the legal resources required to address some of the issues raised in the Questionnaire.

Institut de droit international - Session de Naples (2009) 539

The *President* stated that it was perhaps premature to decide on these matters.

Le *Secrétaire général* rappelle que si le rapporteur a l'obligation de s'informer et de faire rapport à l'Institut, ce dernier est souverain quant à la suite à réserver aux travaux du rapporteur et de la commission. Il n'est toutefois pas possible d'ignorer que la profession journalistique estime peu souhaitable ou peu utile que l'Institut continue en l'espèce de traiter ce sujet.

La séance est levée à 18 h 45.