

REPORTS AND DOCUMENTS

Bringing the Commentaries on the Geneva Conventions and their Additional Protocols into the twenty-first century

Jean-Marie Henckaerts

Jean-Marie Henckaerts is Legal Adviser in the Legal Division of the International Committee of the Red Cross and Head of the project to update the Commentaries on the 1949 Geneva Conventions and the Additional Protocols of 1977.

Abstract

The ICRC Commentaries on the 1949 Geneva Conventions date back to the 1950s, and those on the 1977 Additional Protocols were written in the 1980s. Since the original Commentaries were published, the Conventions and Protocols have been put to the test, and practice with respect to their application and interpretation has developed significantly. In order to capture these new developments a major ICRC project to update the Commentaries on these six treaties is now well underway. Its goal is to contribute to a better understanding of, and respect for, international humanitarian law. Ultimately, the project seeks to enhance protection for the victims of armed conflicts.

: : : : : :

Introduction

The Geneva Conventions of 1949 and their Additional Protocols of 1977 constitute the backbone of international humanitarian law. They contain many of the essential

rules of humanitarian law protecting civilians, medical and religious personnel, and other persons *hors de combat*. The Geneva Conventions enjoy universal adherence, while more than 80 per cent of all countries are States party to the Additional Protocols of 1977.¹

Upon the adoption of the Geneva Conventions in 1949, the International Committee of the Red Cross (ICRC) proceeded 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 Geneva Conventions, in French and in English, under the general editorship of Jean Pictet.² Similarly, when the Additional Protocols were adopted in 1977, ICRC lawyers set out to write a Commentary on each Protocol. These were published in 1986 in French and in 1987 in English.³ The ICRC undertook this work pursuant to its role as guardian and promoter of international humanitarian law. This role – in particular, the ICRC’s commitment to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts⁴ – is recognised in the Statutes of the International Red Cross and Red Crescent Movement. The work also follows from the ICRC’s duty ‘to undertake the tasks incumbent upon it under the Geneva Conventions’ and ‘to work for the faithful application of international humanitarian law applicable in armed conflicts’.⁵ In many cases, the ICRC cannot fulfil these tasks without interpreting the basic treaties of humanitarian law underlying the ICRC’s mandate. This is at the heart of the organisation’s daily work.

- 1 The Geneva Conventions have 195 States Parties, Additional Protocol I on international armed conflicts has 173 States Parties, and Additional Protocol II on non-international armed conflicts has 167 States Parties; see www.icrc.org/ihi. A third Additional Protocol was adopted in 2005, introducing a new protective emblem, the Red Crystal. The current project does not deal with the 2005 Additional Protocol, as a Commentary on this Protocol was published recently. See 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)’, in *International Review of the Red Cross*, Vol. 89, No. 865, 2007, pp. 175–207, available at: www.icrc.org/eng/resources/documents/article/review/review-865-p175.htm.
- 2 Jean S. Pictet, with contributions by Frédéric Siordet, Claude Pilloud, Jean-Pierre Schoenholzer, René-Jean Wilhelm, and Oscar M. Uhler, *Geneva Convention I: Commentary*, ICRC, Geneva, 1952 (French original and English); Jean S. Pictet, with the cooperation of Rear-Admiral M. W. Mouton (Netherlands), with contributions by Frédéric Siordet, Claude Pilloud, Jean-Pierre Schoenholzer, René-Jean Wilhelm, and Oscar M. Uhler, *Geneva Convention II: Commentary*, ICRC, Geneva, 1959 (French) and 1960 (English); Jean de Preux, with contributions by Frédéric Siordet, Claude Pilloud, Henri Coursier, René-Jean Wilhelm, Oscar M. Uhler, and Jean-Pierre Schoenholzer, *Geneva Convention III: Commentary*, ICRC, Geneva, 1958 (French) and 1960 (English); Oscar M. Uhler, Henri Coursier, Frédéric Siordet, Claude Pilloud, Roger Boppe, René-Jean Wilhelm, and Jean-Pierre Schoenholzer, *Geneva Convention IV: Commentary*, ICRC, Geneva, 1956 (French) and 1958 (English).
- 3 ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC and Martinus Nijhoff, Geneva, 1987 : 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.
- 4 Statutes of the Red Cross and Red Crescent Movement, 1986, Art. 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 and MacMillan, Geneva, 2003, pp. 914–922.
- 5 Statutes of the Red Cross and Red Crescent Movement, 1986, Art. 5(2)(c).

Over the years, the ICRC Commentaries have come to be recognised as essential and well-respected interpretations of the Geneva Conventions and their Additional Protocols. The original Commentaries were based primarily on the negotiating history of the Conventions and Protocols and on prior practice. They often provide a historical perspective and an explanation of the major steps in the development of the law. In that respect, they remain largely relevant.

The need for an update of the Commentaries

With the passage of time and the development of practice, it has become necessary to update the original Commentaries. The update seeks to reflect the experience gained in applying 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 of the Commentaries reflect contemporary reality and legal interpretation.

For example, Common Article 1 of the Geneva Conventions states that the 'High Contracting Parties undertake to respect and ensure respect' for the Conventions 'in all circumstances'. The application of the obligation to 'ensure respect' for humanitarian law has significantly expanded since the 1950s, and current practice in this area indicates more clearly that this obligation extends to both international and non-international armed conflicts. The updated Commentaries need to capture and present this understanding.

Furthermore, Common Article 3, which is applicable in non-international armed conflicts, has become a central provision in recent decades due to the prevalence of this type of armed conflict. When this provision was adopted more than sixty years ago, no international criminal sanction was attached to its violation, and little to no international case law interpreting the prohibitions of this provision was available when the original Commentaries were drafted. Today however, under the influence of subsequent practice and developments in international law, it is recognised that serious violations of Common Article 3, such as murder, torture, and hostage-taking, also constitute war crimes in non-international armed conflicts. As a result, the elements of these crimes and their underlying prohibitions in Common Article 3 have been interpreted and further clarified in recent decades, in the case law of international criminal courts and tribunals, as well as in national courts. The updated Commentaries need to take account of these developments.

Another example relates to the area of humanitarian activities where the Conventions provide that both the ICRC and 'any other impartial humanitarian organisation' may offer to undertake such activities. The context in which this occurs today, in terms of the diversity of actors as well as the challenges for humanitarian action, is very different from when the original Commentaries were written. Today there is much discussion about the requirement to obtain consent from the parties to the conflict in order to access conflict zones and, in particular, about the prohibition on withholding such consent on arbitrary grounds. The updated Commentaries need to reflect such debates and present any fault lines that may be observed.

The updated Commentaries

In order to capture such developments in law and practice, a major ICRC project to update the Commentaries is now well under way. Its ultimate goal is to contribute to better respect and protection for the victims of armed conflicts. The update will preserve the format of the existing Commentaries – that is to say, an article-by-article commentary on each of the provisions of the Geneva Conventions and their Additional Protocols. The new edition will provide many references to practice, case law, and academic literature, which should facilitate further research and reading. In addition, detailed cross-references will make it easy to find information on related provisions.

Research and writing of the Commentaries

The updated Commentaries will be drafted by ICRC staff lawyers, as well as by a number of external contributors. Even though the format will eventually be that of an article-by-article commentary, the research and writing for the update are being undertaken topic by topic, not article by article, Convention by Convention, or Protocol by Protocol. This is necessary to ensure coherence across the Commentaries, as many topics are dealt with in one or more provisions of one or more Conventions and/or Protocols. For example, the provisions dealing with the wounded, sick and shipwrecked are found in Geneva Conventions I, II, and IV and in Additional Protocols I and II. As a result, the preparation of the Commentaries on these provisions needs to be carried out in a synchronised manner. Other such topics include children, missing persons and restoring family links, humanitarian assistance, and the distinctive Red Cross and Red Crescent emblems. This method allows for a better overview of the issues involved, consistency between related Commentaries, and a more efficient way of carrying out thematic research and writing.

Research for the project will examine a variety of sources relevant to the application and interpretation of the treaties in recent decades, including military manuals, national legislation, and case law, as well as academic commentary and the ICRC's own field experience. In addition, research staff will conduct consultations with practitioners. The project will also use the ICRC's customary law database, in particular regarding state practice with respect to the application and interpretation of international humanitarian law.⁶

Where relevant, the update will also take into account developments in related areas of international law, such as international criminal law and international human rights law. These branches of international law were still in their infancy when the Geneva Conventions were adopted, and have developed significantly in recent years. The interplay between these branches of international law and international humanitarian law makes it relevant for the updated Commentaries to consider these sources.

⁶ See www.icrc.org/customary-ihl.

Review process of the Commentaries

All draft Commentaries are submitted for review to the group of authors (the Reading Committee) of the Commentary on a particular Convention. The draft Commentary reviewed by the Reading Committee is then submitted to an Editorial Committee composed of senior ICRC and external lawyers. Finally, the drafts will be peer reviewed by a wide selection of scholars and practitioners involved in the interpretation and application of international humanitarian law. These various steps of review seek to ensure that the updated Commentaries reflect current reality and legal interpretation as accurately as possible.

Publication and distribution of the Commentaries

The updated Commentaries will be easily accessible and made widely available. In addition to the printed version, an online version will be made available free of charge on the website of the ICRC, as is currently the case with the original Commentaries.⁷ The electronic version should also facilitate easier search and navigation of the document.

The provisional timeline of the publication of the updated Commentaries foresees the publication of the updated Commentary on Geneva Convention I in 2015, on Geneva Convention II in 2016, on Geneva Convention III in 2017, on Geneva Convention IV in 2018, and on Additional Protocols I and II by the end of 2019. This timeline remains subject to confirmation.

Conclusion

The updated Commentaries seek to provide a well-researched and up-to-date interpretation of the Geneva Conventions and their Additional Protocols. As guardian and promoter of humanitarian law, the ICRC needs to ensure that the Commentaries on the core treaties of international humanitarian law remain up to date. At the same time, in updating the Commentaries, the ICRC reaches out to external experts through research and writing and through review by scholars and practitioners.

The overall purpose of the update is to contribute to a wider dissemination and greater clarification of the content of the Geneva Conventions and their Additional Protocols, and ultimately to better respect and protection for the victims of armed conflicts.

7 See www.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp.