

## CONFERENCE ON THE 2016 ICRC COMMENTARY ON THE FIRST GENEVA CONVENTION

### AFTERNOON RAPPORTEUR SESSION THREE

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The session focused on the classification of international armed conflicts (IACs) and non-international armed conflicts (NIACs) and the subtle distinctions in those classifications that can substantially affect the rules of conflict. In particular, the session dealt with the aspect of consent, or lack thereof, of territorial States to allow another state to use force within its territory, and how that quasi-invasion affects conflict classification. In 2016 Commentaries on the Geneva Conventions, the ICRC holds the position that the general rule of conflict classification applies, consent is a critical and dispositive principle, and that international humanitarian law (IHL) is independent of the legality of the use of force and *jus ad bellum*.<sup>1</sup> The panel discussed the implications of giving consent such a weighted position in the determination of conflict classification.

Determining whether a conflict is an IAC or a NIAC matters, for example, when attempting to prosecute people for war crimes and when determining what aid to give combatants and non-combatants while the conflict is ongoing.<sup>2</sup> Different rules apply depending on the classification. If a conflict is classified as an IAC, it will be governed by the first through fourth Geneva Conventions and Additional Protocol 1. If a conflict is classified as a NIAC, it will be governed by Common Article 3, and Additional Protocol 2.

In modern conflicts, it is increasingly common for a State to occupy another State's territory and carry out military operations in that State. These operations are often directed at non-State armed groups who are in a pre-existing NIAC with the territorial State. The most common modern example

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<sup>1</sup> Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (2d ed. 2016), art. 1 [hereinafter 2016 Commentary GWS].

<sup>2</sup> See generally *id.* art. 3.

of this phenomena is ISIS in Syria.<sup>3</sup> During the discussion, the relevance of consent was highlighted with regards to this type of operation. The 2016 Commentaries suggest that the presence or absence of consent is essential for delineating the applicable legal framework between the territorial State and the intervening State. One panelist noted that should the second State's intervention be carried out without the consent of the territorial State, it would amount to an IAC between the intervening State and the territorial State. This is the case even if the intervening State's conduct is not directed at the territorial State's government or infrastructure.

One of the panelists, a specialist on the subject of classification, agrees with the ICRC that the general rule applies in conflict classification. The use of force triggers an IAC, to which the law of armed conflict applies. In discussing classification, the goal of these laws should be remembered, which is to protect civilians and armed forces from harm and to punish unruly forces who may not otherwise be penalized. While most panelists agreed that consent should be considered in determining the status of the relationship between the intervening State and the territorial State, many felt it should not be the sole consideration. Even if affirmative consent of the territorial State is dispositive of the lack of an international armed conflict between the two groups, lack of consent should not similarly be treated as dispositive. Sovereignty, similarly, is incorrectly objected to as a reason why an IAC is triggered when an armed conflict violates a State's sphere of sovereignty; the panelist felt that the invocation of a State's sphere of sovereignty is a correct consideration if we want to understand what it means when two States are in conflict, because a State is its sovereignty.

One panelist stressed the importance of fact-specific conflict classification. They insisted that state practice is missing in the ICRC proposal for conflict classification. Though it is unclear how we should marry the concepts, if you are an outside state, consent matters, as there are sovereignty issues at stake that are highlighted in the 2016 Commentary. To determine if an international armed conflict exists between a territorial State and an intervening State, one could look at whom the intervening State is exercising force against. If the intervening State is using force against the government or the government infrastructure, an international armed conflict then exists between those two States. As another alternative to considering consent alone, one could consider the intent of the intervening state. However, this comes with the additional difficulty of determining intent. Moreover, such an inquiry conflicts with the text and intention of the 2016 Commentary.

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<sup>3</sup> See *Involvement in Armed Conflicts: Syria*, RULAC, <http://www.rulac.org/countries/syria>.

There are a number of practical concerns pointed out by panelists that serve as reasons for diminishing the current role of consent in the 2016 Commentary. The current language creates an odd result in which an IAC is immediately created between an intervening State and a territorial State even if the only actual conflict is occurring between the intervening state and a non-state actor operating in the territory.<sup>4</sup> In such a case there would be an IAC between the territorial State and the intervening state, but, until the requisite level of intensity is met between the intervening state and the non-state actor, no recognized conflict would exist between them. This creates serious gaps in protection.

On the other hand, if consent is not given a controlling role, another serious gap would be created. For example, if a territorial State does not or cannot immediately respond to a use of force on its territory, during the intervening period between the initial use of force and the point at which it responds, there is not an IAC. Politics can, also, be a complicating factor in determining consent. A state can have legitimate reasons for stating one thing publicly, and agreeing to another behind closed doors.

One panelist suggested that too much time was spent on debating the classification of conflict. LOAC should not be concerned with the lawfulness of the conflict, but rather focused on the victims of the conflict. Also, there are other legal frameworks to look to such as domestic State law, human rights law, and those may actually provide more protections than IHL.

One panelist was concerned that consent has different meanings. For example, how do you gain consent to enter territory that is no longer in the State's control? Where a State has lost territory, you still need to ask their consent. An IAC does not have to mean there is aggression; you often have to characterize and classify the situation in different terms. Relatedly, when there is a NIAC, it does not automatically mean there is violation of *jus ad bellum*.

Consent should play a role in determining classifying conflict, though there was not universal agreement as to how controlling consent should be in determining IACs or NIACs. However, it can be difficult to determine whether consent exists. Further, there may be additional considerations relative to the withdrawal or lack of consent as it relates to conflict classification. At least several of the panelists agree that State sovereignty is a proper consideration in conflict classification. Overall, the focus on consent is an attempt to provide a clear standard. The panel agreed that an unclear standard can allow groups to take advantage of a situation and put civilians at risk.

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<sup>4</sup> 2016 Commentary GWS, *supra* note 1, paras. 402–405.