

From the Gilded Age to the Digital Age: The evolution of ICRC legal commentaries

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Abstract

Legal commentaries are a type of secondary source that provides clarity about the meaning of treaty provisions so they can be appropriately interpreted and applied by practitioners. Since 1870, the International Committee of the Red Cross (ICRC) has produced such commentaries on each successive international humanitarian law (IHL) treaty or update to an existing treaty. Over time, who drafts these commentaries and the methodology behind them has evolved, from early commentaries written by a single jurist who had participated in the drafting of the treaty to multi-authored works based on extensive research and the methodology found in the Vienna Convention on the Law of Treaties. The ICRC Commentaries

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have always been geared towards those tasked with applying IHL, but this audience has expanded over time, giving them a more global reach, and their reception has evolved accordingly. The most recent iteration of the ICRC Commentaries on the 1949 Geneva Conventions and their 1977 Additional Protocols is currently being produced, with some changes in methodology to guarantee that they remain a practical tool for the interpretation and application of those instruments.

Keywords: international humanitarian law, Geneva Conventions, updated Commentaries, treaty interpretation, International Committee of the Red Cross, Vienna Convention on the Law of Treaties, history of IHL.



Introduction

Treaty provisions are carefully crafted before they are agreed to and adopted by States, but no matter how detailed the language, unexpected circumstances may arise. The context may change, technologies may evolve, or other unforeseen developments may take place. On the other hand, those drafting a treaty may intentionally leave terms vague in order to preserve flexibility in interpretation or to secure the agreement of States that otherwise might not sign up to it. Given these and other challenges, how does one know how a given treaty should be interpreted and applied? One tool that is designed to assist scholars and practitioners in this regard is a commentary.

Commentaries are one of a constellation of types of secondary legal resources. They are different from law review articles or monographs in that they are not meant to be the opinion of an author or authors. They are unlike casebooks or textbooks, which are directed at audiences learning about an area of law, and unlike legal treatises, in that they comment on a specific treaty, group of treaties or other legal instrument¹ rather than providing a comprehensive understanding of a given area of law. They are also unlike legal manuals published by States, in that they are not implementing the law but rather presenting the reader with research into how the law has been interpreted and implemented. The 1949 Geneva Conventions and their 1977 Additional Protocols, which, along with their predecessors, form the core of international humanitarian law (IHL), are no exception to the challenges of interpreting and applying international treaties. As each new treaty was concluded, the International Committee of the Red Cross (ICRC), acting in its capacity as the guardian of IHL, produced a reference commentary discussing its provisions.

1 See, for example, Marie-Louise Tougas, “Commentary on Part I of the Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict”, *International Review of the Red Cross*, Vol. 96, No. 893, 2015.

Today, the updated ICRC Commentaries on the Geneva Conventions and their Additional Protocols are heirs to this long tradition of legal commentaries published to support the interpretation and application of the cornerstone treaties of IHL.

This article looks back in time, from the origin of the Commentaries produced by the ICRC to the current project to update them, in order to share some insights on their evolution, in terms of authorship, methodology, audience, form and substance. How have 150-plus years of development of IHL and State practice, along with evolving standards for legal scholarship and treaty interpretation, impacted the Commentaries?

The commentators

The long history of ICRC commentaries on IHL treaties can be traced back to 1870, with the publication of a commentary on the 1864 Geneva Convention and its 1868 additional articles by then ICRC president Gustave Moynier.² Since then, the adoption of every new IHL treaty, or revision of an existing treaty, has led to the publication of at least one reference commentary providing an article-by-article interpretation of the law, informed by its drafting history and prior State practice. Most of these commentaries have been written by or under the direction of an authoritative ICRC figure.

In his review essay on commentaries as a genre of international legal scholarship, Christian Djeffal dates their systematization and subsequent proliferation back only to the United Nations (UN) era. “The drafts and treaties produced at diplomatic conferences such as the Hague Peace Conferences of 1899 and 1907 were not accompanied by commentaries, neither were the attempts to codify international law within the framework of the League of Nations”, he notes.³ And so, it seems that, despite the genre’s medieval roots – dating back to the glossators and commentators on the *Codex Justinianus* – and a strong tradition in German legal scholarship, the pre-Second World War ICRC commentaries on the Geneva Conventions were outliers for their time.

Since the publication of such commentaries was not common in the late nineteenth century’s legal landscape, how was this tradition first established within the ICRC, and why? We suggest looking back to the publication of the very first ICRC commentary to find the answer. In 1870, Gustave Moynier published his *Etude sur la Convention de Genève pour l’amélioration du sort des*

2 Gustave Moynier, *Etude sur la Convention de Genève pour l’amélioration du sort des militaires blessés dans les armées en campagne: 1864 et 1868*, Librairie de J. Cherbuliez, Paris, 1870. All the commentaries mentioned in this article are available for consultation in the ICRC Library. Most of them have been digitized and can be downloaded via the library’s catalogue at: <https://library.icrc.org/library/> (all internet references were accessed in September 2022).

3 Christian Djeffal, “Commentaries on the Law of Treaties: A Review Essay Reflecting on the Genre of Commentaries”, *European Journal of International Law*, Vol. 24, No. 4, 2013, p. 1233, available at: <https://academic.oup.com/ejil/article/24/4/1223/606393>.

militaires blessés dans les armées en campagne: 1864 et 1868, a volume that was part legal treatise, part article-by-article commentary on Geneva Convention I (GC I).⁴ Its content, the profile of its author and the time of publication are important clues to understanding the origin of the present-day ICRC Commentaries.

The ICRC's co-founder and president from 1864 to 1910, Gustave Moynier was a lawyer by training. A particularly prolific writer, he authored many works on the birth of the ICRC and the International Red Cross and Red Crescent Movement, and on IHL. His figure loomed large over the early days of the ICRC and over the birth of GC I. Was he the treaty's main drafter? He gave conflicting accounts on this point in his own writings. In a letter from 1864, he wrote that fellow ICRC co-founder General Dufour, who had led the Swiss Confederate forces to victory during the Sonderbund War, had produced the "draft concordat" that later became GC I. In 1900, in an article in the *Bulletin International des Sociétés de la Croix-Rouge*,⁵ he wrote of a joint effort with General Dufour. In his 1902 autobiography, however, he presented himself as the sole author of the draft.⁶ Moynier was strongly invested in making his contribution to the birth of the Red Cross and GC I one for the history books.⁷ His name on the cover page on the first ICRC commentary is thus not a surprise. Why was he best positioned to write such a commentary and put forward an interpretation of the Convention? He asked – and answered – that question himself in the commentary: "[T]here was a story to tell", he explained, "and we were in a better position than anyone else to know how things had happened."⁸ He derived his authority as a commentator from his first-hand experience in the drafting and adoption of the treaty. This position is reiterated throughout the volume, which is very much imbued with Moynier's personal opinions and recommendations for the development of the law.

What could have motivated Moynier to publish such a commentary in 1870? Six years after its adoption, GC I had already been tested on the battlefield. It had been applied during the Austro-Prussian War of 1866, though only on part of the theatre of the war, as three of the belligerents (Austria, the Kingdom of Saxony and the Kingdom of Hanover) were not parties to the Convention. This first test of the treaty's applicability had led to multiple debates on its revision. In 1868, States had agreed on additional articles extending its principles to maritime warfare; these were adopted but failed to secure any ratifications and thus never entered into force.⁹ The treaty had also found its detractors, who

4 G. Moynier, above note 2.

5 The ancestor of the present journal, published by the ICRC between 1869 and 1919.

6 See Ismaël Raboud, Matthieu Niederhauser and Charlotte Mohr, "Reflections on the Development of the Movement and International Humanitarian Law through the Lens of the ICRC Library's Heritage Collection", *International Review of the Red Cross*, Vol. 100, No. 907–909, 2018, p. 153.

7 For a more substantial and nuanced take, see Cédric Cotter, "The Role of Experience and the Place of History in the Writings of ICRC Presidents", *International Review of the Red Cross*, Vol. 101, No. 910, 2019.

8 G. Moynier, above note 2, p. 65 (authors' translation).

9 Nevertheless, in the Franco-German War of 1870–71 and the Spanish-American War of 1898, the parties agreed to observe their provisions. It was not before the First Hague Peace Conference of 1899 that a

argued that it was inapplicable on the battlefield, that its language was too vague, that it went too far, or that it would encourage espionage. These developments likely motivated the publication of Moynier's commentary, and he engaged directly with critics of the Convention in his text.¹⁰ His approach to refuting such criticism was twofold. First, he anchored the Convention in a history of humanitarian progress in order to stress the treaty's legitimacy. He included a comprehensive historical introduction that recontextualized the Convention and presented its adoption as the logical consequence of the evolution of mentalities on warfare and human suffering in war. Second, in his article-by-article commentary, Moynier insisted on the drafters' full grasp of military realities. He pointedly and repeatedly demonstrated how these were balanced with humanitarian concerns in the treaty.¹¹ To stress this point, he derived examples from State practice, presenting benefits gained from the respect of the Convention during the Austro-Prussian War and contrasting them with clear instances of the harms it sought to prevent, from prior to its adoption.

The publication of the 1870 commentary was meant to raise support for the Convention, provide guidance on its application on the battlefield and convince States of its applicability. Moynier also anticipated future developments in this burgeoning body of international law, writing:

To put it frankly, the number of special treaties designed to mitigate the horrors of war will probably increase, those that already exist will call for others, either to improve them or to fill in gaps, and thus international law will come to always better reflect contemporary customs. Perhaps we will even come to a general codification of the law of war.¹²

His will to encourage and help steer this development is apparent in the commentary. He concluded the book with his personal recommendations – he saw it as particularly important for States to agree on the treatment of prisoners of war (PoWs), in order to prevent the repetition of abuses observed in recent conflicts, citing examples from the American Civil War. Prescient if a bit premature, his conclusion looked toward the adoption of an additional convention that would extend the international legal protection granted to wounded and sick soldiers by GC I to PoWs.

Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention was finally adopted and ratified.

10 He engaged in particular with criticism of the Convention published by the Austrian regimental physician Dr Albert Michaëlis in the journal *Allgemeine Militärärztliche Zeitung: Beiträge zur Wiener Medizinischen Presse* (see, for instance, his article 'Gedanken über den Sanitätsdienst im Treffen mit Beziehung auf das bezügliche k. k. Reglement und auf die Berührungspunkte mit den in Genf gemachten Vorschlägen', published in that journal on 18 September 1864). See G. Moynier, above note 2, pp. 63–64, 134–135, 177–182, 191–193.

11 See, notably, G. Moynier, above note 2, pp. 191–196.

12 *Ibid.*, p. 31 (authors' translation). The original quote in French reads: "Pour parler sans figure, les traités spéciaux destinés à atténuer les horreurs de la guerre iront vraisemblablement en se multipliant, ceux qui existent déjà en appelleront d'autres, soit pour les perfectionner, soit pour en combler les lacunes, et ainsi la législation internationale reflétera toujours mieux les mœurs contemporaines. Peut-être même en viendra-t-on à une codification générale du droit guerrier."

Moynier's prediction on the development of IHL proved true, and as the law developed, the publication of legal commentaries on the new or revised treaties became a tradition. From 1870 to 2005, commentaries on the Geneva Conventions and their Additional Protocols were systematically published soon after those instruments' adoption. The commentators benefited from this proximity in time. Like Moynier, they derived their authority from their first-hand knowledge of each treaty's drafting history, on top of their legal expertise and familiarity with State practice. The author of a certain treaty's commentary has in fact quite commonly been one of its main drafters.

GC I, the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, was first revised in 1906. The main drafter behind the revision was renowned law professor Louis Renault. The report of the drafting committee, which he presented, actually functioned as the revised treaty's commentary. When reproduced in full in the pages of the *Bulletin International des Sociétés de la Croix-Rouge*, it was introduced as "the only authorized commentary ... which admirably summarizes all the work accomplished".¹³ Two years later, the Swiss Red Cross also published a commentary in German authored by the former secretary-general of the 1906 Diplomatic Conference, Swiss law professor Ernst Röhliberger.¹⁴ The publication was celebrated in the *Bulletin*, as the journal also served to spread the word about all new publications related to the activities of the ICRC and the development of IHL.¹⁵

The next revision of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field took place in 1929. After the Diplomatic Conference, Paul Des Gouttes, a lawyer and member of the ICRC's governing body, was tasked with writing the commentary on the revised treaty.¹⁶ He was also the author of the Conference's report. In his preface, ICRC president Max Huber explained why Des Gouttes was uniquely positioned to write the commentary:

Everything pointed to him for this task. As assistant to the secretary-general of the 1906 Diplomatic Conference and secretary-general of the 1929 Conference, he followed closely the discussions of both assemblies. In the course of more than thirty years of collaboration with the International Committee of the Red Cross, he had the opportunity to study many questions closely or remotely related to the Convention.¹⁷

Des Gouttes' authority as a commentator was thus based both on his first-hand knowledge of the negotiations behind the successive revisions of the Convention

13 ICRC, "Le Comité international et la Conférence de 1906", *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 37, No. 148, 1906, pp. 270–272 (authors' translation).

14 Ernst Röhliberger, *Die neue Genfer Konvention vom 6. Juli 1906*, A. Francke, Bern, 1908.

15 "No one was better qualified than the Secretary General of the 1906 Geneva Conference ... to present, on the content of this pact between nations, a systematic study whose value rests on the author's expertise on international questions." "Ernst Röhliberger – la nouvelle Convention de Genève", *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 39, No. 155, 1908, pp. 254–255 (authors' translation).

16 ICRC, Minutes of Meeting, Plenary Session of the Committee, 26 September 1929, ICRC Archives.

17 Max Huber, "Preface", in Paul Des Gouttes, *La Convention de Genève du 27 juillet 1929: Commentaire*, ICRC, Geneva, 1930, p. xviii.

and on his ICRC experience. In his text, he paid homage to his predecessors, building on Renault and Röthlisberger's works on the 1906 Convention.¹⁸ Showing the importance given to legal commentaries at that time, Des Gouttes owned two copies of the latter's commentary, including one dedicated to him by the author, which were gifted to the ICRC Library by his widow after his passing.

The 1929 Diplomatic Conference also adopted the first Convention relative to the Treatment of Prisoners of War. ICRC member and law professor at the University of Geneva Georges Werner, who had worked in the ICRC's International Prisoners of War Agency during the First World War, was among the drafters of the new Convention. A year prior, his study of the draft PoW Convention had appeared in the collected courses of the Hague Academy of International Law.¹⁹ For the ICRC, he was thus a logical choice of author for the commentary on the new treaty, as agreed on 26 September 1929.²⁰ He was however beaten to the publication by Danish diplomat Gustav Rasmussen, who had also attended the 1929 Diplomatic Conference but was not among the Convention's original drafters. Werner then reviewed Rasmussen's commentary in the *Bulletin International des Sociétés de la Croix-Rouge*, a twentieth-century example of a practice continuing to this day, in old and new media.²¹

The ICRC also collected external commentaries, as well as other types of publications reflecting how States were interpreting and implementing IHL. One interesting example found in the ICRC Library's collections is Dr Alfons Waltzog's commentary on the 1907 Hague Convention (IV) on War on Land and its Annexed Regulations and the two 1929 Geneva Conventions, published in the middle of the Second World War.²² The author worked for the court-martial of the German air force, as *Kriegsgerichtsrat* (judge advocate); his commentary was addressed to the officers and officials of Nazi Germany. ICRC jurist Werner Christ published quite a scathing review of the commentary in the *International Review of the Red Cross*, writing that "there [could] be found ... the reflection of trends in Germany or even of the author's personal opinions, some of which appear to be questionable and which often, in our opinion, deviate from the spirit that inspired the Geneva Conventions".²³ A typewritten in-house translation into

18 He notably borrowed a phrase from Röthlisberger: "It has been rightly said that an ambulance without its equipment is like a knife without a blade." P. Des Gouttes, above note 17, pp. 91–92.

19 Georges Werner, "Les prisonniers de guerre", *Recueil des Cours de l'Académie de Droit International*, Vol. 21, 1928.

20 ICRC, above note 16.

21 Gustav Rasmussen, *Code des prisonniers de guerre: Commentaire de la Convention du 27 juillet 1929 relative au traitement des prisonniers de guerre*, Levin & Munksgaard, Copenhagen, 1931; Georges Werner, "Un commentaire du Code des prisonniers de guerre", *Revue Internationale de la Croix-Rouge*, Vol. 14, No. 159, 1932.

22 Alfons Waltzog, *Recht der Landkriegsführung: Die wichtigsten Abkommen des Landkriegsrecht*, F. Vahlen, Berlin, 1942.

23 Werner Christ, "Die wichtigsten Abkommen des Landkriegsrechts", *Revue Internationale de la Croix-Rouge*, Vol. 27, No. 316, April 1945, p. 309–310 (authors' translation). The original quote in French reads: "On n'y trouve pas l'exposé comparatif des thèses qui se sont fait jour dans les différents pays quant à l'application des dispositions conventionnelles, mais bien surtout le reflet des tendances qui prévalent en Allemagne ou même d'opinions personnelles, dont certaines apparaissent comme contestables et qui souvent, selon nous, s'écarterent de l'esprit qui a inspiré les Conventions de Genève."

French of Waltzog's commentary on the 1929 PoW Convention was also produced, now part of the ICRC Library's heritage collection on wartime captivity. This is indicative of the ICRC's work to collect commentaries and other sources on the interpretation and implementation of IHL treaties, an important factor in the development of the dedicated collections of its Library up to the present day. Throughout history, the ICRC commentators have relied on these collections for their work and have expanded them with their own writings.

The adoption of the four 1949 Geneva Conventions marked, quite logically, a turning point in the history of the ICRC Commentaries: they would no longer be a "one-man job". Under the direction of Jean Pictet, a team of ICRC jurists wrote the Commentaries on the four Conventions, published in French and in English throughout the 1950s.²⁴ These commentators were Frédéric Siordet, Claude Pilloud, René-Jean Wilhelm, Jean-Pierre Schoenholzer, Oscar Uhler and Jean de Preux. The first three, as well as Pictet, had worked on the revision of the Conventions and followed the discussions of the 1949 Diplomatic Conference and the earlier expert meetings.

The foreword of the Commentary on GC I draws attention to the genealogy of the Commentaries. It traces a direct line from Louis Renault's 1906 report to the 1929 commentary by Paul Des Gouttes ("who was such a zealous and eminent authority on the Geneva Conventions"²⁵) and finally to the present Commentary. Notably, this also seems to be the first time that the ICRC resorted to an external specialist: Major M. W. Mouton, naval captain and judge at the Dutch Court of Cassation, assisted in the elaboration of the Commentary on Geneva Convention II, relative to the protection of wounded, sick and shipwrecked members of the armed forces at sea.²⁶

In 1977, the preparation of the Commentary on the Additional Protocols again mobilized a team of ICRC jurists, this time under the direction of Claude Pilloud.²⁷ In the 1950s, Pilloud had been Pictet's right-hand man during the preparation of the Commentaries on the 1949 Geneva Conventions. Director of the ICRC's Department of Principles and Law until 1978, he had taken part in the drafting of the 1977 Additional Protocols. He came back from retirement to work on the Commentaries on the Additional Protocols, until his death in 1984. Most of the commentators working under him had also been part of the ICRC delegation to the 1974–77 Diplomatic Conference. The team comprised ICRC

24 Jean Pictet (ed.), *Commentaires des Conventions de Genève du 12 août 1949*, 4 vols, ICRC, Geneva, 1952–58; Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, 4 vols, ICRC, Geneva, 1952–60.

25 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 1: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952 (1952 Commentary on GC I), p. 8.

26 ICRC, Minutes of Meeting, Working Session, 30 April 1953, ICRC Archives.

27 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentaire des protocoles additionnels du 8 juin 1977 aux Conventions de Genève du 12 août 1949*, ICRC, Geneva, 1986; Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987 (ICRC Commentary on the APs).

jurists Jean de Preux, Yves Sandoz, Bruno Zimmermann, Hans-Peter Gasser, Claude F. Wenger and Sylvie-Stoyanka Junod, as well as technical adviser Philippe Eberlin. The latter had been an officer on neutral merchant vessels during the Second World War, before beginning a long career with the ICRC as a delegate in 1945. An expert on the identification of medical transports, he wrote the Commentary on the Regulations Concerning Identification, Annex I to Additional Protocol I (AP I).²⁸ The first woman to author an ICRC Commentary, Sylvie-Stoyanka Junod wrote the Commentary on Additional Protocol II (AP II), relating to the protection of victims of non-international armed conflicts. Like many other ICRC commentators, she was a jurist who would also acquire considerable experience in the field. Her ICRC career spanned over thirty years, both at the organization's headquarters and as a delegate in Latin America, Uganda, Sri Lanka, Georgia, India and Iraq. Jean Pictet, honorary vice-president of the ICRC at the time, presided over the reading committee, which oversaw the drafting of the Commentary.

The Commentaries on the 1949 Conventions and their Additional Protocols of 1977 had been published in French and English only. In 1998, the Commentary on common Article 3 and AP II was published by the ICRC in one volume in Spanish, bringing together a commentary on all articles related to non-international armed conflict. This reflected the increasing importance of the law governing non-international armed conflict, which had become the prevalent form of armed conflict. The stand-alone Spanish translation of the Commentary on AP I followed in 2001.²⁹ Other provisions were perhaps seen as less of a priority for wide dissemination: when Annex I of AP I (containing the regulations for identification of various categories of persons and objects) was amended in 1993, the Commentary on it was amended as well, but the updated Commentary was published only in French³⁰ and has so far not been translated into English.

In 2006, ICRC legal adviser Jean-François Quéguiner – who was a member of the ICRC delegation to the 2005 Diplomatic Conference – wrote the Commentary on the newly adopted Additional Protocol III. This Commentary was published in the *International Review of the Red Cross* in French that year, and translated into English, Arabic, Spanish, Chinese and Russian the next.³¹ This represented a significant expansion in the target audience from the previous

28 Philippe Eberlin, "Underwater Acoustic Identification of Hospital Ships", *International Review of the Red Cross*, Vol. 28, No. 267, 1988, p. 518.

29 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Comentario del Protocolo del 8 de junio de 1977 adicional a los Convenios de Ginebra de 12 de agosto de 1949 relativo a la protección de las víctimas de los conflictos armados internacionales (Protocolo I), Comentario ... sin carácter internacional (Protocolo II) y del artículo 3 de estos Convenios*, 3 vols, ICRC, Bogotá, 1998–2001.

30 Dominique Loye, *Annexe (I) du Protocole (I): Règlement relatif à l'identification (tel qu'amendé le 30 novembre 1993): Commentaire de 2002*, 2002, available at: <https://tinyurl.com/3kkuxbuj>. The 2002 commentary on Annex I, like its 1987 predecessor, comments on the annex article by article.

31 Jean-François Quéguiner, "Commentaire du Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à l'adoption d'un signe distinctif additionnel (Protocole III)", *Revue Internationale de la Croix-Rouge: Sélection Française*, Vol. 88, 2006; Jean-François Quéguiner, "Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an

ICRC Commentaries, which were originally produced in English and French only, and much later in Spanish.

Quite a few of the “usual suspects” of the ICRC’s history – from Gustave Moynier to Jean Pictet – have thus left their mark on the history of the Commentaries. But, with the development of the law, State practice and standards for treaty interpretation, there has been a clear evolution towards a more collaborative effort, with the authority of a Commentary resting on its authors’ combined expertise and rigorous methodology, rather than on the profile of a main author.

In 2011, the ICRC decided to update its Commentaries on the 1949 Geneva Conventions and their 1977 Additional Protocols to take into account the State practice and legal developments that had taken place in the decades since the Conventions were adopted.³² The goal of this endeavour is to ensure that the Commentaries are fit for purpose in contemporary armed conflicts and can serve as a useful interpretive tool for practitioners.³³

The current project to update the ICRC Commentaries on the 1949 Geneva Conventions and their Additional Protocols is the work of many contributors, both internal and external to the ICRC.³⁴ Some of the authors of the Commentaries work in the in-house team dedicated to this project, while others work elsewhere in the ICRC. A number of authors do not work for the ICRC. All the authors of the Commentary on a given Convention are on the reading committee, and thus have an opportunity to give feedback on the Commentaries drafted by others. In addition to external authors, there are around fifty external peer reviewers from all over the world for each of the Commentaries, some working on multiple volumes, totalling over 120 peer reviewers (so far). These are practitioners and academics who ensure that a range of professional specialties and geographically diverse perspectives are represented. Lastly, there is an editorial board to provide

Additional Distinctive Emblem (Protocol III)”, *International Review of the Red Cross*, Vol. 89, No. 865, 2007.

- 32 See, announcing the start of the project, Jean-Marie Henckaerts, “Bringing the Commentaries on the Geneva Conventions and their Additional Protocols into the Twenty-First Century”, *International Review of the Red Cross*, Vol. 94, No. 888, 2012, available at: <https://international-review.icrc.org/articles/bringing-commentaries-geneva-conventions-and-their-additional-protocols-twenty-first>.
- 33 See, for example, comments by Liesbeth Lijnzaad and Titus K. Githiora in Samuel Longuet, Julien Tropini, Alice Sinon and Pauline Lesaffre, “Conference on the ICRC Updated Commentary on the First Geneva Convention: Capturing 60 Years of Practice”, *Military Law and the Law of War Review*, Vol. 56, No. 1, 2017–18, pp. 178, 211; Steven Hill, “Geneva Convention III Commentary: Implementing POW Convention in Multinational Operations”, *Just Security*, 28 October 2020, available at: www.justsecurity.org/73074/geneva-convention-iii-commentary-implementing-pow-convention-in-multinational-operations/; Tim Wood, “GCIII Commentary: Removing Ambiguity on the Treatment of Prisoners of War”, *Humanitarian Law & Policy Blog*, 29 October 2020, available at: <https://blogs.icrc.org/law-and-policy/2020/10/29/gciii-commentary-removing-ambiguity/>. For video testimony on the utility of the updated Commentaries from practitioners and ICRC staff, see ICRC, “Third Geneva Convention – Updated Commentary”, 8 April 2021, available at: www.youtube.com/watch?app=desktop&v=HoEM7qFUWC4.
- 34 Lindsey Cameron, Eve La Haye, Heike Nierbergall-Lackner, Jean-Marie Henckaerts and Bruno Demeyere, “The Updated Commentary on the First Geneva Convention: A New Tool for Generating Respect for International Humanitarian Law”, *International Review of the Red Cross*, Vol. 97, No. 900, 2016, p. 1212, available at: <https://international-review.icrc.org/articles/updated-commentary-first-geneva-convention-new-tool-generating-respect-international>.

guidance and support to the project team, made up of a balance of internal ICRC legal experts and external legal experts representing academics, judges and military practitioners.³⁵ Given all this involvement from legal experts within and outside the ICRC, it is clear that we have come a long way from commentaries that represented the personal opinion of a single jurist.

Methodology

Each of the ICRC Commentaries published since 1870 provides

an article-by-article “commentary” or explanation of the meaning of each provision, its paragraphs, terms, and sentences. For each article, a commentary provides elements for the interpretation of that provision. In addition, a commentary explains the links between articles in a treaty or group of treaties, as well as its links with other rules of international law.³⁶

Some Commentaries are organized differently, providing an overview of the topics addressed.³⁷

The early commentaries introduced above followed the most common structure of an “article-by-article” explanation of the treaty, dissecting each provision and defining key terms. This textual analysis was – and remains – informed by each treaty’s drafting history, by State practice and, in more recent history, by the practice of international courts and tribunals. In the case of a revision of an existing treaty, commentators relied on the analysis featured in their predecessors’ commentaries, to pinpoint areas of change and continuity. The ICRC commentators followed closely the legal scholarship related to the treaties, which could also inform their work. Some books passed from one

35 The composition of the Editorial Committee has changed slightly for each Commentary published so far. For the Commentary Geneva Convention I, the Editorial Committee was made up of (in alphabetical order) Knut Dörmann, then chief legal officer and head of the ICRC’s Legal Division; Liesbeth Lijnzaad, a judge on the International Tribunal for the Law of the Sea; Marco Sassòli, professor at the University of Geneva; and Philippe Spoerri, the ICRC’s then director of international law and cooperation. The Editorial Committee for the Commentary on Geneva Convention II was made up of Knut Dörmann, Liesbeth Lijnzaad, Marco Sassòli and Philippe Spoerri. The Editorial Committee for the Commentary on Geneva Convention III was made up of Knut Dörmann, who at that time was the ICRC’s head of delegation in Brussels; Cordula Droeger, the ICRC’s incoming chief legal officer and head of the Legal Division; Helen Durham, the ICRC’s incoming director of law and policy; Liesbeth Lijnzaad; Marco Sassòli; Philip Spoerri, who at that time was the ICRC’s head of delegation in New York; and Brigadier General Kenneth Watkin (ret.), a former judge advocate from the Canadian Armed Forces. For the forthcoming Commentary on Geneva Convention IV, the Editorial Committee consists of Knut Dörmann; Cordula Droeger; Liesbeth Lijnzaad; Nils Melzer, the incoming ICRC director of law, diplomacy and policy; Marco Sassòli; and Wing Commander Tim Wood, chief legal adviser at Headquarters Joint Forces New Zealand.

36 Jean-Marie Henckaerts, “The Impact of Commentaries on Compliance with International Law”, in American Society of International Law, *Proceedings of the 115th Annual Meeting*, 3 March 2021, p. 56, available at: <https://doi.org/10.1017/amp.2021.99>.

37 This is the case for another prominent Commentary on the 1949 Geneva Conventions and their Additional Protocols: Andrew Clapham, Paola Gaeta and Marco Sassoli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015.

commentator to the next. A French translation of German jurist and professor Carl Lueder's 1876 volume on GC I, for example, belonged successively to Gustave Moynier and to Paul Des Gouttes.³⁸ As the law developed, ICRC commentators of revised or new treaties were able to build on the work of their predecessors precisely because those sources were collected and preserved, thus passing from one "generation" to the next. Finally, the commentators have also systematically been able to draw from what the ICRC had observed during past conflicts. Because of its dual mandate, the organization has historically been uniquely positioned to comment on what worked, and what did not, in the law and its application. Paul Des Gouttes, for instance, recalled practical examples from the work of the International Agency for Prisoners of War, operated by the ICRC during the First World War, to explain the drafters' intentions on specific provisions of the revised 1929 Geneva Convention. He pointed out how the belligerents' reluctance to repatriate captured sanitary personnel, a situation that the ICRC had denounced during the war, impacted the revision of the related article in the Convention.³⁹ He also presented the new obligation to establish and transmit certificates of death as a direct consequence of the Agency's efforts to get such documentation, so that families could be informed of their loved ones' deaths.

The ICRC Commentaries have thus relied on similar types of sources throughout history. They have also shared a common purpose: to make sense of the treaties and, for each of the treaties' provisions, to help bridge the gap between the letter of the law and its application in concrete situations. However, as both law and State practice developed over time, the amount of information to consider dramatically increased, requiring a more systematic and rigorous approach. GC I had ten articles in 1864 when it was first adopted, thirty-three after the 1906 revision, thirty-nine after the 1929 revision and sixty-four (plus annexes) in its final 1949 version. Quite logically, the Commentary's number of pages almost doubled in size between the 1870 and 1952 publications, and more than doubled again between 1952 and the 2016 update, from 542 to 1,344 pages. This evolution is inevitable if the updated Commentaries are to be truly comprehensive. Today, their clear structure and the possibility of accessing the commentary on a specific article online with a few clicks help to guarantee that they remain an accessible practical tool for practitioners, despite their length.

The ICRC Commentaries' methodology has also evolved over time in line with the development of recognized standards for treaty interpretation. Interestingly, some of the principles of treaty interpretation later codified in the Vienna Convention on the Law of Treaties (VCLT)⁴⁰ can already be found in the very early commentaries, introduced as being derived from common sense by the commentator. Moynier, for instance, fought back against criticism regarding

38 Carl Lueder, *La Convention de Genève au point de vue historique, critique et dogmatique*, ICRC, Geneva, and Eduard Besold, Erlangen, 1876.

39 P. Des Gouttes, above note 17, pp. 72–86.

40 Vienna Convention on the Law of Treaties, 1155 UNTS 331, 22 May 1969 (entered into force 27 January 1980) (VCLT).

the lack of precision of the term ‘force militaire’ in the 1864 Convention by referring to the ‘esprit général’ (general purpose) of the treaty;⁴¹ this is in line with Article 31(1) of the VCLT, which requires treaties to 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 light of its object and purpose*” (emphasis added). Moynier had taken particular care to include a section on the purpose of the treaty in his commentary before starting the analysis of its provisions. Time and time again, he returned to this point to refute interpretations that ran contrary to the drafters’ intentions. Paul Des Gouttes would make a similar point in his text, half a century later: “the general purpose of the Convention must inform all of its application, even in the details”.⁴²

The commentators on the 1864, 1906 and 1929 Conventions present their sources, but are less explicit regarding their methodology; instead, each author’s first-hand knowledge of the treaty’s drafting history was asserted as evidence of the commentary’s reliability. This first changed in Pictet’s era, as he drafted methodological guidelines for the team in charge of the Commentaries on the four 1949 Geneva Conventions. In that document, he stressed the importance of rooting the Commentaries’ analysis in the history of the Conventions, relying on the 1949 Diplomatic Conference’s records and other preparatory works from 1946–48. He saw it as necessary to incorporate in the Commentaries the experiences of past conflicts, especially of the Second World War, in order to make sense of the addition of new provisions or the revision of existing ones. Finally, he stated that

although it [will be] a scientific work, the commentary must be clear and accessible to non-lawyers. The style, therefore, must be simple. It will be impersonal and if the author of the commentary has opinions to which he would like to give a more personal touch, he will mark them clearly in the margin.⁴³

This was a clear departure from earlier commentaries, in which authors did not hesitate to make their personal point of view known, criticize or praise the drafters on terminology choices, and make recommendations for future revisions of the law. It is apparent in these methodological guidelines that Pictet saw the preparation of the new Commentaries as a collaborative effort. He notably requested that the authors share their texts with each other at an early stage. The ICRC Commentary on the 1977 Additional Protocols confirmed this evolution; it was explicitly presented as a collective work, prepared according to a series of

41 G. Moynier, above note 2, pp. 143–144: “On a été jusqu’à prétendre que les corps sanitaires, classés dans beaucoup de pays parmi les combattants, pourraient être considérés comme une force militaire. Mais cet exemple, par son exagération même, nous rassure au lieu de nous alarmer. Confronté avec l’esprit général de la Convention, ne montre-t-il pas à quelles subtilités inouïes la critique est contrainte de recourir pour battre en brèche un texte qui, s’il n’est pas irréprochable, est du moins fort intelligible et serre d’aussi près que possible la pensée des rédacteurs.”

42 P. Des Gouttes, above note 17, p. 191 (authors’ translation).

43 ICRC, “Schéma relatif à l’établissement des Commentaires des nouvelles Conventions de Genève”, Minutes of Meetings, Legal Commission, 14 September 1949, ICRC Archives.

well-defined procedures. The commentary on each article was discussed by a reading committee and went through a minimum of two rounds of edits in order to take into account the committee's remarks and ensure consistency across the board.⁴⁴

The authors of the so-called "Pictet Commentaries" were basing their work on State practice prior to the negotiation of the Conventions, notably during the Second World War, and several of them were present at the negotiations themselves and could therefore provide first-hand insights into what the drafters were thinking. The methodology behind the ICRC's ongoing project to update its Commentaries on the 1949 Geneva Conventions and their Additional Protocols is necessarily different.⁴⁵ First, the updated Commentaries are based on State practice and legal developments in the more than seventy years since the adoption of the 1949 Conventions, rather than practice in the lead-up to their negotiation. There is a significant amount of material to delve into, as evidenced by the comparative length of the updated Commentaries. For example, in the 1960 Pictet Commentary on Geneva Convention III, the commentary on common Article 3 is approximately twenty pages long; by contrast, in the 2020 updated Commentary, the commentary on common Article 3 is over 200 pages. This demonstrates the extensive research behind the commentary on each and every article.

Second, this once-in-a-generation update follows the interpretive tools laid down in the VCLT, using that Convention as its methodology. As stated above, under Article 31 of the VCLT, treaties 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 light of its object and purpose". Additional elements that must be taken into account are any subsequent agreements between the parties to the treaty about its interpretation or application, subsequent practice establishing the agreement of all parties regarding the treaty's interpretation (although such unanimous agreement is exceedingly rare for universally accepted treaties like the Geneva Conventions), and other relevant rules of international law that apply in relations between the parties. The VCLT is a comprehensive interpretive tool that must be used as a whole to interpret each treaty provision. In other words, it is not possible to pick and choose which elements to apply – all of them must be used together.

Article 32 of the VCLT refers to supplementary means of interpretation that can confirm or clarify the interpretation of treaty provisions. These include the treaty's preparatory work, State practice that does not fall under Article 31 (the vast majority of State practice referenced in the updated Commentaries), the circumstances of the treaty's conclusion, judicial decisions, and scholarly literature.⁴⁶ In looking at

44 ICRC Commentary on the APs, above note 27, pp. xxv–xxvi.

45 ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, 2nd ed., Geneva, 2020, paras 75–123, available at: <https://ihl-databases.icrc.org/ihl/full/GCIII-commentary>.

46 Jean-Marie Henckaerts and Elvina Pothelet, "The Interpretation of IHL Treaties: Subsequent Practice and Other Salient Issues", in Heike Krieger and Jonas Püschmann (eds), *Law-Making and Legitimacy in International Humanitarian Law*, Edward Elgar, Cheltenham, 2021, pp. 162–168.

State practice, the drafters of the updated Commentaries are able to rely on the ICRC's first-hand observations, some of which are published in its annual reports, press releases, and the *International Review of the Red Cross*, as well as its vast Archives, both those that are open to the public and those that are still sealed.⁴⁷

In accordance with Article 33 of the VCLT, where a treaty has been authenticated in two or more languages, the text is equally authoritative in each language. In such cases, the different-language versions of the treaty must be interpreted to be consistent with each other. This means that the equally authentic French and English versions of the Geneva Conventions can be compared to clarify the meaning of terms. This task is particularly complex for the Additional Protocols, which are equally authentic in all six official UN languages.⁴⁸

Similar to other contemporary ICRC publications,⁴⁹ the updated Commentaries are more open to a diversity of legal positions, and acknowledge alternate legal interpretations where there is no consensus. They are produced in English, but will be translated into the other five official UN languages, reflecting the fact that this is a global conversation that should be open to all, and indeed must be if it is to provide the best possible guidance for practitioners around the world.

Audience and reception

Who are the ICRC Commentaries written for? Jean-Marie Henckaerts, who leads the ICRC project on updating the Commentaries, clearly specifies that

[a]s a genre, commentaries are addressed specifically to practitioners and can play a significant role in enhancing compliance. The purpose of commentaries is to clarify the meaning of the norms so that they can be applied in a well-informed and coherent manner.⁵⁰

To do this effectively, the ICRC Commentaries have sought to be a practical tool, accessible to practitioners who often operate in the midst of hostilities.

Over 150 years ago, when Moynier's commentary on GC I was featured in Louis-Auguste Martin's *Annuaire philosophique*, it was with the latter's

47 For information on the ICRC Archives, see Valerie McKnight Hashemi, "A Balancing Act: The Revised Rules of Access to the ICRC Archives Reflect Multiple Stakes and Challenges", *International Review of the Red Cross*, Vol. 100, No. 907–909, 2018.

48 The six official UN languages are, in alphabetical order, Arabic, Chinese, English, French, Russian and Spanish. See UN, "Official Languages", available at: www.un.org/en/our-work/official-languages.

49 For instance, the *Review* itself, which has made significant progress in diversifying authorship. See Cédric Cotter and Ellen Policinski, "A History of Violence: The Development of International Humanitarian Law Reflected in the International Review of the Red Cross", *Journal of International Humanitarian Legal Studies*, Vol. 11, No. 1, 2020; Bruno Demeyere, "Editorial: Emerging Voices: Increasing the Diversity of Voices Featured in the International Review of the Red Cross", *International Review of the Red Cross*, Vol. 102, No. 914, 2021, pp. 511–513.

50 J.-M. Henckaerts, above note 36, p. 57.

recommendation that his book “be put in the hands of all army and navy officers, and summarized in a few pages for the instruction of the soldier. No one should be able to claim ignorance.”⁵¹ Because the treaty was to be applied during hostilities, its dissemination among decision-makers in governments and in the armed forces was always perceived to be of the utmost importance. This most certainly motivated the publication of the early commentaries, as evidenced by their authors’ insistence on the drafters’ pragmatic grasp of military realities.

In the 1950s, the original ICRC Commentaries on the 1949 Geneva Conventions were sent out upon publication to various selected governments. Each copy was addressed to the Ministry of Foreign Affairs, which was in turn invited to share the information with all the ministries and services concerned, starting with health, the interior and national defence.⁵² Copies were addressed to National Red Cross and Red Crescent Societies throughout the world. Selected libraries, like the US Library of Congress and the Bodleian Library in Oxford, and key academics and international law practitioners also received copies. The latter category included, notably, Sir Hersch Lauterpacht, Erik Castrén, executive director of the Japanese Society of International Law Juji Enomoto, and the International Law Commission. Finally, the Commentaries were also distributed to a series of law journals. The French edition of the Commentary on GC I, for instance, was sent to fifty-nine journals, including *L’Etat et le Droit Soviétique* in Moscow, the *Boletim da Sociedade Brasileira de Direito Internacional* in Rio de Janeiro, and the *Annales de la Faculté de Droit* of St Joseph University of Beirut. This distribution list was perhaps more restrictive than might be expected given the stated goal of the publication – that is, to be “of service to all who, in Governments, armed forces, and National Red Cross Societies, are called upon to assume responsibility in applying the Conventions, and to all, military and civilians, for whose benefit the Conventions were drawn up”.⁵³ However, in the same period, the ICRC also produced other publications for dissemination purposes, many of them more accessible to the general public than a legal commentary. Practitioners and subject-matter experts were a logical priority for the Commentaries.

Representing the practitioner’s point of view, Colonel W. Hays Parks of the US Army presented the Pictet Commentaries as “an invaluable reference tool and historical record”, attributing to their editor the “invaluable role of the honest broker”. Hays Parks summed up the Commentaries’ impact with these words:

[I]n the development of any legal advice regarding the 1949 Geneva Conventions, they are the first reference to which one resorts; and more than one meeting or discussion has been shortened by the question, “What does Pictet say about this?”⁵⁴

51 Louis-Auguste Martin, *Annuaire philosophique: Examen critique des travaux de physiologie, de métaphysique et de morale accomplis dans l’année*, Vol. 7, Ladrangé, Paris, 1870, pp. 357–358.

52 ICRC Circular Fr563b, 16 March 1959, ICRC Archives, B AG 022 033.03.

53 1952 Commentary on GC I, above note 25, p. 8.

54 W. Hays Parks, “Pictet’s Commentaries”, in Christophe Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honor of Jean Pictet*, ICRC, Geneva, and

Other experts have similarly acknowledged the weight that the Pictet Commentaries have acquired over time. For instance Professors Schmitt and Watts call the ICRC Commentaries “leading sources of clarification and background on the Conventions and Protocols for decades”, going on to say that “it is difficult to overstate their influential and nearly authoritative status”.⁵⁵ Because of their widespread acceptance, many scholars rely on the Pictet Commentaries as a matter of course, either expressly calling them “authoritative” or without feeling the need to justify the resort to a work of legal literature.⁵⁶

The original ICRC Commentaries have thus become quite authoritative over time, and in addition to being regularly cited in academic works, have been cited numerous times by various international tribunals,⁵⁷ domestic courts,⁵⁸ and

Nijhoff, The Hague, 1984, p. 496. Hays Parks was then chief of international law in the Office of the Judge Advocate General of the US Army.

- 55 Michael N. Schmitt and Sean Watts, “State *Opinio Juris* and International Humanitarian Legal Pluralism”, *International Law Studies*, Vol. 91, No. 1, 2015, pp. 192–193.
- 56 See, e.g., Mao Xiao, “Are ‘Unlawful Combatants’ Protected under International Humanitarian Law?”, *Amsterdam Law Forum*, Vol. 10, No. 2, 2018, pp. 65, 68, available at: <https://amsterdamlawforum.org/articles/abstract/10.37974/ALF.321/>; Tatiana Londoño-Camargo, “The Scope of Application of International Humanitarian Law to Non-International Armed Conflicts”, *Vniversitas*, Vol. 64, No. 130, 2015, p. 210, available at: <https://revistas.javeriana.edu.co/index.php/vnijuri/article/view/13678>; Fionnuala Ni Aoláin, “*Hamdan* and Common Article 3: Did the Supreme Court Get It Right?”, *University of Minnesota Law Review*, Vol. 91, No. 5, 2007, p. 1539, available at: https://scholarship.law.umn.edu/faculty_articles/73/; Guanzhu Yan, “Analysis of the Scope of ‘Protected Persons’ in the Fourth Geneva Convention of 1949”, *Human Rights*, Vol. 10, No. 1, 2011, p. 9 fn. 5; Alain-Guy Sipowo, “Does International Criminal Law Create Humanitarian Law Obligations? The Case of Exclusively Non-State Armed Conflict under the *Rome Statute*”, *Canadian Yearbook of International Law*, Vol. 51, No. 1, 2013, p. 292 fn. 12, available at: <https://tinyurl.com/uys3n45>.
- 57 See, for example, International Court of Justice (ICJ), *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Separate Opinion of Judge Simma, 19 December 2005, *ICJ Reports 2005*, paras 26, 34, 39; ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Dissenting Opinion of Judge Cañado Trindade, 6 July 2010, *ICJ Reports 2011*, paras 137, 145, 148; International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Blaskić*, Case No. IT-95-14, Decision on the Defence Motion to Strike Portions of the Amended Indictment Alleging “Failure to Punish” Liability (Trial Chamber), 4 April 1997, para. 4(d); ICTY, *Prosecutor v. Alekssovski*, Case No. IT-95-14/1-A, Judgement (Appeals Chamber), 24 March 2000, paras 22, 26–27, 104; ICTY, *Prosecutor v. Delalić*, Case No. IT-96-21-A, Judgment (Appeals Chamber), 20 February 2001, paras 31, 78–79, 96, 132, 143–149, 166, 233, 238, 250, 254–255, 327, 330, 416; ICTY, *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, Judgment (Trial Chamber), 29 November 2002, paras 195, 203, 223; ICTY, *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgment (Trial Chamber), 31 July 2003, para. 459; ICTY, *Prosecutor v. Hadzihasanović and Kubura*, Case No. IT-01-47-AR73.3, Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98bis Motions for Acquittal (Appeals Chamber), 11 March 2005, paras 17, 25; ICTY, *Prosecutor v. Strugar*, Case No. IT-01-42-A, Judgment (Appeals Chamber), 17 July 2008, paras 167, 173, 176–178, 270, 286–287, 298, 329; International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Rutaganda*, Case No. ICRT-96-3-T, Judgment (Trial Chamber), 6 December 1999, paras 92, 100; ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Judgment (Appeals Chamber), 1 June 2001, paras 437, 441; ICTR, *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgment (Trial Chamber), 15 May 2003, paras 355, 357, 359, 363–364, 366–367; ICTR, *Setako v. Prosecutor*, Case No. ICTR-04-81-A, Judgment (Appeals Chamber), 28 September 2011, para. 260.
- 58 See, for example, US Supreme Court, *Hamdan v. Rumsfeld, Secretary of Defense et al.*, 126 S. Ct. 2749, 2764 (2006), Majority Opinion, Justice Thomas Dissenting and Justice Alito Dissenting, 2006; Republic of Colombia, Jurisdicción Especial Para La Paz, Salas de Justicia Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas, Auto No. 19 of 2021, Bogotá, 26 January 2021.

UN documents such as the reports of the Human Rights Council.⁵⁹ This demonstrates that they serve as a valuable resource, and the hope is that the updated Commentaries will do so even more, as they include many more examples of State practice and refer to diverging viewpoints that may shed light on the law as it has developed since the Conventions were adopted. We can already see tribunals and scholars beginning to rely on the updated Commentaries.⁶⁰

The updated Commentaries are not only an academic resource but above all are intended to serve as a practical tool for military commanders, officers, and lawyers and other practitioners who must apply the Geneva Conventions, such as judges, legislators, policy-makers and humanitarians.⁶¹ They are written in clear language and strive to clarify ambiguity,⁶² while leaving room for nuance and acknowledging different schools of thought on how the Conventions should be interpreted.

Despite questions about how the VCLT's treaty interpretation methodology has been applied⁶³ and whether the Commentaries go too far in suggesting how the law should develop,⁶⁴ as well as many strong reactions to the description of the "duty to ensure respect" contained in common Article 1,⁶⁵ the updated Commentaries have been well received by the international legal community.⁶⁶ As Tania Arzapalo Villón from Peru's Ministry of Justice and Human Rights says:

59 See, for example, Human Rights Council, "There Is Nothing Left for Us": Starvation as a Method of Warfare in South Sudan, UN Doc. A/HRC/45/CRP.3, 5 October 2020, paras 34, 37.

60 See, for example, International Criminal Court, *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Second Decision on the Defence's Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9 (Appeals Chamber), 17 January 2017, para. 50; Katayoun Hosseinnejad and Pouria Askary, "The Obligation to Exercise 'Leniency' in Penal and Disciplinary Measures against Prisoners of War in Light of the ICRC Updated Commentary on the Third Geneva Convention", *International Review of the Red Cross*, Vol. 104, No. 919, 2022. See also the article by Antoon De Baets in this issue of the *Review*.

61 See ICRC, "Updated Commentaries Bring Fresh Insights on Continued Relevance of Geneva Conventions", interview with Jean-Marie Henckaerts, 7 March 2016, available at: www.icrc.org/en/document/updated-commentaries-first-geneva-convention.

62 T. Wood, above note 33.

63 See Michael W. Meier, "The Updated GCIII Commentary: A Flawed Methodology?", *Articles of War*, 3 February 2021, available at: <https://lieber.westpoint.edu/updated-gcii-commentary-flawed-methodology/>; Kevin Jon Heller, "First Thoughts from Academia on the Updated GCI Commentary", *OpinioJuris*, 22 July 2016, available at: <http://opiniojuris.org/2016/07/22/multi-blog-series-first-thoughts-on-the-updated-gci-commentary-from-academia/>.

64 Eric Jensen and Carolyn Sharp, "Non-State Commentaries: Law-Making or Law-Suggesting?", *Articles of War*, 8 April 2021, available at: <https://lieber.westpoint.edu/non-state-commentaries-law-making-law-suggesting/>.

65 Michael N. Schmitt and Sean Watts, "Common Article 1 and the Duty to 'Ensure Respect'", *International Law Studies*, Vol. 96, No. 1, 2020; Verity Robson, "Ensuring Respect for the Geneva Conventions: A More Common Approach to Article 1", *OpinioJuris*, 17 July 2020, available at: <http://opiniojuris.org/2020/07/17/ensuring-respect-for-the-geneva-conventions-a-more-common-approach-to-article-1/>; Elizabeth Stubbins Bates, "Geneva Convention III Commentary: Unpacking the Potential of 'Ensure Respect' in Common Article 1", *Just Security*, 30 October 2020, available at: www.justsecurity.org/73166/geneva-convention-iii-commentary-unpacking-the-potential-of-ensure-respect-in-common-article-1/.

66 See Diane Marie Amann, "Commenting on the ICRC Geneva Commentaries", 15 March 2016, available at: <https://dianemarieamann.com/2016/03/15/commenting-on-the-icrc-geneva-commentaries-30-march-in-d-c/>; Eden Lapidor, "New Developments in ICRC Commentaries to the POW Convention", *Just Security*, 18 June 2020, available at: www.justsecurity.org/70863/pow-geneva-convention-commentary-

In the field of international humanitarian law, especially for actors like us who have the task of promoting its implementation, the Commentaries will give us a solid tool with technical and legal aspects that will [not only] facilitate ... the work with the various actors, but also reinforce and improve our work.⁶⁷

Others have praised the updated Commentaries for their incorporation of a modern understanding of the roles played by women in armed conflict,⁶⁸ as well as how detention is carried out during multilateral operations,⁶⁹ among other things. As Major General Nilendra Kumar points out:

Law is not static or dormant. The facts, interpretation, and applications of law change with the passage of time. This is what makes regular revision of the commentary relevant. It brings out narration and details of new experiences that need to be assessed on the touchstone of the IHL.⁷⁰

Looking beyond the substance of the criticisms (and praise) that have met the updated Commentaries, what is notable is that the legal context itself has changed. As with other ICRC publications like the *International Review of the Red Cross*, as the debates among scholars became more sophisticated, the ICRC began to engage more meaningfully with external legal experts.⁷¹ With the advent of blogs and social media, scholars and practitioners worldwide are able to give almost instantaneous feedback and to engage directly with the project team while the drafting process is ongoing.⁷² This is of course also possible at professional conferences and in other “analogue” or “traditional” ways, but new communication tools have enabled this dialogue on a wider scale and in a more inclusive manner. The Commentaries themselves have also been adapted for the

[highlights-of-new-developments/](#); Keiichiro Okimoto, “The United Nations and the Third Geneva Convention”, *EJIL: Talk!*, 26 October 2020, available at: www.ejiltalk.org/the-united-nations-and-the-third-geneva-convention/. The project to update the ICRC Commentaries was also the subject of the 22nd edition of the Bruges Colloquium, an annual workshop co-hosted by the ICRC and the College of Europe that brings together legal practitioners from around Europe. See Colloquium’s website, available at: www.coe-icrc.eu/en/programme.

67 ICRC, above note 33, at 4:15 (ICRC’s translation).

68 Catherine O’Rourke, “Geneva Convention III Commentary: What Significance for Women’s Rights?”, *Just Security*, 21 October 2020, available at: www.justsecurity.org/72958/geneva-convention-iii-commentary-what-significance-for-womens-rights/.

69 S. Hill, above note 33.

70 Nilendra Kumar, “An Important Document to Reiterate Obligations Under Third Geneva Convention” – Maj Gen Nilendra Kumar”, *ICRC New Delhi Blog*, 15 June 2020, available at: <https://blogs.icrc.org/new-delhi/2020/06/15/important-document-to-reiterate-the-obligations-under-geneva-conventions-maj-gen-nilendra-kumar/>.

71 See C. Cotter and E. Policinski, above note 59, pp. 36–67.

72 See Mikhail Orkin, “In Bruges: The Enduring Relevance of IHL and the Updated Commentaries”, *Humanitarian Law & Policy Blog*, 23 February 2021, available at: <https://blogs.icrc.org/law-and-policy/2022/02/23/bruges-ihl-commentaries/>; Kelisiana Thynne, “GCIII Commentary Symposium: ‘Preparations Have been Made in Advance – GCIII and the Obligation to Respect and Ensure Respect by Preparing for Retaining POWS’”, *OpinioJuris*, 27 January 2021, available at: <http://opiniojuris.org/2021/01/27/gciii-commentary-symposium-preparations-have-been-made-in-advance-gciii-and-the-obligation-to-respect-and-ensure-respect-by-preparing-for-retaining-pows/>; S. Hill, above note 33; K. Okimoto, above note 66.

digital age; they can be consulted online via the ICRC's online IHL Database of Treaties, States Parties and Commentaries⁷³ and IHL mobile app.⁷⁴

Ultimately, exchanges with scholars and practitioners allow the Commentaries to be more accurate and therefore more useful, as evidenced by the addition of new analysis to the commentary on common Article 1 in the Commentary on Geneva Convention III to reflect diverging views following intense debate in the legal literature. The fact that more participants are able to engage in these conversations within a shorter range of time means that the process of updating the Commentaries is more dynamic than the drafting of the original Commentaries was. It is not a single legal scholar opining but a network of scholars working together to reflect how the law is being interpreted and applied.

Concluding remarks

There is a clear continuity in the Commentaries' purpose throughout history. Their methodology, however, has evolved to best fulfil that purpose, in line with the development of the codification of the principles of treaty interpretation and the standards of treaty commentaries as a genre of international legal scholarship.

The ICRC remains in a unique position to put forward such interpretative guidance on the application of the Geneva Conventions and their Additional Protocols. Because of its central role in the development of IHL and because of its humanitarian mandate, it has unparalleled access and insight into the history of the Conventions and their application in armed conflict. Neither the ICRC nor its intended audiences are content to rely on the reputation of a single jurist as a sufficient guarantee of the quality of its Commentaries any longer. Today, its jurists base their analysis on the comprehensive records and resources of its Archives and Library, which document decades of State practice. The ICRC is in a unique position to draw on these records, examine seventy years of the Conventions "in action", and present its findings in a condensed and accessible way. Ultimately, the authority of the updated Commentaries stems from their quality, which in turn comes from the diligent research carried out by the commentators and the application of the robust treaty interpretation methodology found in the VCLT and applied to each individual article of the 1949 Geneva Conventions and their 1977 Additional Protocols.

73 Available at: <https://ihl-databases.icrc.org/ihl>.

74 See ICRC, "IHL App 2.0: International Humanitarian Law and More in Your Pocket", 1 October 2021, available at: www.icrc.org/en/document/ihl-digital-app.