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IN PURSUIT OF A TREATY'S SOUL: A STUDY OF THE OBJECT AND PURPOSE OF THE FOURTH GENEVA CONVENTION

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Abstract The Geneva Convention relative to the Protection of Civilian Persons in Time of War provides a practical and effective framework for the protection of civilians in international armed conflicts that has retained its relevance for 75 years since its adoption. As with all treaties, its 'object and purpose' has a concrete impact on how its terms are interpreted, giving insights into the ordinary meaning of the text and allowing the aim of the Convention to be fully realized. This article asks and answers a series of questions to elucidate the role of the object and purpose in treaty interpretation and how to identify the object and purpose of a given treaty before focusing on the specificities of international humanitarian law treaties. On that basis, it determines that the overall 'object and purpose' of the Convention is to protect civilians during armed conflict, including in circumstances where they are subject to permissible measures of control and security. The article then demonstrates how that 'object and purpose' assists with the resolution of specific, well-known interpretive dilemmas including the determination of protected status under the Convention and the application of provisions premised on the existence of a Protecting Power.

Keywords: public international law, treaty interpretation, international humanitarian law, Fourth Geneva Convention, object and purpose, protection of civilians, armed conflict.

I. INTRODUCTION

International treaties, like all texts, are interpreted by the humans that read them. It is only through that interpretation that treaties acquire their meaning and take effect. The French interwar jurist Georges Scelle pointed out the impossibility of an uninterpreted treaty in saying '[t]here is no application without interpretation'.[1] Treaties are in fact living instruments, and interpretation is

[1] G Scelle, *Précis de droit des gens: Principes et systématique* (Recueil Sirey 1934) vol II, 488, 'Il n'y a pas d'application sans interpretation', in its original French (authors' translation).

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not only the force that gives them life, but it also keeps them relevant in an ever-changing world.[2]

As treaties, the Geneva Conventions[3] and their Additional Protocols[4] are of course interpreted by States, but also by any individual or entity that engages with them, whether as a practical necessity or a scholarly pursuit. When lawmakers enact legislation criminalizing war crimes they are interpreting these treaties. When judges issue rulings they are interpreting these treaties. When a ministry of defence adopts rules of engagement they are interpreting these treaties. When a military commander issues orders they and their subordinates are interpreting these treaties. When United Nations (UN) mechanisms issue reports they are interpreting these treaties. When the International Committee of the Red Cross (ICRC), as the guardian of international humanitarian law (IHL), 'work[s] for the understanding and dissemination of knowledge of' these treaties, 'undertake[s] the tasks incumbent upon it under the Geneva Conventions', and 'work[s] for the faithful application of [IHL] in armed conflicts and [takes] cognizance of any complaints based on alleged breaches of that law',[5] all of these activities necessarily involve interpreting these treaties.[6] When a journalist reports on the conduct of hostilities they are relying on an interpretation of these treaties categorizing activities as lawful or unlawful. When academic literature is written about a particular conflict the authors are interpreting these treaties. In short, there is no end to the list of those who interpret international treaties such as the core IHL treaties, including the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), which is the specific focus of this article.

[2] See generally, D Moeckli and ND White, 'Treaties as "Living Instruments"' in MJ Bowman and D Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (CUP 2018).

[3] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (GC I); Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (GC II); Geneva Convention (III) relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (GC III); Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GC IV).

[4] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III) (adopted 8 December 2005, entered into force 14 January 2007) 2404 UNTS 261 (Additional Protocol III).

[5] Statutes of the International Red Cross and Red Crescent Movement (1986) art 5(2).

[6] See ICRC, *Commentary on the Third Geneva Convention* (CUP 2021) (*Commentary on GC III*) 71; F Bugnion, *The International Committee of the Red Cross and the Protection of War Victims* (Macmillan 2003) 914–22.

The authors of this article are both participating in the ICRC project to update the Commentaries on the 1949 Geneva Conventions and are therefore involved in the interpretation of these treaties on a daily basis. The ICRC's updated Commentaries reflect how the Geneva Conventions and their Additional Protocols have been interpreted in the nearly 75 years since their adoption.[7] The methodology behind them is based on Articles 31–33 of the Vienna Convention on the Law of Treaties (VCLT), as discussed in detail below.[8]

The 'object and purpose' of a treaty, and perhaps particularly that of a multilateral, norm-setting treaty like the Fourth Geneva Convention, plays a significant role in ensuring the coherence of the treaty in light of its nature as a living instrument. The 'object and purpose' operates to ensure that the meaning of a treaty's terms continues to make sense over time. The drafters of the Fourth Geneva Convention were already aware during its negotiation that they could not predict future conflict trends that would have an impact on the application of the treaty, and that its provisions had to be drafted to withstand the test of time.[9] This article will examine this specific element of treaty interpretation with regard to the Fourth Geneva Convention. Although it looks at this particular treaty, the analysis is generalizable and much of it can be applied to any treaty.

The article will seek to elucidate the role of the object and purpose in treaty interpretation and how to identify the object and purpose of a given treaty before focusing on the specificities of IHL treaties. On that basis, the article determines that the overall 'object and purpose' of the Fourth Geneva Convention is to protect civilians during armed conflict, including in circumstances where they are subject to permissible measures of control and security. The article then concludes by demonstrating how that 'object and purpose' assists with the resolution of specific well-known interpretive dilemmas including the determination of protected status under the Convention and the application of provisions premised on the existence of a Protecting Power.

II. WHAT IS A TREATY'S 'OBJECT AND PURPOSE'?

The VCLT was the culmination of decades of work undertaken by the International Law Commission (ILC) to codify the law of

[7] See *Commentary on GC III* (n 6) 66–70.

[8] ibid 75–123.

[9] eg early in the drafting process, a representative of the Belgian Red Cross cautioned that provisions must be general enough to apply in future wars that may not be like the wars of the past, indicating that the 1929 Geneva Conventions had been too focused on the events of World War I. Special Commission of National Red Cross Societies (Geneva), *Minutes of the Joint Commission to examine the Draft Conventions to be submitted to the 1948 Stockholm Conference* (1947) 143. Today, it is generally accepted that the choice of broadly worded treaty provisions indicates an intention to endow them with an evolving meaning over time. *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgment) [2009] ICJ Rep 213, para 66. For the analysis of the relationship between the object and purpose and the intent of the drafters, see Section II.D below.

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treaties.[10] Its Articles 31–33 comprise the rules of modern treaty interpretation. Article 31(1) provides the principal means of treaty interpretation, and it is here that the phrase 'object and purpose' appears: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.'[11]

Article 31 goes on to provide other elements that must be taken into account—subsequent agreements and practice, relevant rules of international law applicable between the parties to the treaty and any special meaning given to terms by the parties—while Article 32 provides for supplementary means of interpretation to clarify or confirm the meaning established under Article 31.

The language of the VCLT's general rule of interpretation was designed to provide an interpretive methodology that combines several pre-existing means of interpretation.[12] It thus reconciled textual and teleological approaches which had previously been seen as conflicting methods of interpretation by using the object and purpose of the treaty as one aspect of determining the ordinary meaning of its terms.[13] In this way, the interpretive elements contained in the VCLT form part of a single test to determine the meaning of the text.[14] This is reinforced by the fact that the VCLT itself gives Article 31 the title 'General rule of interpretation'—'rule' being in the singular.[15]

Indeed, a text's ordinary meaning cannot be clear without understanding why that text was promulgated. As Anzilotti stated:

> [o]nly when it is known what the Contracting Parties intended to do and the aim they had in view is it possible to say either that the natural meaning of the terms used in a particular article corresponds with the real intention of the Parties, or that the natural meaning of the terms used falls short of or goes further than such intention.[16]

[10] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

[11] ibid, art 31(1).

[12] JM Sorel and V Boré Eveno, 'Article 31 General Rule of Interpretation' in O Corten and P Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary* (OUP 2011) vol I, 810–11.

[13] See FG Jacobs, 'Varieties of Approach to Treaty Interpretation' (1969) 18(2) ICLQ 318, 319.

[14] See ILC, 'Documents of the Second Part of the Seventeenth Session and of the Eighteenth Session Including the Reports of the Commission to the General Assembly' (1967) UN Doc A/CN.4/SER.A/1966/Add.1; R Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 215–16; A Aust, *Modern Treaty Law and Practice* (3rd edn, CUP 2013) 205; JM Henckaerts et al, 'ICRC Perspectives on the Interpretation of the Third Geneva Convention More Than Seventy Years after Its Adoption' in MN Schmitt and CJ Koschnitzky (eds), *Prisoners of War in Contemporary Conflict* (OUP 2023) 382.

[15] See also ILC, 'Report of the International Law Commission on the Work of its Eighteenth Session' (1966) UN Doc A/CN.4/191, 220.

[16] *Interpretation of the Convention of 1919 Concerning Employment of Women During the Night* (Dissenting Opinion of Judge Anzilotti) [1932] Permanent Court of International Justice (PCIJ) Rep Series A/B No 50, 383.

The treaty interpretation rules as expressed in the VCLT are generally recognized as being customary in nature,[17] meaning that customary norms corresponding to Articles 31–33 apply even to those treaties that were adopted before the VCLT was drafted. Each element of the interpretive rule reflected in the VCLT is of equal importance and could be the subject of its own study. The present article is focused on the 'object and purpose'—what it means, how it is found, and the role the object and purpose of the Fourth Geneva Convention plays in its interpretation.

Understanding the object and purpose of a treaty is essential to its interpretation. The 'fundamental importance' of the object and purpose was recognized as central to good faith treaty interpretation by the ILC during the drafting of the VCLT.[18] However, as Klabbers reflected some 30 years later, '[g]iven the prominent place occupied by the notion of object and purpose in the codified law of treaties, it is rather surprising that we know so little about it'.[19]

A. Where Did the Concept Originate?

The term 'object and purpose' is most often traced back to the International Court of Justice (ICJ) Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, in which the Court alternately referred to the 'object', 'purpose' and 'object and purpose' (sometimes also using the plural) of the treaty in question, apparently interchangeably.[20] Buffard and Zemanek have traced the concept—though expressed in a slightly different formulation—as far back as 1926 when the Permanent Court of International Justice (PCIJ) referred to a treaty's 'aim and the scope'.[21] The language used by the ICJ and PCIJ evolved over time.[22] Ultimately this concept was codified in the VCLT with the term 'object and purpose'.[23]

The phrase 'object and purpose' appears eight times in the VCLT[24] (and one more time with the conjunction 'or').[25] Despite the many uses of the phrase,

[17] See, eg, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v Serbia)* (Judgment) [2007] ICJ Rep 43, para 160; ILC, 'Report on the Work of its Seventieth Session' (2018) UN Doc A/73/10, Ch IV, 13, Conclusion 2.1; Gardiner (n 14) 207.

[18] ILC, 'Fourth Report on the Law of Treaties' (1965) UN Doc A/CN.4/177 and Add.1 & 2, 51.

[19] J Klabbers, 'Some Problems Regarding the Object and Purpose of Treaties' (1997) 8 FinnishYBIL 138, 159.

[20] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 21–4, 27, 29 (*Reservations to the Genocide Convention*).

[21] I Buffard and K Zemanek, 'The "Object and Purpose" of a Treaty: An Enigma?' (1998) 3 ARIEL 311, 315, citing *Competence of the ILO to Regulate, Incidentally, the Personal Work of the Employer* [1926] PCIJ Series B No 13, 18.

[22] ibid 315–16.

[23] For a detailed account of the development of the concept of 'object and purpose' that was ultimately codified in the VCLT, see V Crnić-Grotić, 'Object and Purpose of Treaties in the Vienna Convention on the Law of Treaties' (1997) 7 AsianYrbkIntlL 141, 156–8.

[24] VCLT (n 10) arts 18 (twice), 19(c), 20(2), 31(1), 33(4), 41(1)(b)(ii), 58(1)(b)(ii).

[25] ibid, art 60(3)(b). See also text accompanying n 43 below.

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'object and purpose' is not explicitly defined in the VCLT. Some scholars even suggest that these references may not refer to the *same* object and purpose, but that the term 'object and purpose' may be interpreted differently in light of the context of each provision.[26] Others refute that claim.[27]

The 'object and purpose' of treaties is also referred to in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations[28] and the 1978 Vienna Convention on Succession of States in Respect of Treaties.[29] In these instruments, as in much of the VCLT, the 'object and purpose' is treated as a substantive element that operates in addition to the provisions of the treaty, informing the application of the treaty being interpreted.[30] The rules on treaty interpretation contained in Articles 31–33 are an exception, which Klabbers characterized as 'methodological devices rather than substantive provisions'.[31]

The concept of the object and purpose has been described as 'infus[ing] some common sense and flexibility in the law of treaties', preventing irrational results.[32] It ensures the effectiveness of the terms of the treaty where two (or more) interpretations are possible—'one which does and the other does not enable the treaty to have appropriate effects'.[33] In such a case, good faith and the object and purpose of the treaty ensure that the latter interpretation is adopted.[34] The concept of the object and purpose can be used as a guide to fulfil the aim of the treaty, and it therefore provides coherence to the interpretation of the treaty when viewed as a whole.

B. One Concept or Two?

The conception of the 'object and purpose' appears to have evolved over time in this respect. Looking at the constituent parts of the phrase, 'object' is frequently understood as referring to the rights and obligations contained in the treaty,[35] and its 'purpose' is described as the aim to be achieved by the provisions.[36] This does not mean that they are separate concepts, however. Prior to the

[26] See, eg, Klabbers (n 19) 148–50.

[27] See, eg, U Linderfalk, 'On the Meaning of the "Object and Purpose" Criterion, in the Context of the Vienna Convention on the Law of Treaties, Article 19' (2003) 72(4) NordicJIL 429, 432–3.

[28] UN, 'Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations' (18 February–21 March 1986) UN Doc A/CONF.129/15 (VCLTIO) arts 18, 19(c), 20(2), 31(1), 33(4), 41(1)(b)(ii), 58(1)(b)(ii), 60(3)(b).

[29] Vienna Convention on Succession of States in Respect of Treaties (concluded 23 August 1978, entered into force 6 November 1996) 1946 UNTS 3, preamble, and arts 15, 17(2), 17(3), 18(3), 18(4), 19(3), 19(4), 27(5), 30(1)(a), 30(3)(a), 31(1)(b), 31(3), 32(3), 32(6), 33(2), 33(5), 34(2)(b), 35, 36(3), 37(2).

[30] J Klabbers, 'Treaties, Object and Purpose' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2006) para 3.

[31] ibid, para 3.

[32] ibid, para 21.

[33] ILC, *Yearbook of the International Law Commission* (1966) vol II, 219, para 6.

[34] ibid.

[35] P Reuter, *Introduction to the Law of Treaties* (2nd edn, Routledge 1995) 186; see also Buffard and Zemanek (n 21) 331–2.

[36] ibid.

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conclusion of the VCLT, many scholars looked at the individual terms that make up the phrase separately, considering 'that the object of a treaty consists of the obligations and rights prescribed by the treaty, while its purpose could be said to represent the result that the parties have set out to achieve'.[37] Scholars writing after 1969 who still argue that the 'object' of a treaty is distinct from its 'purpose' are in the minority.[38]

This has been examined by Buffard and Zemanek through the lens of differences in terminology between historic German-, French- and English-language doctrines.[39] Bos splits the difference, considering it wiser to treat the 'object and purpose' as indicating two aspects of the same concept since the interpretation of the 'object' of a treaty will necessarily affect the determination of its 'purpose'.[40] Following the same logic, Hosseinnejad refers to the object and purpose as 'not one, not two'.[41]

The majority view is that the VCLT firmly established 'object and purpose' as a single standard expression: it consistently speaks of the 'object and purpose' together and in the singular.[42] There is one instance where the VCLT uses the phrase 'object *or* purpose' (emphasis added), in Article 60(3), which may imply that these are two separate concepts. However, there is nothing in the drafting history to suggest that this was meant to indicate a difference in meaning, and the repetition of the term 'object *and* purpose' in the later Vienna Convention on the Succession of States in Respect of Treaties drafted by the same body would indicate that this was in fact not intentionally done.[43]

There are judicial opinions issued after the adoption of the 1969 VCLT that may be read as separating the 'object' of a treaty from its 'purpose'.[44] However, as there are equally judicial opinions that clearly refer to the 'object and purpose' as a singular concept,[45] this should not negate the singular concept of the 'object and purpose' as conceived of by the drafters.[46] Furthermore,

[37] Crnić-Grotić (n 23) 173–4, citing H Lauterpacht (ed), *Oppenheim's International Law* (8th edn, Longmans 1955) vol 1, 893 among others.

[38] Buffard and Zemanek (n 21) 318–19; C Rousseau, *Droit international public* (2nd edn, Dalloz 1970) vol 1, 272; M Yasseen, 'L'interprétation des traités d'après la Convention de Vienne sur le droit des traités' (1976) 151 RdC 1, 56–7.

[39] Buffard and Zemanek ibid 322–7. But see Linderfalk (n 27) 433.

[40] M Bos, *A Methodology in International Law* (North-Holland 1984) 153.

[41] K Hosseinnejad, 'Interpretation in Light of Which "Object and Purpose"?' (2018) 61 GYIL 377, 397.

[42] Klabbers (n 30) para 6.

[43] However, the VCLTIO (n 28) reproduces exactly the text of the VCLT (n 10) art 60(3)(b), including 'object or purpose', in its art 60(3)(b). UN, 'United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, 18 February–21 March 1986. Official Records. Volume 2, Documents of the Conference' (1995) UN Doc A/CONF.129/16/Add.1 (Vol.II), 41.

[44] *Border and Transborder Armed Actions case (Nicaragua v Honduras)* (Jurisdiction and Admissibility) (Judgment) [1988] ICJ Rep 69, 89, stating that 'such a solution would be clearly contrary to both the object *and* the purpose' of the treaty in question (emphasis added).

[45] *Oil Platforms (Islamic Republic of Iran v United States of America)* (Preliminary Objection, Judgment) [1996] ICJ Rep 803, 810, 813.

[46] In the drafting history the object and purpose are consistently referred to as a singular 'notion', 'concept', 'expression', 'principle' or 'criterion'. See, eg, UN, 'United Nations Conference on the

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the overwhelming majority of scholars have interpreted the 'object and purpose' as a single concept.[47]

Today, the object and purpose of a treaty should be seen as one whole rather than two distinct halves. Prior to the conclusion of the VCLT there may have been an argument that these were two separate ideas. However, as demonstrated above, it is now firmly established as a term of art that refers to a singular concept.

C. Can There Be More than One Object and Purpose?

It is possible for there to be several objects and purposes that operate in a single treaty.[48] On the other hand, a treaty with no object and purpose would be a logical impossibility.[49]

Sinclair observes that 'most treaties have no single, undiluted object and purpose but a variety of differing and possibly conflicting objects and purposes'.[50] Support for this position is based on the reference in Article 41 (1)(b)(ii) of the VCLT to the 'object and purpose of the treaty *as a whole*' (emphasis added), which could be read as indicating that there may be separate objects and purposes to *parts* of a treaty.[51] The ICJ has also found that a treaty may have several objects and purposes.[52]

A case in point is Article 3 common to the 1949 Geneva Conventions, which has been called 'a treaty within a treaty'[53] and a 'Convention in miniature'[54] or 'mini-Convention'.[55] Common Article 3 has its own object and purpose, separate from the object and purpose of each of the four Geneva

Law of Treaties, First Session, Vienna, 26 March–24 May 1968, Summary Records of Plenary Meetings and of the Meetings of the Committee of the Whole' (1969) UN Doc A/CONF.39/11, 109 para 19; 115 para 2; 122 para 12; 131 para 62.

[47] See Reuter (n 35) 96; ME Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009) 427, with further references; Gardiner (n 14) 212–13 ('a composite item'); DS Jonas and TN Saunders, 'The Object and Purpose of a Treaty: Three Interpretive Methods' (2010) 43(3) VandJTransnatlL 565, 578 ('a unitary concept'). But see Klabbers (n 30) para 8.

[48] See Klabbers (n 30) para 10.

[49] Henckaerts et al (n 14) 387; M Sassòli, 'Is the Time for Law of War Treaty Commentaries Over?' (*Articles of War*, 26 February 2021) <https://lieber.westpoint.edu/time-law-war-treaty-commentaries-over-2/>.

[50] I Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984) 130.

[51] But see Klabbers (n 30) para 7.

[52] *Rights of Nationals of the United States of America in Morocco (France v United States)* (Judgment) [1952] ICJ Rep 176, 196.

[53] See, eg, E Chadwick, *Self-Determination, Terrorism and the International Humanitarian Law* (Martinus Nijhoff 1996) 74; WH Boothby, *The Law of Targeting* (OUP 2012) 49.

[54] See *Final Record of the Diplomatic Conference of Geneva of 1949* (Federal Political Department, Bern) (*Final Record*) vol II-B, 326.

[55] See, eg, F Kalshoven and L Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (4th edn, CUP 2011) 66; K Schöberl, 'The Geographical Scope of Application of the Conventions' in A Clapham, P Gaeta and M Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015) 75; N Zamir, *Classification of Conflicts in International Humanitarian Law: The Legal Impact of Foreign Intervention in Civil Wars* (Edward Elgar 2017) 62.

Conventions.[56] This is clear from the fact that it addresses a different context from the rest of the Conventions (non-international armed conflict as opposed to international armed conflict) and thus has a different scope of application.[57] The fact that this article is common across all four Conventions further supports this, as each Convention addresses a different group of protected persons: wounded and sick soldiers on land; wounded, sick and shipwrecked soldiers at sea; prisoners of war; and civilians. Accordingly, the ICRC's updated Commentary on the Geneva Conventions concludes that 'common Article 3 provides the [1949 Geneva Conventions] with an additional object and purpose, as it serves to protect persons not or no longer participating in hostilities, including persons deprived of liberty, in situations of non-international armed conflict'.[58]

D. Can the Object and Purpose Evolve Over Time?

Particularly prior to the conclusion of the VCLT, some scholars argued that the object and purpose of a treaty should be determined solely from the intent of the drafters at the time the treaty was concluded.[59] This may be thought of as the 'subjective approach'. It is reflected in the 1927 *Chorzów Factory* case, where the PCIJ held that in interpreting a provision of the relevant arbitration treaty:

> account must be taken not only of the historical development of arbitration treaties, and of the grammatical and logical meaning of the words used, but also and more especially of the function which, in the intention of the contracting Parties, is to be attributed to this provision.[60]

However, since the VCLT was drafted, the trend has been toward a more evolutionary approach to the determination of the object and purpose.[61] Jacobs describes the doctrine of 'emergent purpose', a teleological approach to treaty interpretation under which 'the objects and purposes which determine the true interpretation of a treaty may be those which can be found to exist at the time of interpretation, not at the time of conclusion'.[62] The 'object and purpose' is thus able to evolve from the original intent of the parties.[63]

[56] *Commentary on GC III* (n 6) 501, 504, 643, 647, 804.

[57] See ibid 418 ff. See also J Pejic, 'The Protective Scope of Common Article 3: More than Meets the Eye' (2011) 93 IRRC 189.

[58] *Commentary on GC III* (n 6) 90. See also ICRC, *Commentary on the First Geneva Convention* (CUP 2016) (*Commentary on GC I*) 31; ICRC, *Commentary on the Second Geneva Convention* (CUP 2017) (*Commentary on GC II*) 31.

[59] A McNair, *The Law of Treaties* (OUP 1961) 380; VD Degan, *L'Interprétation des Accords en Droit International* (Martinus Nijhoff 1963) 134. See also Crnić-Grotić (n 23) 158–9.

[60] *Case concerning the Factory at Chorzów* (Claim for Indemnity, Jurisdiction, 26 July 1927) PCIJ Series A No 9, 24.

[61] See L Cavaré, *Le Droit international public positif* (2nd edn, Pédone 1969) vol 2, 145–7; Rousseau (n 38) 272; Sinclair (n 50) 130; Crnić-Grotić (n 23) 158–9.

[62] Jacobs (n 13) 320.

[63] ibid 320, 329; MS McDougal, HD Lasswell and JC Miller, *The Interpretation of Agreements and World Public Order: Principles of Content and Procedure* (Yale University Press 1967) 58–9.

The evolutionary approach to determining the object and purpose of treaties should be distinguished from the evolutionary interpretation of individual treaty terms. Although the two are related, one does not necessitate the other. A determination that the 'object and purpose' of a treaty has evolved over time does not necessarily imply that the meaning of all of the terms of that treaty has changed, too. Similarly, it is well established that generic terms in a treaty entered into for long or indefinite duration should be presumed to have an evolving meaning.[64] However, this would be the case even if the object and purpose of such a treaty had remained the same. In fact, the object and purpose of a given treaty may be precisely to establish an adaptable framework, in which case that object and purpose would remain the same over time, but it would nonetheless support an evolutionary approach to the interpretation of the treaty's terms.[65]

The 'objective' or 'emergent purpose' approach to the determination of the object and purpose is particularly suitable for certain types of treaties.[66] This is the case for normative, multilateral treaties like many instruments setting up international organizations. For example, it is generally recognized that the object and purpose of the UN Charter must be construed in light of subsequent developments in the organization.[67] Similar considerations apply to treaties that are intended to establish general standards of behaviour, like IHL treaties: the parties do not enter into them—at least not solely or primarily—in order to trade concessions in a transactional manner. Instead, the development of IHL treaties is 'largely guided by shared interests, the achievement of a "common good"'.[68] As Crnić-Grotić notes, in particular where such treaties are meant to establish universal standards or new norms, 'it is conceivable that the original purpose is lost or has changed over the years'.[69]

It can be particularly difficult to establish a common original intent for multilateral treaties. It is no coincidence that the ICJ's *Genocide* Advisory Opinion, with its seminal reference to the 'object and purpose' as it is understood today, was issued as the multilateral system began to aspire to universal treaties. Normative bilateral agreements can also have an 'object and purpose' that takes on a life of its own.[70] However, the transactional nature of many bilateral treaties renders the object and purpose a simple summary of the concessions of the parties.[71]

[64] *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (n 9) para 66.
[65] E Bjorge, *The Evolutionary Interpretation of Treaties* (OUP 2014) 118–20.
[66] A Favre, 'L'interprétation objectiviste des traités internationaux' (1960) 17 Annuaire Suisse 75, 84–5; Cavaré (n 61) 140.
[67] See Jacobs (n 13) 319–20.
[68] C Droege and E Giorgou, 'How International Humanitarian Law Develops' (2022) 104(920–921) IRRC 1798, 1806.
[69] Crnić-Grotić (n 23) 158–9, 164–5. See also Jacobs (n 13) 320.
[70] Klabbers (n 30) para 19, citing *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Rep 14, 138.
[71] See Arbitral Tribunal Established by Agreement of 23 October 1985 between Canada and France, *Filleting within the Gulf of St. Lawrence (Canada v France)*, Reports of International Arbitral Awards, vol XIX (17 July 1986) 243.

As Sinclair observed, 'in the case of general multilateral conventions, a search for the common intentions of the parties can be likened to a search for the pot of gold at the end of the rainbow'.[72] Indeed, where a treaty has many parties, it is less likely for the parties to have had one uniform understanding of the object and purpose of the treaty in the first place, given that States may make deals in order to reach a compromise, muddying the waters about any consensus on the object and purpose of the final product, and, even in the absence of such compromise, States may have various motivations for drafting and concluding such treaties as well as for ratifying or acceding to them, sometimes long after they were originally concluded. The ambiguity created by treaty negotiation as a process confirms that the object and purpose of a given treaty not only can, but in fact should be kept separate from the intent of the parties at the time the treaty was concluded.

The 'emergent purpose' approach ensures the effectiveness of a treaty's provisions.[73] Changes that have taken place since the adoption of the treaty are thus taken into account, similar to the use of subsequent practice in treaty interpretation under Articles 31(3) and 32 of the VCLT.[74] The 'object and purpose' therefore necessarily evolves over time to take into account the practice of the parties.[75]

III. WHAT IS THE 'OBJECT AND PURPOSE' OF THE FOURTH GENEVA CONVENTION?

There is no universally agreed method of determining the object and purpose of international treaties. As discussed in more detail above, the VCLT includes the phrase 'object and purpose' in several provisions, including Articles 31 and 33 that concern the interpretation of treaties. However, the VCLT does not define these terms, nor does it give any guidance on how the object and purpose of a particular treaty should be determined.

There are certain specificities when it comes to determining the object and purpose of IHL treaties such as the Fourth Geneva Convention. This part of the article begins by expanding on these specificities. It then outlines the key elements to determining the object and purpose of humanitarian treaties under international law. Finally, these elements are applied to establish the object and purpose of the Fourth Geneva Convention.

A. What Are the Specificities of Humanitarian Law Treaties?

Before looking specifically at the Fourth Geneva Convention, it is important to consider whether IHL as a body of law is interpreted in the same way as other

[72] Sinclair (n 50) 130. [73] L Ehrlich, 'L'interprétation des traités' (1928) 24 RdC 1, 84.
[74] See also Crnić-Grotić (n 23) 165–6.
[75] Specifically on the role of subsequent practice in the determination of the object and purpose of treaties, see Section III.B (generally) and Section III.C.5 (as applied to GC IV).

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bodies of international law. The answer, in short, is that although IHL is designed to apply in the most extreme circumstances, it is subject to the same principles of public international law as other bodies of international law—its sources are the same sources as provided for in Article 38 of the ICJ Statute, it is adjudicated by international and domestic tribunals, and it is subject to the same rules of interpretation. This has been confirmed time and again by the practice of States[76] and international bodies,[77] international tribunals[78] and legal scholarship.[79]

For the purposes of treaty interpretation, IHL treaties are subject to the same basic rules of interpretation as other treaties,[80] including as they pertain to the object and purpose of such treaties. There are, however, three specificities of IHL treaties that are relevant for their interpretation in general, as well as for the determination of their object and purpose in particular.

1. Jus cogens *nature of norms contained in humanitarian treaties*

First, many IHL norms have the character of *jus cogens*, or peremptory norms. The VCLT defines a peremptory norm of general international law as 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.[81]

[76] See, eg, Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines, The Hague (16 March 1998); Arrangement between the Government of the United Kingdom and the Government of the United States of America concerning US support for the transfer of UK-held detainees from UK detention to the Afghan authorities, Parwan (2 May 2013). See also the ICRC's study on customary IHL: JM Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law*, vol I: *Rules* (ICRC 2005).

[77] See, eg, UN Secretariat, 'Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law' (6 August 1999) UN Doc ST/SGB/1999/13; European Union Guidelines on promoting compliance with international humanitarian law (IHL) [2005] OJ C327/4.

[78] Tribunals have been established specifically to address violations of international law, including IHL. In addition, the International Criminal Court, established by the Rome Statute in 1998, has jurisdiction over certain serious violations of the Geneva Conventions, and the ICJ has also rendered decisions related to IHL, eg *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 (*Wall* Advisory Opinion); and *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 (*Nuclear Weapons* Advisory Opinion).

[79] See, eg, R Petit and N Jain, 'Preserving the Rule of Law in the Age of the "War on Terror": Lessons from the Experience of International Criminal Tribunals' (2008) 39 StudTransnatlLegalPol 67; ME O'Connell, 'Historical Development and Legal Basis' in D Fleck (ed), *The Handbook of International Humanitarian Law* (4th edn, OUP 2021) 10; E Policinski, 'Treaty Interpretation in the Fog of War: The Evolution of ICRC's Methodology' in P Merkouris and SI Lekkas (eds), *Practice of Interpretation* (OUP, forthcoming). But see L Hajjar, 'The Counterterrorism War Paradigm versus International Humanitarian Law: The Legal Contradictions and Global Consequences of the US "War on Terror"' (2019) 44(4) L&SocInquiry 922.

[80] R Kolb and K Del Mar, 'Treaties for Armed Conflict' in A Clapham and P Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014) 50, 79; M Sassòli, *International Humanitarian Law: Rules, Controversies and Solutions to Problems Arising in Warfare* (Edward Elgar 2019) 43.

[81] VCLT (n 10) art 53.

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The ICJ has held that 'a great many rules of humanitarian law' constitute 'intransgressible principles of international customary law'.[82] For its part, the ILC has observed that it is 'generally accepted' that these rules are peremptory in nature.[83]

The Geneva Conventions are a case in point. They contain provisions that expressly prohibit any agreement that would diminish the protections that individuals are entitled to under the Conventions.[84] This bolsters the argument that numerous norms in the Conventions are non-derogable and, therefore, of a peremptory nature. Certain scholars even contend that *all* rules in the Geneva Conventions should be considered *jus cogens*[85]—a contention that probably goes too far.[86]

Given the peremptory character of many of the rules contained in IHL treaties, Abi-Saab has advocated for their interpretation 'towards perfecting the content and expanding the ambit of humanitarian protection'.[87] Echoing this, Kolb and Del Mar have suggested that 'if it is held that IHL contains a great number of public order, public policy or *jus cogens* norms, it seems quite understandable that the interpretation of such texts has to be expansive rather than narrow'.[88]

These statements should not be misunderstood as endorsing unbridled expansive approaches to the interpretation of treaties containing peremptory norms. Rather, the fact that no derogation is permitted from certain rules means that their interpretation must closely align with the community interest reflected in them.

Therefore, when interpreting IHL treaties that contain peremptory norms, like the Geneva Conventions, emphasis should be placed on strengthening the humanitarian protection they aim to provide.[89] Kolb and Del Mar speak

[82] *Nuclear Weapons* Advisory Opinion (n 78) 257; *Wall* Advisory Opinion (n 78) 199–200.

[83] ILC, 'State Responsibility, Report of the International Law Commission on the Work of its Fifty-Third Session' (23 April–1 June and 2 July–10 August 2001) UN Doc A/56/10, 113, Commentary on art 40, para 5.

[84] GC I–IV (n 3) common arts 6/6/6/7 and 7/7/7/8; and GC IV (n 3) art 47. See also G Abi-Saab, 'The Specificities of Humanitarian Law' in C Swinarski (ed), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (ICRC 1984) 273.

[85] See, eg, E Schwelb, 'Some Aspects of International *Jus Cogens* as Formulated by the International Law Commission' (1967) 61(4) AJIL 946, 956–7; A Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006) 90.

[86] See I Scobbie, 'The Invocation of Responsibility for the Breach of "Obligations under Peremptory Norms of General International Law"' (2002) 13 EJIL 1201, 1211, arguing that certain provisions in the Geneva Conventions 'clearly do not' have *jus cogens* status, using the example of art 38 of GC III (n 3), which mandates that Detaining Powers must provide prisoners of war with 'opportunities for taking physical exercise, including sports and games, and for being out of doors'. As explained by Hameed, the peremptory status of that rule is dubious 'because its subject matter appears trivial, even though [it] is part of an undifferentiated regime which is considered imperative by all, or virtually all, states'. Asif Hameed, 'Unravelling the Mystery of *Jus Cogens* in International Law' (2014) 84(1) BYIL 52, 70.

[87] Abi-Saab (n 84) 273.

[88] Kolb and Del Mar (n 80) 80 (internal footnote omitted).

[89] See also Section III.A.3, discussing the balance between humanity and military necessity built into the rules of IHL and how this influences their interpretation.

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in this connection of a 'human-centred' approach to IHL.[90] This is also how, it is submitted, Abi-Saab's goal of 'perfecting the content and expanding the ambit' should be understood.[91] Accordingly, the *jus cogens* nature of many IHL rules supports adopting a protective approach to interpreting the object and purpose of the treaties in which they are contained.

2. Erga omnes *character of humanitarian treaties*

The second specificity is the *erga omnes partes* character of IHL treaties. IHL treaties differ from many other international treaties in that they are not transactional. Nonetheless, this characteristic is not unique to IHL treaties. For instance, the 1948 Genocide Convention is also not designed to serve the interests of individual States but, rather, 'a common interest, namely the accomplishment of those high purposes which are the *raison d'être* of the convention'.[92]

To give another example, the 'object and purpose' of the 1984 Convention against Torture (CAT)—according to its preamble—is 'to make more effective the struggle against torture … … throughout the world'.[93] On that basis, the ICJ held in *Belgium v Senegal* that '[t]he States parties to the Convention have a *common interest* to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity'.[94] The ICJ went on to describe States' obligations under the CAT as *erga omnes* in nature and made a link to the Genocide Convention.[95] In 2023, Canada and the Netherlands instituted proceedings before the ICJ against Syria, citing the *Belgium v Senegal* case in seeking compliance by Syria with its obligations under the CAT, describing them as 'of an erga omnes partes nature, and … thus owed to the Applicants'.[96]

The Geneva Conventions likewise create *erga omnes partes* obligations for the High Contracting Parties, which—given the universal ratification of the Conventions—means all States.[97] For example, under Common Article 1 of the Conventions, States must not only apply their provisions, but must also do everything reasonably in their power to ensure respect for the provisions by others. In doing so, the Conventions reaffirm the legal interest of the entire

[90] Kolb and Del Mar (n 80).
[91] Abi-Saab (n 84) 273.
[92] *Reservations to the Genocide Convention* (n 20) 23.
[93] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, preamble.
[94] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 422, 449.
[95] ibid.
[96] ICJ, *Joint Application Instituting Proceedings Concerning a Dispute under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (*Canada and the Kingdom of the Netherlands v The Syrian Arab Republic*) (8 June 2023) para 7.
[97] *Commentary on GC III* (n 6) 152; *Wall* Advisory Opinion (n 78) 199; *Prosecutor v Kupreškić et al*, Case No IT-95-16-T, International Criminal Tribunal for the former Yugoslavia (ICTY), Judgment (14 January 2000) para 201.

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international community in their observance, demonstrating the *erga omnes* nature of the obligations created by these core IHL treaties.[98]

To sum up, if the effect of a treaty is *erga omnes*, this logically means that its object and purpose cannot merely be to establish a reciprocal exchange of rights and duties between the State parties for their mutual benefit.[99] There must, instead, be some—in the words of the ICJ—'high ideal'[100] that the parties aspire to. For IHL treaties, such a high ideal by definition points towards greater protection of persons affected by and amelioration of suffering in armed conflict.[101] These treaties, including their object and purpose, should be interpreted in light of that overarching approach.

3. *Balance between humanity and military necessity*

Lastly, the overarching principles of humanity and military necessity that underlie IHL can also affect how the 'object and purpose' is determined. The balance between humanitarian considerations and military necessity is a hallmark of IHL.[102] This balance is reflected in and informs the entire normative framework of this body of norms. As such, it shapes the context in which its rules and other principles must be interpreted.

At first glance, these two pillars of IHL may seem diametrically opposed. However, the true picture is more nuanced. IHL is not based on a balance between pacifism and militarism, or on a balance between the rights of civilians/those *hors de combat* and military practicality. It reflects a balance between humanity, a principle that 'impose[s] certain limits on the means and methods of warfare, and require[s] that those who have fallen into enemy hands be treated humanely at all times',[103] and military necessity, 'the necessity for measures which are essential to attain the goals of war, and which are lawful in accordance with the laws and customs of war'.[104]

[98] *Commentary on GC III* (n 6) 152–3.

[99] This approach has been endorsed in the international jurisprudence. See, eg, Inter-American Court of Human Rights, *The Effect of Reservations on the Entry into Force of American Convention on Human Rights (Arts 74 and 75)* (Advisory Opinion) (24 September 1982) 8.

[100] *Reservations to the Genocide Convention* (n 20) 23.

[101] See, eg, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Judgment) [2015] ICJ Rep 3, 68, holding that 'international humanitarian law governs the conduct of hostilities in an armed conflict and *pursues the aim of protecting diverse categories of persons and objects*' (emphasis added); ICRC, 'War and International Humanitarian Law' (29 October 2010) <https://www.icrc.org/en/doc/war-and-law/overview-war-and-law.htm> ('IHL aims to limit the effects of armed conflicts for humanitarian reasons. It aims to protect persons who are not or are no longer taking part in hostilities, the sick and wounded, prisoners and civilians, and to define the rights and obligations of the parties to a conflict in the conduct of hostilities.').

[102] *Commentary on GC III* (n 6) 91.

[103] N Melzer, *International Humanitarian Law: A Comprehensive Introduction* (ICRC 2022) 19.

[104] Y Sandoz, C Swinarski and B Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC/Martinus Nijhoff 1987) 393. See also AG Abu Hassan, 'Military Necessity and the Restriction on Methods and Means of Warfare'

Both of these IHL tenets therefore contribute to the overall centre of gravity of IHL as a legal framework, which is the protection of those affected by armed conflict.[105] In other words, military necessity is not only permissive. It also limits military action to what is *necessary*, thereby delivering protection in its own right.[106] For example, once a combatant is captured, it is no longer necessary to kill them to gain any military advantage as they have already been taken out of the fight. Similarly, the use of a weapon that causes unnecessary suffering to neutralize a combatant, such as a blade with a serrated edge, by definition fails the test of military necessity.

Whenever new IHL treaties are made, both '[s]tates' military interest and realpolitik on the one hand, and concerns for humanity on the other' animate the negotiating and drafting process.[107] The balance between these principles must therefore also underlie the interpretive process, including in the determination of a treaty's object and purpose.

Overall, this analysis of the specificities of IHL treaties confirms the importance of adopting and maintaining a protective approach to the interpretation of these treaties. It thus sets the groundwork for the following sections, which will focus on how the 'object and purpose' of a treaty is determined, and specifically that of the Fourth Geneva Convention.

B. What Elements Must Be Considered?

As noted, the VCLT does not establish a methodology for the determination of the object and purpose of international treaties. Moreover, there is no other binding international instrument that would provide for such methodology—the closest available document to such a source is the ILC's 2011 Guide to

(2006) 2 JIntlStud 23, 26; S Zgaga, 'Military Necessity in International Criminal Law' (2012) 17 RevCompL 111.

[105] *Commentary on GC III* (n 6) 497, fn 181, noting that 'the fundamental principles of military necessity and humanity reduce the sum total of permissible military action from that which humanitarian law does not expressly prohibit to that which is actually necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances'. At the time of writing, this is not a universally shared view; for a different approach see, eg, MN Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' (2010) 50(4) VaJIntlL 795, 798–801. For discussion of the normative effect of these principles see, eg, 'Forum: The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law' (2010) 42(3) NYUJIntlL&Pol 637.

[106] See, eg, U.S. Department of Defense, *Law of War Manual* (Office of Department of Defense General Counsel, June 2015, updated July 2023) 1035. See also Y Beer, 'Humanity Considerations Cannot Reduce War's Hazards Alone: Revitalizing the Concept of Military Necessity' (2015) 26(4) EJIL 801, 828.

[107] Droege and Giorgou (n 68) 1802. See also Schmitt (n 105) 796; Kolb and Del Mar (n 80) 50; C af Jochnick and R Normand, 'The Legitimation of Violence: A Critical History of the Laws of War' (1994) 35 HarvIntlLJ 49, 50; L Arimatsu, 'Territory, Boundaries and the Law of Armed Conflict' (2009) 12 YIntlHL 157, 161.

Practice on Reservations to Treaties,[108] which will be discussed later in this section.

Relevant scholarship is in agreement about the importance of evaluating the entire text of a treaty in order to determine its object and purpose.[109] Gardiner considers that while 'the preamble may be used as the source of a convenient summary of the object and purpose of a treaty, both the Vienna Convention (Article 31(2)) and practice make it clear that *an interpreter needs to read the whole treaty*'.[110] Similarly, Yasseen observes that 'the object and purpose emerge from the text of the treaty; typically, they are stated in the preamble, but it is possible that the treaty doesn't expressly state them; the object and purpose can then be identified by examination of the text, *the entire text*, in light of the context for the purpose of interpreting the treaty'.[111]

The entire text of a treaty encapsulates its title, preamble, and all of its provisions, as well as any annexes.[112] Some of the provisions may be 'programmatic' in nature in that they fix 'an objective, in the light of which the other [t]reaty provisions are to be interpreted and applied'.[113] Given that such provisions articulate the goals for the achievement of which a given treaty was concluded, they should—if they exist—be given particular weight in the determination of that treaty's object and purpose.[114] Article 1 of the UN Charter, which lists the purposes of the UN, is a good example.[115]

As noted, the most authoritative text concerning the determination of the object and purpose of international treaties is the ILC's 2011 Guide to Practice on Reservations to Treaties.[116] This document addresses this issue in a section dedicated to incompatibility of reservations with the object and purpose of the treaty. Because a reservation that is incompatible with the object and purpose of the treaty is impermissible under international law,[117] the ILC discussed at some length how the object and purpose should be determined.[118]

[108] ILC, 'Guide to Practice on Reservations to Treaties, Report of the ILC, 63rd Session' (26 April to 3 June and 4 July to 12 August 2011) UN Doc A/66/10/Add.1 (ILC Guide to Practice on Reservations to Treaties).

[109] A Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008) 343; Hosseinnejad (n 41) 388; Linderfalk (n 27) 441–2; Crnić-Grotić (n 23) 174.

[110] Gardiner (n 14) 218 (emphasis added).

[111] Yasseen (n 38) 57 (authors' translation; emphasis added).

[112] See, eg, O Dörr, 'Article 31' in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012) 543.

[113] *Oil Platforms* (n 45) 814.

[114] See, eg, Buffard and Zemanek (n 21) 333.

[115] These goals include 'to maintain international peace and security', 'to develop friendly relations among nations', 'to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all' and 'to be a centre for harmonizing the actions of nations in the attainment of these common ends'.

[116] ILC Guide to Practice on Reservations to Treaties (n 108).

[117] VCLT (n 10) art 19; VCLTIO (n 28) art 19.

[118] It should be noted that there is some controversy as to whether the term 'object and purpose' has the same meaning in the context of assessing the compatibility of reservations as in the context of

The Guide notes that in order to determine the object and purpose of a treaty, 'a fairly general approach is required: it is not a question of "dissecting" the treaty in minute detail and examining its provisions one by one, but of extracting the "essence", the overall "mission" of the treaty'.[119] It then proposes a specific methodology for extracting this essence in a succinctly formulated guideline 3.1.5.1:

> The object and purpose of the treaty is to be determined in good faith, taking account of the terms of the treaty in their context, in particular the title and the preamble of the treaty. Recourse may also be had to the preparatory work of the treaty and the circumstances of its conclusion and, where appropriate, the subsequent practice of the parties.

Once again, the centrality of the treaty text is immediately evident, including 'in particular' the title and the preamble. The ILC also ascribes a certain weight to the preparatory work and the circumstances of the conclusion of the treaty. Its reference to the subsequent practice of the parties was motivated by 'the view that the object and purpose of a treaty was likely to evolve over time',[120] which is also shared by the present authors[121]—although, as will be seen, such subsequent practice has been fairly limited in relation to the Fourth Geneva Convention.[122]

Overall, the process of identifying the object and purpose of a treaty is by necessity inductive. The individual elements must be weighed and a good faith attempt made to derive the object and purpose from them. The process may even appear circular to some extent: this is because the VCLT formula for treaty interpretation already contains all of these elements *and* the object and purpose.[123]

This article will examine these elements in the same order in the following section dedicated to the determination of the object and purpose of the Fourth Geneva Convention.

C. How Are These Elements Applied to the Fourth Geneva Convention?

1. Title

The title of the Convention is 'Geneva Convention *relative to* the Protection of Civilian Persons in Time of War of 12 August 1949' (emphasis added). The first

treaty interpretation: see text accompanying nn 26–27 above. This article proceeds on the assumption that their meaning is indeed identical or at least sufficiently similar to allow for reliance on the ILC's analysis. This is in accordance with the ILC's express position on this matter: ILC Guide to Practice on Reservations to Treaties (n 108) commentary to guideline 3.1.5, para 3.

[119] ibid, commentary to guideline 3.1.5, para 2.

[120] ibid, commentary to guideline 3.1.5.1, para 7.

[121] See Section II.D above.

[122] See Section III.C.5 below.

[123] See W Schabas, 'Reservations to Human Rights Treaties: Time for Innovation and Reform' (1994) 32 ACDI 39, 48.

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two of the four Geneva Conventions use a different construction: their titles use the preposition 'for' to link the words 'Geneva Convention' with the rest of the title ('for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field' and 'for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea', respectively).

The difference is not unintentional. In fact, the Fourth Geneva Convention was originally drafted with the preposition 'for' just like its first two sister conventions. However, at the very end of the negotiating process, the delegation of Canada convinced the participants of the Diplomatic Conference to replace the word 'for' with the phrase 'relative to'.[124] This phrase was modelled on the title of the 1929 Prisoners of War Convention, and it was also re-used in the title of the corresponding 1949 Third Geneva Convention.

The last-minute change was, however, unrelated to the overall goal or purpose of the Fourth Geneva Convention. Instead, it was motivated by a desire to ensure that the text of the title accurately reflected the treaty's content. According to the delegation of Canada, the original formulation gave the inaccurate impression that the Convention dealt with 'all aspects of the treatment of civilians in time of war'.[125] As underscored by the Canadian and other delegations, this new convention would not regulate the conduct of hostilities,[126] a type of wartime conduct that profoundly affects civilians, but which would continue to be regulated by the 1899 and 1907 Hague Conventions and their accompanying regulations.[127]

Seconding the Canadian proposal, the Danish delegate noted that 'we have drafted a text concerning only certain rights of the civilian population in time of war and under occupation, but the population has many other rights and privileges which are not provided for in this Convention'.[128] It was for these reasons—essentially, to avoid an impression that the Convention was comprehensive in scope—that the change was adopted at the Conference. One therefore cannot infer more from the title of the Fourth Geneva Convention: it does not determinately establish a clear object and purpose.

2. Preamble

The preamble to the Fourth Geneva Convention is very brief. The reasons for the brevity of the preambles to all four Conventions are well known and will not be repeated here.[129] Suffice it to say that although a detailed preamble for inclusion in all four draft conventions had been proposed, the delegations

[124] See *Final Record* (n 54) vol II-B, 456–8.
[125] ibid 456.
[126] ibid, vol II-A, 805 (United States); ibid, vol II-B, 407–9 (United States, Canada, Switzerland); ibid 498 (Australia); ibid 504 (Switzerland).
[127] See GC IV (n 3) art 154.
[128] *Final Record* (n 54) vol II-B, 457.
[129] See *Commentary on GC III* (n 6) 135–9.

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could not agree on several aspects of it—such as whether and how to refer to a divine authority—and as a result they settled for the lowest common denominator, which was to remove all the substantive content from the drafts.[130]

Hence, the adopted preamble to the Fourth Geneva Convention consists merely of an introductory formula that links the title of the Convention with its substantive parts, but does not elaborate on the motivations behind the substantive text. It reads:

> The undersigned Plenipotentiaries of the Governments represented at the Diplomatic Conference held at Geneva from April 21 to August 12, 1949, for the purpose of establishing a Convention for the Protection of Civilian Persons in Time of War, have agreed as follows:

Discerning readers will notice that the preamble uses the 'for' formulation instead of the 'relative to' formulation that was included in the revised title. However, as noted in the original 1958 commentary, 'this was no doubt an oversight'—the drafters apparently forgot to fix the preamble after they had agreed to amend the title.[131] One thus should not read more into this difference in wording.

Furthermore, each of the first three Conventions had a predecessor which did contain a specific preamble.[132] To some extent, those prior treaties' preambles can help cast light on the object and purpose of their successor treaties.[133] However, in the case of the Fourth Geneva Convention, no such source is available given that the Convention did not succeed any pre-existing treaty on the same subject matter.[134]

Thus, like the title, the preamble is of limited use when it comes to identifying the object and purpose of the Fourth Geneva Convention.

[130] *Final Record* (n 54) vol II-A, 813.

[131] J Pictet (ed), *Commentary on the Third Geneva Convention* (ICRC 1958) 10, fn 1.

[132] For GC I and GC II, see Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (adopted 22 August 1864, entered into force 22 June 1865) 22 Stat 940, 129 Consol TS 361, preamble; Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (adopted 6 July 1906, entered into force 9 August 1907) 35 Stat 1885, 202 Consol TS 144, preamble ('Being equally animated by the desire to lessen, so far as lies in their power, the evils inseparable from war and desiring, for this purpose, to perfect and complete the provisions agreed to at Geneva on 22 August 1864, and 6 July 1906, for the amelioration of the condition of the wounded and sick in armies in the field'); Hague Convention X for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention (adopted 18 October 1907, entered into force 26 January 1910) 36 Stat 2371, 205 Consol TS 359, preamble ('Animated alike by the desire to diminish, as far as depends on them, the inevitable evils of war; [a]nd wishing with this object to adapt to maritime warfare the principles of the Geneva Convention of 6 July 1906.'). For GC III, see Convention relative to the Treatment of Prisoners of War (adopted 27 July 1929, entered into force 19 June 1931) 47 Stat 2021, 118 LNTS 343, preamble.

[133] See Henckaerts et al (n 14) 386–7.

[134] On the relationship between GC IV and the 1899 and 1907 Hague Regulations, see, eg, P Benvenuti, 'Relationship with Prior and Subsequent Treaties and Conventions' in Clapham, Gaeta and Sassòli (n 55) 689.

3. Substantive text of the treaty

In contrast to the elements of the Convention analysed thus far, its substantive text gives a very clear indication of the treaty's underlying aims. This is the case despite the absence of programmatic articles that would establish an overarching objective in light of which the rest of the Convention's provisions were to be interpreted and applied. Instead, it is necessary to review the entirety of the text to extract its overall essence or mission.[135]

The text of the Convention, comprising 159 articles, is of considerable length. It is impossible to analyse each provision here, but certain overarching patterns and trends can nonetheless be identified. As discussed above, many of the Convention's provisions contain rules of a peremptory nature.[136] Similarly, the vast majority of these provisions lend protection to individuals who find themselves in the power of a party to the conflict. Only a few go in the direction of authorizing certain forms of conduct that can be seen as restrictive of individual rights. And even these provisions in fact set limits on the conduct that parties to an armed conflict may engage in, effectively precluding them from taking action that goes beyond this sphere of permissible conduct.

For example, Article 5 authorizes parties to an international armed conflict to restrict the rights provided to persons protected by the Convention. It also underscores that such persons must nevertheless be treated humanely and must not be deprived of the rights of a fair and regular trial. In doing so, the provision sets clear and absolute limits on permissible derogations under the Convention.[137]

Overall, the ratio of protective/restrictive versus permissive/enabling provisions in the Convention is overwhelmingly in favour of the former. This is clear from the structure of the Convention: aside from the general opening provisions and the closing provisions on the execution of the treaty, the core of the Convention (Articles 13–141 representing more than 80 per cent of the text) is found in two parts expressly directed to the protection of the whole of the populations of the countries in conflict (Part II, entitled 'General Protection of Populations Against Certain Consequences of War') and to the protection of a certain category of civilians designated as protected persons (Part III, entitled 'Status and Treatment of Protected Persons'). The specific geographic and personal scope of application of these parts differs,[138] but common to them is the aim of enhancing the protection of individuals falling within their respective scope.[139]

[135] See Section III.B above.

[136] See Section III.A.1 above.

[137] See further ICRC, *Commentary on the Fourth Geneva Convention* (CUP, forthcoming) commentary on Article 5.

[138] See, eg, N Nishat, 'The Structure of Geneva Convention IV and the Resulting Gaps in that Convention' in Clapham, Gaeta and Sassòli (n 55) 1069.

[139] For Part II specifically, see GC IV (n 3) art 13, which expressly states that provisions in the said Part of the Convention are 'intended to alleviate the sufferings caused by war'.

This is also clear from the language used across the Convention. When it speaks of individuals or their property, it uses almost exclusively adjectives indicative of protection such as 'respected',[140] 'protected'[141] or 'entitled'.[142] Conversely, when it refers to the Parties to the conflict, it typically uses modal verbs characteristic of assigning obligations such as 'shall' or 'must'.[143] This reflects a global post-World War II trend in IHL to grant rights directly to individuals, which correspond to obligations incumbent on States (and in some cases on non-State armed groups).[144]

Provisions that authorize States to take certain measures, such as the already mentioned Article 5, which allows for the derogation from certain rights of protected persons, or, to give other examples, rules authorizing the establishment of measures of control and security (including assigned residence and internment),[145] and the requisition or destruction of property by the Occupying Power,[146] are subject to strict conditions. The Convention makes it clear that they are exceptional in nature, while their role is to clarify and calibrate the necessary balance between humanity and military necessity.

To give another example, the regime of civilian internment elaborated in the Convention was meant to protect against the excesses of previous wars, during which civilians could be rounded up indiscriminately and detained without regard to their living conditions or ability to communicate with the outside world and thus be at risk, inter alia, of disappearance.[147] Far from undermining the protective tenor of the Convention, the legal regime governing security measures thus contributes to the greater protection of civilians.

This understanding is also reflected in the scholarly literature.[148] For example, Dinstein observes that 'the bulk of the instrument *lends protection* – either exclusively or inter alia – to the civilian population of

[140] See, eg, GC IV ibid, arts 18, 20, 21, 22, 130.

[141] See, eg, GC IV ibid, arts 18, 20, 21, 27(1), 27(2), 85. This list does not include the numerous provisions that use the adjective in the phrase 'protected persons'.

[142] See, eg, GC IV ibid, arts 19(1), 20(3), 27(1), 35(1), 35(2), 43(1).

[143] See, eg, GC IV ibid, arts 9(2), 12(2), 15(2), 17, 18(4), 24(1), 24(2), 79, 81, 121(2), 132(2), 136 (1), 136(2), 149(3).

[144] See generally, L Hill-Cawthorne, 'Rights under International Humanitarian Law' (2017) 28 (4) EJIL 1187.

[145] GC IV (n 3) arts 27(4), 41–42, 78. See also A Quintin, *The Nature of International Humanitarian Law: A Permissive or Restrictive Regime?* (Edward Elgar 2020).

[146] GC IV ibid, art 53.

[147] See, eg, Preliminary conference of the National Red Cross Societies for the study of the Conventions and of various problems relative to the Red Cross (Geneva, 26 July–3 August 1946), Documents furnished by the ICRC, vol III, 5–8.

[148] See, eg, E Debuf, *Captured in War: Lawful Internment in Armed Conflict* (2013) 341–2; F Hampson, 'Administrative Detention in Non-International Armed Conflicts' in M Lattimer and P Sands (eds), *The Grey Zone: Civilian Protection Between Human Rights and the Laws of War* (Bloomsbury 2018) 161; M Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (2005) 16 EJIL 661, 664–5. This view has also been adopted by some courts at international and domestic level, see *Hassan v the United Kingdom* App No 29750/09 (ECtHR, 16 September 2014) 102; *Abd Ali Hameed Al-Waheed et al v Ministry of Defence* [2017] UKSC 2, 58.

occupied territories'.[149] Similarly, Benvenisti highlights that 'the focus of attention' in the Convention is on 'the *protection* of the population in the enemy's hands'.[150] The substantive core of the Convention is indeed strongly protective in nature, with certain carefully calibrated adjustments to reflect the legitimate security needs of the belligerents.

4. The other three Geneva Conventions

The context of a treaty includes 'any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty'.[151] This means that the context for each Geneva Convention comprises the other three Conventions, adopted simultaneously at the same Diplomatic Conference.[152] Examining each of their object and purpose thus informs the object and purpose of the Fourth Geneva Convention.

The overall 'object and purpose' of the First Geneva Convention is to ensure respect for and protection of the wounded and sick, as well as the dead, in international armed conflict.[153] The overall 'object and purpose' of the Second Geneva Convention is to ensure respect for and protection of the wounded, sick and shipwrecked, as well as the dead, in international armed conflict at sea or other waters.[154] The overall 'object and purpose' of the Third Geneva Convention is to ensure that prisoners of war are humanely treated at all times, while allowing belligerents to intern captured enemy combatants to prevent them from returning to the battlefield.[155]

The 'object and purpose' of the Fourth Geneva Convention, as outlined in this article, is consistent with the object and purpose of the other three Geneva Conventions of 1949. They all share a strong protective aim designed to improve respect for and the protection of the categories of persons they cover. Together they form a protective whole, encompassing all categories of individuals *hors de combat.* A recognition that the belligerents are allowed to impose certain measures of control and security is part of the object and purpose of the Third Geneva Convention, reflecting the fact that the treaty contains strong permissions for belligerents to intern captured enemy combatants in order to prevent them from returning to the battlefield.[156] The Fourth Geneva Convention similarly establishes a regime of measures of control and security, for example internment if a civilian's

[149] Y Dinstein, *The Law of Belligerent Occupation* (2nd edn, CUP 2019) 6, 186.

[150] E Benvenisti, *The International Law of Occupation* (2nd edn, OUP 2012) 11–12 (emphasis added).

[151] VCLT (n 10) art 31(2)(b).

[152] See *Commentary on GC III* (n 6) 85 ('The context also comprises the structure of the Conventions, their titles, the chapter headings and the text of the other articles in the same Convention, *as well as in the other three Conventions*.') (emphasis added).

[153] *Commentary on GC I* (n 58) 30.

[154] *Commentary on GC II* (n 58) 30.

[155] *Commentary on GC III* (n 6) 89.

[156] As discussed in Section III.A.3 above. See also Quintin (n 145) Ch 7.

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activity poses a serious security threat, designed to circumscribe such measures within permissible limits to prevent abuses like those seen in World War II.[157]

5. *Supplementary means of interpretation*

In line with the ILC's guidance, it is valuable to look at the supplementary means of interpretation to verify the interim conclusion from the previous sections. These include the preparatory work of the treaty, the circumstances of its conclusion, and the subsequent practice of the parties.

Early on in the drafting process, the delegations participating in the 17th International Conference of the Red Cross in Stockholm in 1948 agreed that they had an 'obligation to come to an agreement in order to protect civilian populations from the horrors of war'.[158] That formulation was built into the draft preamble of the future Civilians' Convention, which—as explained above—was ultimately significantly shortened and stripped of all substantive content.[159]

Nonetheless, enhancing the protection of civilians in time of armed conflict was the motivation of the entire drafting and negotiation process. This is further evidenced by numerous expressions of the drafters attending the 1949 Diplomatic Conference in Geneva, whether in relation to the work of the conference as such or specifically in regard to the future Fourth Geneva Convention.

In alphabetical order: Australia referred to 'the purpose of this Conference' as being 'concerned with the alleviation of the sufferings of the victims of war'.[160] Bulgaria stated that 'the purpose of the Convention' was to defend 'elementary human rights'.[161] Czechoslovakia stated that the purpose of the Conference was 'to draw up a new Convention for the protection of civilians in time of war'.[162] According to Denmark, '[the Conventions'] object is to protect wounded, sick and shipwrecked persons, prisoners of war and civil populations, in all circumstances'.[163] France stated that 'the object of the Convention was to provide for the protection of persons, and not to safeguard the rights of States'.[164] The Holy See described 'the main purpose of the Civilians Convention' as 'to protect civilian populations against the horrors of war'.[165] Lebanon noted that 'the object of [the Civilians Convention] was to humanize the rules of war'.[166] Mexico stated that 'the principal aim of the Convention was the protection of the civilian population'.[167] Monaco described '[t]he purpose of the Civilians Convention' as 'to carry peace on

[157] Preliminary conference of the National Red Cross Societies (n 147) vol III, 1–2 (of the English document).
[158] ICRC, *Draft Revised or New Conventions for the Protection of War Victims: Texts Approved and Amended by the XVIIth International Red Cross Conference (Stockholm, August 1948)* (ICRC 1948) preamble. [159] See Section III.C.2 above. [160] *Final Record* (n 54) vol II-B, 498.
[161] ibid, vol II-A, 797. [162] ibid, vol II-B, 508. [163] ibid 268; see also ibid 426.
[164] ibid, vol II-A, 622. [165] ibid 692. [166] ibid 695. [167] ibid 671.

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into war'.[168] The Soviet Union considered that 'the humanitarian interests … were the object of the Convention'[169] and added that this was 'a Convention whose purpose was the protection of the civilian population'.[170] Switzerland said that 'the purpose of our Conventions is to protect persons'.[171] And the United States noted that 'the present Conference had not been convened to revise the laws and customs of war; its purpose was to ensure the protection of war victims'.[172]

The present authors have not been able to locate any statements that would negate these declarations of the Convention's protective aims. Two nonetheless deserve to be mentioned for the sake of completeness. First, in response to the French statement quoted earlier, the Australian delegate cautioned that 'the rights, duties and obligations of States had to be taken into account no less than those of individuals'.[173] However, viewed in the light of Australia's later express description of the purpose of the Convention as being 'concerned with the alleviation of the sufferings of the victims of war',[174] it seems that Australia's considered view did not actually differ from that taken by the other delegations.

Second, the United Kingdom (UK) stated that '[t]he object of the laws and customs of war was to establish a reasonable balance between the interests of the civilian population and those of the occupying forces'.[175] This would appear to be a more cautious statement than that of other delegations, as it placed the interests of the individuals (protective aspect) on a par with those of the States (permissive aspect). However, a careful reading reveals that the UK delegate spoke of the entirety of IHL (cf 'the laws and customs of war'), and not of the draft Convention specifically. This baseline description of IHL is compatible with a normative approach designed to strengthen the protective/humanitarian side of the equation.[176] In fact, the UK considered the protective approach as the preferred purpose of the Convention, as is now known from an internal memorandum written at the time, which stated expressly: 'It is the view of the Government of the United Kingdom that *it should be the purpose of the Civilian Convention to protect, in time of war, those persons who have, by reason of the war, ceased to enjoy the diplomatic protection which would be theirs in peace time*.'[177]

Agreement among delegations as to the essence of the Convention being drafted is confirmed by a contemporary report of Colonel Du Pasquier.[178] At the 1949 Diplomatic Conference, Du Pasquier represented Switzerland and also served as the rapporteur of Committee III tasked with the drafting of the Civilians' Convention. He reported that 'all the Delegations [were] fully

[168] ibid 693. [169] ibid 648. [170] ibid 766. [171] ibid, vol II-B, 415; see also ibid 229.
[172] ibid, vol II-A, 650. [173] ibid 622. [174] ibid, vol II-B, 498. [175] ibid, vol II-A, 767.
[176] See Section III.A.3 above.
[177] Government of the United Kingdom, Propositions and Observations of the Governments and other bodies on the 1948 Stockholm Draft, Memorandum by the Government of the United Kingdom, 4 (emphasis added). [178] See *Final Record* (n 54) vol III, 183–5.

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convinced that the essential object of our Convention is effectively to prohibit the inhuman behaviour, one might say ferocity, with which the authorities of certain countries treated the civilians whom they had in their power' during World War II.[179]

Little more needs to be said of the circumstances of the conclusion of the Fourth Geneva Convention. In general terms, the phrase 'circumstances of its conclusion' from Article 32 of the VCLT is understood to refer to the political, social, cultural and other factors surrounding a treaty's adoption.[180] It is a trite observation, and one well confirmed by the contemporary statements referred to above, that the Convention was drafted and agreed on against the fallout of World War II and that it was designed to protect civilians against the recurrence of the horrors experienced. These were the circumstances of its conclusion, and they further confirm the protective purpose behind it.

By contrast to the richness of the preparatory work, the relevant subsequent practice of the parties to the Convention has been fairly scarce. The research for this article did not reveal any express statements by States Parties on this topic.[181] A possible avenue for such expressions is the submission by States of reservations to international treaties or their reactions to reservations submitted by other States,[182] as illustrated by examples from the context of other IHL treaties.[183] A few reservations have been deposited in relation to the Fourth Geneva Convention,[184] but on none of these occasions did the acting States (whether those submitting a reservation or those reacting to one) expressly elaborate on what they considered the Convention's object and purpose to be.[185]

[179] ibid 184. See further, *Final Record* ibid, vol II-A, 806–7; Diplomatic conference of 1949, Minutes of Meetings, Commission III, Session 51, 11–12; C Du Pasquier, 'Observations générales sur l'élaboration de la Convention relative à la protection des civils, à la Conférence diplomatique de Genève' (1949) 368 RevICR 631.

[180] Villiger (n 47) 445; Gardiner (n 14) 398–400; Corten and Klein (n 12) vol I, 860.

[181] Some statements related to the 'spirit' and 'ideals' of the Convention(s) can be found in the preparatory work for the Additional Protocols to the Geneva Conventions. All of them are in line with the argument of the present article. See, eg, ICRC, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 24 May–12 June 1971)* (ICRC 1971) vol I, Annex III; Resolution XIII of the XXIst International Conference of the Red Cross (Istanbul, September 1969); *Official Records of The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (Geneva 1974–1977) vol IV, 177–8, vol IX, 47, 452, vol XII, 124.

[182] ILC Guide to Practice on Reservations to Treaties (n 108).

[183] See, eg, Harold Koh, Legal Adviser, US Department of State, Letter to Paul Seger, Legal Adviser of Switzerland regarding Switzerland's Position on the US Reservation to Protocol III of the Convention on Certain Conventional Weapons (30 December 2009).

[184] For the full list, see ICRC, 'IHL Databases, Treaties and State Parties' <https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/state-parties>.

[185] The closest document in this regard that the present authors could identify was Israel, Declaration relating to the declaration made upon accession by Democratic Yemen (1978) 1080 UNTS 370, stating that certain political pronouncements made in Yemen's declaration were 'in flagrant contradiction to the principles, objects and purposes of the [Geneva] Conventions'. The statement by Israel did not, however, express a view on what those 'principles, objects and purposes' were.

Many States have incorporated the Geneva Conventions into their military manuals.[186] However, such incorporations have also avoided specifying a given State's view on the object and purpose of the Conventions. For example, the 2004 UK military manual contains a sizable chapter on the 'Protection of Civilians in the Hands of a Party to the Conflict', which so closely mirrors the Fourth Geneva Convention that its introduction says that the treaty will be referred to only as *the Convention*.[187] And yet, the manual does not attempt to delineate its object and purpose. To the best of the present authors' knowledge, no other military manual does so either.[188]

States had a particular opportunity to enunciate a modern understanding of the goals underpinning the Convention at one of the three conferences of High Contracting Parties to the Fourth Geneva Convention convened by Switzerland as the depositary of the Convention in 1999,[189] 2001[190] and 2014.[191] However, the outcome declarations of these conferences focused primarily on the Israeli–Palestinian conflict and did not for the most part contain general pronouncements regarding the Convention.[192]

An exception in this regard was the 2001 declaration, which noted the agreement of the participating States that the Fourth Geneva Convention

[186] For a list of military manuals consulted by the ICRC up until 2020 in the process of updating the Commentaries on Geneva Conventions, see *Commentary on GC III* (n 6) 2079–93.

[187] H Lauterpacht, Great Britain, War Office, *The Law of War on Land: Being Part III of the Manual of Military Law* (HM Stationery Office 1958) 215.

[188] Many military manuals include more general statements on the aims and purposes of IHL, also called the law of armed conflict, highlighting the protective nature of IHL. See, eg, Australia, Australian Defence Force, *Law of Armed Conflict*, Australian Defence Doctrine Publication, Executive Series ADDP 06.4 (11 May 2006); Canada, Office of the Judge Advocate General, Department of National Defence, *The Law of Armed Conflict at the Operational and Tactical Levels, Joint Doctrine Manual*, B-GJ-005-104/FP-021 (13 August 2001); Germany, Federal Ministry of Defence, *Law of Armed Conflict – Manual, Joint Service Regulation (ZDv) 15/2*, DSK AV230100262, official English translation of Humanitäres Völkerrecht in bewaffneten Konflikten – Handbuch, Berlin (May 2013); the Netherlands, *Humanitair Oorlogsrecht: Handleiding (The Humanitarian Law of War: A Manual)*, Voorschift No 27-412, Koninklijke Landmacht, Militair Juridische Dienst (September 2005) s 5; Philippines, Armed Forces of the Philippines, *The Law of Armed Conflict, Teaching File for Instructors* (2006); Peru, Centro del Derecho Internacional Humanitario de las Fuerzas Armadas, *Manual de Derecho Internacional Humanitario para las Fuerzas Armadas (Manual of International Humanitarian Law for the Armed Forces)*, Resolución Ministerial No 1394-2004-DE/CCFFAA/CDIH-FFAA (1 December 2004), published in Diario Oficial 'El Peruano' (8 December 2004) 8; Sierra Leone, *IHL Code of Conduct* (2006); United Kingdom, UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Joint Service Publication 383 (1 July 2004).

[189] UN, 'Conference of High Contracting Parties to the Fourth Geneva Convention: Statement' (15 July 1999) <https://www.un.org/unispal/document/auto-insert-194091/>.

[190] P-Y Fux and M Zambelli, 'Mise en oeuvre de la Quatrième Convention de Genève dans les territoires palestiniens occupés: historique d'un processus multilateral (1997–2001)' (2002) 84(847) IRRC 661.

[191] Swiss Federal Council, 'Switzerland Hosts Conference of High Contracting Parties to the Fourth Geneva Convention' (Press Release, 17 December 2014) <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-55724.html>.

[192] For an analysis, see M Lanz, E Max and O Hoehne, 'The Conference of High Contracting Parties to the Fourth Geneva Convention of 17 December 2014 and the Duty to Ensure Respect for International Humanitarian Law' (2014) 96(895/896) IRRC 1115.

'takes fully into account imperative military necessity'.[193] Although not specifically expressing the Convention's object and purpose, the formulation confirms that the Convention, like the rest of IHL, reflects a balance between humanity and military necessity.[194] The States participating in the 2001 conference thus reaffirmed that they viewed the protective aim of the Convention as realistic given that it was constructed by taking 'fully into account' the relevant military considerations.[195]

Overall, the supplementary means of interpretation confirm the interim conclusion of the previous sections. There is no doubt that the drafters intended to endow the Convention with a strong protective core, which radiates throughout the entirety of the text. The subsequent practice of States does not cast doubt on this centre of gravity; rather, it confirms that the Convention's overwhelmingly protective approach reflects a pragmatic balance between humanitarian considerations and military necessity.

IV. CONCLUSION

Understanding the object and purpose of international treaties is crucial for their interpretation. Although it is only one element of interpreting the terms of a treaty, identifying a treaty's object and purpose is an indispensable step in the interpretation of its terms, one of the items on 'a set menu of which no course may be skipped'.[196] Its weight relative to the other elements (including good faith interpretation, the ordinary meaning of the relevant terms, and their context) should not be overstated, but, equally, it should not be ignored.

For IHL treaties like the Fourth Geneva Convention, this process is as important as for any other treaties, but it does have certain specific features. Identifying the object and purpose of humanitarian treaties is in some respects easier, as these instruments are generally designed to enhance protection and reduce suffering in times of armed conflict. However, it is also complicated by the fact that every IHL instrument reflects a careful balance between humanity and military necessity.

This article has examined the contemporary meaning of the notion of a treaty's object and purpose and then applied it in the context of IHL. It outlined the methodology through which the 'object and purpose' of a particular treaty is determined, in light of the peculiarities posed by the *jus cogens* quality of IHL norms, the *erga omnes* character of the relevant treaties, and the all-permeating balance between humanity and military necessity.

On the basis of this analysis, it can be established that the overall 'object and purpose' of the Fourth Geneva Convention is to protect civilians during armed

[193] Conference of High Contracting Parties to the Fourth Geneva Convention, Declaration (5 December 2001) 5. [194] See Section III.A.3. [195] Declaration (n 193) 5.
[196] Henckaerts et al (n 14) 382.

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conflict, including in circumstances where they are subject to permissible measures of control and security. This conclusion, based on a rigorous application of the methodology described above, is consistent with a long line of scholarship[197] and international case law.[198]

Where dilemmas arise in determining the ordinary meaning of individual provisions of the Fourth Geneva Convention, resort to its object and purpose may prove helpful. One of the best-known examples arose in the context of the conflict in the former Yugoslavia in the 1990s. The question was whether allegiance can in certain cases constitute a sufficient legal basis for protected status under Article 4 of the Convention in addition to the nationality criterion.[199] There is broad—though not universal—agreement that if a particular conflict takes place along ethnic, religious or similar lines, and such distinctive features become more important than nationality, counting allegiance towards identifying protected persons is consistent with the Convention's object and purpose.[200] In these circumstances, individuals may exceptionally qualify for protected status even if they share the formal nationality of the State in whose hands they find themselves.[201]

To give another example, the fact that very few Protecting Powers have been appointed in international armed conflicts since 1949 presents a challenge to the application of Convention provisions that are premised on the existence of such a Power.[202] The requirement in Article 61 that the distribution of relief in

[197] See, eg, M Siegrist, *The Functional Beginning of Belligerent Occupation* (2011) 14 <https://books.openedition.org/iheid/94?lang=en>; A Imseis, 'On the Fourth Geneva Convention and the Occupied Palestinian Territory' (2003) 44 HarvIntlLJ 65, 137; International Commission of Jurists, 'Israel's Separation Barrier: Challenges to the Rule of Law and Human Rights' (2004) 17 <https://icj2.wpenginepowered.com/wp-content/uploads/2012/07/Israel-separation-barrier-thematic-report-2004.pdf>; MA Newton, 'The Iraqi High Criminal Court: Controversy and Contributions' (2006) 88(862) IRRC 399, 419–20; Dinstein (n 149) 6; Nishat (n 138) 1069, 1078.

[198] *Delalić*, Case No IT-96-21-T, ICTY, Judgment (Trial Chamber, 16 November 1998) 265–6; *Tadić*, Case No IT-94-1-A, ICTY, Judgment (Appeals Chamber, 15 July 1999) 166, 168; *Delalić*, Case No IT-96-21-A, ICTY, Judgment (Appeals Chamber, 20 February 2001) 113; *Wall* Advisory Opinion (n 78) 175. See also general statements on the purpose of the four Geneva Conventions, eg Inter-American Commission on Human Rights, *Tablada*, Report No 55/97, Case No 11.137, Argentina, OEA/Ser.L/V/II.98, Doc 38 (December 1997) 159; *Hassan v the United Kingdom* (n 148) 102.

[199] See *Tadić* Judgment, ibid 166; see also *Prlić et al*, Case No IT-04-74, ICTY, Judgment (Appeals Chamber, 29 November 2017) 355.

[200] See, eg, T Meron, 'The Humanization of Humanitarian Law' (2000) 94 AJIL 239, 260; K Kittichaisaree, *International Criminal Law* (OUP 2001) 140–1; N Wagner, 'The Development of the Grave Breaches Regime and of Individual Criminal Responsibility by the International Criminal Tribunal for the former Yugoslavia' (2003) 85 IRRC 351, 375–6; K Mačák, *Internationalized Armed Conflicts in International Law* (OUP 2018) 233–7; but see, eg, M Sassòli and L Olson, 'The Judgment of the ICTY Appeals Chamber on the Merits in the Tadić Case' (2000) 82 IRRC 733, 743–4; T Hoffmann, 'The Perils of Judicial Construction of Identity – A Critical Analysis of the International Criminal Tribunal for the Former Yugoslavia's Jurisprudence on Protected Persons' in F Jenkins, M Nolan and K Rubinstein (eds), *Allegiance and Identity in a Globalised World* (CUP 2014).

[201] See further, *Commentary on the Fourth Geneva Convention* (n 137) commentary on Article 4.

[202] Since the adoption of the 1949 Conventions, Protecting Powers have only been appointed in five international armed conflicts. See *Commentary on GC III* (n 6) 49–51, 471–3.

occupied territory must be carried out with the cooperation and under the supervision of the Protecting Power is a case in point. The absence of a State performing that role does not mean that the distribution cannot take place, as this would deprive the population of an occupied territory of humanitarian relief contrary to the object and purpose of the Convention. To address this issue, the Occupying Power should, subject to security considerations, permit a neutral State or an impartial humanitarian body, such as the ICRC, to undertake the functions envisaged in Article 61.[203] In practice, relief in occupied territory is indeed frequently distributed under the supervision of the ICRC and National Red Cross or Red Crescent Societies, confirming that this interpretation—which draws on the object and purpose of the Convention—also reflects a pragmatic and realistic solution.[204]

As these examples show, the object and purpose of the Fourth Geneva Convention has a concrete impact on how its terms are interpreted, giving insights into the ordinary meaning of the text and allowing the protective intent of the Convention to be fully realized.[205]

The Fourth Geneva Convention provides a practical and effective framework for the protection of civilians in international armed conflicts that retains its relevance even 75 years since its adoption. The article has demonstrated the importance of identifying its object and purpose and its practical relevance for resolving dilemmas that may arise in the interpretation of individual provisions of the Convention. It is the authors' hope that it will also contribute towards a generally shared, rigorous and workable approach to the interpretation of the Conventions, which is an essential aspect of ensuring effective protection of individuals in contemporary armed conflicts.

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[203] See further, *Commentary on the Fourth Geneva Convention* (n 137) commentary on Article 61.

[204] See, eg, ICRC, 'Israel and the Occupied Territories: Facts and Figures January to June 2023' (1 October 2023) <https://www.icrc.org/en/document/israel-and-occupied-territories-facts-and-figures-january-june-2023>; ICRC, 'Annual Report 2003' (11 June 2004) 264–7 <https://www.icrc.org/en/doc/resources/documents/annual-report/icrc-annual-report-2003.htm>; and ICRC, 'Annual Report 2002' (11 June 2003) 148 <https://www.icrc.org/en/doc/resources/documents/annual-report/icrc-annual-report-2002.htm>.

[205] For similar examples in the context of GC III, see Henckaerts et al (n 14) 387.

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