

The updated ICRC Commentary on the Second Geneva Convention: Demystifying the law of armed conflict at sea

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Abstract

Since their publication in the 1950s and 1980s respectively, the Commentaries on the Geneva Conventions of 1949 and their Additional Protocols of 1977 have become a major reference for the application and interpretation of those treaties. The International Committee of the Red Cross, together with a team of renowned experts, is currently updating these Commentaries in order to document developments and provide up-to-date interpretations of the treaty texts. Following a brief overview of the methodology and process of the update as well as a historical background to the Second Geneva Convention, this article addresses the scope of applicability of the Convention, the type of vessels it protects (in particular hospital ships and coastal rescue craft), and its relationship with other sources of international humanitarian law and international law conferring

* The authors wish to acknowledge that this article summarizes the key findings of the new Commentary and as such reflects the input of many experts involved in the drafting and review of the Commentary.

protection to persons in distress at sea. It also outlines differences and commonalities between the First and the Second Conventions, including how these have been reflected in the updated Commentary on the Second Convention. Finally, the article highlights certain substantive obligations under the Convention and how the updated Commentary addresses some of the interpretive questions they raise.

Keywords: international humanitarian law, Second Geneva Convention, updated Commentary, law of the sea, treaties conferring protection to persons in distress at sea, International Committee of the Red Cross, protection of wounded, sick and shipwrecked, non-international armed conflict, obligation to search and collect casualties at sea, hospital ships, coastal rescue craft.



A contemporary interpretation of humanitarian law

The 1949 Geneva Conventions and their 1977 Additional Protocols have passed the test of time in many situations of armed conflict over their respective almost seventy and forty years of applicability. They still constitute the bedrock of international humanitarian law (IHL) and provide fundamental rules protecting persons who are not, or are no longer, taking a direct part in hostilities. These persons include wounded and sick members of armed forces, the shipwrecked, prisoners of war, and civilians. Furthermore, the Conventions foresee the protection of specific categories of persons, such as women and children, the elderly and displaced persons.

In the years following the adoption of the 1949 Geneva Conventions and their 1977 Additional Protocols, the International Committee of the Red Cross (ICRC) published a series of Commentaries that were primarily based on the negotiating histories of these treaties and on prior practice.¹ While these Commentaries undoubtedly retain their historic value, the ICRC decided in 2011 to embark, together with a number of renowned external experts, on an ambitious project to update the Commentaries, seeking to reflect the significant developments in the application and interpretation of the Conventions and their Additional Protocols in the intervening years.

The updated Commentaries preserve the format of the original Commentaries, providing an article-by-article analysis of each of the provisions of

1 See 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; Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 2: *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, ICRC, Geneva, 1960; Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 3: *Geneva Convention relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960; Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 4: *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958; Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987.

the Conventions and Additional Protocols. Benefiting from decades of practice and legal interpretation by States (as reflected, for example, in military manuals, national legislation and official statements), courts and scholars, as well as from research done in the ICRC Archives (reflecting practices witnessed first-hand by the ICRC in past armed conflicts), however, they do so in a more detailed manner than the original Commentaries. The new Commentaries not only include the ICRC's current interpretations of the law where they exist, but also indicate where there are divergent views and highlight issues not yet settled.

To achieve this level of detail and nuance, an elaborate drafting process was put in place. Besides authoring updated commentaries to one or more articles of the Second Geneva Convention (GC II), contributors (consisting of ICRC staff lawyers and, importantly, external authors) also read and commented on drafts of updated commentaries on other provisions. Additionally, an Editorial Committee including senior ICRC and non-ICRC lawyers reviewed the updated Commentary on GC II as a whole.² Finally, a group of over forty peer reviewers representing a large geographic diversity and with significant subject-matter expertise, including naval experts, provided insightful comments and suggestions, greatly contributing to the richness of the analysis found in the final product. After the completion of the updated Commentary on the First Geneva Convention (GC I) in March 2016, the online launch of the updated Commentary on GC II on 4 May 2017 constituted the second milestone of this important project.³

The authors of the updated Commentary on GC II followed the same methodology as used for the updated Commentary on GC I. They used the rules of treaty interpretation set out in the Vienna Convention of the Law of Treaties, in particular Articles 31–33, to reflect as accurately as possible the current application and interpretation of GC II. The contributors looked at the ordinary meaning of the terms used in the provisions, their context, the object and purpose of the treaty, and the preparatory work. Additionally, the authors looked at other relevant rules of international law. Since GC II was drafted, many other relevant branches of international law, such as international human rights law and international criminal law, have developed significantly. It is of particular relevance to the topic of armed conflict at sea to assess the impact of the 1982 UN Convention on the Law of the Sea (UNCLOS)⁴ as well as a series of treaties adopted under the auspices of the International Maritime Organization (IMO), conferring protection to persons in distress at sea. A treaty must be “interpreted and applied within the framework of the entire legal system prevailing at the time

2 The Editorial Committee for the updated Commentary on the Second Geneva Convention consists of Liesbeth Lijnzaad and Marco Sassòli as non-ICRC members, and Philip Spoerri and Knut Dörmann as ICRC members.

3 The full version is available online at: ihl-databases.icrc.org/ihl/full/GCII-commentary (all internet references were accessed in July 2017). A hard copy of the updated Commentary on the Second Geneva Convention will be published by Cambridge University Press by January 2018.

4 United Nations Convention on the Law of the Sea, 1833 UNTS 3, 10 December 1982 (entered into force 16 November 1994) (UNCLOS).

of the interpretation”.⁵ The updated Commentary therefore takes account of how these other fields of law have developed over time, and makes reference to them where relevant.

After this brief overview of the background, scope and methodology of the project to update the Commentaries,⁶ this article first situates GC II in its historical context, before addressing the applicability of the Convention and its relationship to other sources of international law. It further describes some of the commonalities and differences between GC I and GC II and their updated Commentaries, as well as highlighting some of the main issues dealt with in the updated Commentary on GC II, including the obligation of parties to an armed conflict to take all possible measures to search for and collect the wounded, sick, shipwrecked and dead at sea, as well as the rules in GC II regulating the protection of hospital ships and coastal rescue craft.

Historical background of the Second Geneva Convention⁷

Naval battles have been fought for several thousand years. Yet, when the first Geneva Convention of 1864 was adopted, conferring protection on wounded and sick members of the armed forces, its rules only applied to warfare on land. The eventual inclusion of victims of warfare at sea in humanitarian treaty law was achieved only several decades later through a separate treaty on warfare at sea.⁸ The distinction thus established in the protection of victims of armed conflict between warfare on land and warfare at sea was maintained in 1949 by the adoption of two different Conventions to apply on land and at sea respectively.

The Geneva Convention of 1864 embodied the principle that members of the armed forces who are *hors de combat* must be protected and cared for regardless of their nationality. It would take roughly forty years before States were ready to extend this principle to armed forces at sea. A proposal by the ICRC to include a paragraph in the 1864 Convention stipulating that similar provisions relating to maritime warfare “could be subject of a later Convention” never made it into the final text.⁹ Two years later, the Battle of Lissa (1866) in the Adriatic

5 International Court of Justice, *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (The Namibia Case)*, 21 June 1971, para. 53.

6 For a more detailed description, see the introduction to the updated Commentary: ICRC, *Commentary on the Second Geneva Convention*, Cambridge University Press, 2017 (ICRC Commentary on GC II), paras 1–66. See also Lindsey Cameron, Bruno Demeyere, Jean-Marie Henckaerts, Eve La Haye and Heike Niebergall-Lackner, “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, 2015, pp. 1210–1214; 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.

7 See ICRC Commentary on GC II, above note 6, Introduction, paras 79–96.

8 Hague Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864, 29 July 1899 (entered into force 4 September 1900).

9 Article 11 of the draft submitted by the Comité International de Secours aux Militaires Blessés to the 1864 Conference, available in the ICRC Archives under ACICR, A AF 21-3b.

Sea once more reminded States of the need to provide for the protection of wounded, sick, shipwrecked and dead members of the armed forces at sea.¹⁰ Prompted by the needless deaths caused by the lack of care and protection for the sick, wounded and shipwrecked during that battle, a conference in 1868 adopted fifteen “Additional Articles relating to the Conditions of the Wounded in War”. These articles addressed issues such as the protection of boats that collect the shipwrecked and wounded, hospital ships and the status of medical personnel. However, the reticence of the major naval powers prevented these articles from entering into force.¹¹

In line with the ICRC’s repeated calls to adapt the 1864 Geneva Convention to the conditions of warfare at sea, the First Hague Peace Conference of 1899 adopted Hague Convention III, drawing inspiration from the Additional Articles of 1868. Hague Convention III, which entered into force in 1900, was the first treaty to protect victims of armed conflict at sea.¹² It was revised in 1907 in light of the new Geneva Convention of 1906 governing land warfare, resulting in the 1907 Hague Convention X on maritime warfare.¹³ This convention would remain the governing treaty for the protection of members of armed forces at sea until the adoption of GC II in 1949.

At the International Conference of the Red Cross in 1934, the ICRC was given a mandate to convene a Commission of Experts “to consider in what respect the modification of the Hague Convention of 1907 would appear to be desirable and possible”.¹⁴ Convened in Geneva in 1937, the Commission adopted a Draft Revised Maritime Convention, to be considered for adoption by States at the next Diplomatic Conference.¹⁵ Owing to the outbreak of the Second World War, the Diplomatic Conference foreseen for 1940 never took place. After the end of that war, the 1937 Draft Convention served as a basis for the drafting of the Second Geneva Convention of 1949. The revisions made in the years leading up to 1949 were heavily influenced by the experience of the Second World War,

10 Pierre Boissier, *History of the International Committee of the Red Cross: From Solferino to Tsushima*, ICRC and Henry Dunant Institute, Geneva, 1985, pp. 190–192.

11 ICRC Commentary on GC II, above note 6, Introduction, para. 84. For an overview of the preparation of and debates during and after the 1868 Diplomatic Conference, see P. Boissier, above note 10, pp. 215–225; J. Galloy, *L’inviolabilité des navires-hôpitaux et l’expérience de la guerre 1914–1918*, Sirey, Paris, 1931, pp. 30–47; Christophe Lueder, *La Convention de Genève au point de vue historique, critique et dogmatique*, E. Besold, Erlangen, 1876, pp. 159–198; J. Pictet (ed.), *Commentary on the Second Geneva Convention*, above note 1, pp. 5–10.

12 ICRC Commentary on GC II, above note 6, Introduction, para. 86. For more details, see *Proceedings of the Hague Peace Conferences: The Conference of 1899*, Oxford University Press, Oxford, 1920, pp. 31–44.

13 ICRC Commentary on GC II, above note 6, Introduction, para. 88. For more details, see *Proceedings of the Hague Peace Conferences: The Conference of 1907*, Vol. 3, Oxford University Press, Oxford, 1920, pp. 305–322. See also J. Galloy, above note 11, pp. 70–90.

14 ICRC Commentary on GC II, above note 6, Introduction, para. 91. For the full text of that resolution, see *Report Concerning the Revision of the Tenth Hague Convention of 1907 for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 1906*, 1937, adopted by a Commission of Naval Experts and presented to the 16th International Conference of the Red Cross, London, June 1938 (Document No. 2a) (Naval Expert Report), p. 1, available at: https://library.icrc.org/library/docs/CDDH/CL_1938/CL_1938_DOC02_ENG.pdf.

15 ICRC Commentary on GC II, above note 6, Introduction, para. 91. For a detailed overview of all the steps that were undertaken, see Naval Expert Report, above note 14, pp. 1–8.

which was unparalleled in scope and in the suffering and casualties caused among both combatants and civilians.¹⁶

Applicability of the Second Geneva Convention and relationship to other sources of international law

GC II applies in the first place in case of an international armed conflict that takes place wholly or partly at sea.¹⁷ Pursuant to Article 3 common to the four Geneva Conventions, fundamental protections also apply in the event of a non-international armed conflict at sea. While the meaning of the term “sea” is central to determining the applicability of GC II, the latter does not contain a definition of this term. It is commonly understood that the term “sea” is used to distinguish the scope of application of GC II from that of GC I, which applies on land. To avoid a protection gap between the two Conventions, the term “sea” should be interpreted broadly. Thus, for the purpose of determining who deserves the protection of GC II, the term “sea” comprises not only saltwater areas such as the high seas, exclusive economic zones, archipelagic waters, territorial waters and internal waters, but also other bodies of water such as lakes and rivers.¹⁸

Once wounded, sick and shipwrecked members of the armed forces are put ashore, GC II ceases to apply and these persons immediately benefit from protection under GC I.¹⁹ This principle applies regardless of which “branch” of the armed forces a person belongs to: a member of the air force who is shipwrecked at sea is protected by GC II, as much as a member of the navy who is wounded on land is protected by GC I.

Although persons cannot be simultaneously protected under GC I and GC II, they can benefit from the parallel application of GC II and the Third Convention (GC III). When wounded, sick or shipwrecked members of the armed forces are cared for by enemy medical personnel or on hospital ships of the enemy force, they “fall into enemy hands” and thus become prisoners of war, protected under GC III.²⁰ Until their recovery, and as long as they remain at sea, they continue to be protected under both GC II and GC III. Wounded and sick prisoners of war who are put ashore are protected simultaneously by GC I and GC III. Once they are recovered, they remain protected under GC III until their final release and repatriation.²¹

16 ICRC Commentary on GC II, above note 6, Introduction, paras 76, 92.

17 *Ibid.*, Art. 4, paras 935–936.

18 *Ibid.*, Art. 12, paras 1374–1376.

19 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II), Art. 4.

20 *Ibid.*, Art. 16.

21 See ICRC Commentary on GC II, above note 6, Art. 16, para. 1577.

Provisions of the Fourth Convention (GC IV) are also relevant in the event of an armed conflict at sea, for the protection of wounded, sick and shipwrecked civilians. GC IV requires, for example, that parties to the conflict assist the shipwrecked and protect them against pillage and ill-treatment, as far as military considerations allow.²² It also mandates the respect and protection of specially provided vessels on sea used to transport wounded and sick civilians, the infirm and maternity cases.²³

Moreover, Additional Protocol I, applicable to international armed conflicts, supplements GC II. It provides several definitions relevant to the wounded, sick and shipwrecked at sea.²⁴ The Protocol also extends the protection of GC II to all civilians who are wounded, sick or shipwrecked,²⁵ and to other medical ships and craft than those mentioned in GC II.²⁶ Additional Protocol II, applicable to non-international armed conflicts, complements the provisions of Article 3 of GC II. For example, it prescribes the search for and collection of the wounded, sick and shipwrecked, and their protection against pillage and ill-treatment.²⁷

Finally, it should be mentioned that customary humanitarian law also applies to warfare at sea. In this regard, special mention must be made of the 1994 *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (San Remo Manual),²⁸ which, in its own words, is a “contemporary restatement – together with some progressive development – of the law applicable to armed conflicts at sea” and which “has been drafted by an international group of specialists in international law and naval experts”. At the time of writing this Commentary, the San Remo Manual is, for the most part, still a valid restatement of customary and treaty international law applicable to armed conflicts at sea. It has been argued, however, that it may be time to consider updating parts of the Manual.²⁹

In parallel to these IHL sources, GC II also interacts with other sources of international law regulating activities at sea. This includes the 1982 UNCLOS. The outbreak of an armed conflict at sea does not terminate or suspend the applicability of most provisions of UNCLOS; they remain in operation and apply simultaneously to GC II during an armed conflict.³⁰ This complementarity is reflected in the updated Commentary on GC II. The term “warship”, for example, used several

22 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), Art. 16.

23 *Ibid.*, Art. 21.

24 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Art. 8.

25 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I), Art. 22.

26 *Ibid.*, Art. 23.

27 *Ibid.*, Art. 8.

28 Louise Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Cambridge University Press, Cambridge, 1995.

29 For further details, see ICRC Commentary on GC II, above note 6, Introduction, para. 115.

30 *Ibid.*, para. 48. Some UNCLOS provisions are exercised “subject to this Convention and to other rules of international law”; see e.g. Art. 2(3). This includes GC II, and it is thus possible that the applicability of individual UNCLOS rules that include such a clause is temporarily suspended. ICRC Commentary on GC II, above note 6, Introduction, para. 49.

times in GC II, must be interpreted based on the definition provided for in Article 29 of UNCLOS.³¹

There are also a number of treaties adopted under the auspices of the IMO, in particular the Safety of Life at Sea Convention³² and the Maritime Search and Rescue Convention.³³ With regard to those IMO treaties that do not expressly limit their scope of application by exempting warships, the question arises to what extent and how they apply during an armed conflict that takes place wholly or partly at sea. No clear answer to this question currently exists. Arguably, these IMO treaties are “multilateral law-making treaties” that, based on the International Law Commission’s 2011 Draft Articles on the Effect of Armed Conflicts on Treaties,³⁴ belong to the categories of treaties that may remain in operation during armed conflict, also when this takes place at sea.³⁵

Commonalities and differences between the First and Second Geneva Conventions

GC II seeks to protect the wounded, sick and shipwrecked members of the armed forces at sea. Similar to the other Geneva Conventions, this is premised on the fundamental principle of respect for the life and dignity of the individual, even, or especially, during armed conflict. This means that victims of armed conflict must in all circumstances be respected and protected; they must be treated humanely and cared for without any adverse distinction based on sex, race, nationality, religion, political opinion or any other similar criteria.³⁶

Certain articles common to all four Geneva Conventions are central to the application of the Conventions and to the protections provided therein. For example, common Article 1 deals with the obligation to respect and ensure respect for the Conventions in all circumstances. Common Articles 2 and 3 deal with the scope of application of the Conventions, respectively for international and for non-international armed conflicts. The updated Commentary on GC I was an important milestone partly because it included updated commentaries on these articles common to all four Conventions. Nevertheless, even for these common articles, the different contexts to which the Conventions apply have warranted some contextualization in the updated Commentary on GC II, dealing with warfare at sea.

31 *Ibid.*, Art. 14, para. 1520.

32 International Convention for the Safety of Life at Sea, 1874 UNTS 3, 1 November 1974 (entered into force 25 May 1980).

33 International Convention on Maritime Search and Rescue, 1403 UNTS, 27 April 1979 (entered into force 22 June 1985).

34 United Nations, International Law Commission, Report of the International Law Commission on the Work of Its Sixty-Third Session, *Yearbook of the International Law Commission*, Vol. 2, Part 2, A/66/10, 2011.

35 See ICRC Commentary on GC II, above note 6, Introduction, paras 51–59.

36 *Ibid.*, Art. 12, paras 1417–1424, 1437–1441.

Contextualization of the updated commentaries on the common articles

Contextualization was sometimes prompted by the existence of complementary rules of international law, outside of IHL, that regulate activities at sea. For example, the updated commentary on Article 2 of GC I notes that the threshold to trigger an international armed conflict is low: “Even minor skirmishes between the armed forces, be they land, air or naval forces, would spark an international armed conflict and lead to the applicability of humanitarian law.”³⁷ This means that any armed interference in a State’s sphere or sovereignty, be it on land, in the air or at sea, may constitute an international armed conflict within the meaning of Article 2.³⁸ This passage is maintained in the updated commentary on Article 2 of GC II. However, it is elaborated that UNCLOS foresees the innocent passage of foreign ships in the territorial sea of another State, which may include warships. The updated Commentary specifies that such passage does not constitute an international armed conflict.³⁹

Some contextualization was also necessary in the updated commentary on common Article 3, regulating non-international armed conflict. The fact that GC II applies at sea entails some practical challenges and raises questions as to how certain provisions are to be applied. For example, one of the questions the updated Commentary addresses is whether detention in the context of a non-international armed conflict can take place at sea.⁴⁰ Article 22 of GC III requires prisoners of war to be interned on land. This applies in international armed conflict, whereas for non-international armed conflict, there is no rule that specifically addresses this issue. However, the updated commentary on Article 3 concludes that, in principle, detention in a non-international armed conflict should also take place on land.⁴¹ Indeed, “the entire system of detention laid down by the Conventions, and in which the ICRC plays a supervisory role, is based on the idea that detainees must be registered and held in officially recognized places of detention accessible, in particular, to the ICRC”.⁴² Furthermore, if detention in the context of a non-international armed conflict were to take place at sea, the conditions of such detention might be such as to violate the requirement of humane treatment, particularly in cases of prolonged detention.⁴³

A further example where the different contexts of warfare on land and warfare at sea warranted the updated commentary on common Article 3 to be contextualized for GC II relates to the right to a fair trial. Common Article 3

37 ICRC, *Commentary on the First Geneva Convention*, Cambridge University Press, Cambridge, 2016, Art. 2, para. 237.

38 ICRC Commentary on GC II, above note 6, Art. 2, para. 259.

39 *Ibid.*

40 *Ibid.*, Art. 3, para. 741.

41 *Ibid.*

42 Jelena Pejic, “Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and other Situations of Violence”, *International Review of the Red Cross*, Vol. 87, No. 858, 2005, p. 385. See also ICRC Commentary on GC II, above note 6, Art. 3, para. 741.

43 ICRC Commentary on GC II, above note 6, Art. 3, para. 580.

prohibits “the passing of sentences and the carrying out of executions without previous judgments pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples”.⁴⁴ In practice, it seems highly unlikely that a trial at sea can fulfil the minimum fair trial guarantees. To stand trial, therefore, persons would normally have to be transferred to land.⁴⁵ Still, the circumstances of being at sea may be relevant when assessing the more specific rights stemming from the right to a fair trial. More concretely, for example, the right to be tried within a reasonable time, which is also pertinent in the context of a non-international armed conflict, may require taking into consideration the exceptional circumstances of being at sea.⁴⁶

Distinctive features of the protective scope of the Second Convention

Further to these examples relating to the application and interpretation of the common articles in the updated Commentary on GC II, there are certain substantive differences between GC I and GC II. These differences relate to the persons and objects protected under the respective Conventions.

Protection of the shipwrecked

While the basic protection provided for in both Conventions is the same, the scope of persons covered by that protection in GC II is adapted to warfare at sea. The Convention protects not only the wounded and sick, but also the shipwrecked. Thus, the text of common Article 3 is worded slightly differently in GC II compared to the other three Conventions, and this has been reflected in the updated Commentary.⁴⁷ Whereas in GC I, GC III and GC IV reference is made only to the “wounded and sick”, GC II consistently refers to the “wounded, sick and shipwrecked”. For the purpose of common Article 3, a “shipwrecked” person is someone who, as a result of hostilities or their direct effects, is in peril at sea or in other waters and requires rescue. A person would also qualify as shipwrecked where, for example, hostilities adversely affect the ability of those who would normally rescue them to do so in fact. It should be noted that a person in such situations must not commit any hostile acts.⁴⁸

Likewise, Article 12, which establishes the general obligation for States to respect and protect in all circumstances, refers to the “wounded, sick and shipwrecked” in GC II, whereas in GC I it refers only to the “wounded and sick”.⁴⁹

44 Common Art. 3 to the Geneva Conventions.

45 ICRC Commentary on GC II, above note 6, Art. 3, para. 696.

46 *Ibid.*, Art. 3, para. 710.

47 *Ibid.*, Art. 3, paras 772–775.

48 *Ibid.*, Art. 3, para. 774.

49 Note, however, that for legal purposes there is no difference between wounded and sick. *Ibid.*, Art. 12, para. 1378.

Protection of hospital ships and coastal rescue craft

Logically, the difference between GC I and GC II also extends to the objects that are protected. While ambulances and other land-based medical transports are protected under GC I,⁵⁰ medical transports used on water are protected under GC II in equal measure. Recognizing an important means by which its obligations may be implemented, GC II affords protection to hospital ships⁵¹ and coastal rescue craft,⁵² as well as to ships chartered for the transport of medical equipment⁵³ and to medical aircraft.⁵⁴

The operation of hospital ships constitutes one way in which parties to the conflict can carry out their obligation to protect and care for the wounded, sick and shipwrecked at sea. To be able to fulfil this function, hospital ships enjoy special protection “at all times”, and they may neither be attacked nor captured.⁵⁵ The hospital ship’s personnel and crew are likewise accorded special protection, owing to the vital role they play in the ship’s performance of its humanitarian functions.⁵⁶

In order to benefit from special protection under GC II, hospital ships must have been “built or equipped ... especially and solely with a view to assisting the wounded, sick and shipwrecked, to treating them and to transporting them”.⁵⁷ It follows that hospital ships may not serve any other than the said humanitarian purpose, and that they lose their protection if they are used to commit acts harmful to the enemy.⁵⁸ As noted in the updated commentary on Article 22, it is their exclusively humanitarian function of impartially providing assistance to protected persons that justifies their special protection,⁵⁹ but parties to the conflict have the right to control and search hospital ships to verify that their use conforms to the provisions of GC II.⁶⁰ This far-reaching right has been inserted by States into the Geneva Conventions in order to counter the possibility that an enemy’s hospital ship may be abused to further military operations.

At present, only a small number of States have military hospital ships, which are not only expensive to operate and maintain but also difficult to protect against attack.⁶¹ The updated commentaries on Articles 33, as well as Articles 18 and 22, point out that one option available to parties seeking to comply with their obligations to respect and protect the shipwrecked, wounded and sick is to transform a merchant vessel into a hospital ship.⁶² It is important to note that

50 GC II, Art. 35.

51 *Ibid.*, Arts 22, 24.

52 *Ibid.*, Art. 27.

53 *Ibid.*, Art. 38.

54 *Ibid.*, Art. 39.

55 *Ibid.*, Art. 22(1).

56 *Ibid.*, Art. 36.

57 *Ibid.*, Art. 22(1).

58 *Ibid.*, Art. 34(1).

59 ICRC Commentary on GC II, above note 6, Art. 22, para. 1927.

60 GC II, Art. 31(1).

61 ICRC Commentary on GC II, above note 6, Art. 22, para. 1928.

62 See *ibid.*, para. 1945; Art. 33, para. 2336; Art. 18, para. 1677.

once a merchant vessel has been transformed into a hospital ship by a party to the conflict, it may not “be put to any other use throughout the duration of hostilities”.⁶³

GC II regulates a variety of aspects pertaining to hospital ships. Two issues in particular have become topical since 1949. First, Article 34(2) refers, as an example of an “act harmful to the enemy” (which may lead to a loss of protection), to the requirement that “hospital ships may not possess or use a secret code for their wireless or other means of communication”. Thus, in principle, communications to and from hospital ships may never be encrypted, and must be sent in the open. However, due to developments in communication technology, most prominently the use of satellites, encryption is now so common that it is unavoidable as an available technology. As a result, the rule has been challenged in a number of military manuals. This development leads the updated Commentary to conclude that “there is, therefore, a certain trend in international practice whereby the use of satellite communications does not constitute a violation of paragraph 2, even if messages and data are transmitted using encryption”.⁶⁴

The second topical issue pertains to whether hospital ships may be armed, in particular whether they may be armed to the level of being able to defend themselves against incoming attacks (as opposed to relying on other vessels, in particular warships, to defend them). In principle, the arming of hospital ships with weapons other than purely deflective means of defence (such as chaffs and flares) or light individual weapons could be considered an act harmful to the enemy, leading to a loss of protection.⁶⁵ Thus, in order to maintain their specially protected status under IHL, the Commentary considers that a party to the conflict may not mount such weapons on a hospital ship.⁶⁶

In addition, GC II affords protection to small craft used by the State or by officially recognized search and rescue organizations.⁶⁷ To qualify for protection under Article 27, coastal rescue craft must be employed by a State that is party to the conflict or by lifeboat institutions of a party to the conflict. In the latter case, these institutions must be “officially recognized” for the craft to be protected. This means that the institution in question must have been approved or authorized by a government authority or other public body to perform coastal rescue functions.⁶⁸

Coastal rescue craft have long rendered assistance to those in distress at sea and might be the only vessels available for this purpose to the vast majority of States, which do not have hospital ships.⁶⁹ Yet, owing to their small size and speed, at the time of the adoption of GC II, rescue craft were considered difficult to identify and were often suspected of engaging in intelligence-gathering for the

63 GC II, Art. 33.

64 ICRC Commentary on GC II, above note 6, Art. 34, para. 2403.

65 *Ibid.*, Art. 34, para. 2378.

66 *Ibid.*, Art. 35, paras 2419–2421.

67 GC II, Art. 27.

68 ICRC Commentary on GC II, above note 6, Art. 27, para. 2194.

69 *Ibid.*, paras 2149, 2151.

enemy.⁷⁰ As explained in the updated commentary on Article 27, this generated a reluctance among States to grant them any special protection. The compromise embodied in GC II is to give small craft special protection, but more limited than that afforded to hospital ships. Compared with the eleven articles dedicated to hospital ships, only one deals with coastal rescue craft, namely Article 27.

Coastal rescue craft that satisfy the conditions for protection may not be attacked, captured or otherwise prevented from performing their humanitarian tasks. This protection extends “so far as operational requirements permit”.⁷¹ By contrast, the protection afforded to hospital ships is stronger. They “may in no circumstances be attacked or captured, but shall at all times be respected and protected”.⁷²

Hence, operational considerations by a reasonable commander may justify interference with rescue craft by, *inter alia*, preventing them from performing their humanitarian tasks in a given sea area. Since the reasonableness will, of course, depend on the prevailing circumstances, it is impossible to define the terms in an abstract manner.⁷³ In this context, it is important to emphasize that this provision cannot be read in isolation from the rules of Additional Protocol I regulating the conduct of hostilities. Thus, coastal rescue craft may only be the object of an attack if they qualify as a “military objective” in the sense of IHL.

Finally, there is no mention in GC II of the status of the crew of coastal rescue craft.⁷⁴

With respect to the marking of hospital ships and coastal rescue craft, it is not constitutive of their protection but merely signals their protected status to the parties to the conflict. According to Article 43, all surfaces of the ship or craft shall be white, and one or more dark red crosses shall be displayed on each side of the hull and on the horizontal surfaces. These traditional marking methods, presupposing close physical proximity to allow for visual confirmation of the marking, might not suffice to ensure the proper identification of protected vessels in view of contemporary techniques of naval warfare, such as long-fire and submarine capabilities. It is therefore significant that Article 43 encourages the parties to the conflict to conclude special agreements on the “most modern methods available to facilitate the identification of hospital ships”.⁷⁵ As noted in the updated commentary on Article 43, there is no reason why such agreements could not also be concluded for coastal rescue craft.⁷⁶ Such agreements could be critical to ensure that protected vessels are effectively identified by parties to the conflict and given the protection to which they are entitled in order to be able to carry out their humanitarian work.

70 *Ibid.*, Art. 27, paras 2150, 2159.

71 GC II, Art. 27(1).

72 *Ibid.*, Art. 22(1).

73 See ICRC Commentary on GC II, above note 6, Art. 27, para. 2206.

74 See *ibid.*, Art. 27, para. 2152, and the commentary on Article 36, Section C.2.d.

75 GC II, Art. 43(8).

76 See ICRC Commentary on GC II, above note 6, Art. 43, para. 2766.

Substantive obligations under the Second Geneva Convention

Further to the central obligation on the parties to an armed conflict that takes place at sea to respect and protect the wounded, sick and shipwrecked, and to treat them humanely in all circumstances, GC II sets out a number of additional obligations intended to ensure that this core obligation is fulfilled. These include the obligation to take all possible measures to search for and collect the wounded, sick, shipwrecked and dead at sea.

To achieve the protective purpose of GC II, it is paramount that the parties to the armed conflict, after each engagement, take all possible measures to search for and collect casualties. The parties might be the only actors sufficiently close to the victims to search for and collect them.⁷⁷ Article 18 thus requires the parties, after each engagement and without delay, to take all possible measures to search for and collect the wounded, sick, shipwrecked and dead at sea, without discriminating between their own and enemy personnel.⁷⁸ The good faith interpretation and implementation of this provision is of critical importance in order to achieve the objectives of GC II.

The obligation to “take all possible measures” is an obligation of conduct to be carried out with due diligence.⁷⁹ All possible measures must be taken “after each engagement” and “without delay”. In this respect, Article 18 differs from the parallel provision in GC I, which requires its obligations to be carried out “at all times, and particularly after an engagement”.⁸⁰ As the updated commentary on Article 18 explains, the different wording reflects the fact that the conditions of warfare at sea, compared to those on land, might make it impossible to carry out search and rescue activities “at all times”.⁸¹

What constitutes “possible measures” in any given case is inherently context-specific. Each organ of the “party to the conflict” – the entity to which the obligation applies – has an obligation, at its own level, to assess in good faith which measures are possible.⁸²

Moreover, the updated commentary on Article 18 takes into account the fact that advances in technology and scientific knowledge may influence what measures a party to the conflict can, in practice, take in any given case. Advances in methods of naval warfare since 1949 have resulted in ever longer-distance attack capabilities. A vessel that has launched a weapon from a considerable distance against an enemy warship or aircraft might not be able to implement “without delay” any of the obligations contemplated on the basis of Article 18, since it is not physically present in the vicinity of the casualties. Still, that vessel remains under an obligation to consider what measures are possible

77 *Ibid.*, Art. 18, para. 1617.

78 *Ibid.*, Art. 18, para. 1618.

79 *Ibid.*, Art. 18, para. 1645.

80 GC I, Art. 15.

81 ICRC Commentary on GC II, above note 6, Art. 18, para. 1653.

82 *Ibid.*, Art. 18, paras 1629–1633.

in light of the circumstances. This includes considering whether it is possible to take measures such as disclosing the geographic location of the attacked vessel or aircraft with as much precision as possible, not only to its land-based authorities but also to enemy and neutral vessels or impartial humanitarian organizations capable of conducting search and rescue operations.⁸³ In this regard, the availability of new technology such as satellites and unmanned aerial platforms can enable a more accurate assessment of the number and location of the shipwrecked, wounded, sick and dead without requiring physical proximity to the attacked vessel or aircraft.⁸⁴

The commentary on Article 18 also describes certain advances in technology and scientific knowledge pertinent to the obligation to search for the dead at sea. There have been considerable developments in underwater technology since 1949 that permit locating and retrieving dead bodies at sea, including remotely operated vehicles with cameras. Moreover, scientific research in marine taphonomy has led to enhanced understanding of the factors that affect human remains in water. The fact that bodies cannot be seen with the naked eye immediately after an engagement no longer means that none can be recovered.⁸⁵ The extent to which a party has access to such technology and knowledge may therefore affect the interpretation of the “possible measures” which that party can take in relation to the search for the dead.⁸⁶

The research for the updated Commentary identified a potential dilemma when it comes to the dead at sea: once a warship sinks with enemy members of the armed forces on board, is the enemy still obliged to take all possible measures to search for and collect them? Or does the vessel regain its sovereign immunity, meaning that only the power to which the vessel belongs has the right to retrieve the dead bodies? On this point, the Commentary has reached the conclusion that sunken warships and other ships that sink with their crews constitute war graves, which must be respected. These vessels regain their entitlement to sovereign immunity once they have sunk.⁸⁷

As a measure to comply with both Articles 12 and 18, a party to the conflict “may appeal to the charity” of neutral vessels to help with the rescue effort, as set out in Article 21. The updated commentary on Article 21 notes that, in some situations, the assistance afforded by neutral vessels might be the best or only way of ensuring that as many wounded, sick, shipwrecked or dead persons as possible can be collected. The use of the word “may” in Article 21 implies that making such an appeal is optional. However, there may be cases in which a party may have to make an appeal in order for it to comply with its obligations, such as where it is unable to carry out a rescue itself.⁸⁸

83 *Ibid.*, Art. 18, para. 1646.

84 *Ibid.*, Art. 18, para. 1645.

85 *Ibid.*, Art. 18, para. 1686.

86 *Ibid.*, Art. 18, para. 1687.

87 *Ibid.*, Art. 18, para. 1688.

88 *Ibid.*, Art. 18, para. 1637; Art. 21, para. 1863.

Once collected, the wounded, sick and shipwrecked must receive “adequate care” as soon as possible.⁸⁹ This includes providing the medical care and attention required by their condition, as well as other forms of non-medical care, such as provision of food, drinking water, shelter, clothing, and sanitary and hygiene items. The parties are furthermore required to record information that can assist in the identification of the wounded, sick, shipwrecked and dead, and to forward this information to the power on which they depend. This is crucial so that families can be apprised of the fate of their loved ones. Specific obligations pertaining to the dead include respectful and honourable treatment, burial, and respect for their resting place.⁹⁰

With regard to the position of neutral States (i.e., States not party to the international armed conflict), GC II contains a number of provisions regulating their obligations vis-à-vis the persons protected by the Convention. First, when they receive or intern such persons in their territory, they shall apply the provisions of GC II by analogy.⁹¹ Secondly, when such persons are taken on board neutral warships or military aircraft, or are landed in a neutral port with the consent of the local authorities, the Convention stipulates that “where so required by international law” they shall be so guarded that they cannot again take part in operations of war.⁹² In view of the scarce and conflicting State practice and literature on this topic, the interpretation of the precise contours of the term “where so required by international law” has proven to be one of the most complex issues the updated Commentary has had to deal with.⁹³ Undesirable as this may be from the perspective of legal certainty, ultimately, States seem to have retained their freedom of interpretation on this point.⁹⁴

Conclusion

Out of the four Geneva Conventions, the Second is the one that probably used to be the least well-known, and that is generally considered to be the most “technical”. The updated Commentary on GC II has been written with the benefit of experience and knowledge accrued over the nearly seventy years that have passed since the initial Commentary was published. This experience and knowledge was acquired both in real-life battlefield situations and through the publication of military manuals and scholarly articles. Thus, this Commentary attempts to demystify the Convention’s alleged difficulty by filling a critical gap in legal scholarship. By so doing, the updated Commentary provides an important guidance tool for a wide audience, including navies and their commanders and military lawyers, international and national courts, governments and academics.

89 *Ibid.*, Art. 18, paras 1674–1681.

90 See GC II, Arts 19 and 20, the latter of which equally deals with burial at sea.

91 See Art. 4.

92 GC II, Arts 15 and 17. A similar rule appears in Art. 40(3).

93 ICRC Commentary on GC II, above note 6, Art. 15, paras 1548–1554; Art. 17, paras 1605–1611.

94 *Ibid.*, Art. 17, paras 1605, 1611.

In comparison with armed conflicts on land, the past decades have not seen many armed conflicts take place at sea (or in other waters). This does not, however, justify complacency. In the event of an armed conflict that takes place wholly or in part at sea, the provisions of GC II must already be known and their contemporary meaning understood. This understanding must be ensured in peacetime, including through prevention activities such as the training of armed forces and especially naval forces. The Commentary constitutes an easily accessible tool which allows a better understanding of the legal obligations to protect wounded, sick and shipwrecked members of the armed forces at sea.

The updated Commentary on GC II was the second in a series of updated Commentaries to be published by the ICRC in the years to come. Currently, research is ongoing with respect to the protection of prisoners of war (GC III) and the protection of civilians in time of war (GC IV). Updated Commentaries will continue to be published consecutively on these Conventions, as well as on their Additional Protocols I and II, over the coming years.