

# Treaty Interpretation in the Fog of War

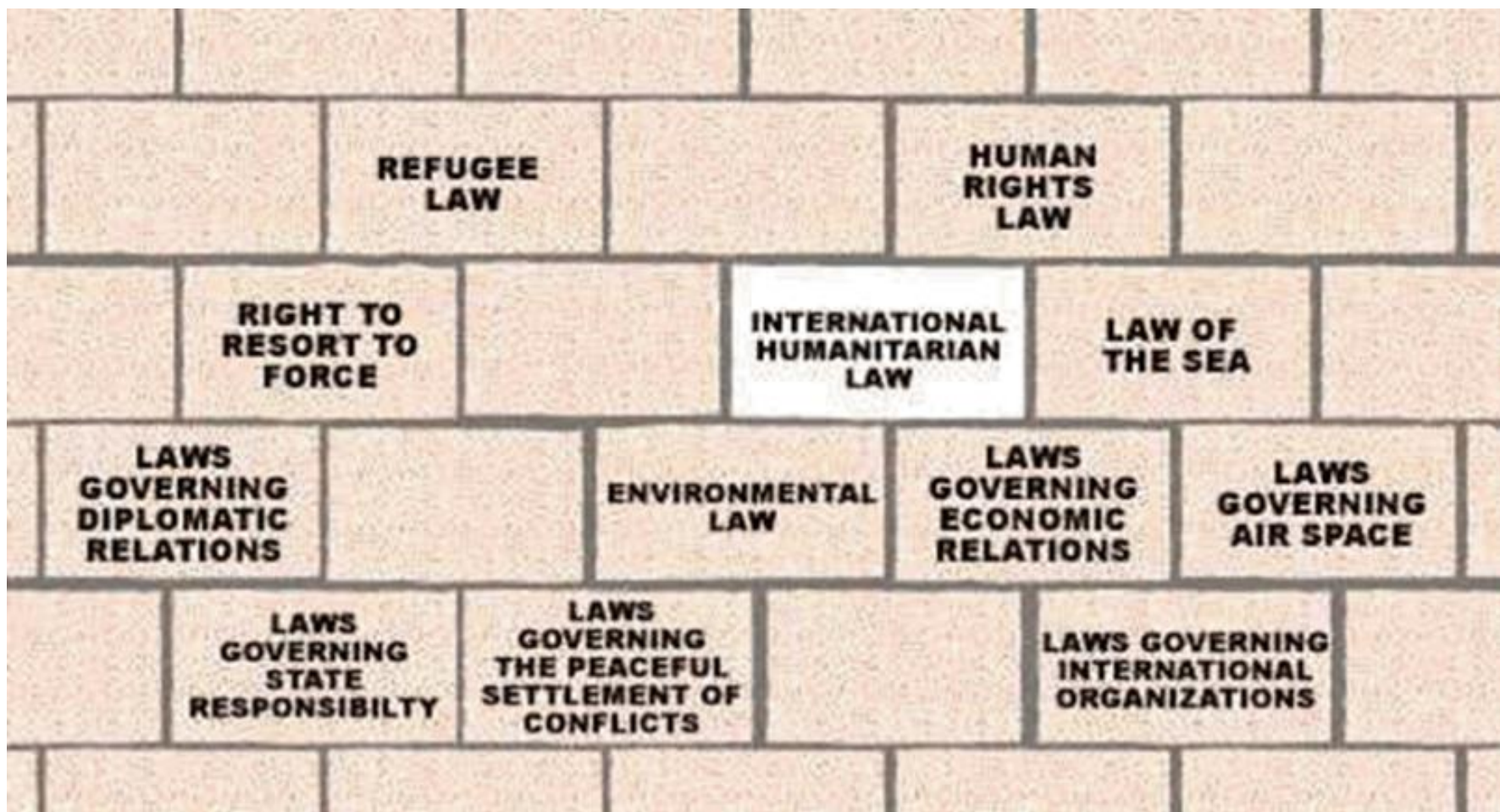
Ellen Policinski  
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10 October 2023, Annual IALL Course



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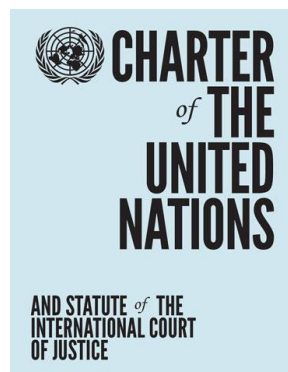
# IHL in the international legal order



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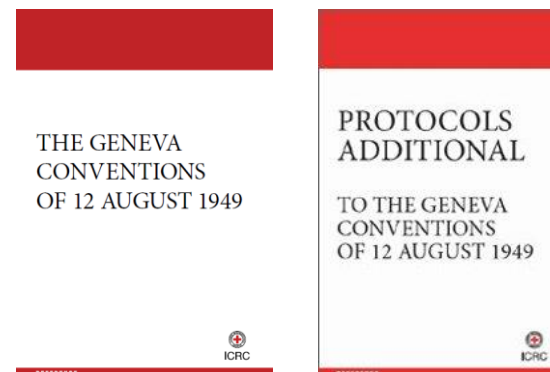
# *Jus ad bellum vs. jus in bello*

## Law on the use of force



- War is prohibited
- Exceptions:
  - Self-defence (Art. 51)
  - Authorisation of the UN Security Council

## Laws of war

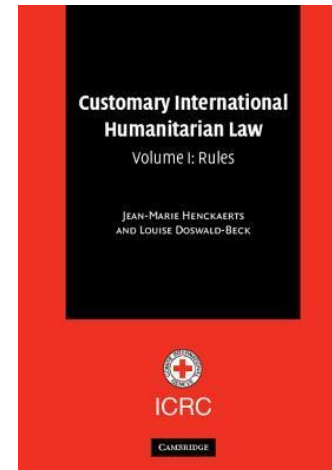
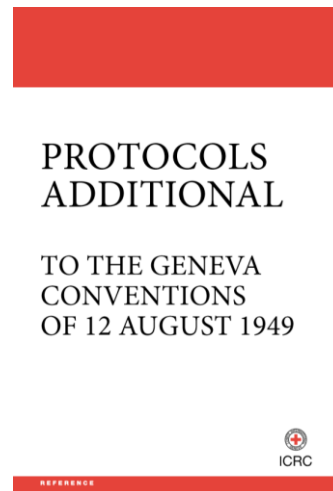
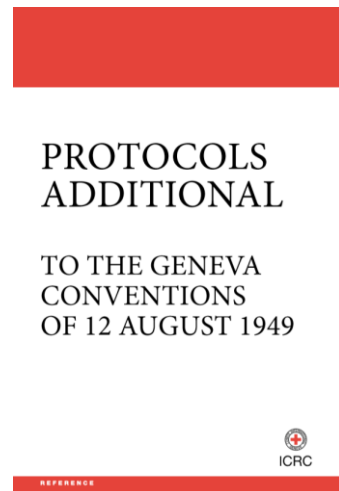


- War is a reality
- IHL is applicable independent of (il)legality of war
- Does not affect legal status of parties to the conflict



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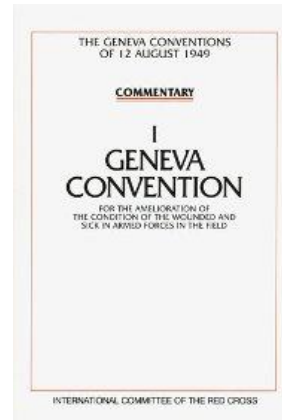
# Sources of IHL



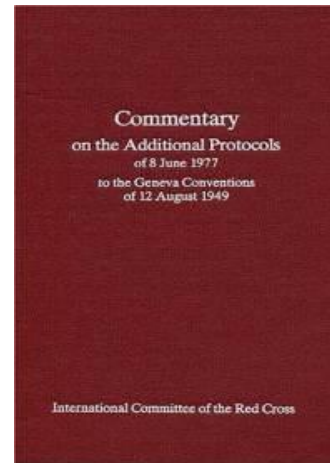
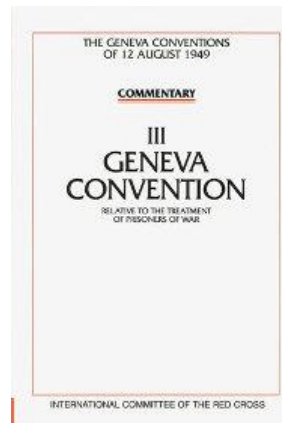
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# Initial ICRC Commentaries

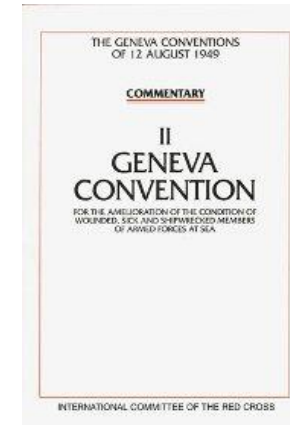
1952



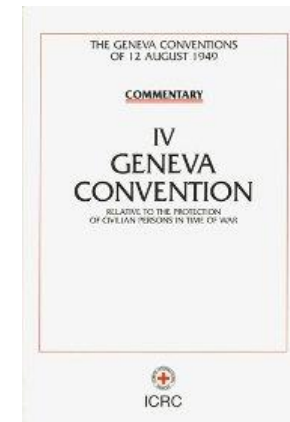
1960



1986



1959



1956



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# Commentaries Update Project

*In 2011, the International Committee of the Red Cross (ICRC) and a team of renowned experts embarked on a major project to update the Commentaries on the Geneva Conventions of 1949 and their Additional Protocols of 1977.*

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*The updated Commentaries take into account developments in law and practice over the past six decades gleaned from State practice, case law, legal writings and the ICRC archives.*

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*They have undergone an extensive peer review by practitioners and academics from around the world.*



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# Interpretive Method

Preparatory Work, case law, literature



Subsequent Practice & Int'l Law



Ordinary Meaning in its context and in light of the object and purpose



Good Faith



VCLT Articles 31-33



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# Commentary on The Third Geneva Convention



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# Prisoners of War

**Article 4 identifies the persons who, if they fall into the power of the enemy, are entitled to protection of the Third Convention, including:**

- members of the armed forces
- members of 'irregular' armed forces that belong to a party to the conflict
- persons who take up arms in response to an invading army, and
- certain categories of civilians authorized to accompany the armed forces.



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# Humane Treatment

*Prisoners of war must **at all times** be humanely treated.*

**Protected Against**

**Acts of Violence or  
Intimidation**

**Insults and Public Curiosity**

**Humiliation**

**Reprisals**

**Medical or Scientific  
Experiments**



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# GC III Commentary

Interpreting GCIII in today's conflicts



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# Who is the Detaining Power?

- Assumes control over (and responsibility for) the individual
- Responsibility rests on the State, not individuals, units, etc.
- Always in the hands of a single Detaining Power
- Multilateral operations must not render determination of the DP impossible

## Can an international organization detain?

### Party to the conflict?

- Westphalian logic of the GCs
- Bound by CIL

### Transfer?

- Not envisaged by the drafters
- Subsequent legal developments
- Object and purpose of GCIII
- No loss of protection



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# Linguistic evolution

## Article 14(1)

*Prisoners of war are entitled in all circumstances to respect for their persons and their honour.*

The meanings of 'honour' in GCIII:

- **Sufficient and appropriate clothing (Art. 27)**
- **Wearing badges of rank and nationality (Arts. 40 and 87)**
- **Treatment in accordance with rank and age (Arts. 44 and 45)**
- **Prohibition of humiliating labour (Art. 52)**
- **The right to be honourably interred (Art. 120)**



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# New technologies

*A 1949 treaty regulating social media, electronic monitoring bracelets, CCTV, video games, e-banking, etc.*

- **Prisoners of war must be protected from insults and exposure to public curiosity (Art. 13)**
- **Surveillance and personal dignity (Art. 14)**
- **Currency and other valuable property (Art. 18)**
- **Educational and recreational materials, including (Arts. 38 and 72)**



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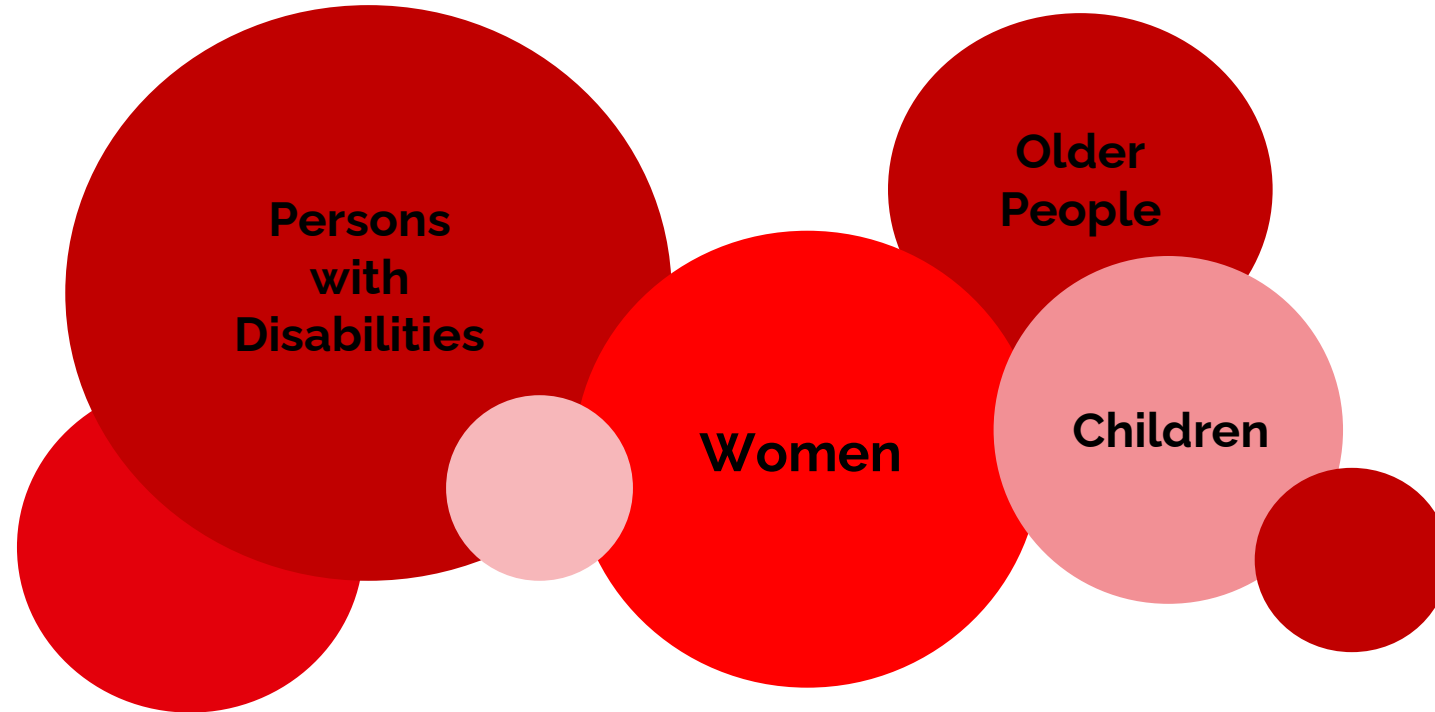
# Changes in medical understandings

- Tobacco use (Art. 26)
  - But! Premises affording every guarantee of hygiene and healthfulness (Art. 22)
- 'Serious hysteria' as a medical condition (Art. 110, Annex I)



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# Persons with distinct needs



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# Gender

***The Convention prohibits adverse distinction based on sex or any other similar criteria.***

The rules relating to women seek to acknowledge the **specific needs** and address the **particular risks**, be they psychological or physiological, women may face during armed conflict.

The present Commentary thus analyses the specific needs of women and other vulnerable groups detained as POWs from the perspective of **contemporary practice and legal requirements**.



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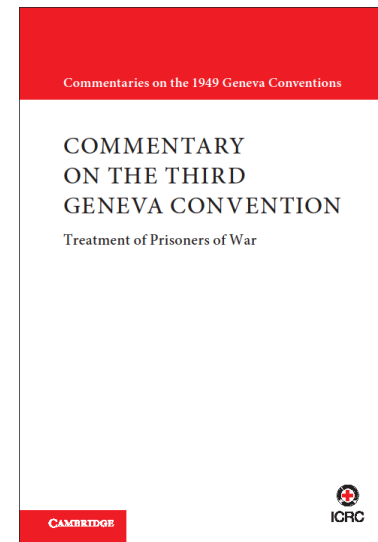
# Questions?



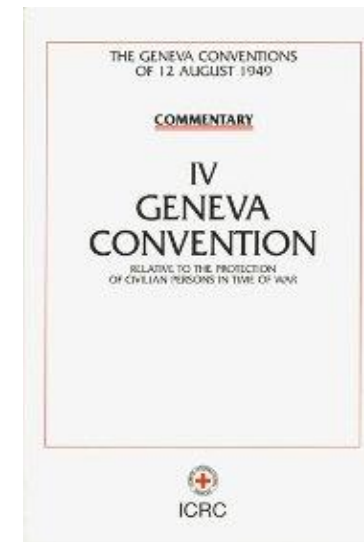
**2016**



**2017**



**2020/21**



**2025**



**CICR**