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### The Updated ICRC Commentary on the Second Geneva Convention: Demystifying the Law of Armed Conflict at Sea

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Heleen Hiemstra & Ellen Noble*

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# The Updated ICRC Commentary on the Second Geneva Convention: Demystifying the Law of Armed Conflict at Sea

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## CONTENTS

I.	A Contemporary Interpretation of Humanitarian Law.....	141
II.	Historical Background of the Second Geneva Convention .....	143
III.	Applicability of the Second Geneva Convention and Relationship to Other Sources of International Law .....	145
IV.	Commonalities and Differences between the First and Second Geneva Conventions.....	149
A.	Contextualization of the Updated Commentaries on Common Articles .....	149
B.	Distinctive Features of the Protective Scope of the Second Convention .....	151
V.	Substantive Obligations under the Second Geneva Convention ....	156
VI.	Conclusion .....	159

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I. A CONTEMPORARY INTERPRETATION OF HUMANITARIAN LAW

The 1949 Geneva Conventions and their 1977 Additional Protocols have passed the test of time over their respective almost seventy and forty years of applicability in many situations of armed conflict. 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 the 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.<sup>1</sup> 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 these Commentaries, seeking to reflect the significant developments in the application and interpretation of the Conventions and their Additional Protocols in the intervening years.

The new Commentaries preserve the format of the original Commentaries, providing an article-by-article analysis of each of the provisions of 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 the practice witnessed first-hand by the ICRC in past armed conflicts), they do so, however, in a more detailed manner than the original Commentaries. The new Commentaries not only include the ICRC's current interpretations of the law

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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: *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; and 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; and Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987.

where they exist, but they 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 Convention, contributors (consisting of both 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 as a whole.<sup>2</sup> 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 in March 2016, the online launch of the updated Commentary on the Second Geneva Convention on 4 May 2017 constituted the second milestone of this important project.<sup>3</sup>

The authors of the updated Commentary on the Second Geneva Convention followed the same methodology as used for the updated Commentary on the First Convention. 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 the Second Convention. 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 the Second Convention 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)<sup>4</sup>

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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](http://ihl-databases.icrc.org/ihl/full/GCII-commentary) (all internet references were accessed in July 2017). A hardcopy of the updated Commentary to 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).

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 of the interpretation”.<sup>5</sup> 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,<sup>6</sup> this article first situates the Second Convention 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 the First and the Second Conventions and their updated Commentaries, as well as highlights some of the main issues dealt with in the updated Commentary on the Second Convention, 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 the Second Convention regulating the protection of hospital ships and coastal rescue craft.

## II. HISTORICAL BACKGROUND OF THE SECOND GENEVA CONVENTION<sup>7</sup>

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 hu-

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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, paras 1–66; 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; and 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, pp. 1551–1555.

7. See ICRC, *Commentary on the Second Geneva Convention*, above note 6, Introduction, paras 79–96.

manitarian treaty law was achieved only several decades later through a separate treaty on warfare at sea.<sup>8</sup> 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.<sup>9</sup> Two years later, the Battle of Lissa (1866) in the Adriatic 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.<sup>10</sup> 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.<sup>11</sup>

In line with the ICRC’s repeated calls to adapt the 1864 Convention to the conditions of warfare at sea, the First Hague Peace Conference of 1899 adopted the Hague Convention (III), drawing inspiration from the Additional Articles of 1868. Hague Convention (III), which entered into

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8. Hague Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864 (adopted 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.

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

11. ICRC, *Commentary on the Second Geneva Convention*, 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; and Pictet (ed.), *Commentary on the Second Geneva Convention*, above note 1, pp. 5–10.

force in 1900, was the first treaty to protect victims of armed conflict at sea.<sup>12</sup> 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.<sup>13</sup> This convention would remain the governing treaty for the protection of members of armed forces at sea until the adoption of the Second Geneva Convention in 1949.

At the International Conference of the Red Cross of 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”.<sup>14</sup> 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.<sup>15</sup> 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, which was unparalleled in scope and in the suffering and casualties caused among both combatants and civilians.<sup>16</sup>

### III. APPLICABILITY OF THE SECOND GENEVA CONVENTION AND RELATIONSHIP TO OTHER SOURCES OF INTERNATIONAL LAW

The Second Geneva Convention applies in the first place in case of an international armed conflict that takes place wholly or partly at sea.<sup>17</sup> Pursuant to Article 3 common to the four Conventions, fundamental protections also apply in the event of a non-international armed conflict at sea. While the

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12. ICRC, *Commentary on the Second Geneva Convention*, above note 6, Introduction, para. 86. For more details, see *Proceedings of the Hague Peace Conference of 1899*, pp. 31–44.

13. ICRC, *Commentary on the Second Geneva Convention*, above note 6, Introduction, para. 88. For more details, see *Proceedings of the Hague Peace Conference of 1907*, Vol. III, pp. 305–322. See also J. Galloy, above note 11, pp. 70–90.

14. ICRC, *Commentary on the Second Geneva Convention*, above note 6, Introduction, para. 91. For the full text of that resolution, see *Naval Expert Report of 1937*, p. 1.

15. ICRC, *Commentary on the Second Geneva Convention*, above note 6, Introduction, para. 91. For a detailed overview of all the steps that were undertaken, see *Naval Expert Report of 1937*, pp. 1–8.

16. ICRC, *Commentary on the Second Geneva Convention*, above note 6, Introduction, paras 76 and 92.

17. *Ibid.*, Art. 4, paras 935–936.

meaning of the term ‘sea’ is central to determining the applicability of the Second Convention, 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 the Second Convention from that of the First Convention, 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 the Second Convention, the term ‘sea’ comprises not only salt water 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.<sup>18</sup>

Once wounded, sick and shipwrecked members of the armed forces are put ashore, the Second Convention ceases to apply and these persons immediately benefit from protection under the First Convention.<sup>19</sup> This principle applies regardless of the ‘branch’ of the armed forces a person belongs to: a member of the air force who is shipwrecked at sea is protected by the Second Convention, as much as a member of the navy who is wounded on land is protected by the First Convention.

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

Provisions of the Fourth Convention are also relevant in the event of an armed conflict at sea, for the protection of wounded, sick and shipwrecked civilians. The Fourth Convention requires, for example, that

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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. GC II, Art. 16.

21. See ICRC, *Commentary on the Second Geneva Convention*, above note 6, Art. 16, para. 1577.



parties to the conflict assist the shipwrecked and protect them against pillage and ill-treatment, as far as military considerations allow.<sup>22</sup> 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.<sup>23</sup>

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

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<sup>28</sup>, 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.<sup>29</sup>

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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) (GC IV), Art. 16.

23. GC IV, 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. GC I, Art. 23.

27. GC I, Art. 8.

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

29. For further details, see ICRC, *Commentary on the Second Geneva Convention*, above note 6, Introduction, para. 115.

In parallel to these other IHL sources, the Second Geneva Convention 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 the Second Geneva Convention during an armed conflict.<sup>30</sup> This complementarity is reflected in the updated Commentary on the Second Geneva Convention. The term ‘warship’, for example, used several times in the Second Convention, must be interpreted based on the definition provided for in Article 29 UNCLOS.<sup>31</sup>

There are also a number of treaties adopted under the auspices of the IMO, in particular the Safety of Life at Sea (SOLAS) Convention<sup>32</sup> and the Maritime Search and Rescue (SAR) Convention<sup>33</sup>. 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 in part 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<sup>34</sup>, belong to the categories of treaties that may remain in operation during armed conflict, also when this takes place at sea.<sup>35</sup>

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30. *Ibid.*, para. 48. Some UNCLOS provision 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 are temporarily suspended. *Ibid.*, para. 49.

31. See ICRC, *Commentary on the Second Geneva Convention*, above note 6, 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) (SOLAS Convention).

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

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 the Second Geneva Convention*, above note 6, Introduction, paras. 51–59.

IV. COMMONALITIES AND DIFFERENCES BETWEEN THE FIRST AND SECOND GENEVA CONVENTIONS

The Second Geneva Convention 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.<sup>36</sup>

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 the First Geneva Convention 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 certain contextualization in the updated Commentary on the Second Geneva Convention, dealing with warfare at sea.

*A. Contextualization of the Updated Commentaries on 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 of Article 2 of the First Geneva Convention 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.”<sup>37</sup> 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.<sup>38</sup>

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

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

38. ICRC, *Commentary on the Second Geneva Convention*, above note 6, Art. 2, para. 259.

This passage is maintained in the updated commentary on Article 2 of the Second Convention. 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.<sup>39</sup>

Certain contextualization was also necessary in the updated commentary on Article 3 common to the four Geneva Conventions, regulating non-international armed conflict. The fact that the Second Geneva Convention 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.<sup>40</sup> Article 22 of the Third Convention 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.<sup>41</sup> 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”.<sup>42</sup> 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 case of prolonged detention.<sup>43</sup>

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 the Second Convention relates to the right to a fair trial. Common Article 3 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

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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, June 2005, p. 385. See also ICRC, *Commentary on the Second Geneva Convention*, above note 6, Art. 3, para. 741.

43. ICRC, *Commentary on the Second Geneva Convention*, above note 6, Art. 3, para. 580.

which are recognized as indispensable by civilized peoples”.<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup>

*B. 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 the Second Convention, there are certain substantive differences between the First and Second Conventions. These differences relate to the persons and objects protected under the respective Conventions.

1. 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 the Second Convention is adapted to warfare at sea. The Convention does not only protect the wounded and sick, but also the shipwrecked. Thus, the text of common Article 3 is worded slightly differently in the Second Convention compared to the other three Conventions, which has been reflected in the updated Commentary.<sup>47</sup> Whereas in the First, Third and Fourth Geneva Conventions reference is made only to the “wounded and sick”, the Second Convention 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

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44. Common Art. 3 to the Geneva Conventions.

45. ICRC, Commentary on the Second Geneva Convention, above note 6, Art. 3, para. 696.

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

47. *Ibid.*, Art. 3, paras 772–775.

them to do so in fact. It should be noted that a person in such situations must not commit any hostile acts.<sup>48</sup>

Likewise, Article 12 which establishes the general obligation for States to respect and protect in all circumstances, refers to the “wounded, sick and shipwrecked”, whereas Article 12 in the First Convention only refers to the “wounded and sick”.<sup>49</sup>

## 2. Protection of Hospital Ships and Coastal Rescue Craft

Logically, the difference between the First and Second Conventions also extends to the objects that are protected. While ambulances and other land-based medical transports are protected under the First Convention,<sup>50</sup> medical transports used on water are protected under the Second Convention in equal measure. Recognizing an important means by which its obligations may be implemented, the Second Geneva Convention affords protection to hospital ships<sup>51</sup> and coastal rescue craft,<sup>52</sup> as well as to ships chartered for the transport of medical equipment<sup>53</sup> and to medical aircraft.<sup>54</sup>

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.<sup>55</sup> 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.<sup>56</sup>

In order to benefit from special protection under the Second Convention, 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”.<sup>57</sup> It follows that hospital ships may not serve any other than the said humanitarian purpose, and

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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.

50. GC II, Art. 35.

51. GC II, Arts 22 and 24.

52. GC II, Art. 27.

53. GC II, Art. 38.

54. GC II, Art. 39.

55. GC II, Art. 22(1).

56. GC II, Art. 36.

57. GC II, Art. 22(1).

that they lose their protection if they are used to commit acts harmful to the enemy.<sup>58</sup> As noted in the updated commentary on Article 22, it is their exclusively humanitarian function of impartially providing assistance to the protected persons that justifies their special protection,<sup>59</sup> but parties to the conflict have the right to control and search hospital ships to verify that their use conforms to the provisions of the Convention.<sup>60</sup> This far-reaching right has been inserted by States in the Geneva Conventions in order to counter the possibility that an enemy's hospital ship is being abused to further military operations.

At present, only a small number of States have military hospital ships, which are expensive to operate and maintain and difficult to protect against attack.<sup>61</sup> 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.<sup>62</sup> It is important to note that 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".<sup>63</sup>

The Second Convention regulates a variety of aspects pertaining to hospital ships. Two issues in particular have become topical since 1949. First, Article 34(2) which 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 none of the communication to and from the hospital ships may be encrypted, but must be sent in the open. Due to developments in communication technology, most prominently the use of satellites, encryption is now so common to the point of being unavoidable as available technology, and 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

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58. GC II, Art. 34(1).

59. ICRC, *Commentary on the Second Geneva Convention*, above note 6, Art. 22, para. 1927.

60. GC II, Art. 31(1).

61. ICRC, *Commentary on the Second Geneva Convention*, above note 6, Art. 22, para. 1928.

62. See *Ibid.*, para. 1945, Art. 33, para. 2336, and Art. 18, para. 1677.

63. GC II, Art. 33.

of paragraph 2, even if messages and data are transmitted using encryption.”<sup>64</sup>

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 a hospital ships with weapons other than purely deflective means of defense (such as chaffs and flares) or other than light individual weapons could be considered an act harmful to the enemy, leading to a loss of protection.<sup>65</sup> 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.<sup>66</sup>

In addition, the Second Convention affords protection to small craft used by the State or by officially recognized search and rescue organizations.<sup>67</sup> To qualify for protection under Article 27, coastal rescue craft must be employed by a State that is party to the conflict or by officially recognized 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 must have been approved or authorized by a government authority or other public body to perform coastal rescue functions.<sup>68</sup>

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.<sup>69</sup> Yet, owing to their small size and speed, at the time of the adoption of the Second Convention, rescue craft were considered difficult to identify and were often suspected of engaging in intelligence gathering for the enemy.<sup>70</sup> 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 the Convention is to give small craft special protection, but more limited than that afforded to hospital ships. Compared

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64. ICRC, *Commentary on the Second Geneva Convention*, above note 6, Art. 34, para. 2403.

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

66. *Ibid.*, Art. 35, para. 2419–2421.

67. GC II, Art. 27.

68. GC II, Art. 27, para. 2194.

69. See ICRC, *Commentary on the Second Geneva Convention*, above note 6, Art. 27, paras 2149 and 2151.

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



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”.<sup>71</sup> 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”.<sup>72</sup>

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.<sup>73</sup> 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 the Convention of the status of the crew of coastal rescue craft.<sup>74</sup>

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”.<sup>75</sup> As noted in the updated commentary on Article 43, there is no reason why such agreements could not also be concluded for

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71. GC II, Art. 27(1).

72. GC II, Art 22(1).

73. See ICRC, *Commentary on the Second Geneva Convention*, above note 6, Art. 27, para. 2206.

74. See *Ibid.*, Art. 27, para. 2152 and the commentary on Article 36, section C.d.

75. GC II, Art. 43(8).

coastal rescue craft.<sup>76</sup> 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 to be able to carry out their humanitarian work.

#### V. 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, the Second Convention sets out a number of additional obligations intended to ensure that this core obligation is fulfilled. This includes 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 the Second Convention, 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.<sup>77</sup> Article 18 of the Convention 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.<sup>78</sup> The good faith interpretation and implementation of this provision is of critical importance in order to achieve the objectives of the Second Convention.

The obligation to “take all possible measures” is an obligation of conduct to be carried out with due diligence.<sup>79</sup> All possible measures must be taken “after each engagement” and “without delay”. In this respect, Article 18 differs from the parallel provision in the First Convention, which requires its obligations to be carried out “at all times, and particularly after an engagement”.<sup>80</sup> As the updated commentary on Ar-

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76. See ICRC, *Commentary on the Second Geneva Convention*, above note 6, Art. 43, para. 2766.

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

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

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

80. GC I, Art. 15.

ticle 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”.<sup>81</sup>

What constitutes “possible measures” in any given case is inherently context-specific. Each organ of the “Party to the conflict” – entity to which the obligation applies – has an obligation, at his or her own level, to assess in good faith which measures are possible.<sup>82</sup>

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 itself “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, and thus not in the possibility of undertaking any. Still, that vessel remains under an obligation to consider what measures are possible 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.<sup>83</sup> 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.<sup>84</sup>

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

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81. ICRC, *Commentary on the Second Geneva Convention*, above note 6, Art. 18, para. 1653.

82. *Ibid.*, Art. 18, paras. 1629–1633.

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

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

none can be recovered.<sup>85</sup> The extent to which a party has access to such technology and knowledge may therefore affect the interpretation of the “possible measures” that party can take in relation to the search for the dead.<sup>86</sup>

The research for this updated Commentary identified a potential dilemma when it comes to 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 sunken with their crews constitute war graves, which must be respected. These vessels regain their entitlement to sovereign immunity once they have sunk.<sup>87</sup>

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, such as where a party is unable to carry out a rescue itself, where it may have to make an appeal in order for that party to comply with its obligations.<sup>88</sup>

Once collected, the wounded, sick and shipwrecked must receive “adequate care” as soon as possible.<sup>89</sup> 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

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

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

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

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

89. *Ibid.*, Art. 18, paras 1674–1681.

be appraised 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.<sup>90</sup>

With regard to the position of neutral States (i.e., States not Party to the international armed conflict), the Second Convention contains a number of provisions regulating their obligations vis-à-vis the persons protected by this Convention. First, when they receive or intern such persons in their territory, they shall apply the provisions of the Convention by analogy. 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.<sup>91</sup> 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 had to deal with.<sup>92</sup> Undesirable as this may be from the perspective of legal certainty, ultimately, States seem to have retained their freedom of interpretation on this point.<sup>93</sup>

## VI. CONCLUSION

Out of the four Geneva Conventions, the Second is the one that probably used to be the least well known, and that is considered to be the most “technical”. The updated Commentary on the Second Convention 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 as well as through the publication of military manuals and scholarly articles. Thus, this Commentary attempts to demystify this 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.

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90. See GC II, Arts 19 and 20 which equally deal with burial at sea.

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

92. ICRC, *Commentary on the Second Geneva Convention*, above note 6, Art. 15, paras 1548–1554 and Art. 17, paras 1605–1611.

93. *Ibid.*, Art. 17, paras 1605 and 1611.

In comparison with armed conflicts on land, the past decades have not seen many armed conflicts take place at sea (or 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 the Second Convention must already be known and their contemporary meaning understood. This understanding must be ensured already 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 the Second Convention 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 (Third Convention) and the protection of civilians in time of war (Fourth Convention). 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. Next, the updated Commentary on the Third Geneva Convention is scheduled to be published in 2019.