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The Updated Commentaries on the First and Second Geneva Conventions “Silent Leges Inter Arma?” Conference Bruges 21 September 2017



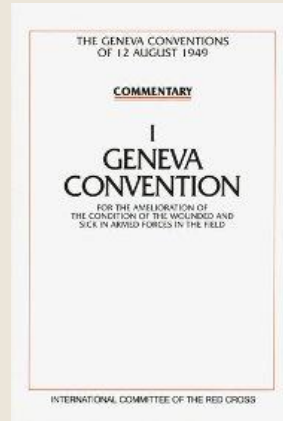
Stéphane Kolanowski
ICRC Brussels



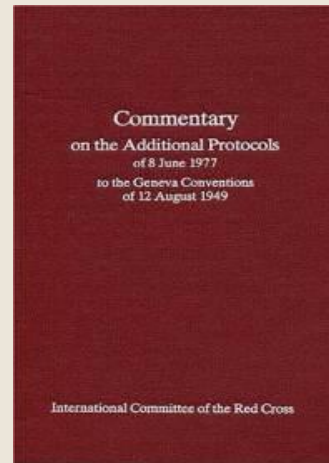
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Initial Commentaries

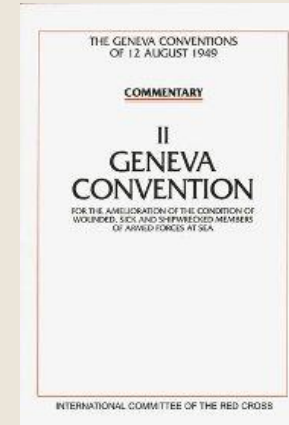
1952



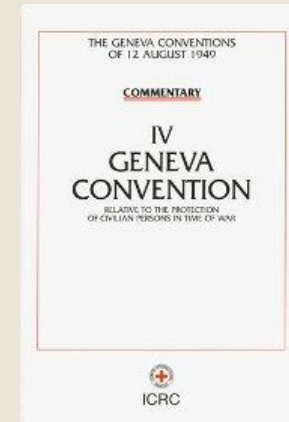
1960



1986



1959



1956



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Objectives of the update

1. Greater clarification of IHL by providing:

- comprehensive and up-to-date interpretation of the GCs and APs, that reflects current practice and legal interpretation.

2. Wider dissemination of IHL by providing:

- key elements for implementing the GCs from a practical perspective
- comprehensive legal information of high quality easily accessible to practitioners and scholars.

Ultimately, better respect and protection for victims of armed conflict



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Process

Research in State practice, case-law, scholarly publications and ICRC archives

Authors prepare and review drafts

Editorial Committee review

Peer review by IHL practitioners and scholars

Editorial Committee review

Commentaries published online and in print



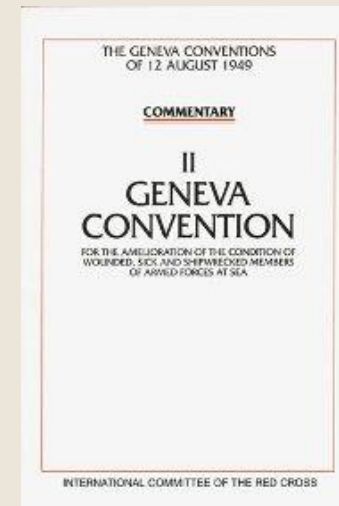
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Updated Commentaries

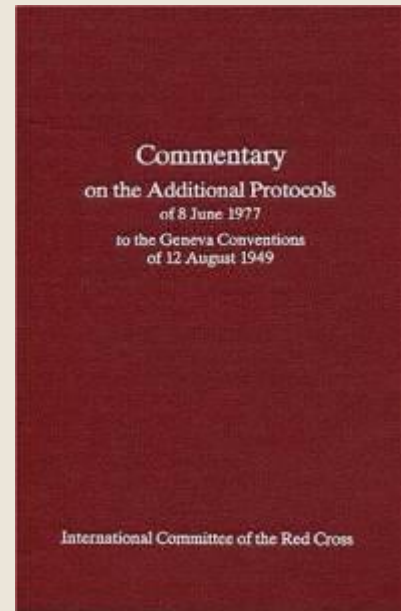
2016



2017

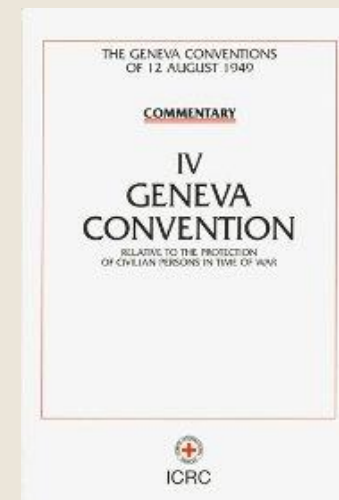


2019



2022

2020





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Interpretative method

- **In good faith**
- **Based on ordinary meaning of the text**
 - **in its context**
 - **in light of the object and purpose**
- **Taking into account**
 - **subsequent practice**
 - **relevant rules of international law**
- **Special meaning of terms**
- **Preparatory work**



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What is new?

- In some instances, subsequent practice and treaties have not followed wording (Protecting Powers; choice of emblems)
- Sometimes practice has not followed procedures foreseen (conciliation and enquiry procedure). **BUT NO DISUETUDE**
- Sometimes no or limited new practice was found (auxiliary medical personnel, staff of National Societies at disposal of armed forces medical services). **BUT NO DISUETUDE.**
- In many instances, interpretation influenced by subsequent practice, new case law, treaties, technologies (Articles 1-3, 47, 49, 50)



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Structure

For each article:

- **Introduction**
- **Historical background**
- **Discussion**
- **Select bibliography**

And tables at the end of the Commentaries with sources such as military manuals, legislation, case-law



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Common articles

- **1. Respect and ensure respect**
- **2. IAC - Scope of application**
- **3. NIAC – Scope and substance**



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Common articles at the end

- **Reprisals**
- **Dissemination**
- **Grave breaches**
- **Enquiry procedure**



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Article 1

The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.



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Internal dimension

- **Respect the Convention**
- **Ensure respect for the Convention**
 - ▶ **Armed forces**
 - ▶ **Civilian population**
- **How?**
 - ▶ **Instructions to armed forces**
 - ▶ **Information to civilian population**
 - ▶ **Legislation, regulations, rules of application**
 - ▶ **Prosecution of breaches, disciplinary sanctions**



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External dimension

- **Ensure respect by other States and non-State armed groups**
- **Prohibition: States may not encourage, provide aid or assistance to violations**
- **Obligation of best effort: States must take steps to bring violations to an end, subject to due diligence:**
 - ▶ **Gravity of the violations**
 - ▶ **Knowledge of the violations**
 - ▶ **Available means**
 - ▶ **Influence over the parties concerned**



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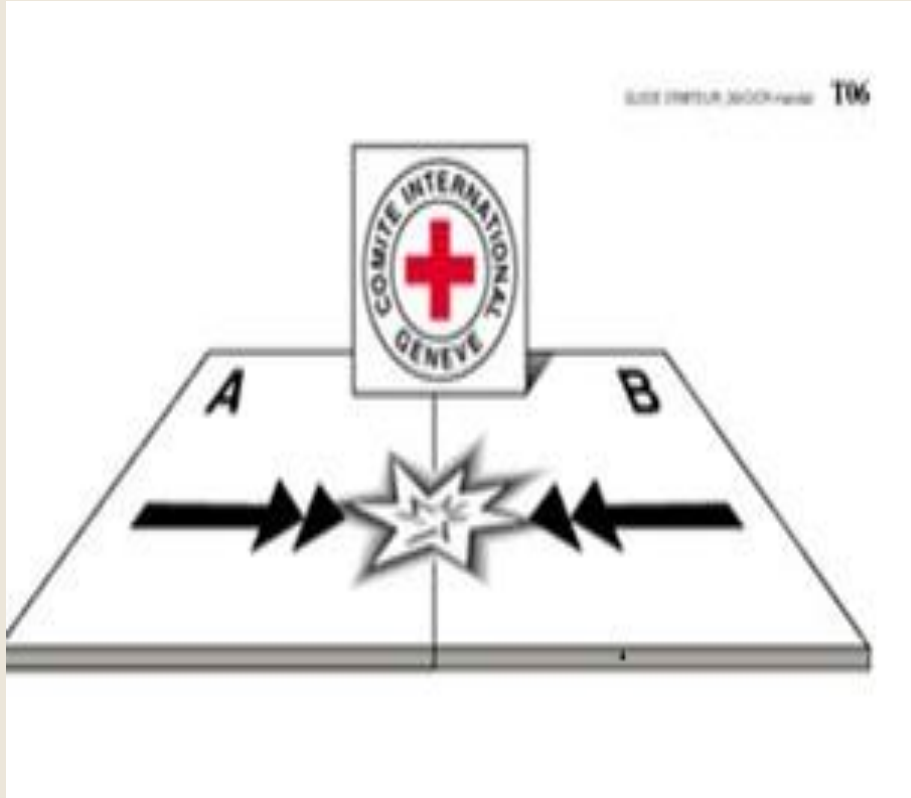
Examples of measures

- **Diplomatic dialogue, protest**
- **Bring before the UN (SC, GA, ICJ), sanctions**
- **Measures to put pressure, e.g. stop trade negotiations, non renewal of trade benefits, stop aid**
- **Put conditions, limit, suspend or stop arms trade**
- **Intervene with coalition partners**



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Article 2 - IAC



International armed conflict

- Armed conflict between States
- IHL applies from first shot
- Cyber conflict?



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Article 3 - NIAC

- **In the case of an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions**
- **The Parties and the intensity**



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Issues in Article 3

- **Geographic scope of application**
 - ▶ **Internal NIAC**
 - ▶ **Spill over NIAC**
 - ▶ **Cross border NIAC**
 - ▶ **Transnational NIAC**
- **Involvement of foreign troops**
- **Involvement of peacekeeping forces**
- **End of a NIAC**



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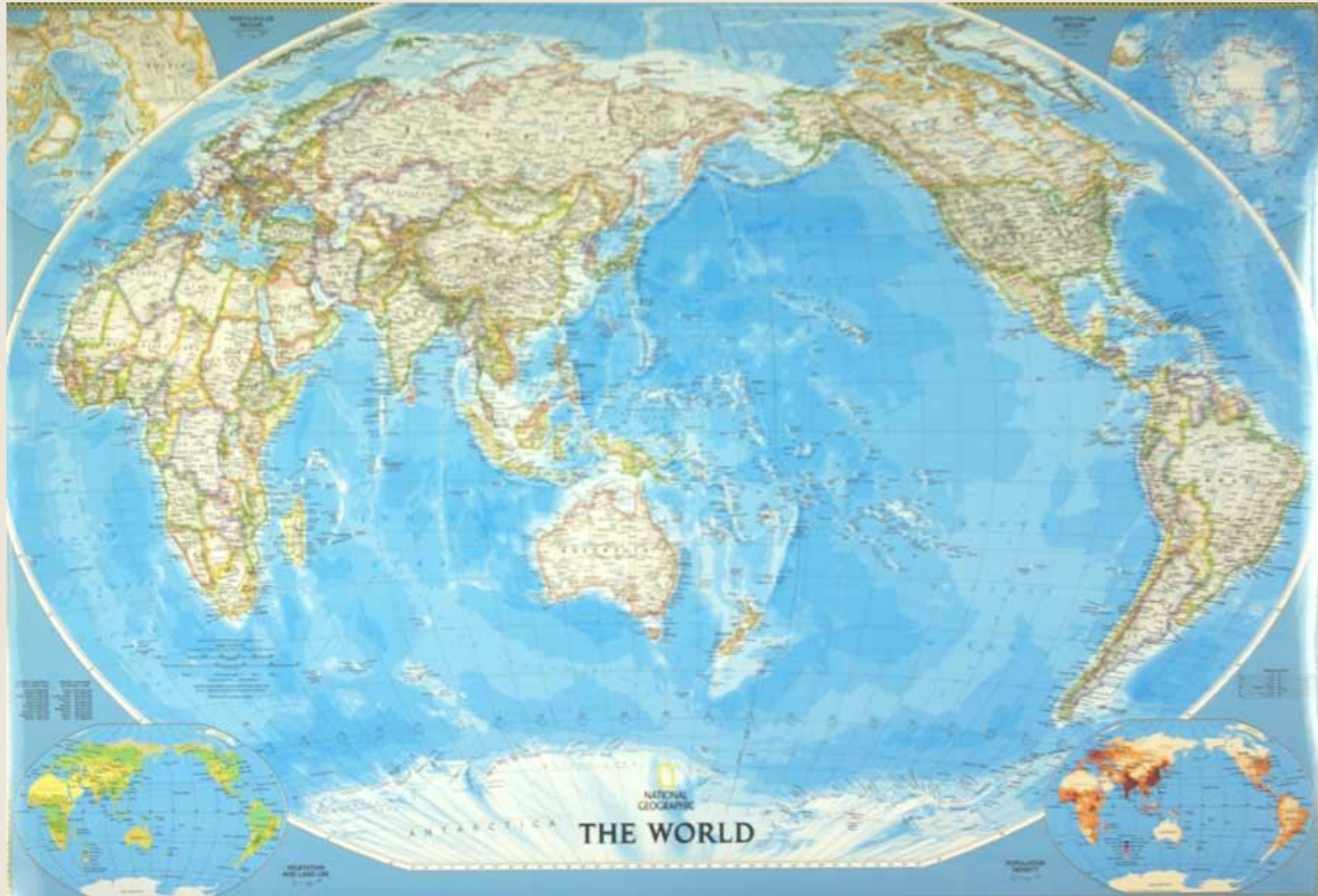
GC I. Care for wounded & sick

- **Wounded and sick**
- **Medical personnel**
- **Medical units**
- **Medical transports**
- **The emblem**
- **The dead**
- **The missing**



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GC II. Where does it apply?





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GC II. Who is protected?

- **Wounded, sick, shipwrecked (WSS)**
- **The dead**
- **Categories protected in view of their assisting the principal categories:**
 - ▶ **medical and religious personnel;**
 - ▶ **medical units;**
 - ▶ **medical transports, including medical aircraft.**
- **NIAC: common Article 3**
- **Common objective with GC I**



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GC II: Protection of WSS

- **Article 12: respect and protect in all circumstances and provide care**
- **Article 19: record ‘any particulars which may assist’ with the identification**
- **Article 18: “SAR” obligation**
- **Article 20: burial at sea v. burial on land**
- **Article 16: In enemy hands = POW**



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Where to find the new Commentary?

www.icrc.org

'War and law' > 'Geneva Conventions and Commentaries'.

The screenshot shows the ICRC website header with the logo and navigation menu. The 'WAR & LAW' menu item is circled in red. Below it, a dropdown menu is visible, with the 'Geneva Conventions and Commentaries' link also circled in red. The background features a banner for 'Sexual violence: A tragic and scar of South Sudan's conflict'.

English | Français | Español | other languages ▾

ICRC INTERNATIONAL COMMITTEE OF THE RED CROSS

QUICK ACCESS ▾ CONTACT DONATE

WHO WE ARE WHAT WE DO WHERE WE WORK **WAR & LAW** SUPPORT US RESOURCE CENTRE 🔍

Conduct of hostilities
Contemporary challenges for IHL
Domestic law and IHL
Emblem
Geneva Conventions and Commentaries
How does law protect in war?
IHL and other legal regimes

International criminal jurisdiction
International Review of the Red Cross
Law and policy platform
Protected persons
Strengthening international humanitarian law
Treaties and customary law
Weapons

WAR & LAW - VIEW ALL >

Sexual violence: A tragic and scar of South Sudan's conflict



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Treaties and Documents

> Geneva Conventions of 1949 and Additional Protocols, and their Commentaries

> By date

> By topic

> By State

Historical Treaties and Documents

> By date

> By topic

> By State

HOW DOES LAW PROTECT IN WAR? Online

Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.

This Convention represents the fourth version of the Geneva Convention on the wounded and sick after those adopted in 1864, 1906 and 1929. The fundamental principles as well as the division into chapters remained the same as in the preceding version with the exception of the new introductory chapter on general provisions. Changes were made especially in Chapter IV (personnel). Hitherto, medical personnel and chaplains falling into enemy hands had to be immediately repatriated. The 1949 Convention, taking account of changed conditions of warfare, provides that they may in certain circumstances be retained to care for prisoners of war. The provisions on medical equipment were correspondingly altered. In the chapter on medical transports it was provided that medical aircraft may in certain circumstances fly over neutral territory. Some clarifications were made as regards the article on the use of the emblem (Article 44).

Table with 4 columns: ID, Title, Commentary of 2016, Commentary of 1952. Rows include Table of Contents, Foreword, Acknowledgements and Abbreviations, Introduction, Title of the convention, Preamble, Chapter I: General provisions, Art. 1, Art. 2, Art. 3.

FORUM OF ADOPTION :

Diplomatic Conference of Geneva of 1949

IN FORCE :

yes

ENTRY IN FORCE :

21.10.1950

MEETINGS OF FORUM :

21.04.1949 - 12.08.1949, Geneva

DATE OF ADOPTION :

12.08.1949

DEPOSITARY :

Switzerland

NUMBER OF ARTICLES :

64 + 2 annexes

AUTHENTIC TEXT :

English, French

SOURCE :

Final Record of the Diplomatic Conference of Geneva of 1949, Vol. I, Federal Political Department, Bern pp. 205-224

FULL TEXT

> Download document(s) :

GC-I-EN.pdf (237.70 kb)



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Value of the new Commentary

- **An ‘ICRC Commentary’ but results from a collaborative process.**
- **Indicates ICRC interpretations, where they exist, as well as main diverging views.**
- **Contributes to the clarification of the Geneva Conventions but is not the final word.**
- **Ultimate authority will depend on its quality (research, writing, consultations).**



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Thank you!