

INTRODUCTION

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**A. The ICRC project to update the Commentaries***1. Background and scope of the project*

- 1 The 1949 Geneva Conventions and their 1977 Additional Protocols constitute the foundation of international humanitarian law today. They contain the essential rules of humanitarian law protecting civilians, persons who are *hors de combat* and medical and religious personnel, as well as a range of protected objects such as civilian objects and medical units and transports. At the time of writing, the Geneva Conventions have been universally ratified or adhered to. Furthermore, a large majority of countries, more than five out of every six, are party to the 1977 Additional Protocols.<sup>1</sup>
- 2 Upon the adoption of the Conventions in 1949, a group of ICRC lawyers who had been involved in the drafting and negotiation of the Conventions set out to write a detailed commentary on each of their provisions. This led to the publication between 1952 and 1960 of a Commentary on each of the four Conventions, under the general editorship of Jean Pictet.<sup>2</sup> Similarly, when the Additional Protocols were adopted in 1977, ICRC lawyers involved in their negotiation set out to write a commentary on both Protocols. These were published in 1986–1987.<sup>3</sup>
- 3 Over the years, these six ICRC Commentaries have come to be recognized as well-respected and authoritative interpretations of the Conventions and their 1977 Additional Protocols, essential for the understanding and application of the law.<sup>4</sup>
- 4 The original Commentaries were based primarily on the negotiating history of these treaties, as observed at first hand by the authors, and on prior practice. In this respect, they retain their historic value. They often contain a detailed comparison with previous conventions, e.g. a comparison between the 1949

<sup>1</sup> For a continuous update, see the websites of the ICRC (<http://www.icrc.org/ihl>) and the depositary (<https://www.fdfa.admin.ch/depositary>).

<sup>2</sup> Geneva Convention I: commentary by Jean S. Pictet, with contributions by Frédéric Sordet, Claude Pilloud, Jean-Pierre Schoenholzer, René-Jean Wilhelm and Oscar M. Uhler, published in 1952 (French original and English). Geneva Convention II: commentary by Jean S. Pictet, with the co-operation of Rear-Admiral M.W. Mouton (Netherlands), with contributions by Frédéric Sordet, Claude Pilloud, Jean-Pierre Schoenholzer, René-Jean Wilhelm and Oscar M. Uhler, published in 1959 in French and in 1960 in English. Geneva Convention III: commentary by Jean de Preux, with contributions by Frédéric Sordet, Claude Pilloud, Henri Coursier, René-Jean Wilhelm, Oscar M. Uhler and Jean-Pierre Schoenholzer, published in 1958 in French and in 1960 in English. Geneva Convention IV: commentary by Oscar M. Uhler and Henri Coursier, with Frédéric Sordet, Claude Pilloud, Roger Boppe, René-Jean Wilhelm and Jean-Pierre Schoenholzer, published in 1956 in French and in 1958 in English.

<sup>3</sup> Additional Protocol I (and Annex I): commentary by Claude Pilloud, Jean de Preux, Yves Sandoz, Bruno Zimmermann, Philippe Eberlin, Hans-Peter Gasser and Claude F. Wenger. Additional Protocol II: commentary by Sylvie S. Junod. Both commentaries were prepared under the editorship of Yves Sandoz, Christophe Swinarski and Bruno Zimmermann and published in French in 1986 and in English in 1987.

<sup>4</sup> See e.g. W. Hays Parks, 'Pictet's Commentaries', in Christophe Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ICRC/Martinus Nijhoff Publishers, The Hague, 1984, pp. 495–497.

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Conventions and the 1929 Geneva Conventions on the Wounded and Sick and on Prisoners of War.

- 5 However, with the passage of time and the development of practice, a genuine need was felt to update the Commentaries. The ICRC therefore decided to embark upon an ambitious project to achieve that purpose. This update seeks to reflect the practice that has developed in applying and interpreting the Conventions and Protocols during the decades since their adoption, while preserving those elements of the original Commentaries that are still relevant. The objective is to ensure that the new editions reflect contemporary practice and legal interpretation. Therefore, the new editions are more detailed as they have the benefit of more than 60 years of application of the Conventions – 40 years in the case of the 1977 Additional Protocols – and their interpretation by States, courts and scholars. The new Commentaries reflect the ICRC's current interpretations of the law, where they exist. They also indicate the main diverging views where these have been identified.
- 6 The update preserves the format of the original Commentaries, that is to say an article-by-article analysis of each of the provisions of the Conventions and Protocols. The commentaries on the common articles in the First Convention have been drafted to cover the four Conventions. They will be adapted to the specific context of a Convention where this is particularly relevant, for example to provide a definition of 'shipwrecked' in the context of the Second Convention.
- 7 The present volume is the first instalment in a series of six updated Commentaries. A commentary on Additional Protocol III that was published in 2007 is not being updated as part of this project.<sup>5</sup>

### 2. *The ICRC's role in the interpretation of the Conventions and Protocols*

- 8 The ICRC mandated the writing of the original Commentaries pursuant to its role as guardian and promoter of humanitarian law. The same is true for the current updated edition. This role is recognized in the Statutes of the International Red Cross and Red Crescent Movement, in particular the ICRC's role 'to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof'.<sup>6</sup> But it also follows from its role 'to undertake the tasks incumbent upon it under the Geneva Conventions' and 'to work for the faithful

<sup>5</sup> Jean-François Quéguiner, 'Commentary on the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III)', *International Review of the Red Cross*, Vol. 89, No. 865, March 2007, pp. 175–207.

<sup>6</sup> Statutes of the International Red Cross and Red Crescent Movement (1986), Article 5(2)(g). On the ICRC's role in the interpretation of international humanitarian law, see also François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, ICRC/Macmillan, Oxford, 2003, pp. 914–922.

application of international humanitarian law applicable in armed conflicts and to take cognizance of any complaints based on alleged breaches of that law'.<sup>7</sup> In many cases, these tasks require the ICRC to interpret the humanitarian law treaties underlying this mandate. Hence, the interpretation of humanitarian law is at the heart of the organization's daily work across its operations.

- 9 A wide variety of other actors also interpret the Conventions and Protocols, in particular States (through government lawyers in ministries, military commanders, staff officers and lawyers, advocates before courts), national and international courts and tribunals, arbitral tribunals, international organizations, components of the Red Cross and Red Crescent Movement, and non-governmental organizations and academics. Where relevant, the interpretations given by these actors have been taken into account in this Commentary, in particular interpretations by States and decisions of courts and tribunals which are among the most important sources of interpretative guidance.
- 10 In addition, what sets the updated Commentaries mandated by the ICRC apart from other academic commentaries is that the contributors were able to draw on research in the ICRC archives, while respecting their confidential nature, to assess the application and interpretation of the Conventions and Protocols since their adoption.

## B. Drafting process

- 11 The research and coordination for this Commentary has been carried out by an ICRC project team. Together with a group of external contributors and some additional ICRC staff lawyers, they drafted this Commentary. All draft commentaries were submitted for review to the group of contributors, the Reading Committee.
- 12 At the same time, many drafts were also submitted for review to other ICRC staff, including staff working in the field of integration and promotion of the law, policy, cooperation within the Red Cross and Red Crescent Movement, protection and assistance. For specific issues, additional consultations with governmental, military and National Red Cross or Red Crescent Society lawyers took place.
- 13 The draft commentaries were subsequently submitted to an Editorial Committee comprising senior ICRC and external humanitarian law experts for review. Based on the Committee's comments, new drafts were prepared and submitted to a comprehensive process of peer review by a wide selection of 60 scholars and practitioners from around the world involved in the study and implementation of humanitarian law. Based on the feedback from the peer

<sup>7</sup> Statutes of the International Red Cross and Red Crescent Movement (1986), Article 5(2)(c).

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review, the project team prepared a final draft for approval by the Editorial Committee. The final text is thus the result of a collaborative process.<sup>8</sup>

- 14 These various steps of consultation and review sought to ensure that the updated Commentary, being written more than 60 years after the initial 1952 Commentary, reflects current practice as accurately as possible and provides up-to-date legal interpretations based on the latest practice, case law, academic commentary and ICRC experience. Details on the treaties, other documents, military manuals, national legislation, national and international case-law referred to can be found in the corresponding tables at the end of this volume.
- 15 The updated Commentary has been drafted to serve a wide audience including, in particular, practitioners of international humanitarian law such as military commanders, staff officers and lawyers, judges and lawyers at national and international courts and tribunals, the ICRC and other components of the Red Cross and Red Crescent Movement, NGO staff, as well as academics and scholars.

## C. Methodology

### 1. Introduction

- 16 The updated Commentary applies the methodology for treaty interpretation as set out in the 1969 Vienna Convention on the Law of Treaties, in particular Articles 31–33.<sup>9</sup> Even though that Convention was adopted 20 years after the Geneva Conventions, these rules are generally considered to reflect customary international law.<sup>10</sup>
- 17 The text below addresses how the methodology has been applied to the interpretation of the Conventions, in particular the First Convention.
- 18 Pursuant to Article 31 of the Vienna Convention on the Law of Treaties, a treaty must be interpreted ‘in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’. Although this rule of interpretation has different

<sup>8</sup> For details concerning the persons involved in the research, drafting and review, see the Acknowledgements.

<sup>9</sup> What follows is only a summary of the issues raised by these articles. For a more detailed commentary on these provisions, see Aust, pp. 205–226; Gardiner, 2015; Sinclair, pp. 114–158; and the sections on Articles 31–32 in Corten/Klein, Dörr/Schmalenbach, and Villiger.

<sup>10</sup> See e.g. ICJ, *Kasikili/Sedudu Island case*, Judgment, 1999, paras 18–20; *Application of the Genocide Convention case*, Merits, Judgment, 2007, para. 160; ILC, Subsequent agreements and subsequent practice in relation to the interpretation of treaties, Conclusion 1.1 (provisionally adopted), *Report of the International Law Commission on the work of its sixty-fifth session*, UN Doc. A/68/10, 2013, p. 11.

elements, which are examined under separate headings below, the interpretation itself must combine all the elements.<sup>11</sup>

- 19 The obligation to interpret the terms of a treaty in good faith flows from the general obligation to respect treaty obligations in good faith, known under the Latin maxim as *pacta sunt servanda* ('agreements must be honoured').<sup>12</sup>

## 2. Ordinary meaning of the terms

- 20 The ordinary meaning of most of the terms in the Conventions can easily be ascertained. They tend to be written in plain language and provide significant details in the provisions themselves (see e.g. many of the detailed provisions of the Third Convention).
- 21 In order to achieve their objectives, the Conventions were drafted in such a way that they should easily be understood by soldiers and their commanders, as well as by civilians. The Conventions provide for their study to be included in programmes of military instruction,<sup>13</sup> and for the Third Convention to be posted in its entirety in prisoner-of-war camps, 'in the prisoners' own language, at places where all may read [it]'.<sup>14</sup> The purpose is for prisoners of war to be able to read the Convention and to be made fully aware of their rights under the Convention during their internment. Similarly the Conventions foresee a role for the civilian population, for example in the search for and collection of the wounded and sick, and hence it is important that civilians be able to understand the (plain) text of the Conventions. Furthermore, civilians are protected under the Fourth Convention, which makes it all the more relevant that they be able to fully understand this treaty.
- 22 However, as practice in the application and interpretation of the Conventions over the past six decades have shown, the meaning of the Conventions' terms is not always clear or may give rise to a need for further interpretation. Where necessary, this Commentary determines the ordinary meaning of terms with reference to authoritative, standard English dictionaries such as the *Concise Oxford English Dictionary*, or legal dictionaries such as *Black's Law Dictionary*.
- 23 Although the updated Commentary has been drafted in English, the authors have consistently consulted and compared the French version of the

<sup>11</sup> See ILC, *Yearbook of the International Law Commission*, Vol. II, 1966, p. 220, paras 9–10; 'Subsequent agreements and subsequent practice in relation to the interpretation of treaties, Conclusion 1.5 provisionally adopted', *Report of the International Law Commission on the work of its sixty-fifth session*, UN Doc. A/68/10, 2013, p. 11; Gardiner, 2015, pp. 31–32; and Aust, p. 208.

<sup>12</sup> Vienna Convention on the Law of Treaties (1969), Article 26. For more details, see Gardiner, 2015, pp. 167–181.

<sup>13</sup> First Convention, Article 47; Second Convention, Article 48; Third Convention, Article 127; and Fourth Convention, Article 144.

<sup>14</sup> Third Convention, Article 41. Similarly, the Fourth Convention needs to be posted inside camps for civilian internees; see Fourth Convention, Article 99.

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Convention, which is equally authentic.<sup>15</sup> Where divergences between the two versions appear to exist, the Commentary proposes an interpretation which reconciles both versions.<sup>16</sup> To ascertain the meaning of the terms in the French version of the Convention, the authors consulted authoritative, standard French dictionaries, such as *Le Petit Robert* or *Le Petit Larousse*.

3. Context

- 24 Pursuant to Article 31(1) of the Vienna Convention on the Law of Treaties, in order to determine the ordinary meaning to be given to the terms of the treaty those terms have be placed ‘in their context’. According to Article 31(2), the context to be considered for treaty interpretation comprises not only the text of treaty, but also its preamble and annexes.
- 25 The First Convention has two annexes: the first is a draft agreement relating to hospital zones and localities and the second is a model identity card for medical and religious personnel attached to the armed forces. These annexes are referred to where relevant in the context of a particular provision.<sup>17</sup> The commentaries on the annexes themselves have not been updated, as this was not considered of sufficient practical relevance.
- 26 The context also comprises the structure of the Conventions, their titles, the chapter headings and the text of the other articles. The Final Act and the annexed 11 resolutions adopted by the 1949 Diplomatic Conference of Geneva are also considered part of the context for the purposes of interpretation of these respective treaties.<sup>18</sup>
- 27 In the case of the Conventions, the marginal titles are neither part of the text nor of the context because these were established after the Diplomatic Conference by the depositary, the Swiss Federal Council. This was done for ease of reference, as the articles of the Conventions have no titles, unlike the articles of the Protocols.<sup>19</sup> The marginal titles of some articles have been slightly adapted in the present Commentary to better identify their subject matter.

4. Object and purpose

- 28 Strictly speaking the object of a treaty may be said to refer to the rights and obligations stipulated by the treaty,<sup>20</sup> while the purpose refers to the aim which

<sup>15</sup> See First Convention, Article 55, and Vienna Convention on the Law of Treaties (1969), Article 33.  
<sup>16</sup> For further details, see the commentary on Article 55, section B.2.  
<sup>17</sup> See the commentaries on Articles 23 and 28.  
<sup>18</sup> See Aust, p. 211; Gardiner, 2015, p. 86; Sinclair, p. 129; and Villiger, p. 430.  
<sup>19</sup> See Marginal Headings (or Titles of Articles) Established by the Swiss Federal Political Department, *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. I, Part III.  
<sup>20</sup> Reuter, p. 186, para. 283; see also Buffard/Zemanek, pp. 331–332.



is to be achieved by the treaty provisions.<sup>21</sup> However, the terms ‘object and purpose’ are used as ‘a combined whole’.<sup>22</sup> Thus, a treaty’s object and purpose is said to refer to its ‘raison d’être’,<sup>23</sup> its ‘fundamental core’,<sup>24</sup> or ‘its essential content’.<sup>25</sup>

- 29 Consideration in good faith of the object and purpose will ensure the effectiveness of the treaty’s terms:

When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation be adopted.<sup>26</sup>

As can be seen from this quote, and as recognized by the International Court of Justice, a treaty may have several objects and purposes.<sup>27</sup> A usual place to look for the object and purpose of a treaty is its preamble.<sup>28</sup> In the case of the Geneva Conventions, the preambles are very short and provide only limited guidance, contrary to the Additional Protocols which have more substantial preambles.<sup>29</sup> However, beyond the preambles, the whole text of the Conventions, including the titles and annexes, has to be taken into account in ascertaining their object and purpose.<sup>30</sup>

- 30 On this basis, it can be ascertained that the overall object and purpose of the First Convention is to ensure respect for and protection of the wounded and sick, as well as the dead, in international armed conflict. The other provisions in the Convention are geared towards this purpose, for example the rules on the search for and collection of the wounded and sick and of the dead. In addition, the rules that require respect for and protection of medical and religious

<sup>21</sup> Buffard/Zemanek, pp. 331–332.

<sup>22</sup> Villiger, p. 427, with further references; Gardiner, 2015, pp. 212–213 (‘a composite item’); David S. Jonas and Thomas N. Saunders, ‘The Object and Purpose of a Treaty: Three Interpretive Methods’, *Vanderbilt Journal of Transnational Law*, Vol. 43, No. 3, May 2010, pp. 565–609, at 578 (‘a unitary concept’).

<sup>23</sup> ICJ, *Reservations to the Genocide Convention*, Advisory Opinion, 1951, para. 23.

<sup>24</sup> Alain Pellet, ‘Article 19. Formulation of reservations’, in Corten/Klein, pp. 405–488, at 450–451.

<sup>25</sup> David S. Jonas and Thomas N. Saunders, ‘The Object and Purpose of a Treaty: Three Interpretive Methods’, *Vanderbilt Journal of Transnational Law*, Vol. 43, No. 3, May 2010, pp. 565–609, at 576.

<sup>26</sup> ILC, *Yearbook of the International Law Commission*, Vol. II, 1966, p. 219, para. 6. See also ICJ, *Territorial Dispute case (Libya v. Chad)*, Judgment, 1994, para. 51: in international law, *effet utile* is regarded as ‘one of the fundamental principles of interpretation of treaties’.

<sup>27</sup> ICJ, *Morocco case*, Judgment, 1952, p. 196; see also Villiger, p. 427, para. 11; Mark E. Villiger, *Customary International Law and Treaties*, Martinus Nijhoff Publishers, Dordrecht, 1985, pp. 321–322; Gardiner, 2015, p. 214 (‘sometimes there seems no particularity in distinguishing between the object and purpose of the treaty and the purpose of particular provisions’); Sinclair, p. 130; and Fitzmaurice, p. 228. But see Jan Klabbbers, ‘Some Problems Regarding the Object and Purpose of Treaties’, *Finnish Yearbook of International Law*, Vol. 8, 1997, pp. 138–160, at 152–153 (potential problems of admitting arguments based on object and purpose of individual provisions).

<sup>28</sup> ICJ, *Morocco case*, Judgment, 1952, p. 196; see also Fitzmaurice, p. 228, and Sinclair, pp. 125–126.

<sup>29</sup> For more details, see the commentary on the Preamble.

<sup>30</sup> See Gardiner, 2015, p. 213; Fitzmaurice, p. 228; and Buffard/Zemanek, p. 332.



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personnel, units and transports and the distinctive emblems all serve the purpose of protecting and caring for the wounded and sick. Lastly, a number of other provisions are intended to ensure respect for the Convention through its promotion, implementation and enforcement.

- 31 Common Article 3 provides the First Convention, and indeed all four Conventions, with another object and purpose, as it serves to protect persons not or no longer participating in hostilities in situations of non-international armed conflict.
- 32 The balance between humanitarian considerations, on the one hand, and military necessity, on the other, is a hallmark of international humanitarian law. This balance is reflected in the text of the Conventions adopted by the Diplomatic Conference of 1949.

### 5. *Additional elements of interpretation*

- 33 Pursuant to Article 31(3) of the Vienna Convention on the Law of Treaties, together with the context, the interpretation provided in the Commentary also has to take into account:
  - (a) any subsequent agreement between the Parties regarding the interpretation of the treaty or the application of its provisions;
  - (b) any subsequent practice in the application of the treaty which establishes the agreement of the Parties regarding its interpretation;
  - (c) any relevant rules of international law applicable in the relations between the Parties.

Items (b) and (c) are particularly important considerations when interpreting the Geneva Conventions. It is important to ascertain the subsequent practice in the application of the Conventions which has accumulated over the decades since their adoption.

- 34 Subsequent practice that does not fulfil the criteria of this provision, i.e. to establish the agreement of the Parties regarding the interpretation of a treaty, may still be relevant as a supplementary means of interpretation under Article 32.<sup>31</sup> This consists of conduct by one or more Parties in the application of the treaty after its conclusion.<sup>32</sup> The weight of such practice may depend on its clarity and specificity, as well as its repetition.<sup>33</sup> The six decades since the adoption of the Geneva Conventions have seen the development of

<sup>31</sup> ILC, Subsequent agreements and subsequent practice in relation to the interpretation of treaties, Conclusion 1.4 provisionally adopted, *Report of the International Law Commission on the work of its sixty-fifth session*, UN Doc. A/68/10, 2013, p. 11.

<sup>32</sup> *Ibid.* Conclusion 4.3 provisionally adopted, p. 12.

<sup>33</sup> ILC, Subsequent agreements and subsequent practice in relation to the interpretation of treaties, Conclusion 8.3 provisionally adopted, *Report of the International Law Commission on the work of its sixty-fifth session*, UN Doc. A/69/10, 2014, p. 169.

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significant practice in their application, which is particularly useful in this respect.

- 35 Other relevant rules of international law include customary humanitarian law and the three Additional Protocols, as well as other relevant treaties of international law, including international criminal law and human rights law where applicable.<sup>34</sup> The latter bodies of law were still in their infancy when the Geneva Conventions were adopted in 1949 but have grown significantly since then. As stated by the International Court of Justice: '[A]n international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.'<sup>35</sup>

### *a. International criminal law*

- 36 With respect to international criminal law, for example, the growing body of case law from the various international criminal courts and tribunals, as well as national courts, illustrates the way in which identical or similar concepts and obligations of international humanitarian law have been applied and interpreted for the purpose of assessing individual criminal responsibility. To the extent that this is relevant for the interpretation of the Conventions, this has been examined.
- 37 For example, the 1979 International Convention against the Taking of Hostages has become a starting point for the interpretation of the notion of the taking of hostages. This is also borne out by subsequent practice, e.g. in the form of the war crime of hostage-taking in the 1998 ICC Statute, the definition in the 2002 ICC Elements of Crimes, and case law.<sup>36</sup>
- 38 That said, it is important to underscore that the humanitarian treaty obligation may be broader than the criminalized parts of it in a rule contained in an instrument of international criminal law. The humanitarian treaty obligation exists independently of the rule of international criminal law on which the case law is founded. The content of the obligation may therefore not be identical in both bodies of law and differences are pointed out wherever they exist.

<sup>34</sup> It should be noted that treaties, other than the Conventions themselves, that are referred to in the Commentaries are used on the understanding that they apply only if all the conditions relating to their geographic, temporal and personal scope of application are fulfilled. In addition, they apply only to States that have ratified or acceded to them, unless and to the extent they reflect customary international law.

<sup>35</sup> ICJ, *Namibia case*, Advisory Opinion, 1971, para. 53. For further details, see also ILC, Conclusions of the work of the Study Group on Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law, reproduced in *Report of the International Law Commission on the work of its fifty-eighth session*, UN Doc. A/61/10, 2006, Chapter XII, para. 251, subparagraphs (17)–(23), pp. 413–415.

<sup>36</sup> For details, see the commentary on common Article 3, section G.3.