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Common Article 1 and the Conflict in Ukraine

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March 10, 2022

by [Marten Zwanenburg](#) | Mar 10, 2022



The Russian invasion of Ukraine and the ensuing armed conflict raise a host of questions related to international humanitarian law (IHL). Some of these concern the legal relationship between Russia and Ukraine only. Others are also directly relevant for States that are not parties to the conflict. The issue of responsibilities that arise for States under common Article 1 of the four Geneva Conventions falls in the latter category. The obligation to “respect and ensure respect” is repeated in Article 1 of Additional Protocol I (AP I). This post posits that States Parties to the Geneva Conventions must “respect and ensure respect” for the Conventions in all circumstances and explores the implications of this legal interpretation in the context of the recent (and currently ongoing) Russian invasion.

Common Article 1

Common Article 1 states, “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” While there is some debate whether this obligation only applies to international armed conflicts (IACs), or also to non-international armed conflicts (NIACs), it is clear that the Russia-Ukraine conflict is an IAC and, therefore, there is no question that Article 1 applies to it.

The Duty to Respect

The duty to “respect” is a reflection of the obligation under general international law for a State Party to a treaty to perform its treaty obligations in good faith. This is the so-called rule of “pacta sunt servanda,” which is laid down in Article 26 of the Vienna Convention on the Law of Treaties. The obligation to respect in common Article 1 thus does not add anything to what States Parties are already bound to under treaty law.

Russia and Ukraine are both parties to the four Geneva Conventions and to AP I. In the context of the conflict in Ukraine, it follows from the obligation to “respect” that Russia and Ukraine may not violate the Conventions or AP I. There would be such a violation if conduct that is attributable to one of the parties breaches one of its obligations. Relatedly, there have been reports alleging that Russia has committed breaches of IHL, and Russia has accused Ukraine of violating articles 51 and 58 of AP I. The International Criminal Court Prosecutor has opened an investigation into the situation in Ukraine.

For other States, it follows from the obligation to respect that they must not breach any obligations they have in relation to the conflict. By way of example, other States must allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel destined for territory under control of one of the parties to the conflict (AP I, Art 70 (2)).

The Duty to Ensure Respect

The answer to the question what is required of States on the basis of the obligation to “ensure respect” is much less straightforward and hotly debated. It is uncontroversial that the obligation to ensure respect has an “internal dimension.” This means that States Parties must cease and take proactive steps to prevent violations. This covers not only their own armed forces and other persons or groups acting on their behalf but extends to the whole of the population over which they exercise authority, *i.e.*, also to private persons whose conduct is not attributable to the State (See ICRC updated commentary GC I).

What is very controversial, however, is whether there is also an “external dimension.” This refers to an obligation for States to ensure respect for the Conventions and AP I by other States Parties, and possibly even by organized armed groups. The ICRC considers that there is such an obligation. This is reflected in the updated ICRC *Commentary to Geneva Conventions I – III*. A number of States, however, have made clear that they do not recognize any such “external dimension.” This includes the United States, the United Kingdom, and Denmark. Some experts (such as Schmitt and Watts) agree with the latter interpretation. I have argued elsewhere that, on balance, the available practice is sufficient to support the conclusion that common Article 1 includes an external dimension.

If indeed the obligation to ensure respect has an external dimension, the question is what such an obligation would require of States Parties in general, and in relation to the conflict between Russia and Ukraine in particular. One question in this context is whether the external dimension only has a negative aspect, or also a positive aspect. The negative aspect refers to an obligation to refrain from certain conduct, namely not to encourage or assist in violations of the Conventions or AP I. The International Court of Justice, in its judgment in the *Paramilitaries* case, derived an obligation not to encourage violations of common Article 1. Its *Wall Advisory Opinion* can also be read as acknowledging that the obligation to ensure respect encompasses a duty not to render aid or assistance to violations of the Conventions.

The ICRC takes the position that the external dimension of the obligation to ensure respect also has a positive aspect. According to the ICRC, this means that States Parties

must take proactive steps to bring violations of the Conventions to an end and to bring an erring Party to a conflict back to an attitude of respect for the Conventions, in particular by using their influence on that Party. This obligation is not limited to stopping ongoing violations but includes an obligation to prevent violations when there is a foreseeable risk that they will be committed and to prevent further violations in case they have already occurred. (para. 197).

This view finds some support in academic literature as well.

Although such a positive aspect can be seen as a demanding obligation, it must be noted that the obligation to ensure respect is a due diligence obligation. This means that a State has a duty to take only such steps as can reasonably be expected of it given the circumstances. What is reasonable for one State may not be reasonable for another.

Common Article 1 and Ukraine

What does all this mean for the conflict in Ukraine? The following discussion accepts for the sake of argument that the obligation to ensure respect has both an internal and external dimension, and that the external dimension includes a positive element.

In the context of the Ukraine conflict, the internal dimension of the obligation to ensure respect is of particular relevance for Russia and Ukraine. Each must clearly ensure respect by its own organs and armed forces. And for Russia it also means the Russian government and its organs must take steps to ensure that forces of the self-declared Peoples' Republics do not violate the Geneva Conventions and Additional Protocol I. This is part of the internal rather than the external dimension because of the control that Russia exercises over the self-declared Peoples' republics, their forces and population.

For other States that are not parties to the conflict, the external dimension of the obligation to ensure respect is relevant. They must not encourage parties to the conflict to violate IHL, nor aid or assist them in doing so. This is particularly relevant for Belarus, which is aiding and assisting Russia *inter alia* by permitting the latter to operate from its territory.

Other States must also take reasonable proactive steps to bring violations of the Conventions to an end and prevent new violations. As stated above, what is reasonable may differ from State to State. It will depend among other things on the type and seriousness of the violation, the influence of the State over the party violating IHL and on its resources. A relatively straightforward measure is calling on the parties to respect IHL or to publicly denounce violations. An example is the statement by the Greek Ministry of Foreign Affairs calling on Russia to respect IHL. A further step would be a formal diplomatic protests of violations.

Imposing sanctions could also constitute a measure to fulfill the obligation to ensure respect. Although the EU and a number of States have imposed sanctions on Russia, these were in reaction to Russia's military aggression and do not seem to be linked to the prevention or stopping of violations of IHL. States could also put IHL obligations on the agenda of an international organization. Reference may be made to AP I, Article 89 in this regard, which provides that in situations of serious violations of the Conventions or of AP I, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.

Arguably, the duty to ensure respect also has consequences for States that are providing arms to the parties to the conflict, in the sense that they must take the likelihood that those weapons will be used to commit violations of IHL into account.

Conclusion

It can be concluded that common Article 1 and the obligation to “respect and ensure respect” are relevant to the conflict in Ukraine. How far this relevance goes, and whether it extends to States that are not parties to the conflict, depends on the interpretation of the obligation “to ensure respect” that is adopted.

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