

HUMANITY’S COMMON HERITAGE: 2016 INTERNATIONAL COMMITTEE OF THE RED CROSS COMMENTARY ON THE FIRST GENEVA CONVENTION

CONFERENCE ON THE 2016 ICRC COMMENTARY ON THE
FIRST GENEVA CONVENTION

PUBLIC PANEL RAPPORTEUR SESSION

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On September 23, 2016, Canadian Major General Blaise Cathcart, Professor Ryan Goodman,¹ Professor Laurie Blank,² and Professor Dapo Akande³ addressed the 2016 Commentaries on the Geneva Conventions of 1949.

After noting that his comments were his own and not those of the Canadian Government, General Cathcart began by noting that sixty-four years had passed since the previous Commentaries, making it a good time for a fresh look at the Geneva Convention. General Cathcart offered five areas of concern about the new Commentaries, as follows.

First, the methodology used by the International Committee of the Red Cross (ICRC): it was unclear how the ICRC made the threshold determination that the original Commentaries even required updating. While there was extensive consultation during the drafting process, it is still not apparent how the ICRC made the determination of which Commentaries were to be updated and why.

Second, the 2016 Commentaries do not reflect the same concerns that were raised in the peer review process of developing the drafts of the new

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Commentaries, which creates, in General Cathcart's personal opinion, a disconnect between the actual State Party contributions and a disconnect with the views expressed by the peer reviewers. Being more open in how the ICRC arrived at their own findings would be helpful in the future. He noted that the original Commentaries followed shortly after the diplomatic conference that led to the Conventions, which meant the Commentaries were a direct result of hearing from State Parties at the diplomatic conference.

Third, General Cathcart noted a lack of engagement with the State Parties on the part of the ICRC in the updating process. The Commentaries heavily rely upon the concept of State practice, and so the lack of engagement creates an area of concern that needs to be explored. Without formal engagement with the State Parties, the ICRC risks placing too much weight on secondary sources to establish a current snapshot of the current State Parties practice. For example, General Cathcart pointed to the reliance by the ICRC on State military manuals. While that practice has been part of an ongoing dialogue between the State Parties and the ICRC, military manuals may not accurately reflect a State's view on all of the issues, in part because they may be a combination of legal perspectives, operational perspectives from commanders, and policy input from policy makers and politicians. He believes the reliance on items like military manuals highlights the validity of his concerns with the methodology employed by the ICRC in determining what was a State practice. The General believes that making a determination under the Law of Armed Conflict (LOAC) is heavily fact-dependent, so when a State is deciding upon a certain set of facts to make a conclusion, the context of those facts and what those facts actually mean are critical to the final outcome. A virtue of the LOAC is that it attempts to remain agnostic about what States say is happening, in the context of an ongoing conflict where it is clear States are using militaries to fight each other, versus what States actually do, and that does not seem to be reflected in the new Commentaries, according to General Cathcart.

Fourth, the General commented on the over-reliance on Customary International Law (CIL). The Commentaries come to conclusions that are reflections of CIL, when there seems to be insufficient evidence presented of State practice to come to such a conclusion. That was a concern already identified by several States, like the United States, and others in their studies on customary international law. The General feels that the new Commentaries provide a wealth of interpretive guidance to States Parties and LOAC practitioners, but the weakness is where there are poorly supported claims that are made up of the provision of norms that have been made into binding CIL by the new Commentaries. In essence, the General worries about the ICRC relying too heavily on its own views of CIL to come to poorly supported conclusions.

Finally, General Cathcart believes that the ICRC takes an overly expansive view of Article 1, in that it legally requires States Parties to ensure other State Parties or non-State actors are respecting the Conventions in conflicts where the State Party is not a participant. He suggested that a more narrow interpretation would be welcomed. The General recognized that these areas, such as ensuring respect by other State Parties, are contentious, but that perhaps the ICRC was being too aspirational which resulted in some confusion and concern by the States Parties.

Professor Goodman turned to the question of asking what the lifespan of the new Commentaries will be. Professor Goodman felt one of the most important things to consider when reading the new Commentaries is that the 2016 Commentaries marked an axial shift by the ICRC with respect to the application of LOAC, especially to non-international armed conflict. There has been, according to Professor Goodman, a “backwards flip” by the ICRC, in the sense that the ICRC traditionally attempts to find ways in which international humanitarian law (IHL) or LOAC would apply to situations of violence, but in fact there are in the Commentaries two situations in which IHL does not apply. This is likely due in large part to the events surrounding September 11, 2001. Before September 11, many states resisted applying LOAC in dealing with terrorist organizations. This, in part, was because State Parties resisted the idea of legitimizing terrorist organizations by thinking of them as lawful combatants, rather than just armed thugs and criminals. The ICRC and other humanitarian organizations pushed for ratification of the Conventions and for applying a low threshold for LOAC application, so that the most fundamental of human rights could be ensured.

After September 11, the Bush Administration and others used the LOAC and the law of targeting (LOT) in order to more aggressively target terrorist regimes and ensure national security. The ICRC and some of the most respected IHL scholars pushed back, and tried to place stricter limits on what exactly an armed conflict is, resulting in a reversal of positions. This is a concern for Professor Goodman, because, from the perspective of humanitarian organizations, LOAC does a great job in regulating the excessive use of force. But some States will not, in the near future, apply human rights law to extraterritorial operations when targeting foreign terrorist organizations, because their position will be that, even if human rights law were to apply, LOT is not regulated by human rights law because the acting State does not have effective control, which is necessary when targeting an actor with lethal force.

Professor Goodman posed the question, what fills that gap? The United States Supreme Court invalidated United States military commissions on the basis of the application of Common Article 3 to the transnational conflict. With respect to Al Qaeda, fair trial rights are not going to look the same

without Common Article 3. Fair trial rights are a fundamental guarantee under Common Article 3. When thinking of criminality, war crimes only exist if one believes that LOAC applies. Human rights violations do not necessarily come with criminal liability.

With respect to his points already made, Professor Goodman raised two points regarding the 2016 Commentaries. First is the concept of transnational, non-international armed conflicts (NIAC). For example, a conflict between a State and a non-State actor, not confined to the State's territory in the sense of a civil war, but rather conflict extending to anywhere the enemy is located. The U.S. position was that anywhere there is a battle, there is an armed conflict. For example, if Al Qaeda is in Pakistan and the battle goes over into Yemen, there is also an armed conflict in Yemen. The ICRC's position, in the past, was that this would lead to a global battlefield. That would be undesirable because it would create increased danger to civilians; a central aim of international humanitarian law is the protection of non-combatants.

In the 2016 Commentaries, Professor Goodman believes the ICRC compromised: it accepted this concept of a "spill over" conflict, with the condition that the armed conflict "spill over" the border to neighboring states. Professor Goodman's concern is that this represents a backflip from the ICRC's previous view. In a sense, the ICRC is stating that LOAC does not apply transnationally, so it would not necessarily apply in Yemen under the scenario Professor Goodman outlined, unless a neighbor of Yemen started the conflict. Professor Goodman reads the Geneva Conventions as having an extraordinarily low threshold for when to apply LOAC, almost to the point that it is left to the discretion of the States. The only reason there is not a higher threshold is because it is up to States to determine when they are in a conflict with a belligerent, or when to recognize a belligerent. But, according to Professor Goodman, the 2016 Commentaries apply this "level intensity of violence" measurement that may say LOAC does not apply in transnational conflicts. This seems to be the reverse of ICRC's post-September 11 positions, and Professor Goodman believes it is based mainly on policy considerations.

Furthermore, Professor Goodman argues this compromise position is arbitrary and potentially unworkable. What is the real difference between neighboring states and a situation where there is just one state in between? The term "neighboring" is ambiguous. Does a neighbor need to be touching the State, or can there be a State in between the two States involved in conflict?

A related issue for Professor Goodman is the emergence of cyber groups. A State actor may be engaging in cyber attacks against another State very remotely, which would seem to result in a transnational conflict. The 2016

Commentaries do recognize the role of cyber activities, because the Commentaries say that the group causing the conflict could be organized sufficiently in the cyber world to count as an organized armed group. Further, cyber activities alone could be sufficiently violent to trigger protections under the 2016 Commentaries. But, Professor Goodman pointed out, this highlights the arbitrary nature of the compromise position of the 2016 Commentaries, in that a purely cyber group initiating a purely cyber attack with cyber weapons and not physically organized would require to be in a neighboring State. To Professor Goodman, that is an arbitrary and unworkable distinction. The ICRC suggests that such incidents have to be analyzed on a case-by-case basis. Professor Goodman admitted he had a question based upon the relationship between the 2016 Commentaries and recent scholarship suggesting that NIACs are governed by the Conventions regardless of territorial location, which suggests an answer quite different from the position of the 2016 Commentaries.

Professor Goodman also believes Common Article 1 is sweeping in its application in that all State Parties have an obligation to ensure respect for the Conventions in any conflict, regardless of whether that State Party has a connection to the armed conflict, and regardless of the identities of the Parties to the conflict. Professor Goodman worries that this interpretation will undermine the acceptance of the 2016 Commentaries by State Parties because it strays so far from what he believes was the original intent of the Framers of the Conventions in 1949. For example, Professor Goodman noted that it took decades for States to accept the concept that they even had the prerogative to scrutinize the human rights practices of other States. Professor Goodman offered a portion of a speech by a United States officer given immediately prior to the release of the 2016 Commentaries that explicitly refuted such an expansive interpretation that Common Article 1 and he noted that, in 1973, the United States stated, in writing, that Common Article 1 did not require international supervision, but rather that Common Article 1 required States to use their influence to induce respect for the Conventions.

Finally, Professor Goodman noted that the ICRC takes the position that LOAC does not necessarily mean force can be used in a NIAC, which is remarkably in step with the way the Obama Administration, since 2013, has divided up the world in the sense of hostile areas and non-hostile areas. And, Professor Goodman notes, positively, that the ICRC holds that proportionality and collateral damage must be taken into account when using lethal force, and that does not just include civilians but also non-combatant members of a military force, similar to the position of the United States Department of Defense.

Professor Blank began her comments by discussing the relationship between the original Commentaries, with a capital “C,” and the 2016

Commentaries, which she suggests should have a lower case “c.” One major reason for this is that the original Commentaries were written by the same actors who wrote the Geneva Convention. Professor Blank offered an analogy of the Founding Fathers publishing commentaries shortly after writing the Constitution. The writers of the original Commentaries knew certain provisions of the Geneva Convention had been written to combat specific acts within the Second World War, and the original Commentaries were written to address those acts. Professor Blank suggested the 2016 Commentaries may lack this authority, and instead serve the more traditional role as simply “comments” on the Geneva Convention. She believes it is important to keep in mind the goals the provisions were trying to achieve when originally written and how those goals have changed after sixty years of world events. Professor Blank noted that many state actors with varying viewpoints created the original Commentaries, and more have arrived since then, a fact which itself alters how we view the two Commentaries.

One overarching question for Professor Blank is what are the 2016 Commentaries meant to do? The challenge is determining whether the Commentaries are meant to serve as the black letter representation of the boundaries of the Geneva Convention or whether they are meant to represent positions and aspirations of what the law should be. Currently, the 2016 Commentaries seem to fall in between and serve as a resource of information and a tool for attacking issues and offer very detailed analysis, whereas the original Commentaries seem to offer a more broad view of events and not fine details. Because the 2016 Commentaries are so detailed, they can be an amazing resource. However, challenges remain in using the Commentaries because they cannot give us a direct answer for every situation but can only help us consider the issue. Professor Blank offered several questions that, for her, remain: what does consent mean; what if the public is protesting, asking for international help, how is that supposed to be evaluated?

Similar to the challenges in defining civilians from non-civilians, where there was a gap between those two definitions, the 2016 Commentaries have tried to clarify what exactly a Non-International Armed Conflict (NIAC) is and how it is different from an International Armed Conflict (IAC). Yet, in trying to better define these terms, the 2016 Commentaries have created a fragmented definition of each, and perhaps will affect how LOAC is applied. Situations are sure to arise that do not fit neatly into either category but rather fall somewhere in between.

Finally, Professor Blank raised what she considered a point of tension between what appears to be an effort in the 2016 Commentaries to maintain as broad of a concept of conflict as possible, particularly with the idea that perhaps there is an IAC anytime a State uses force against a non-State group in another State, and with what seems to be a careful restriction or approach

as to how and when the rules apply. She noted that most of the debates in crafting the 2016 Commentaries centered on defining this “thing” [NAIC] to which all of the Geneva Conventions would apply, but it [NAIC] is still not armed conflict; at some point, Professor Blank said, the 2016 Commentary authors gave up and decided instead to craft rules to apply when the conflict is not an IAC.

Finally, Professor Akande evaluated some of the differences between the original Commentaries and the 2016 Commentaries. The original Commentaries, in Professor Akande’s view, have been afforded an “unjustifiable” authority, almost synonymous with the black letter law. This is primarily because the Geneva Conventions were enacted within the lifetime of the author of the original Commentaries, giving those authors a unique perspective and deep understanding of the Geneva conventions. The original Commentaries are also more authoritative because they were published shortly after the Geneva Conventions. Thus, the lack of authority within the 2016 Commentaries is not due to the merit of the work but instead the timing of the publication. With each new commentary published, authority will inevitably diminish. The 2016 Commentaries will likely be seen as academic work rather than something akin to black letter law like the original Commentaries.

Professor Akande noted that the work of producing the 2016 Commentaries brings about good questions surrounding general international law and treaty interpretation. The 2016 Commentaries provide good material when thinking about how we view treaties and how those views adapt and change over time. The emphasis actors place on treaty interpretation plays a major role in how to use these Commentaries.

Finally, one area of critique within the 2016 Commentaries is that they do not clearly communicate the changes between the original Commentaries and the 2016 Commentaries consistently. This lack of clear and consistent communication is illustrated through three examples. First is the changing definition of NIAC and Consent. We know Common Article 2 governs between two States in conflict. But what happens if an attack on a non-state actor is perpetuated within a foreign state without that foreign state’s consent, does this create an International Armed Conflict between the State using force and the State in which the force is being exerted (i.e., the United States attacks ISIS within Syria without Syria’s consent)? The original Commentaries seem to suggest, in Professor Akande’s view, that for there to be an IAC there must be the involvement of two armed forces. However, the 2016 Commentaries explicitly states that such an interpretation is too narrow. Second, the changing definition of “occupation” within Common Article 2 is noted in a different way. Before the Fourth Geneva Convention, the 1907 Hague Convention defined occupation as when territory was actually under the control of another. However, under the original Commentaries the definition was changed in a

way that an action as small as a patrol could be considered occupation. In the 2016 Commentaries, the original 1907 Hague definition was not altered, and has re-adopted that definition of occupation. Finally, Professor Akande noted there is a variance in whose consent is necessary for the implementation of humanitarian services within Common Articles 9 and 10 of the Fourth Conventions. Those Common Articles state that the ICRC and other humanitarian organizations can offer their services, but that the "Parties concerned" must consent in order for the organizations to assist. The law does not clearly articulate what "Parties concerned" means. The original Commentaries indicated that the "Parties concerned" must be taken to mean all those upon which the possibility of carrying out the aid would impact. The 2016 Commentaries state that the State through which the aid must pass is not a "Party concerned" as it relates only to this provision.

Professor Akande pointed out that, in the first change between the original Commentaries and the 2016 Commentaries, the 2016 Commentaries explicitly acknowledged that change by reference to the original Commentary and explained why the change was made. However, the second change he noted, that change was indicated, but was done so by footnote. Finally, in the third example, the change was not even referenced, and in fact, there was no indication that there was a change between the original Commentaries and the 2016 Commentaries.

Professor Akande proposed that the ICRC adopt a method in which the Commentaries clearly acknowledge the changes being made between the original and new Commentaries. The new commentaries should give justification for the law being changed. This holds true whether it is acknowledging the original Commentaries were wrong and that the law needed to be changed, or if it is acknowledging that case law has been made or events have conspired that changes the ICRC's interpretation. Regardless of the reason, the Commentaries should acknowledge each change made, offer adequate justification for each, and do so consistently throughout.