Proceedings of the Bruges Colloquium

Same Law, New Wars: The Enduring Relevance of International Humanitarian Law and the Importance of the Updated ICRC Commentaries

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CICR

ICRC Delegation to the EU, NATO and the Kingdom of Belgium

Délégation du CICR auprès de l'UE, de l'OTAN,

et du Royaume de Belgique

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Sous la direction de
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Acronyms / Acronymes

Acronyms in English

API or Additional Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977
APII or Additional Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977
The ICRC Commentaries or the updated Commentaries or the Commentaries	ICRC updated Commentaries on the Geneva Conventions of 1949 and their Additional Protocols
Common Article 1	Article 1 Common to the four Geneva Conventions of 1949
Common Article 3	Article 3 Common to the four Geneva Conventions of 1949
CSDP	Common Security and Defence Policy
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EUTM	European Union Training Mission
EU	European Union
GC or Geneva Conventions	The four Geneva Conventions of 1949
GCIII or Third Geneva Convention	Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949
GCIV or Fourth Geneva Convention	Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949
IAC	International armed conflict
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
IHFFC	International Humanitarian Fact-Finding Commission
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
LOAC	Law of armed conflict
NATO	North Atlantic Treaty Organization

NIAC	Non-international armed conflict
NSAG	Non-state armed group
PoW	Prisoner of war
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
VCLT or Vienna Convention	Vienna Convention on the Law of Treaties

Acronymes en français

Article 1 commun	Article 1 commun aux quatre Conventions de Genève de 1949
Article 3 commun	Article 3 commun aux quatre Conventions de Genève de 1949
CAI	Conflit armé international
CANI	Conflit armé non international
CEDH	Cour européenne des droits de l'homme ou Convention européenne des droits de l'homme
CG ou Conventions de Genève	Conventions de Genève de 1949
CGIII ou troisième Convention de Genève	Convention (III) de Genève relative au traitement des prisonniers de guerre, 12 août 1949.
CGIV ou quatrième Convention de Genève	Convention (IV) de Genève relative à la protection des personnes civiles en temps de guerre, 12 août 1949.
CICR	Comité International de la Croix-Rouge
CIHEF ou IHFFC	Commission internationale humanitaire d'établissement des faits
CIJ	Cour internationale de Justice
Commentaires actualisés ou Commentaires du CICR ou les Commentaires	Commentaires actualisés du CICR sur les Conventions de Genève de 1949 et leurs Protocoles Additionnels
CPI	Cour pénale internationale
DIH	Droit international humanitaire
DIDH	Droit international des droits de l'homme
OTAN	Organisation du Traité de l'Atlantique Nord
PI ou Protocole I ou Protocole additionnel I	Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux, 8 juin 1977
PII ou Protocole II ou Protocole additionnel II	Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés non internationaux, 8 juin 1977
TPIY	Tribunal pénal international pour l'ex-Yougoslavie
UE	Union Européenne

Opening Statements
Discours d'ouverture

Federica Mogherini
Rector of the College of Europe

Ladies and gentlemen,

Welcome to this 22nd edition of the Bruges Colloquium on International Humanitarian Law (IHL), for the first time in a hybrid format, which the College of Europe is proud to co-organize with the International Committee of the Red Cross (ICRC).

The cooperation started in the year 2000 when the first Colloquium on IHL was jointly organized – and since then, even if last year virtually, this is a tradition that we are keeping. Besides this annual event hosted in the College of Europe premises in Bruges, we also offer with the ICRC an introductory workshop on IHL to our students both in Bruges and in Natolin. This course is extremely important for the College and for me personally. It allows our students to include in their curricula IHL elements that are crucial not only for their knowledge but also for the European Union, for which most of them are probably going to work afterwards. This gives an extra element of value to this cooperation, but also in itself as the College is not only an academic institution, it is also a place where we can gather a network of different stakeholders, organizations, professionals and institutions – and provide a forum for discussions as a convener of different networks.

The Colloquium is definitely very high level. I am impressed by the list of speakers we have these two days, on a topic that is going to be extremely relevant. I will leave for later and for someone else to introduce the program in detail. I would only like to welcome you shortly in the College's premises and in Bruges, and share with you, and with friends and colleagues that are following us online, a few words about the College of Europe itself.

The College of Europe is a postgraduate institute welcoming yearly 340 students in Bruges and 130 on its other campus in Natolin in Poland. As an international global academic institution,

the College gathers more than 50 nationalities among students, faculty and staff. Its statutes contain the clear mission to contribute to the integration of the European continent. The College of Europe was founded before the European Union itself and has always been – over more than seven decades – the place where the European leadership is formed. It is not only a leadership engine, it is also the place where the future of Europe and the European integration tries to take shape. It is a center of excellence for European studies – but with a global background. Aside to the academic activities, the Development Office is offering executive education and training and running projects on all the issues related to the European Union and the European integration, on very different fields from railways to IHL.

Having served the European institutions for five years, I personally believe that being the Rector of the College of Europe is the best way to give back something to the new generation, try to share what I have learned but also to learn from the younger generations, their ideas, their enthusiasm and also their criticism on the European project.

In my previous capacities, I have worked closely with the ICRC on different IHL related topics that will be addressed during the Colloquium, notably the protection of prisoners, that was most relevant in the Syrian context.

You are going to touch upon very fascinating and very difficult topics these couple of days. Having gone through the list of speakers and the program, I am one hundred per cent sure that you will do this in the best possible hands and with a very interesting mix and blend of different backgrounds. This is the nature of the work that the College has established for 22 years now in cooperation with the ICRC. This is also very much in line with the nature of the College, trying to network people with different views, ideas and approaches.

I wish you all a very interesting but also enjoyable and if possible pleasant stay in the beautiful city of Bruges. It is a pleasure for me to welcome you again here in person and it is really an honor and a privilege to host again this 22nd edition of the Colloquium.

Thank you very much, welcome and all the best for these two days of fruitful work.

Gilles Carbonnier
Vice-President, ICRC

Madam Rector of the College of Europe Federica Mogherini, Excellencies, distinguished panelists and participants, dear colleagues,

Every generation likes to think that it is experiencing the worst of times. Our generation marked by the ongoing COVID-19 pandemic is no exception.

For people in situations of armed conflicts, such as nowadays in parts of Yemen, Ethiopia or the DRC, the worst of times accrues from the sheer human costs of contemporary warfare – often protracted conflicts with chronic and terribly violent cycles.

Beyond the loss of life and injuries resulting in life-long disability, protracted wars destroy entire social systems, critical infrastructure and markets. The humanitarian consequences are immense. And one of the root causes is that parties to armed conflicts repeatedly flout the most basic rules of international humanitarian law.

Today more than ever, the universally ratified Geneva Conventions of 1949 are and remain the reference point protecting our common humanity in armed conflicts.

The Conventions set clear limits to exercise of violence. They offer essential protection to the wounded, sick, shipwrecked, war prisoners and, very importantly, to civilians. They contain globally agreed parameters as to what is acceptable and what is not, on the battlefield and beyond. They have proven crucial for ensuring protection in times of war. They have also exerted a profound influence on the development of national military doctrine, policies and procedures, as well as on military training curricula and programs. Every day, our delegates in the field witness countless instances of armed actors who adapt their decisions and behavior consistent with IHL: for example a wounded soldier of the opposing side who is granted safe passage at a checkpoint, or a decision not to use heavy explosives in a densely populated city centre. For many armed actors, respect for IHL is a matter of professional ethos and identity. It is part of their core values.

The International Committee of the Red Cross (ICRC) was instrumental in the adoption of the Geneva Conventions in 1949, which marked one of the greatest humanitarian legal achievements of the 20th century. To this day, it forms the bedrock of IHL and is an essential part of our common heritage as humanity.

Ladies and gentlemen, the Geneva Conventions are not just some historical documents born of another time. They remain of burning relevance in today's fast evolving warfare. We need to ensure their protective potential is recognized and acted upon by all.

During my visits to conflict-affected countries and communities, be it in Colombia, Iraq, Libya and Niger, I have witnessed not only the relevance, but also the urgency for these rules to be respected; to be translated into practice in the midst of hostilities. This begs many questions in practice: How can the wounded and sick be collected and cared for? How can the medical mission be better protected? What standard of medical care is required for the treatment of the wounded and sick? In dealing with prisoners of war, for example, how does the interpretation of the relevant Conventions' provisions take account of changes in understanding of medical ethics and the protection of personal data? And how do advances in our understanding of key concerns such as gender-based violence, or mental health and psycho-social support, influence how the Conventions' provisions are implemented in relation to people's needs?

Such complex questions raise both legal and operational issues. In this context, the Commentaries on the Geneva Conventions offer invaluable guidance and insights on how words can – and should – turn into action.

The first editions of these Commentaries, written in the 1950s, have been useful for military and civil practitioners as well as for judges and academics. However, both the factual and legal landscapes have evolved since then.

Over the last six decades, the ICRC has gained a huge experience in applying and interpreting the Conventions in contexts that differ from those which led to their adoption. Advances in technology, for example, have influenced how States carry out their obligations. Just think of satellites and unmanned aerial platforms used to assess the number and location of wounded, sick and shipwrecked at sea, or to databases ensuring the record-keeping of prisoners of wars' details.

This is why we felt it was time to update the existing commentaries, taking into account those legal and factual developments that might affect the interpretation of the Conventions. I believe that the new Commentaries are a practical tool that provides accurate interpretations of the rules, based on a comprehensive review of State practice, case law, and ICRC experience.

Indeed, the project to update the Geneva Conventions Commentaries aims to reflect current practices and provide up-to-date legal interpretations. Following the release of the updated Commentaries on the First and Second Geneva Conventions in 2016 and 2017, the publication

of the updated Commentary on the Third Geneva Convention is the most recent milestone of this ambitious project.

We, at the ICRC, find ourselves in a somewhat unique position to oversee the preparation of these Commentaries, combining legal, policy and operational perspectives. But while the ICRC might be a 'Guardian 2.0' of the Geneva Conventions, we do not own IHL and are not the only one to interpret it. IHL – which is essentially a balance between military necessity and the imperative of people's protection – has entered the public space. Discussions on the law – and on violations thereof – have become much more frequent in the public arena over the past half-century, involving people well beyond experts and professionals. We see it as our duty to guide and frame these different discussions in the public space. To this end again, the Commentaries are essential.

Because discourse influences perception, it is our duty to remind everyone – from parties to a conflict to the general public – what the law says and how straight-forward or complex its interpretation is.

The Geneva Conventions are living instruments. We thus need to make sure that the law remains relevant, by ensuring that our interpretations are up-to-date, applicable and applied in today's armed conflict.

The Commentaries provide snapshots of our current understanding of the law. They put forward up-to-date interpretations, and indicate where there are divergent views. They are not to be regarded as the final word. Rather, they offer a basis for further conversations about the implementation, clarification and development of IHL in the future, as practice and interpretations continue to evolve over time.

Colleagues, the Bruges Colloquium provides a unique forum to address such challenging topics. From the protection of civilians to the scope of application of the Conventions, from the growing importance of common Article 3 to the relationship between IHL and other areas of international law, the Colloquium allows engaging on the most pressing issues of our times. Many of those were not reflected in the first edition of the Commentaries, such as sexual and gender-based violence, non-refoulement, or new technologies giving rise to new means and methods of warfare.

I have no doubt that your discussions over the next two days will be highly stimulating, helping to bring the new Commentaries to the attention of IHL scholars and practitioners.

I wish you all a productive and enjoyable Colloquium.

Knut Dörmann
Head of Delegation, ICRC Brussels

Madam the Rector of the College of Europe, dear panelists, dear participants, dear colleagues, dear friends,

It is an enormous pleasure for me to be here and to welcome you as the Head of the Delegation of the ICRC to the European Union (EU), the North Atlantic Treaty Organization (NATO) and the Kingdom of Belgium in this venue of the College of Europe. It is also a great delight to do it again with the presence of the audience in the room, after the online version that we held last year, and to see so many friends from before that we recognize despite wearing masks. That is already quite an achievement and I am very happy that we can have this moment together. As a consequence, in addition to the exchanges on substance through the panels, we will hopefully have again the opportunity during breaks to exchange and reinforce ties that have been established over many years. Unfortunately, this is not quite possible for the colleagues that can only join us online, but we are certainly looking forward to having larger audiences once again in the coming years to allow further connecting through this Colloquium.

Allow me first to reciprocate the words of the Rector about the collaboration we appreciate so much with the College. As previously mentioned, it is a collaboration that has been taking place for many years now, and it covers not only the Colloquium but also other activities. It is something that we value enormously and even the difficult times with Covid-19 do not stop us.

Let me just share a few thoughts at the outset with regard to the program and complement certain ideas that our Vice-President just expressed in his recorded address. This edition of the Colloquium is devoted to the enduring relevance of IHL and to Jean Pictet's heritage, enshrined in the Commentaries on the Geneva Conventions. The discussions in this Colloquium will therefore directly support the endeavors of States, the ICRC and other custodians of IHL to improve the understanding of the law and help generate respect for IHL in an ever-changing world. As the Conventions and their Protocols are living instruments, the content of their provisions needs to be operationalized and, therefore, interpreted in light of contemporary circumstances. The original ICRC Commentary on the four 1949 Geneva Conventions, edited by Jean Pictet between 1952 and 1960, were based on the negotiating history of these treaties and on the practices of the time. Times have changed, and the moment had come for the ICRC, in its role as guardian of IHL, to update these seminal publications.

While the battlefield has changed and conflicts have evolved, the Geneva Conventions remain, in the ICRC's view, as relevant today as they were in the time of their adoption in 1949. They

remain the solid foundation and the key reference for the protection of victims of armed conflict. This is not just because they have reached universal acceptance – something, as you all would agree, is probably quite difficult in today's world. Despite their "old age", they indeed can be interpreted to capture new realities of warfare, including those brought by new technological developments. For the ICRC, the continued relevance of these provisions is crucial, as it allows us to carry out our humanitarian mandate for the protection of and assistance to persons in need during armed conflicts, a mandate that has its foundations in the Geneva Conventions.

In the many contexts in which the ICRC operates, despite the fact that the rules of IHL are too often violated, we witness their positive impact on the lives and dignity of persons in armed conflicts. Our Vice-President alluded to it with some telling examples. At the same time, we observe that the lack of understanding and integration of the law jeopardize its respect. We also witness the challenges that arise in the interpretation and application of IHL in times of rather complex contemporary conflict situations. How to interpret the notion of armed conflict in common article 2 of the Geneva Conventions when nobody fights wars alone anymore and when multinational, partnered operations and support to fighting parties are the norm in the 21st century? How to bring a gender-sensitive approach to the interpretation of the obligations enshrined in the 3rd Geneva Convention when armed forces increasingly include men and women? How to protect the civilian populations when wars are fought in densely populated areas and when the lines are blurred between friends and foes?

We will be addressing these salient legal topics and many others today and tomorrow during the discussions. These topics are relevant for the ICRC operations in the more than 80 countries where we are active. These legal questions are grounded in our observations in the field. Our endeavor throughout the discussions during this Colloquium is therefore to make the connection between the norms and the battlefield realities that the ICRC is witnessing every day.

To lead us in this journey, we are pleased to welcome distinguished speakers and renowned experts. To start the substantive deliberations, we will have keynote speakers who will share their thoughts on how the Commentaries can assist them at EU, NATO and State level, in their daily task to interpret and apply the IHL.

This afternoon, the first session will focus on the Common Articles of the Geneva Conventions and address critical matters, such as how to classify a conflict situation when force is used on the territory of a third State without the consent of that State. We will have perspectives on State responsibility when States indirectly occupy territory through proxies and the content of

the principle of non-refoulement as it relates to protected persons, including how to apply it in situations of non-international armed conflict under Common Article 3.

Our second session today will then dive into the crucial aspects addressed in the recently released updated ICRC Commentary on the Third Geneva Convention. The panel will discuss the main protections which the Third Convention affords prisoners of war. Panelists will also consider its importance in a world where most armed conflicts are not of an international character and in which the concept of prisoners or war does not apply. It will look at atypical detention authorities – among others proxy armed groups and resistance movements – and the evolution of detention modalities in a connected world.

Tomorrow, the third and fourth sessions will tackle critical issues that will be addressed in the updated Commentary on the Fourth Geneva Convention. We will devote one panel to topical issues related the interplay of international humanitarian law and international human rights law, notably looking at the norms governing the use of force, the right to privacy in occupied territories and the deprivation of liberty under the Fourth Geneva Convention.

In the final session, the panel of experts will consider and discuss a range of issues pertinent to the updated Commentary on the Fourth Convention that were submitted by the participants of the Colloquium, including the application of the Fourth Convention in relation to urban, protracted and hybrid conflicts, as well as proxy wars and the protection of civilians.

All these topics and many others are not just priorities for the legal work of the ICRC. Just looking at this year's list of registered participants, this interest seems to be shared by a wide audience. More than 500 participants registered, coming from more than 40 different countries. We have no doubt – and this is my personal hope, that this large attendance and its diversity will lead to fruitful exchanges of views characterized by openness and willingness to share and to learn. There may be issues on which we do not fully concur. But there is no issue where we are not committed to listen and discuss. We therefore encourage you to take the floor, ask questions via the chat box, and make the most of this forum of exchange: make it your Colloquium and a space for dialogue.

For the first time, the Colloquium is held in a hybrid format, allowing both in person and online participation. For this reason and to improve the experience of online participation, sessions have been shortened and more breaks included. During Q&A sessions, participants in the room will be able to take the floor while the dedicated chat box will be open to online participants. Finally, after the positive feedback we received on last-year's fully online edition, we decided to continue offering Russian translation of this event. We hope that these features

will make this Colloquium as stimulating for those who can be present with us today in the room as for those connected online.

Dear colleagues, we are about to start our one-and-a-half-day journey, leading us from technical discussions to practical implications of the application of IHL in contemporary conflicts. The debates we are about to have should be stimulating from an intellectual point of view, but also useful from an operational perspective. Let's not forget indeed the critical importance of the continuous adequacy of the legal norms reconciling humanity and military necessity in modern armed conflicts. For this ideal to translate into actions, the interpretation and application of the law must remain realistic and practicable. Because behind these rules and principles lies the protection of those who do not take part or do no longer take part in hostilities.

On this note, I am pleased to declare the 2.0 version of this Bruges Colloquium open to discuss the 2.0 version of the Commentaries on the Geneva Conventions.

Thank you very much for your attention and I very much hope that we will have a pleasant time together and fruitful discussions.

Keynote Speeches
The Updated Commentaries and their Relevance in Practice
Discours inauguraux
Les Commentaires actualisés et leur pertinence dans la pratique

Chaired by Knut Dörmann
ICRC Brussels

THE PROJECT TO UPDATE THE COMMENTARIES ON THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOLS
LE PROJET D'ACTUALISATION DES COMMENTAIRES DES CONVENTIONS DE GENÈVE ET DE LEURS PROTOCOLES ADDITIONNELS

Jean-Marie Henckaerts
ICRC

Résumé

Jean-Marie Henckaerts est conseiller juridique à la Division juridique du CICR et chef du projet de mise à jour des Commentaires des Conventions de Genève de 1949 et de leurs Protocoles additionnels de 1977. Sa présentation rappelle le lancement récent du Commentaire actualisé de la Troisième Convention de Genève relative au traitement des prisonniers de guerre et expose le projet d'actualisation des Commentaires. Jean-Marie Henckaerts revient notamment sur la nature des Commentaires, les raisons ayant motivé le projet d'actualisation, ainsi que la méthode suivie et la manière dont le projet a été entrepris. Il conclut sur l'objectif des Commentaires, qui est de proposer un outil pratique permettant aux praticiens et universitaires d'accéder facilement à une synthèse de tous les éléments pertinents alimentant les interprétations actualisées des Conventions.

Thank you very much Dr. Dörmann and thank you very much to the organizers, my colleagues, for putting this amazing Colloquium together. I am very happy and pleased to be here today to celebrate in person the launch of the Updated Commentary on the Third Geneva Convention. This Commentary was launched online last year but it has been published in print recently.

That is also one of the reasons for this Colloquium to focus on the Updated Commentary on the Geneva Conventions.

In my presentation, I will focus on the what, the why and the how of the Updated Commentaries.

What are we speaking about?

We are speaking about the Geneva Conventions, and more specifically about their Commentaries. These Commentaries are a specific *genre* of legal literature. We all are familiar with monographs, law review articles, legal handbooks and so on. Commentaries are a specific *genre* of legal writing that provide commentary article by article, which means detailed explanations and interpretations of the different elements of each provision. You also find commentaries in national systems, commentaries on national laws. Many of you are familiar with this concept of a commentary.

These Commentaries are used like a dictionary or an encyclopedia, namely a resource you consult when you deal with specific issues. They are not like a monograph on one topic, they are not like a handbook, they are more like a dictionary or an encyclopedia to be consulted when you have questions about a specific treaty provision or a specific article of international law.

The target audience of Commentaries on international law include practitioners, and more specifically military legal advisors for the Commentaries on the Geneva Conventions; legal advisors in other ministries like ministries of foreign affairs or in attorney general's offices; national IHL Committees which are involved with the implementation and application of IHL in their national systems; the Red Cross and Red Crescent Movement which on a daily basis in all countries in the world is involved in applying, interpreting and disseminating IHL; NGOs working in this area; judges and staff at national and international courts and tribunals and academics and students who work on disseminating and interpreting and explaining the meaning of IHL.

The Updated Commentaries reflect ICRC interpretations where they exist, but also main diverging views. This is a difference with the original Commentaries which tended to reflect only ICRC interpretations. In the 1950s there were probably fewer diverging views because States had just agreed on the Conventions. But 70 years later many issues have arisen in practice, and divergencies of view have come into existence on the interpretation and application of certain rules. This is not a weakness of the Geneva Conventions; it is normal that over time divergencies of view arise. Sometimes these end up before a court, an international court maybe, that can decide how a rule should be interpreted and set a precedent to be followed.

But other times, issues remain unclear, unsettled or disputed and the Commentaries note this in a transparent manner.

Finally, it is important to stress that the Commentaries are not binding. It is the Geneva Conventions that are binding, and they are binding on the 196 States Parties that have ratified them. The Commentaries are tools to assist in the exercise of interpreting the Geneva Conventions.

Why did the ICRC undertake this update?

The original Commentaries date from the 1950s. Today we are in 2021, and the old Commentaries were outdated and were also incomplete. The drafters of the original Commentaries did not have the benefit of the developments in law and practice that happened in the past 70 years, of insights that we now have about how the Conventions have been applied, new issues that have arisen in the past decades and also decisions of international courts and tribunals that have greatly influenced and often clarified our understanding of the Geneva Conventions. Just think about the contribution of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the clarifications it has provided, decades after the Conventions were adopted, for example about the definition of an international and non-international armed conflict. The old Commentaries still refer to telegrams as the fastest means of communication. They also look at disability issues from a purely medical perspective whereas today disabilities are looked at more from a social perspective. And they refer, unfortunately as a sign of their time, to women as "the weaker sex". The need for an update was self-evident in light of these and many other developments.

How have the Commentaries been updated?

We apply the methodology of the Vienna Convention on the Law of Treaties (VCLT), Articles 31 to 32. These articles contain a full-course menu of elements that have to be taken into account. The interpreter has to tick all the boxes on this menu; it is not a pick and choose menu. When you interpret a treaty provision you do not pick one of these methods, it is one method combining all these elements. They include good faith; the ordinary meaning of the text in context; the object and purpose of the treaty; subsequent practice; other relevant rules of international law; and supplementary elements of interpretation, including the preparatory work.

The ordinary meaning of the text is an important starting point to look at the literary interpretation of these words. For example, in Article 71 of the Third Geneva Convention cards mean postcards, and letters are letters on paper.

The next element requires to take into account the object and purpose of the treaty and reflects the teleological interpretation. In this light, postcards and letters can be interpreted and have been interpreted as including modern means of communication, such as email, going beyond the literal meaning of these terms. But the Vienna Convention does not prefer literal over teleological interpretation; it does not favor one method or the other, but presents a mix of both.

As mentioned, the interpretation has to tick all the boxes and therefore also has to take into account subsequent practice. This element of interpretation is one of the reasons why the ICRC embarked on the project to update the Commentaries. This is precisely one of the elements of interpretation that was not available at the time the original Commentaries where written (in the 1950s) because the Conventions had been adopted only recently at that time. With regard to subsequent practice, the International Law Commission (ILC) has recently issued guidance on the meaning of subsequent practice. Under Article 31, subsequent practice refers to the practice establishing the agreement of all parties to a treaty. That is a very high standard that is often difficult to meet when dealing with the Geneva Conventions which are universally ratified, with 196 States Parties. It is difficult to find that kind of subsequent practice. Sometimes it can be established through the practice of some States and silence or acquiescence of other States, but that is not to be concluded lightly. Fortunately, the ILC has also clarified in its report that subsequent practice which does not meet that threshold can still be taken into account in the interpretation of treaties as a supplementary means of interpretation. That is the type of practice that we find very often in the field of IHL, for example practices established in a number of military manuals, giving examples of best practices of how provisions can be implemented, such as those on correspondence of prisoners of war through modern means of communication, such as email, as mentioned before. Another example are the technologies for the identification of persons for which the Geneva Conventions refer to the technology of their time which was fingerprints. Today of course there are other methods of identification, including biometric methods of identification and those are also referred to in practice and can be said to comply with the wording, the object and purpose of the specific provisions. Or for example, the element that has been mentioned before, the diversity and gender perspective that we try to look at in the interpretation of the Geneva Conventions. That means the impact of the application of the rules on men and women, boys and girls. This lens is not only relevant for those few provisions that specifically address the protection of women or the protection of children, but it is actually relevant for all the provisions in the Conventions. So, we have tried to apply this gender perspective throughout the interpretation, and we have also tried to provide examples of practices where this has been applied, for example by the appointment of gender advisors in certain armed forces. By presenting these interpretations, we tick all the

boxes in looking at the literal meaning of the words, but also at the object and purpose of the Conventions and at subsequent practice, showing these examples of interpretation.

I want to emphasize that there are two types of subsequent practice and that we do not mix them up. We are fully aware that most of the time the subsequent practice we refer to is a supplementary means of interpretation because we do not have available the practice that establishes the agreement of all 196 Parties to the Geneva Conventions. For a bilateral treaty or a multilateral treaty with three to five States Parties, that kind of practice might very well exist. But for multilateral IHL treaties, and in particular the Geneva Conventions, this is rather rare and therefore the subsequent practice we refer to is most often of the kind that is applying under Article 32 of the VCLT, as a supplementary means of interpretation.

The next element on the menu is "other relevant rules of international law". This means that treaties have to be interpreted in the framework of the international legal landscape that applies at the time of the interpretation. Here too, there have been numerous developments in international law since 1949, including in IHL with the adoption of the Additional Protocols but also in other fields like human rights law, for example the Convention against Torture which influences the definition of torture, or international criminal law with the adoption of the International Criminal Court (ICC) Statute and the elements of crimes, which has influenced the interpretation of certain concepts of IHL, even though we have to remain aware of the possible differences between IHL and international criminal law.

Other examples that are relevant for the Third Geneva Convention, include the protection of persons with disabilities with the adoption of the Convention on the Rights of Persons with Disabilities (CRPD) that enshrines a social approach to disability rather than a purely medical approach which was still the leading approach at the time the Geneva Conventions were adopted. Another famous example is prisoners of war's access to tobacco and the adoption of the World Health Organization's Framework Convention for the Tobacco Control. For States Parties to this Framework Convention, this Convention may be relevant in how they would apply the Third Geneva Convention in this regard. Another example is privacy and data protection, for example the General Data Protection Regulation (GRPD). This is relevant because the Third Geneva Convention contains several provisions dealing with the collection and processing of data from combatants who are captured, first during questioning (Art. 17), later on when they arrive in a prisoners of war (PoWs) camp when they have to register their details (Art. 70), and when they communicate with their families (Art. 71) or when they die in captivity (Art. 120). Their personal information has to be shared with the national information bureau (Art. 122), which has to share it with the Central Training Agency of the ICRC (Art. 123), to make sure that families are informed of the fate and whereabout of their loved ones and that they

do not go missing. This involves a lot of data collection and processing which today is subject to these rules that have to be taken into account. In this regard, there is no conflict as such between the rules on data protection and the Geneva Conventions if they are applied correctly. With respect to PoWs, for example, the Third Geneva Convention provides a legal basis for this data collection and processing and there is a legitimate ground to do so, namely to make sure that persons do not go missing. These examples show some important changes that have occurred in law and practice since the 1950s and the writing of the Pictet Commentaries

Next on the menu are supplementary means of interpretation under Article 32 VCLT. First among these is the preparatory work (or *travaux préparatoires* in French), i.e. all the records of negotiations and conferences that show how the articles were negotiated, which concerns were discussed by whom and why the articles were ultimately worded the way they were. For the Geneva Conventions this process started formally in 1946 with a preliminary conference of National Societies, followed in 1947 by a meeting of governmental experts, in 1948 the Stockholm Red Cross Conference and ultimately the diplomatic conference that adopted the Conventions in 1949. Many of the authors of the initial Commentaries were present in those meetings and when they wrote their Commentaries they took these elements as a very important basis, including also the prior practice which was mainly that of the World War II. The application of the VCLT shows that looking at the preparatory work is not part of the general rule of interpretation (under Art. 31 VCLT), but a supplementary means of interpretation (under Art. 32 VCLT). In the framework of our work to update the Commentaries, we still look at the preparatory work to fully understand the background and the context of the negotiations of the specific provisions. Nevertheless, beyond this, we now have access to the subsequent practice that took place in the decades after the adoption of the Geneva Conventions and the other relevant rules that developed since then.

Other supplementary means of interpretation include international judicial decisions (for example decisions from the ICJ, ICTY or ICC) and "the teachings of the most highly qualified publicists of the various nations". According to the Statute of the International Court of Justice (ICJ) (Art. 38), these "teachings" or publications are a subsidiary means for the *determination* of rules of international law and so they can also serve as supplementary means for the *interpretation* of rules of international law, including when they report on state practice. This includes, for example, books that analyze the legal aspects of the Eritrea-Ethiopia conflict which was one of the recent international armed conflicts where large numbers of prisoners of war were taken and so it is interesting to see how the Geneva Conventions were applied in that context. In the wake of that conflict the Eritrea-Ethiopia Claims Commission, an arbitral tribunal was set up that issued awards, including for claims from Eritrea on the treatment of

its prisoners of war by Ethiopia and vice versa. These awards have also been used as supplementary means of interpretation in the Updated Commentary on the Third Geneva Convention.

Process to update the Commentaries

We applied the VCLT methodology in practice by doing research, including into the various sources of subsequent practice, other relevant rules of international law and supplementary means of interpretation. On that basis, we drafted the Updated Commentaries which were submitted to an Editorial Committee, and then to a large group of Peer Reviewers. These are experts, both academics and practitioners, from around the world who review the drafts in their personal capacity. We examine their views and comments, and we discuss them with the Editorial Committee before we finalize and publish the Updated Commentaries. It is quite a long process and we try to make sure that we take all views into account. The Peer Review process has been particularly important to alert to us to diverging views, to local or regional perspectives, to publications or case law that we may have missed. Today, we have completed three of the six Commentaries in total to be updated, namely on the four Geneva Conventions of 1949 and on their Additional Protocols I and II of 1977. The Additional Protocols I and II are more recent than the Geneva Conventions but there have also been many developments in the area of the Additional Protocols. The project does not cover the Commentary on Additional Protocol III because that one is even more recent and there has been more limited practice in its application. But at some point in the future, that Commentary may also need to be updated.

We are now working on updating the Commentary on the Fourth Geneva Convention which is planned to be published in 2024. The year that will coincide with the 75th anniversary of the Geneva Conventions. So hopefully by that time we will have been able to update the Commentaries on the four Geneva Conventions, which is a difficult task because it has not been done in the past sixty years have passed, many developments have taken place, and the research, collection and summary of all the materials is an arduous task.

In addition to this research, and collecting all this material and condensing it in as short as possible space so that it remains accessible and readable for the practitioners, we also go through these various steps of review, which are time-consuming but very useful and necessary to reach the result that we want to have: a clear and concise a commentary as possible that will serve as a practical tool for the target audiences that were mentioned before.

Conclusions

In conclusion, the Commentaries reflect the idea that interpretation has to take place in the moment of application and in the current legal landscape. That is also the idea behind the title

of this colloquium: that the old laws have to be applied to new wars and we have to interpret the Conventions in light of developments in law and practice. That means that in 2021 we have to apply the law as it is in 2021 and not as it was in 1949 or in the 1950ies when the original Commentaries were published. It is a constant challenge for practitioners, judges and everyone working with IHL to interpret the law in light of the current situation. Therefore, the purpose of these Commentaries is to be a practical tool that provides easy access to summaries of all relevant elements that inform up-to-date interpretations of the Conventions. They allow anyone to find out what the ICRC's interpretations of the Conventions entail, as well as the main diverging views. In that sense the Commentaries are meant to help practitioners and academics with their work. I recommend their use in that sense and with that spirit in mind.

Thank you.

THE RELEVANCE OF THE UPDATED COMMENTARIES IN EU'S WORK AND POLICY

LA PERTINENCE DES COMMENTAIRES ACTUALISÉS DANS LE TRAVAIL ET LA POLITIQUE DE L'UE

Eamon Gilmore
EU Special Representative on Human Rights

Résumé

Eamon Gilmore est le représentant spécial de l'Union Européenne pour les Droits de l'homme. Son intervention explique en quoi et dans quel cadre les Commentaires actualisés du CICR aux Conventions de Genève sont utilisés dans le travail de l'UE. Eamon Gilmore revient d'abord sur sa récente visite en Ukraine et les actions que l'UE y mène pour renforcer la mise en œuvre du DIH. Il expose ensuite plus largement les actions et positions de l'UE concernant la promotion et la mise en œuvre du DIH dans son action extérieure. Enfin, il précise l'intérêt et l'utilité des Commentaires actualisés pour l'UE. Ceux-ci constituent des ressources précieuses guidant la prise de décision de l'UE en matière de DIH, en particulier en ce qui concerne l'évaluation des violations du DIH. Eamon Gilmore conclut sur l'importance du DIH dans les conflits armés actuels et sur l'importance de pouvoir recourir à des interprétations à jour et dignes de confiance du DIH, ce que permettent les Commentaires actualisés.

It is a great pleasure and privilege to be here with Federica Mogherini, Rector of the College of Europe, Gilles Carbonnier, Vice-President of the ICRC, and all the distinguished panellists.

I am speaking to you from Kyiv, Ukraine, and I have just come back from visiting the line of contact in eastern Ukraine. I am here to discuss the human rights situation and to address issues in relation to the conflict in eastern Ukraine, including in the non-government-controlled areas of Donetsk and Luhansk as well as in the illegally annexed Crimean peninsula.

Indeed, the illegal annexation of the Crimean peninsula and the ongoing conflict in the east since 2014, at the very heart of Europe/Eurasia, have reminded us of the importance of international humanitarian law and the protection of civilians.

The security situation in the conflict zone continues to remain volatile, and in the past days, I have heard many reports of breaches of the ceasefire. In light of this, I have recalled the

obligation to comply at all times with international humanitarian law, including with the principles of distinction, proportionality and precaution.

I met with local NGOs who are advocating for remedy and reparation mechanisms to civilian victims of the conflict and have encouraged Ukrainian authorities to develop a comprehensive legal framework in this regard.

I have also witnessed the deterioration of the humanitarian situation due to the pandemic: the closure of the line of contact has a significant impact on the delivery of humanitarian assistance in the non-government-controlled areas. Households continue to face protection risks due to active shelling in densely populated areas around the line of contact. Food security concerns, lack of access to healthcare, and lack of access to water makes the humanitarian situation even more critical.

It is essential that both sides restore full access across the line of contact in order to ensure access to basic services and humanitarian assistance as well as protection in accordance with international humanitarian law.

I have also called on Ukraine to ratify the Rome Statute of the International Criminal Court. As Ukraine has already accepted the ICC's jurisdiction with respect to alleged crimes committed in its territory since 20 February 2014, ratification would be the logical next step and a demonstration of Ukraine's commitment to the international rules-based order.

Ukraine is just one example of a country where the EU includes, in its work, actions which aim at strengthening the implementation of IHL.

The EU has underlined that international law, including international humanitarian law, is one of the strongest tools the international community has for ensuring the protection of all persons. The EU is committed to put the promotion of and adherence to IHL at the heart of its external action, as stated in the European Union's Global Strategy of 2016, the EU Action Plan on Human Rights and Democracy 2020-2024 and the EU Guidelines on Promoting Compliance with IHL.

This means supporting training in IHL, in particular for military and security forces. It also includes leveraging the EU's political, economic and military weight to promote IHL compliance, as outlined by the Commission's recent Communication on the EU's humanitarian action and confirmed by the Council Conclusions adopted on its basis.

In February 2019, the Council added a new emphasis to my mandate to contribute to the promotion of compliance with IHL and the promotion of support for international criminal justice, in particular, support for the ICC. This emphasis remained in the renewal of my mandate in February 2021, and I have been discharging this mandate in Afghanistan, in the Tigray region of Ethiopia, in Yemen, and others.

I have been asked to speak about the relevance of the updated ICRC commentaries in EU's work and policy. Allow me to say at the outset that ICRC Commentaries are indeed very relevant today and a valuable tool for the EU, both in the framework of our security policy decision-making and for the practical, operational work of EU actors in the field. Some examples of EU policies and activities will illustrate this.

The promotion of the compliance with IHL is a responsibility shared by all the EU institutions and Member States. As I earlier said, EU's action on IHL is based on the 2009 EU Guidelines on Promoting Compliance with IHL. The EU Guidelines insist in particular on dissemination and training on IHL.

In the context of our crisis management operations, the Guidelines state that *'The importance of preventing and suppressing violations of IHL by third parties should be considered, where appropriate, in the drafting of mandates of EU crisis-management operations […] with a special attention to law enforcement officials and the training of military personnel'.* The Guidelines also say that *'The EU should consider providing or funding training and education in IHL in third countries including within the framework of wider programmes to promote the rule of law'.*

The EU oversees 17 civilian and military EU crisis management missions and operations promoting peace and security, under the EU's Common Security and Defence Policy (CSDP). EU Training Missions (EUTM); for example, EUTM Somalia, EUTM Mali and EUTM Central African Republic, have explicit references in their mandates to promote compliance with IHL.

Through its CSDP missions and operations, the EU also provides training on the Law of Armed Conflict and basic principles of IHL, for example to the Malian Armed Forces, and the Armed Forces in the Central African Republic, as well as strategic advice on the application of IHL and International Human Rights Law.

ICRC commentaries are extensively used – together with the other ICRC publications – as one of the main reference tools, both in the drafting of the mandates of our CSDP missions and operations and in the preparation of curricula and training provided by the missions and operations to the law enforcement and armed forces in third countries.

ICRC Commentaries are also used for the dissemination of IHL in EU funded programmes. For example, in Serbia, where the EU provides financial support to a project on war crimes trial monitoring, legal practitioners dealing with war crimes cases in Serbia and the region will be provided with translations of the most relevant parts of the ICRC's Commentaries on the Geneva Conventions.

ICRC Commentaries are a valuable tool also in the framework of our security policy decision making. In its external policy, the EU is called on to operate in very different contexts and different types of conflicts. EU actors often have to respond to violations of IHL. Our legal advisors are often asked to provide advice on how to deal with allegation of IHL violations. In these cases, it is imperative to get the law right, in particular when complex or sensitive issues are at stake.

In this respect, the correct interpretation of the Geneva Conventions – the bedrock of IHL – is key. This is not an easy task, as it means interpreting the Conventions adapting them to specific, complex realities, and taking into account recent developments in state practice and case law.

The ICRC Commentaries are an invaluable tool to guide in this process.

For example, the Commentary on the First Geneva Convention has been used to clarify the meaning of respect for the wounded and sick and the rules on the protection of medical facilities and transport in conflict situations, an area where the EU has been much involved.

Even though international armed conflicts are less frequent than non-international armed conflicts, they still exist, and they still raise complex issues involving the interpretation of the Third Geneva Convention.

In the recent conflict between Azerbaijan and Armenia, we had to address issues related to the repatriation of prisoners of war, which involved multifaceted issues on which prisoners have the right to protection, in which cases the status of prisoners of war is lost or when prisoners of war should be released. All difficult and sensitive issues for which the ICRC Commentary on the Third Geneva Convention provided vital information and answers.

In conclusion, international humanitarian law is very relevant because conflicts – either international or non-international – endure. Law, including IHL, is a means to an end. IHL is a strong tool if it is applied in good faith, and continually developed and interpreted to address new challenges. Hence the importance of being able to rely on up-to-date and trustworthy

sources to interpret the relevant law and apply it to the diverse and evolving situations. The ICRC Commentaries are an important instrument to this end. We very much look forward to the next updated Commentary on the Fourth Geneva Convention as well as the Additional Protocols.

Thank you.

PARTAGE D'EXPÉRIENCE SUR LA PERTINENCE DES COMMENTAIRES DES CONVENTIONS DE GENÈVE DANS LA PRATIQUE

THE RELEVANCE OF THE COMMENTARIES ON THE GENEVA CONVENTIONS IN PRACTICE

Camille Faure
Ministry of Armed Forces, France

Summary

Camille Faure is Deputy Head of Legal Affairs at the French Ministry of Armed Forces. In this keynote speech, she draws from the experience of the French Ministry of Armed Forces to illustrate the practical relevance of the ICRC Commentaries on the Geneva Conventions. The ICRC Commentaries specify, define and illustrate IHL rules, based on the method of interpretation which are set out in the Vienna Convention on the Law of Treaties and on concrete examples. In doing so, they guide the operational implementation of IHL by the armed forces. Furthermore, the updated Commentaries clarify how the rules adopted more than half a century ago should be applied in contemporary armed conflicts, particularly regarding cyberspace, new weapon systems based on artificial intelligence, the involvement of private actors or the notion of public curiosity. France particularly looks forward to the updated Commentary on Additional Protocol I, notably the definition of protected civilian objects and how it applies to data, or the definition of an attack and how it relates to the use of autonomous weapon systems. Camille Faure concludes that the project to update the ICRC Commentaries on the Geneva Conventions is an invaluable endeavor, which confirms the relevance of IHL and ensures its full implementation.

Mesdames, messieurs, chers amis,

Je vous remercie pour cette invitation à l'édition 2021 du Colloque de Bruges. C'est pour moi un plaisir et un honneur de participer à ce rendez-vous prestigieux de réflexion autour du droit international humanitaire, sur un sujet aussi stratégique que les Commentaires des Conventions de Genève. Cette année encore, la thématique du colloque traite d'un aspect essentiel de l'intégration du droit international humanitaire (DIH) aux opérations militaires, en examinant la pertinence des Commentaires pour appréhender la complexité et l'évolution des conflits armés.

Il ne fait aucun doute que les Commentaires des Conventions de Genève favorisent le respect du DIH en tant qu'ils précisent, définissent et illustrent les stipulations du DIH, suivant une

méthode collégiale, rigoureuse, fidèle aux principes d'interprétation posés par la Convention de Vienne sur le droit des traités (cf. les articles 31 à 33 de la Convention de Vienne sur le droit des Traités).

Tout en palliant certaines imprécisions, les Commentaires offrent l'immense avantage de fournir des illustrations concrètes et directement applicables. En cela, ils orientent la pratique, comme en témoigne le renvoi fréquent à ces derniers par les manuels opérationnels des Etats. A cet égard, le manuel de droit opérationnel français en cours de rédaction y puise maintes références ou illustrations.

A l'orée de nos échanges, je présenterai brièvement la lecture du ministère français des armées d'un sujet placé à la croisée du droit et de l'action militaire en soulignant tout d'abord comment les Commentaires sont utilisés par les forces armées comme moyen d'opérationnalisation directe du DIH puis en démontrant l'utilité voire l'urgence de leur actualisation pour appréhender les nouvelles pratiques opérationnelles.

I. Les Commentaires revêtent, tout d'abord, un caractère fondamental en termes d'opérationnalisation du droit international humanitaire.

En effet, le DIH n'est pas seulement un ensemble de normes « à respecter et faire respecter en toutes circonstances » comme le stipule l'article 1er commun aux Conventions de Genève. Il est également un véritable guide opérationnel qui oriente, innerve et contribue à objectiver le processus de décision militaire.

Les Commentaires sont essentiels pour l'intégration du droit aux opérations.

Par exemple, lorsque l'article 57 du Protocole I aux Conventions de Genève prescrit de « *faire tout ce qui est pratiquement possible pour vérifier que les objectifs à attaquer […] sont des objectifs militaires* », cela se traduit dans les faits par le déploiement de plusieurs drones ou l'envoi d'équipiers au sol pour observer la nature et le comportement de l'objectif militaire selon des procédures établies et prévues en amont.

Les termes mêmes employés dans les Conventions et les Commentaires, comme celui de « *faire tout ce qui est pratiquement possible* »[1], pourront directement transparaître dans la documentation opérationnelle, tant ils traduisent de manière pragmatique les obligations juridiques et les modes d'action militaires. **La règle et le vocabulaire juridiques façonnent ainsi la décision militaire.**

Les Commentaires détaillent, expliquent et illustrent le vocabulaire des Conventions. Ils permettent à l'esprit du texte, notamment aux grands principes qui sous-tendent les Conventions, de trouver leur place dans le processus de décision militaire.

Nous le savons, la conduite des opérations réserve une place importante à l'oralité. La règle de droit y sera principalement évoquée de manière orale, par exemple par les conseillers juridiques opérationnels au moment de la préparation d'une frappe aérienne, ou encore lorsque le chef d'élément tactique transmet à la radio ses instructions à ses équipiers avant d'engager le combat.

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1 Article 57 du Protocole additionnel I aux Conventions de Genève, Commentaire de 1987 : « *2195 L'identification de l'objectif, surtout lorsqu'il est situé à une grande distance, doit donc se faire avec beaucoup de soin. Certainement, ceux qui préparent ou décident une telle attaque vont fonder leur décision sur les renseignements qui leur sont fournis et on ne peut pas exiger d'eux qu'ils aient une connaissance personnelle de l'objectif à attaquer et de sa nature exacte; mais leur responsabilité n'en est pas moins en jeu, et, en cas de doute, même léger, ils devront demander des renseignements complémentaires et ordonner éventuellement de nouvelles recherches à ceux de leurs subordonnés tactiques et des responsables des armes d'appui – notamment artillerie et aviation – qui ont cette charge et pourront avoir à en répondre devant eux. Dans le cas d'attaques à longue distance, les informations résulteront, en particulier, de reconnaissances aériennes et du service de renseignements, qui cherche naturellement, par des moyens divers, à recueillir des informations sur les objectifs militaires ennemis. L'appréciation des informations recueillies devra comprendre un contrôle sérieux de leur véracité, cela d'autant plus que rien n'interdit à l'ennemi de mettre en place de faux objectifs militaires ou de camoufler les véritables. Or, il est bien certain qu'aucun commandant militaire responsable ne désire porter son effort contre des objectifs qui ne présentent pas d'intérêt militaire. A cet égard, l'intérêt humanitaire et l'intérêt militaire vont de pair […] 2198 Les mots « tout ce qui est pratiquement possible » ont fait l›objet de longues discussions. Des délégations ont précisé, lors de l›adoption de l›article, qu›elles les entendaient comme signifiant : tout ce qui est faisable ou pratiquement faisable, compte tenu de toutes les circonstances au moment de l'attaque, y compris celles qui sont liées au succès des opérations militaires. Cette dernière formule paraît trop large devant les exigences du présent article. Il y aurait lieu de craindre qu'en invoquant, en général, le succès des opérations militaires, on en vienne à négliger les devoirs humanitaires ici prescrits. Là encore, l'interprétation sera une question de bon sens et de bonne foi. Ce qu'on demande à celui qui lance une offensive, c'est de prendre en temps utile les mesures d'identification nécessaires, afin d'épargner, autant que possible, la population. On ne voit pas en quoi le succès des opérations militaires en serait compromis. 2199 Enfin, une délégation a remarqué que l'identification des objectifs dépendait en grande partie des moyens techniques de détection dont disposent les belligérants. Cette remarque paraît juste. Certains belligérants pourront, par exemple, disposer de renseignements fournis par un appareil moderne de reconnaissance, alors que d'autres belligérants ne posséderont pas cette source d'informations* ».

L'enjeu majeur est de faire correspondre le langage des opérationnels et celui du droit.

Dans ce contexte, les Commentaires permettent de restituer la signification exacte des impératifs juridiques en les rendant plus accessibles et compréhensibles, y compris en situation d'urgence opérationnelle. Ceci d'autant plus que l'oralité favorise parfois les abus de langage, la multiplication d'acronymes et d'expressions issues de doctrines et non du droit. Par exemple, l'acronyme « P.ID » pour « positive identification » désigne une certitude raisonnable qu'un objectif est bien militaire.

Les Commentaires permettent de donner à cette sémantique opérationnelle une précision juridique. Ainsi, le commentaire associé à l'article 57 du Protocole I aux Conventions de Genève précise que « (…) *l'appréciation des informations recueillies* [dans le cadre de l'identification d'un objectif] *devra comprendre un contrôle sérieux de leur véracité*[2] ». Cette précision, et notamment la notion de « *contrôle sérieux* » est une orientation claire du travail qui doit être effectué pour caractériser une cible comme un objectif militaire, au-delà de la terminologie opérationnelle.

La pertinence des Commentaires est telle qu'ils sont susceptibles de nourrir la réflexion, la planification militaire et notre pratique conventionnelle.

Les Commentaires permettent aussi d'éclairer, de qualifier juridiquement des pratiques opérationnelles inhabituelles.

Les modes d'actions réputés « hybrides », c'est-à-dire en deçà du seuil de l'ouverture du feu, ont pu surprendre et certains d'entre eux n'ont pu être appréhendés qu'à l'aide des Commentaires, notamment pour ce qui concerne la définition de la perfidie ou plus communément des ruses de guerre.

2 Article 57 du Protocole additionnel I aux Conventions de Genève, Commentaire de 1987, par. 2195.

Les commentaires de l'article 37 du Protocole I aux Conventions listent[3] en effet à titre indicatif des ruses de guerre qui peuvent inspirer la planification opérationnelle, par exemple le recours à des « *méthodes de guerre psychologique* » qui pousseront l'adversaire à déserter.

De la même manière, cette liste indicative permet de comprendre les manœuvres et procédés observés dans certains conflits, par exemple le fait, comme le mentionne le commentaire au paragraphe 1521, « *d'enlever des uniformes les signes indiquant le grade, l'unité, la nationalité ou la spécialité* », pratique qui a pu caractériser certains modes d'actions dans un passé récent[4].

Les Commentaires permettent enfin d'orienter notre pratique conventionnelle afin de concilier nos obligations au regard du DIH et du droit international des droits de l'homme (DIDH).

S'agissant du commentaire de la Première Convention de Genève sur l'article 3 (conflits à caractère non international) et en particulier sur le principe de non refoulement (commentaire, paragraphe 708), il est précisé qu' « *en raison des droits fondamentaux qu'il protège, l'article 3 commun devrait être entendu comme interdisant également aux parties au conflit de transférer des personnes placées sous leur pouvoir à une autre autorité lorsqu'il y a un risque que leurs*

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3 Ibid., : « *1501. L'idée de préciser la règle d'interdiction de la perfidie au moyen d'une liste d'exemples concrets s'est imposée dès le début des travaux, pour des raisons aussi bien d'ordre pratique que technique. Sur le plan pratique, il est certain que l'énumération de situations concrètes facilite la tâche de ceux qui ont à donner des instructions aux combattants. Sur le plan technique, c'est un élément auxiliaire non négligeable en vue de cerner une notion difficile à définir concrètement. […] 1521. Certains manuels militaires font en effet une énumération assez extensive des procédés communément qualifiés de ruses de guerre: procéder à des attaques par surprise, à des embuscades, à des opérations terrestres, aériennes ou navales simulées; feindre le repos ou l'inactivité; camoufler des troupes, des armes, des dépôts, des positions de tir dans l'environnement naturel ou artificiel; profiter de la nuit ou de conditions météorologiques favorables (brouillard, etc.); construire des installations qui ne seront pas utilisées; installer de faux aérodromes, mettre en position de faux canons et de faux chars blindés et créer des champs de mines factices; disposer une petite unité de telle manière qu'elle apparaisse comme une troupe plus importante en la dotant d'une forte avant-garde ou de nombreux avant-postes; transmettre par la radio ou par la presse des informations inexactes; permettre sciemment à l'adversaire d'intercepter de prétendus documents, plans d'opérations, dépêches, nouvelles qui sont en fait sans rapport avec la réalité; employer les longueurs d'ondes de l'ennemi, ses mots de passe, ses codes télégraphiques pour transmettre de fausses instructions; prétendre être en communication avec des troupes de renfort qui n'existent pas; procéder à des parachutages factices ou à des opérations de ravitaillement simulées; jalonner des itinéraires en sens inverse, déplacer des bornes ou falsifier les indications routières; enlever des uniformes les signes indiquant le grade, l'unité, la nationalité ou la spécialité; donner aux membres d'une même unité militaire des signes d'unités différentes pour faire croire à l'ennemi qu'il se trouve en face d'une force plus importante; employer des signaux à seule fin de tromper l'adversaire; avoir recours aux méthodes de la guerre psychologique en incitant les soldats ennemis à se rebeller, à se mutiner ou à déserter, éventuellement en emportant des armes et des moyens de transport; inciter la population ennemie à se révolter (55) contre son gouvernement, etc.* »

4 Notamment lors de l'annexion de la Crimée en 2014.

droits fondamentaux soient violés lors du transfert. L'interdiction d'un tel transfert est habituellement désignée par l'expression « non-refoulement » ».

Le Commentaire débat ensuite de l'existence d'une telle obligation en DIH applicable aux conflits armés internationaux.

Ces développements, tout comme la jurisprudence de la Cour européenne des droits de l'homme, ont conduit la France à introduire des stipulations dans ses accords de statut des forces en opérations extérieures, afin que le rappel de la possibilité de capturer en DIH soit assorti de garanties robustes au profit des personnes transférées[5].

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5 Article 10 de l'accord sous forme d'échange de lettres entre le Gouvernement de la République française et le Gouvernement du Mali déterminant le statut de la force « Serval », signées à Bamako le 7 mars 2013 et à Koulouba le 8 mars 2013 : « *La Partie française traite les personnes qu'elle pourrait retenir et dont elle assurerait la garde et la sécurité conformément aux règles applicables du droit international humanitaire et du droit international des droits de l'homme, notamment le Protocole additionnel aux Conventions de Genève du 12 août* 1949 *relatif à la protection des victimes des conflits armés non internationaux (Protocole II) adopté le 8 juin 1977, et la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants du 10 décembre 1984.*
La Partie malienne, en assurant la garde et la sécurité des personnes remises par la Partie française, se conforme aux règles applicables du droit international humanitaire et du droit international des droits de l'homme, notamment le Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés non internationaux (Protocole II) adopté le 8 juin 1977, et la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants du 10 décembre 1984.
Compte tenu des engagements conventionnels et constitutionnels de la France, la Partie malienne s'engage à ce que, dans le cas où la peine de mort ou une peine constitutive d'un traitement cruel, inhumain ou dégradant serait encourue, elle ne soit ni requise ni prononcée à l'égard d'une personne remise, et à ce que, dans l'hypothèse où de telles peines auraient été prononcées, elles ne soient pas exécutées.
Aucune personne remise aux autorités maliennes en application du présent article ne peut être transférée à une tierce partie sans accord préalable des autorités françaises.
La Partie française, le Comité international de la Croix-Rouge (CICR), ou, après approbation de la Partie malienne, tout autre organisme compétent en matière de droits de l'homme, dispose d'un droit d'accès permanent aux personnes remises.
Les représentants de la Partie française, du Comité international de la Croix-Rouge et, le cas échéant, d'un autre organisme mentionné à l'alinéa précédent, sont autorisés à se rendre dans tous les lieux où se trouvent les personnes remises ; ils auront accès à tous les locaux utilisés par les personnes remises. Ils seront également autorisés à se rendre dans les lieux de départ, de passage ou d'arrivée des personnes remises. Ils pourront s'entretenir sans témoin avec les personnes remises, par l'entremise d'un interprète si cela est nécessaire.
Toute liberté sera laissée aux représentants susmentionnés quant au choix des endroits qu'ils désirent visiter ; la durée et la fréquence de ces visites ne seront pas limitées. Elles ne sauraient être interdites qu'en raison d'impérieuses nécessités militaires et seulement à titre exceptionnel et temporaire.
La Partie malienne s'engage à tenir un registre sur lequel elle consigne les informations relatives à chaque personne remise (identité de la personne remise, date du transfert, lieu de détention, état de santé de la personne remise).
Ce registre peut être consulté à leur requête par les Parties au présent accord, par le CICR ou, le cas échéant, par tout autre organisme compétent en matière de droits de l'homme mentionné au cinquième alinéa du présent article.

II. La révision des Commentaires permet d'assurer la bonne application du DIH à des pratiques nouvelles et à l'évolution des moyens et méthodes de guerre.

La mise à jour des Commentaires est essentielle pour maintenir un ensemble juridique stable mais vivant, susceptible de demeurer une référence en toutes circonstances et de servir véritablement de guide aux engagements militaires.

Je salue ainsi le travail titanesque d'actualisation des Commentaires entrepris par le CICR, qui permet aux Conventions, ce « *monument juridique*[6] », de rester « *des textes bouillonnant de sève et palpitant de chaleur humaine*[7] » pour reprendre les expressions de Jean Pictet.

La révision des Commentaires des Conventions de Genève est indispensable aux forces armées françaises puisqu'elle éclaire des stipulations adoptées il y a plus d'un demi-siècle au regard d'évolutions contemporaines non appréhendées par les premiers commentaires. On pense notamment à l'émergence du cyberespace comme nouveau milieu de confrontation, à l'intervention d'acteurs privés, ou encore au développement de nouveaux systèmes d'armes à l'heure de l'intelligence artificielle.

Ainsi, concernant l'obligation de traiter les prisonniers de guerre en tout temps avec humanité, l'article 13 de la troisième Convention de Genève stipule que ces derniers doivent « *de même être protégés en tout temps, notamment contre tout acte de violence ou d'intimidation, contre les insultes et la curiosité publique* ». Les nouveaux commentaires (2020) permettent d'appréhender la **curiosité publique** à l'aune de l'ère des nouvelles technologies numériques en indiquant que la notion de publicité, de curiosité concerne toute prise de photographie et de vidéo, indépendamment du moyen de communication et de diffusion utilisés. En cela, cette actualisation permet de formuler des directives claires à destination des opérationnels.

La révision des Commentaires de la troisième Convention de Genève a permis également à la direction des affaires juridiques de formuler des orientations claires en matière d'habillement des prisonniers de guerre et, plus généralement, des détenus au regard de l'exigence de **respect de leur honneur**. En effet, les nouveaux commentaires précisent que l'honneur, bien

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Les dispositions précédentes sont sans préjudice de l'accès du Comité international de la Croix-Rouge aux personnes remises. Les visites du CICR aux personnes remises s'effectueront en conformité avec ses modalités de travail institutionnelles ».

6 Jean Pictet, « Dévelopement et principes du droit international humanitaire », éd. Pedone, Paris, 1983.

7 Jean Pictet, « Le droit humanitaire et la protection des victimes de la guerre », éd. Institut Henri Dunant, Genève, 1973.

qu'étant une notion subjective, doit être apprécié en fonction de critères objectifs, à savoir : l'âge, le genre, la religion ou encore la culture.

Au regard de l'évolution significative des conflits, milieux et systèmes d'armement, nous appelons de nos vœux l'actualisation du Commentaire du premier Protocole additionnel aux Conventions de Genève.

Dans le cas des cyberopérations menées en contexte de conflit armé, l'absence d'actualisation de certains Commentaires a pu servir de fondement à des interprétations que nous estimons contraires au principe de distinction s'agissant du statut des données.

Je m'explique : le commentaire de l'article 52 du Premier Protocole Additionnel relatif à la définition du bien civil protégé caractérise la notion de bien comme chose visible et tangible[8].

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8 Article 52 du Protocole additionnel I aux Conventions de Genève, Commentaire de 1987 : « *2007. Le mot « biens », en français, signifie « chose tangible, susceptible d'appropriation ». En anglais, le mot utilisé est « objects », ce qui signifie «something placed before the eyes, or presented to the sight or other sense, an individual thing seen, or perceived, or that may be seen or perceived; a material thing». 2008 On le voit, aussi bien en français qu'en anglais, il s'agit de quelque chose de visible, de tangible* ». Extrait du non papier Cyber : « *La distinction entre objectifs militaires et biens civils.* Dans le cyberespace, des équipements ou des systèmes informatiques, des données, des processus ou des flux d'échanges qui composent un service peuvent constituer un objectif militaire si, d'une part, ils **contribuent à l'action militaire** par leur nature (postes informatiques des forces armées, réseaux de commandement militaire, de localisation, de surveillance etc.), leur emplacement (lieux depuis lesquels sont menées les cyberattaques), leur destination (usage prévisible des réseaux informatiques à des fins militaires), ou leur utilisation (usage d'un pan du réseau à des fins militaires) ; et si d'autre part, **leur destruction totale ou partielle, leur capture ou neutralisation confèrent un avantage militaire précis**. Dès lors, un centre de propagande peut constituer un objectif militaire licite et faire l'objet d'une cyberattaque, si ce dernier diffuse des instructions liées à la conduite des hostilités. A l'opposé, tous les biens qui ne sont pas des objectifs militaires sont considérés comme des biens civils. Une attaque menée dans le cyberespace ne peut être dirigée contre des **systèmes informatiques utilisés par des écoles, des établissements médicaux, ou encore par tout autre service exclusivement civil, ni contre des systèmes dont la destruction entraînerait uniquement des effets tangibles sur des biens civils, sauf si ces derniers sont utilisés à des fins militaires**. Au regard de la dépendance numérique actuelle, des données de contenu (comme des données civiles, des données bancaires, des données médicales etc.) sont protégées au titre du principe de distinction. Les cyber-opérations doivent également prendre en compte la protection spéciale de certains biens, tels que les unités sanitaires, les biens culturels, l'environnement naturel, les biens indispensables à la survie de la population, ainsi que les installations contenant des forces dangereuses. **Cette protection s'étend aux équipements et aux services informatiques, ainsi qu'aux données nécessaires à leur fonctionnement (comme, par exemple, les données médicales liées au fonctionnement d'un établissement hospitalier**).
Une infrastructure informatique, ou un système qui sert à la fois à des fins civiles et à des fins militaires, peuvent être considérés, après une analyse minutieuse et au cas par cas, comme un objectif militaire. Ils peuvent être ciblés à condition que soient respectés les principes de proportionnalité et de précaution. Compte tenu de l'hyperconnectivité des systèmes, le commandement exerce une vigilance sur l'ensemble de l'action pour éviter, ou du moins réduire au minimum dans le respect des principes de précaution et de proportionnalité, les effets sur les civils et les biens de caractère civil.

Cette notion de matérialité est utilisée par certains Etats, et cela est notamment exprimé dans le *Manuel de Tallinn*[9], pour exclure la donnée comme bien protégé en contradiction nous semble-t-il avec le principe de distinction.

L'émergence de nouvelles technologies et le développement de nouveaux systèmes d'armement bien éloignés des caractéristiques classiques, posent de nouvelles questions pour lesquelles les commentaires actuels ne sont pas exhaustifs. Ainsi, concernant les systèmes armés létaux autonomes, ni l'article 49 PA I, ni le Commentaire de cet article ne proposent de définition claire de l'attaque, probablement car cette notion ne posait pas difficulté en 1977. S'agissant des systèmes d'armes létaux autonomes (SALA) et du temps de latence entre leur déploiement éventuel et la production d'effets, la question se pose aujourd'hui de savoir si une attaque démarre au moment du déploiement de l'arme, de la programmation de l'attaque ou de l'ouverture du feu.

En cela, la révision des Commentaires est une entreprise indispensable pour démontrer et asseoir l'actualité du DIH et assurer sa pleine application.

A l'heure où le supposé silence du DIH sur une pratique ou une arme spécifique sert, à bien des égards, à alimenter l'argumentaire de certaines parties quant à l'existence d'un soi-disant vide juridique, les Commentaires révisés démontrent que le DIH a assez de souplesse pour régir les évolutions des conflits armés.

Le travail de révision des Commentaires est ainsi une entreprise de clarification du langage car, pour reprendre les mots d'Albert Camus, « *mal nommer un objet, c'est ajouter au malheur de ce monde*[10] ».

Je vous remercie pour votre attention.

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9 "*The majority of the International Group of Experts agreed that the law of armed conflict notion of 'object' is not to be interpreted as including data, at least in the current state of the law. In the view of these Experts, data is intangible and therefore neither falls within the ordinary meaning' of the term object, nor comports with the explanation of it offered in the ICRC Additional Protocols 1987 Commentary*", "*In case of doubt as to whether an object and associated cyber infrastructure that is normally dedicated to civilian purposes is being used to make an effective contribution to military action, a determination* ***that it is so*** *being used may only be made following a careful assessment*", Michael Schmitt et Liis Vihul (dir.), *The Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, Cambridge University Press, 2017, règle 100, comment 6, p. 437. Pour le CICR, ces commentaires de 1987 ne doivent pas être interprétés comme excluant le fait que des données puissent être considérées comme des biens protégés au regard du DIH. En effet, au regard de la dépendance numérique actuelle, une telle interprétation serait contraire au but et à l'objet du DIH.

10 Albert Camus, « Sur une philosophie de l'expression », 1944.

NATO PERSPECTIVE ON THE INFLUENCE OF THE COMMENTARIES
PERSPECTIVE DE L'OTAN SUR L'INFLUENCE DES COMMENTAIRES

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Résumé

John Swords est conseiller juridique et directeur du bureau des affaires juridiques de l'OTAN à Bruxelles. Dans son intervention – qui ne reflète pas nécessairement la position de l'OTAN – il commente le projet d'actualisation des Commentaires des Conventions de Genève du point de vue de l'OTAN. Tout d'abord, il souligne l'importance des Commentaires et de leur actualisation en termes juridiques, pour collecter les interprétations existantes, stimuler le débat et clarifier encore davantage les notions à interpréter. Il rappelle ensuite que les missions et opérations de l'OTAN prédatent l'actualisation des Commentaires. Dès lors, il est considéré que les Etats membres restent garants de la responsabilité opérationnelle. Il note toutefois que les Commentaires sont une référence pour les conseillers juridiques de l'OTAN et de ses Etats membres, notamment en ce qu'ils informent du socle commun et de la diversité de vues et d'interprétation des dispositions des Conventions. Les Commentaires sont également une ressource pour interpréter les Conventions au regard des défis juridiques contemporains, notamment en lien avec l'émergence des nouvelles technologies.

Hello everyone and thank you so much the ICRC for inviting me to be here today to say a few introductory words about the Commentaries and in particular their influence in NATO and on NATO lawyers. I should start by saying it is a real pleasure to be back at the Colloquium on a seat where a few years ago in my former capacity as a UK government lawyer. Today I am a NATO lawyer and I have been asked to address issues from the perspective of NATO, which I will do, but I should also stress that these comments and observations are personal ones and do not necessarily reflect the views of the Allies or indeed the organization itself.

Let me start with a few observations on the general importance of commentaries before turning specifically to the ICRC, the Updated Commentaries and their impact on NATO.

1. The importance of the Updated Commentaries

So, like all international law, IHL evolves in accordance with state practice and *opinio juris*, and it adapts as it is applied to the ever-changing world around us. These developments need to be reflected in our shared understanding of the law, consistent with the rule of law. Publications, likely commentaries, serve that end. One obviously needs a certain clarity in the law itself, as it develops and as it is applied in new contexts, in order for the law to continue to serve its purpose of meaningful governance and for IHL in particular to help reduce civilian harm and unnecessary suffering.

We need to recognize that that process or development in determination of the law in various different contexts is not always easy, hence the value of commentaries to guide us along the way. It is of course an ongoing and iterative process, and interpretation or application of the law in different contexts can turn on the precise facts or the weights that different actors reasonably accord to sometimes competing values.

As we have heard, the updated ICRC Commentaries, unlike their predecessors which for obvious reasons focused on the original Conventions' text and on the travaux, the updated version benefits greatly from being able to draw on some 70 years of state practice. By way of example, one area where that approach bears fruit is in the context of non-international armed conflicts (NIACs) where we have seen some convergence on the rules in international armed conflicts (IACs) and NIACs, particularly in so-called internationalized NIACs. IHL, which originally envisaged a greater role for domestic law alongside it in what were originally envisaged to be internal armed conflicts, has certainly developed a great deal by state practice over more recent years. Indeed, the majority of NATO's own operations have been in the context of NIACs.

By way of example, reflecting those operational developments and the consensus of some 160 Nations at the 32nd international conference of the Red Cross, the ICRC articulated in the Commentaries their view that IHL provides States with both a power to detain in NIACs as well as obligations around the conditions of detention. This point is particularly pertinent when it comes to States grappling with any parallel international human rights law obligations, another feature perhaps influencing some of the content, with the Updated Commentaries no doubt drawing on the spirit of Article 31 of the Vienna Convention on the Law of Treaties.

To their great credit, the ICRC also sets out in the Commentaries a range of different interpretations as we have heard on issues when there is genuine debate. Indeed, the whole process of formulating these Commentaries has involved a much broader process of engagement. The power to detain in NIAC is in fact one such example where respectable arguments have existed on either side of the debate. The approach of setting out a range of respectable arguments

is not a shortcoming but simply a reflection of the current state of the law on certain issues. Moreover, this pragmatic approach contributes to the debate and the ongoing process of law's development. And it cuts both ways of course. So whilst there has been broad support on the issue of NIAC's detention from a number of States, a number of NATO Allies have for example failed to endorse some of the expansive articulations of the Common Article 1 duty to ensure respect for IHL, or indeed the notion that parallel IACs are always crystallized when a third State intervenes against a non-state actor without host nation's consent. I believe you might be touching on some of these issues in the course of the next day and a half. Some Nations have spoken out publicly about such concerns while others may have been more discreet. But part of the value of Commentaries is that they may attempt to tease out legal positions on matters of armed conflicts which are not always so clear or publicly disclosed, and the ICRC is in a very strong position to do so.

In other words, the prominence and expertise associated with Commentaries from the ICRC can sometimes helpfully provoke Nations into setting out more clearly their positions which can provoke further debates and clarifications, and which can then in turn encourage other States to follow suit and further refine the law. I suppose these views could in turn be reflected in future Commentaries of the ICRC.

Of course, sometimes there are valid concerns, operational and otherwise which prevent States from publicly engaging as much as they would like to, and that just needs to be borne in mind by readers when regarding certain passages in the Commentaries which sometimes quite understandably rely more on the openly available academic perspectives.

2. The relevance of the Updated Commentaries to NATO

In terms of the relevance of the Updated Commentaries to NATO specifically, obviously we need to bear in mind that most of NATO's operations and activities actually pre-date 2016 Update of the 1st Convention. Moreover, many NATO operations, missions and activities have occurred outside of armed conflicts or are not considered by Allies to be participation in any such armed conflicts. Indeed, when the NATO Alliance has been engaged in armed conflicts, the Nations themselves have always retained operational responsibility such that ultimately, they follow their own national views of the law rather than any one all-encompassing NATO view.

But that is not to say that NATO lawyers like all practitioners and operational lawyers in the field do not have well-thumbed copies of the Commentaries on their desk or regular access to the online resources. That's true whether it is inward facing research for example on NATO operations, short notice exercises, legal exchanges, engagement with partner countries or just advice on the formulation of defense and security policy, or whether it is the outward looking

stuff: advising officials on events that are unfolding around the world and the behavior of others.

As a legal adviser to NATO, where we have 30 Nations with different national as well as international legal obligations, different interpretations, different jurisdictions between international legal fora, different traditions, histories and risk appetite, it is not always obvious where to start when advising clients on a legal framework. Publications like the Commentaries are a very useful starting point to identify the ICRC's view of the law and the main legal arguments. Lawyers in NATO consult the Commentaries to that end, just as I consulted them regularly when I was in national government. Even if not each Ally share the views of the ICRC on each and every issue, there is a huge amount of common ground which we must not lose the sight of.

Moreover, Nations need to be alive to these occasional differences of view expressed by such a respected and expert institution, to appreciate what other Nations might consider the law to be.

Indeed, even within the Alliance, you are very likely to have certain of the 30 Allies very sympathetic to such views. And similarly, where the Commentaries set out a range of reasonable arguments, it is not uncommon to see that diversity of viewpoints reflected within the Alliance as well. Of course, in an era where armed conflict is increasingly justiciable in many Allied countries, we also need to consider how claimants in the courts will pick up on the views of the Commentaries.

It is of course also an era in which we see a number of authoritarian regimes challenging the rule of law itself. It is crucial that NATO Allies stand up to defend the rule of law, indeed double down on their commitment to it. The rule of law is a key part of our values. It is in the preamble of the North Atlantic Treaty, but it is also a key part of what distinguishes us from some other States. Our constructive engagement with the Commentaries chimes with our shared commitments to the rule of law.

Finally, I should note that this is also an era marked by the emergence of disruptive new technologies in operational domains, where the prospect of international treaties is often described as undesirable, unnecessary or perhaps unrealistic. That too perhaps leaves open an obvious role for the Commentaries.

To summarize, we have used the Commentaries to help guide us over the last sixty years, we need them just as much today and we will I am quite sure continue to need them in many years to come. Thank you to the ICRC for the Commentaries and thank you all today for your time, and I hope you enjoy the rest of the conference.

Panel 1
The Common Articles: Cross-Cutting Interpretation Challenges
Les articles communs : questions transversales d'interprétation

Chaired by Mikhail Orkin
ICRC

INDIRECT OCCUPATION, DIFFERENT TYPES OF CONTROL AND VARYING DEGREE(S) OF CONTROL
OCCUPATION INDIRECTE, DIFFÉRENTS TYPES DE CONTRÔLE ET DEGRÉS VARIABLES DE CONTRÔLE

Yutaka Arai-Takahashi
University of Kent, Brussels

Résumé

Yutaka Arai-Takahashi est professeur de droit international à la Brussels School f International Studies de l'Université du Kent. Dans cet article, il systématise les degrés de lien entre un Etat et un groupe armé et se demande plus particulièrement quel est le standard approprié pour qualifier une situation d'occupation indirecte en DIH. Tout d'abord, en se fondant sur la jurisprudence et sur la doctrine, il identifie cinq niveaux pour qualifier le degré de connexion entre un groupe armé et un Etat soutenant ce groupe. Il propose ensuite sept scénarios illustrant ces différents degrés et l'évolution du droit applicable en fonction de l'évolution des dynamiques entre les parties au conflit. Enfin, il distingue trois concepts : (1) la classification du conflit, y compris l'identification de l'occupation indirecte ; (2) l'affiliation des forces armées irrégulières à une partie à un conflit armé international (CAI) ou attribution ; (3) la responsabilité de l'Etat qui soutient un groupe armé. Il propose six manières de systématiser la variabilité des degrés de contrôle en articulant ces trois questions. Yutaka Arai-Takashi conclut que le « contrôle effectif » devrait être le standard d'attribution à la fois en ce qui concerne le droit de la responsabilité internationale de l'Etat et en DIH, plutôt que la notion de « contrôle global », se fondant en particulier sur le fait que les règles d'attribution requièrent l'accord des parties. Afin de pallier les possibles lacunes que cette interprétation pourrait entraîner en termes de responsabilité,

il propose de s'appuyer sur les notions d'obligations positives en droit international des droits humains et sur la notion de « diligence raisonnable » (« due diligence »).

I. Introduction

The International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber in *Tadić* famously held that the notion 'overall control' provides a benchmark not only for internationalising a *prima facie* non-international armed conflict (NIAC) but also for determining State responsibility for the conduct of an *organized* armed group.[1] The suitability of the 'overall control' test for conflict classification has been cautiously approved by the International Court of Justice (ICJ) in *Application of the Genocide Convention in Bosnia*.[2] However, the latter has confirmed its precedent finding in *Nicaragua*[3] that the standard of 'effective control' is the correct test of attribution in the *general* law of State responsibility.[4] Proceeding along the line of the ICTY's reasoning,[5] a situation where a State exercises an 'overall control' over an armed group that holds effective control over part of a foreign State's territory may be described as 'indirect occupation' or 'occupation by proxy'.[6] Yet, in one (isolated) case, as will be seen below, the ICTY Trial Chamber suggested a possibly intermediate standard between 'overall control' and 'effective control' with a view to identifying indirect occupation. On the other hand, it should be submitted that even prior to the *Tadić* Appeals judgment, IHL *appears* to allow for a lower threshold for attribution under Article 91 of Additional Protocol I (AP I).

In view of different degrees of nexus between a State and an armed group that is in control of part of the territory, it may be asked what would be the appropriate standard for identifying indirect occupation and if this should correspond to the test for determining responsibility

1 ICTY, *Prosecutor v. Tadić,* Case No. IT-94-1, Judgment, Appeals Chamber, 15 July 1999, paras 90-145.

2 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (*hereinafter *Application of the Genocide Convention in Bosnia*), Judgment, 27 February 2007, para. 404.

3 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (*Nicaragua* case), Merit, Judgment, 27 June 1986, paras 110 and 115.

4 ICJ, *Application of the Genocide Convention in Bosnia, supra* n. 2, para. 400.

5 ICTY, *Prosecutor v. Prlić et al,* Judgment, Trial Chamber, 29 May 2013, Vol. 1, para. 96; ICTY, *Prosecutor v. Prlić et al,* Appeals Chamber, Judgment, 29 November 2017, para. 238.

6 T. Ferraro, 'Determining the beginning and end of an occupation under international humanitarian law', (2012) 94 IRRC 133, at 139-140. See also V. Koutroulis, *Le début et la fin de l'application du droit de l'occupation,* (2010), at 29-35; R. Bartels, 'Internationalisation of Armed Conflicts due to Third State Involvement 70 Years after the Adoption of the Geneva Conventions', in R. Hofmann & M. Malkmus (eds), *70 Jahre Genfer Konventionen – Stand und Perspecktiven des Humanitären Völkerrechts* (2021) 117, at 134-135.

of the State for acts of the armed group. This paper aims to provide several models that can coherently explain different degrees of nexus between a State and an armed group that are contemplated under IHL.

II. Different Degrees of nexus between a State and an Armed Group that are contemplated under IHL

From the case law and doctrines it is possible to extrapolate the following five different degrees of connection between an armed group and a supporting State, which serve as criteria for different purposes under IHL:

(i) the degree of 'complete dependence and control';
(ii) 'effective control';
(iii) an 'intermediate standard' of control;
(iv) 'overall control';
(v) the threshold for the requirement of belonging under Article 4A(2) GCIII.

Albeit misconstrued by the *Tadić* Appeals Chamber,[7] the first is one of the two standards found by the ICJ in *Nicaragua*.[8] It is the most stringent criterion of attribution and the one that is envisaged under Article 4 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) adopted by the International Law Commission (ILC).[9] This may be called 'complete dependence and control' test[10] or 'strict control' test.[11] As discussed at the inception, the second is the other (and more famous) standard of attribution identified by the ICJ in *Nicaragua*.[12] The third is the standard suggested by the ICTY Trial Chamber in *Naletilić,* which will be dwelt upon below. As briefly mentioned above, the fourth standard is the one that the *Tadić* Appeals Chamber claims to be the benchmark not only for conflict classification, but even for attribution under the *general* law of State responsibility. With regard to the fifth standard, its low-threshold nature and broader ambit, as compared with the conceptual parameters of 'control', can be borne out by *Pictet's Commentary*,[13] which states that the requirement

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7 *Tadić* Appeals Judgment, *supra* n. 1, paras 97- 98,

8 *Supra* notes 3 and 4 respectively.

9 ILC, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001,* (2001) *Yearbook of ILC,* Vol. II, Part Two.

10 M. Milanović, 'Special Rules of Attribution of Conduct in International Law', (2020) 96 ILS 295 at 329.

11 S. Talmon, 'The Responsibility of Outside Powers for Acts of Secessionist Entities', (2009) 58 ICLQ 493, at 498 and 513.

12 ICJ, *Nicaragua* case, *supra* n. 3, para. 115; ICJ, *Application of the Genocide Convention in Bosnia, supra* n. 2, para. 400.

13 *Pictet's Commentary on GCIII,* at 57.

of belonging under Article 4A(2) GCIII may be fulfilled by a mere '*de facto*' nexus. Similarly, according to the ICRC's revised Commentary on the Geneva Conventions (GC), it is sufficient that an armed group declares to fight on behalf of a Party to an international armed conflict (IAC), and that the latter acknowledges this at least tacitly.[14] It is suggested here that since those different degrees of control or nexus are developed for different ends, they should not be confused with each other.

III. The '*Naletilić* formula' for the requisite threshold of control over an armed group in case of indirect occupation

It is worth quoting what the ICTY Trial Chamber in *Naletilić* (2003) stated. The relevant passage reads that:

> The overall control test, submitted in the *Blaškić* Trial Judgement, is not applicable to the determination of the existence of an occupation. The Chamber is of the view that there is an essential distinction between the determination of a state of occupation and that of the existence of an international armed conflict. The application of the overall control test is applicable to the latter. A further degree of control is required to establish occupation. Occupation is defined as a transitional period following invasion and preceding the agreement on the cessation of the hostilities. This distinction imposes more onerous duties on an occupying power than on a party to an international armed conflict.[15]

The *Naletilić* Trial Chamber's rationale for a higher degree of control than 'overall control' rests on the implications of positive obligations under the law of occupation. On one hand there is every reason to believe that without physical control of the territory, a system of administration for maintaining order and public life would be practically impossible.[16] Yet, the gist of the issue here is to do with the degree of control over an armed group, not with the requirement of control over territory. It may not be immediately clear why the stricter and more specific degree of control than 'overall control' over an armed group is necessary with a view to discerning indirect occupation. Still, the intermediate standard may be rationalized by the perceived need to align the standard for determining indirect occupation (and applicability of the IHL of occupation) with the test for attributing the conduct of a proxy to a State.

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14 ICRC, *Revised Commentary on GCIII* (2020), paras1005 &1007.

15 ICTY, *Prosecutor v. Naletilić and Martinović,* Trial Chamber, Judgment, 31 Mach 2003, para. 214. See also Kyo Arai, 'Purokushi-wo-tsuujita Senryo' ('Occupation through a Proxy') in: K. Ashida et al (eds), *Succession of Positivist International Legal Studies* (*Jisshou-no Kokusaihogaku-no Keisho*) (2019), Ch. 35 at 907-944 at 914; 'Between Consented and Un-consented Occupation', (2018) 51 *Israel Law Review* 365.

16 R. Kolb and S. Vité*, Le droit de l'occupation militaire – Perspectives historiques et enjeux juridiques actuels* (2009), at 180.

IV. Relevance of the Degree of Control over an Armed Group to Certain Provisions of the Geneva Conventions That are Limited to the 'Regulars'

The question of degree of control becomes germane to several provisions of the 1949 Geneva Conventions that limit the power to take some measures relating to the occupied territory only to the *State* armed forces. The express wording of those provisions seem to privilege the 'regulars' within the meaning of Article 4A(1) GCIII, excluding the 'irregulars' covered by Article 4A(2) GCIII. Such restrictions of the power to the 'regulars' appear in the provisions on administration of prisoners of war (POW) camps,[17] disciplinary punishment,[18] and civilian internment camps.[19] Arguably, the scope of application of other provisions of the Geneva Conventions might be implicitly confined to the 'regulars'.[20] It can be suggested here that for an armed group to be approximated to the 'regulars' and to exercise certain measures in the territory under its control, it would have to be seen as a '*de facto* organ' of a sponsoring State. Yet, for that purpose, a considerably stringent test of 'complete dependence' needs to be fulfilled, as suggested by the ICJ in *Nicaragua*[21] and codified in Article 4 ARSIWA.

V. Implications of Varying Degrees of Nexus between an Armed Group and a Supporting State for Determining Indirect Occupation

Seven scenarios may be mapped out to show how different degrees of nexus between an armed group and a State come into play when determining the legal character of both conflict and territorial control held by an armed group, and the applicable legal regime of IHL.[22] Instances of indirect occupation is most likely to occur as a consequence of 'internationalization' of an

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17 Article 39(1), 1st sentence, GCIII.

18 This is reserved only for a 'camp commander' and a 'responsible officer' under Article 96 GCIII, and the 'responsible officer' in turn has to meet the requirement of Article 39 GCIII.

19 Article 99(1), 1st sentence GC IV.

20 For instance, under Article 78 GC IV, the occupying power is allowed to intern civilians where there are 'imperative reasons of security'. Yet, as administrative detention of protected persons is the exception even in occupied territory, it may be asked if an armed group is fit for undertaking 'value judgment' of the notion 'security', which may risk being read arbitrarily. Other measures that might be seen implicitly limited to the 'regulars' are the power to conclude an agreement with another Party to an IAC, as for establishing safe zones and removing the vulnerable from dangerous zones (Articless 14(2) & 17 GC IV) and a special agreement for reinforcing protections (Articles 6/6/6/7 GCI-IV). See L. Cameron and V. Chetail, *Privatizing War – Private Military and Security Companies under Public International Law,* (2013), at 109-112.

21 *Supra* n. 6.

22 J.J. de Hoogh 'Articles 4 and 8 of the ILC Articles on State Responsibility – the *Tadić* Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia', (2002)72 BYIL 255, at 291.

intra-state armed conflict.[23] Seven scenarios can be contemplated. Note that this author suggests that in the event of internationalization of a conflict, exceptionally the 'overall control' standard be substituted as the threshold for the requirement of belonging under Article 4A(2) GCIII. Further, in all the situations, it is not excluded that the territory controlled by a proxy force may in theory turn into the 'directly' occupied territory because the stringent test under Article 4 ARSIWA is met and the proxy deemed as a *de facto* organ of a supporting State.

First, imagine a situation where armed group α declares to fight on behalf of State A (which acknowledges this), intervenes in the territory of State B, and gains effective control over part of the territory. The legal character of the armed conflict between armed group α and State B may be considered a NIAC, save in two exceptional cases: (i) where State B is already involved in hostilities against State A to which armed group α is considered to appertain within the meaning of Article 4A(2) GCIII; (ii) where even in the absence of State A's parallel involvement in hostilities against State B, the NIAC may turn into an IAC when State A's degree of control over armed group α reaches the tipping point of 'overall control'. In the first exceptional case, what would be a NIAC between an armed group α and State B may be subsumed into an IAC between State A and State B. In those two exceptional cases, the applicable paradigm of IHL would correspondingly shift from the IHL of NIAC to the IHL of IAC (hostilities), followed by the IHL of IAC (occupation).

Second, consider a situation where armed group α, which is affiliated to State A but with a degree that falls below the standard of 'overall control', has intervened in the enclave of State B. Armed group α later withdraws but stands on the border while ready for having its effective authority felt among the inhabitants of the enclave within a reasonable time. The group also tightly controls the borders, territorial waters and airspace of this enclave. Here again, the conflict initiated by armed group α is characterized as an NIAC unless there is an IAC between State A and State B, with armed group α acting as the 'independent force' for the former as covered by Article 4A(2) GCIII. Further, in default of State A's concurrent hostilities against State B, State A's 'overall control' over armed group α may provide a key to internationalizing the conflict. Yet, there remains a vexed question of applicability of the IHL on occupation subsequent to the withdrawal of armed group α. This depends on how flexibly the main element of occupation, the *capacity* to exert effective control over territory, should be interpreted. This author is sceptical of applicability of the normative regime of occupation in a territory where there is no presence of a foreign troop and where a re-intervening foreign troop would meet with an intensive armed resistance.[24]

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23 See M. Milanović, 'The Applicability of the Conventions to "Transnational" and "Mixed" Conflicts', in A. Clapham, P. Gaeta and M. Sassòli (eds), *The Geneva Conventions – a Commentary* (2015), at 31.

24 This is the subject of debates in relation to the Gaza Strip after the Israeli withdrawal.

Third, consider a situation in which State A furnishes support to armed group β that has already been engaged in a NIAC in the territory of State B and where this support is pivotal in enabling this group to gain territorial control either immediately or after lapse of some time. The change in the applicable paradigms of IHL would occur at a certain juncture where the degree of 'overall control' by State A over armed group β is attained: IHL of NIAC ⇒ IHL of IAC (hostilities) / IHL of IAC (occupation). Or if one agrees with the *Naletilić* Trial Chamber's intermediate degree of control, there would be a phase-by-phase model: IHL of NIAC ⇒ IHL of IAC (hostilities) ⇒ IHL of IAC (occupation).

Fourth, suppose that armed group β has been engaged in a NIAC with control over part of State B's territory.[25] Consider that it *subsequently* declares to fight on behalf of State A, which is already involved in an IAC against State B in parallel. Provided that the degree of closeness between armed group β and State A is sufficient to meet the requirement of belonging under Article 4A(2) GCIII (which is not difficult) but not the 'overall control' level, this situation presents a mix conflict model: a NIAC between armed group β and State B; and an IAC between State A and State B.[26] Still, when the degree of control by State A over armed group β attains the level of 'overall control', the NIAC between armed group β and State B may be absorbed into the IAC between State A and State B. The applicable paradigm of IHL would be: the IHL of NIAC alongside the IHL of IAC (hostilities) ⇒ IHL of IAC (hostilities and occupation).

Fifth, imagine a situation where State A supports the governmental forces of State B in its fight against armed group β. The latter succeeds in overthrowing the central government with gains in control over most of State B's territory and population. Yet, it leaves some part of the territory continuously held by the former governmental forces, which are always assisted by State A. The change in the governments results in the corresponding alteration in the legal status. The former governmental forces are now converted to an armed opposition group. Suppose that State A wields 'overall control' over these ex-governmental forces of State B, the applicable paradigms of IHL would be: IHL of NIAC ⇒ IHL of IAC (hostilities and occupation).[27]

Sixth, consider a situation where armed group α that is affiliated to the government of State A intervenes in the territory of State B with the consent of the latter (say, with a view to fighting armed group β) and acquires effective control over parcel of State B's territory. Imagine,

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25 See *Pictet's Commentary on GC IV,* at 35-36. See also W. Kälin and J. Künzli, *The Law of International Human Rights Protection*, 2nd ed., (2019) at 149.

26 The situation may be different if armed group β has pledged to fight on behalf of State A from the outbreak of an IAC between State A and State B. In such a case, there may be only a single IAC, with armed group β deemed to belong to State A.

27 Article 10 ARSIWA. See L. Condorelli & C. Kress, 'The Rules of Attribution: General Considerations', in J. Crawford, A. Pellet and S. Olleson (eds), *The Law of International Responsibility,* (2010), 221 at 231.

however, that the consent of State B is subsequently withdrawn. The legal effect is that the continued presence of armed group α may be seen as indirect occupation. In this situation, the shift in the applicable paradigms of IHL would be: *occupatio pacifica* ⇒ IHL of IAC (occupation).

Seventh, imagine a situation of State secession where State B issues a declaration of independence from State A, which musters broad international support.[28] Suppose that armed group α, which is opposed to State B's independence and supported by State A, fights State B's armed forces while already maintaining effective control over part of State B's territory. At a certain point State B becomes widely recognized as an independent State (irrespective of doctrinal controversy over the constitutive effect of recognition by other States) while State A comes to be seen as exercising 'overall control' over armed group α. At that juncture, the conflict that has been initially labelled a NIAC may be internationalized. With armed group α now deemed as the 'irregulars' fighting on behalf of State A within the meaning of Article 4A(2) GC III, the applicable legal regime would be IHL of IAC (both of hostilities and occupation).

VI. Proposed Approaches to Make Sense of Varying Degrees of Closeness/Control

Next, against the background of three conceptually different issues (conflict classification, including identification of indirect occupation; irregulars' affiliation to a party to an IAC; and responsibility of a supporting State), this author puts forward six proposed approaches that aim to make sense of the different degrees of a nexus between an armed group and a supporting State. The first approach is to propose that the 'overall control' standard should serve to determine not only the legal regime of indirect occupation but also the question of State responsibility. This proposition proceeds along the line of reasoning of the ICTY Appeals Chamber in *Tadić*. The proposed alignment of the standards for internationalization and attribution through the benchmark of 'overall control' is endorsed by the ICRC's revised Commentary on the GCs on the basis of the need to 'avoid a situation where some acts [of independent forces] are governed by the law of international armed conflict but cannot be attributed to a State'.[29]

The second approach draws a line between the question of conflict classification and State responsibility. It maintains that the question of indirect occupation should be examined by the same yardstick of 'overall control' as that for internationalization of an armed conflict. Yet, endorsing the ICJ's reasoning in *Nicaragua* and *Applicability of the Genocide Convention in Bosnia*, this approach suggests that the criterion for determining indirect occupation should

28 See Milanović (2015), *supra* n. 23, at 34.

29 *ICRC's Revised Commentary on the GC I,* para. 271 (on common Article 2 GCs).

be decoupled from the question of attribution for State responsibility. It argues that the latter question needs to be addressed by the standard of effective control under customary international law.

The third approach seeks to harmonize the standard for determining indirect occupation (and hence the applicability of IHL of occupation) with the test of attribution. Yet, the uniform standard to be chosen here is tuned on the *Naletilić* Trial Chamber's intermediate degree of control. It suggests that such a nuanced standard be applied to assess both the applicability of IHL of occupation and the responsibility of a supporting State for act of a proxy.

The fourth approach assumes the tripartite standards. It starts with differentiating between the question of internationalization of an armed conflict and that of indirect occupation, proposing the 'overall control' standard for the former question and the intermediate degree of control for the latter. Then when it comes to the responsibility of a supporting State for the acts of an armed group, this approach opts for the 'effective control'.

Fifth, it may be suggested that the legal regime of occupation should be applied by analogy to a non-State armed group as the 'direct' occupying power even though the conflict remains formally a NIAC. This would result in imposing the occupying power's duties and obligations directly on a non-State armed group.[30] The advantage of such a policy-based approach is to bypass the cumbersome question of ascription (for conflict classification) and to dispense with the question of attribution of a non-State actor's act to the responsibility of a State.[31] Yet, clearly, in the absence of sufficient State practice, it is far from the *lex lata*.

The sixth approach challenges any clinical distinction between the occupied territory and non-occupied territory (namely, the invasion/withdrawal phase or the territory under aerial control). It proposes a nuanced understanding of the notion of 'effective control' over territory in a 'functional' way.[32] More specifically, this approach suggests that the applicability of the rules of occupation be determined on a gradual and differentiated basis, taking into account their nature and practical operationalizability.[33]

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30 S. Sivakumaran, 'Re-envisaging the International Law of Internal Armed Conflict', (2011) 22 EJIL 219 at 245-7; K. Mačák, *Internationalized Armed Conflicts in International Law,* (2018), at 229.

31 This author owes the distinction between 'ascription' and 'attribution' to: Milanović (2020), *supra* n. 10, at 318-9.

32 See A. Gross, *The Writing on the Wall* (2017), especially, *ibid*, at 58, fn. 25.

33 Medical or food supply should be distributed, whilst clearly the overall duties of administration would be inconceivable without sizable tract of land under sustained effective control.

VII. Conclusion: Need to Unhook the Question of Identification of Indirect Occupation from That of Attribution for State Responsibility

As noted above, the endorsement by the ICRC's revised Commentary of the *Tadić* Appeals Chamber's approach is pursuant to its concern to close any 'responsibility gap'. Yet, this author's point is that even following this approach, some lacunae may remain with respect to the imputation of acts of an armed group appertaining to a State. This would hold true unless the 'overall control' standard might be substituted as the threshold for the affiliation of the 'irregulars' under Article 4A(2) GCIII, as implicitly suggested by the *Tadić* Appeals Chamber.[34]

Arguably, Article 91 AP I might be read as suggesting a standard that is lower than 'overall control'. Leaving aside the controversy over whether Article 91 AP I covers the 'irregulars',[35] a syllogism may be presented as follows. First, it may be argued that this provision, whether customary or not, requires a State to account for *all* acts of its armed forces. Second, the notion 'armed forces' within the meaning of AP I includes an irregular armed group because of the API's 'harmonization approach' that eliminates the traditional distinction between the 'regulars' and the 'irregulars' under Article 43 AP I. Still, it remains the case that the irregular's affiliation to a State is evaluated on the basis of a lax standard for the requirement of belonging ('*de facto* relationship'). Third, *ergo*, such a lax standard for the question of an armed group's affiliation to a State Party might be considered sufficient to fulfil the test of attribution. To recall, 'overall control' is much higher than the minimum threshold for the requirement of belonging.

As a way to justify such a lower standard of attribution that might be *prima facie* envisaged for Article 91 AP I, it may be suggested that the rules of attribution under IHL constitutes the *lex specialis*, as compared with the 'effective control' standard contemplated under general international law.[36] The test of attribution might be pitched at level of 'overall control' or even as low as the minimum threshold for the requirement of belonging under Article 4A(2) GCIII. However, a caveat ought to be attached to the hypothesis that IHL was equipped with the *lex specialis* on attribution. As highlighted by the ILC's commentary to Article 55 ARSIWA,[37] any

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34 ICTY, *Tadić* Appeals Judgment, *supra* n. 1, paras 90-92. See also K. Del Mar, 'The Requirement of "Belonging" under International Humanitarian Law', (2010) 21 EJIL 105-124, at 111-2 and 114-5.

35 de Hoogh, *supra* n. 22, at 284; and M. Milanović, 'State Responsibility for Genocide', (1996) 17 EJIL 553, at 585.

36 M. Sassòli, 'State Responsibility for Violations of international Humanitarian Law', (2002) 84 IRRC 401 at 406.

37 ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, para. (5) of the general commentary & para. (2) of the commentary to Article 55.

specific rule of attribution has to be expressly agreed upon by the parties. Hence, this paper endorses 'effective control' not only as the yardstick of attribution under the *general* law of State responsibility but also under IHL. With respect to any 'responsibility gap', it is submitted that the concept of State responsibility should be 'holistically' grasped, and that the responsibility of a supporting State may be identified through the doctrines of positive obligations under IHRL and the general notion of 'due diligence'.[38]

38 Milanović (2020), *supra* n. 10 at 328.

THE ICRC COMMENTARY ON COMMON ARTICLE 3 AND THE PRINCIPLE OF NON-REFOULEMENT

LE COMMENTAIRE DU CICR SUR L'ARTICLE 3 COMMUN ET LE PRINCIPE DE NON-REFOULEMENT

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Résumé

Colonel Nathalie Durhin dirige le département de droit opérationnel, Commandement allié Opérations (ACO) Bureau des affaires juridiques (OLA), au sein du SHAPE (OTAN). Dans son intervention, elle s'appuie sur son expérience en tant que conseillère juridique militaire chargée du suivi post-transfert et des visites aux détenus pour illustrer des questions pratiques de mise en œuvre du principe de non-refoulement en conflit armé non international. Tout en soulignant l'importance et l'utilité des Commentaires du CICR pour interpréter le principe de non-refoulement (PNR) contenu dans l'article 3 commun aux Conventions de Genève, elle appelle le CICR à en préciser davantage les modalités de mise en œuvre. Elle regrette en particulier que, tout en donnant des définitions utiles, les Commentaires effectuent de nombreuses références à différentes sphères du droit, notamment le droit des réfugiés et les droits humains, sans en préciser explicitement l'applicabilité en temps de conflit armé. De plus, elle note que les dispositions relatives à la mise en œuvre du PNR sont moins développées que celles justifiant de son applicabilité. Il serait donc également utile de partager des lignes directrices et bonnes pratiques concernant les garanties procédurales protégeant les individus transférés. Enfin, Nathalie Durhin illustre son propos par une étude de cas détaillée fondée sur son expérience des opérations de détention et de transfert au Sahel, dans le contexte de l'opération Barkhane en 2014.

Common article 3 (Common Article 3) is often known as a "convention in miniature" within the Geneva Conventions. However, the updated Commentaries on the First and Third Convention published by the ICRC in 2016 and 2020[1] have extensively developed the part concerning only this article, with 560 articles and more than 200 pages. This is because Common Article 3 applies solely to non-international armed conflicts (NIAC) and will be the only article applicable to NIAC until the moment when the Parties agree to bring the Convention into force between

1 Commentaries on Common Article 3 are to be found both in the 2016 (First Convention) and 2020 (Third Convention) updated Commentaries. The numbering of the paragraphs referred in this article is from the 2020 Commentaries (https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=31FCB9705FF00261C1258585002FB096).

them in whole or in part. For instance, this article is paramount when it comes to detention operations in NIAC, since treaty law on deprivation of liberty of persons is very limited for these kinds of conflicts.

It thus was necessary to reflect on the current interpretations of this basic article, so that it can be applied effectively in today's armed conflicts. For example, Common Article 3 is largely considered to incorporate the principle of non-refoulement (PNR[2]), but it is worth examining in detail why, how and to what extent this principle should be applied in NIAC. The updated Commentaries are meant to be an essential tool for practitioners and are thus highly relevant for those (military commanders, officers, legal advisors etc.) engaged in military operations, especially in alliances (e.g., NATO) or coalitions, when divergences in legal interpretations are most common.

As a military lawyer in the French armed forces for almost two decades, and now a NATO Legal Advisor[3], I will share with you my views on how the PNR is depicted in the updated Commentaries on Common Article 3, the scope of its application, and the main issues raised (or not) by the Commentaries. I will also illustrate my point by referring to the detention and transfer operations conducted by the French armed forces in Sahel.

I. According to the ICRC Commentaries on Common Article 3, why should PNR be applied in NIAC?

In Common Article 3, there is no explicit prohibition on non-refoulement, and nor is there one in the previous Commentaries. The 2016 updated Commentaries consequently add useful definitions, current issues and recommendations. Paragraph 745 mentions the "traditional sense" of the principle, which "*prohibits the **transfer of a person from one State to another** in any manner whatsoever if there are **substantial grounds** for believing that the person would be **in danger** of suffering the violation of **certain fundamental rights** in the **jurisdiction of that State**"*[4]. In the first paragraph of the Common Article 3 Commentaries, this definition is slightly different, as the ICRC recalls the prohibition on "*Parties to the conflict from transferring **persons in their power** to **another authority** when those persons would be in danger of suffering a **violation of those fundamental rights** upon transfer"*[5].

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2 The acronym used in this article for the principle of non-refoulement (PNR) is purely personal.

3 Since 2019, Colonel Nathalie Durhin has been the Operational Law Branch Head within the Office of Legal Affairs (OLA) of the Supreme Headquarters Allied Powers in Europe (SHAPE), the NATO Operational Command. The views expressed in this article are hers alone and do not reflect NATO and the French military forces' views or policies.

4 Emphasis added.

5 Emphasis added.

To justify the applicability of this principle in NIAC, the Commentaries refer to many bodies of law, in the following order: International Humanitarian Law (IHL), Refugee Law, International Human Rights Law (HIRL), extradition treaties and principle of Customary International Law[6].

The 2020 Commentaries focus mainly on the implicit existence of PNR in IHL, which makes sense considering the ICRC is the custodian of this body of law. First, Common Article 3 protects the fundamental rights, as mentioned in the first paragraph 744, and PNR is clearly one of them. Refoulement should also be prohibited because of its strong and obvious link to violence against life and person (murder, torture, ill-treatments etc.). Second, IHL, at minimum, prohibits a party to a conflict from circumventing Common Article 3 rules by deliberately transferring a detainee to another party that would violate those rules[7]. Common Article 1[8] could also be referenced, since the obligation to ensure respect for the Conventions implies that a party should ensure the safety of a transferred person to another party. Other IHL provisions can also be referred to, such as Article 12 CGIII[9], Article 45 CGIV (transfer of protected persons), Article 118 GCIII (return of Prisoners of War) and Article 5.4 APII (measures to ensure the safety of released persons).

The implicit existence of PNR in IHL is reinforced by the fact that IHRL also applies during armed conflicts[10], especially in NIACs, as a "complementary protection". Without provoking a never-ending debate on IHRL's applicability in armed conflicts[11], the Commentaries focus on the prohibition on torture, cruel treatment or the outrage upon personal dignity referred to in Common Article 3, and the relevance of IHRL provisions and case law, to advocate for PNR' applicability in NIAC.

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6 See for instance the 2007 UNCHR Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. https://www.unhcr.org/4d9486929.pdf

7 See Articles 12 CGIII and Article 45 CGIV.

8 Common Article 1 to the four Geneva Conventions reads as follows: "*The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances*".

9 Article 12.2 CGIII: "*Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody*".

10 See for instance Cordula Droege, "*Transfers of detainees: legal framework, non-refoulement and contemporary challenges",* International Review of the Red Cross, Volume 90 Number 871 September 2008, p. 675. "*If the absolute prohibitions in human rights law mean that authorities must not only refrain from subjecting persons to such treatment but also from transferring them to places where they will be subjected to such treatment, there is no reason why it should not be the same under humanitarian law*".

11 All IHRL case law references regarding purpose are to be found in a footnote (665) to paragraph 749.

II. What are the consequences of the applicability of PNR in NIAC?

The question of who is bound by PNR and where it applies can be answered more easily. The applicability to both States and non-state actors is enshrined in the foundational logic and purpose of Common Article 3. Interestingly, the Commentaries recognize the specific challenges raised by International Organizations (IOs), which may find it difficult to meet all PNR requirements. Even if Customary International Law is applicable to IOs, and IHL/IHRL obligations apply to the States that make up IOs, some States do not accept PNR applicability, which is highly criticized by many HR bodies and case law. When it comes to the territorial applicability of the PNR, the notion of "transfer of control" should be considered the trigger, even though it is not really detailed in the Commentaries. Paragraph 744 mentions the transfer "to another authority", even if the terms "transfer of a person from one State to another" are found in the traditional definitions. However, the ICRC considers that the PNR should be applied irrespective of the crossing of a border, which is consistent with other "soft law" provisions like the 2012 Copenhagen Principles[12].

Surprisingly, the provisions on the implementation of the PNR are less developed than the ones justifying its applicability. There are only two paragraphs dealing with the consequences for the detaining authority, and there is little explanation about procedural obligations. First, the detaining authority must assess carefully whether there are substantial grounds for believing that a person would be at risk if transferred. This "risk assessment", as the military would say, should be conducted "*ex ante*", when planning the transfer, and in good faith. The assessment should consider objective reviews of the policies and practices of the receiving authorities, reports from independent sources, along with less subjective information, stemming for instance from interviews with the detainee. The challenge presented is that there should be proper evidential basis of possible ill-treatments, and that the risks should be somehow foreseeable.

Second, the Commentaries mention as a good practice the post-transfer monitoring established by some States and IOs in NIAC situations. Without taking sides, they focus on the access granted to transferred persons, enabling the monitoring of their personal situation, as long as it is assessed that there could be a danger. In parallel, the "capacity building" efforts carried out by some stakeholders are briefly mentioned. This could encompass the efforts undertaken by some armed forces, in their civil-military cooperation (CIMIC) activities, to sustain the judiciary and penitentiary systems, to support infrastructure projects, or more

12 See the Copenhagen process on the handling of detainees in international military operations, October 2012. https://iihl.org/wp-content/uploads/2018/04/Copenhagen-Process-Principles-and-Guidelines.pdf

broadly to train people in IHL and IHRL. These efforts may indeed increase the respect for Common Article 1 obligations.

III. The main issue raised by the Commentaries relates to the very application of the PNR in NIAC

One can easily understand that the ICRC did not extensively address the issue of Refugee Law[13] and its applicability in armed conflict situations. The "traditional sense" of the principle (paragraph 745) can be understood as an implicit reference to Refugee Law. However, that PNR constitutes above all the cornerstone of international refugee protection[14], and the interconnection of these different bodies of law in armed conflict situations, are worthy of discussion. As mentioned by Rodenhaüser[15], "*The main difference between the principle of non-refoulement under its different codifications is the question of who falls under its protection and for what reasons. Under refugee law, it protects refugees against return to places of persecution, while under IHL it only applies to certain categories of persons that are affected by armed conflicts. Under human rights law, the principle of non-refoulement can protect any person under a State's jurisdiction, provided a pertinent danger exists in the State to which the person shall be transferred. Depending on the applicable human rights treaties, the principle protects individuals against different dangers that may not be covered by other bodies of law, such as a risk of death penalty, cruel punishment, or child recruitment and participation in hostilities, regardless of whether the danger to the person is based on a discriminatory ground or not. While refugee law recognizes certain narrowly defined exceptions to the principle of non-refoulement, the principle is absolute under other bodies of law*".

Nevertheless, the Commentaries dare to mention some authors' statement about the possibly too tenuous link of PNR with IHL[16]. To counter this assertion, the ICRC advocates for an implicit applicability under IHL. Nevertheless, the demonstration would have been more convincing if the Commentaries provided a clear statement on IHRL applicability in armed conflicts, even if the closure of this never-ending debate would not have been achieved by these already lengthy Commentaries. Generally, the reference to numerous bodies of law without firm state-

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13 Except when mentioning PNR as a core principle of Customary International Law and referring to the 2007 UNHCR Advisory Opinion.

14 See Emanuela-Chiara Gillard, "*There's no place like home: States' obligations in relation to transfers of persons",* International Review of the Red Cross, Volume 90 Number 871 September 2008, pp. 728-730.

15 Tilman Rodenhaüser, *"The principle of non-refoulement in the migration context: 5 key points"*, in ReliefWeb, 30 March 2018: https://reliefweb.int/report/world/principle-non-refoulement-migration-context-5-key-points

16 See Françoise J. Hampson, "*The Scope of the Obligation Not to Return Fighters under the Law of Armed Conflict"*, in David James Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law*, Brill Nijhoff, Leiden, 2014, pp. 373-385, at 385.

ments about their respective applicability in armed conflicts could be detrimental to the demonstration. The Commentaries are of the greatest value to IOs like NATO, within which member States can have different treaty law obligations and divergent legal interpretations. Since some member States may be tempted not to accept the application of PNR when under the command and control of an IO[17], it is paramount that the Commentaries take a stand. Notably in 2019, NATO/SHAPE referred to PNR in a planning guide related to detention operations but mentioned that States' views differ on it. When it came to mention the obligations that shall be "taken into account", reference was made to "Common Article 3 interpreted by ICRC", assuming that this interpretation would not be too open to dispute. Consequently, without clear statements on the question of bodies of law's applicability, an IO such as NATO could still face challenges when drafting precise directives or procedures pertaining to detention operations.

IV. The notions of "fundamental rights" or "control" might have been more developed

Since PNR is analyzed within the scope of Common Article 3, the ICRC logically refers to the "fundamental rights" enshrined within Common Article 3, mainly the violence against life and person (murder, mutilation, cruel treatment and torture) and outrages upon personal dignity (in particular humiliating and degrading treatments). The principle of "no Common Article 3 circumvention by a transfer" should also be true for all the Common Article 3 fundamental guarantees, including the prohibition on the passing of sentences without affording all judicial guarantees, even if the more restrictive interpretation of Human Rights bodies in this field must be taken into consideration. The Commentaries do not explicitly address the other fundamental rights that could be protected by Refugee Law and IHRL, e.g., the prohibition on proceedings that could lead to the death penalty, the prohibition on enforced disappearance, or the rights of children, even if the scope of these rights has been expanded in case law[18] when it comes to PNR's applicability. Finally, the ICRC does not clearly state the scope of applicability of these prohibitions, i.e. only States or non-State actors as well?

The notion of "control" (paragraphs 750 to 752) is not defined in detailand could raise some practical issues. There is of course an abundance of ECtHR case law regarding the notion of "effective control" as a trigger for the extra-territorial applicability of Human Rights, a decision of which is outside of the scope of this paper. However, providing some guidelines about the degrees of control an authority should apply over an individual to activate the PNR's applicability could be very useful. At least, it can be assumed that people are under the power, or "under the control" of an authority whatever the deprivation of liberty is designated (return,

17 See also Cordula Droege, *ibid*, pp. 683-686.

18 See for instance ECtHR, Al-Saadoon and Mufdhi v. the United Kingdom, 2 March 2010, concerning death penalty.

rejection, expulsion, refusal, deportation, extradition, transfer etc.) and how long it lasts. But what happens in case of allied and/or partnered operations? Let's look again at the example of NATO detention operations, and the difficulty to establish clear responsibility when it comes to PNR, and Human Rights in general. Just think about a deployed military police (MP) unit, from Nation A, with a MP Commander from Nation B, under the command of a Force Commander from Nation C. Who has effective control over a captured person? Does that answer vary between the moment of the capture, and later when the individual is in custody? Which nation is responsible for ensuring that the captured person is not refouled, since capture and detention are "national responsibility" within NATO? Moreover, what kind of responsibility can be established for an IO or a nation, which does not conduct transfer operations *per se*, but provides assistance to these operations? For instance, a recent Danish High Court judgement of June 2018 raised interesting questions. This Court has decided to compensate Iraqi citizens captured during a joint operation and subsequently ill-treated, ruling that the Danish troops should have known about the risks of inhumane treatment by the Iraqi security forces, even if the Danes were only "assisting" Iraqi forces in operations aimed at suspected insurgents[19].

V. What are the other issues not sufficiently addressed in the Commentaries?

The Commentaries do not address the issue of transfer when an individual cannot be handed over to another State or authority, because the State has collapsed or is collapsing. When a transfer is not possible, the option is either to "catch and release" (which does not make much sense from an operational point of view) or indefinite detention. Additionally, there are sometimes domestic political constraints preventing from conducting detention operations, even if a transfer to a third party could be possible. The Commentaries do not address the question of transfer agreements or diplomatic assurances[20] that could be granted by States, even if they are a common practice used by States to try to abide by the PNR[21]. Obviously, these diplomatic agreements do not *per se* relieve the State of its obligations under the PNR. Additionally, they could be, in the best-case scenario, unable to remove the risk of torture and other ill-treatments, and in the worst-case scenario, only a semblance of agreement, aimed at showing good will to abide by the law, but with no real intent to monitor the threats to

19 See Anders Henriksen, "*Detainees in Iraq win damages from Denmark in High Court ruling*", in Just Security, 22 June 2018. https://www.justsecurity.org/58340/detainees-iraq-win-damages-denmark-high-court-ruling/

20 See UNHCR Note on Diplomatic Assurances and International Refugee Protection, August 2006. See also Emanuela-Chiara Gillard, ibid, pp. 742-749.

21 See the French practice below, point VI.

transferred persons. However, the ECtHR has never condemned this practice, but has addressed the assurances' reliability on a case-by-case basis[22].

The question of the "secondary refoulement" is also worth mentioning. What if a transfer occurs between nations part of the same IO/coalition, or between the host nation to which detainees have been transferred, and another (third) State? Without post-monitoring processes, it is almost impossible to track these possible secondary transfers. But even if some guarantees are in place, it is often very difficult for the armed forces to monitor transfers that can occur under a civilian/judiciary framework (extradition processes for instance). Additionally, when transfer agreements are reached with a host nation, mainly because of the will to respect its sovereignty and primary jurisdiction, it is difficult to challenge some judiciary decisions taken in accordance with other international agreements binding the host nation with third States.

Finally, there is a lack of details regarding the procedural obligations related to the PNR, which are not all controversial. At least, when a transfer is planned, the captured person should be informed about it, in a language he/she understands, and in a timely manner. But this could enable the detainee to challenge the transfer's decision, and armed forces may face some difficulties in defining the extant of these guarantees, for instance the modalities of this contestation (right to challenge the transfer before a court, or an independent body?). The possibilities for the detainee to express fears, or to get assistance of legal counsel, should also be considered, even if (especially for the latter) some practical, operational and/or security considerations could limit the option. In any case, exchange of good practices are important for the armed forces trying to apply in good faith the consequential procedural guarantees of PNR, whilst balancing the risk to their own security and efficiency.

VI. As a case study: French detention and transfer operations in Sahel

In the context of the French operation Barkhane[23] led in Sahel since 2014, the French armed forces are conducting capture and detention operations, in accordance with a very strict legal framework. France is involved in some NIACs, and consistent with both the spirit of IHL and an IHRL perspective, its armed forces are authorized to detain individuals for security reasons, for a very limited period. The standards applied to the conditions of detention and procedural guarantees are stemming from IHL, and whenever possible, from IHRL. Consequently, the PNR's application is deemed as paramount. Since these detentions are considered as excep-

22 See for instance ECtHR, Chahal v. The United Kingdom, 15 November 1996; or ECtHR, Shamayev and 12 others v. Georgia and Russia, 12 April 2005.

23 See https://www.defense.gouv.fr/operations/afrique/bande-sahelo-saharienne/operation-barkhane/dossier-de-reference/operation-barkhane

tional measures, and because the French armed forces do not intend to detain for a long period within the territory of sovereign States and launch judiciary proceedings against the individuals posing a threat, it has been decided to enter into transfer agreements with the host nations.

Without entering into too much detail about these transfers, the decision was taken after a proper assessment of the overall state of the prisons' systems. In principle, if the detentions' conditions are found to be unacceptable (taking into account the differences of standards that can exist between a western country and a less developed one), a transfer agreement shall not be reached. To make this assessment, the French authorities rely on military intelligence but also on open source information, and reports from different independent entities or NGOs. The update of this assessment, when the agreement is in force, can become challenging, because it could be considered as a completed task and/or with no more sufficient resources allocated. As already mentioned, if the standards are considered as not sufficient, the armed forces are faced with an operational and legal dilemma ("catch and release" or unlimited detention).

The transfer agreements concluded by the French authorities contain provisions amounting to "diplomatic assurances"[24]. On one hand, the host nations commit to treat the transferred individuals in accordance with IHL and IHRL (including the prohibition on the death penalty). On the other hand, the host nations grant a right to post-transfer visits to the French authorities and the ICRC, and possible other Human Rights bodies. Consequently, these agreements enable the post-transfer monitoring of the treatment of detainees.

The French armed forces have also established procedural safeguards for the transfer of the captured persons. As soon as an individual is captured, he/she is informed of the reasons of this capture. Later in the process, he/she is also informed of subsequent procedures (detention, release, or transfer to the local authorities). It is important to note that the reasons of the detention are periodically reviewed by a decision board. Before any transfer, a thorough assessment of the risks is conducted, in accordance with the PNR requirements. The practical difficulties faced by the French armed forces are the following: what if there is no systematic practice of torture in the envisaged detention facilities? How to take into account the personal circumstances of the captured person, who is not always willing to talk to the detaining authority, and his/her subjective fears? How to be sure that these fears are expressed in good faith, knowing that these captured persons mainly belong to organized armed groups deemed as illegal by the host nation's authorities?

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24 See footnote 20.

In order to secure the transfer and the tracking of the individuals, a "transfer file" is created for each captured person. The transfer files include the name, age, nationality, medical records etc. and are handed over to the host nations' authorities along with the captured persons. It is of the utmost importance to register medical data, to be able to confirm the medical status of the CPRERS when transferred, and to check during the post-transfer visits if his/her condition has evolved. Additionally, all elements that could be of use for ensuring a future good treatment of the transferred individual are recorded. Nevertheless, in many cases, mentioning the fears expressed by the captured persons in the file could prejudice the individual when transferred to the control of the host nations' authorities. Finally, the transfers are executed in the presence of ICRC personnel, acting in an impartial manner, in order to ensure that the rights of the captured persons are respected, either by the transferring forces or by the host nations' security forces.

As a Legal Advisor for the French Operation Barkhane, in 2014, I conducted regular post-transfer visits in the Malian detention facilities, to make sure that the host nation's authorities respected the terms of the transfer agreement. France indeed considers that there is a legal obligation to conduct these visits (mainly based on the ECtHR case law) until the transferred captured persons' final judgement. In practice, due to the slowness of Malian judicial procedures, these visits could continue for a very long time, which brings new challenges regarding the respect of some fundamental rights, including, but not limited to, the right to a fair and expeditious trial. One of the practical difficulties I had to deal with was the frequency of the visits paid to the transferred captured persons. On one hand, they should be conducted on a regular basis, to properly evaluate their situation and the evolution thereof. On the other hand, they should be conducted on a rather "random" basis, to prevent the tendency of the local prison authorities to "prepare" the visit and make sure that the detainees would be in good condition. But for security and logistic reasons, and also in order not to jeopardize the necessary good relations with the Malian security forces, the visits could not be totally unpredictable.

I was also confronted with practical challenges regarding the assessment of possible Human Rights violations. First, the local detentions standards had to be taken into consideration, along with the fact that the detainees were almost all eager to come back under French custody, since they somehow "appreciated" their previous detention conditions, in comparison to their current ones. Second, it was extremely difficult to make a fair evaluation of the treatment of the detainees. It was not always possible to have access to all the detainees, for reasons sometimes difficult to understand or challenge. It cannot be denied either that the penitentiary personnel were not always cooperative, and for instance not always able to explain if some bad conditions were due to "normal" illnesses (as malaria) or medical neg-

ligence. Besides, the prison staff was not always aware of the existence and/or the details of the transfer agreement, and I had to demonstrate patience, pedagogy and diplomacy to explain why I was requesting access to some detainees, and why I really cared about their well-being, considering that many of them conducted armed attacks against French soldiers. Finally, I have to admit that it was however easier to monitor the compliance with respect to the prohibition on torture/ill-treatments as opposed to the right to a fair trial, because of the lack of leverage the military has on the judicial authorities, even with the support of the French diplomatic authorities. Additionally, one paramount question was "what are the possible remedies" when some recurrent ill-treatments and/or violations are documented. Does the transfer have to cease immediately? What if the diplomats' involvement is not sufficient to bring the violations to an end?

I would finally like to mention some issues related to the already mentioned "secondary transfers". In NIACs such as the ones occurring in Mali or in Niger ("cross-border NIACs"), the members of the organized armed groups are sometimes host nations' nationals, but may also come from neighboring countries, or from ones that are even more distant. In many cases it is impossible to determine the nationality of the captured persons. When the captured persons are transferred to the host nations, and when their nationality is presumed, the French authorities inform the embassies of the respective captured persons, at least to make their situation known to their consular authorities. But I never felt a great involvement from these authorities to take care of these individuals, who had directly taken part in hostilities in a very complex regional environment. It was thus particularly difficult to monitor their situation and to challenge their subsequent extradition, when we were sometimes informed of it.

My experience as a military lawyer conducting post-transfer monitoring and detainees' visits may serve as an illustration of the practical challenges that can be faced when trying to apply the PNR in a NIAC situation. In this respect, and as a practitioner, the updated Commentaries are of great use. Specifically, the arguments regarding the applicability of the PNR in NIAC are very useful, but details regarding the implementation modalities are still much needed. That is why, in the future, the ICRC should consider clarifying the extent of the applicability of IHRL in armed conflict, along with developing guidelines or collecting good practices regarding the procedural safeguards to be applied to transferred individuals.

DISCUSSION

During the Q&A session, the panellists and participants discussed the notion of attribution, the related standards of control, and the interpretation of the principle of non-refoulement under Common Article 3 of the Geneva Conventions.

I. Attribution

Distinguishing attribution for the purpose of classification of conflicts v. attribution for the purpose of responsibility

Several participants commented that, although the question is complex, it could be misleading to distinguish the question of classification of conflicts on one hand, and the rules on attribution and responsibility on the other hand, as if they were distinct concepts or as if attribution was only a secondary rules issue. They suggested that these concepts are logically linked, particularly because the rules on attribution necessarily precede and determine the classification of conflicts. Acts must be attributed to a State to determine whether a conflict is international, even though this can be regarded as independent from the responsibility for violations.

A participant specified that in order to be able to determine whether there is an IAC between States, i.e. the classification of conflict, it is necessary to establish whether a State has used force against another State and therefore to attribute this force to that State. Since IHL does not contain specific rules for the question of attribution, it is necessary to refer to the rules of responsibility.

A participant acknowledged that there is no ideal solution whatever standard is used. For instance, in an armed conflict between State A and State B, if the standard for responsibility is "effective control" rather than "overall control" and State A is regarded as not responsible, there may be a responsibility gap, i.e. no one being responsible, because under the law of IAC armed groups are not responsible. This may be even more complicated regarding responsibility under the law of NIAC.

A panellist took the opposite view, saying that, when it comes to attribution it is important to differentiate several situations, particularly between the notions of agent and organ and between classification and responsibility. The panellist explained that the term "agent" that is used in the GCs can be interpreted as encompassing irregular armed forces, most notably under Article 4(A)2 GCIII. However, the law on State responsibility may have different implications.

Article 4 of the International Law Commission's Draft Articles on State Responsibility refers to the attribution based on the organ of the State, including both *de jure* and *de facto* organs, whereas Article 5 refers to the private person or entity acting the governmental function, i.e. agency. Article 8 on the degree of instructions, direction and control addresses both organ and agency. When a NSAG is regarded as a *de facto* organ of the State, it is based on a very high and strict standard. Regarding the notion of agency, a laxer standard comes into play. For the panellist, state responsibility issues need to be differentiated, because they are a legal consequence of the violation of IHL on classification.

Regular and irregular armed forces

Referring to para. 2483 of the ICRC Commentary on Article 39 GCIII, a participant said that the term "regular armed forces" in this article must necessary include irregular armed forces. This is because in practice, it is inevitable that armed forces that are under the overall control of a Party to a conflict and fight for this State will make prisoners.

The participant also extended this reasoning to proxy warfare, even though according to the participant, the Commentary does not seem to address it. The participant noted that it makes sense for the Commentary not to refer to proxy warfare, because in practice no armed group would ever admit that it is a proxy and no State which has a proxy would never admit it either. However, it is worth noting it in the discussion because the issue of proxy warfare raises numerous questions and is of significant interest for lawyers and academics. More broadly, the participant suggested that several articles would have to be interpreted in another way so that they give a meaningful result for proxy warfare.

Referring to Article 49 GCIV, in addition to Articles 39 and 96 GCIII, a panellist asked whether there was a legal basis for extending the application of these articles to irregular armed forces. For the panellist, this would amount to overriding the expression of a legal provision without any amendment, which is a reasoning that the ECtHR rejected in the *Johnston and others v. Ireland* case (1986). In this case, the ECtHR found that Article 12 of the European Convention on Human Rights included the right to marriage between a man and a woman and excluded the right to divorce. The panellist concluded that the teleological interpretation was regarded as being overstretched. Therefore, coming back to the ICRC's Commentary, the panellist said that extending the applicability of these articles to irregular armed forces was a policy suggestion at this stage, unless there was an amendment to the articles.

Selecting the appropriate standard of control

A panellist commented that there is a normative bearing in selecting certain types of control over others. The panellist referred to Eastern Ukraine as an example. According to the panel-

list, no state responsibility would arise with respect to an armed group that has to meet the effective control test, whereas the situation would be different with the overall control test. In other words, the decision about which test is appropriate pre-determines issues relating to the classification of an armed conflict and there is a normative bearing in lowering the standard of the State's responsibility for the sake of identifying state responsibility.

The panellist further said that while there may be legitimate ethical reasons for the ICRC to favour the overall control test in the way that the ICTY *Tadić* decision foresees it, saying that IHL is equipped with the *lex specialis* on the rule of attribution for the purpose of responsibility is nonetheless a too far-reaching assessment. The panellist suggested referring to IHRL, in particular customary IHRL which is considered as binding on armed groups, rather than directly trying to identify responsibility under IHL on the basis of a lower degree of control.

A participant suggested an alternative way of proceeding. The ICJ says that the appropriate test is effective control. However, there is a problem with the effective control test and with having two tests because there may be a responsibility gap even in a situation that satisfies the test for the purposes of IHL, whether it concerns classification of the conflict or occupation. Therefore, a solution could be to accept the effective control formula and to redefine its content[1]. An example is the report of the Commission on Inquiry of Burundi in 2018, in which the Commission established the responsibility of the State of Burundi for an organised armed group operating within its territory based on a redefined ICJ's effective control test.

Another participant referred to indirect occupation, saying that it would be odd that an armed group be an occupying power. The participant asked a question more specifically on the appropriate standards of control in a situation of indirect occupation and whether the panellists agreed that current proposed definitions of indirect occupation imply a drop down of the threshold for the purpose of occupation. A situation of indirect occupation entails two elements of control: (1) a State exercises a certain type of control, e.g. overall control over an armed group; (2) this armed group holds effective control over part of a foreign State's territory. It may therefore entail two different standards. In addition, the overall control test is an easier to prove standard. In a situation of direct occupation, a State must have effective control over a territory in order to be an occupying power. However, when it comes to indirect occupation, under the proposed definition, there is a proxy in between who fulfils the effective control standard over the territory, while there is a drop down of the effective control standard regarding the State's control. Yet, the occupying power can only be a State. The participant disagreed with the ICTY in the *Prlić* Appeal, in which the ICTY recognised that there could be

1 Also see: Renaud de Villaine, «L'attribution à un État des actes d'une entité non-étatique agissant sur son territoire : le cas des Imbonerakure au Burundi», Droits fondamentaux, n° 19, 2021, 18p.

occupation by proxy. The participant was of the view that for the purpose of occupation, the ICTY would have to apply the effective control test also to the control over the proxy.

A panellist concluded that regarding the overall control/effective control over an armed group, the overall control test would be sufficient for the internationalization of the conflict, while the effective control test would be necessary for state responsibility. However, with regard to control over the territory, there is a significant debate among academics particularly on whether there was effective control in the case of the Gaza strip after the disengagement of the Israeli Army in 2005 and this should be interpreted in a very nuanced manner. According to the panellist, half of the academics argue that there is a continuing occupation, the other half says that it is no longer an occupied territory. The first argument is more normative-driven, so that the law of occupation applies in its entirety for the Palestinian population in Gaza. The panellist said that he agreed with the ethical argument and the plight of Gazans and with the humanitarian imperative. However, in terms of legal argument, the panellist suggested that a more functional or progressive approach based on the nature of the control and the nature of the specific rights and obligations would be more convincing. This would entail going beyond a clinical dichotomy law of occupation v. law of conduct of hostilities, by acknowledging that there is a blurred line.

II. Common Article 3 and the principle of non-refoulement

International Human Rights Law in the Commentaries

A participant noted that IHRL was used in the ICRC Commentaries on Common Article 3 to interpret the principle of non-refoulement (PNR). However, IHRL does not seem to be used as announced by the ICRC in its General Introduction to the Commentaries as a mere means of interpreting the GCs, in particular Common Article 3. According to the participant, IHRL seems rather used as a means for completing the articles, adding a new requirement which means inserting the applicability of the PNR as provided under IHRL in NIAC. In addition, the participant highlighted that by including the PNR in Common Article 3 inspired by IHRL, the Commentaries make it applicable to both States and non-state actors although the applicability of IHRL to armed groups remains highly controversial. A panellist agreed that the way the Commentaries rely on IHRL was unclear and that this was problematic in practice. This is linked to the extent to which IHRL is applicable in an armed conflict situation, which is a very context-dependent issue.

Another panellist explained that the ICRC applied the methodology of Article 31 of the Vienna Convention on the Law of Treaties with the result that non-refoulement under Common Article 3 is an IHL principle, although the Commentary refers to parallel systems of international law

where that concept has been more developed. Therefore, the principle is not coming from IHRL. It is an IHL principle under Common Article 3 that a party to the conflict cannot torture or murder and thereby cannot transfer someone to other parties where it has knowledge that it will happen. The same reasoning applies with the prohibition of sexual violence: the word sexual violence does not appear in Common Article 3, yet no one challenges that this is part of Common Article 3 and that it is a violation of the various provisions that underpin it, such as the ones on cruel and degrading treatment.

A panellist replied that for practical reasons, it would be better to have a more explicit statement clarifying how the various bodies of law apply, especially because the Commentaries draw from a very wide range of references and it may be detrimental to the clarity of the argument.

Practical challenges in post-transfer operations

A participant asked a question about post-transfer monitoring. Parties to the conflict are prohibited from circumventing the obligations under Common Article 3 by transferring to other parties in the knowledge that violations of IHL may occur. The participant asked how in practice commanders drew the line and at what point, based on the aggregation of observations that they have, they may decide to stop the transfers to a third party.

A panellist said that the decision depends on the standards in the country where a Party is operating. In a country where torture is widespread, the decision is clear: there will be strong protests and then the Party will subsequently think about stopping transfers. The issue is more difficult when violations are less systematic or unclear. The question becomes: "after how many deaths or reports or allegations from other detainees should the operation be stopped?". In addition, the commander fears to be instrumentalized. There is a very detailed process that must be applied on the ground, with different measures and steps: first talking to the prison staff, then to the diplomatic level and then thinking about stopping the transfer. However, the final decision is very context dependent. Partner operations, in which a State A has enter partnership with another State B that is also a detaining authority, may pose significant challenges. State A may find itself in a delicate position in which it has to tell partner State B that transfers will stop because it does not trust State B anymore, while at the same time keeping State B a partner. The panellist admitted that finding a balance is not always easy on the ground. It also depends on the knowledge that the Parties have of the standards.

2nd Panel
The Third Convention: Protecting Prisoners of Today's Wars
2ème panel
La Troisième Convention : protéger les prisonniers des guerres contemporaines

Chaired by Elzbieta Mikos-Skuza
University of Warsaw and College of Europe Natolin, Humanitarian Fact Finding Commission

SETTING THE SCENE: THE CONTINUED RELEVANCE OF PROTECTIONS FOR PRISONERS OF WAR
LA PERTINENCE CONTINUE DES PROTECTIONS POUR LES PRISONNIERS DE GUERRE

Cordula Droege
ICRC

Résumé

Cordula Droege est conseillère juridique et dirige la Division juridique du CICR. Dans cette intervention, elle présente les principales protections garanties aux prisonniers de guerre par la Troisième Convention de Genève. Elle rappelle le principe primordial selon lequel les prisonniers de guerre doivent être traités humainement et protégés en tout temps, ainsi que l'obligation de respect, de protection et d'égalité de traitement sans distinction de caractère défavorable. Les protections garanties aux prisonniers de guerre couvrent un large spectre, qu'il s'agisse des conditions de vie de base, de la discipline, des conditions de transfert, libération et rapatriement, du droit à un procès équitable ou des relations avec le monde extérieur. De plus, bien que trouvant ses racines dans deux guerres mondiales, la Troisième Convention de Genève demeure pertinente, à la fois en CAI mais également, du fait du droit coutumier et en pratique, en CANI. Par ailleurs, l'interprétation actualisée de la Troisième Convention de Genève facilite sa compréhension et son application dans les conflits armés contemporains, notamment pour ce qui concerne les nouveaux moyens de communication, l'éthique médicale, la protection des données, les nouvelles technologies ou l'appréhension des notions de handicap et de santé mentale. La mise à jour du Commentaire du CICR de la Troisième Convention de Genève reflète donc une interprétation

actuelle du droit et met ainsi en lumière les éventuels changements en termes de protection. Il constitue dès lors une ressource essentielle pour tous les praticiens concernés par le DIH.

Good afternoon everyone.

In my presentation today I will focus on the essential protective aspects of the Third Geneva Convention, consider its continued relevance and also speak about the role of the updated ICRC Commentary on the Third Geneva Convention in ensuring this relevance.

I. Essential protective elements of the Third Geneva Convention

The Convention is a decidedly pragmatic document, that was drafted in the wake of the Second World War. With the painful lessons in mind, the Third Geneva Convention revised and expanded the existing protection afforded to prisoners of war under the 1929 Convention. The Third Geneva Convention contains 143 articles, 46 more than its predecessor. These additions and revisions were deemed necessary, given the changes that had occurred during the previous two decades. Experience had shown that the daily life of prisoners revolved around the specific interpretations of the Convention and its regulations, and that in fact its interpretation had life and death effects on prisoners in the Second World War.

As a result, certain of those regulations of the 1949 Convention were designed more explicitly, providing more clarity that was lacking in the preceding provisions. For instance, and perhaps most importantly, the categories of persons entitled to prisoner of war status were broadened to encompass members of militias or voluntary corps belonging to parties to conflicts under certain conditions in Article 4 of the Convention. The conditions and places of captivity were also more precisely defined, in particular with regard to the labour of prisoners of war, their financial resources, and the relief they receive. The guarantees to be afforded in judicial proceedings were specified; and importantly a unilateral obligation was established to release and repatriate them without delay after the cessation of active hostilities.

Whilst these provisions were the result of observations of two specific previous wars, First and Second World Wars, in today's detention places, they are the exact issues that have continued to be at the heart of the protection of prisoners of war, both in positive and negative ways. The major protection issue that the ICRC has seen in the detention of prisoners of war, but also in other detention settings, are in many ways the same as those observed in these past conflicts. But also, some parties have shown much better respect of prisoners of war, by respecting these rules.

I will now recall some of the most essential protections set forth in the Third Convention.

First, and at the heart of the Third Geneva Convention, is the fundamental principle that prisoners of war must be treated humanely and protected at all times. All other points flow from this overarching principle and the obligation of equal respect and protection without adverse distinction.

Then many articles regulate the treatment and conditions in the camp. Prisoners of war are to be provided with adequate food and safe quarters, with clothing. They are to receive adequate medical attention as required by their state of health. They are to pursue intellectual, educational, and recreational activities. The disciplinary regime to which they can be subjected is regulated and prisoners of war have the right to a fair trial. There are detailed provisions about their work, their remuneration and financial resources.

Critically the Convention affords prisoners of war the right to keep in contact with the outside world and in particular with their families and to receive collective relief. The Detaining Power must allow ICRC delegates to visit all places where prisoners of war are located and interview them without witnesses. Prisoners of war must be released and repatriated without delay after the cessation of active hostilities, except where they have been criminally indicted or are serving a criminal judicial sentence.

Lastly, the grave breaches regime requires States to sanction violations of the Convention.

All these issues, from basic living conditions, discipline and fair trial to relations with the outside world are live issues in detention settings today.

II. The continued relevance of the Third Geneva Convention and the ICRC updated Commentary

Now I will make two reflections on the Geneva Conventions, particularly the Third Geneva Convention, and their relevance today.

Application in IAC and NIAC

The first reflection is on the application of its rules in international armed conflicts and in non-international armed conflicts both as a matter of law and as a matter of policy.

Today, the Third Geneva Convention is universally ratified and over the past seventy years, we have seen its real impact in conflict again and again. Of course, the Third Geneva Convention only applies in international armed conflicts. One question about the Third Geneva Conven-

tion that the ICRC is sometimes asked is whether it is still relevant in a world in which the majority of armed conflicts are non-international. We cannot deny that today, there are few international armed conflicts and relatively few prisoners of war compared to past wars. Yet, we do continue to see conflicts between States erupt, and we do continue to see prisoners of war taken. It is perhaps good news that they are fewer than they used to be in 1949 but there is unfortunately no reason to think that they will disappear in time. Hence, the Convention continues to serve its vital role to ensure humane treatment in these international armed conflicts.

The protections contained in the Convention also serve as a template for the treatment of detainees beyond the context of international armed conflict. The Convention has inspired standards of treatment that could be and should be and has in fact been applied in other types of conflicts or where the nature of the conflict was contentious – for instance as agreed to by parties as special agreements. Professor Sassòli will delve into this wider sphere of influence of the Third Convention in his presentation.

On this point, I would note that the updated Commentary continues the work undertaken by the ICRC in studying the rules of customary international humanitarian law. Much of the Third Geneva Convention is reflective of customary law. The updated Commentaries examination of the customary law of the Convention can be useful to scholars and practitioners in relations to situations beyond those in which the prisoners of war protections of the Convention would apply *de jure* but where similar rules apply as a matter of customary law. Even beyond the rules of customary law deriving from GCIII, GCIII rules, and the fact that they make good sense and are protective, can be a basis for a dialogue on humanitarian issues with States. The ICRC has often done this and invoked the protection of the Third Convention as a basis for a dialogue even if it was not a dialogue based on a legal obligation. To give you an example, one of the rules in the Third Geneva Convention, Article 13, is the prohibition to expose prisoners of war to public curiosity. There is no equivalent rule in non-international armed conflicts, but we are very often engaged with parties to conflict about the need not to expose detainees to public curiosity as part of the prohibition of inhumane and degrading treatment for instance, sometimes with success.

Contemporary interpretation

My second reflection is on the need to interpret the rules in light of contemporary developments, which is really what brings us to the heart of the ICRC's project on the updated Commentaries.

Now that over seventy years have passed since the adoption of the Third Convention, contemporary interpretation is necessary to facilitate understanding and application of the Convention in today's wars. We need these clarifications to ensure that the Convention remains fit for purpose and to allow for interpretation and translation of the Convention's provisions to modern times and contemporary wars. As Tim Wood has pointed out, critics of the relevance of the Third Geneva Convention tend to latch on to provisions which may at first glance appear anachronistic, but has he puts it, to extrapolate the redundancy of the complete Convention from a few provisions is misguided and perhaps opportunistic. For instance, the articles in GCIII ensuring communication with family and the outside world for prisoners of war may reference telegrams and telegraphs, but the fundamental rule these provisions put forward is as important today as it was at the time of its adoption. A survey of practice, as the Commentary contains, also facilitates an understanding of how these provisions have been actualized by States as technology has developed – allowing for more current technologies such as telephone contact to be used. Some military manuals as well foresee now more modern communication means such as emails and so on. Another example is that provisions ensuring remuneration for paid work by prisoners of war reference nominal values which look absurdly small today. The key point of such a provision – which is absolutely enduring – is curbing slave labour by prisoners of war and ensuring their work conditions. Here again the updated Commentary works to contextualize these provisions so that they can be fully applied in a way which is appropriate for wars today and to the benefit of prisoners of war.

This really does go to the heart of the aim of the project. The main aim of the updated Commentaries is to give people an understanding of the law as it is interpreted today, so that it is applied effectively in today's armed conflicts. We see this as an important contribution to reaffirming the continued relevance of the Conventions, generating respect for them and strengthening protection for victims caught up in armed conflict. The experience gained in applying and interpreting the Conventions over the last seven decades has generated a detailed understanding of how they operate in armed conflicts all over the world and in contexts that are very different from those that led to their adoption. With this, the new Commentaries go far beyond their first editions from the 1950s, which were largely based on the preparatory work for the Conventions and on the experience of the Second World War.

In this way, the Commentary sheds light on many issues. The Third Geneva Convention covers a broad array of considerations relating to a prisoner's life from the time of capture to their final release and repatriation. Many of the key issues clarified by the updated Commentary concern the changes that have taken place in connection to these protections. For instance, today, medical ethics and data-protection standards are far more developed than in 1949. This raises questions regarding the application of provisions that require medical data to be

disclosed, and also about how data should be handled and protected in our digitalized world. Such questions would also extend to the appropriate use by Detaining Powers of electronic means to identify prisoners of war – including biometrics – or of new technologies to conduct surveillance.

The updated Commentary also covers the changes that have taken place in understanding of people's needs. For instance, the Convention covers such matters as disability and mental health. It was fairly progressive for its time, but the terminology had become obsolete, and an updated interpretation was necessary. The Convention has a provision pertaining specifically to respect for women, and the interpretation in this regard had to be updated as well. The ICRC benefitted from the support of the Swedish Red Cross to give us advice on the gender dimension of this Convention for the Commentary. Thus, this Commentary reflects the changes in practice and other areas that have taken place since the middle of the 20th century.

It is our hope that, like its predecessor, the updated Commentary will be an essential resource for practitioners like military commanders, officers, lawyers and those engaging with detention in armed conflicts. We are hopeful that it will be used to train members of the armed forces including before conflict breaks out, to prepare instructions for armed forces and to ensure that military orders comply with the law. We also anticipate its usefulness for judges who have to apply humanitarian law, including in criminal courts and tribunals where those accused of violating the law may be prosecuted. The idea is for anyone to be able to take it off the bookshelf and look at what has been the practice of the laws of wars, what military manuals say, if there is a debate about interpretation and so on. There is a strong need in our opinion for the law to be known widely and to be understood by all, and we are confident at the ICRC that the updated Commentary will become an important tool in this regard.

Thank you.

THE (IR)RELEVANCE OF THE THIRD GENEVA CONVENTION IN CONTEMPORARY ARMED CONFLICTS
LA (NON-)PERTINENCE DE LA TROISIÈME CONVENTION DE GENÈVE DANS LES CONFLITS ARMÉS CONTEMPORAINS

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Résumé

Marco Sassoli est professeur de droit international à l'université de Genève et commissaire au sein de la Commission internationale de juristes (CIJ). Dans cet article, il examine la pertinence de la Troisième Convention de Genève au regard des conflits armés contemporains et en souligne les limites, parmi lesquelles le fait que la Troisième Convention s'applique aux CAI, qui sont aujourd'hui relativement rares. Tout en soulignant que l'application par analogie de la Troisième Convention aux CANI a également des limites, il affirme que la Troisième Convention garde toute son utilité dans l'éventualité d'un CAI de grande ampleur. Une limite fondamentale à la pertinence de la Troisième Convention concerne l'approche collective, qui selon lui n'est plus appropriée dans beaucoup de conflits armés contemporains et ne correspond pas aux valeurs des droits humains. Une approche plus individualisée serait appropriée, en particulier concernant les causes d'admissibilité, les procédures s'appliquant à la détermination de la nécessité d'interner et le rapatriement. Toutefois, en dépit de ces limites, cette Convention demeure selon lui une référence pour les situations de détention en conflit armé. La Troisième Convention est parfois davantage acceptée et respectée que l'interdiction du recours à la force prévue par la Charte des Nations Unies ou les droits humains, et peut donc faire la différence. Par ailleurs, la Troisième Convention est un modèle accepté en termes de protection de certaines catégories de personnes privées de leur liberté – bien qu'il serait préférable selon lui, de faire une analogie avec la protection des internés civils prévue par la Quatrième Convention. Enfin, les études de terrain démontrent que la Troisième Convention a une influence sur la pratique des acteurs non-étatiques, au-delà de son champ d'application personnel formel, et est donc parfois invoquée avec succès par les délégués du CICR pour améliorer la protection des personnes détenues en CANI.

I. Introduction

The Third Geneva Convention (Convention III) is a universally accepted treaty that offers protection that is detailed and appropriate to the situation of armed conflicts to war victims par excellence: soldiers of one State falling into the power of the enemy State during an inter-

national armed conflict (IAC). It is therefore welcome and fully cogent that the International Committee of the Red Cross (ICRC) published an updated Commentary on that Convention, taking practice of the last 60 years and other branches of international law into account in its interpretation.[1] Nevertheless, IACs are fortunately no longer the predominant type of armed conflict nowadays and the number of prisoners of war (PoWs) in contemporary conflicts is very low. One could therefore wonder whether Geneva Convention III is still relevant in contemporary armed conflicts.

II. Convention III applies only in international armed conflicts

Convention III protects prisoners of war. Prisoners of war and combatants legally exist only in IACs. This is one of the few differences between international and non-international armed conflicts (NIACs), which has survived the recent tendency of bringing IHL of NIACs closer to IHL of IACs via alleged rules of customary law or by analogy.

International armed conflicts are fortunately rare

IACs are rare in the contemporary world. This is fortunate. We hope that this will not change, but it could. In a major IAC with 100'000 PoWs, the collective approach of Convention III, which refers to the persons it protects as a collective category based upon mainly collective criteria determining their status, would be appropriate. More individualistic human rights oriented proposals, which have appeared in recent scholarly writings, including my own,[2] based upon limited, asymmetric IACs with a limited number of PoWs would be unrealistic in such situations, while Convention III, understood according to the updated Commentary, would be fully relevant again. It may conversely be the case that even the updated Commentary interprets some rules, based upon the practice in limited asymmetric IACs with a limited number of PoWs and in the light of other rules of international law in an individualistic way, which would no longer be realistic in a major IAC.

Even in contemporary international armed conflicts, parties often deny prisoner-of-war status to enemies they intern

When we look at the few IACs that currently exist, parties often find an excuse to deny PoW status to enemies they detain under different pretexts. First, they often deny that an IAC exists. Second, even when they recognize the existence of an IAC, they deny that enemies they detain fulfil the conditions to benefit from combatant status, which is, in most cases, a

1 *Commentary on the Third Geneva Convention, Convention (III) relative to the Treatment of Prisoners of War*, ICRC, Cambridge University Press, 2021 (hereafter Updated Commentary GCIII).

2 Marco Sassòli, 'Release, Accommodation in Neutral Countries, and Repatriation of Prisoners of War', in: Clapham, Gaeta and Sassòli (eds), *The 1949 Geneva Conventions, A Commentary*, Oxford, Oxford University Press, 2015, at 1065.

necessary but not sufficient condition to benefit from PoW status. It is therefore crucial that the updated Commentary on Article 4 of the Convention clearly defines who is, but also who is not a PoW. It in particular rejects the suggestion, made by some States[3] and scholars,[4] that some persons are 'unlawful combatants', bearing the disadvantages of PoW status – to be deprived of freedom for an indefinite period without judicial control – without benefitting of the advantages – in particular combatant immunity and treatment according to Convention III.[5]

Atypical detaining authorities in international armed conflicts have difficulties to comply with Convention III

In addition, in many situations in which Convention III arguably applies, persons who could be PoWs are held by untypical detaining authorities, for whom many rules are not realistic, if interpreted literally. First, already in 1949, resistance movements not only could have had their members benefit from PoW status but also detain members of enemy armed forces, who benefit from PoW status and treatment. They could not, however, possibly ensure, for instance, that those PoWs are interned in a camp put under the immediate authority of a responsible commissioned officer who is a member of the regular armed forces of the State to which they belong.[6] The updated Commentary therefore rightly so softens this requirement.[7] Second, respecting the letter of all rules of Convention III becomes even more difficult when a national liberation movement holds combatants of the party against which it is fighting. It should treat them as PoWs as IHL of IACs applies to national liberation wars according to Protocol I.[8] Third, such difficulties arise even more conspicuously when a proxy armed group holds PoWs. The approach that was for the first time applied by the International Criminal Tribunal for the former Yugoslavia in the Tadić case,[9] according to which IHL of IACs applies to an armed conflict be-

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3 Most well-known is the position of the US and Israel in this regard, see for example, White House, Office of the Press Secretary, Statement by the Press Secretary to the Geneva Convention, 7 May 2003, available at: https://georgewbush-whitehouse.archives.gov/news/releases/2003/05/20030507-18.html; Israel, On Imprisonment of Illegal Combatants, No. 5762, 2002 (amended on 7 December 2008), available at (unofficial translation): https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=7A09C457F76A452BC12575C30049A7BD&action=openDocument&xp_countrySelected=IL&xp_topicSelected=GVAL-992BUG&from=state.

4 Cristopher Greenwood, "International Law and the "War against Terrorism"' (2002) 78 *International Affairs* 301, 316; Ingrid Detter, *The Law of War,* 2nd edn, Cambridge, Cambridge University Press, 2000, at 136; Yoram Dinstein, "Unlawful Combatancy" (2002) 32 *Israel Yearbook on Human Rights* at 247; Ruth Wedgwood, 'Al Qaeda, Terrorism, and Military Commissions' (2002) 96 *The American Journal of International Law*, at 335.

5 Updated Commentary GCIII, *op. cit.*, paragraph 991.

6 As required by GCIII, Art. 39(1).

7 Updated Commentary GCIII, *op. cit.*, paragraph 2483.

8 P I, Art 1(4).

9 ICTY, *The Prosecutor v. Dusko Tadić*, IT-94-1-A, Appeals Chamber, Judgement, 15 July 1999, paras 87-162.

tween the territorial State and a proxy controlled by another State, corresponds to legal logic. There are, furthermore, strong arguments in favour of overall control as the decisive test.[10] Nevertheless, when this test is applied in practice during an armed conflict to protect persons affected by such conflict, it leads to serious legal and practical challenges. Such challenges are particularly acute when a proxy has to comply with Convention III, which is a part of the IHL of IACs. The fact that the proxy and the controlling State – by definition – deny control is only a part of the problem. Even a proxy willing to apply the Convention will confront serious difficulties to comply, for example, with the need to provide judicial guarantees offered by Convention III which refer to the legislation and courts of the controlling State.[11]

III. Possibilities and risks of applying Convention III to non-international armed conflicts

As most contemporary armed conflicts are NIACs and in line with a general contemporary tendency to apply the same rules in IACs and in NIACs, Convention III could become much more relevant if it could apply by analogy in NIACs. However, firstly, combatant immunity in NIACs is inconceivable. No State would accept that its citizens can wage war against their own government or between each other. No government would renounce in advance the right to punish its own citizen for participating in a rebellion, which would be necessary to apply PoW status to the situation.

Secondly, the right to detain members of adverse armed forces without any individual decision as long as the conflict lasts, which is a consequence of PoW status, would not be recognized by any State as a right also belonging to armed groups. An automatic right to intern is equally inappropriate, although sometimes suggested by States,[12] for members of armed groups held by a State. Indeed, upon arrest it is more difficult to identify fighters (i.e. members of an armed group) as compared to soldiers of another State's armed forces in an IAC. A tribunal can make the correct classification, but it will only have its say if the arrested person is not classified as a PoW.[13] Second, PoWs in IACs must be released and repatriated at the cessation

10 Updated Commentary, *op. cit.*, paragraphs 302-306.

11 GCIII, Arts 82, 84, 87, 99 and 102.

12 See United States District Court of Colombia, "Respondents' Memorandum regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay", in re: Guantanamo Bay Detainee Litigation, 13 March 2009, p. 1, available at: https://www.justice.gov/sites/default/files/opa/legacy/2009/03/13/memo-re-det-auth.pdf.

13 GCIII, Art 5, prescribes status determination tribunals for detained persons only when the Detaining Power wants to *deny* them PoW status.

of active hostilities,[14] but that moment in time is more difficult to determine in a NIAC and even then IHL does not oblige governments to release captured rebels.[15]

Finally, however, when it comes to the treatment of enemy fighters interned by the government, problems similar to those when PoWs are held arise, and many of them could be solved in ways similar to the ones in which Convention III solves them for PoWs. When it comes to government soldiers held by armed groups, such analogy is subject to more limitations because of the capacity of most armed groups to comply with many of the sophisticated rules of Convention III.

IV. The collective approach of Convention III is no longer appropriate for many contemporary armed conflicts

A more fundamental problem affecting not the applicability but the appropriateness of Convention III for contemporary armed conflicts, even when they constitute IACs, is that unlike what has been the case before 1949, today PoW status and treatment is no longer the best one can get in an IAC under IHL.

The right to detain PoWs without any judicial procedure for an indefinite period – until the cessation of active hostilities – is shocking from a human rights perspective and not foreseen for any other category of persons under IHL. Convention III nevertheless assumes that it is in the interest of a captured person to get a PoW status.

First, according to Article 5 of Convention III, when doubts exists regarding the status of persons who 'committed a belligerent act', they must be treated as PoWs 'until such time as their status has been determined by a competent tribunal'. No procedure, however, is prescribed for the reverse case: persons who are treated by a belligerent as PoWs but who want to contest their qualification as combatants. In 1949, only the advantages of PoW status and the related combatant immunity from prosecution were seen. Today, it is understood that Convention III implies also disadvantages. A person should therefore be able to oppose PoW status. Possible solutions include allowing such persons to institute habeas corpus proceedings under domestic law and IHRL.[16] Indeed, persons who deny being PoWs argue that the detaining power does not have the legal basis offered by Convention III allowing to deprive them of their liberty.

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14 GCIII, Art. 118.

15 APII, Art 6(5), simply *encourages* the widest possible amnesty.

16 UN Working Group on Arbitrary Detention, "United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court", Principle 16 and Guideline 17, paragraphs 30 and 95, as annexed to UNGA, "Report of the Working Group on Arbitrary Detention" (2015) UN Doc A/HRC/30/37.

Another possibility, suggested by the updated Commentary *de lege ferenda* is to apply Article 5 procedures to such cases.[17]

Second, assuming that Convention III offers best protection, among the people benefiting from (but also enduring) PoW status it includes untypical categories of persons, who would benefit more from civilian status. The extreme case is crews of a merchant ship sailing under the flag of the adverse party in an IAC, who have PoW status.[18] This totally disregards today's realities of commercial shipping. Taken literally it means that in case of an IAC between Liberia and Sierra Leone lasting for four years, a Filipino sailor working on a ship owned by a Greek company sailing under Liberian flag and transporting Chinese goods may be interned without any individual procedure for four years. The updated Commentary correctly suggests that this should be limited to 'members of the crew whose professional activities are directly linked to the military activities of the armed forces'.[19]

Even beyond those extreme examples, the collective approach of Convention III no longer corresponds to individual human rights values. Only the obligation to repatriate seriously wounded or sick PoWs takes the specificities and the will in each case into account.[20] In conformity with the growing tendency in international law to fully take the circumstances of each individual case into account, the time may have come in many conflicts not to determine collectively the time when a fighter must be released and repatriated, but to determine this through individual procedures. One could thus imagine that even during a contemporary, limited IAC, periodic individual determinations be made to balance that individual's right to freedom against the legitimate security interests of the Detaining Power, *i.e.* the probability that this individual will again participate in hostilities and the extent of the threat this individual represents when doing so. The collective, undifferentiated right to intern PoWs until the cessation of active hostilities may, however, become again realistic and protective in a major IAC, for which GCIII was made.

At the cessation of active hostilities, the collective obligation to repatriate all PoWs without delay[21] may again raise difficulties for some PoWs in contemporary IACs if they do not wish to be repatriated. May or must the detaining power not repatriate them in such a case despite the

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17 See Updated Commentary GCIII, para. 1121; Françoise Hampson, "The Geneva Convention and the Detention of Civilians and Alleged Prisoners of War", (1991) 4 *Public Law* 507; Marie-Louise Tougas, "Determination of Prisoner of War Status", in: Clapham, Gaeta and Sassòli (eds), *The 1949 Geneva Conventions, A Commentary*, Oxford, Oxford University Press, 2015, at 953-4.

18 GCIII, Art. 4(A)(5).

19 Updated Commentary GCIII, op. cit., paragraph 1058.

20 GCIII, Art. 109.

21 GCIII, Art. 118(1).

clear wording of Article 118 of Convention III and the risks of abuse? Although repatriation is compulsory under Convention III and PoWs cannot renounce their rights,[22] the *jus cogens* principle of *non-refoulement* under IHRL and international refugee law now prohibit the forcible repatriation of PoWs fearing persecution.[23] However, as this exception offers the detaining power room for abuse and risks rekindling mutual distrust between parties that just stopped hostilities, the prisoner's wishes should be the determining factor, but it can be difficult to objectively ascertain those wishes. The practice of the last 50 years is to let the ICRC ascertain the wishes of the PoW and not to repatriate those who refuse.[24] However, in the current migration unfriendly international political environment, any suggestion that the individual may freely choose where to live sounds very exotic. Therefore, the updated ICRC Commentary suggests a nuanced solution. It is, however, not clear whether it goes beyond a very wide understanding of the *non-refoulement* principle.[25]

V. Convention III remains nevertheless a blueprint for conflict-related detention, profoundly anchored in the culture and traditions of all peoples

Despite all aforementioned limitations to the relevance of Convention III in contemporary armed conflicts, it remains, beyond its formal applicability, a blueprint for conflict-related detention. It is furthermore deeply anchored in the culture of peoples and States. This was evidenced by a profoundly inhumane regime like that of Saddam Hussein in Iraq. Without hesitation it violated the prohibition of the use of force under the UN Charter against Iran and Kuwait and committed egregious Human Rights violations against Iraqis. However, it treated at least those Iranian PoWs the ICRC was allowed to visit during the IAC between Iran and Iraq lasting from 1981-1988 – and the ICRC was allowed to visit most of the Iranian PoWs – more or less in conformity with Convention III.[26] The Convention made the difference.

In armed conflicts and beyond, many people are still deprived of their liberty not because of what they did, but merely because they belong to a certain category of persons. Convention III remains a blueprint for the treatment of such persons. Admittedly, in both IACs and NIACs, an analogy with civilian internees, whose treatment is regulated by Convention IV in a way

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22 GCIII, Art 7.

23 For a detailed argument, see Marco Sassòli "Release, Accommodation in Neutral Countries, and Repatriation of Prisoners of War", in: Clapham, Gaeta and Sassòli (eds), *The 1949 Geneva Conventions, A Commentary*, Oxford, Oxford University Press, 2015, at 1051-4.

24 For detailed references on this point, *ibid*., at 1055-6.

25 Updated Commentary GCIII, op. cit., paragraphs 4467-4473.

26 See e.g. UN Security Council, *Prisoners of war in Iran and Iraq: the report of a mission dispatched by the Secretary-General, January 1985*, 22 February 1985, S/16962, paragraph 54(b)

very much inspired by the regulations of Convention III,[27] would be preferable. That analogy would in particular be much more appropriate with regards to the admissible reasons for and the procedure leading to such internment, in particular in NIACs.[28] However, the regime protecting civilian internees is much less well anchored in public conscience world-wide than PoW status.

Beyond its formal passive personal field of application, many parties to contemporary armed conflicts invoke Convention III. This is not only done for the benefit of persons belonging to that party. Field research has shown that armed non-State actors practice when depriving government soldiers they captured of their liberty is consistent in granting those soldiers a status similar to PoW under Convention III.[29] This status entails that the detention is based on the membership to government armed forces, and that detainees are entitled to combatant immunity. Cases of prosecution of government soldiers for the mere fact of having directly participated in hostilities are very rare.

Even ICRC delegates in the field often successfully invoke rules of GCIII by analogy for the benefit of persons detained in NIACs, although this may not be exactly what the ICRC legal division advises them to do. What is even more interesting, is that parties to NIACs apparently most often do not object but enter into a discussion about whether the relevant standards were or were not respected.

VI. Conclusion

In conclusion, Convention III remains a cornerstone of IHL. Fortunately, IACs to which it formally applies have become rare. This could, however, change and the Convention, as interpreted in the updated Commentary would then be entirely fit to serve its purpose. For many recent limited asymmetric IACs and for NIACs, that require a more individualized approach, it is not fully adapted, in particular concerning the admissible reasons for and procedure determining the need of internment. Nevertheless, even when its letter does not apply, Convention III remains a blueprint for rules on the treatment of people deprived of their liberty not because of what they did, but merely because they belong to a certain category of persons – a reason unacceptable under Human Rights law, but which is still frequent both in and outside armed conflicts.

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27 See GCIV, Arts. 80-135.

28 Updated Commentary GCIII, *op. cit.*, paragraphs 759-761.

29 Jelena Plamenac, *Unravelling Unlawful Confinement in Contemporary Armed Conflicts: Belligerents' Detention Practices in Afghanistan, Syria and Ukrain*e, forthcoming, Brill, 2022.

THE USE OF FORCE AGAINST PRISONERS OF WAR
L'UTILISATION DE LA FORCE CONTRE LES PRISONNIERS DE GUERRE

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Résumé

Camilla Guldahl Cooper est professeure associée en droit opérationnel au Norwegian Defence University College/Command and Staff College. Dans cet article, elle souligne que l'application de différents régimes juridiques peut parfois fragiliser la protection traditionnelle prévue en DIH. Elle prend pour exemple l'article 42 de la Convention III en vertu duquel l'usage des armes contre les prisonniers de guerre, et en particulier ceux qui tentent de s'évader, est considéré comme un « moyen extrême ». Dans le cas précis de l'interprétation de l'article 42, elle affirme que l'attention accrue portée au droit international des droits humains a l'effet inverse de celui attendu : cela réduit plutôt que n'améliore la protection. Afin que la protection offerte par l'article 42 s'applique pleinement, elle propose d'interpréter la définition d'une évasion réussie à la lumière de l'article 91 de la même Convention. Cela impliquerait qu'en cas d'évasion, l'article 42 s'applique jusqu'à ce que le prisonnier ait rejoint ses propres forces ou des forces alliées, ou ait quitté le territoire contrôlé par l'autorité détentrice ou ses alliés. Si pendant son évasion celui-ci utilise la force contre ceux qui tentent de le capturer à nouveau, la réponse ne devrait inclure la force qu'en dernier recours, comme un moyen extrême, et seulement après plusieurs avertissements. Cela procurerait la meilleure protection possible aux soldats capturés, ce qui est l'objet de la Convention III. Camilla Guldahl Cooper reconnait que dans certains cas, il peut y avoir un avantage en termes de protection à s'appuyer sur d'autres régimes juridiques. Toutefois, elle recommande de s'assurer que les règles de protection spécialement développées pour les situations de conflit armé soient bien comprises avant d'être réinterprétées. Dans le cas de l'article 42, interpréter cette disposition comme étant une disposition de maintien de l'ordre public ou remplacer le DIH par les droits humains saperait la protection garantie en DIH.

The application of the Geneva Conventions faces many challenges, amongst others due to the situations it is applied in having changed considerably since the treaties were adopted. Another complicating factor is the application of conflicting legal regimes which in some areas seems to blur the traditional legal protection afforded by the law of armed conflict (LOAC). One of these areas, which is the focus of this paper, is one where the facts are as old as war itself, namely the use of force against prisoners of war and particularly those who attempt to

escape, but where the increased focus on International Human Rights Law (IHRL) appear to have the opposite effect of what is intended, namely to reduce rather than enhance protection of human lives.

The use of weapons against prisoners of war is regulated in Article 42 of the Third Geneva Convention, which reads as follows:

> "The use of weapons against prisoners of war, especially against those who are escaping or attempting to escape, shall constitute an extreme measure, which shall always be preceded by warnings appropriate to the circumstances."

This is an old provision, taken from the 1874 Brussels Declaration[1] and the 1880 Oxford Manual[2], which regulated the use of weapons to deal with prisoners attempting to escape. After the second world war, it became clear that the law of armed conflict should regulate all use of force against prisoners of war. Although escape is the only situation explicitly mentioned, it is now only included as an example. Other situations where the prison guards may need to use weapons include prison riots and situations where one or more prisoner poses a threat to the guards or other prisoners.

Article 42 is interesting for several reasons. It regulates something that looks very much like law enforcement or self-defence. And in fact, it is one of the very few provisions in the Geneva Conventions which regulates law enforcement type of force. Rather than regulating force in accordance with the basic LOAC principles, directed at a lawful target, Article 42 proscribes the use of force as a measure of last resort to deal with a threat. It's therefore something we would expect to see regulated by International Human Rights Law, not LOAC.

Secondly, the provision reflects the fundamental idea in LOAC that once a soldier is captured, he should no longer be treated as an enemy, but with respect, because he is merely a tool used by his State to achieve political goals. Soldiers who become *hors de combat* are no longer lawful targets. While in captivity, soldiers are entitled to protection, both from the hostilities in general and from others in the camp. In return, they are expected to behave in a manner which does not undermine the discipline and control of the camp.

This brings me on to a final aspect of Article 42 that I would like to point out: Military forces generally have a duty to attempt escape so they can return to their forces and continue fighting. As mentioned, the original provision focused on the use of force to prevent escape and

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1 1874 Brussels Declaration Article 28.

2 1880 Oxford Manual Article 68.

restricted the ability of the detaining power to attack the escaping forces. Although it may be in the interest of the detaining power to kill escaping prisoners, and it could potentially even meet the requirement of military necessity at least at a tactical level, States would also want the opportunity to get their captured troops back.

The result is a peculiar provision, which seems to overlap both the provisions regulating the treatment of prisoners of war, the rule stating that persons *hors de combat* are to be protected from being the object attacks, and also human rights law as applicable to the law enforcement paradigm.

This appears to be how it is dealt with in the updated Commentary – that is, as a law enforcement type provision.[3] However, is it that simple? Can and should this LOAC provision really be interpreted in light of International Human Rights Law? I would argue not. And in order to substantiate this position, I will explain when and how Article 42 applies and how it relates to IHRL.

The provision states that it applies to anyone who has "fallen into the power of the enemy". According to the updated Commentary,[4] the prisoners of war do not need to be interned in a camp for the protection to apply, it is enough to have been captured on the battlefield. If it is unclear whether a person has sufficiently "fallen into the power" of the opponent, he or she will in any case be protected by the provision of Additional Protocol I (API) prohibiting attacks on persons *hors de combat*.[5]

Rather than referring to the use of force, Article 42 regulates the use of *weapons* against PoWs. This includes both lethal and non-lethal weapons. It also stipulates that the detaining power must give warnings – plural, so at least two – before using weapons as an extreme measure. Both of these aspects are uncharacteristic to LOAC and resembles human rights law.

The generally accepted situations of application, namely to prevent escape, to deal with riots or to defend oneself or others, also reflect human rights law provisions, more precisely the exceptions set out to the right to life in Article 2 of the European Convention of Human Rights. As prisoners of war are persons under the effective control of the detaining power, this is an area where the application of IHRL to situations in armed conflict arguably is beyond discussion.

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3 See e.g. GCIII 2021 Commentary, Para. 2535-36.

4 GCIII 2021 Commentary, Para. 2524.

5 API Art. 41.

This is in others words an area where IHRL is particularly relevant. And to a large extent, these LOAC and IHRL provisions overlap:

- use of force must be an extreme measure or absolutely necessary,
- the type of situations where force may be used is limited,
- force escalation procedures such as warnings should be used as far as possible,
- and both regimes require the detaining power to investigate deaths[6].

So perhaps it would be easier to say that detention and the use of force against PoWs are regulated by IHRL and the law enforcement paradigm? If a form of *lex specialis*[7] approach is applied, where the legal framework that provides most concrete rules to a situation is the one that applies, the first impression may be that it makes sense to see law enforcement or human rights as the primary framework here. It would also have the beneficial effect of harmonising the legal framework on using force for all categories of detainees, whether PoWs, security detainees or interned persons, making it the same standard for international and non-international armed conflicts.

However, although this is an area where LOAC and IHRL overlap, they are not actually identical. As will be explained, it is therefore important to continue to look to LOAC, and not replace it with IHRL, on this question.

But first, a point of clarification. A distinction should be made here between escape and the other situations the provision regulates. Human rights application hinges on effective control over an area or a person, which would cover situations arising inside the PoWs camp. For the use of force in defence or to deal with riots, the detaining power will most likely have the required effective control.

By contrast, an escaping prisoner will at some stage be beyond the detaining power's effective control. If the law enforcement paradigm was the applicable regime for the use of force against PoWs, once the prisoner is beyond effective control, this would presumably be replaced by the conduct of hostilities paradigm, including the possibility of using lethal force as a first resort as long as the person is not *hors de combat*. The practical result is that the escaping prisoners runs a real risk of being shot in the back.

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6 GCIII, Art. 121

7 There are many theories on the concept of *lex specialis*. The approach taken here is that the rule does not cause entire legal regimes to be replaced by the rules considered to be *lex specialis*, but rather that it is a tool that may be used to solve conflicts between rules in concrete situations. Based on an analysis of the law applicable to a concrete situation, the rule that provides the best solution not just for one side, but taking the totality of the situation into account, should be applied.

This goes to the core of Article 42: the use of weapons against prisoners of war, and *especially* against those who are escaping or attempting to escape, shall constitute an *extreme measure*, always preceded by warnings. In a way, this should be seen as a *lex specialis* rule within the *lex generalis* of LOAC, introduced to ensure captured soldiers get maximum protection.

The problem is, as pointed out by the updated Commentary,[8] that LOAC is unsettled on the issue of when an escape has been successful for the purpose of targeting. According to Article 91 of GCIII, escape is only successful when the prisoner re-joins own or allied forces or has left the territory controlled by the detaining power or its allies. However, Article 91 deals with the question of the punishment for escape of recaptured prisoners of war, and as a result, some argue that the threshold provided by this provision is too high. They suggest instead that for the purpose of targeting, the escape is successful when the prisoner is outside the camp and the guards have stopped the pursuit.

This view corresponds with the human rights requirement of effective control and resembles the rules in Article 41 API concerning persons *hors de combat*: a person who is *hors de combat*, including those in the power of an adverse Party, shall not be the object of an attack as long as he or she "abstains from any hostile act and does not attempt to escape"[9]. This means, for instance, that if a wounded person continues to fight, he or she will be a lawful target of attack. Or, if he attempts to escape, force may be used to stop him.

However, the *hors de combat* provision is more suited to regulate the situation of getting *into* captivity, not how they transition *out* of the protected status and become lawful targets again. In order for the protection offered in Article 42 to apply as intended, the GCIII definition of successful escape should be applied as a general standard to GCIII, including Article 42. This will provide captured soldiers with the best protection, which after all is the purpose of GCIII. This means that in the case of escape, Article 42 should apply until the prisoners re-joins own or allied forces, or leaves the territory controlled by the detaining power or its allies. If the prisoners during their escape uses force against those attempting to recapture them, the response should only include force as a matter of last resort, as an extreme measure, and only after issuing warnings.

The enhanced protection provided by Article 42 makes sense when taking the fact that soldiers are merely a tool used to further a political goal. They are obliged to follow orders and as pointed out, most soldiers have an obligation to attempt to escape if they are captured. It would not make sense if the same states permitted the detaining power to kill anyone trying

8 GCIII 2021 Commentary, Para. 2554.

9 API art. 41.

to escape. Second, this rule is basically intended to prevent escaping prisoners being shot in the back. As I mentioned at the start, the regulation of the use of weapons against escaping PoWs is one of the older rules of LOAC, and one of the traditional principles of LOAC is that of chivalry. It is not very chivalrous to shoot someone in the back, especially not someone who is most likely unarmed. Furthermore, PoWs may be considered useful in that they can be used to get own forces back, and States therefore had an interest in ensuring a very high threshold for killing them.

This is illustrated by an 1800 essay on *military law, and the practice of Courts-Martial*. It explains: "It is not common to put to death prisoners of war. They are detained in safe custody, till they are exchanged by cartel, for an equal number of our subjects who may be in the hands of the enemy, or till the conclusion of a peace restores them to their liberty: and in the mean time they are treated with humanity."[10] A more modern example may be found in the conflict in Nagorno-Karabakh, where Azerbaijani forces exchanged 15 Armenian PoWs for maps showing the locations of nearly 100,000 landmines in the territories previously controlled by Armenia.[11]

LOAC is commonly described as being designed to protect the victims of war, but in fact it is intended to protect *all* individuals, including the combatants. In some areas, LOAC and those protected by these rules may benefit from other legal regimes, such as International Human Rights Law, being applied in addition to LOAC. However, care must be taken to ensure that the long-established rules of protection specially developed for situations of armed conflict are fully understood before they are re-interpreted or replaced. Otherwise, we risk reducing the unique protection which has been offered by LOAC long before International Human Rights Law was invented. In the case of using force against escaping PoWs, interpreting the provision as a law enforcement provision or replacing LOAC with human rights will undermine the protection already provided by LOAC. Whereas the law enforcement regime will protect the escaping PoW only until the detaining power loses effective control, according to Article 42 and GCIII, the requirement to only use force against escaping prisoners as an extreme measure will apply until their escape is deemed successful, that is, when they re-join their forces or leave the detaining power's territory.

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10 Alexander Fraser Tytler, *An essay on military law, and the practice of Courts-Martial* (R.E. Mercier and Co, No. 31 Anglesea-Street, Dublin, 1800) p. 66.

11 Herszenhorn, David M., 'Azerbaijan trades Armenian prisoners of war for mine maps', *Politico*, 12 June 2021, https://www.politico.eu/article/azerbaijan-armenia-prisoners-war-nagorno-karabakh-landmine-maps-blinken/.

DISCUSSION

During the Q&A session, the panellists and participants discussed the substantive protections afforded to PoWs, the fundamental guarantees for detainees in NIAC, the existing and possible compliance mechanisms and the methods of interpretation of the Convention.

I. Substantive protections afforded to PoWs

The use of weapons against PoWs, including escaping PoWs (Article 42 GCIII)

A panellist specified that in its interpretation of Article 42 GCIII, the ICRC was very careful not to say that Article 42 is a law-enforcement rule. Article 42 puts obligations on the parties to use force only as an extreme measure, i.e. as a measure of last resort, and after warnings have been given. Nonetheless, this article contains obligations and requirements to the parties that are very similar to the ones that exist in law enforcement or in human rights law, meaning that there are similarities in practice.

As to the question about when a prisoner has escaped or not according to the rule of Article 91, the panellist said that ultimately, the test is whether the prisoner is *hors de combat* or not, even before having reached back the line of their own troops. The ICRC took a very nuanced and careful position: the Commentary is not meant to be an academic commentary. It is meant first and foremost to give practical guidance to those who have to apply the rules. Therefore, it is oriented in terms of what matters when a practitioner applies the rules.

A panellist specified that, from a legal perspective, a PoW who is outside immediate control after escaping and hides and shoots has nonetheless not yet successfully escaped. Therefore, in that case, PoWs are still under the status of PoW, even if they are outside the effective control of the detaining authority. Furthermore, force should be used as an extreme measure, even if the PoW is outside the camp and has a weapon. PoWs are captured persons the detaining powers are taking away from their unit. Even if PoWs are outside a detention camp, they are still not with their fighting forces. For the panellist, by referring to academic discussions, the Commentary made it less clear when the PoW can be attacked. That would open up the argument that the PoW could be shot in the back and also undermine the old protection afforded to PoWs under IHL. According to the panellist, the discussion in the Commentary about the practice being unclear about when the protection ends and about whether these articles are about *hors de combat* principles undermines or blurs a question which had been clear until then in the law. The panellist concluded that PoWs should not be shot in the back: just

because they are outside the camp does not mean they have successfully escaped, and the threshold is considerably higher for good reasons.

The rights of persons with disabilities

A participant underscored that GCIII had to be interpreted in light of new social contexts and legal developments, such as the development of the perception of disabled persons. The participant said that GCIII envisages those persons as people subject to a disease and that under Article 30 authorizes to put them in isolation. The participant asked whether this provision could be regarded as being in clear contradiction to IHRL, in particular to Article 14 of the Convention on the Rights of Persons with Disabilities which provides *inter alia* that the existence of disability should in no case justify a deprivation of liberty, especially in light of the interpretation of this article by the Committee on the Rights of Persons with Disabilities. This would amount to one of the very few contradictions between IHL and IHRL.

A panellist specified that regarding isolation, the Third Geneva Convention says "may" and not "must". The panellist concurred that international law has developed, and that recent developments should be taken into account. However, the panellist highlighted that in the ICRC Commentary, the Convention on the Rights of Persons with Disabilities is already very much taken into account, unlike most human rights instruments. In some situations, especially in large-scale IAC, it may be necessary and justified in terms of protection to separate disabled PoWs. Nonetheless, it may certainly not be done automatically, because the understanding of disability has changed, from a very medical approach at the time – which the panellist said that it would retroactively be defined as a crime against humanity – to today's approach. The panellist highlighted that the same reasoning applies to technology and the understanding of the "honour of a woman".

Religious freedom of PoWs

A panellist commented that there is now a surprising range of players who know about PoWs and take account of the rules. For example, during the Gulf War 1990-1991, in the run-up to the conflict, Saudi Arabia would not allow its coalition partners to have religious personnel conducting Christmas services even in the middle of a camp where no Saudi citizens could see them. As soon as they started dealing with PoWs, they knew they had the obligation to meet their religious needs. Therefore, they asked their coalition partners for assistance in doing so, and Bibles circulated in Saudi Arabia.

Internment of PoWs by a neutral country

Regarding internment by a neutral third State, a participant referred to a concrete case involving Sweden in the Vietnam war. In 1971 the Nixon administration proposed that Sweden intern

PoWs who were held in North Vietnam. Sweden never made an offer to the North Vietnamese. The participant asked whether North Vietnam violated IHL by rejecting the internment scheme and whether IHL obligates Sweden to agree to the idea. A panellist opined that interning PoWs in a neutral country is a very good idea, that is favoured by the Convention. However, there is no obligation, neither for the neutral country nor for the Parties to the conflict. This means that neither Sweden nor North Vietnam violated the Convention. For the wounded and sick PoWs, it is certainly even more encouraged. As an example, during the Second World War, PoWs were transferred from belligerent countries to Switzerland to be interned there rather than in Germany, allowing them to get better treatments.

Gender perspectives on detention

On the gender perspective on detention and the fact that the updated Commentary takes a contemporary gender lens, a panellist said that it is a hugely important topic from a military perspective, especially regarding PoWs. It is one of the areas which really has a practical impact because there is a considerably different and a higher risk to female PoWs than to male PoWs. This is both because of the type of abuse that they potentially may be facing but also because so far women in front-row are normally in low numbers. Complying with the requirement of separating men and women comes with a risk of having one or two women on their own, and men in a different room, which in itself is a higher risk for that one person being left on her own, both because of what they might be exposed to but also the isolation. Therefore, according to the panellist, this is definitely an area where the update is very positive, including with respect to the old-fashioned way women are being described in the GC.

A participant added that sometimes within a group of PoWs that are being detained, there is also a risk of gender-based violence within the same armed forces. That is how the ICC in the *Ntaganda* case[1] found the crimes of rape and sexual enslavement of girls and boy soldiers in a NIAC. The defender was initially saying that there was no crime committed under the same military forces or personnel, but this was rejected by the Court.

II. Fundamental guarantees for detainees in NIAC

A participant asked a general question about NIAC and fundamental guarantees, which also built the bridge with the ICRC's work on the Commentary on the Fourth Geneva Convention: does and should ICRC Commentary on GCIV address the status of detainees, i.e. interned civilians in parallel with those of PoWs under GCIII and Additional Protocol I, at least at the outset? Another participant asked whether there were any developments in respecting fundamental guarantees of detainees of an adverse non-State party in recent armed conflicts.

1 Ntaganda case: ICC Appeals Chamber confirms conviction and sentencing decisions (icc-cpi.int)

A panellist answered that for NIACs, the starting point on the treatment and fundamental guarantees is Common Article 3, and the ICRC Commentary on Common Article 3 is very rich. It has also been translated into several languages. This is particularly relevant for such a provision that is so important for everyone to understand. He added that Additional Protocol II is also relevant and stressed that should those two sources be respected, in contexts such as Ethiopia, it would be already a good starting point for the protection of individuals. According to this panellist, it is possible to interpret the rule of Common Article 3 in light of the law of IAC because the differences between IAC and NIAC are limited when it comes to the treatment of detainees and fundamental guarantees, especially judicial guarantees. Furthermore, most of the time, it is uncontroversial that IHRL applies in NIAC because such conflict takes place on the territory of a given State. Common Article 3 and the human rights guarantees then all lead exactly to the same result. Regarding the treatment by NSAGs, many would deny that they are bound by IHRL. They are however bound by Common Article 3.

The panellist added that the practice of non-state actors is currently being studied by the Geneva Academy and Geneva Call[2]. On one hand, one can argue that IHRL outlines the contours of the judicial guarantees that should be afforded by all civilized people. On the other hand, some of these guarantees should be adapted to the specificities of armed groups, because interpreting a rule in a way the addressee is materially unable to comply would be useless and reduce the credibility of IHL.

III. Compliance with IHL

The principle of reciprocity

A participant asked whether 21st century state practice suggested a revival of the reciprocity principle on the level of observance in relation to PoWs' treatment, particularly in the context of the repatriation process. More specifically, the participant asked whether reciprocity could be regarded as a legal measure to guarantee observance or whether this was only a sociological factor.

A panellist disagreed that there could be a revival of the reciprocity principle under IHL based on recent State practice. First, it goes against treaty rules. Second, if one had to analyse whether customary law, independently of the Convention, foresees a revival of reciprocity, the panellist is not sure that it would be the case. However, the Convention is clear (Articles 1-16). Article 13 of the Third Convention excludes reprisals against PoWs. Article 60(5) of

2 "From Words to Deeds: a study of armed non-state actors' practice and interpretation of international humanitarian and human rights norms", joint research project by the Geneva Academy and Geneva Call

the Vienna Convention on the Law of Treaty excludes the possibility of suspending a treaty in reaction to a violation. Article 50(1)(c) of the ILC Articles on State Responsibility excludes countermeasures in violation of treaties of a humanitarian character. The fact that, unfortunately, there was reciprocity in recent conflicts such as Iran-Iraq or Eritrea-Ethiopia cannot lead to desuetude because this practice is not widespread enough and it was not followed, to the panellist's knowledge, by *opinio juris*. Those States did not claim that the rule is *in desuetudo* and that there is now a new rule. Therefore, the panellist does not think that there is reciprocity. However, the question as to why violations of IHL are being committed is not a legal question but a sociological question. Indeed, chances that a Party commits violation of IHL are greater if the other Party also commits violations of IHL.

Enforcement and compliance mechanisms

A participant asked a question relating to the applicability of IHL to NSAGs and the possibility of bringing them to justice. The participant said that in situation of armed conflicts such as in the Tigray region in Ethiopia, there are credible reports that non-state actors execute PoWs. The participant asked how the ICRC or international courts can verify such reports and bring into account such perpetrators which are not party to the Geneva Conventions.

A panellist said that the Third Geneva Convention does not apply *de jure* to non-State actors. It applies in IAC between two or more States. Nonetheless, nothing prevents non-State actors to respect some of the provisions that would be equivalent to those in GCIII, either by analogy or because as a matter of law they are part of customary law or because they are reflected in the rules applicable in NIAC regarding the respect and humane treatment of PoWs. Non-compliance with IHL is a key question, both in NIAC and in IAC. There is no evidence that NSAGs generally disrespect the law more than States do.

On how to get actors to comply with the law, the panellist stressed that positive reciprocity is the first answers: "if you respect the law yourself you have greater chance that your enemy will also respect the law". This is according to him a sociological argument. In terms of enforcement of the rules of IHL, just like the rest of international law, the panellist recognized that compliance mechanisms are relatively weak because States did not want to introduce very strong compliance mechanisms within the GC. There are some mechanisms, that have not or hardly been used, such as the Protecting Powers or the International Humanitarian Fact-Finding Commission (IHFFC). Amongst other possible actions, the panellist highlighted access by the ICRC and other impartial humanitarian organizations to areas where violations are being committed as well as the obligation for all States to respect and ensure respect for the GC by all parties to the conflict, and more broadly, to ensure respect for IHL when it comes to NSAGs. He finally mentioned international criminal law which allows for the prosecution of

IHL violations, while noticing that is is more and more sophisticated and increasingly embedded into national legislation.

A panellist complemented that States are not always inclined to accept the involvement or use of existing mechanisms. He explained that the IHFFC approached the authorities to propose its services regarding the Tigray region. A webinar was even organized at the Addis Ababa University about the different modalities of carrying out such a mission but these démarches did not trigger any reactions nor concrete results so far.

IV. Methods of interpretation

A last question related to the necessary level of detail when interpreting the Third Geneva Convention. A participant asked whether the relevance of GCIII would be best assured by resolving ambiguities or by leaving them to operate. A panellist answered that there are very few conventions that are less clear than GCIII. GCIII is an incredibly precise convention and most international treaties are more ambiguous. The panellist observed that one of the weaknesses of GCIII is precisely that it is so precise that it is more difficult to adapt, on the contrary to, for instance, the European Convention on Human Rights, whose general words can be adapted to evolving circumstances. Contributors may have had good reasons after the Second World War to adopt a very precise wording. However, the more precise the wording, the more difficult it could become to propose an evolutive interpretation of the terms of the treaty. In the panellist's view however, the Commentary quite successfully adapts the interpretation of the Third Convention to new environments . Moreover, the panellist highlighted that the ambition to make a legislation so precise that it is no longer ambiguous is an illusion. The more details one gives, the more gaps it will produce. On the other hand, having such a precise treaty is also an advantage in international law, which is usually characterized by principles without judges to interpret them and self-application based on good faith – a sometimes scarce hence precious resource for the application of IHL.

3rd Panel
Fourth Convention Commentary: IHL-IHRL, between Complementarity and Interplay
3ème panel
Commentaire de la Quatrième Convention : DIH-DIDH, entre complémentarité et interactions

Chaired by Kubo Mačák
ICRC

IHL – IHRL: NAVIGATING BETWEEN *LEX SPECIALIS*, PARALLEL APPLICATION AND COMPLEMENTARITY IN ORDER TO DEFINE THE CONTOURS OF STATE OBLIGATIONS
DIH-DIDH : NAVIGUER ENTRE LEX SPECIALIS*, MISE EN OEUVRE PARALLÈLE ET COMPLÉMENTARITÉ AFIN DE DÉFINIR LES CONTOURS DES OBLIGATIONS DES ÉTATS*

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Résumé

Vaios Koutroulis est professeur de droit international public au centre de droit international de l'Université Libre de Bruxelles. Cette contribution vise à établir le cadre général de l'interaction entre le DIH et le DIDH dans le contexte de l'application de la quatrième Convention de Genève (CG IV) et à définir ainsi les contours des obligations des États en application de cette Convention. L'argumentation s'appuie sur les positions formulées par les Etats concernant les observations générales n° 35 sur la liberté et la sécurité de la personne (art. 9) et n° 36 sur le droit à la vie (art. 6) adoptées par le Comité des droits de l'homme (CDH), ainsi que sur les positions formulées par les Etats concernant le projet de principes sur la protection de l'environnement en rapport avec les conflits armés, élaboré par le Commission du droit international (CDI). La

1 Professor of Public International Law, International Law Centre, *Université libre de Bruxelles*. Part of the text of this contribution is based on a chapter entitled "Are IHL and IHRL still two distinct branches of public international law?", to be published in the second edition of the *Research Handbook on Human Rights and Humanitarian Law*, R. Kolb, G. Gaggioli, P. Kilibarda (eds.), Edward Elgar Publishing, 2022.

question du lien entre DIH et DIDH en conflit armé soulève finalement une question plus large : les conflits armés sont-ils réglementés exclusivement par le DIH ou les Etats acceptent-ils également l'application d'autres règles de droit international public ? Sur la base de cette analyse de la position des Etats, Vaios Koutroulis conclut que le DIDH s'applique en situation de conflit armé et d'occupation et, dès lors, que le DIDH ne peut être ignoré dans le Commentaire actualisé de la Convention. De plus, il précise que l'application du DIDH en temps de conflit armé a une valeur ajoutée principalement lorsque le DIDH constitue une source autonome d'obligations pour les parties belligérantes. En effet, un acte qui ne viole pas le DIH peut toutefois violer le DIDH.

So much has been written on the topic of the relations between International Humanitarian Law (IHL) and International Human Rights Law (IHRL) that, even if these relations were not complicated, it is safe to say they would have become so.

The objective of this presentation will be to set the general framework with respect to the interplay between IHL / IHRL in the context of the application of the fourth Geneva Convention (GCIV) and thus define the contours of state obligations under the convention. Instead of dwelling on the theoretical aspects of the interplay, which have been sufficiently analyzed in legal scholarship, I will explore the relations between IHL and IHRL, using as background material the positions formulated by States themselves with respect to General comment no 35 on liberty and security of persons and General comment no. 36 on the right to life adopted by the Human Rights Committee (HRC).[2] These will also be complemented by the positions formulated by States in relation to the Draft principles on the protection of the environment in relation to armed conflicts,

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2 CCPR General comment No. 35: Article 9 (Liberty and security of person), CCPR/C/GC/35 (16 December 2014) and CCPR Draft general comment No. 35: Article 9 (Liberty and security of person) CCPR/C/GC/R.35/Rev.3 (10 April 2014). The HRC received written observations on Draft general comment No. 35 from the following 8 States: Australia, Ireland, Japan, Switzerland, United States, Belarus, Canada and the United Kingdom. All the submissions are available in HRC, 'Draft General Comment article 9 – Call for Comments' <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/DGCArticle9.aspx>. Some of the abovementioned States remained silent on the relations between IHL and IHRL.
CCPR General Comment No. 36: Article 6: right to life, CCPR/C/GC/36 (3 September 2019) and CCPR Draft general comment No. 36: Article 6: right to fife) (Revised draft prepared by the Rapporteur) (undated) <https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_EN.pdf>. The HRC received written comments on Draft general comment No. 36 from the following 23 States: Australia, Austria, Brazil, Canada, Denmark, Egypt, Finland, France (both on the draft general comment and on the final comment), Germany, Japan, Malta, Namibia, New Zealand, Norway, Poland, Portugal, Russian Federation, Sweden, Switzerland, The Netherlands, Turkey, United Kingdom, United States. All the submissions are available in HRC, 'General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights – Right to life' <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx>. In this case as well, several of the abovementioned States remained silent on the relations between IHL and IHRL.

elaborated by the International Law Commission (ILC).[3] In this case of course, the scope of the applicable law is broader that human rights strictly speaking; it concerns essentially instruments relating to international environmental law. However, the crux of the matter remains the same: are armed conflicts exclusively regulated by IHL or do States accept the application of other rules of public international law as well? Moreover, human rights also have a role to play in relation to the protection of the environment and several States in their interventions and comments framed the protection of the environment and the issues raised in connection to it as a human rights issue.

On the basis of these views, I will make two points: firstly, IHRL does apply in situations of armed conflict and occupation and, thus, human rights law cannot be ignored in the updated Commentary on the Convention (A); secondly, the only way the application of IHRL during an armed conflict can have a substantial added value is when it can constitute a source of autonomous obligations for the belligerent parties (B).

A. *Lex specialis* put aside: human rights law applies during an armed conflict and complements the application of IHL rules

One can no longer simply apply only the rules of GCIV in a situation of an international armed conflict or occupation. Human rights law – and other branches of public international law for that matter – remain applicable as well. In other words, the idea according to which IHL is a *lex specialis* that altogether excludes the applicability of human rights is no longer tenable and must be put to rest once and for all. Aside to the list of well-known precedents from judicial and quasi-judicial bodies confirming this statement,[4] it should be noted that, both before

3 In 2019, the Commission adopted on first reading a set of draft principles on the protection of the environment in relation to armed conflicts, A/CN.4/L.937, 6 June 2019. In this context, States had the opportunity to transmit information directly to the ILC and to comment on the draft principles before the 6th Committee, in 2021. The following States submitted information to the ILC in 2016: Lebanon, Micronesia, the Netherlands, Paraguay, Slovenia, Spain, Switzerland, the United Kingdom. The following States submitted information in 2021: Belgium, Canada, Colombia, Cyprus, the Czech Republic, El Salvador, France, Germany, Ireland, Israel, Japan, Lebanon, the Netherlands, Portugal, Spain, Sweden (on behalf of Nordic countries), Switzerland, the United Kingdom and the United States. Several other States commented on the draft principles before the 6th Committee.

4 ICJ, *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion of 8 July 1996, *1996 ICJ Reports* 226, para 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion of 9 July 2004, *2004 ICJ Reports* 136, para 106; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda),* Judgment of 19 December 2005, *2005 ICJ Reports* 168, paras 216-17. CCPR General comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004, pp. 4-5, paras 10-11 <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F21%2FRev.1%2FAdd.13&Lang=en> and General comment No. 36, *supra* note 2, p. 13, para 63; European Court of Human Rights (ECtHR), *Hassan v. The United Kingdom*, Grand Chamber, judgment, 16 September 2014, app no 29750/09; *Georgia v. Russia (II)*, Grand Chamber, judgment (merits), 21 January 2021, app no 38263/08.

the HRC and before the ILC, the vast majority of States which discussed human rights – with a couple of notable and rather well known exceptions – supported this view. States may not always agree as to how IHRL – or other general rules of public international law like environmental law – interact with IHL during an armed conflict, but they do not outright reject its application in a situation of armed conflict.

Since human rights apply in a situation of an international armed conflict and occupation, how do they influence the interpretation and application of the rules of GCIV? In other words, what are the consequences of the application of human rights during an armed conflict and do they have any concrete impact on State obligations under IHL, and more specifically the GCIV? These are the questions I will turn to now.

B. What is the added value of the application of human rights during an armed conflict or occupation?

In the views transmitted by States, two main approaches to the relations between IHL and IHRL can be discerned. The first one subordinates IHRL to IHL: under this approach, the parallel application of IHRL to armed conflicts has no substantial added value: human rights add (almost) nothing to IHL (1). The second approach pleads in favor of maintaining IHRL autonomy with respect to IHL. Under this view, IHRL imposes on States obligations that do not exist under IHL (2).

1. Subordinating IHRL to IHL: the deprivation of human rights applicable in armed conflict from any significant legal consequences

According to this first view, in situations of armed conflict, IHRL will be violated only if IHL is violated as well; and, *a contrario*, if IHL is not violated, IHRL will not be violated either.

You may call it IHL being *lex specialis*[5] (which strictly speaking, in most cases, it is not), or IHL being the "controlling body of law",[6] or IHRL accommodating IHL, or complementarity, or

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5 United Kingdom's observations on Draft general comment No. 35, *supra* note 2, pp. 4-5, para 21: "it is the United Kingdom's position that international humanitarian law is the *lex specialis* in situations of armed conflict; and that it displaces or modifies Article 9 of the ICCPR in respect of detention"; United Kingdom's observations on Draft general comment No. 36 *supra* note 2, p. 6, para 33: "IHL is more than relevant to armed conflict, it is the *lex specialis*. (…) While we accept the requirement to investigate breaches of IHL in accordance with relevant international standards, we do not accept an obligation to investigate allegations of article 6 breaches in situations of armed conflict."

6 US Response to Inter-American Commission Report on Guantanamo, Office of the Legal Adviser, US Department of State, *Digest of US Practice in International Law 2015* (International Law Institute, 2016) 776; Canada's observations on Draft general comment No. 35, *supra* note 2, p. 2, para 11.

"conciliatory interpretation", you may call it whatever you want, the result will be the same: IHRL will be interpreted in such a way as to prohibit only what is already prohibited by IHL and, most importantly, not to render unlawful a conduct that does not violate IHL.

The prohibition of arbitrary detention and the prohibition of arbitrary deprivation of life give an example of this subordination of IHRL to IHL. Article 9 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary detention. The crux of the matter is what does "arbitrary" mean. In a situation of an armed conflict, arbitrary will be defined according to IHL. Thus, a detention according to IHL rules (such as the detention of prisoners of war under GCIII or the internment of civilians under GCIV) will not be arbitrary under article 9 of the Covenant; because such internment is undertaken in conformity with IHL, it will also be in conformity with article 9 of the Covenant and thus will not be considered arbitrary. The *Hassan* case which interpreted article 5 of the European Convention on Human Rights (ECHR) – much more rigid in its formulation that article 9 of the ICCPR – is an example in this respect. On the other hand, a detention that violates IHL (for example, a civilian whose internment is not absolutely necessary under article 42 GCIV, or a civilian interned long after the close of hostilities, or despite the fact that the reasons justifying the internment ceased to exist) will violate IHL and – because it violates IHL – will also be arbitrary and in violation of article 9 of the Covenant.

The same reasoning applies to article 6 of the Covenant and the "arbitrary" deprivation of life. A deprivation of life that violates IHL (an attack in violation of the principle of distinction for example) will be arbitrary for the purposes of the Covenant and will thus also violate article 6 of the ICCPR. On the contrary, an attack which does not violate IHL (the killing of an enemy combatant in conformity with the principle of distinction) will not be arbitrary under article 6 of the Covenant.

This adjustment or subordination of IHRL to IHL finds a positive echo in the declarations of several States.[7] For example, with respect to ICCPR article 9 on detention, Australia asserted that IHL "should be taken into account in interpreting the scope and application of article 9" of the ICCPR,[8] stating that "human rights obligations may continue to apply in situations of armed conflict, although they may be displaced to the extent necessitated by IHL."[9] Similarly, with respect to article 6 of the ICCPR, Germany stated that "while Article 6 of the Covenant remains applicable in situations of armed conflict, the conduct of hostilities is governed by the special regime of international humanitarian law. The rules of international humanitarian

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7 See the positions expressed by States in the previous notes.

8 Australia's observations on Draft general comment No. 35, *supra* note 2, p. 2, para 7.

9 *Ibid*, p. 5, para 25.

law are indeed relevant to the interpretation and application of the right to life in situations of armed conflict."[10] Thus, being a 'special regime', IHL determines the interpretation and application of article 6 of the Covenant.[11]

Even under this restrictive approach, one should not lose sight of at least two important consequences of the parallel application of IHRL in armed conflicts: (a) the influence exercised by IHRL on the definition of terms used in IHL treaties (like, for example, the definition of torture); and, (b) the possibility for human rights bodies to have jurisdiction over violations committed during armed conflicts. However, aside from these two elements, under the view that is examined here, IHRL is limited to the quite decorative function of merely approving what is already allowed under IHL and prohibiting conduct that already constitutes a violation of IHL. This is where the second approach comes along.

2. "Liberating" IHRL from IHL: the recognition of meaningful legal consequences to IHRL applicable in armed conflict

In both General comment No. 35 and General comment No. 36, the HRC puts forth an interpretation that favours a meaningful simultaneous application of IHL and IHRL: under the Committee's view, conformity with IHL does not necessarily imply conformity with IHRL and it is possible for IHRL to be violated during armed conflict even when IHL is complied with.[12]

Unsurprisingly, several States that reacted to the General comments were not very happy with this view.[13] However, and this is the most important element, this negative stance is not shared by all States. Indeed, some States, such as Norway,[14] Switzerland[15] and, implicitly, the

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10 Germany's observations on Draft general comment No. 36, *supra* note 2, pp. 5-6, para 23.

11 Along the same lines, see Canada's observations on Draft general comment No. 36, *supra* note 2, p. 5, para 22; Russia's observations on Draft general comment No. 36, *supra* note 2, pp. 10-11, para 39.

12 General comment No. 35, *supra* note 2, p. 19, para 64: "[s]ecurity detention authorized and regulated by and complying with international humanitarian law *in principle* is not arbitrary" (emphasis added); General comment No. 36, *supra* note 2, p. 13, para 64: "[u]se of lethal force consistent with international humanitarian law (…) is, *in general*, not arbitrary" (emphasis added).

13 See the positions mentioned in previous notes.

14 Norway's observations on Draft general comment No. 36, *supra* note 2, p. 6, para 30; with respect to "the obligation to disclose elements of the targeting process, Norway "fully support[ed] the view expressed by the Committee that a certain openness is expected in order to comply with the obligations set out in article 6."

15 Switzerland's observations on Draft general comment No. 36, *supra* note 2, pp. 1-2, para 4.

Netherlands[16] have adopted a more nuanced view as to the complementarity leading to both branches being sources of autonomous obligations.

More examples on this, and perhaps more telling, come from the positions adopted by States in the context of the ILC work on the protection of the environment in relation to armed conflicts. The ILC, while asserting that IHL was the *lex specialis* during armed conflict, followed a "holistic approach" and integrated international environmental law and human rights law references to the draft principles and their commentaries. For the purposes of the GCIV, draft principles 20 to 22 applicable in situations of occupation are particularly relevant. These draft principles set down a number of obligations of the occupying power, which has to:

- respect and protect the environment of the occupied territory in accordance with applicable international law;
- take environmental considerations into account in the administration of the occupied territory;
- take appropriate measures to prevent significant harm to the environment of the occupied territory which is likely to prejudice the health and well-being of the population of the occupied territory;
- respect the law and institutions of the occupied territory concerning the protection of the environment;
- administer and use natural resources in the occupied territory for the benefit of the population of the occupied territory and for other lawful purposes under IHL;
- and, in doing so, it must use natural resources of the occupied territory in a sustainable way, minimizing environmental harm;
- exercise due diligence to ensure that activities from within the occupied territory do not cause significant harm to the environment of areas beyond the occupied territory.[17]

16 The Netherlands' observations on Draft general comment No. 36, *supra* note 2, p. 6, para 30. The States that sent their remarks on the Draft general comments without raising any objections to the Committee's approach on the relations between IHRL and IHL can also be considered as subscribing to this approach, unless they have explicitly inserted a caveat in this respect.

17 ILC, Protection of the environment in relation to armed conflicts, text and titles of the draft principles provisionally adopted by the drat committee on first reading, A/CN.4/L.937, p. 4.

Aside from a few states that expressed critical views,[18] several States agreed with the integrated or holistic approach followed by the Commission: Colombia,[19] Ireland,[20] Germany,[21] Portugal,[22]

18 Israel, Comments from the State of Israel on the International Law Commission's *Draft Principles on the Protection of the Environment in Relation to Armed Conflicts* as adopted by the Commission in 2019 on first reading, pp. 2-3, paras. 8-11 <https://legal.un.org/ilc/sessions/73/pdfs/english/poe_israel.pdf>; Russian Federation, A/C.6/74/SR.31, p. 6, para. 30; US, Comments of the United States on the International Law Commission's draft principles on the protection of the environment in relation to armed conflicts, October 6, 2021 <https://legal.un.org/ilc/sessions/73/pdfs/english/poe_us.pdf>; France, Comments and observations of the French Republic on the draft principles of the International Law Commission on protection of the environment in relation to armed conflicts, pp. 4 and 6 <https://legal.un.org/ilc/sessions/73/pdfs/english/poe_france.pdf>.

19 Colombia, Permanent Mission of Colombia to the United Nations, Comments of Colombia on the draft principles on protection of the environment in relation to armed conflicts, p. 1, para. 3 <https://legal.un.org/ilc/sessions/73/pdfs/english/poe_colombia.pdf>: "international humanitarian law needs to be integrated into other branches of law, such as environmental law, human rights law and treaty law"; Colombia, A/C.6/74/SR.30, p. 18, para. 109: "the obligation to protect human rights and the environment did not cease during armed conflict."

20 Ireland, Comments by Ireland on the International Law Commission's draft principles on protection of the environment in relation to armed conflicts, p. 1, para. 2 <https://legal.un.org/ilc/sessions/73/pdfs/english/poe_ireland.pdf>: "particularly welcomes the Commission's analysis of how certain aspects of international humanitarian law (IHL) apply in relation to the protection of the environment, and of how other areas of international law, including international human rights and environmental law, complement IHL in relation to the protection of the environment in situations of armed conflict and occupation."

21 Germany, A/C.6/74/SR.30, p. 9, para. 50: "commended the Commission on the preparatory work it had done to identify norms for the protection of the environment in different legal regimes and interpret them in order to develop a comprehensive approach for the formulation of general rules and principles."

22 Portugal, Comments of Portugal to the Draft Principles on Protection of the Environment in relation to Armed Conflicts adopted on first reading by the International Law Commission, p. 2 <https://legal.un.org/ilc/sessions/73/pdfs/english/poe_portugal.pdf>: "pleased that the work of the Commission on this topic confirms and strengthens the view that armed conflicts are not exclusively ruled by International Humanitarian Law, by also incorporating rules and recommendations stemming from International Human Rights Law, the Law of the Sea, International Criminal Law and International Environmental Law." See also Portugal, A/C.6/74/SR.29, p. 15, para. 101.

Micronesia,[23] Morocco,[24] Spain,[25] Switzerland,[26] Soudan,[27] Armenia,[28] and the Netherlands.[29] With respect to occupation more specifically, which is of direct interest to our topic, the majority of States welcomed the draft principles on occupation and the integration of rules other than IHL, such as the right to self-determination, permanent sovereignty over natural resources, or human rights.[30]

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23 Micronesia was happy that "the recognition of close links between human rights and the protection of the natural environment from armed conflict and other harms, were reflected to a certain extent in a number of the draft principles", A/C.6/74/SR.29, p. 14, para. 93.

24 Morocco accepted that "the connections drawn in the draft principles between international human rights law and the law of armed conflict were a priori a justified necessity", A/C.6/74/SR.30, p. 2, para. 3.

25 Spain, Comments and observations of the Kingdom of Spain on the draft principles of the International Law Commission on protection of the environment in relation to armed conflicts, p. 2, para. 5, p. 6, para. 14 and pp. 7-8, para. 18 <https://legal.un.org/ilc/sessions/73/pdfs/english/poe_spain.pdf>.

26 Switzerland invited the ILC to consider "including more human rights wording in the draft principles", Ministry of Foreign Affairs, Department of Public International Law, Comments and observations of Switzerland on the topic "Protection of the environment in relation to armed conflicts", p. 1 <https://legal.un.org/ilc/sessions/73/pdfs/english/poe_switzerland.pdf>.

27 Soudan, A/C.6/74/SR.29, p. 10, para. 60.

28 Armenia, A/C.6/74/SR.31, p. 9, para. 54: "the scope of the Commission's work should include international human rights law. Protection of the environment was closely linked to the exercise of inalienable economic and social rights and free disposal of natural resources by virtue of the right of self-determination. In addressing the issue of illegal exploitation of natural resources in conflict situations, the Special Rapporteur should therefore refer to the economic and social rights of peoples in conflict areas."

29 The Netherlands, letter of 30 December 2020, Annex: Advisory Committee on Public international Law, Advisory Report on the ILC's Draft principles on Protection of the Environment in Relation to Armed Conflicts, Advisory report no. 36, 9 July 2020, p. 12 <https://legal.un.org/ilc/sessions/73/pdfs/english/poe_netherlands.pdf>: "the Netherlands sees a role for other areas of law in providing environmental protection in conflict situations. This applies in particular to the role of human rights, given that severe environmental damage impedes the observance of various rights, including the right to life and the right to health."

30 Germany, Comments by the Federal Republic of Germany on the International Law Commission's draft principles on the 'Protection of the environment in relation to armed conflicts' adopted on first reading, para. 12 <https://legal.un.org/ilc/sessions/73/pdfs/english/poe_germany.pdf>. Italy, A/C.6/74/SR.28, p. 5, paras. 23 and 24: "The trend in the current work seemed to be to treat the law of armed conflict as *lex specialis* in relation to international environmental law. Clarifications would be welcome regarding the applicability of environmental treaty obligations not affected by the application of international humanitarian law during armed conflict. Such clarifications would also be warranted in the case of long-term occupation, where international humanitarian law was considered *lex specialis*, prevailing automatically over international environmental law, something which did not fully reflect current needs for the protection of the local population and the environment." Argentina "welcomed the inclusion of the principles of self-determination and permanent sovereignty over natural resources in the draft principles adopted by the Commission on first reading. That would entail the necessary limitation of the general framework for administration and use by the Occupying Power"; A/C.6/74/SR.29, p. 6, paras. 29-30. El Salvador, A/C.6/74/SR.29, p. 19, paras. 128-129. Cyprus, Written com-

Concluding remarks

The long references above are important for a number of reasons. From a methodological point of view, the debate about IHL and IHRL is dominated by theoretical views from legal scholars and it would be useful to add more States' positions to the equation. Moreover, when States' positions are mentioned with respect to the IHL / IHRL interplay, the tendency is to focus a lot on a few States, with restrictive approaches, whose views dominate the debate. The same goes for judicial precedents bearing on GCIV rules. In this respect, the first objective of this contribution is to bring to light opinions expressed by other States.

In terms of substance, the overwhelming majority of States accept that other rules apply concurrently with IHL during armed conflict. Once this is accepted, then the question becomes whether the application of IHRL has any added value with respect to IHL. In this regard, it has been shown that a great number of States accept the idea that IHRL and other rules of international law apply in armed conflicts in parallel but independently from IHL. The consequences of this independent application are twofold.

Firstly, IHL should be interpreted according to these rules and may be interpreted restrictively due to these rules. One example in this respect are States calling for a restrictive interpretation of the powers exercised by the occupying power in the name of the right to self-determination of the population of the occupied territory.

Secondly, IHRL can be the source of autonomous obligations on belligerent States. Thus, even a conduct that does not violate IHL may violate IHRL. This is the logical consequence of the parallel application of distinct rules to the same facts. It is also the position adopted by the ECtHR, both in the *Hassan* and in the recent *Georgia v. Russia (II)* judgments.

It is in light of this double impact from IHRL that the contours of States obligations under the GCIV should be understood. One thing that seems clear on the basis of the views expressed and mentioned above is that completely subordinating IHRL to IHL, especially outside a conduct of hostilities context such as the one GCIV essentially deals with, is no longer tenable.

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ments by the Republic of Cyprus on the International Law Commission's draft principles on the 'Protection of the environment in relation to armed conflicts', p. 3, para. 3 <https://legal.un.org/ilc/sessions/73/pdfs/english/poe_cyprus.pdf>: "The Republic of Cyprus shares and supports the view that State responsibility can be triggered in cases of environmental harm within the context of belligerent occupation on the basis of several legal frameworks, including the law of armed conflict and the law of international human rights". Greece, A/C.6/74/SR.28, p. 9, paras. 50 and 52. Lebanon, Draft principles on protection of the environment in relation to armed conflicts, p. 2 <https://legal.un.org/ilc/sessions/73/pdfs/english/poe_lebanon.pdf>. Italy, A/C.6/74/SR.28, p. 6, para. 26. Algeria, A/C.6/74/SR.31, p. 9, para. 52.

SHOULD THE ICRC COMMENTARY ON GCIV, DEALING WITH OCCUPATION, TAKE ACCOUNT OF HUMAN RIGHTS LAW?
LE COMMENTAIRE ACTUALISÉ DU CICR SUR LA CG IV TRAITANT DE L'OCCUPATION DOIT-IL TENIR COMPTE DES DROITS HUMAINS ?

Françoise Hampson
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Résumé

Françoise Hampson est professeure émérite de droit international à l'Université d'Essex. Dans cette contribution, elle dépasse les questions relatives à l'applicabilité et à l'application du DIDH en temps de conflit armé et interroge la pertinence d'inclure le DIDH dans le Commentaire actualisé du CICR de la Convention IV. Elle confirme tout d'abord que le DIDH est pertinent et s'applique en situation d'occupation. Elle remarque ensuite que le DIDH n'est pas la seule branche du droit international dont on peut questionner la nécessaire prise en considération dans le Commentaire actualisé de la Convention IV : cette question se pose de la même manière pour l'ensemble du droit international. Elle pose ensuite la question de savoir si les obligations d'un Etat découlent, dans leur ensemble, du seul DIH interprété à la lumière du DIDH, ou si certaines de ses obligations découlent du DIH et d'autres du DIDH de manière autonome et indépendante. Françoise Hampson souligne à cet égard que la prise en compte par les Etats du DIDH ne peut être interprétée d'office comme un changement dans l'interprétation de la règle de DIH. Une difficulté supplémentaire est liée selon elle au fait que les Etats ne sont pas tous Parties aux mêmes instruments. Ceci l'amène à questionner jusqu'à quel point et dans quelle mesure il faut inclure le DIDH dans le Commentaire actualisé. Elle conclut en proposant des éléments de réponse relatifs à la pertinence des décisions des organes de droits humains pour l'actualisation du Commentaire de la Convention IV. Parmi ceux-ci, elle souligne la priorité donnée par un organe de droits humains à une règle de DIDH ou à une règle de DIH et l'acceptation générale de cette priorité par les Etats. Elle appelle enfin à la prudence lorsque des références sont faites à des décisions d'organes régionaux, notamment la Cour Européenne des Droits de l'Homme, dont la jurisprudence ne s'applique qu'aux Etats parties à la Convention régionale éponyme.

This presentation, like the last one, is going to involve more questions than answers and I am hoping that you will help clarify what some of the answers should be. My question is much more specific than the issue that Prof. Vaios Koutroulis addressed which was "*how do you handle the interrelationship*". Mine is "*should the ICRC Commentary on the Fourth Geneva*

Convention (GCIV) dealing with occupation take account of human rights law (IHRL)?". So, it is in the specific context of a commentary on a treaty on IHL that I am looking at this.

A. Whether IHRL is relevant in situations of occupation

Obviously the first question is whether IHRL is applicable at all in a situation of occupation. I think that, for the reasons given by Prof. Vaios Koutroulis, that is easy.

First, we need to remember why it matters. (1) The first reason why it matters is that if IHRL is relevant to a situation, it is part of the legal obligations of the State that is an Occupying Power. This does not mean necessarily that it is part of IHL. It is simply part of the baggage the State takes with it when it finds itself in occupation of territory. Everybody needs to know whether that is the case; the State itself and its armed forces, but in addition the ICRC needs to know, and NGOs need to know. (2) But there is a second reason. As Prof. Vaios Koutroulis pointed out, if IHRL to some extent in some way is applicable, it means that human rights (HR) bodies have jurisdiction. So, this may mean that they are handling cases where they interpret IHRL in the light of IHL, but still it means that armed forces will need to be more accustomed to judicial scrutiny than they have been heretofore. The question definitely matters.

The rationale of IHRL is that it deals with the relationship between those exercising governmental authority and those subject to its exercise. That is exactly what is happening in situations of occupation. So, the rationale for the rules is the same. That means that questions of sovereignty or legitimacy are not pertinent. They are not prerequisites for the existence of obligations under IHRL. It is a matter of *de facto* exercise of state authority.

Let us consider the attitude of key players. Political bodies and judicial and quasi-judicial bodies all accept that IHRL applies in situations of occupation, with the exception of Israel and erratically the United States (US). (1) In the case of political bodies, the United Nations Security Council (UNSC) and the United Nations General Assembly (UNGA) frequently call on parties involved in armed conflict to respect their obligations under IHRL and the law of armed conflict. If in fact, IHRL was completely subservient to IHL, then they would only need to refer to that. The political bodies act through resolutions and those are adopted by States. The Human Rights Council gives mandates to commissions of inquiry that include both IHRL and IHL. (2) Regarding judicial and quasi-judicial bodies, such as the International Court of Justice (ICJ), the Human Rights Committee and the European Court of Human Rights (ECtHR), it is not just the human rights bodies, who of course would say that IHRL applies. The ICJ thinks it applies. This is significant evidence of the acceptance of the principle.

So, I think there is overwhelming evidence that to some extent, in some way, IHRL applies in situations of occupation. But that is not in fact the question that is confronting the ICRC.

Before looking at the content of IHRL, we need to remind ourselves of the question.

B. The question is "should a commentary on an IHL treaty, which is dealing with occupation, take account of IHRL?"

Here I have got to make a couple of preliminary points. First of all, the argument is not just about IHRL. It applies equally well to the entire body of international law. I think it depends on three things. First, to what extent do international legal obligations continue to apply during an armed conflict? In the past, the view seemed to be that the outbreak of hostilities suspended all international legal obligations between the parties except for those dealing with armed conflict. But the International Law Commission (ILC) study suggests that this presumption is now reversed, unless that is expressly excluded or impossible. So now the presumption is that such obligations continue in force. The second question is the extent to which a State's international legal obligations apply outside its national territory generally – this is not just a HR question. The third question is whether an Occupying Power is affected by the international legal obligations of the territorial sovereign. Do its international obligations somehow impregnate the territory even when the Occupying Power is present without consent? I am going to limit myself to considering the Occupying Power own obligations – not least because I do not know the answer to the third question and that is one of the issues I hope you might help clarify.

Another preliminary point: my brief is to deal just with occupation. I will not address a part of GCIV that, in my view, is inappropriately neglected. That is the treatment of enemy aliens in the State's territory. With regard to the impact of IHRL on IHL provisions, I suspect that (1) it works differently in that area than it does in a situation of occupation because you are on national territory; (2) it will have much more of an impact there. But that is not part of the brief and you might want to come back to it.

Putting aside those two preliminary remarks, there is still a lot in there that still needs to be unpacked. We need to remember that we are not asking "what are the legal obligations of the Occupying Power?". It is not a commentary on the law of occupation. The text is a commentary on a *treaty,* GCIV. What does that mean? The starting point is the treaty itself. So, the starting point is not the law of occupation, not the legal obligations of States. It is the treaty. Clearly the ICRC needs to consider the words of treaty. That includes how those words have been interpreted including any change of interpretation over time, then subsequent State practice *with regard to the treaty*.

That gives rise to a real problem. Let us assume that State A used to say that a particular provision in GCIV required it to do *x,* but now says it requires it to do both *x* and *y*. The State could be saying one of two things. It could be saying that it is just interpreting the GCIV provisions and its interpretation has changed, possibly, but not necessarily, as a result of IHRL. Or, the State could be saying: our interpretation of GCIV has not changed, but taking account of IHRL, we think that *x* is no longer enough, in addition we have to do *y*. Those are two different approaches. In the second case, IHRL does not have effect on its IHL interpretation. It is a separate, independent, autonomous source of obligations. Now, if States explained which approach they were taking when they changed their interpretation, life would be much easier. But they very rarely do. It certainly means that the ICRC cannot simply assume that any change in interpretation is a change in the interpretation of an IHL rule. It may be because of this separate independent second source of obligation.

There is another problem if the ICRC is going to take account of other areas of international law, including IHRL. Clearly, States have different legal obligations. Just thinking in terms of IHRL, some are subject to international, regional and sub-regional treaties. Some have ratified some treaties and not others. But the interpretation of a provision of GCIV in a Commentary on GCIV cannot vary depending on what States have ratified. Nor is the Commentary the lowest common denominator, because in that case it would not look at any other areas of international law, in case there is a State which has not ratified something. This involves the question of what you are doing when you interpret a text. This is an ICRC Commentary. If a court is interpreting a treaty, a court has got specific parties before it, so it knows what the State's other obligations are. Therefore, it can take account, relying on Article 31 of the Vienna Convention on the Law of Treaties, of other obligations. But that is not the case if you are writing a Commentary on the Geneva Conventions. It would be even more problematic to take account of customary IHRL, since there is no general agreement as to its content. I am not for a second challenging the relevance of IHRL to State conduct or to a description of the law of occupation. I am not challenging its relevance to the Commentary. It is more a question "to what extent and in what way is it relevant?". And I think that is quite challenging.

I would refer to paragraphs 99 to 105 of the ICRC Commentary on the Third Geneva Convention (GCIII) where the ICRC sets out its approach. In a typical ICRC way, it is very cautious, but they have left themselves wriggle room. I think it is not clear how they are going to give effect to that approach. There is a difference between setting out your approach and then applying it.

C. When are the decisions of HR bodies relevant to a Commentary on GCIV?

A brief word on how HR bodies handle situations of occupation because until you know what they are doing and what the issues are, it is a bit hard to integrate it.

I have always been struck in my contact with the military by the fact that the overwhelming majority of European military seems to think that the only HR treaty is the European Convention on Human Rights (ECHR). A few military lawyers are aware of the International Covenant on Civil and Political Rights (ICCPR) but very few seem to be aware of the range of international HR treaties. Virtually none seem to be aware of the role of Special Procedures and how they work. This could be a problem if they encounter them in the field. For example, the territorial State may have issued a standing invitation to one or more Special Procedures.

There is a huge number of monitoring and enforcement bodies. Some of the treaties are general, but some are really specific, either dealing with a specific group (e.g. children) or on a specific issue (e.g. enforced disappearances). There are also Charter bodies. They have got a big advantage in that they have got a mandate over all UN members; it does not depend on ratifications. I am thinking here of special procedures. Most of those mandates are issue-specific, but some are country-specific. I wonder whether mechanisms that have got very specific mandates see everything through that prism and whether that stops them having some sort of wider view. Does that affect how they handle the relationship with IHL? Generally, I think that the general treaty bodies do a better job of approaching the issue of how to handle that relationship than working groups, for example the Working Group on Arbitrary Detention.

What is the product of these HR bodies? Some of it deal with issues in a general way. For example, concluding observations on State reports or general comments. This does not mean it is useless, but it means it is different from whether they are making a finding of violation. Some can produce findings of violation which may or may not be binding depending on a particular treaty, but they are doing so on the basis of a very specific configuration of facts. It is not an abstract kind of finding. Some can do both – most can do both – but the ECtHR can only make specific findings of violation on specific configurations of facts.

One word of warning regarding the ECtHR' jurisprudence. The ECtHR addresses both situations of occupation as understood by IHL and situations in which a State exercises "decisive influence" over a local authority in a territorial space. It does not necessarily mean that is an occupation either under IHL or anything else. I am not even calling it "proxy occupation". I think it is better to see this as a form of "decisive influence". That means the ICRC would have

to distinguish between the two, because the case law on "decisive influence" is not relevant to occupation unless it is confirmed by case law on occupation.

On account of their mandate, you cannot expect HR bodies to come up with findings of violations of IHL. They are not allowed to. Unlike the ICJ, which can find a violation of any area of international law it wants, and some commissions of inquiry that have a mandate to deal with both, HR bodies' mandates limit them to finding violations of IHRL. They can use IHL to reach that conclusion, but it is always going to be expressed in that language.

There is a bigger challenge if you look at the case law arising out of situations of occupation. In the majority of the case law on occupation, no reference at all is made to IHL in the judgements. It is possible that the parties referred to it. I can give you a very specific example. I was briefed by the Republic of Cyprus to represent them when they intervened in the case of *Varnava & others v. Turkey*, ECtHR, 18 September 2009, which concerns in IHL language the missing in war and in HR language enforced disappearances. I can tell you with complete confidence, there was a lot of reliance on the obligations with regard to the missing in war in the memorial of the Republic of Cyprus because I put it there. I did it to reinforce the HR analysis. It is not that I thought there was a conflict, but apart from a footnote reference to the "Geneva Convention" (*sic*) of 1949, that is all that you will see in the actual judgement.

So, I think the ICRC needs an awareness of all IHRL dealing with situations of conflict, including occupation, when it is dealing with States, reminding States what their obligations are, and also for many of its own activities. But it only needs a tiny bit of the IHRL iceberg in relation to a Commentary on GCIV. So yes, IHRL is relevant to a lot of ICRC activities. That does not mean it is relevant to a Commentary.

When do I think it is relevant to a Commentary on GCIV?

- When a HR body, fully cognizant of IHL, gives priority to a HR rule and if that is generally accepted by States, there is no problem. I think it actually modifies the interpretation of the IHL rule. The example I would give is Article 118 of the GCIII. Before 1990, there was some uncertainty but the coalition which expelled Iraqi forces from Kuwait had no hesitation in applying the principle of *non-refoulement*. So the question is: are there similar rules in GCIV where a HR body has or is likely to give precedence to a HR rule? I can only think of one but there may be others. If a State sought to expel an enemy alien to a country where there would be a well-founded fear of persecution, by analogy with Article 118, I think that will give rise to problems. You see why I think that the part of GCIV which deals with enemy aliens in your own territory is really important. I cannot think of other

areas where this is reasonably likely to happen, certainly say with regard to occupation, but there may be.

- What happens if a HR body wants to give precedence to IHRL but it is not generally accepted by States? Well, it is possible that it would be accepted regionally, by virtue of regional case law. For example, yesterday Col. Nathalie Durhin made reference to the issue of transfer of a person to a place where they would face a flagrantly unjust trial, raising issues under Article 6 of the ECHR. That is only a European preoccupation; it is unknown outside Europe. If the interpretation is not accepted at all, not even regionally, then I am not sure that is relevant just because a HR body says it.
- What if a HR body says an IHL rule prevails over conflicting IHRL? Then why bother referring to the opinion at all? The IHL rule applies as it stands. In fact, I think that it is important to refer to that. It means that you can assert in the Commentary that IHRL is subject to the IHL rule because a HR body said so. The obvious example is the one that Prof. Vaios Koutroulis gave of *Hassan v. UK,* ECtHR, 16 September 2014. Be careful with this judgement. I have the impression that many people think that it answers all questions to do with detention, at least in international armed conflicts. It dealt with legal authority to intern, grounds for detention and the review mechanism. It did not address procedural guarantees. That question did not arise in the case. So, there are many issues to which we do not yet know the answer. It is also singularly unclear in that judgement whether the Court thought it was dealing with GCIII or GCIV. It is not altogether its fault. When Hassan was detained, if he had been whom the UK forces thought he was, he would have been a GCIII detainee. But in fact, the person detained was the military man's brother. In fact, it was a GCIV detention. I think it is worth signalling cases when a HR body has shown deference to IHL.
- Here, I need to raise a question which is for future deliberation, but you need to be aware of it. How would HR bodies handle the internment of those under 18? You may need to raise the issue in the Commentary. That does not mean giving a long account of peacetime IHRL on the subject. That illustrates the need to take account of the work of a range of HR bodies, including the Human Rights Committee under the ICCPR, the Committee on the Rights of the Child under the Convention of the same name and the Working Group on Arbitrary Detention.
- In some cases, a HR judgement is not in conflict with IHL but at a tangent to it. IHRL and IHL sometimes pursue different goals. This is relevant in relation to GCIV and the issue of occupation. The preoccupation in armed conflict is to order the parties not forcibly to move people around. In that context, people cannot be compelled to move, "*unless*…". Those used to that context are not thinking in terms of the right of people to move around, including to move from non-occupied to occupied territory or to move within non-occupied territory. They are not used to thinking in terms of the freedom of movement.

Normally, if there is an issue specific to HR, you would not need to take account of it in the Commentary. Where, however, there is a related but different IHL provision, I think that it may be useful to warn people in the Commentary. The very fact that it *is* addressed in IHL may blind people to the existence of the different approach of IHRL.

- I am not aware of other categories of judgement that would be relevant to the Commentary. If you take the example of investigations of alleged violations or the significant case law involving the UK, the Netherlands, Germany, all that case law is entirely based on IHRL. IHL does speak about investigations: there is an obligation to investigate suspected violations of the law of armed conflict and it is not just limited to those violations that would constitute war crimes. IHL treaty law, however, does not say anything about how to conduct investigations. The Commentary cannot just refer to all the HR case law, which comes from Europe. I would have a good deal of sympathy with African, American and Asian States saying "*where did you get that stuff from*?".

I think the ICRC has got to be really careful. There are cases in which IHRL and the decisions of HR bodies are going to be relevant to the Commentary. But it is a small minority of cases. This is a Commentary on an IHL treaty. It is not a Commentary on the obligations of an occupying power and it is not a commentary on the law of occupation. Thank you.

IMPLEMENTING THE DUTY TO PROTECT THE "PROTECTED PERSONS"
MISE EN ŒUVRE DU DEVOIR DE PROTÉGER LES « PERSONNES PROTÉGÉES »

Mirco Anderegg, Swiss Armed Forces

Résumé

Mirco Anderegg est adjoint au directeur du droit international à l'Etat-major des Forces armées suisse. Dans cette présentation, il examine les implications du devoir de protéger les personnes protégées en application de l'article 27 de la Convention IV. En particulier, il souligne qu'en autorisant, voire même en exigeant la conduite d'opérations militaires et le recours à la force, l'obligation de protéger les personnes protégées contre tout acte de violence ajoute un niveau de complexité au cadre juridique régissant les opérations militaires. De plus, il souligne que cet article peut relever du DIH, du DIDH ou même des deux à la fois. Ainsi, l'étendue de l'obligation de protéger n'est pas nécessairement claire, ni même le régime juridique applicable – bien que selon lui, cet article implique nécessairement qu'une puissance occupante prenne des mesures appropriées pour prévenir tout acte ou menace de violence physique. De plus, le DIDH permettrait de fournir une protection aux personnes qui ne seraient pas couvertes par la Convention IV. En ce qui concerne le régime juridique applicable, Mirco Anderegg affirme que la protection des civils relèverait d'une activité de maintien de l'ordre, prioritairement encadrée par le DIDH. Toutefois, il montre que selon les situations, le DIH peut à nouveau entrer en jeu. Enfin, il donne des exemples de défis pratiques causés par le recoupement entre DIH et DIDH et conclut que pour que cette obligation soit respectée, des règles d'engagement claires, des formations et une discipline professionnelles crédibles sont essentiels.

The following lines address some practical issues of the interplay between IHL and IHRL with regards to GCIV. They specifically examine the implications of the duty to protect the "protected persons" stipulated in Art. 27 GCIV[1]. By potentially not only allowing, but requiring the conduct of military operations and the use of force, the obligation to protect protected persons from all acts of violence adds a layer of complexity to the legal framework governing military operations. These may be governed by international humanitarian law (IHL), international human rights law (IHRL) or both. In order to lawfully fulfil this obligation, clear rules of engagement, credible training and professional discipline are essential.

1 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of August 12, 1949.

Contemporary conflict theatres – such as Mali, from which the author draws his experience[2] – are often characterized by a variety of actors. State and non-state actors, ethnic groups and others stand in sometimes complicated relations to each other, including a number of more or less distinct situations of tension and armed conflicts. These conflicts may emerge after an initial armed conflict has degraded the security situation. The authorities who would normally be responsible for a safe and secure environment, are absent. This leaves the population without protection from threats posed by certain actors.

When no occupation follows the hostilities, it would be the territorial State who is responsible for the restoration of a safe and secure environment. Sometimes, other States or international organizations try to fill in the gap and/or support the government in doing this, as it is the case in Mali[3].

When the territory is under belligerent occupation, this task falls to the occupying State.

1. The responsibility of the occupying State to protect

According to Art. 27 GCIV, protected persons "shall be protected especially against all acts of violence or threats thereof". What this protection entails is not further specified in GCIV[4], and the ICRC's Commentary is silent on this.

One could imagine, that this aspect of protection against threats by other actors did not have the same importance in the conventional armed conflict scenarios which inspired the drafting of the Convention and its Commentary that it has today. However, an updated Commentary could explore this more in depth and shed some light on the questions arising, as did other authors and i.e. some military manuals, based on more recent experiences[5].

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2 GCIV is applicable to International Armed Conflicts (IAC); at present, no IAC is ongoing in Mali. However, in order to better understand the duty to protect, the author assumes it to be useful to draw parallels from Non-international Armed Conflict (NIAC) theaters, considering that the majority of ongoing armed conflicts are NIACs. Cf. Geneva Academy, The Rule of Law in Armed Conflict Project, https://www.rulac.org.

3 Cf. *inter alia* MINUSMA's mandate, United Nations Security Council Resolution (UNSCR) 2584 (2021), para. 30.

4 Cf. Commentary on the Fourth Geneva Convention, Ed. Jean S. Pictet, International Committee of the Red Cross, Geneva 1958, p. 201 ff.

5 Cf. i.e. Military Manual on international law relevant to Danish armed forces in international operations, Danish Ministry of Defence Defence Command Denmark, 2016 (Danish Manual), p. 437 ff.

It is to point out that Art. 27 GCIV first speaks of *respect* to the persons, honour, family rights, religious convictions and practices, and manners and customs of the protected persons. It adds to this the *protection* against all acts of violence and threats thereof.

This language used in Art. 27 GCIV reminds of IHRL. In IHRL, the notion of *respect* requires states to refrain from violating human rights themselves, while the notion of *protection* requires them to prevent abuses of human rights by non-state actors.[6]

However, it may not be clear that these understandings apply to the context of Art. 27 GCIV in the same manner. This specific rule[7] could also merely mean that occupying States are required to take appropriate measures to avoid violence against the civilian population by their own troops; without having to anticipate and counter threats posed by other actors or the obligation could be limited to the prosecution of abuses which have occurred already. The extent of the obligation is not evident either. Is a level of safety and security to be reached which is equal to the one before the conflict or to the one before the occupation? Does it simply mean the occupying State should endeavour to continuously improve security?

The evolving doctrine and practice regarding the protection of civilians in UN Peacekeeping missions may help the interpretation of Art. 27 GCIV, despite them operating in a different context. They are no occupation force, *inter alia* because they work under the principle of consensus and therefore with the consent of the host State. However, the protection of the local population against physical violence is often a priority mandate of a peacekeeping mission.[8] The mission is partly filling in the role of the host State in providing security within a war-torn environment. The practical challenges on the ground therefore may be similar to those arising during occupation in this regard.

In both situations, whether in an occupation setting or under a protection of civilians mandate, IHRL instruments will apply simultaneously, with a similar purpose. Obviously, their scope is different, i.e. with Art. 27 GCIV not covering all persons present in an occupied territory[9] (as IHRL would). Nevertheless, it seems reasonable to consult IHRL for the interpretation of the protection notion.

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6 Cf. i.e. https://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx.

7 There are other rules which require more than just abstaining from violence, such as Art. 64 GCIV.

8 Cf. https://peacekeeping.un.org/en/protection-of-civilians-mandate.

9 Art. 4 GCIV defines the protected persons.

After all, I argue that the passage on the protection against violence in Art. 27 GCIV requires an occupying State to proactively take appropriate measures to prevent any act of physical violence or threats thereof against the protected persons.[10]

The role of IHRL during occupation is major in most cases. The qualified control required for occupation will regularly meet the criterion of territorial jurisdiction triggering the application of IHRL[11], with a broader scope than GCIV. IHRL would also provide protection for those who are not generally covered by GCIV but may nevertheless be in need of protection – such as the nationals of co-belligerent or neutral States which entertain a normal diplomatic representation with the occupying State[12] but are unable or unwilling to provide protection themselves.

Moreover, with regards to the protection against acts of violence IHRL can be complementary in an additional sense: namely as a resource for interpretation by clarifying the bearing of this rule.

2. Law applicable when protecting civilians in occupied territory

The obligation to protect against all acts and threats of violence could *require* that the occupying State conducts operations, using force, against persons or groups who are a threat for the civilian population in the occupied territory. Subsequently, the question of the (international) law applicable to a specific action or operation to protect civilians arises.

Generally, the protection of civilians is not part of the conduct of hostilities but a law enforcement activity and will therefore primarily be guided by IHRL, as applicable. However, depending on the situation, IHL can come into play again, depending on the characteristics of the threat:[13]

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10 It could be discussed whether an exception needed to be made for cases in which the threat originates from agents of the State whose territory is occupied. An argument could be made that if the occupying State steps into the protection role in a quasi "fiduciary" manner, it should not be obliged to act against the sovereign. It could also be argued that an *obligation* to use force against agents of the occupied State in certain cases could prolong the armed conflict. Moreover, such an obligation may create an incentive for the other party to keep occupying forces busy by using violence against the civilian population. However, the wording of Art. 27 GCIV does not hint to that direction. It explicitly mentions *any* act of violence and appears to prioritize the protection of the protected persons.

11 Cf. i.e. Danish Manual, p. 432; a different view is taken in the US Manual, p. 758.

12 And are therefore not "protected persons" for the purpose of GCIV, cf. Art. 4.

13 The scenarios a-c are inspired by a similar split-up in the Danish Manual, p. 438 ff.

a. Organized armed resistance against the occupation

The group posing a threat may be a resistance movement against alien occupation meeting the criteria of Additional Protocol I (API)[14], and its activities may be directed primarily against the occupation itself. In such a case, the rules on international armed conflicts would apply and the members of the group would be combatants; they could be directly targeted but would also benefit from the prisoner of war status when captured.

b. Other armed groups engaging in armed conflict with the occupying State

A different scenario would emerge when an armed group is engaging in an armed conflict which is distinct from the initial conflict underlying the occupation; with the group having no ties to the State whose territory is occupied. Such situations could then constitute a non-international armed conflict governed by Common Article 3. The members of the group could be directly targeted, provided the occupying State derogated from its IHRL obligations accordingly, but would not be considered prisoners of war when detained.

c. Armed groups not being party to an armed conflict with the occupying State

It is also imaginable that an armed group is neither friendly nor hostile to the occupying State but is engaging in a non-international armed conflict with another group, for example as a result of interethnic tensions. In such a case, action against such groups in order to protect civilians could be legitimized and even required by IHL, but not be governed by IHL since there is no armed conflict between the concerned armed group and the occupying State. The primary framework in such a case would be IHRL.

However, practice shows that operations to protect civilians – especially when armed groups need to be engaged proactively – can degenerate into intensive violence which, over time, may give rise to a new armed conflict between an Occupying Power and that armed group.

In all of these situations, IHRL will be at least the complementary, if not the primary framework governing military operations to protect civilians.

3. Practical challenges caused by the overlapping of IHL and IHRL

It is nothing new that the simultaneous applicability of IHL and IHRL poses significant practical challenges to armed forces. This is accentuated when the applicable legal framework in the same operation depends on the adversary the troops are facing and when this adversary is not clearly distinguishable. A number of gunmen may be identified as a threat to civilians, but it

14 Art. 1 para. 4 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, of 8 June 1977 (API).

may not be clear to what group they belong and how they would react when troops intervene. IHRL may be the applicable legal framework, but openly hostile threats can suddenly arise.

Depending on the adversary and the applicable law, different tactics and procedures may apply. Is it required to apply minimum force? Do troops need to try to capture, rather than being allowed to use potentially deadly force immediately? Do we need to warn the adversary, and if so, how?

In my view, three major factors can help soldiers and commanders cope with complex legal requirements.

a. Clear Rules of Engagement and Soldier's Cards

Legal texts are sometimes hard to digest for non-lawyers and can only be successfully implemented through clear and concrete rules of engagement (ROE). ROE are a set of rules which summarize operational, political and legal guidance, translating both IHL and IHRL, as applicable, into military terms. They give commanders guidance on what they at their level are *allowed* to do to achieve their mission (which states what they are *required* to do). Soldiers at their level need even clearer directive on how to achieve their mission. This is usually done by issuing them „soldier's cards" which summarize the ROE relevant to them. It may be helpful to issue different soldier's cards, implementing different warning and firing procedures, applying to the different paradigms in which they are acting – law enforcement or conduct of hostilities – and specifying when to switch from one paradigm to the other.

It is key that these ROE use clear language which does not need much further interpretation and that commanders and troops are used to working with them. Unfortunately, some missions' ROE have the tendency of merely repeating the text of the mandate, without concretizing the authority of a commanders and soldiers at their level.

b. Effective Training

Operations with rapidly changing paradigms require effective training. When IHRL is the primary legal framework for an operation, many soldiers are under the impression that the law and their ROE do not allow them to effectively defend themselves because they were told that in all cases they could only defend themselves when their opponent was already firing at them. Such oversimplification and exaggerated cautiousness in training can undermine the credibility of the law and specifically IHRL. Training should therefore not be limited to lectures of the law and ROE but should focus on practical scenarios, including role plays and scenario-based live fire exercises. Training must be credible; it should not only focus on what *not* to do but give soldiers a realistic sense of appropriate reactions in a given situation.

c. Discipline

In order to respect the law, and especially with regards to grave violations of IHL and IHRL, discipline may play an even more important role than training. During my own mission in Mali, after incidents involving alleged violations of ROE or the law by own troops, administrative investigation often concluded merely that "more training on human rights" should be conducted. However, it is usually not a lack of training that leads to a serious violation of the law – it does not take much training for soldiers to remember that it is forbidden to kill detainees or other protected persons.

It is more important to create a professional environment in which clear rules are credibly implemented. This is a commander's responsibility which requires taking appropriate measures to install a culture of professionalism well before the actual operation. This includes consistent and credible repression, but must also take into account the human nature and therefore take measures to cope with emotions of engaged troops; this could for example mean that troops capturing an individual after an attack on their unit are not allowed to interrogate that individual on their own, in order to avoid acts of revenge.

During the Q&A session, the panellists and participants addressed several sub-topics relating to the interplay between IHL and international human rights law (IHRL) and the extent to which the ICRC Commentary should rely on and refer to IHRL.

IHRL and States' obligations in the Commentary

Regarding the reference to States' obligations in the Commentary, a participant said that the aim of the Commentary is not to provide an overview of the Occupying Powers' obligations, although it must take into account the Hague Regulations in addition to the GCIV, because IHL treaties are part of the law of armed conflict.

A participant added that there is nonetheless a need to unpack the issue of governance in the Commentary, particularly in the context of legislation. As an example, the participant said that when the Israeli troops occupied the Occupied Territories, they suspended the death penalty, and that it was technically a breach of the rules on occupation. However, nobody challenged it – which, according to the participant, seemed to indicate a high level of state acceptance. Nonetheless, it is unclear whether it sets a precedent that would entail that the same principle would apply to any change of legislation that is more protective to affected populations, or whether it is only a very specific case that is explained by contingent and political reasons. The participant pointed that there has been a lot of discussions on the degree to which it is possible to make legislative changes. In the case of the Occupied Territories, there is a risk of having a legislative situation frozen for sixty years and therefore highly inadequate. For the participant, that does not necessarily mean that the Commentary should refer to IHRL or assume that IHRL is always the way forward to interpret IHL or that any authority who implements IHRL is behaving righteously. There can also be an issue of cultural norms and acceptance, e.g. should an Occupying Power want to legislate on sexual discrimination. In any event, the reliance on IHRL is to be handled with care.

Operational challenges and concrete implementation of the protected persons' regime in an occupied territory

A participant highlighted the different rationales of the two bodies of law, one protecting all persons and IHL protecting specific categories of protected persons. In practice, this may raise an operational challenge in applying a protected persons' regime, for instance in territories with nationals of the Occupying Power. The participant more specifically asked the view of the audience as to whether the Commentary should deal with that operational challenge.

A participant said that in that case, reading IHL treaties in the light of IHRL may cause additional difficulties and may sometimes be misleading. For instance, judges of HR courts may think that the "protected persons" category amounts to discrimination in favour of these persons. However, the participant said that the notion of "protected persons" is analogous to the notion of "disabled persons", whereby States have particular obligations with regard to those who are vulnerable. The concept of protected persons is the reason why the protection of civilians in Additional Protocol I (API) is not exactly part of Geneva Law: the concept of protected persons in IHL refers to (1) those adversely affected by the armed conflict and; (2) in the power of the other side. It is because of their specific vulnerability that protected persons are in need of protection and therefore it is not discrimination in favour of them.

Nonetheless, the participant confirmed that there needs to be a clear bottom line. For instance, when Iraqi forces invaded Kuwait, many Iraqis were refugees in Kuwait. In this example, there is a challenge because these persons were nationals of Iraq, but they were not co-belligerents and as such, they did not belong to the category of protected persons. Under IHL, the applicable fundamental guarantees may be found in Art. 75 API. This IHL provision is generally regarded as customary. There would be no need of IHRL in that case.

The participant pointed to an additional challenge for the ICRC, which is to update the interpretation of the Geneva Conventions in the light of the Additional Protocols when the interpretation of the Additional Protocols will only be updated afterwards.

Another participant agreed with the complementary relationship between IHL and IHRL but noticed that there is sometimes an unfortunate effect of IHRL. The participant gave the example of the settlers in the occupied territories who would be given an equal treatment under the right of non-discrimination. In particular, in the case law of the Israeli Supreme Court acting as High Court of Justice regarding the use of highways or land requisitions, the settlers' rights or the rights of the Israelis who are travelling through the motorway which cuts across the Occupied Territories would be given priority if the right to life is considered as more fundamental than the right to property or right to freedom of movement that are guaranteed in the Hague Regulations or in customary law only in a limited manner. The participant therefore questioned whether even a more nuanced approach to the incorporation of IHRL in IHL would be necessary, especially because the impact of human rights law is to equalize without taking into account the context of the belligerents. The participant said that in that case, it is a *de facto* government, which has a governmental control, that has to be assumed by the Occupying Power for the sake of the most vulnerable namely the population under belligerent occupation. IHRL would decontextualize any structural differences and inequality of populations with different levels of vulnerability.

Relevance and weight of regional human rights case law and national case law when interpreting the Geneva Conventions

A participant acknowledged that from a global perspective and regarding IHRL, the weight and impact given to the judgements of the ECtHR by other regional systems are relative. Nonetheless, the participant underscored that the ECtHR provides one of the most refined judgements in human rights law, which gives some weight to it. A participant said that the ICRC should be careful when including the ECHR as a basis for legal obligations under the Geneva Conventions. Nonetheless, the ICRC 2019 Guidelines on Investigating violations of IHL already rely on the jurisprudence of the ECtHR or of the Inter-American Court of Human Rights. The participant is of the view that, for reasons of methodological consistency, it might be already too late to draw a strict line and to exclude it completely. The participant suggested thinking about how to integrate it as a normative indicator for good practice, rather than focusing on the question of whether it should be included or not in the Commentary.

However, the participant was unsure about the relative weight that should be given to national courts' decisions regarding the role of human rights or the interpretation of IHL. The participant referred in particular to the Israeli Supreme Court sitting as the High Court of Justice. A panellist said that national case law is part of state practice. Nonetheless, it should be kept in mind that it is state practice by an interested State. The panellist highlighted that the problem with occupation is that since there are very few States that have admitted being an Occupying Power, there are very few national judgements that directly discuss the interpretation of the relevant articles of GCIV. Therefore, the panellist suggested being very cautious in generalizing.

Questioning the notion of complementarity

A panellist said that talking about complementarity between IHL and IHRL is not accurate enough. Sometimes IHL and IHRL are pursuing the same goal in the same way. Other times they are broadly tending in the same direction but IHRL, through its case law, is usually more specific than IHL. For the panellist, even if IHRL and IHL are heading in the same direction, this does not mean that human rights bodies can apply IHRL definitions and IHRL details in situations of armed conflicts, because there are fewer options in such situations of armed conflict than in other situations. Therefore, the details provided under IHRL may be inappropriate. In such cases, it means that IHRL and IHL are pursuing similar goals, but they are doing it in a different way. There are some areas of silence in IHL in which there are rules that exist under IHRL, for instance the rules on search. However, the panellist said that even in that case, it cannot simply be assumed that IHRL must be applied instead. The panellist concluded that the word "complementarity" is too vague. Rather, the question should be: are IHL and IHRL pursuing the same goal in the same way, pursuing the same goal but in a slightly different

manner, or is IHL silent, which should not necessarily imply that peacetime standards apply automatically to fill this potential gap.

Broad v. narrow inclusion of IHRL in the Commentary on GCIV

A participant distinguished a broad versus a narrow approach in incorporating IHRL in the updated Commentary. The broad approach would entail that the ICRC Commentaries and, in particular, the Commentary on the Fourth Convention should deal with the issue of applicability and application of IHRL in armed conflict in general, i.e. which and how IHRL norms apply in such situations, in combination with IHL. On the contrary and on the basis of the methodology as it is described in the Commentaries, the Commentaries would rather focus more narrowly on the use of IHRL only as a means of interpreting the relevant IHL norms. An example of the narrow interpretation would be the references to the jurisprudence of the ICTY regarding the notion of torture and cruel treatments.

A panellist agreed that the Commentary on GCIV is not the place for a general discussion between IHRL and IHL. However, it may be relevant to address it in the updated Commentary on API, which contains both conduct of hostilities' and protection of victims' rules. In that case, the panellist believes that the interplay between IHL and IHRL may work differently than in GCIV.

Regarding GCIV more specifically, a panellist underscored the importance of the notion of enemy aliens on a State's own territory. The panellist referred to an example of the early 1990s in which the UK detained in the UK alleged prisoners of war and civilians. The Home Office had not consulted the Ministry of Foreign Affairs nor the Ministry of Defence in advance, which created confusion when one of the persons they interned as a (civilian) security threat appeared to be an informant for the Foreign Office. As far as the Ministry of Defence was concerned, the then Brigadier Army Legal Advisor and the Army Legal Service said that were informed the day before by the Home Office contacted them that they were to carry out the operation and detain prisoners of war. Interestingly, the decision challenges the use of the ordinary *habeas corpus* proceedings by both those who said they were not prisoners of war and those who said they should not be interned. According to this participant, IHRL and IHL would play out very differently in such situation where the State has not derogated to IHRL provisions, because the armed conflict is taking place on another State's territory. In such situations, human rights bodies would probably dismiss the application of GCIV provisions and rely on IHRL and the remedy would be *habeas corpus* rather than a review or appeal mechanism as provided for in GCIV.

A participant commented that even in the first hypothesis of a narrow approach, human rights have a substantive impact on a wide range of issues, including issues that are not regulated by IHL. Even under a restrictive approach, IHRL would apply in the case of the GCIV in an IAC. The participant therefore disagreed with the idea that the Commentary should include IHRL only to a very narrow extent. The purpose of the Commentary is to support practitioners and therefore there is a need to remind them that they have to take into account other rules than IHL when they decide if they have to act or not, and in what way. Indeed, the practitioner generally represents a State which has to comply with all its international obligations. The participant drew a parallel with the disciplinary procedures against prisoners of war that are foreseen in the Third Geneva Convention. In that example, the commander also needs to be reminded of the human rights instruments which bind some of the States that have to apply the Convention. The participant noted that at the time of Jean Pictet, it was totally correct to say that procedures regarding the deprivation of liberty were totally different and acknowledge that it can also still be true today, depending on the context, e.g. human rights law in Asia. The participant added that this does not change the fact that treaties are only binding on State Parties and that ECtHR decisions are only binding on ECHR State Parties.

Duty to protect of a territorial occupied State

Referring to Art. 27 GCIV and the duty to protect protected persons against the threats by third parties, a panellist asked whether there might be an exception when threats are coming from agents of the occupied State. This suggestion is based on the idea that the occupied State has he primary responsibility to protect civilians on its territory whilst the occupying forces inherited that fiduciary duty during the time of the occupation. According to the panellist, it could therefore be reasonable to exclude acts carried out by agents of the territorial from this duty in order not to prolong the armed conflict. The occupied State could indeed have an incentive to pose a threat to the civilian population in order to keep the occupying force busy. The panellist however noted as a counter argument that GCIV clearly refers to "all acts of violence". In addition, the UN protection of civilians' mandate would include, if necessary, engaging the forces of a host State under the protection of civilians' mandate, even if the consent of that host State would be a requirement for the existence of the mission. Therefore, it would not necessarily be justified to exclude the territorial State. The panellist concluded that it could be further discussed and clarified.

Scope of Article 31(3)(c) of the Vienna Convention on the Law of Treaties

A panellist said that the underlying problem to several of the questions is the scope of Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT). The question may not be as binary as sticking to very strict definitions on one hand and making entire bodies of law

migrate into IHL on the other hand. There may be a grey area in between and it is where the strategic choice will be made. The panellist agreed that the terminology will be affected by other bodies of law. However, for instance, it would not be possible to insert the numerous rules relating to the use of natural resources into the Commentary on GCIV. Another example is the prohibition of pillage under Art. 33 GCIV and the notion of property: there is a strategic choice to make about how broadly or actively the Commentary uses Art. 31(3)(c) VCLT and the extent to which the Commentary on the provision of GCIV on pillage incorporate what the Hague Regulations say about the protection of private property. For the panellist, even when adopting an interpretation as broad as possible about Art. 31(3)(c), integrating all the provisions and interpretations relating to the usufructuary status of the occupation power into the Commentary on GCIV would not be feasible. Similarly, the obligation to investigate violations of the right to life under Art. 6 ICCPR is arguably broader that the obligation to investigate under IHL.

Another panellist said that there are two different problems under Art. 31(3)(c) VCLT: one is how far other relevant rules of international law should be considered, and the other is the context. A State interpreting a treaty in the light of all its obligations or a court interpreting the obligations of a State Party would have to go much further than a Commentary on the treaty.

The duty to investigate

A participant asked how France and the United Kingdom backed their critical statement towards the General comment of the Human Rights Committee before the ECtHR in the *Georgia v. Russia (II)* judgment. The participant suggested that these arguments may no longer be valid at least regarding the ECHR. However, there is some interplay in that case.

A panellist answered that the question is about identifying the source of the legal obligations, whether it is IHL or human rights only. In the *Georgia v. Russia (II)* judgment, the Court accepted that there was a difference in the scope of the duty to investigate. Therefore, there are two options. The first option would be to interpret Art. 1-46 GCIV and possibly Common Article 1 GC on the obligation to respect and ensure respect for IHL as including the duty to investigate as applicable also to situations covered by IHRL, e.g. Art. 2 ECHR. The duty to investigate under IHL would therefore be broadened. The second option would be to limit the duty to investigate to violations of IHL. There would then be an additional duty to investigate on the basis of IHRL.

A panellist opposed the view that there is an obligation to prevent and suppress grave breaches of IHL and highlighted that the ICRC Guidelines on investigating violations of IHL made

clear that human rights rules are best practice in that case. The panellist said that the ICRC would need to decide in the updated Commentary to what extent best practices that are not legal obligations should be taken into account, not as obligations under IHRL, but as IHL best practice.

4th Panel
Fourth Convention Commentary: Selected Topics from the Audience
4ème panel
Commentaire de la Quatrième Convention : sélection de thèmes proposés par les participants

Chaired by Gloria Gaggioli
Geneva Academy, Swiss National Science Foundation, University of Geneva

DÉFINIR LES PERSONNES PROTÉGÉES À TRAVERS LE PRISME DE LA NATIONALITÉ : UNE INTERPRÉTATION DÉLICATE
DEFINING PROTECTED PERSONS THROUGH THE LENS OF NATIONALITY: A DELICATE INTERPRETATION

Odile Vandenbossche
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Summary

Odile Vandenbossche is a PhD Candidate at the University of Liège. In her contribution, she focuses on the interpretation of the nationality criterion, one of the criteria mentioned in Article 4 GCIV to define the persons who are protected under GCIV ("dont elles ne sont pas ressortissantes"/"of which they are not nationals"). First, she notes that the ambiguity surrounding the nationality criterion makes it difficult to determine who is eligible for the status of protected person. She illustrates this issue by several examples: nationals under the control/'power of' their country of origin, deprivation of nationality during the conflict, multi-nationality or change of nationality during the conflict. Then, she sets out several reasons why interpreting the nationality criterion may prove challenging: the lack of definition in the Convention itself, the plethora of different terms used in the Convention and the Pictet Commentary to refer to the criterion, as well as the evolving nature of the concept. The international jurisprudence and doctrine identified the limitations of the nationality criterion. However, the debate continues between a narrow approach based on the legal nexus between a person and the State, and a broader approach based on the idea of allegiance or ethnicity, as endorsed most notably by the ICTY Appeals Chamber. Odile Vandenbossche notes that both approaches have been widely criticized. She concludes by

suggesting a more nuanced and gradual approach, a "tiered system" of the nationality criterion: for instance, the narrow approach could be used in IAC, while a wider approach might be more relevant to interethnic conflicts. This could be detailed in precise interpretation guidelines, that would add gradual subsidiary criteria to the formal nationality criterion, such as, inter alia, ethnicity, allegiance or residency.

Article 4 de la quatrième Convention de Genève (CG IV) : définition des personnes protégées

Comme l'a écrit Pictet en 1956, l'article 4 de la CG IV « *est en quelque sorte la clé de la Convention, puisqu'il définit les personnes qu'elle vise* »[1], à savoir les personnes protégées qui tombent sous la protection de l'ensemble de cette Convention. Cependant, malgré l'importance de cet article, la définition qu'il contient n'est pas très explicite. Un des facteurs qui contribue à maintenir le flou autour de la définition des personnes protégées vient de l'interprétation à donner aux termes : « dont elles ne sont pas ressortissantes » / « of which they are not nationals » dans la version anglaise. Ces concepts découlent directement de la notion de nationalité. Dès lors, un des éléments qui permettra de déterminer si un individu peut ou non prétendre au statut de personne protégée au sens de l'article 4 de la CG IV est la nationalité de cette personne – d'où l'importance de bien comprendre ce que cette notion englobe. Cependant, la nationalité apparait comme un concept incertain et une mauvaise interprétation de ce concept pourrait mener à des situations problématiques.

Un concept incertain qui pourrait mener à des situations problématiques

Les catégories de personnes pouvant prétendre au statut de personne protégée peuvent varier en fonction du critère de nationalité qui est d'application. Ainsi, par exemple, une vision restrictive du critère de nationalité – se basant uniquement sur la nationalité juridique au regard du droit interne – exclurait automatiquement du statut de personne protégée les nationaux sous le contrôle de leur pays d'origine ; alors qu'une vision large – retenant par exemple l'allégeance de la personne – permettrait d'inclure les propres nationaux de la puissance au pouvoir dans le statut de personne protégée. L'ambiguïté autour du critère de nationalité à appliquer en vertu de l'article 4 de la CG IV contribue donc à la difficulté de déterminer quelles sont les personnes pouvant prétendre au statut de personne protégée.

1 PICTET Jean, Commentaire de la Convention de Genève relative à la protection des personnes civiles en temps de guerre, Genève, CICR, 1956, p. 51.

Afin de bien illustrer cette problématique, j'ai choisi de vous présenter un échantillon de cas dans lesquels la détermination du statut de personne protégée pourrait être problématique en raison de l'incertitude autour du critère de nationalité à appliquer. D'autres situations sont toutefois envisageables.

Les nationaux sous le contrôle/'au pouvoir de' leur pays d'origine

Une lecture *a contrario* de l'article 4 de la CG IV mène à la conclusion que des nationaux se trouvant au pouvoir de leur propre pays ne sont pas des personnes protégées. Une telle approche restrictive pourrait nous sembler tout à fait acceptable dans certaines situations mais problématique dans d'autres.

Imaginons par exemple le cas d'un ressortissant belge installé en France depuis de nombreuses années. Si un conflit armé international éclate entre la Belgique et la France, ce ressortissant belge n'aura pas les mêmes protections que ses camarades, de nationalité française, s'ils se retrouvent sous le contrôle des autorités belges. Les individus de nationalité française bénéficieront des protections de l'ensemble de la CG IV, alors que le ressortissant belge ne bénéficiera que des protections minimales du Titre II et des autres protections résiduelles du droit international humanitaire. Cette différence de traitement, exclusivement basée sur la nationalité, pourrait nous sembler injuste. Toutefois, ce sentiment d'injustice ne serait peut-être pas présent si, par exemple, ce ressortissant belge n'était installé en France que depuis seulement deux semaines. L'inclure dans le statut de personne protégée sur la base du simple fait qu'il réside en France pourrait à son tour sembler problématique. Cet exemple illustre bien la difficulté d'appliquer ce concept et la nécessité de l'éclairer davantage.

Une déchéance de nationalité pendant le conflit

Il arrive qu'un civil interné par sa propre puissance en raison de ses activités liées à un conflit armé se voit déchoir de sa nationalité par sa puissance d'origine.[2] En cas de déchéance de nationalité, l'individu change-t-il de statut au regard du droit international humanitaire ? Peut-il devenir une personne protégée au sens de l'article 4 de la CG IV et bénéficier d'une protection différente suite à cette déchéance de nationalité ?

Les pluri-nationaux

Lorsqu'une personne possède deux nationalités ou davantage, le risque de tomber dans une des exclusions de l'article 4 de la CG IV est plus élevé. Ainsi, par exemple, si une des nationalités de la personne est la même que celle de la Puissance sous le contrôle de laquelle elle

2 Voyez par exemple l'article 23/1 du Code de la nationalité belge qui permet la déchéance de nationalité des personnes qui auraient commis des faits de terrorisme.

se trouve – et s'il n'y a pas de règle de conflits de nationalités dans ce pays – elle sera exclue d'office du statut de personne protégée parce que considérée comme un national sous le contrôle de son pays de nationalité. Abstraction sera alors faite de son autre nationalité.[3]

Un changement de nationalité pendant le conflit

Un autre exemple pourrait être le cas d'une personne qui change de nationalité pendant le conflit. Tel serait le cas d'un détenu interné par une Partie au conflit dont il n'a pas la nationalité mais dont il acquiert la nationalité au cours de sa détention. Un tel changement de nationalité pourrait-il avoir un impact sur sa qualité de personne protégée, et en conséquence sur la protection à laquelle il peut prétendre ?

La nationalité : une notion incertaine à géométrie variable

Différentes raisons pourraient expliquer l'incertitude autour de l'interprétation à donner au critère de (non-)nationalité requis par l'article 4 de la CG IV.

Absence de définition

Premièrement, aucune définition de la notion de nationalité n'apparait dans les Conventions de Genève de 1949, dans les Protocoles Additionnels de 1977, dans la jurisprudence ou dans la doctrine.

Pléthore de terminologies

Au contraire, une multitude de terminologies sont utilisées pour se référer à la nationalité et aux non-ressortissants de l'article 4 de la CG IV. Au sein même de la CG IV, le terme 'étranger' est utilisé pour se référer aux non-ressortissants[4]. Au sein des Commentaires de 1956, trois expressions différentes sont utilisées pour parler des non-ressortissants : les 'personnes de nationalité ennemie'[5] ; les 'personnes de nationalité étrangère'[6] ; ou encore les 'ressortissants ennemis'[7]. La version anglaise utilise les termes 'non-nationals'. Enfin d'autres préfèrent se référer à la notion d''ennemis'[8]. Cette multitude de terminologies contribue à maintenir le flou autour du concept de nationalité.

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3 Voyez à ce sujet, SASSÒLI Marco, *International Humanitarian Law, Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, Cheltenham, 2019, p. 289.

4 Voy. à ce sujet la Section II, Titre III de la CG IV.

5 PICTET, *supra,* n. 1, p. 51.

6 *Ibid*.

7 *Ibid.*, p. 52.

8 Voy. par exemple CLAPHAM Andrew, GAETA Paola and SASSÒLI Marco, *The 1949 Geneva Conventions, A Commentary,* Oxford, OUP, 2015, p. 1140.

Une notion en évolution constante

Une autre raison qui pourrait expliquer l'ambiguïté autour du concept de nationalité tient au contexte dans lequel ce critère évolue, à savoir un contexte en évolution constante. Ainsi, au moment de l'adoption des Conventions de Genève de 1949, le critère de nationalité requis par l'article 4 s'inscrivait dans un contexte de réciprocité[9] et relevait d'une matière exclusivement interne aux Etats[10]. Le contexte a maintenant évolué et le droit international humanitaire est centré davantage sur l'individu, notamment avec l'adoption des Protocoles Additionnels et l'évolution des conflits armés.

Compte tenu de ce contexte changeant, il est possible qu'une nouvelle approche du critère de nationalité soit nécessaire. Comme formulé dans les Commentaires des Protocoles Additionnes du CICR[11] : « *[l]' adoption même de [l'article 1 § 4 du PA I] suffit à entraîner, dans les situations visées, l'obligation d'interpréter de façon nouvelle certains critères utilisés par le droit humanitaire, tel celui de nationalité »*[12].

Un débat qui fait rage

Quoiqu'il en soit, tant la jurisprudence internationale que la doctrine reconnaissent que le critère de nationalité requis à l'article 4 de la CG IV est problématique. Toutefois, le débat continue de faire rage autour de ce que ce terme englobe réellement. Ainsi, nous avons d'un côté les partisans d'une approche restrictive de la nationalité et d'un autre ceux qui lui préfèrent une vision plus large.

Deux approches principales du concept de nationalité

Première approche : vision restrictive de la nationalité

La première approche principale du concept de nationalité utilisé dans l'article 4 de la CG IV repose sur une vision restrictive de la nationalité, une nationalité *sensu stricto*. Il s'agit d'une approche selon laquelle la nationalité requise par l'article 4 serait une nationalité formelle basée uniquement sur un lien juridique entre un individu et un Etat au regard du droit interne de cet Etat.

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9 *Ibid.*, p. 1140-1141.

10 Voy. à ce sujet: DE GROOT Gerard-René and WILLEM VONK Olivier, *Internationals Standards on Nationality Law, Texts, Cases and Materials,* Wolf Legal Publishers, The Netherlands, 2015, p. 41-43 ; voy. aussi CIJ, *Affaire Nottebohm*, Liechtenstein c. Guatemala, 6 avril 1955.

11 SANDOZ Yves, SWINARSKI Christophe et ZIMMERMAN Bruno, *Commentaire des Protocoles additionnels du 8 juin 1977 aux Conventions de Genève du 12 août 1949*, Genève, CICR, 1986.

12 *Ibid.*, para. 117, p. 55.

Une telle vision est compatible avec une application littérale de l'article 4 de la CG IV. Il a été soutenu que cette approche permet notamment de garantir une meilleure sécurité juridique[13], une facilité de la preuve du lien entre un Etat et un individu[14], et serait en outre plus adaptée aux conflits interétatiques classiques[15]. Cette approche restrictive a régulièrement été soutenue par la défense devant le TPIY.[16]

Deuxième approche : vision large de la nationalité

La deuxième approche privilégie une nationalité *sensu lato* laquelle repose sur une vision plus large du critère de nationalité revendiqué par l'article 4 de la CG IV. La Chambre d'Appel du TPIY s'est largement exprimée en faveur d'une telle interprétation large du concept de nationalité.[17] Selon le TPIY, il s'agirait d'une nationalité basée sur la substance des relations.[18] Une telle approche permettrait de soustraire le critère de nationalité à celui d'allégeance ou d'appartenance ethnique.

Cette vision serait plus adaptée pour faire face aux conflits armés internationaux contemporains tel que, par exemple, le conflit interethnique en ex-Yougoslavie[19] ; et permettrait d'inclure davantage de personnes dans le statut de personne protégée – assurant donc une plus grande protection des individus[20].

En outre, comme suggéré par la Cour Internationale de Justice dans l'affaire Nottebohm[21], outre la nationalité formelle, la nationalité effective doit aussi être prise en compte – cette dernière prend compte d'éléments tels que le domicile de l'intéressé, ses liens familiaux, sa participation à la vie publique, etc.

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13 Voy. notamment à ce sujet, SASSÒLI Marco and OLSON Laura, "The Judgment of the ICTY Appeals Chamber on the merits in the Tadic case, new horizons for international and criminal law?", in IRRC, September 2000, Vol. 82, n° 839, p. 744.

14 SASSÒLI, *supra,* n. 3, p. 292.

15 Voy. notamment à ce sujet : KOLB Robert, *Ius in bello: Le droit international des conflits armés,* Bruxelles, Bruylant, 2003, p. 179-180.

16 TPIY, *Affaire Tihomir Blaskić – « Vallée de la Lasva »,* 3 mars 2000, para. 126 ; TPIY, *Affaire Zlatko Aleksovski – « Vallée de la Lasva »,* 24 mars 2000, para. 149 ; TPIY, *Affaire Mucic et consorts – « Camp de Celebici »,* 20 février 2001, para. 59.

17 Voy. par exemple : TPIY, *Affaire Tadic,* 15 juillet 1999, para. 166-168.

18 Voy. à ce sujet : TPIY, *Affaire Tadic,* paras, 166-168 ; TPIY, *Affaire Camp de Celebici*, para, 84.

19 Voy. à ce sujet : TPIY, *Affaire Tadic,* 15 juillet 1999, para. 166 ; TPIY, *Affaire Tihomir Blaskic – « Vallée de la Lasva »*, 3 mars 2000, para. 127 ; MAIA Catherine, KOLB Robert et SCALIA Damien, *La protection des prisonniers de guerre en droit international humanitaire,* Bruxelles, Bruylant, 2015, p. 83-84.

20 Voyez notamment : TPIY, *Affaire Tadic,* 15 juillet 1999, para. 166 ; TPIY, *Affaire Mucic et consorts – « Vallée de la Lasva »,* 20 février 2001, para. 73.

21 CIJ, *Affaire Nottebohm*, Liechtenstein c. Guatemala, 6 avril 1955.

Deux approches critiquées

Il convient de rappeler à ce stade que chacune de ces approches a fait l'objet de nombreuses critiques.

Prochaines étapes ?

Face à ce constat – à savoir la nationalité comme concept clé dans la protection des personnes, un concept aux contours incertains, et un débat qui continue de faire rage – quelles sont les prochaines étapes ?

Il est possible que le nouveau commentaire de la CG IV permette d'éclairer quelque peu les contours de cette notion et les termes « dont ils ne sont pas ressortissants » repris à l'article 4 de la CG IV.

Toutefois, est-il nécessaire qu'une seule et unique approche soit retenue ? Serait-il possible que ces deux approchent, plutôt que d'être en opposition soient complémentaires ? Une proposition de solution pourrait être la mise en place d'un 'système de gradation' du critère de nationalité retenu par l'article 4 de la CG IV. Par exemple, une vision restrictive de la nationalité pourrait être maintenue pour les conflits interétatiques classiques, alors qu'une vision large sera privilégiée pour les conflits interethnique du même style que celui en ex-Yougoslavie.

Un tel système pourrait par exemple être mis en place par l'intermédiaire de lignes directrices d'interprétation. Ainsi, la nationalité requise serait différente en fonction du cas d'espèce. Il se pourrait par exemple que la nationalité purement formelle, au sens juridique du droit interne d'un Etat, soit adaptée à tel contexte, alors que des critères subsidiaires soient préférés dans d'autres situations. Ces critères subsidiaires pourraient être graduellement ordonnés en privilégiant en première instance celui qui se rapproche le plus de la nationalité formelle, à savoir l'ethnicité, pour ensuite se retourner, si nécessaire vers l'allégeance, et ensuite vers la résidence ou tout autre critère de moindre importance, et ainsi de suite.

URBAN, PROTRACTED AND HYBRID: APPLYING THE 4TH CONVENTION TO NOWADAYS CONFLICTS

URBAINS, PROLONGÉS ET HYBRIDES : L'APPLICATION DE LA 4ÈME CONVENTION AUX CONFLITS ACTUELS

Christian De Cock
EU Strategic HQ (MPCC)

Résumé

Christian De Cock est conseiller juridique au sein de la capacité militaire de planification et de conduite (MPCC) de l'Etat-major de l'UE (Service Européen pour l'action extérieure – SEAE). Dans sa présentation, il note que les termes « urbains », « prolongés » ou « hybrides » ne permettent pas de définir précisément les conflits contemporains. Il s'intéresse à l'un des traits qui caractérisent les conflits aujourd'hui : « la guerre par proxy/par procuration », qu'il désigne comme étant un type de conflit armé international (CAI) dans lequel les Etats ont le plus souvent recours à des groupes armés organisés non-étatiques dans des Etats tiers. Il souligne que cela permet notamment aux Etats d'échapper à toute responsabilité pour les actions ou violations commises par ces groupes. Dans un premier temps, il nuance l'utilité des Commentaires actualisés du CICR, en notant en particulier que ceux-ci ne reflètent pas toujours les positions des Etats et que dès lors, les conseillers juridiques nationaux préfèrent se référer aux textes juridiques directement applicables à leur Etat, ainsi qu'aux doctrines et plans opérationnels reflétant la position de leur Etat sur le DIH. Concernant la guerre par procuration et l'élément de contrôle justifiant l'internationalisation des conflits armés internationaux (CANI), Christian De Cock est d'avis que le test du « contrôle global » développé par la jurisprudence du TPIY dans le jugement Tadic n'était pas nécessaire et est problématique, en ce qu'il nuit à la protection des personnes protégées, en diluant la responsabilité et en incitant les Etats à recourir à des groupes armés non étatiques. De plus, Christian De Cock souligne que la coexistence de plusieurs types de conflits, à la fois CAI et CANI, dans un même environnement opérationnel peut faire sens en termes de qualification juridique mais n'est pas forcément utile en termes de protection des civils. Il conclut qu'une manière de résoudre cette difficulté et de garantir un maximum de protection aux civils serait de développer un régime unique, indépendant de la qualification du conflit.

Ladies and Gentlemen,

Before jumping into the core of my presentation, I would like to express my gratitude to the ICRC for having invited me to this Colloquium and to speak about the protection of civilians under the Fourth Geneva Convention. The views expressed are those of the author in his personal capacity and do not intend to reflect the views of the Military Planning and Conduct Capability, the EU, or the European External Action Service.

1. Introduction

Applying the Fourth Convention (GCIV) in nowadays conflicts, as mentioned in the subtitle of my presentation, requires the identification of what types of conflict are encapsulated by the term 'nowadays conflicts'. This is not an easy endeavor since there is no unanimity or single definition of what nowadays conflicts exactly entail as different terms may have different meanings to different people. Identifying conflicts as 'urban', 'protracted' or 'hybrid' is therefore not necessarily very helpful as there is no single type of armed conflict that comes predominantly to the fore today. Having said that, it appears to me that there is a 'new' trend in the framework of international armed conflicts (IAC), namely the fact that States more often than not make use of non-State organized armed groups to do their dirty work in neighbouring or far-away countries. It allows States to turn a blind eye to conflicts in which they are, at least indirectly, engaged and even to escape any responsibility for the actions (or violations) committed by these groups. These conflicts are sometimes referred to as 'proxy wars' and it is precisely this type of conflict I'll consider in more detail during my presentation.

2. Preliminary observations

As a preliminary issue, let me also address the relative value and importance (or not) of the updated Commentaries. Notwithstanding the valuable work in drafting these updated Commentaries, one should not over-evaluate their legal significance either. Firstly, it is noteworthy to recall that these updated Commentaries reflect the views of the ICRC. Secondly, whereas the original Commentaries were closely linked to proceedings of the Diplomatic Conference leading to the adoption of the Conventions, as reflected in the many cross-references reflecting the viewpoints of States when negotiating the draft articles of the Geneva Conventions, this link is completely absent in the new Commentaries. From that perspective, the new Commentaries differ significantly from the original Commentaries. Contrary to what has been suggested in a previous panel, military legal advisors do not refer to the ICRC Commentaries in order to find the applicable legal rules and/or their interpretation when advising their commanders in the field. Legal advisors will refer to the law as it binds their respective State and will refer primarily to their national documents, such as operational plans, and national doctrines reflecting the view of their State on IHL, when applying the Geneva Conventions on a particular situ-

ation. Therefore, it would be misleading to over-evaluate the practical significance of these updated Commentaries.

As mentioned in the beginning of my presentation, it is also not always helpful to qualify conflicts as 'urban', 'protracted' or 'hybrid'. History has shown that labelling conflicts in these (and other) terms, such as counter-terrorism operations, counter-insurgency operations or security operations, has sometimes been used by governments to escape from their legal obligations under IHL, as being not applicable or impossible to apply given the specific circumstances of the conflict in which they are waging war. Therefore, we need to dismiss such claims and turn back to the legal classification of conflicts in terms of international or non-international armed conflicts, each of them carrying its own legal rules. Having said that, it appears to me that two types of conflict merit specific attention. Firstly, the fact that States make use of 'proxy's' to wage their battles and what it means in terms of conflict classification and, secondly, the coexistence of multiple armed conflicts on the same theatre of operations.

3. Internationalized conflicts

The first problem is not entirely new. In the past, States have also had recourse to non-state armed groups in wartime. Yesterday, one of the panels was entirely devoted to the legal classification of internationalized non-international armed conflicts (NIACs), and particularly on the 'control' element to identify such conflicts. The aim is not to re-open the discussion, but it appears to me that less to no attention has been given to the fact that the jurisprudence of the ICTY in the *Tadic* case, which led to the adoption of the 'overall' control test, remains very problematic. Indeed, as pointed out by Judge Mc Donald, there was no reason for the Tribunal to develop this new test, based on the facts of this case. I fully agree with her opinion that the VRS (the Bosnian-Serb armed group) was completely dependent of the VJ (Serbia-Montenegro's army). This should immediately have triggered the applicability of the law of international armed conflicts (IACs). Unfortunately, this new 'overall' control test has since then been confirmed not only in the later jurisprudence of the Tribunal, but also by the International Criminal Court (ICC) and, now, in the updated ICRC Commentaries on the Geneva Conventions. As we are discussing the relevance of the Fourth Geneva Convention in this panel, the aforementioned discussion is not without relevance. Under Art. 4 GCIV, civilians are only protected persons insofar they are not nationals of the Party to the conflict in the hands of which they are. That is of particular importance in occupied territories, as it entails that the Occupying Power is responsible for acts committed by their locally recruited agents of the nationality of the occupied territory – even if the foreign Power 'occupies' or operates in certain territory solely through the acts of local *de facto* organs or agents. However, the question as to which criteria determines the overall classification of a '*prima facie*' internal armed conflict (IAC) as an 'internationalized conflict' still remain as there is still controversy between

the ICTY's 'overall control test' (endorsed by the ICC and the ICRC in its updated Commentaries) and the ICJ's 'effective control test'. This is not without interest for the overall protection of the civilian population, particularly in case of breaches of GCIV, as the international responsibility of the State for acts of its '*de facto*' agents would only come into play under the 'effective control' test, notwithstanding the so-called 'overall control' test developed by the ICTY to classify conflicts as international in nature. On top of that, it is not excluded that this leads to less instead of more protection for the civilian population, and could even serve as an incitement for States to use non-State organized groups to carry out their dirty work, since attribution and international responsibility would only arise in case of 'effective control'.

4. Co-existence of multiple armed conflicts

The second contemporary issue that has an impact on the protection of the civilian population in times of armed conflict is the fact that different armed conflicts may co-exist on the same theatre of operations. The former conflict in Afghanistan in the immediate aftermath of the 9/11 attacks, the conflicts in Libya in 2011 or the still ongoing hostilities in Iraq and Syria against ISIS demonstrate the complexity of this operational environment in which different actors were involved, leading to different conflict classification. Let us take Libya as an example. In 2011, it was the theatre of multiple conflicts, each of them regulated by a particular set of legal rules. Firstly, there was the conflict between the pro- and anti-Gaddafi forces. Secondly, multinational troops, operating under the NATO umbrella, were engaged in hostilities against the pro-Gaddafi forces in implementing their mandate in accordance with the applicable UNSC Resolutions (UNSCRs). In such an environment, one needs to define the nature of the conflict(s) in order to apply the correct legal standards. Following the events in Egypt and Tunisia, riots and protests broke out in Benghazi, in the eastern part of Libya. The clashes between protesters and governmental forces did not reach the threshold of armed conflict triggering the applicability of the law of armed conflict. By the end of February 2011, the anti-Gaddafi forces controlled parts of the territory allowing them to conduct sustained operations against the regime forces. At the same time, the National Transitional Council was set up with the authority to take quasi-governmental powers in the 'liberated' areas. The military intervention pursuant to UNSCR 1973 clearly amounted to an international armed conflict between the States participating in the coalition and Libya, regulated by Common Article 2 to the Geneva Conventions. As a result, the situation amounted to the co-existence of multiple armed conflicts (a NIAC and multiple IACs), each of them carrying its own legal framework and rules. While this may work perfectly for the purpose of conflict classification in legal terms, the co-existence of different armed conflicts may not necessarily be very helpful in terms of civilian protection. More often than not, the reality of the battlefield demonstrates that the control over disputed areas may shift from one party to another. In legal terms, this would lead to situations in which the civilian population would enjoy protection under GCIV

in situation A (IAC), but not in situation B (NIAC). One way to solve this problem, aimed at providing maximum civilian protection, could consist in developing a unified treaty regime, regardless the classification of the conflict. Time will tell if this could materialize in the future.

Pending your further questions, this ends my presentation.

Thank you.

NOBODY FIGHTS ALONE: PROXY WARS AND THE PROTECTION OF CIVILIANS

PERSONNE NE SE BAT SEUL : LES GUERRES PAR PROCURATION ET LA PROTECTION DES CIVILS

Heike Krieger
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Résumé

Heike Krieger est professeure de droit public et de droit international à la Freie Universität Berlin. Dans cette contribution sur les guerres par procuration, elle analyse les questions d'interprétation autour des obligations et de la responsabilité des Etats qui soutiennent des parties au conflit, en illustrant son propos par le cas du Yémen. Ces questions étaient déjà au cœur du jugement Nicaragua de la CIJ en 1986 et les violations graves du DIH dans de nombreuses guerres par procuration contemporaines ont intensifié les efforts pour délimiter le contenu de ces obligations, ce qui a, en réponse, donné lieu a de la résistance de la part de certains Etats. Heike Krieger analyse les articles applicables : l'article 16 du Projet d'articles sur la responsabilité de l'Etat pour fait internationalement illicite et l'article 1 commun aux Conventions de Genève. Concernant l'article 16, l'interprétation juridique de la notion de « connaissance » est en débat, certains Etats y incluant un élément « d'intention » souvent difficile à prouver. De plus, il peut être avancé que l'article 16 n'implique pas d'obligations positives de collecter des informations. En revanche, l'article 1 commun lie tous les Etats, même non Parties à un conflit armé, et prévoit des obligations positives et négatives, ainsi que des obligations concernant les acteurs non-étatiques. De plus, l'article 1 établit un standard de diligence raisonnable. Toutefois, les obstacles pour la mise en œuvre de ces normes demeurent. Outre des interprétations contestées, la controverse juridiques s'articule autour de ce que le standard de diligence raisonnable requiert en termes d'évaluation du risque. Bien que cette affaire porte sur l'interprétation des obligations du Traité sur le commerce des armes et de la position commune de l'UE, la décision de la Cour d'appel britannique de 2019 concernant l'approbation gouvernementale de transferts d'armes vers l'Arabie saoudite dans le contexte du conflit au Yémen donne des éléments d'interprétation de l'article 1 commun aux CG. Heike Krieger conclut en indiquant que s'il n'y a pas de vide juridique empêchant de déterminer la responsabilité juridique, certaines insécurités et questions d'interprétation demeurent, en particulier du fait de la réticence des États à voir leur marge de manœuvre politique réduite. Elle suggère que les normes de diligence raisonnable et les litiges transnationaux sont la voie à suivre pour contenir juridiquement les effets d'une telle interpretation discrétionnaire et, donc, de la guerre par procuration.

1. The challenge of proxy wars

Proxy wars seem to be the new catch phrase for grasping the complex nature of current armed conflicts. The concept has moved away from its connotation in the Cold War where it described constellations in which the US and the USSR pursued their geopolitical interests through providing military assistance to ideological allies fighting each other. In contrast, the notion is now used as an umbrella term for the highly complex, entangled, networked, and protracted conflicts we currently see, in particular in the Middle East. These conflicts are characterized by their globalized nature with a multitude of actors ranging from States and international organizations to armed groups, paramilitaries, private military companies and also – to some extent – transnational companies. Sponsors and proxies act within interconnected supply chains often in integrated transport, information and economic systems and create support relationships during armed conflicts to which they may or may not be a party.[1] From a legal perspective material support granted is decisive. This support includes, inter alia, arms transfer and logistical support, such as the provision of targeting coordinates or of bots for disinformation operations.[2]

The increase in proxy warfare endangers the protection of civilians because it is feared to create gaps in legal responsibility *ex ante* and *ex post*.[3] Who will be responsible to take which precautionary measures? Which actors will be accountable in terms of State responsibility? How much space for abuse and circumvention is opened up?

These problems are not necessarily new. Sponsoring of armed groups was at the centre of the ICJ's 1986 Nicaragua judgment.[4] However, grave violations of IHL in many of the current proxy wars have intensified efforts to reify the content of duties limiting the political discretion of sponsors. These efforts have in turn created some resistance by certain sponsoring states. An important case in point is UK and US support for the Saudi-led coalition fighting in Yemen on the one hand and Iranian support for the Houthi coalition on the other hand.[5] This support is granted despite reliable public UN and NGO reports[6] finding systematic violations of IHL by the parties to the conflict. Thus, the UN Group of Eminent Experts on Yemen in a supplement

1 ICRC, *Allies, Partner, Proxies: Managing Support Relationships in Armed Conflict to Reduce the Human Cost of War* (2021), 18; C. Rondeaux/D. Sterman, *Twenty-First Century Proxy War: Confronting Strategic Innovation in a Multipolar World Since the 2011 NATO Intervention* (2019), 4 et seq.

2 Cf. Rondeaux/Sterman (note 1), 7 et seq.

3 ICRC (note 1), 5, 18.

4 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits,* Judgment, I.C.J. Reports 1986, 14.

5 American Bar Association, *The Legal Framework Regulating Proxy Warfare* (2019), 22, 47 et seq.

6 E.g. Amnesty International, *Yemen 2020* (https://www.amnesty.org/en/location/middle-east-and-north-africa/yemen/report-yemen).

to its 2021 report voiced its 'concern about the continued arms transfers to parties to the conflict in Yemen, notwithstanding the documented serious violations of international humanitarian law and human rights law occurring.'[7] The group stressed that in view of the public reports 'no State can now claim not to be aware of such violations' and that despite of that the US and the UK continued their support. Moreover, Iran continues to support the Houthis in Yemen irrespective of the UNSC's sanctions regime and its arms embargo against specific Houthi members.[8] So what lies behind the continuing support for conflict parties in Yemen? Are we facing legal gaps, contestations of legal interpretations or an enforcement challenge in view of geopolitical interests?

2. The required knowledge and the case of the conflict in Yemen

For legally evaluating US and UK support, Art. 16 of the draft Articles on Responsibility of States for internationally wrongful acts (ASR) and Common Art. 1 GC are most relevant.[9] According to Art. 16 ASR, States may be held responsible for aiding or assisting in a violation of IHL. Given that according to reports, US-origin munitions were used in a number of relevant cases in Yemen[10], for Art. 16 ASR to apply, the US must have supplied these munitions with knowledge of the circumstances of the internationally wrongful act. In academic literature it is disputed what knowledge actually means. Is mere knowledge sufficient or is a certain intend required? There are relevant voices in literature arguing that 'knowledge' in Art. 16 ASR needs to be understood as a 'wrongful intent'. For this interpretation, these voices rely on the ILC drafting process, State practice and the findings of the ICJ in the Bosnian Genocide case.[11] Indeed, in the ILC drafting process, the United States welcomed 'the incorporation of an intent requirement in the language of Art. 16 (a)' which 'must be narrowly construed'.[12]

Such an intent would be hard to prove in the case of US and UK support for the Saudi-led coalition since they both have assisted the coalition in ensuring that unintended disproportionate air strikes do not take place.[13] However, there is also an argument that some situations may

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7 UN Human Rights Council, *Accountability update – Group of Eminent International and Regional Experts on Yemen*, 14 September 2021, UN Doc. A/HRC/48/CRP.4, para. 57.

8 UN Human Rights Council, *Situation of human rights in Yemen, including violations and abuses since September 2014 - Detailed findings of the Group of Eminent International and Regional Experts on Yemen*, 29 September 2020, UN Doc. A/HRC/45/CRP.7, p. 3 and p. 105 et seq., para. 414.

9 In addition, Art. 6 (3) and 7 of the Arms Trade Treaty provide a pertinent standard.

10 American Bar Association (note 5), 22.

11 Georg Nolte/Helmut Aust, 'Equivocal helpers – Complicit states, mixed messages and international law', 58 *International and Comparative Law Quarterly* (2009), 1, 13-15.

12 UN, Comments and observations received from governments, UN Doc. A/CN.4/515 and Add. 1-3 (2001), 52.

13 American Bar Association (note 5), 23.

require modifications in interpreting the knowledge element, in particular 'where internationally wrongful acts are manifestly being committed'. For such a modification both the character of the co-operation and of the violations at stake can be taken into account.[14] Such an interpretation is backed by the ILC commentary on Art. 41 (2) ASR which states that in cases of violations of peremptory norms knowledge can be assumed since such serious violations would receive widespread attention.[15] Thus, it may be argued that, in cases of solidified and structured co-operations, a consistent and recurring pattern of serious breaches of peremptory norms by the State using assistance indicates the knowledge of the contributing State and requires to stop providing support.[16] In the case of arms supply to the Saudi-led coalition in Yemen, the US and the UK try to justify their behaviour on factual grounds. In their public statements, they have fallen short of condemning certain operations in Yemen as unlawful, have argued that violations are confined to rare cases, have stated that the violations may not have been intentional or claimed that past violations are no indication for future cases of non-compliance.[17] Thereby, they shift a legal dispute from the normative to the factual level.

However, in view of disputes about the factual level there is a relevant gap in Art. 16 ASR since the argument can be raised that it does not entail positive duties to gather information about possible wrongdoings by proxies.[18] Moreover, it does not cover support for non-State actors which is relevant for assessing Iranian support for the Houthis. Therefore, Common Article 1 GC needs to be taken into account. The all-encompassing nature of this obligations renders it central to any effort to bind sponsors in proxy warfare: First, because it obliges all contracting States even if they are not a party to an armed conflict.[19] Second, because it also covers obligations concerning non-State actors.[20] Third, because the duty to ensure respect encompasses a positive duty of the contracting States to 'exert their influence, to the degree possible, to stop or to prevent violations by others.[21] And fourth, because the duty to ensure respect establishes a negative duty to not assist State or non-State actors in violations of IHL. In this respect, Common Article 1 GC does not entail the stricter standard of knowledge

14 Nolte/Aust (note 11), 15; for the role of *ius cogens*: Helmut Aust, Complicity and the Law of State Responsibility (2011), 347 et seqq.

15 ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, 35, 115 para. 11; American Bar Association (note 5), 21.

16 Cf. American Bar Association (note 5), 19 albeit applying a lower standard.

17 American Bar Association (note 5), 22.

18 American Bar Association (note 5), 21; see, however, Aust (note 14), 248; Nolte/Aust (note 11), 15.

19 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, paras. 158 and 159.

20 ICRC, Commentary on Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949 (2020), Art. 1 para. 158, 186.

21 ICRC Study on Customary International Humanitarian Law (2005), Rule 1; ICRC (note 20), para. 197.

in the sense of wrongful intent which Art. 16 ASR requires.[22] Instead, according to the ICRC, what is sufficient in cases of arms transfers is 'an expectation, based on facts or knowledge of past patterns' which 'would require an appropriate assessment prior to any arms transfer.'[23] This requirement also introduces a due diligence element into the assessment of a violation of the negative duty under Common Article 1 GC and calls for efforts to gather information.

In sum, Common Article 1 GC establishes a due diligence standard against which the actions of sponsoring States in proxy warfare can be judged. What matters under such a standard is the likelihood that a risk of serious IHL violations materializes, that this risk is foreseeable and that the State possesses the capacity to act. This capacity depends, inter alia, on 'the means reasonably available to the State, and the degree of influence it exercises over those responsible for the breach.'[24] These approaches are in line with both a systematic and teleological interpretation of Common Art. 1 GC. They take into account the seriousness of IHL violations as violations of peremptory norms, the objective of the Fourth Geneva Convention to protect civilians and the broader goal to contain escalatory effects of proxy warfare. While, in the drafting process of the Geneva Conventions, the US argued that the duty to ensure only refers to a State's own population, the current interpretation is confirmed by subsequent practice, including pronouncements by the ICJ.[25] Thus, Common Art. 1 GC sets clear legal standards for determining legal responsibility for proxy warfare.

3. How to define the due diligence standard

Still, as the cases of US and UK support for the Saudi-led coalition in Yemen demonstrate, hurdles for enforcing these standards remain. Next to contested interpretations, some of the legal controversy has unfolded around the question what the due diligence standard actually requires in terms of (risk) assessment. A case in point is a UK Court of Appeal decision of 2019 concerning governmental approval for arms transfers to Saudi Arabia in the context of the conflict in Yemen.[26] The case revolves around the interpretation of Criterion 2(c) of the Consolidated EU and UK Arms Export Licensing Criteria which bring criteria for assessing licence applications in line with the EU Common Position[27] and the obligations under the Arms Trade Treaty. However, in view of the criteria's function to assess risks of arms transfers, the Court's findings may be taken into account for the interpretation of Common Art. 1 GC.

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22 ICRC (note 20), para. 192; Aust (note 14), 389.

23 ICRC (note 20), para. 162.

24 ICRC (note 20), para. 198.

25 ICRC (note 20), paras. 145 et seqq.

26 UK Court of Appeal (Civil Division), *The Queen (on the application of Campaign Against Arms Trade) and The Secretary of State for International Trade* [2019] EWCA Civ 1020.

27 EU Council Common Position 2008/944/CGSP of 8 December 2008.

The criteria require to 'deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of IHL.' The Court acknowledged that 'the UK made sustained efforts in offering training … to emphazise the importance of observance of IHL to Saudi Arabia'.[28] But it also found that, for his assessment when granting a licence, the UK Secretary of State had to deal with the question as to 'whether there was an historic pattern of breaches of IHL on part of the Coalition' because in case of an affirmative answer 'despite all such [training] efforts, then that would unavoidably become a major consideration in looking at the "real risk" in the future'[29] – a sound interpretation of what due diligence would require. After a longer process of re-evaluation of IHL related 'incidents of concern' in Yemen, the UK government held that such IHL violations were 'isolated incidents'[30], again shifting the dispute to the factual level. As a consequence, the UK granted new licenses for arms sales. Apparently, States shun to clearly address the legal debate and instead prefer to raise factual claims in order to preserve their political discretion.

4. On a concluding note

Against this background, it remains decisive to concretize due diligence standards with the help of other actors. The ICRC obviously plays an important part in this respect, for example with its 2021 publication 'Allies, Partners and Proxies' which elaborates on pertinent due diligence measures in great detail. Likewise, strategic transnational litigation contributes to complementing governmental practice with court practice as an important instrument to further clarify pertinent due diligence standards. In the UK, new judicial proceedings have been initiated[31] and, in summer 2021, the South African Litigation Centre started legal proceedings before the North Gauteng High Court (Pretoria) in relation to arms sales to Yemen.[32]

In sum, in proxy warfare there are no legal gaps which would prevent to determine legal responsibility but some interpretative insecurities and contestations remain. Above all, the current situation is characterized by an apparent reluctance on the side of sponsor States to have their political discretion curtailed. In a manner comparable to many other fields of international law, due diligence standards and transnational litigation seem to be the way ahead to legally contain the detrimental effects of such a discretion and, thus, of proxy warfare.

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28 UK Court of Appeal (note 26), para. 137.

29 UK Court of Appeal (note 26), paras. 138, 144.

30 UK, Statement made by Elisabeth Truss, Secretary of State for International Trade, 7 July 2020, Statement UIN HCWS339, https://questions-statements.parliament.uk/written-statements/detail/2020-07-07/HCWS339.

31 CAAT, Arms Sales back on Trial, 22 April 2021, https://caat.org.uk/news/arms-sales-back-in-court/.

32 South African Litigation Centre, South African Arms Trade Case, 7 June 2021, https://www.southernafricalitigationcentre.org/2021/06/07/south-african-arms-trade-case-human-rights-organisations-ask-the-courts-to-review-decisions-to-export-arms-to-saudi-arabia-and-the-united-arab-emirates/

PREVENTION AND REPRESSION OF WAR CRIMES
PRÉVENTION ET RÉPRESSION DES CRIMES DE GUERRE

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Résumé

Michael Meier est le conseiller civil principal du Juge-avocat général de l'armée de terre des Etats-Unis pour les questions liées au droit des conflits armés. Dans cette contribution, Michael Meier donne son analyse des notions de prévention et de répression des crimes de guerre, en particulier de l'obligation d'enquêter. En ce qui concerne la prévention, l'obligation de « faire respecter » prévue dans l'article 1 commun CG serait une obligation interne devant être intégrée dans les formations des forces armées. L'obligation internationale des Etats d'agir face aux crimes de guerre impliquerait trois éléments : (1) adopter la législation nationale nécessaire pour poursuivre les criminels de guerre présumés ; (2) rechercher les personnes accusées d'avoir commis des crimes de guerre ; et (3) juger ces personnes ou les remettre à un autre État pour qu'elles y soient jugées. Dans une deuxième partie, il partage son analyse de l'obligation d'enquêter. En vertu des articles 146 à 148 CG IV, cette obligation d'enquêter s'appliquerait aux infractions graves ainsi qu'aux violations qui pourraient engager la responsabilité pénale individuelle. L'article 87 PA I donne la possibilité d'utiliser les structures internes des forces armées pour mener à bien cette obligation. En ce qui concerne les CANI, bien que ni le PA II, ni l'article 3 commun n'imposent une obligation, cette obligation serait reconnue ou suggérée dans la règle 158 de l'étude du CICR sur le droit international humanitaire coutumier, dans le préambule du Statut de Rome et dans les décisions des tribunaux internationaux. Il conclut en proposant quatre éléments clés de l'obligation d'enquêter - l'indépendance, l'efficacité, la rapidité et l'impartialité[2]*. Enfin, il illustre son propos par la directive 2311.01 du* Department of State *des Etats-Unis, mise à jour en juillet 2020 et dont le système repose avant tout sur la chaîne de commandement.*

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2 See also Michael N. Schmitt, *Investigating Violations of International Law in Armed Conflict*. Harvard National Security Law Journal. Vol. 2., at 79-83.

Good morning, I want to thank the organizers of this event for the invitation to attend this meeting. This is my first time to be here at the Colloquium. I do work for the United States Army so I have to make sure I add our standard disclaimer. The views expressed here are my own and not necessarily those of the United States Army, the Department of Defense or the United States Government. I do plan on explaining the US policy on war crimes investigations but there are parts that are my personal suggestions.

I want to raise 3 points this morning: (1) the requirement for prevention of war crimes; (2) look briefly at Articles 146-48 GCIV and address the requirement for investigations, which is not well set out in the Conventions; and, (3) discuss how the United States has implemented our obligations with respect to investigations regarding war crimes allegations.

I. Prevention of War Crimes

Common Article 1 of the Geneva Conventions requires Parties to "respect and ensure respect for the present convention in all circumstances."[3] Looking to the Pictet Commentary, it provided, in part:

> Furthermore, if it is to fulfil the solemn undertaking it has given, the Government must of necessity prepare in advance, that is to say in peace-time, the legal, material or other means of ensuring the faithful enforcement of the Convention when the occasion arises.[4]

The Pictet Commentary suggests that the drafters understood "ensure respect" to be an internal duty of parties to an armed conflict to train and properly supervise individuals under their control to ensure compliance with the Conventions.

How does a State train its forces in a way to ensure compliance with the Conventions? In my view, it can't just be a onetime obligation, but rather it must be woven into all training of its armed forces. For example, there will be training to all new members of the armed forces to give them a basic understanding of the obligations. However, there needs to be follow on training at various levels depending on one's position. In the United States, we have training both for our military and civilian attorneys, but also training for commanders and forces. This can be incorporated into exercises, training scenarios, etc. For example, in the U.S. Army, we

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3 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 1, Aug. 12, 1949, 75 UNTS 31-32; Geneva Convention for the Amelioration of the Condition of Wounded, Sick And Shipwrecked Members of Armed Forces at Sea, art. 1, Aug. 12, 1949, 75 UNTS 85-86; Geneva Convention Relative to the Treatment of Prisoners of War, art. 1, Aug. 12, 1949, 75 UNTS 135-136; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 1, Aug. 12, 1949, 75 UNTS 287-288.

4 Pictet, 1960 Commentary on the Third Geneva Convention, at 18.

have training for our commanders at the Battalion, Brigade, and General Officer level through our Senior Officer/General Office legal training (SOLO/GOLO courses).

Treaty Obligations

Before the two World Wars, the duty to investigate and prosecute war crimes was usually undertaken by individual States pursuant to their domestic rules and regulations. The Articles of War and Lieber Code are notable examples in American history. This is not to say that the concept of international war crimes was non-existent. In fact, the first international war crimes prosecution occurred in 1474 with the trial of Peter von Hagenbach in Austria.

However, it was only after World War II that an international legal requirement for States to act in the face of war crimes emerged. Upon ratification of the 1949 Geneva Conventions, States Parties to those four conventions took on three fundamental obligations— (1) enact domestic legislation required to prosecute alleged war criminals; (2) search for those accused of committing war crimes; and, (3) try such individuals or turn them over to another State for trial.

II. Geneva Conventions and Requirement for Investigations

I want to briefly discuss the three provisions dealing with grave breaches, war crimes, and investigations looking specifically at GCIV since that is what we are addressing in this conference.

Description of Provisions under GCIV

Article 146. Penal Sanctions I. General Observations

The Geneva Conventions do not prescribe any specific war crime penalties, but instead require all States to "enact any legislation necessary to prove effective penal sanctions for person committing, or ordering to be committed, any of the grave breaches [later defined in Article 147]."[5] Art. 146 gives each member State jurisdiction over persons accused of committing or

5 Article 146: Penal Sanctions I. General Observations. Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=6F96EE4C7D1E72CAC12563CD0051C63A. The inclusion of the language "or ordering to be committed" suggests that command responsibility is clearly baked into the Geneva Conventions, but this is not so. For further discussion on command responsibility in regard to war crimes, see Diane Marie Amann's observations of the *Bemba* case here: https://iccforum.com/responsibility. Also see Michael N. Schmitt, *Investigating Violations of International Law in Armed Conflict*, Harvard National Security Law Journal, Vol. 2., 32-84. Schmitt observes that "[i]t is not entirely clear whether a failure to report and investigate [possible IHL violations] renders the commander or other responsible officer a principal or accessory to the war crime in question, or whether a separate offense has been committed."

ordering others to commit war crimes, regardless of nationality,[6] and obliges States to suppress all violations of the Geneva Conventions, including those that do not rise to the level of grave breaches.[7]

This last requirement indicates that "all breaches of the Convention should be repressed by national legislation."[8] The 1958 Commentary on the Geneva Convention advises "[t]he Contracting Parties who have taken measures to repress the various grave breaches of the Convention and have fixed an appropriate penalty in each case should at least insert in their legislation a general clause providing for the punishment of other breaches."[9]

Article 147. Penal Sanctions II. Grave Breaches

This article provides States a list of what actions constitute grave breaches: "willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."[10]

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6 Article 146: Penal Sanctions I. General Observations *supra* note 4. Article 146 obliges each member State "to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts."

7 Article 146: Penal Sanctions I. General Observations *supra* note 4. Article 146 also obliges each member State to "take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches [as defined by Article 147]."

8 Commentary of 1958. Penal Sanctions. Articles 146-148.

9 *Id*.

10 Article 147: Penal Sanctions II. Grave Breaches. Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/380-600169?OpenDocument. One journal provides the following commentary on grave breaches: "The Geneva Conventions of August 12, 1949, introduced the grave breaches system, which explicitly criminalized certain acts, and requires the states parties to criminalize certain acts and to prosecute or extradite the perpetrators. The advantage of this approach is its clarity and transparency, which are so important to criminal law. The disadvantage is the creation of the category of "other" breaches, which involves the violation of all the remaining provisions of the Conventions, some of which are arguably less categorically penal. Nevertheless, the introduction of the system of grave breaches cannot alter the possibility that the other breaches may be considered war crimes under the customary law of war. Some national statutes provide that violations other than grave breaches may also give rise to criminal responsibility, without necessarily being subject to universal jurisdiction. Moreover, the list of grave breaches may be expanded through treaty interpretation, and various types of conduct may be treated as war crimes."Centennial Essay: Reflectionsss on the Prosecution of War Crimes by International Tribunals, 100 A.J.I.L. 551, 572 (emphasis added).

Additionally, it is worth noting that IHL now generally accepts that the violations of Common Article 3 or Additional Protocol II (both of which do not include a provision on grave breaches) will trigger individual criminal responsibility in non-international armed conflicts.[11] As one journal observed, "[w]hen the International Criminal Tribunal of Rwanda Statute was debated in the Security Council, no state opposed treating violations of Common Article 3 and Additional Protocol II as bases for the individual criminal responsibility of perpetrators."[12]

Article 148. Responsibilities of the Contracting Parties
Lastly, Article 148 GCIV holds that no member State is "allowed to absolve itself or any other High Contracting Party of any liability incurred by it incurred by itself or by another High Contracting Party in respect of breaches referred to in [Articles 146-147]."[13]

The GCs don't really address "war crimes" but rather "grave breaches". The term "war crime" denotes those LOAC violations that can result in *individual criminal responsibility*. For example, in the United States, we have implemented the requirement to enact domestic legislation through the War Crimes Act of 1996, found in Title 18 of the United States Code (U.S.C.), §2441.[14] This statute defines a war crime as four different types of conduct: (1) a grave breach of any of the 1949 Geneva Conventions, or of any Protocol to such convention that the U.S. is party to; (2) conduct prohibited by Article 23, 25, 27, or 28 of the 1907 Annex to the Hague Convention IV; (3) a grave breach of common Article 3 when committed in the context of and in association with an armed conflict not of an international character (defined later in the statute); and (4) when a person acts to willfully kill or cause serious injury to civilians during armed conflict in a way contrary to the provisions of Protocol II[15] as amended on 3 May 1996.[16]

Investigations of Grave Breaches under Geneva Conventions

As we are well aware, under the Geneva Conventions all "grave breaches" constitute war crimes, even though not all war crimes are grave breaches. Qualification as a "grave breach"

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11 *Id*.

12 *Id*.

13 Article 148: Responsibilities of the Contracting Parties. Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/380-600170?OpenDocument

14 18 U.S.C. §2441. Also relevant is 18 U.S.C. § 2442 which concerns the recruitment or use of child soldiers.

15 Otherwise known as the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996.

16 18 U.S.C. § 2441 - War crimes. (c)(1)-(4).

results in universal jurisdiction, which allows prosecution by any State, whether involved or not.

The general duty to investigate possible war crimes is derived from nearly identical provisions contained in each of the four Geneva Conventions that require States Parties "to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches" and to prosecute them or turn them over to another State for prosecution.[17]

Although the text appears to require investigation and prosecution only upon allegation of a "grave breach", Article 146 also requires States Parties to take "measures necessary for the *suppression* of all acts contrary to the provisions of the present Convention other than [] grave breaches", as in the case, for instance, of a violation of Common Article 3 to the Conventions. A duty to investigate is certainly a measure necessary to suppress criminally punishable breaches, regardless of whether or not they are defined as "grave" in the Conventions.

Today, it is clear that the duty to investigate found in the Conventions applies to serious violations thereof that raise the prospect of individual criminal responsibility. This view has been incorporated into United States practice, which we will discuss later.

Command Responsibility under Additional Protocol I

Art. 87 of Additional Protocol I (API) to the Geneva Conventions supplements the obligation to investigate and prosecute war crimes during international armed conflict by requiring "military commanders ... to prevent and, where necessary, to suppress and to report" violations of the Geneva Conventions or the Protocol by anyone under their command or control. It also obliges them "to initiate steps as are necessary to prevent" such violations and "where appropriate, to initiate disciplinary or penal action against violators."[18]

In this context, API expressly contemplates using the internal structures of armed forces to identify, investigate, and prosecute those responsible for violations. The United States, although not a State Party to API, imposes even more extensive requirements on its armed forces (e.g., Department of Defense Law of War Manual (Chapter 18)[19], The Commander's

17 Article 146: Responsibilities of the Contracting Parties. Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

18 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts art. 87, June 8, 1977, 1125 UNTS 3.

19 Office of the General Counsel, U.S. Department of Defense, Department of Defense Law of War Manual (December 2016).

Handbook on the Law of Land Warfare (Chapter 8)[20], and Department of Defense policy), to conduct investigations.

Investigations in NIACs

Neither Additional Protocol II to the Geneva Conventions, applicable in non-international armed conflicts, nor Common Article 3, impose a duty to investigate alleged war crimes. This begs the question of whether there is a requirement under customary international law to investigate war crimes during non-international armed conflicts.

Application of the requirement to investigate in non-international armed conflict is less straight-forward. However, Rule 158[21] of the *Customary International Humanitarian Law* study asserts, with explanation, that the duty applies in such conflicts, an assertion supported by the fact that the treaty instruments cited above in support of a customary rule during international armed conflict are equally applicable in non-international armed conflict.

Moreover, the Rome Statute's preamble "affirms," without limitation to international armed conflict, that "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation."[22] This statement is particularly relevant given that the Statute's catalogue of war crimes differentiates between international and non-international armed conflicts. Finally, decisions of international tribunals evince support for extending the duty to investigate to non-international armed conflict.[23]

Content of the Obligation to Investigate

The relevant provisions of the Geneva Conventions and Additional Protocol I offer only slight guidance on the nature or depth of the investigation that must be conducted into war crimes, or the circumstances that trigger the obligation. However, it is possible to look, by analogy, to human rights law to see there should be four elements to an investigation. They include: independence, effectiveness, promptness, and impartiality. Regardless of the divergent views on the applicability of human rights law in armed conflict, it seems clear that compliance with

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20 Army Field Manual 6-27, *The Commanders' Handbook on the Law of Land Warfare*, (August 2019).

21 Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law (Cambridge University Press, 2005), https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule158.

22 Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 90, available at: https://legal.un.org/icc/statute/99_corr/cstatute.htm#art.8.

23 https://www.icty.org/x/cases/tadic/acdec/en/51002.htm (*Tadic* decision, paras. 111-127).

these principles are the foundation of every credible and objective investigation and these principles should be applied to war crimes investigations.

An American colleague of mine, Professor Mike Schmitt, concluded (and I agree with him) that the four elements, considered in light of the text and context of the GCs as well as API, provided some conclusions as to war crimes investigations. They include, in part:

(1) There is no obligation to conduct investigations to try and uncover LOAC violations. It is "an allegation" of a war crime that leads to the investigation

(2) Investigations are required in IACs and NIACs

(3) The source of the allegation should not be limited

(4) If there is a reasonable suspicion of a war crime, that is enough to trigger the investigation

(5) Only credible allegations require investigations

(6) It is not required that the ID of the possible offender be known, only a suspected violation.

(7) War crimes must be investigated promptly

(8) No prohibition on commanders investigating within their own units or committed by others under their control

(9) Subordinate commanders have the responsibility for reporting and investigating but this does not relieve a superior commander from their responsibility to address war crimes that have come to their attention.

(10) Impartiality and independence does not mean that the investigation must be outside of the chain of command. It means that the investigator must be able to act without undue influence or interference when making findings of possible criminal activity

(11) The depth of the investigation will depend on the complexity of the matter and the seriousness

(12) States must take action to punish those who have violated LOAC. This means appropriate disciplinary action (including possible prosecution) with the military system or by the civilian court system.[24]

24 Michael Schmitt, *supra* note 4, at 79-83.

III. How the United States Implemented its Obligations to Investigate War Crimes

DoD Law of War Program

The Department of Defense implements its obligations under the Geneva Conventions through DoD Directive 2311.01, which was updated in July 2020.[25] This directive revised the old policy that was issued back in 2006.[26]

Under the 2006 policy, a "reportable incident" was "a possible, suspected, or alleged violation of the law of war, for which there is credible information, or conduct during military operations other than war that would constitute a violation of the law of war if it occurred during an armed conflict."[27]

Unfortunately, there was no definition of what constituted "credible information", so under the old policy, it often led to some confusion or disagreement about whether a particular allegation needed to be reported/investigated.

> The policy was also very general and provided that:
>
> 4.1. Members of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.
>
> 4.2. The law of war obligations of the United States are observed and enforced by the DoD Components and DoD contractors assigned to or accompanying deployed Armed Forces.
>
> 4.3. An effective program to prevent violations of the law of war is implemented by the DoD Components.
>
> 4.4. All reportable incidents committed by or against U.S. personnel, enemy persons, or any other individual are reported promptly, investigated thoroughly, and, where appropriate, remedied by corrective action.[28]

The 2020 revised Directive made significant changes to the old Directive. Now, the new Directive requires:

> Members of the DoD Components comply with the law of war during all armed conflicts, however characterized. In all other military operations, members of the DoD Components

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25 DoD Directive 2311.01, *DoD Law of War Program,* (2 July 2020).
26 DoD Directive 2311.01E, *DoD Law of War Program*, (6 May 2006).
27 *Id*. at ¶3.2.
28 *Id*. at §4.

will continue to act consistent with the law of war's fundamental principles and rules, which include those in Common Article 3 of the 1949 Geneva Conventions and the principles of military necessity, humanity, distinction, proportionality, and honor.[29]

It includes reporting of incidents to ensure that commanders can exercise their responsibilities to implement and enforce the law of war. Accordingly, all reportable incidents are reported promptly through the chain of command. Assessments, investigations, inquiries, or other reviews of incidents needed to determine appropriate responses, which may include: (a) Additional review or investigation, such as referral to a responsible Defense Criminal Investigative Organization or inspector general's office of competent jurisdiction; and (b) Transmission to relevant U.S. departments and agencies, partner governments, or other authorities with responsibilities with respect to the reportable incident.[30]

Further, DoD components must take appropriate actions to ensure accountability and to ***improve efforts to prevent violations*** of the law of war in U.S. military operations. All soldiers are trained on the law of war. These actions include:

(a) Providing additional training.

(b) Taking adverse or corrective administrative action, including non-judicial punishment.

(c) Instituting criminal proceedings.

(d) Revising or issuing policies, regulations, instructions, procedures, training documents, or other guidance to incorporate lessons learned.[31]

All military and U.S. civilian employees, contractor personnel, and subcontractors assigned to or accompanying a DoD Component must report through their chain of command all reportable incidents, including those involving allegations of non-DoD personnel having violated the law of war.[32]

If individuals don't feel comfortable going through their chain of command, they can also make reports through other channels, such as the military police, a judge advocate, or an inspector general. Reports will also be forwarded to the chain of command of the subject of the allegation, where appropriate.[33]

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29 DoD Directive 2311.01, *supra* note 18, at ¶1.2a.

30 *Id.* at ¶ 1.2c(4) and (5).

31 *Id.* at ¶ 1.2c(6).

32 *Id.* at ¶ 4.2.b.

33 *Id.* at ¶ 4.1.c.

The unit commander that obtains the information about an alleged violation of the law of war must assess whether the allegation is based on credible information and thus constitutes a reportable incident. The unit commander must immediately report reportable incidents, by operational incident reporting procedures or other expeditious means, through the chain of command to the Combatant Commander. Unlike the old Directive, the 2020 Directive includes a definition of "credible information" as follows:

> Information that a reasonable military commander would believe to be sufficiently accurate to warrant further review of the alleged violation. The totality of the circumstances is to be considered, including the reliability of the source (e.g., the source's record in providing accurate information in the past and how the source obtained the information), and whether there is contradictory or corroborating information.[34]

The unit commander or higher authorities receiving information about a reportable incident must then take steps, where warranted, to preserve on-scene evidence, direct an assessment, investigation, inquiry, or other review. Many cases must be referred to a responsible Defense Criminal Investigative Organization.[35]

If the unit commander or a superior commander determines that an allegation is not supported by credible information, the allegation will nonetheless be forwarded through the chain of command to the appropriate Combatant Commander with this determination. The Combatant Commander may provide additional guidance on making and forwarding such determinations, including regarding the timing and manner of doing so.[36]

Finally, the Combatant Commander must report all reportable incidents to the Chairman of the Joint Chiefs of Staff, the Secretary of Defense, the Commander of United States Special Operations Command, if applicable, and relevant Secretaries of the Military Departments. Further, every six months, the Combatant Commander must ensure that the central collection of information on reportable incidents that the Combatant Commander has reported pursuant to this issuance is updated and accessible by the Secretary of Defense. The central collection must include:

(1) The reportable incidents reported to the Secretary of Defense in the previous 6 months.

(2) The disposition, if any, of each reportable incident within the Combatant Command.

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34 *Id.* at G.2. Definitions.

35 *Id.* at ¶ 1.2c.(5)(a).

36 *Id.* at ¶ 4.2.c.

(3) The results of any review or investigation of reportable incidents completed within the Combatant Command in the previous 6 months and any such information forwarded by the Military Departments.

(4) Information on any significant corrective actions taken within the Combatant Command and any such information forwarded by the Military Departments.

(5) Any additional information the Combatant Commander deems relevant.[37]

That is a very quick and brief discussion on prevention and suppression of war crimes and I look forward to any questions you may have. Thank you!

37 *Id.* at ¶ 4.3.b.

DISCUSSION

The panellists discussed the nationality criterion, the control tests, the duty of due diligence and the duty to investigate, the implementation of IHL in practice and the possibility of a new complicity rule.

1. Nationality criterion

Relevance of nationality to protection

The moderator asked what the different instances of the nationality criterion were in the Fourth Geneva Convention other than in Article 4 and whether this had an impact on the protection of civilians. IHL is traditionally regarded as protecting enemy nationals. There has also been a series of development under IHL. For instance, the protection applies when children are recruited by armed forces and in cases of sexual violence against child soldiers. This means that when reading ICRC's Commentaries, there is protection even if the nationality is the same. The moderator further asked to what extent nationality is a relevant criterion for the protection of civilians.

A panellist distinguished two parts in the question: first, the different occurrences of this criterion in the Geneva Conventions; and second, the relevance of the nationality criterion for the protection of civilians.

Regarding the nationality criterion in the Geneva Conventions, the panellist explained that the nationality criterion does not necessarily appear as such, nonetheless, it is part of the debates on the interpretation of certain provisions. This is particularly apparent in Article 4 GCIII which defines PoWs. In this article, there is no nationality criterion as such. However, state practice, national case law and to a lower extent international case law sometimes consider that the nationals of the detaining power cannot claim the PoW status. The debate in that case relates to whether there is an issue of nationality or not. According to the panellist, this is accepted but not necessarily as a requirement of nationality per se, rather as another sort of connection or linkage.

The panellist highlighted that another provision where the nationality criterion does not appear as such but is implied is Common Article 3 GCs, which sets out a list of criteria or elements for non-discrimination. In this list of Common Article 3, nationality does not figure as a criterion. The nationality criterion does appear in all other provisions, be it in the GCs or elsewhere, where there is a list of criteria for non-discrimination. The only article in which

it has been removed is Common Article 3. The panellist concluded that this is an issue that requires further reflection.

Secondly, on the question as to whether the nationality criterion is still relevant for the protection of civilians, the panellist said that although there is no clear answer on that and it is still part of an ongoing research, it is not so much the idea of nationality but rather the idea of a relationship or a connection between a State and an individual that matters. The question then would become: is the individual connected with a State and does this contribute to acquiring better protection or on the contrary to being removed from protection?

Additional criteria complementing or superseding nationality

The moderator asked what kind of rapprochement or connection with a State is likely to supersede the formal nationality criterion in the case of an international armed conflict where nationals of the same State are fighting each other, e.g. the ICTY allegiance or ethnicity or other links of another nature. This would be the hypothesis of an IAC by proxy where a third State controls a group fighting the territorial State. Moreover, the moderator asked how such links or connections could be established with certainty in this case and without endangering the individual on whose behalf protection is claimed.

The broader approach involving allegiance and ethnicity has been criticized for being difficult to prove. Allegiance is volatile and likely to change during a conflict for one individual. This means that the debate around nationality would also apply for allegiance because there is no definition of what allegiance is. Allegiance is a very old term that comes from the feudal system. This has not yet been addressed, either by the jurisprudence or by any convention. On the contrary, ethnicity was briefly addressed by the ICTR, although in a specific context. It is therefore a bit more specific.

The panellist recommends adopting a case-by-case and gradual approach. At first sight this seems complicated, however cases of individuals falling under the power of their own State are very rare. The proposed approach in such cases would be to first look at nationality. Then if the nationality criterion does not apply because the context or the circumstances in proxy wars are such that the relationship between the individual and a given State is unclear, the next criterion to look at would be ethnicity, which would be less volatile that allegiance. Ethnicity is understood as a community of people who share the same language and beliefs. This would also be a way to respond to the criticism that has been made that a criterion that is too broad would allow for too broad a protection and include all individuals under Article 4, which was not the intention of the legislators when the Convention was adopted. Then, if the criterion is too difficult to apply, the panellist recommends switching on a case-by-case basis

to the allegiance criterion. If it does not provide effective results, other alternative criteria may follow, depending on each case, such as the domicile, the positions that the person has taken publicly or acts and the relationship to the State.

The moderator commented that the nationality criterion has the advantage of being an objective one, whereas allegiance or even ethnicity may be more subjective criteria. She asked whether there were concrete elements that define ethnicity and whether the approach should combine objective and subjective criteria.

The panellist answered that making a choice between objective and subjective criteria is sometimes necessary, however it is also sometimes not possible because the situation makes it impossible. Relying on criteria that are as objective as possible would certainly guarantee more legal security. On the other hand, relying on complementary gradual criteria would allow for an approach that can be tailored to a given context, not only according to the type of armed conflict but also to the personal situation of the individual. The panellist drew a parallel with the approach that is used in the ICRC's Interpretative Guidance to the Notion of Direct Participation in Hostilities under IHL: a case-by-case analysis, looking concretely at how the person behaves. The panellist concluded that although it is complex, the legal insecurity can only be solved by analyzing individual situations.

2. Degree of control

The moderator referred to the argument that having two different control tests, an overall control test for the classification of conflicts and an effective control test for state responsibility, would bring more confusion in practice. The moderator said that it was a hint from the ICJ in the Genocide case that a dissociation of the two criteria could be contemplated. However, the ICTY considered that the overall control was also the appropriate test for attribution. Therefore, the moderator said that it is not necessary to distinguish between the two tests: rather, the overall control test could apply both for attribution and for classification.

The moderator also asked whether relying on the effective control test would not be an incentive for States to support groups and contribute to proxy wars with no consequences for them in terms of attribution or conflict classification.
A panellist was of the view that the effective control test was not necessarily appropriate and that the ICTY developed it as a new additional test which created the dichotomy and the continuing discussions between the two courts. The panellist said that the ICC seemed to endorse the overall control test, however the court did not elaborate enough on why the overall control test would be the new test. The panellist then asked why the ICRC considered that the overall control test would be the relevant test in that case, whether it is in terms of providing more

protection to the civilian population or because it endorses the legal reasoning of the ICTY as it was expressed in Tadic. The panellist concluded that in his view, it would be much clearer if there were only one test. The panellist also highlighted that the argument of States escaping responsibility could also work the other way around, by saying that the overall control test would be an incentive for proxies to escape responsibility.

A panellist highlighted that beyond the national legal systems and the specific obligations for each State, there may be a need to unify standards, in particular as far as the EU is concerned. Another panellist highlighted that from his perspective, EU CSDP missions and operations are not conducted within the framework of armed conflicts and as such, IHL does not bind EU missions and operations. Nonetheless, this is a discussion relating to the applicability of IHL to multinational forces as a whole, including EU, UN and NATO forces. Regarding the EU more specifically, the panellist said that the EU and its Member States would abide by what the Council would determine as being applicable in the framework of CSDP missions and operations.

3. Duty of due diligence

The moderator pointed to the duty of due diligence under Common Article 1 and highlighted that it may be difficult for States to know what concrete steps they need to take to implement their positive obligations. The moderator further asked what the limits of such a positive obligation would be.

A panellist said there are also some legal disputes concerning for instance the subjective or objective nature of due diligence, both under Common Article 1 and due diligence cases in general. However, the capability of the State per se is already a limit. The panellist referred to the Bosnian Genocide case by saying that the closer a State is, the stronger the possibility of influencing a State party or another party, e.g. a non-state actor, the stronger the obligations will be. The panellist gave the example of organizational practices of the German government: the government established bodies to collect and bring together the information that is available, for instance regarding the situation in Afghanistan in 2021. The panellist suggested that such practices could also be implemented by non-state actors.

Another panellist said that for the US, the government may decide to cut off arms sells or to restart arms transfers depending on the outcomes of the discussions when there are suspicions or indications that there are violations taking place. However, the panellist also specified that the US does not support the view that Common Article 1 entails external legal obligations regarding external support. Since the 1940s and the Pictet's Commentary, the US has always

been of the view that it is an internal obligation for States. Lastly, the panellist asked whether the case involving the UK[1] was not based on the ATT rather than Common Article 1.

A panellist replied that the interpretation of Common Article 1 is still debated in ongoing legal disputes, as for Article 16, between more restrictive interpretations and broader interpretations. However, with respect to Common Article 1, the panellist said in the last ten years, more and more States accepted the external legal obligations. For instance, the German government has changed its legal position over time and there is therefore a move in that direction. Nonetheless, the US did not do so. The panellist also confirmed that the UK case indeed relates to the ATT, which is yet another field through which the same issue comes up, with duties of monitoring, transparency and the prohibition of transfers. The case was not on the ATT per se but more on implementing measures, on the EU and UK national criteria for exportations. Therefore, it would imply transferring the standard and using that standard for the interpretation of Common Article 1.

A participant added that the UK case was not about whether the arms being used violate IHL or human rights law. The question, under the EU directive and UK domestic law, was whether the Secretary of State had introduced a system that was capable of *enabling* that. The Court was very careful to limit itself to that because otherwise it would have been appealed. The participant also emphasized that the UK claimed that the violations happened incidentally or occasionally and that they did not intend them. However, the panellist said that the issue is not whether war crimes are being committed, but whether violations of IHL are being committed, which does not only depend on intention.

4. Investigation

Obligation to prevent and suppress IHL violations

Reacting to a question from the moderator, a panellist agreed that the obligation to suppress IHL violations entails that there is a need to investigate any type of violations, because it would be impossible to suppress them without investigating. The panellist further confirmed that investigations are about serious violations of IHL, not only grave breaches, i.e. anything that raises individual criminal responsibility. In addition, the panellist confirmed that IHL violations do not only give rise to individual criminal responsibility, but also state responsibility.

1 UK Court of Appeal (Civil Division), *The Queen (on the application of Campaign Against Arms Trade) and The Secretary of State for International Trade* [2019] EWCA Civ 1020

A participant commented that if the panellist accepted that there is an obligation to prevent and suppress violations of IHL, not war crimes, it should be noted that many of these violations of IHL include violations that do not give rise to criminal liability. This means that States will have to look at their national systems. For instance, if a system for target identification takes information from informers without checking their reliability, the forces may end up hitting a civilian target with large number of casualties. There would be not war crime committed because there is no mental element, but there is a violation of IHL because the national system does not satisfy the requirement for determining that an object is a military objective. The participant mentioned that the investigation into the strike on the MSF hospital in Kundunz was conducted in an efficient manner as far as criminal law and disciplinary law are concerned, however it was a failure regarding state responsibility. The participant further asked whether there was a system in place to investigate the civil liability of the US and a panellist said that it does not happen and that usually it falls under a criminal law discussion rather than state responsibility.

Independence and transparency

The moderator said that in the context of the expert process that took place for the drafting of the Guidelines on investigating IHL violations, which was a project conducted by the Geneva Academy and the ICRC, there were many discussions on the notions of independence and transparency. The moderator asked the panellists to clarify these two criteria.

A panellist said that for the United States, independence does not necessarily mean outside of the chain of command, although it is better if the investigation is outside of the chain of command. For most of the investigations, if this occurred at the company level or the battalion level, the investigator is senior level than the individuals that are involved in the incident, which from the perspective of the panellist means that the investigator is outside of the incident. The panellist explained that in the view of the US military, there is always a chain of command and everyone is subject to it all the way up to the President of the US. They also recommend bringing in the criminal investigative services, with military police forces conducting the investigations or sometimes reliance strictly on the unit.

Regarding transparency, the panellist said that the US do not release many of their criminal investigation reports. The reports of the court martial are public and can be released. However, it is done in certain way. If it is within the military, they will brief the family members of the military. The panellist said that with respect to victims' families, that can be harder to do. The panellist gave the example of a strike in ISIS territory, by saying that in such a case the forces would not have the ability to send an investigator to talk to the family members, while some NGOs may have the ability to do so.

Another panellist added three remarks. First, the panellist agreed with the previous panellist that ensuring respect is an internal component, apart from some external elements that are provided for in specific IHL provisions such as the ones on the transfer of PoWs to another State or the obligation to prosecute or extradite. The internal component entails an obligation to ensure respect by the members of a State's own forces. Second, the panellist said that the investigation is often regarded as being either within or outside the chain of command while in practice it is both inside and outside. The duty to investigate is part of the command responsibility in order to prevent but there is also an obligation to repress that can take place within the chain of command. Then with allegations of war crimes, there may be a criminal procedure which will mostly be dealt with outside of the chain of command by an independent and impartial organ, be it within or outside the military. Lastly, on transparency, the panellist said that usually Belgium does not disclose some of the practices they have in terms of targeting and detention operations. For instance, Belgium was accused by Russia to have committed a war crime through air strikes in Mosul. Such cases are referred to a specific commission within parliament, "*le suivi des operations militaires*". What happened during the alleged violations is disclosed, but only to the members of Parliament, in order to have democratic oversight over what the armed forces are doing in the context of operations that were authorised by Parliament.

Another panellist said that indeed these notions are disputed, and many States take a more restrictive approach. On proxy warfare more specifically, the panellist said that what matters is the State's behaviour, notably any form of logistical or weapon support, how the State and its agents are acting rather than the concrete activities of a non-state actor that would be attributed. Therefore, it is not truly an external dimension that falls under Common Article 1.

A panellist also encouraged the ICRC to expand more on best practices for investigations in the Commentaries.

5. Contextual implementation of IHL

A panellist said that there is no one size fits all definition of nowadays conflicts and that at the same time the operations depend on the legal classification of the conflict, which depends on the assessment of the facts. In practice, the joint operation planning group includes legal advisers and the government who decides on deploying forces and how. The joint operation planning group develops a concept of operations that will result in an operational plan. The panellist stressed that it is important to analyze the fact on the ground, which will lead to the classification of the conflict between not an armed conflict, a NIAC – either low intensity/ high intensity – or an IAC. That would then be the starting point for national forces in order to develop rules of engagement, detention rules or the operational plan or the mission plan. From

a legal perspective, the analysis of the facts leads to the classification of the conflict and then to the applicable law and then the applicable law is translated in rules that are understandable for the individual soldiers on the ground and commanders. Nonetheless, the panellist emphasised that this depends on the analysis of the facts and the specific context of that specific military operation. Consequently, what is valid for one operation may be completely invalid or irrelevant in the framework of another operation. This means that the legal assessment needs to be contextual and specifically tailored to the theatre of operations, beyond new labels which do not refer to the typology of conflicts as such.

6. Complicity rule

The moderator asked whether, given the ICJ's approach in the Bosnian genocide case regarding Article 16 of the Draft Articles on State Responsibility, it would be possible to envisage a complicity rule between States and non-state actors. She also asked whether such a rule would not better describe the relationship in proxy warfare since it entails an active contribution.

A panellist said that such a rule could not necessarily be grounded on the Bosnian Genocide case because Article 16 did not really play out in that case. The case was more about general law of Article 1 of the Genocide Convention. The panellist agreed that this would be a sensible norm on a theological level, however the panellist underscored that there are already disputes within state practice about knowledge or intent and therefore it is difficult to imagine that this rule would crystallize. In addition, it might be easier to use the norms that exist and develop them in subsequent practice instead of creating new obligations and finding support for that. As a result, Article 1 would be a better option in that case.

PARTICIPANTS LIST IN BRUGES

This 22nd edition of the Bruges Colloquium was held in a hybrid format, online and in Bruges. Over 380 participants from about 60 countries joined the Colloquium online, while the following participants participated in the Colloquium in Bruges:

- **AMANI CIRIMWAMI Ezéchiel**
  Max Planck Institute Luxembourg for Procedural Law
- **ANDEREGG Mirco**
  Swiss Armed Forces
- **ARAI-TAKASHI Yutaka**
  University of Kent
- **BARTELS Rogier**
  International Criminal Court/Netherlands Defence Academy
- **BERNARD Alexandra**
  KU Leuven
- **BEYTOUT-LAMARQUE Coline**
  French Red Cross
- **BORGES Pedro**
  KU Leuven
- **BUMGARDNER Sherrod Lewis**
  NATO
- **BUMGARDNER Lewis Billing**
  UCLouvain
- **DEBARRE Alice**
  International Committee of the Red Cross
- **DE COCK Christian**
  EEAS – Military Planning and Conduct Capability
- **DE KLERK Steve**
  CARE
- **DEPREZ Christophe**
  University of Liège
- **DE VIDTS Baldwin**
  International Institute of IHL
- **DÖRMANN Knut**
  ICRC Brussels
- **DOUCET Ghislaine**
  International Committee of the Red Cross

- **DURHIN Nathalie**
  NATO SHAPE
- **EDWARDS Christie**
  OSCE Office for Democratic Institutions and Human Rights
- **EL AMOURI Sarah**
  Vrije Universiteit Brussel
- **FAURE Camille**
  French Ministry for the Armed Forces
- **FERNANDEZ DEL COTERO CECADES Nieves**
  European Commission, ECHO
- **FRANGI Ariadne**
  Vlaamse Overheid
- **GAGGIOLI Gloria**
  Geneva Academy
- **GIAUFFRET Charlotte**
  International Committee of the Red Cross
- **GOES Benjamin**
  Chancellery of the Prime Minister, Belgium
- **GULDAHL COOPER Camilla**
  Norwegian Defence University College
- **HAMPSON Françoise**
  University of Essex
- **HENCKAERTS Jean-Marie, International Committee of the Red Cross**
- **JACQUES Philippe, Université Catholique de Louvain**
- **JANSSENS Pauline Charlotte, KU Leuven**
- **KOLANOWSKI Stéphane, International Committee of the Red Cross**
- **KOUTROULIS Vaios, Université Libre de Bruxelles**
- **KRIEGER Heike, University of Berlin**
- **LONERGAN Peter, KU Leuven**
- **MACAK Kubo, International Committee of the Red Cross**
- **MARQUET David-Pierre**
  International Committee of the Red Cross
- **MARTINEZ PEREA Alejandra**
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- **MCCLEAN Stefan**
  KU Leuven
- **MEIER Michael W.**
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- **MIKOS-SKUZA, Elzbieta**
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- **MONACO Louna**
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- **ORKIN Mikhail**
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- **PACJOLSKA Magdalena**
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  KU Leuven
- **PAVON Iris**
  Mission of Switzerland to NATO
- **PEREZ BLANCO Beatriz**
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- **PION Kato**
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- **PLAMENAC Jelena**
  United Nations
- **PRESSLEY Elise**
  Belgian Red Cross-Flanders
- **ROSSELLINI Sabine**
  French Red Cross
- **SASSÒLI Marco**
  University of Geneva
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- **VANCOLLIE Evelyn**
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- **WARNOTTE Pauline**
  International Committee of the Red Cross
- **WILLIAMS Blake**
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- **WOJCIK Agnieszka**
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CICR

22nd Bruges Colloquium on International Humanitarian Law
21-22 October 2021

SAME LAW, NEW WARS: THE ENDURING RELEVANCE OF INTERNATIONAL HUMANITARIAN LAW AND THE IMPORTANCE OF THE UPDATED ICRC COMMENTARIES

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Hybrid edition, online and in Bruges

Simultaneous translation into French / English / Russian
Traduction simultanée en anglais/français/russe
Синхронный перевод на французский / английский / русский языки

Day 1: Thursday, 21 October 2021
09:00-17:00 (CET)

Registration and Opening Statements
Inscription et discours d'ouverture

9:00 - 9:45 Registration
09:45 - 10:30 Openings Statements

Speakers

Federica Mogherini, Rector, College of Europe
Gilles Carbonnier, Vice-President, ICRC
Knut Dörmann, Head of Delegation, ICRC Brussels

10.30 - 10:50 Coffee break

Keynote Speeches – The Updated Commentaries and their Relevance in Practice
Conférenciers.ères d'honneur – Les Commentaires révisés et leur pertinence dans la pratique

10:50 – 10:55 Introduction to the topic by the Chair **Knut Dörmann**, ICRC Brussels

Topics to be addressed:

1. *The project to update the Commentaries on the Geneva Conventions and their additional Protocols*
2. *Ratifying the treaties, applying the dispositions: a State perspective*
3. *NATO perspective on the influence of the Commentaries*
4. *The EU and IHL: supporting the effective application and relevant interpretation*

10:50 – 12:00 Presentation by the keynote speakers

Jean-Marie Henckaerts, ICRC
Eamon Gilmore, EU Special Representative for Human Rights, International Humanitarian Law and International Criminal Justice
Camille Faure, Ministry of Armed Forces, France
John Swords, Office of Legal Affairs, NATO HQ

12:00 – 13:30 **Sandwich lunch**
Address: Garenmarkt 15, 8000 Bruges

1st Panel – The Common Articles: Cross-Cutting Interpretation Challenges
1er panel – les articles communs : questions transversales d'interprétation

13:45 – 13:50 Introduction to the topic by the Chair, **Mikhail Orkin**, ICRC

Topics to be discussed:

1. *Interpreting the GC IV in relation to conflict classification; occupation law and the invasion phase and consent for the implementation of humanitarian services*
2. *State responsibility of an indirect occupying power for conduct of an armed group under its control*
3. *Common Article 3 and the obligation of non-refoulement*

13:50 – 14:30 Presentation by the speakers

Yutaka Arai-Takahashi, University of Kent
Nathalie Durhin, NATO SHAPE

14:30- 15:15 Moderated Discussion and Q&A

15:15 - 15:30 Coffee break

2nd Panel – The Third Convention: Protecting Prisoners of Today's Wars
2ème panel – La Troisième Convention : protéger les prisonniers des guerres contemporaines

15:30 – 15:35 Introduction to the topic by the Chair, **Elzbieta Mikos-Skuza**, University of Warsaw and College of Europe (Natolin), Humanitarian Fact Finding Commission

Topics to be discussed:

1. *Setting the scene: the continued relevance of protections for prisoners of wars*
2. *The relevance of the Third Geneva Convention in contemporary armed conflicts*
3. *The modalities of detention and concerns faced by state militaries in capturing prisoners of wars*

15:35 – 16:20 Presentation by the speakers

Cordula Droege, ICRC
Marco Sassòli, University of Geneva
Camilla Guldahl Cooper, Norwegian Defence University College

16:20 – 17:00 Moderated Discussion and Q&A

17:30 - 20:30 **Standing dining reception**
Address: Garenmarkt 15, 8000 Bruges

Day 2: Friday, 22 October 2021
09:00-13:00 (CET)

3rd Panel – Fourth Convention Commentary: IHL-IHRL, between Complementarity and Interplay

3ème panel – Commentaire de la Quatrième Convention : DIH-DH, entre complémentarité et interaction

09:00 – 09:05 Introduction to the topic by the Chair, **Kubo Mačák**, ICRC

Topics to be discussed:

1. *IHL-IHRL: Defining the contours of state obligations*
2. *Law enforcement in occupied territories and procedural guarantees: interaction between GC IV and IHRL*
3. *Bringing IHRL abroad during military operations*

09:05 – 10:00 Presentation by the speakers

Vaios Koutroulis, Free University of Brussels
Françoise Hampson, University of Essex
Mirco Anderegg, Swiss Armed Forces

10:00 - 10:40 Moderated discussion and Q&A

10:40 - 11:00 Coffee break

4th Panel – Fourth Convention Commentary: Selected Topics from the Audience

4ème panel – Commentaire de la Quatrième Convention: sélection de thèmes proposés par les participants

11:00 – 12:45 Discussion and Q&A moderated by the Chair, **Gloria Gaggioli**, Geneva Academy, Swiss National Science Foundation, University of Geneva

Topics to be discussed:

1. *Questioning the relevance of the nationality criterion*
2. *Urban, protracted and hybrid: applying the 4th Convention to nowadays conflicts*
3. *Nobody fights alone: proxy wars and the protection of civilians*
4. *Prevention and repression: a double edge sword to ensure compliance?*

Speakers:

Odile Vandenbossche, University of Liège
Christian De Cock, EU Strategic HQ (MPCC)
Heike Krieger, Freie Universität Berlin
Michael W. Meier, Office of the United States Army Judge Advocate General

12:45 – 13:00: **Closing Statement by Knut Dörmann**, ICRC Brussels

SPEAKERS' BIOGRAPHIES
CURRICULUM VITAE DES ORATEURS

Day 1: Thursday, 21st October 2021

Welcome and Opening Addresses
Allocutions de bienvenue et discours introductifs

Ms. Federica Mogherini is the Rector of the College of Europe since September 2020. She co-chairs the United Nations High Level Panel on Internal Displacement since January 2020. From 2014 to 2019, she has served as the High Representative of the European Union for Foreign Affairs and Security Policy and Vice-President of the European Commission. Prior to joining the EU, she was the Italian Minister for Foreign Affairs and International Cooperation (2014), and a Member of the Italian Chamber of Deputies (2008-14). In her parliamentary capacity, she was Head of the Italian Delegation to the NATO Parliamentary Assembly and Vice-President of its Political Committee (2013-14); member of the Italian Delegation to the Parliamentary Assembly of the Council of Europe (2008-13); Secretary of the Defence Committee (2008-13); and member of the Foreign Affairs Committee. She also coordinated the Inter-Parliamentary Group for Development Cooperation. Federica Mogherini is a Fellow of the Harvard Kennedy School. She is also a member of the Board of Trustees of the International Crisis Group, Fellow of the German Marshall Fund, member of the Group of Eminent Persons of the Preparatory Commission for the Comprehensive Nuclear Test Ban Treaty Organization, member of the European Leadership Network for Multilateral Nuclear Disarmament and Non-Proliferation, and member of the Board of Directors of the Italian Institute for Foreign Affairs (IAI). She has a degree in Political Science from the University of Rome "La Sapienza". She was born in Rome in 1973, lives in Belgium and has two daughters.

Dr. Gilles Carbonnier is the Vice-President of the International Committee of the Red Cross (ICRC) (appointed in 2018). Since 2007, Dr. Carbonnier has been a professor of development economics at the Graduate Institute of International and Development Studies (Geneva), where he also served as director of studies and president of the Centre for Education and Research in Humanitarian Action. His expertise is in international cooperation, the economic dynamics of armed conflict, and the nexus between natural resources and development. His latest book, published by Hurst and Oxford University Press in 2016, is entitled Humanitarian Economics: War, Disaster and the Global Aid Market. Prior to joining the Graduate Institute, Dr. Carbonnier worked with the ICRC in Iraq, Ethiopia, El Salvador and Sri Lanka (1989–1991), and served as an economic adviser at the ICRC's headquarters (1999–2006). Between 1992 and 1996, he was in charge of international trade negotiations (GATT/WTO) and development cooperation programmes for the Swiss State Secretariat for Economic Affairs.

Dr. Knut Dörmann is Head of Delegation of the ICRC Brussels delegation to the EU, NATO and the Kingdom of Belgium since June 2020. Previously he was ICRC's Head of the Legal Division and Chief Legal Officer (December 2007 - May 2020), Deputy Head of the Legal Division (June 2004 - November 2007) and Legal Adviser at the Legal Division (December 1998 - May 2004) (in charge of among others the law applicable to the conduct of hostility, cyber warfare, the protection of the environment, international criminal law). He holds a Doctor of Laws (Dr. jur.) from the University of Bochum in Germany (2001). Prior to joining the ICRC, he was Managing Editor of Humanitäres Völkerrecht - Informationsschriften (1991-1997), Research Assistant (1988-1993) and Research Associate (1993-1997) at the Institute for International Law of Peace and Armed Conflict, University of Bochum. Dr. Dörmann has been a member of several groups of experts working on the current challenges of international humanitarian law. He has extensively presented and published on international humanitarian law, international law of peace and international criminal law. He received the 2005 Certificate of Merit of the American Society of International Law for his book 'Elements of War Crimes under the Rome Statute of the International Criminal Court', published by Cambridge University Press.

Session One – Keynote Speeches: The Updated Commentaries and their Relevance in Practice

Première session – Conférencier.ères d'honneur : Les commentaires révisés et leur pertinence dans la pratique

Dr. Jean-Marie Henckaerts is head of the ICRC project to update the Commentaries on the Geneva Conventions of 1949 and their Additional Protocols of 1977. So far, three commentaries have been published: 1/ 2016 – updated Commentary on the First Geneva Convention ; 2/ 2017 – updated Commentary on the Second Geneva Convention; 3/ 2020 - updated Commentary on the Third Geneva Convention. Prior to this, he was the head of the ICRC's project on customary international humanitarian law. He holds the degrees of Doctor of Juridical Science from The George Washington University Law School, Master of Laws from the University of Georgia School of Law and Bachelor of Laws from the University of Brussels.

Mr. Eamon Gilmore is the European Union Special Representative for Human (since March 2019) and has also served as EU Special Envoy for the Colombian Peace Process since October 2015. Eamon was Ireland's Deputy Prime Minister and Minister for Foreign Affairs and Trade from 2011 until July 2014 in a coalition government which succeeded in steering Ireland from an IMF bailout to become one of the fastest growing economies in the European Union. During this time, he also led Ireland's successful Presidency of the European Union, was President of the EU's General Affairs Council and was Chairperson-in-Office of the OSCE. Eamon Gilmore oversaw and renewed Ireland's development aid programme and developed a new Government

policy to actively engage with the 70 million members of the Irish Diaspora throughout the world. He was leader of the Irish Labour Party from 2007 to 2014 and led the party to its best ever election results in the general and presidential elections of 2011. He was one of the longest serving members of the Irish Parliament (Dáil Éireann), from 1989 to 2016, being elected in six successive elections to represent the constituency of Dun Laoghaire. Eamon is a former Union leader and active advocate for social rights and a champion of the liberal agenda. He has campaigned for women's and LGBT+ rights, playing an active role in the legalization of contraception, divorce, abortion and same sex marriage in Ireland. Eamon has long been a campaigner for peace. As Minister for Foreign Affairs and Trade, he managed the Northern Ireland Peace Process on behalf of the Irish Government. Since his resignation as leader of the Labour Party in 2014, Eamon has been actively involved with the EU on its external work. In 2016, he was appointed adjunct professor at the School of Law and Government in Dublin City University. In 2017, he was Visiting Practitioner Professor at the School of Public Policy in the Central European University, Budapest. He has also lectured at universities, think tanks and public policy conferences throughout Europe, the UK, the USA, Latin America, China and Africa. He has written two books; "Inside the Room" tells of his experience in Ireland's Crisis Government (2011 – 2014). Eamon has been honored with awards for his leading role in the promotion of human rights. In 2015, he was named by the Washington based "Foreign Policy" Magazine as one of the 100 leading Global Thinkers for his role in Ireland's Marriage Equality Referendum, which approved same-sex marriage. In 2017, Eamon was shortlisted for the European Innovation in Politics Award for his role in the same sex marriage campaign, and also for his idea in 2010 to establish the Constitutional Convention (later the Citizen's Assembly), which recommended the holding of the referendum. The Government of France has made him an Officier of the Legion d'Honneur. Colombia has honoured him with the Order of San Carlos (Gran Cruz) for his work on the Colombian Peace Process. In his current role as EU Special Representative for Human Rights, Eamon will act to enhance the European Union's effectiveness, presence and visibility in protecting and promoting human rights in the world. Eamon grew up on a small farm in Caltra, County Galway. He was educated at Garbally College, Ballinasloe and at the National University of Ireland, Galway, which has conferred him with an Honorary Doctorate in Laws.

Ms. Camille Faure is, since 2017, the Deputy head of the Department of legal affairs, Ministry for the armed forces. Before this, she was the Head of the International and European Law Division, Department of Legal affairs, Ministry of Defense (between 2015-2017). Previously, she was *Chargée de mission* for the Legal adviser of the Department of legal affairs of the Ministry of Foreign Affairs (2011-2015), the Head of the International Law Office, Department of legal affairs, Ministry of Defense, (2008-2011), the Deputy Head of the planning of investment expenditures Office, Department of finance, Ministry of Defense (2007-2008), the *Chargée de*

mission for the Hospitalization and Care Organization Division (DHOS), Health Ministry (2002-2004), and the Hospital deputy director, Regional University Hospital Center of Nancy (1998-2002). She studied at the Graduate of Ecole nationale d'administration (ENA), (2005-2007), the Graduate of Ecole nationale de la Santé publique (ENSP), (1996-1998), the Graduate of Institut d'Etudes Politiques de Strasbourg, (1989-1992). She also has a Master's Degree in health law and bioethics, Faculty of law and political sciences, Rennes, (1997).

Mr. John Swords is Secretary General Jens Stoltenberg's chief legal adviser. He leads the multinational legal team in the Office of Legal Affairs, which provides timely legal advice on policy issues, develops consensus solutions for compliance with multinational legal requirements, and promotes and defends the Organization's legal interests in numerous internal and external venues. He also represents NATO in external legal bodies such as the Council of Europe's Committee of Legal Advisers and conducts regular engagements with NATO Allies, Partners, and other international organizations as well as the general public. Prior to joining NATO, Mr. Swords worked in the United Kingdom's Government Legal Department for 15 years. For the last six of those years Mr. Swords was the head of the Operational and International Humanitarian Law Division in the United Kingdom's Ministry of Defence. Mr. Swords was called to the bar in 2002 and is a member of Gray's Inn.

Session Two – 1st Panel: The Common Articles: Cross-Cutting Interpretation Challenges
Deuxième session – 1er Panel : Les articles communs : questions transversales d'interprétation

Mr. Mikhail Orkin is a Legal Adviser in the Commentaries Update Unit at the International Committee of the Red Cross. Previously, Mikhail was an operational legal adviser at the ICRC Delegation in Israel and the Occupied Territories. Mikhail has diverse legal experience as a legal adviser, prosecutor, and trial advocate. Mikhail has a Bachelor of Laws from University College London, an LL.M. from Tel-Aviv University and an LL.M. in International Human Rights and Humanitarian Law from American University Washington College of Law.

Prof. Yutaka Arai-Takahashi, Professor of international human rights law, University of Kent, Brussels; visiting professor of international law at Xi'an Jiaotong Univ, China. Yutaka did his LLB and LLM at Keio before obtaining PhD at University of Cambridge. His main publications include: **Monographs**: *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, 2002); *The Law of Occupation - Interplay between International Humanitarian Law and International Human Rights Law* (Brill, 2009); **Articles**: '"Scrupulous but Dynamic" – The Freedom of Expression and the Principle of Proportionality under European Community Law', (2005) 24 *Yearbook of European Law* 27 (OUP); 'Unprivileged (Unlawful) Combatants Captured on a Battlefield and the Geneva Conventions',

(2018) 48 *Israel Yearbook on Human Rights* 63 (Brill); 'Unearthing the Problematized Terrain of Prolonged Occupation', (2019) 52 *Israel Law Review*125 (CUP); 'Thresholds in Flux – the Standard for Ascertaining the Requirement of Organization for Armed Groups under International Humanitarian Law', 26 *Journal of Conflict and Security Law* 79 (OUP)); and **Book chapters**: 'Proportionality', in: D. Shelton (ed.), *The Oxford Handbook of International Human Rights Law,* (OUP 2013) 446; 'Excessive Collateral Civilian Casualties and Military Necessity: Awkward Crossroads in International Humanitarian Law (IHL) between State Responsibility and Individual Criminal Liability', in F. Baetens & C. Chinkin (eds), *Sovereignty, Statehood and State Responsibility* (CUP, 2015) 325.

Col Nathalie Durhin graduated in Public Law from "*Sciences Po Paris*" in 1992. She joined the French Air Force in 1995, and got a specialization in International Humanitarian Law. She also obtained a master degree in International Relations and Military Strategy from the Universities of Milan and Rome (2010). She was Legal Advisor (LEGAD) for the Balkans region at NATO JFC Naples (2001-2002), and Chief Admin of Nancy Air Base (2006-2009). She headed the LOAC bureau within the Department of legal affairs at the French Ministry of defense (2010-2013), then the Operational Law section at the French Joint Staff (2013-2016). She was also LEGAD of the Inspector-General for the French Air Force (2017-2019). She has been deployed as LEGAD in Kosovo and Bosnia, two times in Afghanistan, at Naples CJTF for Operation Unified Protector (Libya), and for the French operations Serval and Barkhane in Mali and Chad. In 2016, she has been assigned in New York, as a military expert within the team of the Special Coordinator on improving UN response to sexual exploitation and abuse (SEA). Since September 2019, she is the Operational Law Branch Head within SHAPE Office of Legal Affairs (NATO – Belgium).

Session Three – 2nd Panel: The Third Convention: Protecting Prisoners of Today's Wars
Troisième Session – 2ème Panel : La Troisième Convention : protéger les prisonniers des guerres contemporaines

Dr. Elzbieta Mikos-Skuza is a senior lecturer at the Faculty of Law, University of Warsaw, Poland and a visiting professor at the College of Europe in Natolin. Her fields of specialization include public international law, international humanitarian law and peaceful resolution of international disputes. She is the Director of Master Studies on Humanitarian Action (joint studies organized by the consortium of European universities called NOHA – Network on Humanitarian Action) and Postgraduate Studies on Humanitarian Assistance at the University of Warsaw. For many years she has been volunteering with the Polish Red Cross, including the function of PRC's vice-president. She is also vice-president of the International Humanitarian Fact-Finding Commission established under Protocol Additional I of 1977 to the Geneva Conventions of 1949.

Dr Cordula Droege is the chief legal officer and head of the legal division of the ICRC, where she leads the ICRC's efforts to uphold, implement and develop international humanitarian law. She joined the ICRC in 2005 and has held a number of positions in the field and at headquarter, including as head of the legal advisers to operations, and most recently as chief of staff to the President of the ICRC. She has some twenty years of experience in the field of international law, and in her earlier career worked for the International Commission of Jurists, the Inter-American Court of Human Rights and the Max Planck Institute for International Law. She holds a law degree and a phD from the University of Heidelberg and an LL.M from the London School of Economics.

Prof. Marco Sassòli is professor of international law at the Faculty of Law of the University of Geneva, Switzerland. From 2001-2003, he has been professor of international law at the Université du Québec à Montreal, Canada, where he remains associate professor. He is commissioner of the International Commission of Jurists (ICJ). Marco Sassòli has worked from 1985-1997 for the International Committee of the Red Cross (ICRC) at the headquarters, inter alia as deputy head of its legal division, and in the field, inter alia as head of the ICRC delegations in Jordan and Syria and as protection coordinator for the former Yugoslavia. He also chaired from 2004-2013 the board of Geneva Call, an NGO engaging non-State armed actors to respect humanitarian rules. From 2018-2020 he has been director of the Geneva Academy of International Humanitarian Law and Human Rights. Marco Sassòli has published widely on international humanitarian law, human rights law, international criminal law, the sources of international law, and the responsibility of states and non-state actors.

Prof. Camilla Guldahl Cooper is Associate Professor in operational law at the Norwegian Defence University College / Command and Staff College, where she has been employed since 2008. She has a bachelor (LLB) in Law and Sociology from Cardiff University, masters (LLM) in Public International Law from the University of Nottingham, and doctorate (PhD) in Operational Law from the University of Oslo, including a period as a visiting scholar at the Stockton Center for International Law (US Naval War College). In her PhD-project, which was completed in 2018, Cooper focused on NATO Rules of Engagement, the law of armed conflict and personal self-defence. Cooper has written and updated the Norwegian Manual of the Law of Armed Conflict, and is responsible for the topics the law of armed conflict and NATO for the Great Norwegian Encyclopedia.

Day 2: Friday, 22nd October 2021

Session Four – 3rd Panel: Fourth Convention Commentaries, Part I: IHL-IHRL, between Complementarity and Interplay

Quatrième session – 3ème Panel : Commentaire de la Convention IV, Partie I : DIH et DIDH, entre complémentarité et interaction

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Dr. Kubo Mačák is a Legal Adviser in the ICRC's Legal Division, assigned jointly to the Commentaries Unit and the Arms and Conduct of Hostilities Unit. Prior to joining the ICRC in October 2019, he worked as an Associate Professor at the University of Exeter in the UK. In that position, Kubo taught and researched in the areas of public international law, international humanitarian law, and international cyber law. He is the author of the book *Internationalized Armed Conflicts in International Law* (OUP 2018) and of multiple articles in peer-reviewed journals including the *International Review of the Red Cross*, the *Journal of Conflict and Security Law*, and the *Cambridge International Law Journal*. Kubo is also the General Editor of the *Cyber Law Toolkit*, an interactive online resource on the international law of cyber operations. He holds a doctorate in international law from the University of Oxford (Somerville College), an undergraduate degree in law from Charles University in Prague, and the Diploma of the Hague Academy of International Law.

Prof. Vaios Koutroulis is professor of International Law at the Université Libre de Bruxelles since 2013. He studied law at the University of Athens and the Université Libre de Bruxelles (ULB). He received his PhD in 2011 for a thesis on the relations between *jus contra bellum* and *jus in bello*, currently under publication from Bruylant editions (Brussels). Vaios teaches at the *Université Libre de Bruxelles*, the Catholic University of Lille and the Royal Belgian Military School. His courses include law of armed conflict, international criminal law, law of international responsibility, and public international law. He was also an adviser to the Counsel and Advocate of Belgium in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* before the International Court of Justice. His publications focus mainly on *jus in bello* and *jus contra bellum* and include a monograph on belligerent occupation published by Pedone editions (Paris).

Prof. Françoise Hampson is an Emeritus Professor of Law at the University of Essex. She has acted as a consultant on humanitarian law to the International Committee of the Red Cross and regularly teaches on the courses at the International Institute of Humanitarian Law, San Remo. From 1998 to 2007, she was an independent expert member of the UN Sub-Commission on the Promotion and Protection of Human Rights. Professor Hampson has successfully litigated many cases before the European Court of Human Rights in Strasbourg and, in recognition of her contribution to the representation of Kurdish applicants, was awarded Human Rights

Lawyer of the Year in 1998 jointly with her colleague from the Human Rights Centre, Professor Kevin Boyle. More recently, together with her colleague Professor Noam Lubell, she has submitted third party interventions to the European Court of Human Rights on the relationship between Law of Armed Conflicts and the European Convention on Human Rights (ECHR) in the cases of Hassan v. UK and Georgia v. Russia (No.2). From 2016 to 2021, she was a member of the UN Commission of Inquiry on Burundi. She has taught, researched and published widely in the fields of armed conflict, International Humanitarian Law and on the ECHR.

Dr Mirco Anderegg is the Deputy Head of the Law of Armed Conflict section at the Swiss Armed Forces Staff, advising the Armed Forces on matters of international law since 2017. This section is also in charge of training in international operational law in the Armed Forces and the legal review of weapons, means and methods of warfare. Prior to joining the Armed Forces, Mirco graduated from the University of Fribourg and qualified as an attorney in St.Gallen. He holds the rank of Major and was deployed to the UN mission in Mali (MINUSMA) as a legal adviser in 2020. Mirco is a Co-president of the Swiss group in the International Society of Military Law and the Law of War.

Session Five – 4th Panel: Selected Topics
Cinquième session – 4ème Panel : Commentaire de la Convention IV, Partie II : sélection de thèmes

Prof. Gloria Gaggioli, is the Director of the Geneva Academy of International Humanitarian Law and Human Rights and an Associate Professor at the Law Faculty of the University of Geneva. She is also member of the board of Geneva Call and of the International Review of the Red Cross. She has researched and taught in several Universities in Denmark, France, Sweden, Switzerland and the United States and published in various fields of public international law. She is currently leading a research project funded by the SNSF on 'Preventing and Combating Terrorism and Violent Extremism: Towards a Legal-Empirical Approach'. Her work has focused notably on issues related to the interplay between international humanitarian law and international human rights law, the right to life and the use of force, including the conduct of hostilities, law enforcement and self-defence. Prior to joining the University of Geneva, she served as Legal Adviser in the legal division of the International Committee of the Red Cross.

Mme. Odile Vandenbossche, is a PhD candidate working on the protection of persons in international humanitarian law through the prism of nationality. She is a member of the Belgian Network of Junior Researchers in International Law. She previously worked as a teaching assistant in Nationality Law at the 'Université de Liège' (Belgium). She also worked as a legal assistant to the Senior Delegate to NATO and the armed forces in Europe at the ICRC Delega-

tion in Brussels and as a legal attaché to the legal division of the ICRC in Geneva. She holds a Master of Laws from the 'Université de Liège' (Belgium) and accomplished part of her bachelor and master degrees at the 'Universiteit Maastricht' (The Netherlands). She also holds an LL.M. in International Human Rights and International Humanitarian Law from the University of Essex (United-Kingdom).

Col Christian De Cock obtained Master degrees in the fields of Aeronautical and Military Sciences, Law, Political Sciences, Public Management, and Security and Defense. Having graduated from the Belgian Royal Military School in 1990, Colonel (GS) De Cock served in the Belgian air force as Platoon and Company Commander for the Force Protection Units (1990-1996). After two years of being a Military Instructor (1996-1998), he taught at the Law Department of the Belgian Royal Military School for five years (1998-2003). He became Legal Advisor from 2004 to 2007, prior to which he joined a course at the Royal Defense College and after which he participated in an Advanced Staff and Command Course at the National Defense College in the Netherlands. In 2008, he took up the position as the Head of the International Law Section of the Legal Department of the Belgian armed forces. From April 2012 till June 2015, he served as the Head of the Operational Law Section, after which he became the Chief of Staff of the Legal Department from July 2015 till July 2016. He held the position as Special Advisor to the Director-General of the Legal Department of the Belgian Armed Forces, after which he became Associate Professor of Law at the Royal Military Academy in January 2017 in the fields of international criminal law, the law of armed conflict and disarmament law. In September 2017, he took up the position as the legal advisor to the Director of the EU Military Planning and Conduct Capability (MPCC). Colonel (GS) De Cock has participated in several operational deployments as legal advisor in Afghanistan (2004, 2006, 2008, 2009, and 2010), during Counter-piracy and Counter-narcotics operations with the Navy, during operation Unified Protector (2011), and operation Inherent Resolve (2014). He is also a member of the visiting teaching staff at the International Institute of Humanitarian Law in San Remo (Course Director of the French Military LOAC Course), member of the visiting teaching staff at the NATO School (Operational Law Course), and guest lecturer at the universities of Ghent, Liège and Tilburg. Colonel (GS) De Cock was rewarded twice the Certificate of Merit by the Military Lieber Society (2008 and 2012).

Prof. Heike Krieger holds the Chair for International and Public Law at the Freie Universität Berlin. She is Max Planck Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg and Co-Chair of the Berlin-Potsdam Research Group (KFG) "The International Rule of Law – Rise or Decline?". She has, inter alia, taught at the Universities of Göttingen, Nottingham,and the Centre for Transnational Legal Studies, London. Between 2007 and 2014 she acted as a judge of the Constitutional Court of the State of Berlin. Heike Krieger

is Editor-in-Chief of the Yearbook of International Humanitarian Law (T.M.C. Asser Press and Springer) and member of the Editorial Board of the Journal of Conflict and Security Law (OUP). Her recent publications include the edited volumes "Law-making and Legitimacy in International Humanitarian Law" (EEP 2021) and "The Legal Pluriverse Surrounding Multinational Military Operations" (OUP 2020, ed. with R. Geiß).

Mr. Michael W. Meier currently serves as the senior civilian adviser to the Army Judge Advocate General on matters related to the Law of Armed Conflict (LOAC). He advises on legal and policy issues involving LOAC, reviews proposed new weapons and weapons systems, serves as a member of the DoD Law of War Working Group, and provides assistance on detainee and Enemy Prisoner of War affairs. Mr. Meier is also an adjunct professor of law at Georgetown University Law Center where he teaches courses on LOAC and is a lecturer at the NATO School in Oberammergau, Germany. Mr. Meier previously served as an Attorney-Adviser with the Office of the Legal Adviser for Political-Military Affairs, U.S. Department of State, from June 2009 until June 2016. Mr. Meier served almost 23 years as an Army Judge Advocate from 1986 until his retirement as a Colonel in August 2009. Mr. Meier earned a B.B.A. degree from Midwestern State University, a J.D. degree from the St. Mary's University, a LL.M. from Georgetown University, a LL.M. in Military Law from The Judge Advocate General's School, and a M.S. in Strategic Studies from the United States Army War College.