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Conference on the ICRC updated Commentary on the First Geneva Convention: Capturing 60 years of Practice

SUMMARY

The Belgian Interministerial Commission for Humanitarian Law,
The Belgian Red Cross and
The International Committee of the Red Cross (ICRC)
With the support of the Belgian Society for International Law

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Friday, 29 September 2017
Egmont Palace
Place du Petit Sablon 8 *bis*, 1000 Brussels

I. Welcome and general introduction by Mrs Lieve Pellens, President of the Belgian Interministerial Commission for International Humanitarian Law

The Red Cross Movement is well-known, contrary to the Interministerial Commission for International Humanitarian Law (CIDH in French). The Belgian CIDH was created in 1987 and is therefore one of the oldest national commissions for the implementation of International Humanitarian Law (IHL). The CIDH is a permanent consultative organ for the Belgian federal Government. It is tasked with identifying which measures should be taken for the implementation of IHL and making recommendations to competent authorities towards that goal. It is composed of experts from all departments concerned with the implementation of IHL as well as of representatives of the Belgian Red Cross. Every civil servant in the CIDH speaks as a representative of his/her department but is entitled to share his/her personal analysis since it is an independent commission. The CIDH holds plenary trimestral meetings but mainly works through its six working groups.

Regarding the topic of today's Conference, let me remind that the four 1949 Geneva Conventions and their 1977 Additional Protocols are the foundation of IHL. Their interpretation has considerably evolved since their adoption. The International Committee of the Red Cross (ICRC) and a group of experts have endeavoured to update their commentaries and the first volume resulting from this project is now available. This conference will focus on four topics regarding the new Commentary on the First Geneva Convention: the obligation to 'ensure respect' for the Geneva Conventions; Conflict Classification [international armed conflict (IAC) and non-international armed conflict (NIAC)]; the protection of the wounded and sick in both IAC and NIAC; the implementation of the Geneva Conventions, including Dissemination and Criminal Aspects.

II. The ICRC Commentaries Project: Objectives and Outcomes by Mr Jean-Marie Henckaerts, Head of Commentaries Update Unit, ICRC Legal Division

The Conference aims to discuss the update of the first Commentary on the First Geneva Convention. The Commentary led by Jean Pictet gave more answers on how to interpret and apply the first Convention according to the experiences of the two World Wars. However, after 60 years of new wars and practice of the Geneva Conventions, the writers of the new Commentary thought about the necessity to analyse again these Conventions within the light of the new type of conflicts.

Contrary to the first version, this new Commentary tried to catch all the opinion and practice within the different legal cultures, all around the world. This new Commentary is not to be seen only as the ICRC's point of view on IHL. As a result, the final version of this new Commentary always tried to present the main interpretation on every provision, but also the diverging views.

The writers used an interpretative method based on good faith in the interpretation and understanding of the Convention. They took into account the subsequent practice and other relevant rules of international law. They also tried to respect the special meanings of each term~~s~~. Finally, whereas the *travaux préparatoires* of the Geneva Conventions were the starting point of the previous Commentary, they have been used as the last source within this new version.

As we all know, the ultimate purpose of the First Geneva Convention is the situation of the wounded and sick within armed conflicts. If this subject is still relevant, a new Commentary appeared necessary given the new practice developed in the conduct of hostilities.

In addition, what was interesting and useful in the renewal of the Commentary was that some provisions of the Geneva Convention had no real subsequent practice since their adoption - for instance, conciliation and enquiry procedures. Nevertheless, they had to be understood and applied in the light of the new conflicts. In other instances, very limited practice was found - for instance, auxiliary medical personnel and retention regime. However, in many cases, some new understanding has been found, highly influenced by practice, new case law, treaties, technologies and new perspectives.

That is why the writers truly believe this new Commentary is of an important value in IHL practice. It indicates the ICRC's interpretation, as well as the main diverging views when they exist. Finally, the commentators highlight that if the Commentary contributes to clarify the Geneva Conventions, it does not however give the final word on IHL understanding at all. The ultimate authority of this work, and of the other commentaries that started with the same methods on the other three Geneva Conventions, will depend on their quality.

III. PANEL I : The obligation to 'ensure respect' for the Geneva Conventions

1. Speaker: Mrs Liesbeth Lijnzaad, Ministry of Foreign Affairs of The Netherlands

The new Commentary on the First Geneva Convention draws on relevant practice and developments that have occurred in Public International Law and IHL since the publication of the Pictet Commentary on the First Geneva Convention. The 1952 Commentary discussed Common Article 1 in just four paragraphs, whereas there are 74 paragraphs about this provision in the 2016 Commentary. This is truly one of the provisions where the development of the law between 1952 and 2016 is the most visible. Common Article 1 is the opening shot of the Geneva Convention and has to be setting the tone. The content of this article has to be considered as legally binding. If it were to be just an ideal or a dream, it would have been written as part of the preamble of the Convention, not as its first article.

Common Article 1 states: *"The High Contracting Parties undertake to respect and ensure respect for the present convention in all circumstances"*. There are three elements within this provision: the element of undertaking to respect the Convention; the element to ensure respect of the Convention; and the element of undertaking to do so in all circumstances. The element of undertaking to respect the Convention is presumably the least problematic part: it essentially states *"pacta sunt servanda"*. The difficult element is the obligation to ensure respect. It was already clear in 1952 that the engagement taken up under Article 1 extended to those over whom the High Contracting Parties had authority. The 1952 Commentary also mentioned that any High Contracting Party may and should endeavour to bring back an attitude of respect for the Convention when another High Contracting Party is failing to fulfil its own obligations.

There is at least a consensus on the desirability of such a provision. The question is whether this obligation is just a moral norm or a legal obligation. If it is a legal obligation, at what level would efforts by a High Contracting Party to ensure that another High Contracting Party respects the Conventions satisfy the obligation enshrined in Common Article 1? There is both a positive and a negative aspect to the obligation to ensure respect. The negative aspect implies the obligation not to facilitate or encourage the violation of the law by one's partners. In that regard, there is a presumption of knowledge of how one's partners operates, which is to a certain

extent understandable in joint operations: partners are supposed to know how each other interprets IHL. There is also an active duty - a due diligence obligation, which implies that a State is required to do anything within its power to prevent IHL violations by its partners. Not all agree on that reading of the obligation to "ensure respect" as a positive obligation since it is not very concrete. A number of States have considered that this obligation should not be a legal debate but a policy debate referring to the whole question of the behaviour of others and the quality of their implementation of IHL.

On the "in all circumstances" element, that aspect of Article 1 is nowadays settled. In 1952, it was thought to cover respect in peacetime as much as respect in times of armed conflict. That implies also the applicability of that obligation in situations of NIAC.

2. Commentator: Mr Ola Engdahl, Ministry of Foreign Affairs of Sweden

The obligation provided by Article 1 is of particular importance in multilateral operations. There is an obligation to each Party to the Geneva Conventions to respect it. It follows that this obligation must include the training and education of military forces and an effective disciplinary and judicial system in place for investigation of offenses. Differences in training and education as well as the implementation of IHL in different contributing nations render compliance with IHL in multinational operations as a somewhat daunting task.

Multilateral operations often have a common set of Rules of Engagement (ROE). The duty to "respect and ensure respect" would require a State to carefully review these ROE before committing personnel to the operation. The duty to respect also entails an obligation to not encourage nor assist violations of IHL. This may be of a particular importance in the context of a peace operation, which often provides support to local or governmental forces.

Even though peace operation forces do not take part in a particular armed conflict, their pre-deployment training should include proper IHL instructions if they are drawn into an armed conflict even though these operation forces themselves are not involved in the hostilities. Indeed, reporting IHL violations may also be part of the mandate of peace operations and the troops must be able to identify and report those violations by other parties to an armed conflict.

It should be noted that ineffective ways and means of compliance with IHL may weaken the respect of the local population for personnel involved in a peace operation and jeopardize the whole operation.

IV. PANEL II: Conflict Classification (IAC and NIAC)

1. Speaker: Mr Dapo Akande, Oxford University

Articles 2 and 3 of the Geneva Conventions provide the framework for classifying a conflict. Classification is an important issue, as it will determine which law applies to the situation. Even though differences between the law of IAC and the law of NIAC are shrinking through customary law, they do still exist. That is why it is crucial to determine the classification and thus the applicable law whenever a foreign State uses force against a non-state armed group on the territory of another (the territorial State).

The first question is whether there is any NIAC between the intervening State and the non-state armed group. If the criteria of intensity and organisation established by the ICTY in the *Tadic* case are met, common Article 3 to the Geneva Conventions will apply. Indeed, this provision

does apply to extraterritorial NIACs. Sometimes, the intensity criterion will only be met by aggregating hostilities between the intervening State and the armed group occurring on the territory of different territorial States. There might also be situations where the intensity criterion is simply not met so that there is no NIAC.

The second question is whether there is *also* an IAC between the intervening State and the territorial State as the first is using force on the territory of the latter. In that regard, the new Commentary differs from the previous one. The previous Commentary seems to suggest that there needs to be the involvement of the armed forces of two States. The new Commentary now explains that any use of force on the territory of another State without its consent brings into effect an IAC between the two States, even if the reason for the use of force is to engage a non-State armed group. I share this position. Consent is the key. Whenever the intervening State uses force against the armed group with the territorial State's consent, there will be no IAC. On the contrary, if the territorial State does not consent to the foreign State's intervention, there will be an IAC.

Leaving aside the question of the territorial State's consent, there are at least two situations where it is clear that a transnational armed conflict between a State and a non-State group will be governed by the law of IAC whenever the armed group belongs to or acts on behalf of the territorial State and whenever the intervening State occupies parts of the territorial State's territory. More controversy in this area focuses on the other cases of lack of consent of the territorial State. Indeed, the ICRC's reasoning is that, in the case where there is no consent of the territorial State, the use of force by the foreign State is a use of force *against* the territorial State. This position is not in contradiction with the separation between *jus in bello* and *jus ad bellum* as it makes no judgment about whether this is lawful or unlawful under the *jus ad bellum*.

Three more points should also be emphasized. Firstly, one should not equate the State with its government. Secondly, if the question were whether or not the State using force has affected the governmental infrastructure, it would be difficult to discern what that actually means. Thirdly, to attempt to distinguish between use of force directed at a non-State armed group and use of force which has, as its overall purpose, to influence the government of the State, is to condition the application of IHL on the motivation of the attacking State. This would be problematic.

2. Commentator: Mrs Lone Kjelgaard, Office of Legal Affairs, NATO

NATO Allies came up with several conclusions at the Warsaw Summit. Firstly, they confirm their commitment to ensure that they remain a parallel community of freedoms, peace and security. Secondly, their ability to work together within the Allies and with partners has to be achieved through training, exercises, and development of NATO standards. Legal ability remains of great importance to be able to conduct military operations efficiently and consistently with the *legal obligations of each nation*, which are the key points. However, it is outside NATO's mandate to give an opinion on classification. In any case, it would be difficult to reach a consensus on classification if it would be possible to do so. NATO Allies often have different views on that question. NATO does not talk about the legal classification of conflict but solely about its role. As a military alliance, NATO will only have to facilitate the awareness of what each contributing State can or cannot do. NATO does aim to use the highest common

denominator when it comes to our legal values. In order to do so, it has different tools: rules of engagement (ROE), consultation of national cabinets and political consensus.

Consensus among NATO member States is crucial. NATO Allies consent to all military operations that NATO undertakes. Once consensus is achieved on the principle of the intervention, NATO will develop a concept operation that is approved by the twenty-nine States. Subsequently, NATO will develop the operational plan with the ROE.

Variety of legal challenges exist for NATO Allies, such as the growing influence of the role of human rights law, detention (which is a national responsibility) and hybrid activities. Despite these challenges, NATO member States and partners sometimes set high the bar for themselves and go above what might be legally required. It is essential for NATO that it is seen as acting in accordance with its values and the legitimacy of the operations depends on the appearance to commit to law.

V. Panel III: The protection of the wounded and sick in both IAC and NIAC

1. Speaker: Mr Vaios Koutroulis, Free University of Brussels

After acknowledging the added value of the updated Commentary on Common Article 3, Vaios Koutroulis focused his presentation on four specific points that deserve closer attention. The first one, with which he agrees, deals with the question of Common Article 3's application on a party's own armed forces. The second one, that he disagrees with, is the affirmation by the commentary that the rules on the conduct of hostilities are excluded from the scope of Common Article 3. Finally, he found vague the position taken by the Commentary on the two last points, namely the situation of the necessity of parties' consent for humanitarian activities in NIACs, and the case of the loss of protection by medical transports and units when committing acts harmful to the enemy.

Concerning the first point, the commentary rightly recognises that Common Article 3 is also applicable within a party's own forces since it reflects "elementary considerations of humanity". This position was held by the International Criminal Court in the *Ntaganda* case. According to Vaios Koutroulis, the application of Common Article 3 to actions occurring between members of the same party to an armed conflict is indeed in conformity both with the text of the article and with its object and purpose.

About the second point, the Commentary takes the position that Common Article 3 cannot be the source for specific rules regulating the conduct of hostilities. However, there are two objections to this view. Firstly, the distinction between the conduct of hostilities' regulation and the protection of victims of war's law is a rather formalistic one. Indeed, sometimes one rule can actually be attached to both of them. Secondly, this Commentary's position is in perfect contradiction with the ICRC customary IHL study which suggested the opposite point of view.

Within the third point, the Commentary took the position that only the consent of the party actually controlling the territory is necessary to allow humanitarian activities. Thus even in context of NIAC and if the party in question is the non-state actor. However, it is not certain whether humanitarian actors will find any meaningful guidance in the Commentary since this latter, in its content, reminds the right under international law for the sovereign territorial State to regulate access to its territory. Thus, it is not clear which consent is really required in practice,

if the consent of the non-state actor controlling the territory to access is enough or if the consent of the territorial State is also needed.

Finally, in the last point, the absence of position taken by the Commentary is highlighted on the question of the loss of protection for medical transports and units when committing acts harmful to the enemy. Indeed, both the position of temporary loss of that protection, on one hand, and the position of permanent loss, on the other hand, are equally presented, without one being chosen as preferred by the ICRC. Then, this point risks to be of little help for conflict actors in practice.

2. Commentator: Mr Titus K. Githiora, Kenya School of Government

The updated Commentary of the first Geneva Convention is extremely detailed and useful to face the reality of contemporary NIACs and the training in IHL of all the parties. NIACs are today highly characterized by violations on a large scale, from both state and non-state actors. Lack of respect for IHL and general impunity make civilian populations the first victims of armed conflicts. Thus, Common Article 3 of the Geneva Conventions is the cornerstone of the principle of "human treatment" by stating specific prohibited acts that shall be avoided by all "in all circumstances", even within NIACs. Hence, the updated Commentary highlights that Parties at war remain under not only moral appeals, but essential legal obligations, which must benefit from automatic application to ensure protection of the victims.

VI. Panel IV: Implementation of the Geneva Conventions, including Dissemination and Criminal Aspects – Developments and Novelties

1. Speaker: Mrs Eve La Haye, ICRC

The grave breaches regime, provided for by Article 49 of the first Geneva Convention, remains the cornerstone of the various compliance mechanisms set up by the Geneva Conventions in 1949. This regime is articulated around two main obligations. The first obligation, stated in paragraph 1 of Article 49, is to enact legislation that provides for effective penal sanction, within national law, for serious violations of IHL. The second one, stated in paragraph 2, is the obligation to prosecute or extradite alleged perpetrators.

The first obligation (enacting domestic legislation) is addressed to all State parties and has to be fulfilled without delay, in peace time. There are different options open to States in order to comply with that obligation but a preliminary step will be for them to analyse their existing domestic legal framework in order to assess whether their national legislation already contains the relevant prohibitions and the jurisdictional basis to extend jurisdiction to grave breaches committed by any perpetrators, regardless of their nationality. States have largely been complying with that aspect of the grave breaches regime, especially since the adoption of the ICC Statute that is based on a complementarity principle.

The second obligation is to search for and prosecute or extradite alleged perpetrators. The Geneva Conventions are the first instruments to include an unconditional obligation for States to first prosecute, second to extradite and to include the principle of universal jurisdiction. That second obligation calls for more clarifications.

Firstly, the obligation to prosecute is not an absolute one. Nevertheless, if a State has found sufficient evidence, it cannot decide not to press charges and has to prosecute the case.

Secondly, the principle of universal jurisdiction, provided for in paragraph 2 of Article 49, implies that the obligation to prosecute must be carried out, regardless of the nationality of the alleged offenders. Even though Article 49, paragraph 2 does not require any link with the prosecuting State, practice shows that States have not endowed a literal interpretation of that article and that they have chosen to make prosecutions conditional on the presence, temporary or permanent, of the alleged offender on their territory.

Thirdly, Article 49 does not contain any time frame for the performances of the obligations it states. Nevertheless, it is implicit that States have to act in a reasonable time. Consequently, as soon as a State party realizes that a person who allegedly committed a grave breach is on its territory, its duty is to take action to ensure that the person is found, and, when so warranted, either prosecuted or extradited.

Finally, another important issue that was not touched upon either in the Geneva Conventions or the Pictet Commentary is the one of immunities. The new Commentary has taken into account the developments in that matter and has shed some light on the topic. The ICJ has also dealt with this issue in its *Yerodia* case and has stated that officials enjoy inviolability and full immunity from criminal jurisdictions throughout the duration of their tenure of office, even if they are suspected of having committed international crimes. They can then be prosecuted for private acts, once they left office. Academics and commentators have expressed some critics with regard to some of the ICJ findings in that case.

To conclude, a critical assessment of the grave breaches regime reveals, as stated above, that the vast majority of States have complied with the first obligation and have enacted proper domestic implementing legislation. However, State practice shows that there has been little use of the grave breaches regime, in particular on the basis of universal jurisdiction. Most of the time, priority has been given to States with a direct link to the crime. Some explanatory factors might be the legal, practical and political obstacles that States have come across with, such as the issue of access to victims and witnesses or access to evidence. In order for the system of national repression of grave breaches to function effectively, focus should be put – among other things – on States' mutual assistance with regard to criminal proceeding and on setting up prosecutorial prioritization strategies in order to establish a strategic order in which war crimes and gross human rights violations are investigated and prosecuted at the domestic level.

2. Commentator: Mrs. Laura De Grève, Belgian Red Cross

Firstly codified in the 1906 Geneva Convention, the legal obligation on dissemination of International humanitarian law (IHL) was amplified and specified in article 47 of the First Geneva Convention of 1949 for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. A similar provision on dissemination is included in all four Geneva Conventions of 1949.[1] Also, the Additional Protocols of 1977 and 2005 contain provisions on

[1] Article 47 of GCI; Article 48 of GCII; Article 127(1) of GCIII and Article 144(1) of GCIV.

dissemination.[2] Moreover, this obligation is as well recognized as customary international humanitarian law.[3]

As party to the Geneva Conventions, States bear the main and fundamental responsibility to disseminate IHL. However, States can be assisted by other actors such as the different components of the International Red Cross and Red Crescent Movement:~~,~~ the International Committee of the Red Cross and National Red Cross and Red Crescent Societies. As auxiliaries to their public authorities in the humanitarian field[4], National Societies assist their authorities to disseminate and ensure respect for IHL. Because the expertise in IHL, the privileged relationship with the authorities, the knowledge of the national context and potential needs of main target audience, National Societies can play a key role in this area. National Societies can also play a role in the National IHL Committee, which is the case for the Belgian Red Cross in the Belgian Interministerial Commission for International Humanitarian Law.

According to the provisions found in the four Geneva Conventions, the States are to disseminate the text of the Conventions "as widely as possible in their respective countries". This leaves a certain margin of discretion with respect of the concrete measures to be taken, depending for example on the means available. Several activities can be developed: training, courses, information sessions, bilateral dialogue, incorporation in military handbooks and rules of engagement, public communication. Some examples of means that can be used are books, flyers, role plays, social media etc.

Article 47 of GCI particularly refers to the armed forces and the entire population as target audiences. The study of international humanitarian law by the military is essential. Not only because these actors bear responsibility for its application, they are likely to come into situations in which they benefit from the protection of IHL, for example when they are wounded. Knowledge of the provisions of IHL granting them protection may help prevent violations of the rights secured to them.

The dissemination of IHL to the entire population can contribute to environment conducive to the respect of IHL. Defining the main target audiences amongst the entire population is always evolving, considering the different roles in national contexts. During the last years, National Red Cross and Red Crescent Societies have been focusing on a broad range of groups: from National Societies staff and volunteers, to governments, universities, schools, youth, medical personnel, humanitarian actors, journalists and the general public. Some of these target audiences can be considered to have a multiplication effect in the dissemination and promotion of IHL, as they may indirectly disseminate IHL and/or have an influencing role towards other stakeholders, including the population.

The obligation to disseminate has to be complied with both in time of peace as in time of war. Experience has shown repeatedly, that it is to some extent useless to start talking about IHL

[2] In respectively Article 83 of API; article 19 of APII and article 7 of APIII.

[3] See the ICRC study on customary international humanitarian law in rules 142-143 (published in 2005).

[4] Article 3 of the Statutes of the International Red Cross and Red Crescent Movement.

when an armed conflict has started. At that point in time if is often too far too late, although in many cases there is no alternative than to start the dissemination of IHL. To have a fair chance of being effective, implementation and dissemination must therefore begin before the start of a conflict.

To conclude, it is widely recognized that knowledge of the rules alone will not prevent violations of IHL. Continued development of doctrine, training and materials, continued dialogue between the different actors, as well as other preventive and repressive measures are key factors in shaping the behaviour of actors in armed conflict.

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