

THERE AND BACK AGAIN: HOW TO ENSURE COMPLIANCE WITH IHL BY RELYING ON NON-TRADITIONAL VOICES AND LIVE TO TELL THE TALE

This panel was convened at 11:15 a.m., Wednesday, March 24, 2021, by its moderator Ioana Cismas of the University of York Center for Applied Human Rights, who introduced the panelists: Pascal Bongard of Geneva Call; Tanisha Fazal of the University of Minnesota; Jean-Marie Henckaerts of the International Committee of the Red Cross; and Nontando Habede of St. Augustine College.

THE IMPACT OF COMMENTARIES ON COMPLIANCE WITH INTERNATIONAL LAW
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Better understanding of the Geneva Conventions increases compliance with the norms of international humanitarian law. The commentaries are one tool for gaining that understanding.

I. COMMENTARIES AS A GENRE OF INTERNATIONAL LEGAL SCHOLARSHIP

Commentaries are a particular genre in the field of international legal scholarship, alongside essays, book reviews, law review articles, treatises dealing with a specific field, and monographs on a specific subject, among others.¹ Each genre has specific features that structures the publication in question and influences how it presents and discusses the law.

In international law, commentaries typically focus on a specific treaty or groups of treaties,² but there are also commentaries on soft-law instruments.³ The International Committee of the Red

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¹ See Christian Djéffal, *Commentaries on the Law of Treaties: A Review Essay Reflecting on the Genre of Commentaries*, 24 EUR. J. INT'L L. 1223 (2013).

² See, e.g., Jiří TOMAN, THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT: COMMENTARY ON THE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT AND ITS PROTOCOL (1996); COMMENTARY ON THE SECOND PROTOCOL TO THE HAGUE CONVENTION OF 1954 FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT (2009); THE CONVENTION ON THE PROHIBITION OF THE USE, STOCKPILING, PRODUCTION, AND TRANSFER OF ANTI-PERSONNEL MINES AND ON THEIR DESTRUCTION (Stuart Maslen ed., 2004); WILLIAM SCHABAS, NOWAK'S CCPR COMMENTARY (3d ed. 2019); THE UNITED NATIONS CONVENTION AGAINST TORTURE AND ITS OPTIONAL PROTOCOL: A COMMENTARY (Manfred Nowak, Moritz Birk & Giuliana Monina eds. 2019); WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE (2d ed. 2016); THE CONVENTION ON CLUSTER MUNITIONS: A COMMENTARY (Gro Nystuen & Stuart Casey-Maslen eds., 2010); THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY (Andreas Zimmermann, Jonas Dörschner & Felix Machts eds., 2011); CHRISTIAN J. TAMS, LARS BERSTER & BJÖRN SCHIFFBAUER, CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE: A COMMENTARY (2014); THE 1949 GENEVA CONVENTIONS: A COMMENTARY (Andrew Clapham, Paola Gaeta & Marco Sassòli eds., 2015); THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY (Otto Triffterer & Kai Ambos eds., 3d ed. 2016).

³ See, e.g., JORGE VIÑUALES, THE RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT: A COMMENTARY (2015).

Cross (ICRC) is currently in the process of updating its commentaries on the 1949 Geneva Conventions and their Additional Protocols of 1977. It published updated commentaries on the First, Second, and Third Geneva Conventions in 2016, 2017, and 2020 respectively, and work on the Fourth Convention is ongoing. This Article looks at this subject in the light of this experience.

Commentaries approach a treaty in a structured manner, through 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.

The method of interpretation commentaries, including the ICRC’s updated Commentaries on the Geneva Conventions, is set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (Vienna Convention or VCLT). This method is geared toward compliance, as is the Vienna Convention itself. Indeed, the Vienna Convention is based on the fundamental rule that treaties must be respected: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”⁴ This is the basic norm underpinning the entire law of treaties. It finds specific expression in common Article 1 of the 1949 Geneva Conventions which provides that each high contracting party must “respect and ensure respect” for the Conventions.

In addition to this fundamental norm requiring respect, the VCLT rules on treaty interpretation are also geared toward the ultimate goal of the Vienna Convention which is compliance with treaties in good faith. The following is an overview of the main elements of treaty interpretation which have to be applied as a combined whole:

First, VCLT Article 31 requires that treaties “shall be interpreted in good faith.” Good faith is a fundamental requirement for enhancing compliance. An interpretation in bad faith would not advance the objective of the treaty.

Second, the Vienna Convention requires that a treaty be interpreted in accordance “with the ordinary meaning of the terms to be given to the terms of the treaty in their context.” This reflects the objective to apply a treaty as it was agreed and not to divert from its meaning. It is linked to the requirement of good faith.

Third, the treaty terms have to be interpreted “in the light of [the treaty’s] object and purpose.” This requirement reflects the objective to apply the treaty not only according to the letter, but also according to its spirit. It is also related to good faith. Consideration in good faith of the object and purpose will ensure the effectiveness of a treaty’s terms. According to the International Law Commission:

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.⁵

As can be seen from this quote, and as recognized by the International Court of Justice, a treaty may have several objects and purposes.⁶

Fourth, the Vienna Convention requires the interpretation to take into account “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its

⁴ Article 26, entitled “*Pacta sunt servanda*.”

⁵ Y.B. INT’L L. COMM’N, VOL. II, 219, para. 6 (1966). See also Territorial Dispute Case (Libya v. Chad), Judgment, 1994 ICJ Rep. 6, para. 51 (Feb. 3) (in international law, *effet utile* (useful effect) is regarded as “one of the fundamental principles of interpretation of treaties”).

⁶ Case Concerning Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), Judgment, 1952 ICJ Rep. 176, 196 (Aug. 27).

interpretation.” This allows treaties to evolve over time and to adapt, for example to technological changes. The ILC has concluded that subsequent practice that does not fulfill the criteria of this provision, i.e., to establish the agreement of all the parties regarding the interpretation of a treaty, may still be relevant as a supplementary means of interpretation under Article 32.⁷ This consists of conduct by one or more parties in the application of the treaty after its conclusion.⁸ The weight of such practice may depend on its clarity and specificity, as well as its repetition.⁹ The seven decades since the adoption of the Geneva Conventions have seen the development of significant practice in their application, which is particularly useful in this respect.

Fifth, other relevant rules of international law must also be taken into account. This serves to preserve the integrity of international law as a whole and to avoid contradictions between different branches and norms. It is sometimes referred to as the objective of “systemic integration” whereby the field of international law forms an integrated and consistent body of rules.¹⁰

Finally, VCLT Article 32 allows recourse to supplementary means of interpretation, including, but not limited to, the preparatory work of a treaty and the circumstances of its conclusion, to confirm the meaning of the terms based on the main rule of treaty interpretation or to clarify the meaning when it remains ambiguous. Supplementary means, which are not explicitly listed in the VCLT, but which are often referred to by commentators and interpreters, include international judicial decisions and, as mentioned earlier, subsequent state practice that does not meet the requirements of Article 31.

Applying the method of treaty interpretation in good faith advances compliance with treaties, including humanitarian law treaties.

II. ADDRESSEES OF COMMENTARIES

As 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. Commentaries do so by presenting all relevant elements to be taken into account in the interpretation of the various provisions of a treaty.

In the first place, this concerns *government officials*, including military lawyers and commanders, for example when they are reviewing orders and regulations, rules of engagement, military manuals, and doctrine. It further concerns national and international *judges* who have to apply and interpret humanitarian law in a specific case. It also concerns international civil servants serving international organizations, staff of NGOs and academic personnel working in this area of law. And finally it concerns the ICRC itself. The updated Commentaries on the Geneva Convention, for example, help to ensure that the ICRC has a coherent and well-informed approach to its interpretation of the Conventions. Such interpretation is necessary, in particular, in the light of the organization’s role “to work for the faithful application of international humanitarian law applicable in armed conflicts.”¹¹

⁷ Int’l L. Comm’n Rep. on Work of Its 70th Session, Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, Conclusion 2.4 (Adopted on Second Reading), 13, UN Doc. A/70/10 (2018).

⁸ *Id.*, Conclusion 4.3 (provisionally adopted).

⁹ *Id.* at 15.

¹⁰ See, e.g., Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT’L & COMP. L. Q. 279 (2005).

¹¹ Statute of the International Red Cross and Red Crescent Movement, Art. 5(2)(c) (1986).

III. COMMENTARIES AS A PRACTICAL TOOL

Commentaries are a practical tool for all those who have to apply and interpret the law. By bringing together the elements of interpretations, and in particular subsequent practice and other relevant rules of international law, commentaries also provide examples of application, challenges to compliance, and best practices in applying the norms in question. They record these examples and practices from past conflicts so that practitioners today can learn from the past.

One strength of commentaries is their comprehensive approach to a treaty or set of treaties. They do not focus on a specific, detailed area or topic of the law, but on all provisions of a treaty and seek to explain the relationship of the treaty's provisions with "other relevant rules of international law" as required by VCLT Article 31(3)(c). They apply a method of interpretation to explain what the rules mean and how they can be effectively implemented, in a general fashion. Courts may often undertake a similar task of interpretation but usually restrict themselves to addressing only what is necessary to resolve the specific legal dispute before them, typically involving a set of facts that have already been established. To be as useful as possible in improving compliance and supporting those who have to resolve questions as they arise in the future, a commentary, on the other hand, seeks to provide a general overview of the interpretative elements that will be relevant for practical aspects of interpretation and implementation across the widest possible range of contexts.

Judicial decisions can clarify some rules, or specific aspects of a rule, while commentaries focus on the entire "system" set out in a treaty, or a set of treaties, like the 1949 Geneva Conventions and their Additional Protocols.

While commentaries may occasionally identify and address ambiguities or point out possible ways of resolving contested issues, for the most part they reflect existing interpretations based on the elements of the VCLT. They bring together these elements of interpretation in a systematic manner, in one place, for easy access by practitioners and academics.

The VCLT method of interpretation is geared toward the practice of states. The ICRC Commentary on Common Article 3 of the Geneva Conventions refers to some practice of non-state armed groups, e.g., in relation to special agreements.¹² The traditional doctrine of sources and interpretation of international law favors state practice. There is increasing debate, however, about the legal value of the humanitarian commitments of non-state armed groups. The precise legal value of these commitments and instruments remains unclear. There is nevertheless a tendency to consider them. For one, they can be looked at to see how states react to them and how courts treat them, both of which can be taken into account under the traditional doctrine of interpretation.

In conclusion, commentaries are a tool to increase compliance. Writing commentaries ultimately serves to seek better compliance with and respect for the treaties they deal with.

WHAT YOU FIGHT FOR SHAPES HOW YOU FIGHT

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The question of where to begin when considering the conditions under which states and non-state actors comply with international humanitarian law (IHL) is itself an interesting one because of the history of IHL. IHL was created by states, principally to govern their behavior in relation to

¹² See COMMENTARY ON THE FIRST GENEVA CONVENTION, paras. 849, 856 (2016).

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