

CONFERENCE ON THE 2016 ICRC COMMENTARY ON THE FIRST GENEVA CONVENTION

AFTERNOON RAPPORTEUR SESSION ONE

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International humanitarian law regulates the conduct of armed conflict and seeks to limit its effect by protecting people who are not participants in the hostilities. The Geneva Conventions and Additional Protocols, serve as the basis for international humanitarian law, calling for measures to be taken to prevent or put an end to all breaches. Commentaries on these Conventions serve as guidance for States' implementation of these Conventions. In 2016, for the first time since 1952, the International Committee of the Red Cross (ICRC) issued Updated Commentaries on the First Convention which gives rise to a series of questions States have to face. At a very basic level, there is a question of what the obligation to ensure respect for the Geneva Conventions means and what the scope of the obligation is.

I. THE DUTY TO ENSURE RESPECT

The 2016 Commentaries on Common Article 1 suggest an expansion of the meaning of ensuring respect from the 1952 Commentaries.¹ The expansion of this obligation has been a point of contention among States. Paragraph 164 demands that States “must take proactive steps to bring violations of the Conventions to an end and to bring an erring party to a conflict back to an attitude of respect for the Conventions.”² Importantly, this language highlights a shift from ensuring respect internally, within the state, to an external obligation regarding other erring parties.

In reference to Common Article I, there has been debate on what “undertake,” “respect,” and “ensure respect” mean. One view suggests that “undertake” imposes a legal obligation on States to make certain other States

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¹ 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].

² *Id.* para 164.

ensure respect for the Geneva Conventions. The United Nations Security Council Resolution 681, in December 1990, was consistent with this view, “call[ing] upon the High Contracting Parties . . . to ensure respect by Israel . . . for its obligations under”³ the Geneva Conventions, thereby assigning an obligation to all States. This obligation reflects the idea of the States’ collective responsibility to ensure respect for the Geneva Conventions, so that when one state invades another, an obligation for the international community arises to take a proactive role of ensuring respect through positive action, not just for those two state actors. Proponents of an expansion argue that a high standard may require States to think of international humanitarian law more concretely.

A contrary view sees “undertake” not as a legal term and understands the obligation to ensure respect only as binding the State in situations where that State is an actor. Under this view, United Nations Security Council resolutions are merely policy pronouncements and not legally binding documents. When enforcement of international humanitarian law is left to a single State actor alone and that State actor does not enforce, it should not follow logically that a State in Continent X should have an obligation to ensure that another State in Continent Y respects the Geneva Conventions. By this view, the 2016 Commentaries are overbroad or simply aspirational.

Another concern States have with the expansive approach of the 2016 Commentaries, is that Additional Protocol II does not mention ensuring respect, leading some States to see this as a game-changing expansion.⁴ States argue that they knew what they were signing up for initially, but this new interpretation changes the deal after the parties have signed. With regard to Grave Breaches, States clearly have an interest, but that does not automatically imply an obligation. Some States previously commented that although no legal obligation to ensure respect existed, those States may have a policy of and an interest in ensuring that other countries respect the Geneva Conventions. In rebuttal, proponents for a legal obligation of ensuring respect find that regardless of whether there is an obligation or a strong policy preference, the end result of ensuring respect for the Geneva Conventions will be the same in practice. Additionally, the purpose of Common Article 3 sets minimum levels of treatment by States, suggesting that states would have to hold other states to that standard.

³ S.C. Res. 681, para. 5, U.N. Doc. S/RES/681 (Dec. 20, 1990).

⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609 (1977).

II. THE SCOPE OF THE DUTY

Interpreting the scope of a State's duty, the ICRC views the States' obligation to ensure respect as an obligation of due diligence.⁵ As noted in the 2016 Commentaries, the obligation depends on many factors, such as the means reasonably available to the state, the degree of influence the state has over the actor committing violations, the foreseeability of the violation, and the knowledge of the violation. But because these factors were recognized in 1952, the ICRC does not interpret them as new. Further, this obligation is a positive one, meaning that States "must take proactive steps to bring violations of the Conventions to an end and to bring an erring Party to a conflict back to an attitude of respect for the Conventions."

Additionally, there is a question of when the duty arises from a territorial perspective. It seems obvious the duty arises within a state's own jurisdiction. The United States, in 1973, wrote to the ICRC that States who were party to Common Article 1 were under a duty within its jurisdiction, but the obligation had limits. The duty can extend to those areas within a State's control relating to another State in violation, but such a duty would only be triggered if the act or actor was within the State's jurisdiction. Thus, other opinions would argue that an obligation is triggered by some threshold of control.

One example raised concerning the scope of duty is a State which sold arms to another State, which then used those arms in a manner which violated the Geneva Conventions. If the selling State knew in advance the weapons were to be used for acts violating the Geneva Conventions, that transfer would constitute an act contrary to ensuring respect. But two of the three largest arms suppliers do not currently have language that prohibits arms transfers to countries on the basis of the Geneva Conventions. Therefore, the ICRC should consider if those state practices were driven or guided by Common Article 1 and provide more guidance because the answer will vary globally.

This type of obligation is further corroborated by the mistranslation of the original French from the 1952 Commentaries stating that every Party, whether neutral, ally, or enemy "should" do everything they could to ensure respect for the Geneva Conventions.⁶ The correct translation was that every Party "must" do what it can to ensure respect.

One example is where a State is accusing another State of intentionally acting in a way that violates the Geneva Conventions. Subject to the Updated

⁵ 2016 Commentary, *supra* note 1, art. 1.

⁶ COMMENTARY: I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 367 (Jean Pictet ed., 1952).

Commentaries, the positive obligation in this case would be to take steps to bring the violation to an end. Due diligence could be to consider who can best influence the violating State, among the other enumerated factors. But another issue arises because the way States fight wars has changed since 1952. Wars are now fought primarily in coalitions and knowledge is transmitted expeditiously. An ally's invasion of another country is on Twitter immediately. Thus, a State could not deny evidence of that kind and may be subject to a positive duty based on a number of factors referenced in Paragraph 165, such as means reasonably available such as foreseeability, the means at their respective disposal, the gravity of the breach, etc.⁷

In regard to the obligations that States actually have, Paragraph 181, titled "Overview of Possible Measures," provides some guidance.⁸ One of the possible measures offered includes sending in a peacekeeping force, which certainly seems to contemplate the use of force. On the other hand, Common Article 1 itself, may not provide the grounds for the use of military force, as the use of military action appears to be omitted, which may be explained by the obligation to ensure respect. The measures offered do not represent a closed list, because the word "possible" indicates that other measures are logically possible and "include" indicates that these possible measures are not exclusive. Nor do the measures constitute a new list, having been used previously and serve as guidelines of specific types of positive action States may take.

⁷ 2016 Commentary, *supra* note 1, para. 165.

⁸ *Id.* para. 181.