21 Summary of the Conference on "Victims of Armed Conflicts at the Juncture of International Humanitarian Law and Human Rights Law"

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On 11 May 2017 the Ministry of Foreign Affairs and Trade of Hungary in cooperation with the Swiss Federal Department of Foreign Affairs hosted an international Conference on "Victims of Armed Conflicts at the Juncture of International Humanitarian Law and Human Rights Law". The Conference brought together academics from various universities, experts and government representatives from a number of countries to discuss the relationship between international humanitarian law and human rights law with a focus on issues relating to compliance, accountability and fact-finding.

Discussions began with examining the similarities and differences between international humanitarian law and human rights law, addressing the relationship between these two branches of international law on an abstract level.

Christine Byron, lecturer in law at Cardiff Law School launched the discussion by highlighting the overlap that exists between these two areas of law, emphasizing that their common purpose is to protect human life and dignity. It is not surprising therefore that in these two fields of law we may find rules that are similar in substance (e.g. the prohibition of torture or inhuman treatment or references to judicial guarantees). It was noted that the principle of non-discrimination must be respected equally when applying human rights and international humanitarian norms. On the other hand, when investigating the primary cause for increased interaction between the two fields, we must also take stock of the main differences between these two regimes. One of the key differences is that international humanitarian law does not provide for individual complaints procedures for the victims. The enforcement mechanisms of international humanitarian law often lack effi-

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ciency in guaranteeing sufficient compliance to ameliorate the situation of civilians in armed conflicts. She underlined that the limitations inherent in the traditional enforcement mechanisms of international humanitarian law compelled victims of armed conflicts to turn to the human rights fora for remedies.

Grave breaches of international humanitarian law are subject to universal jurisdiction. Conversely, as a distinct feature of human rights law, professor Byron pinpointed the functioning of regional human rights mechanisms. She referred to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention) as the most advanced treaty in the realm of human rights protection. A survey of the case law of the European Court of Human Rights (ECHR), or other regional human rights bodies reveals that these apply or refer to international humanitarian law when dealing with conflict situations. Through their practice, these fora contribute greatly to breaking down the barriers between the two areas of law.

The speaker also examined the issue of the *lex specialis* doctrine, a legal tool for solving conflicts of norms. To date *lex specialis* is the prevailing principle in describing the relationship between human rights and international humanitarian law. This doctrine is frequently embraced by military lawyers in order to explain why only international humanitarian law is relevant in an armed conflict. However, a more complex approach must be adopted when explaining the relationship between these two legal regimes. (Reference was also made to the evolving case law of the International Court of Justice.) Depending on a number of considerations, both human rights regulations and international humanitarian law norms may be characterized either as *lex generalis* or *lex specialis*.

While some fear that the differences create tension, others stress the ideological incompatibility between the two branches of law. According to Christine Byron, despite its complexity, this relationship is workable and it is likely that the difference between international and non-international armed conflict may change the interplay of human rights and humanitarian law.

Andrea Gioia, professor of International Law at the University of Modena and Reggio Emilia gave a presentation on international humanitarian law questions before the ECHR. His introduction focused on why the question of the application of the Convention in situations of armed conflict arose. The ECHR was established under the Convention. Over the past decades the Council of Europe has become a Pan-European organization, and some of its member states have been involved in armed conflicts. Accordingly, the ECHR was faced with a growing number of complaints relating to armed conflicts, especially non-international armed conflicts. Moreover, as a result of the Court's recent approach to the extraterritorial application of the Convention, other member states were involved in complaints relating to situations of international armed conflict outside Eu-

rope. This therefore compelled the ECHR to address the relationship between the rules of the Convention and the rules of international humanitarian law.

Professor Gioia also referred to the doctrine of *lex generalis-lex specialis* as a helpful, practical tool especially in case of a conflict of norms. This is however rarely the case in the relevant complaints and probably explains why until recently the ECHR chose not to expressly refer to international humanitarian law in its decisions, apart from exceptional cases. Another factor behind the cautious attitude of the ECHR was probably that most cases related to non-international armed conflicts, in respect of which the rules of international humanitarian law are less developed. Case studies in fact show that the ECHR often refers to international humanitarian law and also to the practice of the International Court of Justice when outlining the legal framework of a case, but usually refrains from expressly applying international humanitarian law in the relevant decision.

Recently however, the ECHR admitted in at least one case relating to an international armed conflict that if a respondent State expressly invokes international humanitarian law for this purpose, this body of law may be applied in order to interpret the applicable rules of the Convention, and even to modify them to some extent. So far, however, the ECHR has not been prepared to apply the same reasoning to cases of international armed conflict. The fact that states refrain from invoking Article 15 of the Convention in order to justify derogations therefrom may in part justify this attitude. Nevertheless, the ECHR has undoubtedly shown a more open attitude towards international humanitarian law, also reinforcing its expertise in these matters. Welcoming this positive development the speaker emphasized the need for coherence of the two legal branches and the responsibility and continued contribution of the ECHR in fostering such convergence.

In his presentation professor Gioia provided an overview of a number of cases of the ECHR relating to situations of armed conflict. Among others, he referred to Hassan v. United Kingdom, Al Jedda v. United Kingdom, Sargsyan v. Azerbaijan and Kononov v. Latvia.

Luc Côté, senior Consultant of the OHCHR and the UNDP presented his views on the subject of international humanitarian law and human rights law in the context of reports of fact-finding commissions or commissions of enquiry. Establishing such commissions is a way to respond to situations of serious violations of international humanitarian law, human rights law and international criminal law. With the growing number of armed conflicts and internal disturbances in recent years we have witnessed increased political will to create such bodies.

These mechanisms may be tasked by international organizations, by states or other entities. The mandates given to these mechanisms are similar in substance. Generally they cover the documentation and investigation of serious violations with the aim of ensuring some form of accountability to counter impunity. From that perspective, and

from a practical point of view, it is largely irrelevant whether these are violations of human rights law or international humanitarian law.

Since these bodies are non-judicial mechanisms, they are to be regarded as advocacy tools. It is important however to assess how they can contribute more efficiently to providing evidence admissible in court. It is highly advisable for example to involve legal experts in the work of these commissions to provide a serious legal analysis. The impact of a commission on accountability including possible criminal prosecutions may also depend on how the commissioner interprets his or her own mandate. Identifying individuals responsible for the commission of specific offences is a delicate matter for these bodies and most reports do not attempt this in order to respect due process guarantees. The commissions do not have prosecution powers and their findings generally do not meet the standard of proof applicable in criminal trials. However, by collecting and documenting facts their report may serve as a basis for later allegations resulting in criminal prosecution. Apart from individual criminal accountability, mention was made of state, institutional (e.g. political, security, judicial) and groups' accountability. Luc Côté concluded by commending the establishment of the International, Impartial and Independent Mechanism which is to assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law committed in the Syrian Arab Republic since March 2011.

The assessment of the role of fact-finding continued with the presentation of **Thilo Marauhn**, President of the International Humanitarian Fact-Finding Commission. Besides accountability, which is one aspect of international law, fact-finding commissions and commissions of enquiry may also be seen as tools for the peaceful settlement of disputes.

Article 90 of Protocol I. Additional to the Geneva Conventions of 1949 contains provisions on the establishment of an International Fact-Finding Commission. It states that the Commission is competent *to enquire into any facts alleged to be a grave breach or other serious violation of the Geneva Conventions or Protocol I*. Furthermore the Commission is competent *to facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and Protocol I. in human rights law and humanitarian law*. In other words, it mandates the Commission to put forward proposals endorsing compliance with the treaties by the parties in conflict, possibly preventing further violations. When examining the legal framework, one should also keep in mind that settlement is still a political process. Fact-finding commissions are a means of diplomacy and may contribute to the de-escalation of conflicts.

Thilo Marauhn also explained the complexity of the fact-finding exercises. The commissions are usually faced with a number of questions (such as the matter of access, handling information, respecting confidentiality rules), therefore, the involvement of different experts is crucial.

Marco Sassòli, professor of international law at the University of Geneva, Faculty of Law presented further ideas on the relationship between international humanitarian law violations and international human rights law violations in armed conflicts. Many, but not all international humanitarian law violations also constitute violations of international human rights law. As individuals may trigger international human rights mechanisms, which may lead to binding decisions of European, Latin American and African regional mechanisms, and as this body of law gives rise to an individual right to remedy, victims of international humanitarian law violations have sometimes but not always an interest to frame such violations as human rights infringements. In other words, from the perspective of the victim, the international human rights law regime offers mechanisms that may be more effective.

Conversely, many violations of human rights in armed conflicts equally violate international humanitarian law, and victims of such violations may also have an interest in framing them as international humanitarian law violations, in particular because that law is without doubt equally addressed to armed groups and because in this respect the International Committee of the Red Cross has a clear mandate.

Problems occur mainly when a certain conduct governed by international humanitarian law does not violate international humanitarian law, but violates international human rights law. In such cases, the following questions arise: when does international humanitarian law actually contradict international human rights law and how is state conduct regulated by international law in such cases. In the speaker's opinion, such contradictions are relatively rare and they can be solved by determining the *lex specialis* based on the facts at stake. This result may also be referred to as a systemic integration of the two branches. Beyond this, persons and mechanisms applying these branches of international law have differing perspectives and philosophies, which may influence the result of their assessment.

In his final remarks Marco Sassòli reminded his audience of the problem of non-respect and the reluctance of states to adopt measures enhancing the effectiveness of the implementation mechanisms of international humanitarian law and the clarification of its rules, in particular in non-international armed conflicts. Human rights law and its mechanisms, although far from being ideal in solving problems arising in armed conflicts, nevertheless continue to play an important role in the protection of war victims.

Annyssa Bellal, Strategic Adviser on International Humanitarian Law at the Geneva Academy of International Humanitarian Law and Human Rights, focused on the responsibility of armed non-state actors (ANSA) for international humanitarian law and human rights violations.

At present a great majority of armed violence occurs between states and ANSAs or between ANSAs. However, we can only find a few definitions for ANSAs under international law (e.g. those used by the UN Security Council, the European Union, Conciliation

Resources). ANSAs comprise all sorts of entities, such as traditional organizations that fight for political or economic gains, vigilante groups, militias, rebels, terrorist groups, organized transnational crime networks and private military security companies.

Annyssa Bellal also described to what extent states can be directly responsible for the violations of both international humanitarian law and human rights law committed by armed non-state actors under the norms of state responsibility. Reference was made to the Articles governing the Responsibility of States for internationally wrongful acts, namely its article 8, 9 and 10. Article 8 applies when an ANSA in fact acts under the control of a state. Article 9 may be evoked when wrongful acts are a result of the absence or default of official authorities. Article 10 establishes state responsibility when an ANSA becomes the new government.

Annyssa Bellal went on to examine to what extent international humanitarian law binds ANSAs, also explaining the controversy over the applicability of human rights law to these actors, and what this entails in terms of accountability mechanisms as well as with regard to their ability to implement international humanitarian law norms.

It is generally accepted that all categories of ANSA parties in non-international armed conflicts are accountable under international humanitarian law through Common Article 3 of the 1949 Geneva Conventions, Additional Protocol II. to the 1949 Geneva Conventions as applicable, and customary international humanitarian law.

Although just a few human rights treaties explicitly refer to ANSAs, there are strong arguments to support that human rights law also applies to them. On the one hand, the civilian population may be subject to violations committed by ANSAs which are not addressed by international humanitarian law. On the other hand, international humanitarian law may only be applied in case the conditions (e.g. intensity of the violence, level of organization of the ANSA) are met. In these cases (besides domestic law) the only remaining legal framework is human rights law. Consideration should also be given to the issue of individual criminal responsibility. In her closing remarks Annyssa Bellal expressed hope for clear political will to establish how to hold ANSAs accountable on an international level.

In his presentation **Sándor Szemesi**, associate professor of international law at the University of Debrecen, focused on the compliance systems of international humanitarian law and human rights law. The international protection of human rights was strengthened when the UN General Assembly adopted the Universal Declaration of Human Rights (UDHR) on 10 December 1948. The UDHR, together with the International Covenant on Civil and Political Rights and its two Optional Protocols, and the International Covenant on Economic, Social and Cultural Rights, form the so-called International Bill of Human Rights. There are nine core international human rights treaties (the most recent one is on enforced disappearance, entered into force on 23 December 2010), and all UN Member States have ratified at least one of them (and 80 percent have

ratified at least four). Currently, there are ten human rights treaty bodies at UN level, which are committees of independent experts. Professor Szemesi went on to discuss the legal status and work of these human rights bodies.

He also introduced the main regional human rights mechanisms (Council of Europe and the ECHR, Inter-American Court of Human Rights, African Court on Human and Peoples' Rights), analyzing whether these bodies can deal with international humanitarian law issues. He briefly addressed the procedures to follow when filing a complaint. In his concluding remarks Professor Szemesi underscored the importance of providing pro-active guidelines to prevent repeated violations of human rights or international humanitarian law.

Dr Sarah McCosker, Legal Adviser to the International Committee of the Red Cross (ICRC) gave an overview of the intergovernmental process jointly facilitated by the ICRC and the Government of Switzerland, on 'Strengthening Respect for International Humanitarian Law'.

Dr McCosker first outlined the main drivers for the initiative, explaining that the greatest challenge facing international humanitarian law today is not a lack of rules, but the lack of respect for existing norms by parties to armed conflicts. States have generally recognized that international humanitarian law compliance must be improved and it is well known that compliance mechanisms provided for in the 1949 Geneva Conventions and their Additional Protocols of 1977 have never or rarely been used. In particular, and in contrast with other areas of international law, international humanitarian law lacks an institutional structure that would allow for regular meetings of States and discussion of compliance issues. She recalled that the Geneva Conventions do not provide for regular meetings, where States can share their views and experiences concerning compliance with international humanitarian law.

Dr McCosker then outlined briefly the results of the 2012-2015 consultations that preceded the current intergovernmental process. During this period, nine major meetings with States were held, and the outlines of a possible new international humanitarian law compliance mechanism began to emerge. This comprised a regular Meeting of States which would serve as an anchor for thematic discussions on international humanitarian law issues and national reporting on compliance with international humanitarian law. This led to the adoption of a resolution in 2015 at the 32nd International Conference of the Red Cross and Red Crescent (Resolution 2), recommending the continuation of a State-driven intergovernmental process, based on the principle of consensus, with the aim of finding State agreement on the features and functions of a potential new international humanitarian law forum of States and on ways to enhance implementation using the potential of the International Conference of the Red Cross and Red Crescent and regional fora.

The most recent formal meeting of States in April 2017 focused on the features and functions of a potential new international humanitarian law forum. Views were divided between those States who consider that current mechanisms examining international humanitarian law issues from within other legal frameworks are insufficient, and thus support the idea of creating a new forum of States on international humanitarian law, and other States who oppose or have reservations about creating a new forum and would prefer to focus on strengthening existing mechanisms. Dr McCosker outlined the next steps in the process, which will include further discussions in the second half of 2017, focused on the International Conference and regional fora. In looking ahead, Dr McCosker reflected on some of the key challenges and opportunities involved. Given, that international humanitarian law remains a sensitive topic for many States it appears difficult to achieve progress in this area, in particular through a multilateral diplomatic process based on consensus. However, the widespread lack of respect for international humanitarian law remains a critical humanitarian problem. The intergovernmental process offers an important opportunity for States to work together to take positive steps increasing respect for international humanitarian law. It is up to States to ensure that this initiative succeeds. The ICRC hopes that over time, the intergovernmental process will bear fruit, with concrete outcomes that will ultimately promote greater respect for international humanitarian law.

Vincent Boulanin,researcher at the Stockholm International Peace Research Institute presented a case study on autonomous weapons systems (AWS). His presentation first pointed out that there is no agreed definition of AWS. Pursuant to some definitions (e.g. UK definition), no AWS exist as yet, while according to the definitions proposed by the ICRC and the USA, a number of systems could be classified as autonomous. These include some types of air defense systems, vehicle protection systems, and guided munitions (e.g. loitering munitions). He then made the case that the debate on the definition of AWS is somehow misleading for two reasons. Firstly because autonomy – be it from a technical or legal perspective – is better understood as the attribute of a system's function (e.g. navigation, targeting) than that of a system as a whole. Secondly, all weapons that use automation/autonomy for targeting, regardless of how sophisticated they are, raise the same core legal and ethical issues, namely: a) can they, in the intended circumstances of use, respect the rules of international humanitarian law or human rights law? b) if the operation of the weapons result in a violation of international humanitarian law or human rights law, is it possible to attribute responsibility to an individual or state and hold them accountable?; finally, c) is it ethically acceptable for the weapon to independently select and attack targets? Next, his presentation described how autonomy is currently used in weapon systems, what autonomous functions are technically capable of and what their implications are from a legal point of view. He notably discussed the extent to which existing weapons can(not) comply with the principle of distinction, proportion-

ality and precaution. Vincent Boulanin presented two current technological developments, namely swarming and machine learning, that have the potential to deliver advances of autonomy in weapon systems in the short and middle term. Finally, he discussed the extent to which these may raise new legal challenges, notably vis-à-vis the implementation of Article 36 Review (Protocol I. Additional to the Geneva Conventions).

Tamás Vince Ádány, associate professor of international law at Pázmány Catholic University, Faculty of Law and Political Sciences looked at the topic of autonomous weapons systems from a legal point of view. He stressed that while there were apparent conceptual and technical differences between international humanitarian law and international human rights provisions, the two areas shared some essential values – the respect for human life is a clear example.

In most legal arguments weapons systems are examined generally first from humanitarian perspectives. Nonetheless, development of new weapons is subject to a broader range of norms according to Article 36 Protocol I. Additional to the Geneva Conventions. The ICRC Commentary on this article fails to give guidance as to the relevance of general human rights law. Nevertheless, the text repeatedly mentions the responsibility of governments to determine the legality or illegality of the use of any new weapon introduced into their armed forces. In his presentation Professor Ádány attempted to identify an international human rights law obligation of governments that may reflect or substantiate their obligation under international humanitarian law. He underlined that the positive obligations regarding the right to life and the prohibition of torture are obvious candidates, but this leads to a number of questions with regard to the competent fora (national courts, international human rights courts, UN treaty bodies, international criminal tribunals etc.) and the preconditions for jurisdiction. It also has to be born in mind that simply having more competent courts would not *per se* increase accountability and respect for the rules.