

Common Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations

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Abstract

Common Article 1 to the four Geneva Conventions lays down an obligation to respect and ensure respect for the Conventions in all circumstances. This paper focuses on the second part of this obligation, in particular on the responsibility of third States not involved in a given armed conflict to take action in order to safeguard compliance with the Geneva Conventions by the parties to the conflict. It concludes that third States have an international legal obligation not only to avoid encouraging international humanitarian law violations committed by others, but also to take measures to put an end to on-going violations and to actively prevent their occurrence.

Keywords: Common Article 1 to the Geneva Conventions, ensuring respect, obligation *erga omnes*, compliance, third States' responsibility, Stockholm Conference, treaty interpretation, preventing IHL violations, stopping IHL violations, prevention, Arms Trade Treaty.

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The importance of compliance

Contemporary armed conflicts – such as those in Syria, the Central African Republic and South Sudan, to name just a few – continue to be marked by enormous human suffering. They also illustrate how complex armed violence has become nowadays. Despite the emergence of new actors of violence, and new means and methods of warfare, all of which may put existing international humanitarian law (IHL) rules to the test, IHL continues to provide an adequate framework to attenuate the effects of armed conflict and to establish a judicious balance between the principles of humanity and military necessity.¹ Treaty and customary law provisions set limits to the waging of war, but the single biggest challenge facing IHL today lies in persuading parties to the conflict to comply with the rules by which they are bound. Violations of the most fundamental and uncontroversial rules remain a sad reality.² Stricter compliance with existing IHL rules would considerably improve the plight of persons affected by armed conflicts.³ Thus, there is a pressing need to generate respect for the law and, as one important avenue in this context, to re-emphasize and clarify the extent to which, as provided by common Article 1 to the four Geneva Conventions (CA 1), as well as by Article 1(1) of Additional Protocol I (AP I), the High Contracting Parties thereto are bound to “respect and ensure respect” for their provisions “in all circumstances”.

The obligation to respect the Geneva Conventions means that a State must do everything it can to guarantee that its own organs abide by the rules in question.⁴ In essence, this part of the provision reaffirms the basic principle of *pacta sunt servanda*, codified in Article 26 of the Vienna Convention on the Law of Treaties. In the case of a non-international armed conflict, the obligation to respect also binds organized armed groups, in accordance with Common Article 3. Indeed, compliance with IHL is the primary responsibility of the parties to a conflict. However, CA 1 goes one step further by introducing an undertaking to ensure respect in all circumstances, which, in turn, consists of an internal and an external component. The internal component implies that each High Contracting Party to the Geneva Conventions must ensure that the Conventions are respected

- 1 See the report presented by the International Committee of the Red Cross (ICRC) to the 31st International Conference of the Red Cross and Red Crescent, *Strengthening Legal Protection for Victims of Armed Conflicts*, ICRC, Geneva, October 2011, p. 4.
- 2 Even the most longstanding IHL obligation, which was at the heart of the early treaty IHL, *i.e.* the delivery of impartial healthcare in armed conflict, is affected by this lack of respect vis-à-vis existing rules. See ICRC, *Healthcare in Danger: Making the Case*, August 2011, available at: www.icrc.org/eng/assets/files/publications/icrc-002-4072.pdf.
- 3 *Ibid.* See also International Institute of Humanitarian Law, *Strengthening Measures for the Respect and Implementation of International Humanitarian Law and Other Rules Protecting Human Dignity in Armed Conflict*, 28th Round Table, Sanremo, 2–4 September 2004; ICRC Vice-President Beerli, *Respecting IHL: Challenges and Responses*, 36th Round Table, Sanremo, 5–7 September 2013, available at: www.icrc.org/eng/assets/files/2013/round-table-san-remo-beerli-2013-icrc.pdf.
- 4 Luigi Condorelli and Laurence Boisson de Chazournes, “Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests”, *International Review of the Red Cross*, Vol. 82, No. 837, 2000, pp. 67–86.

at all times not only by its armed forces and its civilian and military authorities, but also by the population as a whole.⁵ The existence of this internal obligation, as well as the possibility to hold States legally responsible in case of failure to comply with it, is widely accepted. The external component postulates that third States not involved in a given armed conflict – and also regional and international organizations⁶ – have a duty to take action in order to safeguard compliance with the Geneva Conventions, and arguably with the whole body of IHL, by the parties to the conflict.

The purpose of this article is to cast some light upon this external component, which some authors have described as being beset by uncertainty.⁷ In particular, emphasis will be placed on the nature and extent of the obligations of each High Contracting Party to the Geneva Conventions to ensure respect by the other High Contracting Parties, whether they are a party to the conflict or not.⁸ If compliance with existing IHL constitutes the key element for averting current humanitarian problems during armed conflict, there is then a need to elucidate the extent of this obligation. For instance, in a conflict in which a State A systematically mutilates civilians from a State B, must a neutral State C endeavour to stop such mutilations? In a situation of occupation in which a State A prevents the occupied territory of a State B from receiving humanitarian assistance, what are the responsibilities of a non-belligerent State C with close diplomatic ties to State A? Is it lawful for a State C to sell weapons to a State A, if it knows that they are going to be used to commit serious IHL violations in a conflict against a State B? CA 1 is a sound basis for dealing with these matters.

By construing the scope of CA 1, this article will demonstrate that third States – that is, States not taking part in an armed conflict – have an international legal obligation to actively prevent IHL violations. First, it will examine the historical background of the obligation to ensure respect, in particular by revisiting the *travaux préparatoires* to the Geneva Conventions of 1949. Second, it will focus on an array of subsequent practice by States, intergovernmental organizations and international tribunals, supporting the view that third States indeed have a duty to ensure compliance with IHL, even in conflicts to which they are not a party. After having evinced the existence of this external

5 Final Record of the Diplomatic Conference of Geneva of 1949, Vol. 2, Section B, p. 53.

6 Adam Roberts considers that if States have an obligation to ensure respect, then regional and global international organizations are also bound by this very same obligation, since they are themselves composed of States. See Adam Roberts, “Implementation of the Laws of War in Late 20th Century Conflicts”, in Michael N. Schmitt and Leslie C. Green (eds), *The Law of Armed Conflict: Into the Next Millennium*, International Law Studies, Vol. 71, Naval War College, Newport, 1998, p. 365.

7 Luigi Condorelli and Laurence Boisson de Chazournes, “Quelques remarques à propos de l’obligation des États de ‘respecter et faire respecter’ le droit international humanitaire ‘en toutes circonstances’”, in Christophe Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ICRC and Martinus Nijhoff Publishers, Geneva, 1984, p. 18; Tomasz Zych, “The Scope of the Obligation to Respect and to Ensure Respect for International Humanitarian Law”, *Windsor Yearbook of Access to Justice*, Vol. 27, 2009, p. 252; Carlo Focarelli, “Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?”, *European Journal of International Law*, Vol. 21, No. 1, 2010, p. 127.

8 For a more general overview of CA 1, including the obligation to respect, see e.g. L. Condorelli and L. Boisson de Chazournes, above [note 7](#).

component of the obligation, the article will assess its exact nature. In that sense, it will frame CA 1 within the context of an obligation of due diligence – as opposed to an obligation of result – and will briefly enumerate a series of measures available to States in order to comply therewith. Lastly, the article will look at the type of action that CA 1 requires from High Contracting Parties to the Geneva Conventions, or prohibits them from taking. This last part will emphasize the role that CA 1 can play in delineating a preventive approach to IHL violations. For these purposes, the recently adopted Arms Trade Treaty will be used as a case study.

Historical background of the obligation to ensure respect by others

Article 25 of the 1929 Geneva Convention on the Amelioration of the Condition of the Wounded and Sick in Armies in the Field and Article 82 of the 1929 Geneva Convention on the Treatment of Prisoners of War already established that both texts “shall be respected by the High Contracting Parties in all circumstances”. These provisions have been unanimously read as imposing, for the first time, the obligation to abide by the rules of the Conventions regardless of the behaviour of other parties.⁹ Apart from their unprecedented character within the law of treaties,¹⁰ Articles 25 and 82 of the 1929 Geneva Conventions laid down the foundations of what is now known as the principle of non-reciprocity¹¹ – in other words, that reciprocity may not be invoked to disregard IHL obligations in case the adversary violates the law. If the 1929 Geneva Conventions marked a milestone in the efforts to safeguard compliance with IHL, CA 1 to the four Geneva Conventions of 1949 went a step further by asserting that “the High Contracting Parties undertake to respect and to ensure respect for the [Geneva Conventions] in all circumstances”. Three major diverging features need to be highlighted between CA 1 and its 1929 predecessors:

1. First and foremost, CA 1 introduced the obligation to “ensure respect” for the Geneva Conventions. Several of the numerous implications of this new commitment will be discussed below.

9 *Ibid.*, p. 19; Frits Kalshoven, “The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit”, *Yearbook of International Humanitarian Law*, Vol. 2, 1999, pp. 7–10; Alexandre Devillard, “L’obligation de faire respecter le droit international humanitaire: l’article 1 commun aux Conventions de Genève et à leur Premier Protocole Additionnel, fondement d’un droit international humanitaire de coopération?”, *Revue Québécoise de Droit International*, Vol. 75, 2007, pp. 77–79.

10 Note that, under the law of treaties, a material breach of a treaty by one of the parties allows the others to terminate the treaty or to suspend its operation in whole or in part. Article 60(5) of the 1969 Vienna Convention on the Law of Treaties recognizes the exception to this rule, anticipated by the 1929 Geneva Conventions, by providing that this regime “do[es] not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties”.

11 Also known as the prohibition of negative reciprocity. See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, reprint 2009 (ICRC Customary Law Study), pp. 498–499.

2. Second, unlike in 1929, when the obligation to respect in all circumstances was placed within the chapters dealing with the issue of execution at the very end of the Conventions, the 1949 Diplomatic Conference decided to place the more far-reaching obligation of CA 1 right at the beginning of all four Geneva Conventions. Such a decision should be seen as anything but trivial, in terms both of its purpose and of its imperative nature.¹²
3. Third, CA 1 is written in the active voice (“The High Contracting Parties undertake to respect and to ensure respect”), whereas its 1929 counterparts resorted to the passive voice (“shall be respected by the High Contracting Parties”). Regardless of whether the use of a particular grammatical construction entails any legal value, the wording of CA 1 helps to emphasize the system of protection underpinning the Geneva Conventions, and hence its interpretation.

The common Articles to the Geneva Conventions reflect matters that the drafters deemed significant enough “to merit emphasis through repetition”.¹³ It is reasonable to assume that CA 1 goes beyond the mere obligation to respect the Geneva Conventions at the domestic level. After all, the above-mentioned customary principle *pacta sunt servanda* already acknowledges that any State ratifying a particular treaty is bound to respect it in good faith. If CA 1 represents such a breakthrough in the development of IHL, it is not because it reiterates an already existing and uncontroversial rule of public international law but rather due to its unprecedented creation of a legal obligation for each State to ensure respect towards the international community as a whole.¹⁴ This is what can be deduced from a joint analysis of the *travaux préparatoires* and the subsequent application of CA 1 for over sixty years.

Before looking back at the inception of the Geneva Conventions, it is necessary to highlight that the *travaux préparatoires* are to be seen as a supplementary means of interpretation,¹⁵ contrary to the ulterior behaviour of States in the application of a treaty, which constitutes a primary source in the analysis of conventional obligations.¹⁶ Nevertheless, taking into consideration

12 See Fateh Azzam, “The Duty of Third States to Implement and Enforce International Humanitarian Law”, *Nordic Journal of International Law*, Vol. 66, 1997, p. 72 : “Article 1 ... is not preambular or introductory, it is an active provision of the Conventions and Protocol and indeed, its placement at the very beginning of both is an indication of its imperative nature.” See also Jean Pictet (ed.), *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 1958, p. 15.

13 Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge University Press, New York, 2010, p. 84.

14 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols to the Geneva Conventions of 12 August 1949*, 1987, para. 45.

15 Vienna Convention on the Law of Treaties, Art. 32.

16 *Ibid.*, Art. 31(2). See also Giovanni Distefano, “La pratique subséquente des États parties à un traité”, *Annuaire Français de Droit International*, Vol. 40, 1994, p. 46 (emphasis in original):

Si le recours aux travaux préparatoires souligne le souci de connaître cette volonté dans la phase de gestation du traité, recourir à l'examen de l'application et de l'exécution de ce dernier souligne le besoin d'établir ladite volonté sur le terrain. Encore, les travaux préparatoires ne nous éclairent-ils qu'au regard des intentions embryonnaires des parties à un traité, alors que l'analyse de la pratique subséquente des États contractants constitue assurément une interprétation *authentique* et *pratique* de leur volonté commune véhiculée par l'instrument conventionnel.

that—as stated above—some authors have deemed the undertaking to ensure respect by others to be a norm surrounded by uncertainty, a study of both the origin and practice of this obligation will shed further light upon the nuances of the rule.

Travaux préparatoires

According to François Bugnion, the *travaux préparatoires* to the Geneva Conventions are not conclusive when it comes to construing the scope of CA 1. He asserts that both the internal and external aspects of the duty to ensure respect were put forward and that the Diplomatic Conference of 1949 did not find it necessary to decide between them. The formulation retained would permit both interpretations.¹⁷ Frits Kalshoven has gone one step further by stating that nothing in the *travaux préparatoires* justifies an interpretation of CA 1 whereby third States have an international legal obligation to ensure respect for the Geneva Conventions in conflicts to which they are not a party.¹⁸

In his analysis of the drafting history of CA 1, Kalshoven concluded that the drafters did not intend an interpretation whereby the phrase “to ensure respect” implied that each High Contracting Party undertook to ensure respect by all other parties.¹⁹ In his view, there is “simply nothing to suggest that the authors of the proposed text, with Claude Pilloud as the key figure among them, were thinking along those lines”.²⁰ Kalshoven considers that CA 1 simply sought to address the issue of implementation of the Geneva Conventions in the event of non-international armed conflict (NIAC)—that is, to ensure that the non-State party to a NIAC also respects the basic precepts of IHL.²¹

The admittedly scarcely documented drafting history can also be understood differently. The obligation to ensure respect was first introduced in the opening articles of each one of the Draft Revised or New Conventions for the Protection of War Victims submitted by the ICRC to the Stockholm International Conference of the Red Cross in 1948.²² The ICRC established the drafts with the assistance of government experts, National Red Cross Societies and other humanitarian associations.²³ The final text, presented in the form of a booklet, contained both the proposed articles and details on the meaning and justification of each provision. The exact proposed wording of CA 1 was the following:

The High Contracting Parties undertake, in the name of their peoples, to respect, and to ensure respect for the present Convention in all circumstances.

17 François Bugnion, *Le Comité International de la Croix Rouge et la protection des victimes de la guerre*, ICRC, Geneva, 2000, pp. 1080–1081.

18 F. Kalshoven, above note 9, pp. 3–61.

19 *Ibid.*, p. 14.

20 *Ibid.*

21 *Ibid.*, pp. 13–16.

22 ICRC, Draft Revised or New Conventions for the Protection of War Victims, Geneva, May 1948, pp. 4, 34, 51 and 222.

23 *Ibid.*, pp. 1–2.

Next to this text, the ICRC introduced a series of remarks. The booklet was made available to all National Red Cross Societies and governments participating at the Stockholm Conference.²⁴ Due to its importance to understanding the original meaning of the obligation to ensure respect, it is worth reproducing the remarks made to CA 1 in their entirety (emphasis added):

The ICRC believes that this Article, *the scope of which has been widened*, should be placed at the head of the Convention. The new wording covers three points:

- (1) The undertaking subscribed to by High Contracting Parties to respect the Convention in all circumstances.
- (2) The undertaking subscribed to by the High Contracting Parties to ensure respect for the Convention in all circumstances.
- (3) A formal declaration stating that the two above undertakings are subscribed to by Governments in the name of their peoples.

Re (1) This stipulation corresponds to Art. 25, Sec. 1, of the 1929 Convention.

Re (2) The ICRC believes it necessary to stress that if the system of protection of the Convention is to be effective, the High Contracting Parties cannot confine themselves to implementing the Convention. *They must also do everything in their power to ensure that the humanitarian principles on which the Convention is founded shall be universally applied.*

Re (3) By inviting the High Contracting Parties to make formal declaration of their undertaking, in the name of their peoples, the ICRC aims at associating the peoples themselves with the duty of ensuring respect for the principles on which the present Convention is founded, and of implementing the obligations which result therefrom. Another advantage of the present wording will be to facilitate the implementing of the present Convention, especially in case of civil war.²⁵

Kalshoven argues that the authors used the word “universal” as a way to ensure compliance with the Geneva Conventions by all parties to a NIAC.²⁶ He submits that “for a concept belonging to the realm of international relations to figure without explanation between two elements relating to the domestic level would be very strange indeed”.²⁷ Kalshoven also considers that

precious little had ... remained of the original motives behind ... the new draft Article 1. For its authors, its main *raison d'être* now appeared to lie in getting populations involved in the process of creating and maintaining respect for the principles embodied in the Conventions, thus binding them to such respect even in time of civil war or non-international armed conflict.²⁸

24 *Ibid.*, p. 2.

25 *Ibid.*, p. 5, (emphasis added).

26 F. Kalshoven, above note 9, p. 14.

27 *Ibid.*

28 *Ibid.*, p. 16.

The following elements, it is submitted, may also prompt a different understanding of the underlying intent:

1. The draft Article 2 presented to the Stockholm Conference by the ICRC already dealt with the issue of civil war (in paragraph 4), explicitly stating the binding nature of the obligation to respect for IHL for all parties to a NIAC; and draft Article 1, by maintaining the notion of “to respect the Conventions in all circumstances”, coupled with a statement in draft Article 2 confirming that the *clausula si omnes* contained in earlier IHL treaties would not govern the relations of parties to an armed conflict (in paragraph 3), restated the principle of non-reciprocity.²⁹ At the same time, the remarks made by the ICRC with regard to CA 1 (see above) began by spelling out that the scope of this provision was wider than that of its equivalents in the 1929 Geneva Conventions. Since both the principle of non-reciprocity and the issue of civil war were being dealt with elsewhere, one must presuppose that this enlarged scope mainly referred to the obligation to ensure respect universally.
2. The third paragraph of the remarks made by the ICRC already dealt with the issue of non-international armed conflict. Thus, the second paragraph thereof must have a different scope.
3. The ordinary meaning of the term “universal” used in the ICRC remarks is particularly univocal and one can comfortably assert that, at least in the domain of international law, it means the very opposite of domestic. Scholars like Eric David agree with the reading that a universal application of CA 1 can obviously not be restricted to a national level.³⁰ The Stockholm text and the related remarks may therefore well be read with such a wider understanding.

The *travaux préparatoires* of the 1949 Diplomatic Conference show that there was very little discussion on the issue of CA 1. Only Italy, Norway, the United States, the ICRC and France took the floor during the deliberations at the Special Committee.³¹ Mr Maresca, representing Italy, pointed out that the obligation to ensure respect was “either redundant or introduced a new concept into international law”.³² As shown above, there are good reasons to believe that the latter is true – otherwise, if it would merely have been redundant, one might have expected a deletion. The delegates

29 Paragraphs 3 and 4 of draft Article 2 stated the following:

Should one of the Powers in conflict not be party to the present Convention, the Powers who are party thereto shall, nevertheless, be bound by it in their mutual relations.

In all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties, the implementing of the principles of the present Convention shall be obligatory on each of the adversaries. The application of the Convention in these circumstances shall in nowise depend on the legal status of the parties to the conflict and shall have no effect on that status.

30 Eric David, *Principes de Droit des Conflits Armés*, Bruylant, Brussels, 2008, para. 3.13: “une application universelle ne se limite évidemment pas à une application nationale”.

31 Final Record of the Diplomatic Conference of Geneva of 1949, above note 5, p. 53.

32 *Ibid.*

from Norway and the US highlighted that the object of CA 1 was to ensure respect “by the population as a whole”, without elaborating on the issue.³³ After that, Mr Pilloud, on behalf of the ICRC, pointed out that

in submitting its proposals to the Stockholm Conference, the International Committee of the Red Cross emphasized that the Contracting Parties should not confine themselves to applying the Conventions themselves, but should do all in their power to see that the basic humanitarian principles of the Conventions were universally applied.³⁴

None of the delegates opposed this statement, nor did they raise any issues regarding their accord – or discord – with the statements made by Norway, the US and the ICRC.³⁵ It may therefore be assumed that the universal application of a treaty should not be restricted to the domestic level.³⁶ Since a draft with clarifying remarks had been distributed to all the participants – and taking into consideration that a straightforward statement as to its meaning had also been made by the ICRC – it is unlikely that delegates had a narrow understanding of the undertaking to ensure respect. They chose a broad formulation that accommodates an external scope, be it in terms of an entitlement or a duty.

Interestingly, the Commentaries to the Geneva Conventions published by the ICRC in the 1950s support the view that CA 1 imposes an obligation to ensure respect by others:

[I]n the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally.³⁷

33 *Ibid.*

34 *Ibid.*

35 It is impossible to know in retrospect what the delegates had in mind at the time. The fact is that none of them contradicted the ICRC statement. In this sense, it might be interesting to remember that most scholars consider that silence can be used as supporting evidence for acquiescence. See 13 I. C. MacGibbon, “The Scope of Acquiescence in International Law”, *British Yearbook of International Law*, Vol. 31, No. 143, 1954, in particular pp. 146–147. See also G. Distefano, above note 16, p. 48: “La doctrine, par ailleurs, tend à attribuer au silence valeur probatoire aux fins interprétatives par voie de comportement ultérieur des parties”.

36 E. David, above note 30, para. 3.13.

37 J. Pictet, above note 12, p. 16. Note that the original French version of Pictet’s Commentaries is clearer when it comes to delineating the dichotomy between the entitlement to act (*pouvoir*) and the obligation to do so (*devoir*): “Ainsi encore, si une Puissance manque à ses obligations, les autres Parties contractantes ... peuvent-elles – et doivent-elles – chercher à la ramener au respect de la Convention” (*ibid.*, p. 21). The original French version of Pictet’s Commentaries is even stronger in the case of the Third Geneva Convention, since it only refers to a duty: “Ceci vaut pour le respect que chaque État doit lui-même à la Convention mais, en outre, si une autre Puissance manque à ses obligations, chaque Partie contractante (neutre, alliée ou ennemie) doit chercher à la ramener au respect de la Convention”. Jean Pictet (ed.), *Commentaire: IIIème Convention de Genève Relative au Traitement des Prisonniers de Guerre*, 1960, p. 21.

Finally, the system of protection underpinning the Geneva Conventions as a whole seems to run counter to the arguments of those who dispute the external element of the obligation in CA 1. As pointed out by Frédéric Siordet:

The monstrous character of certain violations of the Conventions committed [during the Second World War] where there had been no scrutiny led to a modification of the very idea of scrutiny. It was no longer merely a question of recognizing the legitimate right of a belligerent to see that the Conventions were applied, and to facilitate his doing so. For the private right of belligerents was substituted the general interest of humanity, which demanded scrutiny, no longer as a question of right, but of duty.³⁸

Siordet puts forward the existence of the Protecting Powers in Articles 10/10/10/11 of the Geneva Conventions as an example of a provision strengthening CA 1.³⁹ He adds that the legal obligations imposed upon the parties to a conflict no longer seem sufficient by themselves, which is why the Geneva Conventions “seek ... in addition to provide for scrutiny and cooperation from outside the Parties to the conflict”.⁴⁰ Indeed, the need for supervision had already been discussed at the 1929 Diplomatic Conference, but it was only fully developed and made mandatory in the Geneva Conventions of 1949.⁴¹

At any rate, the acceptance of an obligation to ensure respect by others for both international and non-international armed conflicts was expressly acknowledged after the adoption of the Geneva Conventions and is also what emanates from an analysis of the (more relevant) subsequent practice in the application of the treaty.⁴²

Sixty years of State practice

In the first years after the adoption of the Geneva Conventions, the idea of third-party responsibility did not arouse much interest among government officials or even among scholars. It was only in 1968, in Tehran, that the United Nations

38 Frédéric Siordet, *The Geneva Conventions of 1949: The Question of Scrutiny*, ICRC, Geneva, 1953, p. 21.

39 In his concluding remarks regarding common Article 10/10/10/11, Siordet considers that the reason for imposing such an obligation upon third States is precisely to “strengthen[] Article 1”. *Ibid.*, p. 71.

40 *Ibid.* Although Siordet focuses on the role of Protecting Powers, he makes the link between this new function and the existence of a legal obligation to ensure respect by others as enshrined in CA 1. Moreover, he broadly defines this obligation as one of due diligence—an issue that this article addresses in a later section. Siordet writes in *ibid.*, p. 44, that:

The Protecting Power, on the other hand, whose action takes place in the territory of a foreign country, has only limited means at its disposal. Nevertheless the Conventions make it compulsory, within the limits of these means, for the Protecting Power to lend its services and to exercise its scrutiny in the application of the Conventions, in so far as it is itself a Party to the Conventions. The formal obligation of Article 1 “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances” is as compulsory for it as for the Parties to the conflict. That is a situation heavy with consequences.

41 David P. Forsythe, “Who Guards the Guardians: Third Parties and the Law of Armed Conflict”, *American Journal of International Law*, Vol. 70, No. 1, 1976, p. 43.

42 Vienna Convention on the Law of Treaties, Art. 31(3)(b).

(UN) International Conference on Human Rights, in the preamble to Resolution XXIII, reminded States party to the Geneva Conventions of their responsibility to “take steps to ensure respect of these humanitarian rules in all circumstances by other States, even if they are not themselves directly involved in an armed conflict.”⁴³ Although the resolution was adopted by sixty-seven votes to none, with two abstentions, it is not absolutely clear whether the term “responsibility” referred to a legal obligation or something less.⁴⁴ However, the vast array of subsequent practice supports the imperative nature of the duty to ensure respect for States that are not party to an armed conflict.

The International Court of Justice (ICJ) has, on various occasions, asserted the imperative nature of the obligation to ensure respect. In the *Nicaragua case*, the Court considered that even though the United States was not a party to the NIAC, it had an obligation to ensure respect for the Geneva Conventions in all circumstances.⁴⁵ It further added that this obligation did “not derive only from the Conventions themselves, but from the general principles of humanitarian law”.⁴⁶ In its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court underscored that “every State party to [the Fourth Geneva Convention], whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with”.⁴⁷

Together with the ICJ, both the Security Council and the General Assembly have issued a myriad of resolutions⁴⁸ reaffirming the existence of a legal obligation for third States to ensure respect for IHL in conflicts to which they are not a party.⁴⁹ For instance, the Security Council has called upon third States to ensure compliance

43 International Conference on Human Rights, *Resolution XXIII: Human Rights in Armed Conflict*, Teheran, 12 May 1968, preamble, available at: www1.umn.edu/humanrts/instree/1968a.htm.

44 Kalshoven has expressed doubts on construing Resolution XXIII as an implicit acceptance of the legal obligation enshrined in CA 1. F. Kalshoven, above note 9, p. 43. Other authors do not hesitate to support the opposite view. See e.g. F. Azzam, above note 12, p. 62.

45 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment (Merits), 27 June 1986, para. 220.

46 *Ibid.*

47 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Wall Case)*, Advisory Opinion, 9 July 2004, para. 158. See also ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, paras 211 and 345. In this case, the ICJ did not analyse the issue of third States’ responsibility. However, it did indeed consider that the undertaking to ensure respect for IHL constituted a legal obligation under international law.

48 Condorelli and Boisson de Chazournes consider that “common Article 1 has in the last ten years [1990–2000] almost become a basic norm of behaviour ... within the framework of the United Nations”: see L. Condorelli and L. Boisson de Chazournes, above note 4, pp. 76–78, for a more detailed study on UN practice. See also Toni Pfanner, “Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims”, *International Review of the Red Cross*, Vol. 91, No. 874, 2009, pp. 305–306 and 314–323.

49 Similarly, other intergovernmental organizations have also called upon their members to comply with their duty to ensure respect under CA 1. See e.g. NATO, Parliamentary Assembly, Civilian Affairs Committee Resolution No. 287, Amsterdam, 15 November 1999, para. 7.

with IHL in Israel/Palestine,⁵⁰ Bosnia and Herzegovina⁵¹ and Rwanda.⁵² Furthermore, in a report submitted to the Security Council by the Secretary-General, it was unambiguously affirmed that:

Under [the Fourth Geneva Convention], each Contracting State undertakes a series of unilateral engagements, vis-à-vis itself and at the same time vis-à-vis the others, of legal obligations to protect those civilians who are found in occupied territories following the outbreak of hostilities ... the Security Council should consider making a solemn appeal to all the High Contracting Parties to the Fourth Geneva Convention that have diplomatic relations with Israel, drawing their attention to their obligation under article 1 of the Convention to "... ensure respect for the present Convention in all circumstances" and urging them to use all the means at their disposal to persuade the Government of Israel to change its position as regards the applicability of the Convention.⁵³

A similar appeal was made in Resolution 45/69 of December 1990, entitled "The Uprising (Intifadah) of the Palestinian People". Therein, the General Assembly not only requested the Occupying Power to abide by the provisions of the Fourth Geneva Convention, but also called upon all States party to that Convention "to ensure respect by Israel ... for the Convention in all circumstances, in conformity with their obligation under article 1 thereof".⁵⁴ The same body has approved other quasi-identical resolutions in the last two decades.⁵⁵

Within the framework of the United Nations, such appeals have also been issued by the Sub-Commission on Human Rights⁵⁶ and the Commission on Human Rights,⁵⁷ as well as its successor the Human Rights Council.⁵⁸

The participants in the Diplomatic Conference of Geneva of 1974–1977 also included the obligation to ensure respect in Article 1(1) of the First Additional Protocol to the Geneva Conventions of 1949 and, as pointed out by

50 UN SC Res. 681 (1990), UN Doc. S/RES/681, 20 December 1990.

51 UN SC Res. 764 (1992), UN Doc. S/RES/764, 13 July 1992.

52 UN SC Res. 955 (1994), UN Doc. S/RES/955, 6 November 1994.

53 Report Submitted to the Security Council by the Secretary-General in Accordance with Resolution 605 (1987), UN Doc. S/19443, 21 January 1988, paras 24–27.

54 UN GA Res. 45/69, UN Doc. A/RES/45/69, 6 December 1990, para. 3.

55 See e.g. UN GA Res. 60/105, UN Doc. A/RES/60/105, 8 December 2005, para. 3; UN GA Res. 62/107, UN Doc. A/RES/62/107, 17 December 2007, para. 3; UN GA Res. 63/96, UN Doc. A/RES/63/96, 5 December 2008, para. 3; UN GA Res. 68/81, UN Doc. A/RES/68/81, 16 December 2013, para. 3; and UN GA Res. 68/82, UN Doc. A/RES/68/82, 16 December 2013, para. 7.

56 See e.g. UN Sub-Commission on Human Rights, Res. 1990/12, 30 August 1990, para. 4; Res. 1991/6, 23 August 1991, para. 4; Res. 1992/10, 26 August 1992, para. 4; and Res. 1993/15, 20 August 1993, para. 4.

57 See e.g. UN Commission on Human Rights, Res. 2005/7, 14 April 2005, preamble and para. 5. This resolution "[c]alls upon Member States to take the necessary measures that fulfil their obligations under the instruments of international human rights law and international humanitarian law to ensure that Israel ceases killing, targeting, arresting and harassing Palestinians, particularly women and children" (emphasis in original).

58 Human Rights Council, UN Doc. A/HRC/4/NGO/59, 7 March 2007.

Levrat, they decided to do so “with full knowledge of the facts”.⁵⁹ In 1993, the Final Declaration of the International Conference for the Protection of War Victims reiterated that the responsibility to respect and ensure respect encompassed the need to guarantee “the effectiveness of international humanitarian law and take resolute action, in accordance with that law, against States bearing responsibility for violations of international humanitarian law with a view to terminating such violations”.⁶⁰ Two years later, in 1995, Resolution 1 of the 26th International Conference of the Red Cross and Red Crescent, which was adopted by consensus, reaffirmed that “every State must respect in all circumstances the relevant principles and norms of humanitarian law and ... must ensure respect for the Conventions and Protocols”, thus leaving no doubt as to the imperative nature of this obligation.⁶¹

The ICRC has consistently and publicly emphasized this aspect of CA 1 and reminded States of their obligations thereunder. It has taken a number of steps, confidentially or publicly, individually or generally, to encourage States, including those not party to a conflict, to use their influence or offer their cooperation in order to ensure respect for IHL.⁶² When it is deemed necessary in the interest of the victims to appeal to the responsibility of all High Contracting Parties regarding a specific situation, the ICRC chooses from a range of possibilities at its disposal, among which is the quite exceptional measure of making a public appeal. Appeals to High Contracting Parties expressly referring to CA 1 were made by the ICRC, for example, in 1974 (Middle East), in 1979 (Rhodesia/Zimbabwe), in 1980 (Afghanistan), in 1983 and again in 1984 (Iran and Iraq), in 1992 (Bosnia-Herzegovina) and in 1995 (Rwanda). Moreover, in a series of regional expert seminars organized by the ICRC in 2003 as preparation for the 28th International Conference of the Red Cross and Red Crescent, participants confirmed that by virtue of CA 1 third States are bound not only by a negative legal obligation to neither encourage a party to an armed conflict to violate IHL nor to take action that would assist in such violations, but also by a positive obligation to take appropriate action – unilaterally or collectively – against parties to a conflict who are violating IHL.⁶³

It has often been said that, due to the intrinsically confidential nature of the diplomatic machinery involved, it is difficult to record practice of individual States

59 Nicolas Levrat, “Les conséquences de l’engagement pris par les Hautes Parties contractantes de ‘faire respecter’ les Conventions humanitaires”, in Frits Kalshoven and Yves Sandoz (eds), *Mise en œuvre du droit international humanitaire*, Martinus Nijhoff Publishers, Dordrecht and Boston, 1989, p. 269 (translation by the authors): “en connaissance de cause”. See also Y. Sandoz, C. Swinarski and B. Zimmermann, above note 14, para. 44: “[M]ost importantly, the Diplomatic Conference fully understood and wished to impose this duty on each Party to the Conventions, and therefore reaffirmed it in the Protocol as a general principle.”

60 Final Declaration of the International Conference for the Protection of War Victims, Geneva, 1 September 1993, at II(11), available at: www.icrc.org/eng/resources/documents/misc/57jms8.htm.

61 See also 30th International Conference of the Red Cross and Red Crescent, Resolution 3, 2007, para. 2.

62 See e.g. F. Bugnion, above note 17, p. 1081.

63 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, December 2003, p. 47, available at: www.icrc.org/eng/assets/files/other/ihlcontemp_armedconflicts_final_ang.pdf.

illustrating this obligation to ensure respect by third parties.⁶⁴ Scholars in the early 1990s, in particular, therefore voiced a word of caution as to whether governments felt themselves obliged to intervene when a party to an armed conflict violated IHL.⁶⁵ However, such passiveness was deemed “hard to justify, or even to understand”, considering the undeniable external component of the rule.⁶⁶ As of today, thanks to an ever-growing tendency that has been gaining momentum over the last two decades, it is doubtful that one can keep questioning the lack of State practice illustrating this duty. Interestingly, in this respect, the EU felt the need to adopt guidelines on promoting compliance with IHL.⁶⁷ As indicated under the section on purpose, it is emphasized that the “[g]uidelines are in line with the commitment of the EU and its Member States to IHL, and aim to address compliance with IHL by third States, and, as appropriate, non-State actors operating in third States”. The guidelines also state means of action at the disposal of the EU in relation to third countries.

Other, more contextual State practice also illustrates a sense of positive duty.⁶⁸ For instance, in 1980, the member States of the European Economic Community (ECC), predecessor of the European Union, issued a joint statement, known as the Venice Declaration, considering that Israeli settlements were illegal under international law. Through the Venice Declaration, the ECC “stress[ed] the need for Israel to put an end to the territorial occupation which it has maintained since the conflict of 1967”.⁶⁹ Since then, numerous European institutions, such as the European Council,⁷⁰ the European Commission⁷¹ and the Council of the

64 Hans-Peter Gasser, “Ensuring Respect for the Geneva Conventions and Protocols: The Role of the Third States and the United Nations”, in Hazel Fox and Michael A. Meyer (eds), *Effecting Compliance*, British Institute of International and Comparative Law, 1993, p. 31; L. Condorelli and L. Boisson de Chazournes, above note 7, p. 27; N. Levrat, above note 59, p. 291; T. Zych, above note 7, p. 256.

65 H.-P. Gasser, above note 64, p. 32.

66 *Ibid.*

67 European Union, “Updated European Union Guidelines on Promoting Compliance with International Humanitarian Law (IHL)”, *Official Journal of the European Union*, Doc. 2009/C 303/06, 15 December 2009, pp. 12–15, available at: [http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52009XG1215\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52009XG1215(01)&from=EN).

68 In addition to the practice specifically referenced in this article, see the ICRC database on State practice for further examples, available at: www.icrc.org/customary-ihl/eng/docs/v2_rul_rule144. As can be seen, and contrary to what is sometimes asserted (see Birgit Kessler, “The Duty to ‘Ensure Respect’ under Common Article 1 of the Geneva Conventions: Its Implications on International and Non-International Armed Conflicts”, *German Yearbook of International Law*, Vol. 44, 2001, p. 509), States have also acted and invoked CA 1 in situations of NIAC – see *infra* the cases of Syria, Libya and Sudan.

69 “The Venice Declaration”, *Palestine-Israel Journal of Politics, Economics and Culture*, Vol. 6, No. 2, 1999.

70 See e.g. European Council, *Presidency Conclusions of the European Council: Annex V*, 25 and 26 June 1990, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=DOC/90/2&format=HTML&aged=0&language=EN&guiLanguage=en>; *Presidency Conclusions Brussels European Council*, 17 October 2003, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=DOC/03/48&format=HTML&aged=0&language=EN&guiLanguage=en>.

71 See e.g. European Commission, *EU–Israel: Implementation of the Interim Agreement in the Framework of a Strengthened Regional Cooperation*, 13 May 1998, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/98/426&format=HTML&aged=0&language=EN&guiLanguage=en>; and *Jerusalem and Ramallah Heads of Mission Report on East Jerusalem*, 2005, available at: www.nodo50.org/csca/agenda05/palestina/jerusalem-ue_eng.pdf.

European Union,⁷² as well as many EU representatives,⁷³ have repeatedly – and publicly – emphasized that the building of settlements anywhere in the Occupied Palestinian Territories, including East Jerusalem, is prohibited by IHL.

Continued violations of human rights and IHL in the Darfur region led the United States to put in place a series of economic sanctions against Sudan. In particular, the United States imposed a trade embargo against Sudan, prohibited the importation of goods and services of Sudanese origin, and put into effect “targeted sanctions against individuals and entities contributing to the conflict in the Darfur region.”⁷⁴ At any rate, as it will be seen below, economic sanctions are but one of the means available to ensure respect by others.

On the occasion of the armed conflict in Libya in 2011, countries from all over the world condemned indiscriminate attacks causing death among the civilian population and urged the Libyan government to respect IHL;⁷⁵ in February 2011 the European Union approved a package of sanctions against Libyan leaders, including an arms embargo and a travel ban.⁷⁶

The current armed conflict in Syria has also given rise to a variety of situations in which third States have endeavoured to ensure respect for IHL by the belligerents. In May 2012, following the killing of civilians in the Syrian city of Houla, almost a dozen countries from the Americas, Europe and Australia expelled all Syrian diplomats from their respective territories as a means of protest.⁷⁷ The EU (in association with various candidate and non-EU States) has referred explicitly to CA 1 in its diplomatic *démarches* to put an end to the “terrible” IHL violations committed in Syria, such as the denial of humanitarian assistance, the attacks against humanitarian workers, the use of siege and starvation as a method of warfare, indiscriminate attacks causing death among the civilian population and the recruitment of children into the armed forces:

The lack of respect for international humanitarian law and human rights is appalling and concerns us all ... Common article 1 of the Geneva Conventions clearly requires that all the contracting Parties, and I quote, “undertake to respect and to ensure respect” for the conventions “in all circumstances”. Thus, it is a collective obligation on all of us not only to respect but also to ensure that the parties to the conflict respect their

72 Council of the European Union, *Declaration by the Presidency on Behalf of the EU on Israeli Settlements*, 9 September 2009, available at: http://europa.eu/rapid/press-release_PESC-09-106_en.htm?locale=EN.

73 See e.g. “EU’s Ashton Criticizes Israel for Approval of ‘Illegal’ Settlement Homes”, *Haaretz*, 23 February 2012, available at: www.haaretz.com/news/diplomacy-defense/eu-s-ashton-criticizes-israel-for-approval-of-illegal-settlement-homes-1.414327.

74 Department of the Treasury, *An Overview of the Sudanese Sanctions Regulations*, 25 July 2008, available at: www.treasury.gov/resource-center/sanctions/Programs/Documents/sudan.pdf.

75 Human Rights Council, “Council Holds Interactive Dialogue with Commission of Inquiry on alleged Human Rights Violations in Libya”, 9 June 2011, available at: www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11131&LangID=E.

76 “EU Agrees Libya Arms Embargo, Travel Ban”, *Reuters*, 28 February 2011, available at: www.reuters.com/article/2011/02/28/eu-libya-sanctions-idAFLDE71R1NI20110228.

77 “Several Countries Expel Syrian Diplomats as EU Mulls Joint Expulsion”, *Al Arabiya News*, 29 May 2012, available at: <http://english.alarabiya.net/articles/2012/05/29/217206.html>.

humanitarian obligations. We need to ensure actual enforcement of the obligations.⁷⁸

All in all, taking into consideration both the drafting history of CA 1 and the subsequent practice of States, international tribunals and intergovernmental organizations,⁷⁹ States not party to an armed conflict have a legal obligation to ensure respect for the Geneva Conventions, and for applicable IHL more broadly,⁸⁰ through taking positive steps. What needs to be elucidated are the exact nature and extent of this legal obligation.

Nature of the obligation to ensure respect

Article 48 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts provides that any State other than an injured State is entitled to invoke the responsibility of another State if the obligation in question is “owed to the international community as a whole”—this is indeed the case with the Geneva Conventions, which lay down legal obligations of an *erga omnes* nature.⁸¹ That said, the obligation to ensure respect in its external dimension, imposed by CA 1, is distinct from the right of third States to act vis-à-vis the breach of *erga*

78 EU Statement, with the alignment of Iceland, Montenegro, Serbia, Albania, Bosnia and Herzegovina and the countries of the Stabilization and Association Process, *United Nations General Assembly: Humanitarian Situation in Syria*, 25 February 2014, available at: www.eu-un.europa.eu/articles/en/article_14647_en.htm.

79 For a brief analysis on how resolutions, declarations and other normative instruments adopted by international organizations can be constitutive of the *opinio juris* of IHL rules, see Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law*, Clarendon Press, Oxford, 1989.

80 ICJ, *Nicaragua v. United States of America*, above note 45, para. 220.

81 See International Criminal Tribunal for the Former Yugoslavia (ICTY), *The Prosecutor v. Zoran Kupreskic and Others*, Case No. IT-95-16-T, Judgment (Trial Chamber), 14 January 2000, para. 519:

As a consequence of their absolute character, these norms of international humanitarian law do not pose synallagmatic obligations, *i.e.* obligations of a State vis-à-vis another State. Rather – as was stated by the International Court of Justice in the Barcelona Traction case (which specifically referred to obligations concerning fundamental human rights) – they lay down obligations towards the international community as a whole, with the consequence that each and every member of the international community has a “legal interest” in their observance and consequently a legal entitlement to demand respect for such obligations.

See also Tihomir Kamenov, “The Origin of State and Entity Responsibility for Violations of International Humanitarian Law in Armed Conflicts”, in Frits Kalshoven and Yves Sandoz (eds), *Implementation of International Humanitarian Law*, Martinus Nijhoff Publishers, Dordrecht and Boston, 1989, pp. 193–194; Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge and New York, 2002, p. 245; ICJ, *Wall Case*, above note 47, paras 155–157; ICJ, *Barcelona Traction Light and Power Company Limited*, Judgment, *ICJ Reports 1970*, paras 33–34, states:

An essential distinction should be drawn between the obligations of the State towards the international community as a whole, and those arising vis-à-vis another State ... By their very nature, the former are the concern of all States. In view of the importance of the rights involved all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

omnes obligations under public international law.⁸² As shown in previous sections – and as can be seen from a significant amount of verbal State practice as expressed in international organizations/fora and elsewhere – CA 1 goes beyond an entitlement for third States to take steps to ensure respect for IHL. It establishes not only a right to take action, but also an international legal obligation to do so. The words “ensure respect” imply an active duty and the term “undertake” suggests a genuine obligation,⁸³ and this applies to all aspects of CA 1 – both the internal and the external component. The Commentaries on the Geneva Conventions, when it comes to the imperative nature of the undertaking to ensure respect by others, assert that CA 1 is not a stylistic clause but a provision invested with imperative force.⁸⁴ A similar reading regarding the binding nature of the word “undertake” is made by the Commentaries on AP I,⁸⁵ as well as by the ICJ in the context of the Genocide Convention.⁸⁶ Furthermore, this is also what can be deduced from the language of the international rulings, resolutions and statements analysed in the previous section. Thus, the question at this point is not so much whether CA 1 imposes a binding obligation, but rather what type of obligation lies beneath it.

A duty of diligent conduct

International obligations – as well as domestic ones – can be divided into two types.⁸⁷ On the one hand, there are obligations of result, which imply that a State must attain a

82 In the *Wall Case*, the ICJ made a clear distinction between the existence of *erga omnes* obligations within the body of IHL and the obligation imposed upon third States by CA 1 to ensure respect in all circumstances. See ICJ, *Wall Case*, above note 47, paras 155–159. For an in-depth analysis of the legal regime of *erga omnes* obligations, as well as of the diverging features of other treaty-based obligations in whose performance all contracting parties are said to have a legal interest (also referred to as *erga omnes partes* or *erga omnes contractantes* obligations), see Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law*, Cambridge University Press, Cambridge, 2010, pp. 117–157.

83 ICJ, *Nicaragua v. United States of America*, above note 45, para. 220.

84 J. Pictet, above note 12, p. 17.

85 Y. Sandoz, C. Swinarski and B. Zimmermann, above note 14, para. 40. Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *New Rules for the Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff Publishers, The Hague and Boston, 1982, p. 43:

Since para. 1 does not limit the obligations of the High Contracting Parties to territories involved in the conflict, the obligation to ensure respect for the Protocol falls also upon Parties not involved in the conflict. They have to use any lawful means at their disposal in their international relations to ensure that the High Contracting Parties involved respect the Protocol.

86 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *ICJ Reports 2007*, para. 162:

The ordinary meaning of the word “undertake” is to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation. It is a word regularly used in treaties setting out the obligations of the Contracting Parties ... It is not merely hortatory or purposive. The undertaking is unqualified ... and it is not to be read merely as an introduction to later express references to legislation, prosecution and extradition. Those features support the conclusion that Article I, in particular its undertaking to prevent, creates obligations distinct from those which appear in the subsequent Articles. That conclusion is also supported by the purely humanitarian and civilizing purpose of the Convention.

87 Riccardo Pisillo-Mazzeschi, “The Due Diligence Rule and the Nature of the International Responsibility of States”, *German Yearbook of International Law*, Vol. 35, 1992, pp. 47–48.

specific outcome. On the other hand, there exist obligations of means, also called obligations of due diligence, where States are only obliged to follow a certain conduct, regardless of whether they attain the desired result or not. In summary, “the obligation of result is an obligation to ‘succeed’, while the obligation of diligent conduct is an obligation to ‘make every effort’”.⁸⁸ Some authors have considered that High Contracting Parties might be held liable for failure to fulfil their CA 1 obligation until the desired result of ensuring respect for the Geneva Conventions in all circumstances is achieved.⁸⁹ However, this can hardly be the case. A State not party to a specific armed conflict cannot be said to be under an obligation to reach a particular outcome—for example, the cessation of all IHL violations by a belligerent—with regard to that conflict. On the contrary, third States can only be under an obligation to exercise due diligence in choosing appropriate measures to induce belligerents to comply with the law. This does not turn the duty to ensure respect into a vacuous norm, since States are under the obligation, depending on the influence they may exert, to take all possible steps, as well as any lawful means at their disposal, to safeguard respect for IHL rules by all other States.⁹⁰ If they fail to do so, they might incur international responsibility. In this sense, it should be highlighted that the intricateness of international relations, including the political dynamics to which a State might be subject, does not diminish the validity of this obligation.⁹¹ In fact, the opposite is true: a State with close political, economic and/or military ties (for example, through equipping and training of armed forces or joint planning of operations) to one of the belligerents has a stronger obligation to ensure respect for IHL by its ally.⁹² This is precisely the underlying logic of CA 1, as well as of other IHL rules in which close ties between two States lead to the reinforcement of their existing obligations.⁹³

Further guidance for the purposes of CA 1 can be drawn from the ICJ in the case *Bosnia and Herzegovina v. Serbia and Montenegro*. Therein, the ICJ found that the legal obligation to prevent genocide enshrined in Article 1 of the Genocide Convention was also one of due diligence. With regard to the due diligence standard, it held that States are obliged to use “all means reasonably available to them” and that a State incurs responsibility only if it has “manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the

88 *Ibid.*, p. 48.

89 See e.g. F. Azzam, above note 12, pp. 73–74.

90 L. Condorelli and L. Boisson de Chazournes, above note 4, p. 39; Paolo Benvenuti, “Ensuring Observance of International Humanitarian Law: Function, Extent and Limits of the Obligation of Third States to Ensure Respect of IHL”, *International Institute of Humanitarian Law Yearbook*, 1989–1990, p. 29; M. Bothe, K. J. Partsch and W. A. Solf, above note 85, p. 43.

91 F. Azzam, above note 12, p. 74.

92 H-P. Gasser, above note 64, p. 28.

93 For an example of how burden and means can be correlated with regard to the principle of *non-refoulement*, see Laurent Colassis, “The Role of the International Committee of the Red Cross in Stability Operations”, in Raul A. “Pete” Pedrozo (ed.), *The War in Iraq: A Legal Analysis*, US Naval War College International Law Studies, 2010, pp. 467–468.

genocide”.⁹⁴ The ICJ further added that due diligence can only be assessed *in concreto*.⁹⁵ This is the case with any obligation of due diligence,⁹⁶ including the duty to ensure respect for IHL by others.⁹⁷ Thus, only a case-by-case analysis can reveal whether a State has actually violated CA 1. For that purpose, together with the capacity to influence the parties to the conflict, it is important to take into consideration the seriousness of the potential violation.⁹⁸ For instance, a non-belligerent State C could hardly justify its passiveness vis-à-vis grave breaches of the Geneva Conventions committed by State A against State B, in particular if State C has a “special relationship” with State A.⁹⁹ Such a special relationship is even more pronounced if third States provide support, directly or indirectly, to a party to an ongoing armed conflict.

Possible measures to ensure respect

As for the possible measures for ensuring compliance with IHL available to States not party to an armed conflict, these can be classified into three broad categories.¹⁰⁰ First, measures aimed at exerting diplomatic pressure: these include, *inter alia*, protests lodged with the corresponding ambassador, public denunciations, pressure through intermediaries and/or referral to the International Fact Finding Commission¹⁰¹ – in

94 See ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro*, above note 86, para. 430:

It is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. In this area the notion of “due diligence”, which calls for an assessment *in concreto*, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence.

95 *Ibid.*

96 See Robert P. Barnidge, “The Due Diligence Principle under International Law”, *International Community Law Review*, Vol. 8, 2006, p. 118 : “While general principles can, and should, be sketched in the abstract, here, as elsewhere, the assessment under the due diligence rule is necessarily specific to particular facts and circumstances.”

97 T. Pfanner, above note 48, p. 305.

98 A. Devillard, above note 9, p. 101; B. Kessler, above note 68, p. 506, states: “The intensity of the treaties’ violations is another element that is important for obliging the States to take further steps to ‘ensure respect’ of the Conventions. This already follows from the *ratio legis* of the Geneva treaties.”

99 According to Kessler, this “special relationship” originates from different factors, such as “common history, common ethnic roots or even geographical proximity”. *Ibid.*, p. 506. As seen above, Gasser focuses on military and economic influence. See H.-P. Gasser, above note 64, p. 28.

100 For a full analysis of this question, see Umesh Palwankar, “Measures Available to States for Fulfilling their Obligation to Ensure Respect for International Humanitarian Law”, *International Review of the Red Cross*, Vol. 33, No. 298, 1993, pp. 9–25. See also the possible actions that the EU has identified in its guidelines on the promotion of IHL (European Union, above note 67): political dialogue, general public statements, *démarches* and/or public statements about specific conflicts, restrictive measures/sanctions, cooperation with other international bodies, crisis management operations, individual responsibility, training, denying export of arms.

101 AP I, Art. 90.

the event that both States have accepted its competence – or the International Criminal Court. Second, coercive measures taken by the State itself, such as measures of retorsion: the above-mentioned expulsion of Syrian diplomats might fall under this category. Third are measures taken in cooperation with an international organization.¹⁰²

Of course, States are free to choose among the different measures at their disposal. Nevertheless, CA 1 should not be used to justify a so-called “*droit d’ingérence humanitaire*”.¹⁰³ In principle, permitted measures must be limited to “protest, criticism, retorsions or even non-military reprisals”.¹⁰⁴ Armed intervention may only be decided within the context of the UN, and in full respect of the UN Charter.¹⁰⁵ The rules on the resort to armed force (*jus ad bellum*) govern the legality of any use of force, even if it is meant to end serious violations of IHL. The content of CA 1 is not part of *jus ad bellum* and thus cannot serve as a legal basis for the use of force.

Failing to take measures will give rise to the international responsibility of the third State only when its conduct cannot be deemed diligent. What needs to be proved is the inconsistency between the State’s actual conduct and the conduct demanded by the “due diligence standard”.¹⁰⁶ Needless to say, the burden of proof is higher than in the case of obligations of result, where it suffices to demonstrate that the outcome required by the norm has not been reached. An additional hurdle exists in the case of the obligation to ensure respect, since diplomatic *démarches* are often conducted bilaterally and discretely. Be that as it may, holding third States accountable for their failure to ensure compliance with IHL is more than a conjectural speculation – supposing, that is, that they do not meet the adequate “due diligence standard”. It remains to be seen what elements compose that standard.

Specific content of the obligation to ensure respect

In the *Nicaragua* case, the ICJ considered that, by virtue of the duty to ensure respect, the United States was “under an obligation not to encourage persons or groups

102 See e.g. *ibid.*, Art. 89.

103 L. Condorelli and L. Boisson de Chazournes, above note 4, pp. 76–78. See also H.-P. Gasser, above note 64, p. 29: “The right to take action with a view to ensuring full respect for humanitarian law by belligerents does not include the right to derogate from the prohibition to use force against another State. This seems to be uncontroversial.”

104 B. Kessler, above note 68, p. 506.

105 L. Condorelli and L. Boisson de Chazournes, above note 4, pp. 76–78. See also ICRC, “The ICRC’s Position on ‘Humanitarian Intervention’”, *International Review of the Red Cross*, Vol. 83, No. 842, 2001, pp. 530–531:

The question of what measures are to be taken by the States and the United Nations in order to put an end to [breaches of IHL] is not dealt with by humanitarian law, but rather by the UN Charter (Chapters VII and VIII) ... If armed intervention is decided upon, the Security Council can decide whether it is to be carried out by the UN forces or delegated to a State or regional security body. However, Article 53 of the Charter specifies that “no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council”.

Article 89 of AP I stipulates in this regard that in cases of serious violations of the Geneva Conventions and AP I, the High Contracting Parties undertake to act, jointly or individually, in cooperation with the UN and in conformity with the UN Charter.

106 R. Pisillo-Mazzeschi, above note 87, p. 50.

engaged in the conflict in Nicaragua to act in violation of the provisions of [common Article 3 to the Geneva Conventions]”.¹⁰⁷ Since then, it has often been repeated that CA 1, as well as the general principles of humanitarian law to which it gives expression, prohibits third States from encouraging the parties to a conflict to violate IHL. As pointed out by Meron, the well-grounded principles of good faith and *pacta sunt servanda* impose upon States party to the Geneva Conventions not only a duty to abide by their own obligations, but also a duty not to encourage other parties to violate theirs.¹⁰⁸ Furthermore, according to the general regime of State responsibility, third States are under the obligation not to knowingly aid or assist in the commission of IHL violations.¹⁰⁹ They also must refrain from recognizing as lawful any situation created by a serious breach of peremptory norms of IHL.¹¹⁰ All of these obligations can be considered negative duties, and even if CA 1 did not exist, they would flow from other norms of international law.¹¹¹ To give but one example, such negative duties could arise in multinational operations. High Contracting Parties would be prevented from carrying out joint operations with other States if there was an expectation that these States would act in violation of the Geneva Conventions or other relevant norms of IHL, unless they took active measures to ensure respect therewith. Such measures to ensure respect could include joint planning, training or mentoring programmes. This logic lies at the heart of UN Security Council Resolution 1906,¹¹² which reiterated that

the support of MONUC [United Nations Organization Stabilization Mission in the DRC] to FARDC-led [Armed Forces of the DRC] military operations against foreign and Congolese armed groups is strictly conditioned on FARDC’s compliance with international humanitarian, human rights and refugee law and on an effective joint planning of these operations.¹¹³

However, the fact that these negative duties emanate from public international law, together with the above-mentioned practice, as well as the fact that CA 1 uses the term “ensure” in the active voice, indicates that the scope of the obligation to ensure respect is “undoubtedly larger than simply ‘not encouraging’”,¹¹⁴ and also includes a series of positive obligations.

107 ICJ, *Nicaragua v. United States of America*, above note 45, para. 220.

108 T. Meron, above note 79, p. 31.

109 Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, Art. 16.

110 *Ibid.*, Art. 41(2). See also ICJ, *Wall Case*, above note 47, paras 158–159, recalling also CA 1.

111 A. Devillard, above note 9, p. 86: “L’interdiction de l’aide ou de l’assistance à la violation du droit international est une règle coutumière qui s’apparente au concept de complicité en droit interne.” See also B. Kessler, above note 68, p. 503; C. Focarelli, above note 7, pp. 169–170; F. Kalshoven, above note 9, pp. 503–504; Yves Sandoz, “Mise en œuvre du droit international humanitaire”, in UNESCO and Institut Henry-Dunant, *Les dimensions internationales du droit humanitaire*, Pedone, Paris, 1986, pp. 302–303.

112 Security Council, Resolution 1906 (2009), UN Doc. S/RES/1906, 23 December 2009.

113 The same logic could apply with a view to stopping and preventing violations, as shown in the following sections.

114 N. Levrat, above note 59, p. 268 (translation by the authors). The French original reads: “[L]’étendue de l’obligation de ‘faire respecter’ couvre un champ indubitablement plus large que simplement ‘ne pas encourager.’”

Stopping IHL violations

To start with, High Contracting Parties have a duty to exert their influence/take appropriate measures to put an end to ongoing IHL violations. This aspect of CA 1 is the basis for Rule 144 identified in the ICRC Customary Law Study, which provides, *inter alia*, that States “must exert their influence, to the degree possible, to stop violations of international humanitarian law”.¹¹⁵

The above-mentioned abstract from the Commentaries to the Geneva Conventions already established that in the event of a belligerent failing to fulfil its obligations, third States have an obligation to “endeavour to bring it back to an attitude of respect for the Convention”.¹¹⁶ *Prima facie*, the idea of bringing back one of the parties to the conflict to an attitude of respect implies that a violation of IHL has previously taken place. The Commentary to the First Additional Protocol equally echoed this aspect of the obligation.¹¹⁷ According to expert participants in the five seminars organized by the ICRC in 2003 on the issue of improving compliance with IHL, States not involved in an armed conflict have a positive obligation to “take action ... against States who are violating international humanitarian law, in particular to intervene with States over which they might have some influence to stop the violations”.¹¹⁸

Such an obligation to stop IHL violations is evidenced specifically in Article 89 of AP I, which provides that “[i]n situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act jointly or individually, in cooperation with the United Nations and in conformity with the United Nations Charter”.

Many of the examples of State practice mentioned above were actually aimed at putting an end to situations that contravened basic humanitarian norms and, as shown by the ICRC Customary Law Study, they account for a well-grounded legal obligation. But going one step further, it is worthwhile pondering whether, in addition to requiring third States to exert their influence/take appropriate measures to bring ongoing violations to an end, the duty to ensure respect in its external dimension also includes a preventive component.

Preventing IHL violations

If one looks at CA 1 against the backdrop of the atrocities committed during the Second World War, and in the light of its object and purpose, there are strong arguments that support an undertaking to prevent violations of the Conventions. An illustration of the eagerness of States at the time of negotiating the Geneva Conventions to avoid falling back into the scourges of the Second World War is manifest in Article 1 of the Genocide Convention, adopted only a few months

115 ICRC Customary Law Study, above [note 11](#), p. 509.

116 J. Pictet, above [note 12](#), p. 16.

117 Y. Sandoz, C. Swinarski and B. Zimmermann, above [note 14](#), paras 42–43.

118 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, above [note 63](#), p. 49.

earlier than the Geneva Conventions. In that Article, the “Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish”. Looking at that provision, the ICJ held that the word “undertake”—the same used by CA 1—sets a legally binding obligation,¹¹⁹ and asserted that the obligation of States was one of conduct, which could be breached if they failed to take all measures within their power to prevent genocide.¹²⁰ Interestingly, the ICJ further added that claiming, or even proving, that the means reasonably at the disposal of a State were insufficient was irrelevant for the purposes of breaching the obligation, since “the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result—averting the commission of genocide—which the efforts of only one State were insufficient to produce”.¹²¹ It is submitted that this whole framework is indeed similar to the one underpinning CA 1, and which Pilloud described as an obligation for all High Contracting Parties to “do all in their power to see that the basic humanitarian principles of the Conventions were universally applied”.¹²²

Several scholars have posited that the obligation to ensure respect includes a duty to take measures to prevent IHL violations. For instance, Devillard argues that although reacting to illicit conduct—that is, stopping ongoing breaches of a rule—constitutes the “heart” of CA 1, the role of prevention should not be neglected.¹²³ He adds that the consequences of IHL violations are often too serious to simply accept “*a posteriori* interventions”.¹²⁴ Although, according to Devillard, a general obligation of prevention incumbent on third States can be excluded, an obligation to prevent IHL violations would be triggered in situations where the risk of such violations can be reasonably foreseen.¹²⁵ In his analysis of the *erga omnes* obligation to ensure respect by others, Gasser refers not only to stopping violations, but also to “prevent[ing] further breaches from happening” and “act[ing] when parties to an armed conflict are likely to disregard the law or are about to violate their humanitarian obligations”.¹²⁶ Other authors seem to go even further when they frame CA 1 primarily as a duty to “avert the occurrence of violations”, instead of only acting at the stage at which the misbehaviour has already taken place.¹²⁷ It is not possible in abstract to elucidate the criteria under which non-belligerent States could incur international responsibility for their failure to prevent the violation of IHL rules. At any rate, it is clear that this obligation, being one of due diligence, only arises in cases in which the prospective

119 See ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro*, above note 86, para. 162.

120 *Ibid.*, para. 430.

121 *Ibid.*

122 Final Record of the Diplomatic Conference of Geneva of 1949, above note 5, p. 53.

123 A. Devillard, above note 9, p. 96.

124 *Ibid.*

125 *Ibid.*, pp. 96 (where Devillard speaks of a specific risk) and 97 (“une obligation de prévention des violations du droit humanitaire dont on peut raisonnablement craindre la commission”).

126 H.-P. Gasser, above note 64, pp. 31–32.

127 N. Levrat, above note 59, p. 277 (translation by the authors): “La faute consisterait dans ce cas en la non-utilisation des moyens existants pour empêcher la survenance d’une violation des Conventions.”

inobservance of IHL is marked by a certain degree of predictability. That is why Gasser resorts to the idea of likelihood and Devillard to foreseeable risk. Indeed, under international law, due diligence obligations involving the need to prevent a particular event can only be triggered if the event in question is actually foreseeable.¹²⁸

The High Contracting Parties themselves have also endorsed this interpretation of CA 1 during the 30th International Conference of the Red Cross and Red Crescent, where they stressed

the obligation of all States to refrain from encouraging violations of international humanitarian law by any party to an armed conflict and to exert their influence, to the degree possible, to prevent and end violations, either individually or through multilateral mechanisms, in accordance with international law.¹²⁹

Moreover, UN pronouncements also point in this direction. For instance, a Security Council resolution from 1990 dealing *inter alia* with the intention of the government of Israel “to resume”¹³⁰ the deportation of Palestinian civilians in the occupied territories—that is, a potential IHL violation which had not yet occurred—called upon “the High Contracting Parties to [the Fourth Geneva Convention of 1949] to ensure respect by Israel, the occupying Power, for its obligations under the Convention in accordance with Article 1 thereof”.¹³¹ In such instances, the obligation to ensure respect should clearly be seen through the prism of prevention.

As a matter of fact, the duty to ensure respect by others has been conceived of as a general principle informing the entire field of IHL implementation.¹³² In this sense, it is interesting to note that measures to enforce IHL usually revolve around the concepts of repression and prevention,¹³³ and that in fact, according to Marco Sassòli, the focus between these two elements must always be placed on the latter.¹³⁴

128 See e.g. International Law Commission, “Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries”, *Yearbook of the International Law Commission*, Vol. 2, Part 2, 2001, pp. 153–154:

In general, in the context of prevention, a State of origin does not bear the risk of unforeseeable consequences ... [D]ue diligence is manifested in reasonable efforts by a State to inform itself of factual and legal components that relate foreseeably to a contemplated procedure and to take appropriate measures, in timely fashion, to address them. Thus, States are under an obligation to take unilateral measures to prevent significant transboundary harm or at any event to minimize the risk thereof.

Note that “the ILC’s description of the due diligence principle can be analogized to international law generally when the operative rule at issue imposes a due diligence obligation” (R. P. Barnidge, above note 96, p. 117).

129 30th International Conference of the Red Cross and Red Crescent, Resolution 3, 2007, para. 2.

130 UN SC Res. 681, above note 50, para. 3.

131 *Ibid.*, para. 5.

132 A. Devillard, above note 9, p. 113.

133 T. Pfanner, above note 48, p. 280.

134 Marco Sassòli, “State Responsibility for Violations of International Humanitarian Law”, *International Review of the Red Cross*, Vol. 84, No. 846, 2002, p. 401 : “For a branch of law that applies in a fundamentally anarchic, illegal and often lawless situation such as armed conflicts, the focus of implementing mechanisms is and must always be on prevention.”

Thus, considering this preventive component as part of the duty to ensure respect would be coherent not only with the means whereby IHL is usually implemented,¹³⁵ but also with the manner in which CA 1 itself has often been framed.¹³⁶

All in all, and despite the need for further State practice and academic research elucidating the scope of this international legal obligation, it seems that prevention is inextricably intertwined with the duty to ensure respect. Failing to acknowledge this preventive aspect would probably be inconsistent with the *raison d'être* of the Conventions, one of their main goals being to forestall the transgression of their rules. In fact, CA 1 is only one of the mechanisms envisioned by the drafters of the Geneva Convention to attain this objective. Other examples include:

1. The supervisory role of the Protecting Powers.¹³⁷
2. The obligation to disseminate the content of the Geneva Conventions as widely as possible, “in time of peace as in time of war”.¹³⁸
3. The obligation to enact legislation to provide effective penal sanctions for and to repress grave breaches of the Geneva Conventions and AP I.¹³⁹
4. The obligation to “take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than ... grave breaches”.¹⁴⁰ According to the Commentaries, the latter implies that States must do all they can to prevent the commission or repetition of acts contrary to the Conventions.¹⁴¹

Moreover, part of the reason why States must bring ongoing IHL abuses to an end – in conformity with CA 1 – is also to prevent them from occurring again in the future.¹⁴²

Hence, it seems that CA 1 can and must be raised on its own whenever it helps to safeguard respect for the Geneva Conventions, and arguably for the whole body of

135 See e.g. Y. Sandoz, above [note 111](#), p. 299: “Il nous a paru que l’on pouvait distinguer trois types de moyens [pour la mise en œuvre du droit international humanitaire]: le moyens préventifs ... les moyens de contrôle ... [et] les moyens de répression.”

136 B. Kessler, above [note 68](#), p. 499, with further references:

Article 1 does not state anything about how the States shall ensure that the Conventions are respected ... Under the assumption that “ensuring respect” of a rule means making someone respect it, there are four means of enforcement: (1) repressive action against any violation of the Conventions, (2) help by one State to enable another State to fulfil its duties under the Conventions, (3) control, and (4) prevention.

137 Geneva Conventions, Arts 10/10/10/11.

138 Geneva Conventions, Arts 47/48/127/144.

139 Geneva Conventions, Arts 49/50/129/146; AP I, Arts 11, 85 and 86.

140 Geneva Conventions, Arts 49(3)/50(3)/129(3)/146(3).

141 Jean Pictet (ed.), *Commentary: I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 1952, p. 367: “The expression ‘faire cesser’, employed in the French text, is open to various interpretations. In our opinion it covers everything a State can do to prevent the commission, or the repetition, of acts contrary to the Convention.”

142 A. Devillard, above [note 9](#), p. 97. For a brief analysis on the importance of prevention and deterrence in the context of international criminal law, see ICTY, *The Prosecutor v. Blaskic*, Case No. IT-95-14-A, Judgment (Appeals Chamber), 29 July 2004, para. 678.

IHL, including when it comes to the obligation to prevent violations of its rules. A very clear example thereof can be found in the context of the Arms Trade Treaty (ATT).¹⁴³

The ATT and the obligation ensure respect

Modern efforts to control the humanitarian consequences of the arms trade can be traced back to the Brussels Conference Act of 1890. Therein, approximately twenty nations prohibited the introduction of firearms and ammunition to the Congo basin, with a view to curbing their “pernicious and prevailing role” in the slave trade and wars in Africa.¹⁴⁴ Since then, international law has struggled to find an adequate balance between the legality of arms and the need to rein in some of their more deleterious effects. This debate has been gaining momentum in the last fifteen years, culminating with the recent adoption of the ATT.

In 1998, over twenty like-minded States gathered in Oslo for the first time to specifically discuss the challenges raised by the spread of small arms.¹⁴⁵ They drew up a document wherein they recognized the humanitarian and security concerns linked to the arms trade and enumerated a series of existing norms that needed to be developed in order to address the problem. In particular, they referred to the obligation to respect and ensure respect for IHL.¹⁴⁶ A year later, in a study entitled *Arms Availability and the Situation of Civilians in Armed Conflict*, the ICRC, concerned about “the proliferation of weapons in the hands of new and often undisciplined actors”,¹⁴⁷ recommended that States “review their policies concerning the production, availability and transfer of arms and ammunition” in light of their responsibility under CA 1.¹⁴⁸ Since then, numerous codes of conduct on arms exports have incorporated compliance with IHL as part of their criteria for authorizing transfers. For instance, the Organization for Security and Cooperation (OSCE) *Document on Small Arms and Light Weapons* requires participating States to avoid issuing licenses for exports where they deem that there is a “clear risk” that the arms in question might “threaten compliance with international law governing the conduct of armed conflict”.¹⁴⁹ Instruments laying down similar criteria include the Organization of American States (OAS) Model Regulations for the Control of Brokers of Firearms,¹⁵⁰ the Economic Community of West African States (ECOWAS) Convention on Small Arms and

143 General Assembly, *Arms Trade Treaty*, UN Doc. A/Res/67/234 B, 2 April 2013.

144 General Act of the Brussels Conference Relative to the African Slave Trade, Brussels, 2 July 1890, Art. VIII.

145 For a comprehensive study of the norm-building process that preceded the ATT, see Denise García, *Small Arms and Security: New Emerging International Norms*, Routledge, London, 2006.

146 *An International Agenda on Small Arms and Light Weapons: Elements of a Common Understanding – Concerns and Challenges*, Oslo, 1998, cited in D. García, above note 145, pp. 46–58.

147 ICRC, *Arms Availability and the Situation of Civilians in Armed Conflict*, Geneva, 1999, p. 1.

148 *Ibid.*, p. 24.

149 308th Plenary Meeting of the OSCE, *Document on Small Arms and Light Weapons*, FSC.DOC/1/00/Rev.1, 24 November 2004, Section III(A)(2)(b)(v).

150 OAS, Model Regulations for the Control of Brokers of Firearms, Their Parts and Components and Ammunition, 2003, Art. 5: “The National Authority shall prohibit brokering activities and refuse to grant licenses if it has reason to believe that the brokering activities will, or seriously threaten to ... (c) lead to the perpetration of war crimes contrary to international law.”

Light Weapons¹⁵¹ and the Best Practice Guidelines for the Implementation of the Nairobi Declaration.¹⁵² All of these conventions and guidelines tend to focus on the likelihood of prospective IHL violations in order to establish whether weapons can be legitimately transferred. Thus, their main focus is to “avert the occurrence” of such abuses in the future – that is, to prevent them.¹⁵³

During the 28th International Conference of the Red Cross and Red Crescent, the High Contracting Parties to the Geneva Conventions endorsed a similar interpretation of the role played by CA 1 vis-à-vis the prevention of IHL violations in this domain:

In recognition of States’ obligation to respect and ensure respect for international humanitarian law, controls on the availability of weapons are strengthened – in particular on small arms, light weapons and their ammunition – so that weapons do not end up in the hands of those who may be expected to use them to violate international humanitarian law.¹⁵⁴

The UN General Assembly gave further impulse to these efforts by adopting Resolution 61/89 of 2006, where it requested the creation of a group of experts to examine the “feasibility, scope and draft parameters for a comprehensive, legally binding instrument establishing common international standards for the import, export and transfer of conventional arms”.¹⁵⁵ However, even at that time, it was clear that – from an IHL perspective – if the ATT negotiations succeeded, the new legal instrument would only complement the already existing obligation to ensure respect by others.¹⁵⁶ That is precisely the reason why a solid majority of States supported from the outset the view that respect for IHL should become one of the main criteria in the assessment of arms transfers within the treaty.¹⁵⁷ As a

151 ECOWAS, Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials, 2006, Art. 6(2): “A transfer shall not be authorised if its authorisation violates obligations of the requesting States, as well as those of Member States, under international law, including ... universally accepted principles of international humanitarian law.”

152 Regional Centre on Small Arms and Light Weapons, *Best Practice Guidelines for the Implementation of the Nairobi Declaration and the Nairobi Protocol on Small Arms and Light Weapons*, 2005, p. 25:

State Parties shall not authorize transfers which are likely to be used ... (ii) for the commission of serious violations of international humanitarian law; (iii) in acts of aggression against another State or population, threatening the national security or territorial integrity of another State, or threatening compliance with international law governing the conduct of armed conflict.

153 N. Levrat, above note 59, p. 277.

154 28th International Conference of the Red Cross and Red Crescent, *Agenda for Humanitarian Action*, Geneva, 2003, final goal 2(3). In a report submitted to High Contracting Parties during the 31st International Conference of the Red Cross and Red Crescent, the ICRC reiterated that the obligation to ensure respect “entails a responsibility [for all States] to make every effort to ensure that the arms and ammunition they transfer do not end up in the hands of persons who are likely to use them in violation of IHL”: ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflict*, report of the 31st International Conference of the Red Cross and Red Crescent, October 2011, p. 46.

155 UN GA Res. 61/89, UN Doc. A/Res/61/89, 18 December 2006, para. 2.

156 Daniel Thürer, *International Humanitarian Law: Theory, Practice, Context*, The Hague Academy of International Law, 2011, p. 223.

157 *Ibid.*, p. 224.

matter of fact, evaluating the level of respect for IHL before authorizing the export of arms has been considered an international legal obligation of a customary nature.¹⁵⁸

The ATT was adopted by the UN General Assembly in April 2013.¹⁵⁹ It included a very explicit reference to CA 1. Indeed, the duty to “[r]espect[] and ensur[e] respect for international humanitarian law in accordance with, *inter alia*, the Geneva Conventions of 1949” was deemed one of the fundamental principles pervading the whole document.¹⁶⁰ Against the backdrop of this principle, Article 6(3) of the ATT established that a State Party must not authorize any transfers of conventional arms if it has knowledge that the weapons would be used in the commission of grave breaches to the Geneva Conventions of 1949, attacks against civilians or civilian objects, or other war crimes as defined by international agreements to which it is a party. Even if the export is not prohibited under Article 6, the following Article prohibits transfer if there is an “overriding risk” that the weapons might be used to commit or facilitate a serious violation of IHL.¹⁶¹ As for the criteria States may use to assess the risk of transferring arms or military equipment, the ICRC has proposed a variety of indicators that include the recipient’s past and present IHL record, the recipient’s alleged intentions – as expressed through its own commitments – and the recipient’s capacity to ensure that the weapons in question are not used in a manner that is inconsistent with IHL.¹⁶²

It should be noted that, as previously seen, the obligation to ensure respect cannot be circumscribed to the mere prohibition of aiding or assisting in the commission of IHL violations.¹⁶³ Therefore, in the context of arms transfers, CA 1 also prescribes a series of positive obligations that go beyond the wording of Article 16 of the Draft Articles on Responsibility of States. According to the International Law Commission, aid or assistance are only unlawful when the assisting State has knowledge of the circumstances that make the conduct illegal and decides to carry out such conduct with a view to facilitating the violation. In the case of arms exports, Draft Article 16 can be translated in the following manner: State C would only incur international responsibility if it sells weapons to State A in order to facilitate the infringement of IHL against State B, and with knowledge that the weapons will be used for such purpose. In contrast, CA 1 would require State C to assess whether State A is likely to use the weapons to violate IHL in an armed conflict with State B, and to refrain from transferring the arms if there is a substantial or clear risk that they could be used in that manner.¹⁶⁴

158 Zeray Yihdego, *The Arms Trade and International Law*, Hart Publishing, Portland OR, 2007, pp. 226–232, with further references.

159 UN GA Res, 67/234, UN Doc. A/Res/67/234 B, 2 April 2013 (Armes Trade Treaty).

160 *Ibid.*, 5th principle of the preamble.

161 *Ibid.*, Arts 7(1)(b)(i) and 7(3).

162 ICRC, *Arms Transfer Decisions: Applying International Law Criteria*, Geneva, 2007, pp. 9–15.

163 M. Sassöli, above note 134, p. 413.

164 *Ibid.*, pp. 412–413; Maya Brehm, “The Arms Trade and States’ Duty to Ensure Respect for Humanitarian and Human Rights Law”, *Journal of Conflict and Security Law*, Vol. 12, No. 3, 2008, pp. 375–377 and 386; Alexandra Boivin, “Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons”, in *International Review of the Red Cross*, Vol. 87, No. 859, 2005, pp. 475–479.

At any rate, the legal debate that led to the adoption of the ATT is but one example of the ways in which CA 1 can contribute to endeavours to improve compliance with IHL. There can be no doubt as to the great potential of the duty to ensure respect by others when it comes to enforcing IHL rules in other domains – for instance, by clarifying the obligation of multinational forces during the transfer of detainees.¹⁶⁵

Conclusion

CA 1 epitomizes the commitment of States to avoid IHL violations taking place in the future. It does so by creating a framework whereby States not party to a particular armed conflict must use every means at their disposal to ensure that the belligerents comply with the Geneva Conventions and AP I, and probably with the whole body of IHL.¹⁶⁶ As shown by this article, CA 1 is not a mere entitlement to act. Instead, it imposes upon third States an international legal obligation to ensure respect in all circumstances. This obligation, which applies in international and non-international armed conflicts, is one of due diligence: to avoid breaching it, States must make every lawful effort in their power, regardless of whether they attain the desired result or not. For that purpose, they can choose among the different means at their disposal – with the exception of military intervention, which would only be lawful if undertaken in accordance with the UN Charter. That said, as in many other branches of international law, the larger the means, the greater the responsibility.

With regard to the content of the obligation to ensure respect in its external dimension, CA 1 clearly includes a duty of third States not to encourage persons or groups engaged in an armed conflict to act in violation of the Geneva Conventions, nor to knowingly aid or assist in the commission of such violations. Nonetheless, CA 1 goes well beyond this negative duty. Firstly, it includes an obligation to put an end to ongoing IHL violations. Secondly, the obligation to ensure respect encompasses the duty to prevent breaches of IHL from occurring.

In a world where compliance with existing rules seems to be the main hurdle to limiting the effects of armed conflict and to adequately protecting

165 See e.g. Cordula Droège, “Transfer of Detainees: Legal Framework, Non-Refoulement and Contemporary Challenges”, *International Review of the Red Cross*, Vol. 90, No. 871, 2008, p. 687. Droège makes the link between the transfer of detainees and the obligation to ensure respect, which – as already indicated – also applies to multinational forces:

Beyond the responsibility arising from direct attribution to them, international organizations are also bound by the obligation to ensure respect for international humanitarian law. Thus, if a multinational operation is carried out under the umbrella of an international organization, that organization is particularly well placed to take steps to prevent and terminate violations of international humanitarian law committed by the State. In such cases it should exert its influence as far as possible within the framework of its relations with the state concerned.

166 This is what can be deduced from current State practice, including the above-mentioned resolutions adopted by the High Contracting Parties during the International Conferences of the Red Cross and Red Crescent.

persons who are not or are no longer participating in hostilities, underscoring the preventive component of the legal obligation established by CA 1 is of paramount importance. Third States, thanks to their more neutral stance vis-à-vis the dynamics of the conflict, are in a privileged position to ensure that the “general principles of humanitarian law to which the Conventions merely give specific expression”¹⁶⁷ are respected universally. It can only be hoped that they will live up to the commitment they made when they subscribed to a body of law whose main purpose is precisely to prevent violations of the very same rules it enunciates.

167 ICJ, *Nicaragua v. United States of America*, above [note 45](#), para. 220.