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Common Article 1 of the Geneva Conventions and the
Obligation to Ensure Respect

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Abstract

The obligation to respect and ensure respect is codified by common Article 1 of the Geneva Conventions and in Article 1(1) of Additional Protocol I. The following research essay shall consider the second portion of this obligation, that is the obligation to ensure respect, and in particular the responsibilities of third States observing conflicts to which they are not a party. There are two competing interpretations of this obligation. One interpretation, favoured by the International Committee of the Red Cross in their 2016 Updated Commentary, requires that States are required to adopt all appropriate measures to ensure that International Humanitarian Law is observed universally. An alternate interpretation promotes a far more restricted interpretation of this obligation. This research essay concludes that the obligation to take measures to put an end to on-going violations and to actively prevent their occurrence is not supported by the initial intention of the High Contracting Parties or the subsequent practice of States. Rather common Article 1 call for a more narrow interpretation whereby States have an obligation to avoid encouraging international humanitarian law violations and to ensure respect of international humanitarian law within their respective jurisdiction.

Key Words

International Humanitarian Law – Common Article 1 – Geneva Conventions – Obligation to Ensure Respect

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Part I – Introduction

War is one of the most ancient and primal forms of human interaction. It has been described as inevitable, invading the minds of statespersons like “penetrating cosmic dust”¹. It has also been described as an illogical phenomenon, a paradox as put by Tolstoy:²

That is to say, an event took place in diametrical opposition to all laws, human and divine... These millions of humans rushed into the perpetration of very hideous crime: Murder, pillage, theft, fraud, forgery, treachery, incendiarism – the judicial annuals of the whole world could not furnish so long or so black a list in the course of many centuries – and yet those who committed them did not think themselves as criminals!

Currently there are approximately 25 conflicts and a further 20 humanitarian crises, many of which that are ongoing, that represent immediate challenges for the international community. These conflicts and crises – as epitomised by the current situations in Syria and Yemen – are characterised by enormous human suffering and violations of International Humanitarian Law. These conflicts illustrate the most significant challenge faced IHL is not the content or number of rules in this area, but rather how to enforce those rules.

One of the primary obligations that promotes compliance with IHL is the general principle of humanitarian law that States are obliged to respect and ensure respect for IHL³. This principle has been codified by both Common Article 1 of the Geneva Conventions and Article 1(1) of the Additional Protocol I.

Written in the context of the 2016 Updated ICRC Commentary of the 1949 Geneva Convention I and the on-going debate this research essay shall address the scope of the obligation under CA1, particularly as regards the obligations of third States. This paper argues that the interpretation adopted by the ICRC in the 2016 Updated Commentary is unduly broad. In contrast, the initial intention of the High

¹ I.S. Bloch *Modern Weapons and Modern War* (Grant Richards, London, 1900) at 1 xiii.

² Leo Tolstoy *War and Peace* translated by Louise and Aylmer Maude (David Campbell, London, 1992) at Book 9, Chapter LX.

³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 at 220.

Contracting Parties, and the subsequent practice of states, requires a much narrower interpretation of the obligation under CA1.

This research essay shall first consider the initial intention of the High Contracting Parties. It will then examine whether a broader interpretation is supported by the subsequent conduct of States, specifically in the context of third state responses to humanitarian crises. Finally, this essay shall conclude with an interpretation of CA1 that is grounded in the initial intention of the High Contracting Parties and subsequent practice of States.

Part II – International Humanitarian Law and the ICRC

1. International Humanitarian Law, the Geneva Conventions and Common Article 1

IHL has been described as a branch of law that has been ‘contaminated’ by ethics and idealism⁴. As identified by J Pictet, IHL also constitutes, “that considerable portion of international public law which owes its inspiration to a feeling for humanity and which is centred on the protection of the individual [which] appears to combine two ideas of a different character, one legal, the other moral”⁵. Be this as it may, IHL is significant in its enunciation of clear limitations on the force used against combatants and civilians in times of conflict and pronounces the humanitarian principles that are intended to offer protection to those caught in areas of conflict and crisis⁶.

The Geneva Conventions are currently the major IHL conventions, and having been ratified by 196 States, are universal in their scope and application⁷. These conventions have given expression to the “elementary considerations of humanity”⁸, and establish the humanitarian principles by which the signatory countries are to treat an enemy’s military and civilian nationals in times of war.

⁴ J Pictet *International Humanitarian Law*, (ICRC, Geneva, 1955) at 3.

⁵ J Pictet *Humanitarian Law and the Protection of War Victims* (Leyden, Geneva, 1975) at 11.

⁶ *International Humanitarian Law* in G.R. Berridge & L. Lloyd *The Palgrave Macmillan Dictionary of Diplomacy* (3rd ed, Basingstoke: Macmillan Publishers Ltd, London, 2012).

⁷ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226 at 79.

⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 at 218.

CA1 provides one of the core obligations of the Geneva Conventions, specifically regarding the enforcement of IHL:⁹

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

CA1 contains both an obligation to respect and an obligation to ensure respect. The first part of this obligation, the obligation to respect in all circumstances, is uncontentious, and is derived directly from the two 1929 Geneva Conventions: “The provisions of the present Convention shall be respect by the High Contracting Parties in all circumstances”¹⁰. It imposes an obligation that a State must do everything it can to guarantee that its own organs abide by the rules in question¹¹. This provision, in essence, represents a reaffirmation of the principle *pacta sunt servanda*, codified by Article 26 of the Vienna Convention on the Law of Treaties¹². The principle of *pacta sunt servanda* gives expression to the binding force of treaties in international law, establishing the legal relationship and good faith performance obligations between parties¹³.

In contrast the obligation to ensure respect, absent from the earlier 1864 and 1906 Geneva Conventions, goes a step further. While not initially contentious the scope of this obligation has come under increasing scrutiny, specifically regarding the obligations of third states. This obligation is now subject to two competing interpretations.

One interpretation holds that States are not only required to ensure that IHL is respected not only by their own organs and subjects within their respective jurisdictions, but universally by all. This would require that third States not involved in a given armed conflict have a duty to take measures in order to ensure compliance with the Geneva conventions. An alternate and far narrower

⁹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) 75 UNTS 287 (signed 12 August 1949, entered into force 21 October 1950), art 1.

¹⁰ Geneva Convention on the Wounded and Sick (signed 27 July 1929, no longer in force), art 28(1) and Geneva Convention on Prisoners of War (signed 27 July 1929, no longer in force) art 82(1).

¹¹ Luigi Conforelli and Laurence Boisson de Charzournes *Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests* (2000) 82(837) IRRC 67 at 67-68.

¹² Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980) art 26.

¹³ Kirsten Schmalenbach “Article 27: Internal law and observance of treaties” in Oliver Dörr and Kirsten Schmalenbach (eds) *Vienna Convention on the Law of Treaties: A Commentary* (Springer, Berlin, 2012) 453 at 460.

interpretation holds that the obligation to ensure respect applies only in respect to the State's own population and groups under the effective control of the state¹⁴. In accordance with this view, there is no legal obligation to ensure respect for IHL by other States or by foreign non-State actors, only a moral obligation to do so¹⁵.

2. The 2016 Updated ICRC Commentary

The International Committee of the Red Cross is an impartial, neutral and independent organisation whose humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence. Under Article 5 of the Statutes of the International Red Cross and Red Crescent Movement the ICRC is mandated to work for the faithful application of IHL, to take cognisance of any complaints based on alleged breaches of that law, to work for the understanding and dissemination of knowledge of this body of rules and to prepare any development thereof. A necessary corollary of this mission is the vital task of strengthening IHL. It is from this broad mandate that the ICRC derives its task of ensuring that knowledge of IHL is disseminated. A key component of this dissemination is the publication of comprehensive commentaries of the Geneva Conventions, that while not binding have at times been influential in ascertaining the scope of rights and obligations that exist under IHL.

In the Updated 2016 Commentary the ICRC contends that the scope, CA1 of the Geneva Conventions, in particular the obligation to ensure respect for humanitarian law, has expanded significantly since the 1950s. The ICRC maintains that the current practice in this area indicates that the obligation to ensure respect extends to both international and non-international armed conflicts and entails a much broader range of negative and positive duties.

The ICRC Commentary defines CA1 as having both an internal and external elements. The internal aspect covers states obligation to respect and ensure respect for the Conventions by their own armed forces and other persons or groups whose conduct is attributable to them, as well as the whole population over which they

¹⁴ Frits Kalshoven "The Undertaking to Respect and Ensure Respect in All Circumstances: from Tiny Seed to Ripening Fruit" (1999) 2 Y.B. Int'l Human L. 3 at 60.

¹⁵ Hans-Peter Gasser "Ensuring Respect for the Geneva Conventions and Protocols: The Role of Third States and the United Nations" in Hazel Fox and Michael A. Meyer (eds) *Armed Conflict and the New Law. Volume II: Effecting Compliance* (London: British Institute of International Comparative Law, 1993).

exercise authority. The external, and far more controversial, aspect relates to ensuring respect by others, in particular other parties to a conflict regardless of whether the State itself is a party to that conflict. The ICRC provides that the duty to ensure respect sets a clear standard, as ensuring means “to make certain that something will occur or be so” or inversely ‘make sure that (a violation) does not occur’¹⁶. This requires States to take appropriate, even pre-emptive, measures to prevent violations from occurring during both war and peacetime¹⁷.

This obligation imposes duties that are both negative and positive in their application¹⁸. Under the negative obligation States must abstain from encouraging, aiding or assisting in violations of the conventions. The High Contracting Parties may neither encourage, nor aid or assist in violations of the Conventions by parties to a conflict. The positive obligations require states to take proactive steps to bring violations of the Conventions to an end and bring the erring party back to an attitude of respect for the Conventions. States must do everything reasonably in their power to prevent and bring such violations to an end¹⁹. It should be noted that such an obligation would take the form of an obligation of means rather than result, whereby States would be required to take reasonable measures rather than achieve a specific outcome²⁰. In this way the external dimension of the obligation to ensure respect for the conventions goes well beyond the principle of *pacta sunt servanda*.

The Commentaries of the ICRC to the 1949 Geneva Conventions and to the Additional Protocol I unequivocally support this broader interpretation and while not binding have enormously influenced the doctrinal debate²¹. However, the commentary of the ICRC exhibits a clear tendency towards an interpretation of IHL that is conducive to its purpose “to work for the faithful application of IHL applicable to armed conflict”. In this way the commentary can be subjected to the critique that it is not entirely objective is an instrument through which the ICRC can promote an interpretation of IHL that accords with the organisations own

¹⁶ ICRC *Commentary on the First Geneva Convention* (2nd ed, Cambridge University Press, 2016) at 145.

¹⁷ ICRC *Commentary on the First Geneva Convention* (2nd ed, Cambridge University Press, 2016) at 145.

¹⁸ ICRC *Commentary on the First Geneva Convention* (2nd ed, Cambridge University Press, 2016) at 154.

¹⁹ ICRC *Commentary on the First Geneva Convention* (2nd ed, Cambridge University Press, 2016) at 145.

²⁰ Riccardo Pisillo-Mazzeschi “The Due Diligence Rule and the Nature of the International Responsibility of States” (1992) 35 *German Y.B. Int'l L.* 10 at 48.

²¹ Carlo Focarelli “Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?” (2010) 21 *EJIL* 125 at 127.

mission and objective for stricter compliance with IHL²². Consequently, it has become necessary to consider whether the ICRC's commentary is in fact based in either the initial intention of the High Contracting Parties or the subsequent developments and state practice in this area.

Part III – Initial Intention of the High Contracting Parties

1. Interpreting a Treaty

Interpretation, the process of establishing the true meaning of a treaty, is indispensable in the understanding the scope and application of a treaty provision. The Vienna Convention on the Law of Treaties sets out the rules and elements to be taken into account during the process of interpretation²³. Rather than a set of prescriptive rules the Vienna Convention lays down a single general rule accompanied by principles on the elements and means of treaty interpretation that are generally accepted and drawn from relevant international practice²⁴. In this way the process of interpreting a treaty is a unity, a single combined operation, whereby the various elements enumerated in the paragraphs of the Article are placed on the same footing²⁵.

The general rule is set out by Article 31(1) of the Vienna Convention which provides that interpretation must be based on the ordinary meaning to be given to the terms of the treaty in their context and in light of the object and purpose of the treaty. As expressed by the ICJ this is because the wording of a treaty is presumed to be the authentic expression of the intention of the Parties²⁶. As provided by Article 32 in ascertaining the initial intention of the parties information and material outside the text of a treaty can also be referred to. Primarily, recourse may be had to the preparatory materials and the circumstances of its conclusion. While these preparatory materials, commonly referred to in its French version as "*travaux préparatoires*", are deemed to be only a supplementary means of

²² F. Bugnion *The International Committee of the Red Cross and the Protection of War Victims* (Macmillan, Oxford, 2003) at 914.

²³ I Sinclair, *The Vienna Convention on the Law of Treaties*, (2nd ed, Manchester University Press, Manchester, 1984) at 117.

²⁴ Oliver Dörr "Article 31: General rule of interpretation" in Oliver Dörr and Kirsten Schmalenbach (eds) *Vienna Convention on the Law of Treaties: A Commentary* (Springer, Berlin, 2012) 521 at 523.

²⁵ *Golder v United Kingdom* (A/18) (1979-80) 1 E.H.R.R. 524 at 30.

²⁶ *Territorial Dispute (Libya v Chad) (Merits)* [1994] ICJ Rep 6 at 41; *Legality of the Use of Force (Serbia and Montenegro v Belgium) (Preliminary Objections)* [2004] ICJ Rep 279 at 100.

interpretation, they are still significant and often examined in order to ascertain the true intention of the parties. As *Gardiner* puts it, courts and tribunals tend to seize on anything that looks helpful²⁷.

2. Initial Intention of the High Contracting Parties

In the context of CA1 at one time the broad interpretation of the obligation to ensure respect was partially based on the initial intention of High Contracting Parties to the 1949 Geneva Conventions and to the Additional Protocol I, that they “fully understood and wished to impose a duty on each Party to the Conventions” to ensure universal compliance with IHL²⁸. This interpretation was supported by the initial 1952 Commentary to the Geneva Conventions.

2.1. The Original Commentary

The Commentaries published by the ICRC in the 1950s favour an interpretation of CA1 that includes an obligation to ensure respect of the conventions by others. As unequivocally enunciated by their author Jean Pictet:²⁹

In 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 Conventions.

Pictet places an external element of the obligation in CA1 as central to the system of protection underpinning the Geneva Conventions. Pictet maintains that in order to ensure a proper working system of protection, as envisaged by the Geneva Conventions, the Contracting Parties should not be content to merely apply the provisions themselves, but “should do everything in their power to ensure that the humanitarian principles underlying the Conventions are universally applied”³⁰. It should be noted, in contrast to the updated commentary, the original commentary is not clear whether CA1 manifests itself as an entitlement to act or an obligation to do so. The diction adopted by Pictet, “should” and “may”, has the immediate

²⁷ R Gardiner *Treaty Interpretation* (2nd ed, Oxford University Press, Oxford, 2017) at 302.

²⁸ Claude Pilloud (ed) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff, Geneva, 1987) [*Commentary on the Additional Protocols*] under article 1(1).

²⁹ J. Pictet *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 1958, at 16 available at <<https://www.icrc.org/ihl.nsf>>.

³⁰ J. Pictet *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 1958, at 16 available at <<https://www.icrc.org/ihl.nsf>>.

connotations of an entitlement, whereby CA1 merely empowers or encourages States to take action rather than obliges them to do so. Interestingly, the French version of the original commentaries is more unequivocal in differentiating between an entitlement to act (*pouvoir*) and an obligation (*devoir*), referring only to an obligation to act³¹. Such an interpretation, whereby Parties are merely obliged to act, was initially held by some to be inconsistent with the term “undertake”. As noted by Frédéric Sordet who declared that “the private right of belligerents was substituted [for] the general interest of humanity, which demanded scrutiny, no longer as a question of right, but of duty”³². Here, undertake is clearly interpreted as manifesting a duty to take positive and proactive measures when faced with violations of IHL and is consistent with the updated commentary which clearly provides for an obligation under CA1 rather than an entitlement to act³³.

2.2. The Actual Initial Intention

However, the position adopted by the initial commentary is no longer as unassailable as it once was. As pointed out by Fritz Kalshoven “there is nothing in the published records of the Conference that supports [the ICRC’s] contention”³⁴. Kalshoven’s interpretation is supported by others who have concluded that when it was adopted CA1 was not intended to create a wide external obligation³⁵.

The phrase “shall be respected by the High Contracting Parties in all circumstances” appears in both the 1929 Geneva Conventions for the Amelioration of the Condition of the Wounded and Sick and Armies in the Field and the Treatment of Prisoners of War³⁶. These provisions have been consistently and unanimously interpreted as imposing, for the first time, the obligation to abide by

³¹ Jean Pictet *Commentaire: IVème Convention de Genève Relative au Traitement des Prisonniers de Guerre*, 1960 at 21 available at <<https://www.icrc.org/fr/publication/0205-commentaires-des-conventions-de-geneve-du-12-aout-1949-volume-iii>>.

³² Frédéric Sordet, *The Geneva Conventions of 1949: The Question of Scrutiny* (ICRC, Geneva, 1953) at 21.

³³ ICRC, *Commentary on the First Geneva Convention*, (2nd ed, Cambridge University Press, 2016) at 154.

³⁴ Frits Kalshoven “The Undertaking to Respect and to Ensure Respect in all Circumstances: from a Tiny Seed to Ripening Fruit” (1999) 2 Y.B. Int’l Human L. 3 at 54.

³⁵ R. Geiss “The Obligation to Respect and Ensure Respect for the Conventions” in *The 1949 Geneva Conventions – A Commentary* Andrew Clapham, Paola Gaeta and Marco Sassoli (eds), (Oxford University Press, Oxford, 2015) at 121; also see also Adam Roberts “The Laws of War: Problems of Implementation in Contemporary Conflicts” (1995-1996) 6 Duke J. Comp. & Int’l L. 11 at 29-30.

³⁶ Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (signed 27 July 1929, no longer in force) art 25; and Convention Relative to the Treatment of Prisoners of War (signed 27 July 1929, no longer in force) art 82.

the rules of the Conventions regardless of the behaviour of the other contracting parties³⁷. CA1 of the four 1949 Geneva Conventions took the additional step asserting that “the High Contracting Parties undertake to respect and to ensure respect for the [Geneva Conventions] in all circumstances”. As noted by the ICJ, this wording, and the position at the forefront of the Convention, are clearly indicative of an intent to strengthen the formula already found in the 1929 Conventions, through placing an obligation to ensure respect of IHL by those within the jurisdiction and control of the state, not just the organs of the state³⁸. As regards the scope of this obligation, it was the understanding of the High Contracting parties that the obligation to ensure respect for the conventions referred specifically to their respective populations and jurisdictions³⁹.

Interestingly, the Final Record of the diplomatic Geneva Conference of 1949 offers little illumination as to the understanding or scope of CA1⁴⁰. But what was discussed reflects a more limited understanding of the obligation to ensure respect that what was contended by the ICRC. In regards to CA1 it was stated that the obligation was along the lines of Articles 25 and 82 of the 1929 Conventions⁴¹. Mr. Maseca, representing Italy, noted that the term “ensure respect” was “either redundant or introduced a new concept into international law”⁴². These words are taken to suggest the significance of CA1, as if the phrase were merely redundant it would have resulted in a deletion. More significant are the words of Mr. Pilloud speaking on behalf of the ICRC:⁴³

In submitting its proposals to the Stockholm Conference, the International Committee of the Red Cross emphasised that the Contracting Parties should not confine themselves to applying the Conventions themselves, but should

³⁷ Frits Kalshoven “The Undertaking to Respect and to Ensure Respect in all Circumstances: from a Tiny Seed to Ripening Fruit” (1999) 2 Y.B. Int’l Human L. 3 at 7-10.

³⁸ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16 at 53; see also Frits Kalshoven “The Undertaking to Respect and to Ensure Respect in all Circumstances: from a Tiny Seed to Ripening Fruit” (1999) 2 Y.B. Int’l Human L. 3 at 7-10; and Condorelli and Boisson de Chazournes, “Common Article 1 of the Geneva Conventions Revisited: Protecting Civilian Interests” (2000) 82(837) IRRC 67 at 85-86.

³⁹ Frits Kalshoven “The Undertaking to Respect and to Ensure Respect in all Circumstances: from a Tiny Seed to Ripening Fruit” (1999) 2 Y.B. Int’l Human L. 3.

⁴⁰ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 separate opinion of Judge Higgins at 39.

⁴¹ Final Record, vol. II B, at 26 (7th meeting, 17th May 1949).

⁴² Final Record, vol. II B, at 53 (9th meeting, 25th May 1949) (Italy).

⁴³ Final Record, vol. II B, at 53 (9th meeting, 25th May 1949) (Norway and US).

do all in their power to see that the basic humanitarian principles of the Conventions were universally applied

None of the delegates opposed this statement, nor did it arouse any debate. Consequently, the absence of discord has been interpreted by some as acquiescence to a broader interpretation of CA1, whereby universal application of the 1949 Geneva Conventions should not be restricted to the domestic level⁴⁴. However such an interpretation appears isolated and conflicts with the 1949 Diplomatic Conference records which do not suggest an awareness on the part of government delegates, or indeed ICRC participants, that the phrase to ensure respect implied anything beyond internal observance⁴⁵. Kalshoven's investigation of the drafting and negotiating history of the 1949 Conventions and the 1977 Additional Protocols reveals that "no-one at the Conference of 1949 or 1977 ever discussed the text of the Article in terms even remotely resembling the ICRC's interpretation, let alone... qualified it as an obligation"⁴⁶. At no point was the possibility that the expression "ensure respect" could mean an undertaking that each state had to take measures against other states to ensure compliance mentioned or even discussed. What can be inferred from this is that the scope of article 1, was not intended to be universal, in these circumstances universally was taken to mean, "by all concerned" or "the whole population"⁴⁷. In this context, the words to ensure respect take on another meaning: "to ensure that the whole population of a country which was party to the conventions would respect the law in all circumstances, even perhaps in the case of civil war"⁴⁸.

This analysis of the available evidence suggests that the inclusion of the expression "ensure respect" in CA 1 was not meant to go beyond the commitment taken by State Parties to guarantee the respect of the Geneva Conventions internally. It is therefore reasonable to conclude that CA1 when it was adopted did

⁴⁴ Éric David *Principes de droit des conflits armés* (3rd ed, Bruylant, Brussels, 2002) at para 3.13.

⁴⁵ Adam Roberts, "The Laws of War: Problems of Implementation in Contemporary Conflicts" (1995-1996) 6 *Duke J. Comp. & Int'l L.* 11 at 29-30.

⁴⁶ Frits Kalshoven, "The Undertaking to Respect and to Ensure Respect in all Circumstances: from a Tiny Seed to Ripening Fruit" (1999) 2 *Y.B. Int'l Human L.* 3 at 52.

⁴⁷ Condorelli and Boisson de Chazournes, "Common Article 1 of the Geneva Conventions Revisited: Protecting Civilian Interests" (2000) 82(837) *IRRC* 67 at 69.

⁴⁸ Adam Roberts, "The Laws of War: Problems of Implementation in Contemporary Conflicts" (1995-1996) 6 *Duke J. Comp. & Int'l L.* 11 at 29-30.

not mean to confer an external dimension to the obligation for State Parties to ensure respect of the Conventions by other states⁴⁹.

Part IV – A Changing Interpretation

1. Evolution of a Treaty

The presumption established through an examination of the original text of a treaty, and the corresponding intention of the contracting parties, is not final⁵⁰. As provided by Article 31(3) of the Vienna Convention attention must also be cast towards the subsequent developments and the current consensus and understanding of the parties at the time of interpretation⁵¹. For current purposes the provision of significance is Article 31(3)(b) which provides that in interpreting a treaty account must be taken of “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”⁵². The particular value of subsequent practice is long established, and is now well developed in the practice of international courts and tribunals⁵³.

The subsequent practice of the parties in implementing the treaty constitutes objective evidence of their understanding as to the meaning of the treaty and their obligations. Such a provision is significant because it allows for the meaning of a treaty provision to be informed by changing circumstances in both the reality in which it is applied and the corresponding understanding of the contracting parties.

This is particularly relevant to the interpretation of the Geneva Conventions as the reality in which they are applied has changed significantly since 1949. Armed conflicts have become increasingly complex, with the cycles of hostilities being sparked by political, ethnic, national or religious grievances and the struggle for

⁴⁹ R. Geiss “The Obligation to Respect and Ensure Respect for the Conventions” in *The 1949 Geneva Conventions – A Commentary*, Andrew Clapham, Paola Gaeta and Marco Sassoli (eds) (Oxford University Press, Oxford, 2015) at 120.

⁵⁰ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16 at 53.

⁵¹ Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980) art 31(3).

⁵² Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980) art 31(3)(b).

⁵³ For the jurisprudence of the ICJ see the references provided by the Court in *Kasikili/Sedudu Island (Botswana v Namibia)* [1999] ICJ Rep 1045 at para 50.

critical resources⁵⁴. These changes represent a difficult challenge for IHL to overcome. While some of these difficulties, can be attributed to the difficulty that law has keeping pace with an evolving reality, which has become more and more complex, many more can be attributed to the specific weaknesses of IHL⁵⁵. It is these deficiencies, the egregious violations of IHL by both state and non-state actors, and the need to afford to provide basic protections of IHL to combatants and civilians that has created an appetite to expand to scope of CA1 so as to fill any current gaps in IHL and thus uphold the core objectives of IHL of protecting human life, physical integrity and dignity⁵⁶.

1.1. State Practice and *Opinio Juris*

However, these subsequent developments must also be supported by state practice, that illustrates a consensus amongst states supporting the development of the new rule. Whether in the interpretation of treaties or development of customary international law, evidence of state practice is essential. As noted by Lord Alverstone, “the mere opinions of jurists, however, eminent or learned, that it out to be so recognised, are not in themselves sufficient”⁵⁷. In order to establish that a rule is binding what is required is a combination of state practice and *opinio juris*. State practice is what is said and done by states, while *opinio juris* represents the belief, on the part of governments, that their conduct is obliged by international law. These requirements are well established in the jurisprudence of the ICJ. As enunciated by the Court in the *North Sea Continental Shelf Case*:⁵⁸

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States

⁵⁴ Martin Van Creveld *On Future War* (Brassey’s, London, 1991) at 192.

⁵⁵ ICRC “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts” (2015) 97(900) IRRC 1427 at 1430.

⁵⁶ Antonio Cassese “Current Challenges to International Humanitarian Law” in Andrew Clapham and Palo Gaeta (eds) *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press, Oxford, 2014) 3 at 9.

⁵⁷ *West Rand Central Gold Mining Company Ltd. v. The King*, [1905] 2 K.B. 391, at p. 407. The dictum was approved by the Privy Council in *Mohan v. Attorney-General for Palestine* [1948] A.C. 351 at p. 369.

⁵⁸ *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) (Merits)* [1969] ICJ Rep 3 at 77.

concerned must therefore feel that they are conforming to what amounts to a legal obligation.

This statement was subsequently affirmed by decisions such as the *Continental Shelf (Libya v Malta)* case, where it was provided that, “it is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States”⁵⁹. Therefore, whether the broad interpretation is an accepted part of IHL requires analysis of relevant state practice and *opinio juris* in this area.

2. Evidence of State Practice and *Opinio Juris*.

It is perhaps surprising that given the strong assertions by the ICRC of the existence of the broad scope of CA1 there is very little evidence of State practice that can be adduced to support the broad interpretation of CA1⁶⁰. As concluded by Hans-Peter Gasser:⁶¹

A brief look at the behaviour of governments leaves no doubt that they do not feel themselves under a legal obligation to act if humanitarian law is being flouted by a party to an armed conflict. If third parties actually do act, they do so if and when they feel that a *demarche* is also in their own interest or if public pressure at home is such that to act seems wiser than to run counter to public opinion

This apparent paucity of state practice is difficult to reconcile with what some have contended as an undeniable external component of the obligation to ensure respect⁶². This is supported by the comments of Cornelio Sommaruga, who was of the view that states only had a moral obligation to act if other states violated IHL⁶³. While some scholars point to an ever growing tendency over the last two decades and some contextual state practice that illustrates the existence and

⁵⁹ *Continental Shelf (Libyan Arab Jamahiriya/Malta) (Merits)* [1985] ICJ rep 13 at 27.

⁶⁰ Condorelli and Boisson de Chazournes “Common Article 1 of the Geneva Conventions Revisited: Protecting Civilian Interests” (2000) 83(837) IRRC 67.

⁶¹ Hans Peter Gasser “Ensuring Respect for the Geneva Conventions and Protocols: The Role of Third States and the United Nations” in Hazel Fox and Michael A. Meyer (eds) *Armed Conflict and the New Law. Volume II: Effecting Compliance* (British Institute of International and Comparative Law, London, 1993) at 32.

⁶² Hans Peter Gasser “Ensuring Respect for the Geneva Conventions and Protocols: The Role of Third States and the United Nations” in Hazel Fox and Michael A. Meyer (eds) *Armed Conflict and the New Law. Volume II: Effecting Compliance* (British Institute of International and Comparative Law, London, 1993) at 32.

⁶³ Frits Kalshoven “The Undertaking to Respect and Ensure Respect in All Circumstances: from Tiny Seed to Ripening Fruit” (1999) 2 Y.B. Int'l Human L. 3 at 60

acceptance of a positive duty⁶⁴, examination of several relevant humanitarian crises and interventions illustrates that the broad interpretation is far from being universally accepted by states.

The proponents of the broader interpretation rely on evidence ranging from the ICRC resolutions, the 1968 Tehran Conference, the adoption of Article 1(1) of Additional Protocol I in 1977, the ICJ's jurisprudence as well as a number of interventions following violations of IHL. The following section will consider whether such reliance is justified.

2.1. 1968 Tehran Conference

The first example of state practice that may be used to support a broader interpretation of CA1 occurs in 1968 in Tehran at the United Nations International Conference on Human Rights, which is often cited as one of the stronger examples supporting a broader interpretation. The preamble of the Resolution XXIII on "Human Rights in Armed Conflicts", adopted at the 1968 Tehran Conference on Human Rights explicitly mentioned the obligation to ensure respect for IHL "by other States"⁶⁵. The Preamble served to remind States 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". However, in spite of the resolution being adopted by sixty seven votes to none, with two abstentions, it is not clear whether the term "responsibility" was understood by the states to impose a legal obligation or merely a moral one⁶⁶.

Once more, Kalshoven disputes the significance of the Resolution XXIII, expressing doubts on construing the resolution as an implicit acceptance of the legal obligation said to be enshrined in CA1⁶⁷. Analogous to the 1949 diplomatic conference in Geneva and the adoption of CA1, at the Tehran Conference there

⁶⁴ K. Dörmann and J Serralvo "Common Article 1 to the Geneva Conventions and the obligation to prevent IHL violations" (2015) 96(896) IRRC 707 at 720; see also Birgit Kessler "The Duty to 'Ensure Respect' under Common Article 1 of the Geneva Conventions: its Implications on International and Non-International Armed Conflicts" (2001) 44 German Y.B. Int'l L. 498 at 509.

⁶⁵ International Conference on Human Rights, Resolution XXIII: Human Rights in Armed Conflict, Teheran, 12 May 1968, preamble para 9, available at: <<https://www1.umn.edu/humanrts/instree/1968a.htm>>.

⁶⁶ Frits Kalshoven "The Undertaking to Respect and to Ensure Respect in all Circumstances: from a Tiny Seed to Ripening Fruit" (1999) 2 Y.B. Int'l Human L. 3 at 43.

⁶⁷ Frits Kalshoven "The Undertaking to Respect and to Ensure Respect in all Circumstances: from a Tiny Seed to Ripening Fruit" (1999) 2 Y.B. Int'l Human L. 3 at 43.

was a clear absence of debate around the adoption of Resolution XXIII. Notably, while the resolution was passed by an overwhelming majority a number of countries, including Tanzania and Mexico amongst several western states, expressed caution that too extensive a right would be too difficult and expensive for many countries to implement⁶⁸. The absence of debate, when appraised in conjunction with these statements, allows for the inference that “the participants at the Conference may not all have been aware of the various possible interpretations”⁶⁹. Subsequent conferences appear to affirm this point with, similar wording being explicitly rejected by the human Rights Council in 2008 regarding the resolution for the “Protection of the human rights of civilians in armed conflict”⁷⁰. The final text of this resolution, in contrast to a draft which reproduced the wording of the 1968 resolution, merely emphasised that “State parties to the Geneva Conventions of 1949 have undertaken to respect and ensure respect for these conventions in all circumstances”⁷¹.

There are other conferences of significance, such as the Diplomatic Conference of Geneva of 1974-77, the International Conference for the Protection of War Victims, the 1993 Vienna World Conference on Human Rights the 26th International Conference of the Red Cross and the Red Crescent of 1995. For the purposes of this essay it is sufficient not note that while these conferences accomplished much in terms of normative developments and the enhancement of enforcement mechanisms, none go as far as to illustrate a consensus amongst states of the existence of an external duty to ensure respect.

2.2. The Jurisprudence of the ICJ

The jurisprudence of the International Court of Justice is significant in determining the scope of CA1. In several instances, the ICJ has confirmed the external

⁶⁸ LAC, SSEA fonds, RG6, ,International Conference on Human Rights, Teheran, 1968, ° box 119, file, pt. 2, ,Telex from San Jose to External re: UN Human Rights Conference Teran, ° 18 April 1968, 1-2; ,Telex from DSLAM to External re: UN Human Rights Conference Teran, ° 18 April 1968, 1; ,Telex from Mexico City to External re: UN Human Rights Conference Teran, ° 23 April 1968, 1.

⁶⁹ Frits Kalshoven, “The Undertaking to Respect and to Ensure Respect in all Circumstances: from a Tiny Seed to Ripening Fruit” (1999) 2 Y.B. Int’l Human L. 3 at 44.

⁷⁰ *Protection of the Human Rights of Civilians in Armed Conflict* HRC Res 9/9 UN. Doc. A/HRC/9/L.21 (2008).

⁷¹ *Protection of the Human Rights of Civilians in Armed Conflict* HRC Res 9/9 UN. Doc. A/HRC/9/L.21 (2008) at 2.

dimension of the obligation to ensure respect as well as its customary international law status⁷².

In the *Military and Paramilitary Activities in and against Nicaragua* case the court maintained that although the United States was not a party to the non-international armed conflict (NIAC) that was occurring in Nicaragua, it remained subject to an obligation to ensure respect for the Geneva Conventions in all circumstances⁷³. The Court further examined the nature of the obligation not to encourage violations of IHL, out of virtue of the duty to ensure respect for IHL, stating that:⁷⁴

There is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to “respect” the Conventions and even “to ensure respect” for them “in all circumstances”, since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression. The United States is thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions

It is important to note that the diction adopted by the ICJ, expresses the view that the duties flowing from the obligation to ensure respect are negative in their application. In other words, the only obligation on the United States was not to encourage violations of IHL⁷⁵. This is particularly interesting when considering the facts of the case. As identified by the ICJ, was the United States “well aware of, at the least, the allegations that the behaviour of the *contras* in the field was not consistent with humanitarian law”⁷⁶. Furthermore, the ICJ recognised that United States by virtue of its support of the *contras*, exercised a degree of influence over them that would have allowed it to do far more than merely refrain from

⁷² *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136.

⁷³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14.

⁷⁴ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 at 220.

⁷⁵ Tomasz Zych “Respect and Ensuring Respect for International Humanitarian Law” (2009) 27 Windsor Y.B. Access Just. 251 at 266.

⁷⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 at 121

encouraging violations of IHL⁷⁷. It is in this context of the influence and knowledge attributed to the United States that the ICJ refrains from suggesting that the United States was required to take any positive steps or to exert its influence over the *contras*. Rather, the ICJ preferred to impose the single negative obligation to simply not encourage such violations.

The ICJ reached a similar conclusion in its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. This opinion is significant because the ICJ found that the legal consequences Israel's violations of obligations included *erga omnes* obligations. As these obligations are by their very nature the concern of all states. Consequently, the ICJ held that all States are under an obligation to ensure compliance with IHL. The ICJ enunciated 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"⁷⁸. The importance of this statement is that it clearly enunciates that the scope of the obligation to ensure respect encompasses every party to the Conventions, regardless of whether they are parties to a conflict⁷⁹.

However, once again, and consistent with the prior jurisprudence, the Court framed these obligations in negative terms, articulating that "all States are under an obligation not to recognise the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation creating by such construction"⁸⁰. The Court did not specify what this duty entailed beyond negative obligations not to recognise or assist. There is no indication that can be elicited from the judgment that the Court considered the duty to manifest positive duties. This aspect of the Courts judgment has been subject to some critique from those who prefer a broader interpretation, articulating that in regard of the consequences for third States, the Courts opinion is "devoid of any discernible

⁷⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 at 256.

⁷⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 at 158.

⁷⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 at 159.

⁸⁰ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 at 159.

elaboration of the rules and principles of international law at instance⁸¹. Some go further by extrapolating upon the ICJ's advisory opinion, attempting to construe the words and reasoning of the Courts as to entail positive, not just negative obligations⁸². However, such views are at odd with the submissions of the States participating in the case, which reveal that the proponents of the broad interpretation were representative of a mere minority⁸³. Consequently, while the ICJ is explicit in its emphasis that the obligation to ensure respect is universal in its character, the Court does not venture to articulate that there are positive duties which flow from the obligation.

Therefore, in summary, while the ICJ has recognised the universal character of the obligation to ensure respect, the court defines the duties flowing from the obligation as being negative, rather than positive. Such an interpretation of the ICJ's jurisprudence is at odds with the ICRC commentary which seeks to impose obligations that are not only universal, but also require positive measure in order to be fulfilled.

2.3. UN Resolutions

The judgments of the ICJ are supplemented by a number of United Nations resolutions that support the recognition of an external dimension and third state obligations. There are a number examples over the last half century where the UN Security Council and the UN General Assembly have in part relied on the obligation to ensure respect to call on third states to take measures in response to IHL violations. Examples include the UN Security Council Resolution 681 where the UN called upon third States to react to the Israeli violations of the Fourth Geneva Convention⁸⁴. This is supported by resolution 45/69 of December 1990, in which the General Assembly requested the Occupying Power to abide by the Fourth Geneva Convention and called upon all States party to that convention "ensure respect by Israel... for the Convention is all circumstances, in conformity

⁸¹ Iain Scobbie "Smoke, Mirrors and Killer Whales: the International Court's Opinion on the Israeli Barrier Wall" (2004) 5 German Law Journal 1107 at 1114 and 1124-1125

⁸² Ardi Imesis, "Critical Reflections on the International Humanitarian Aspects of the ICJ Wall Advisory Opinion" (2005) 99 A.J.I.L 102 at 115.

⁸³ Of the eight interveners that addressed the issue only the Arab States and Egypt suggested that third parties had a positive duty; see Written Statements submitted by Palestine, the Kingdom of Saudi Arabia, the Hashemite Kingdom of Jordan, the Republic of Indonesia, the Swiss Confederation and the Islamic Republic of Pakistan.

⁸⁴ *Territories Occupied by Israel* SC Res 681 S/RES/681 (1990) at operative para 5.

with their obligation under article 1 thereof⁸⁵. Similar examples exist with regard to, Bosnia, Herzegovina and Rwanda where the UN Security Council and UN General Assembly called for third States to ensure compliance with IHL⁸⁶. As noted by Condorelli and Boisson de Chazournes “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”⁸⁷.

However, the State compliance with these resolutions must be viewed in the context of Article 25 of the UN Charter. Article 25 sets out the core obligation of UN member states to, “accept and carry out the decisions of the Security Council in accordance with the Present Charter”⁸⁸. The obligations assumed by members of the United Nations under Article 25 are the direct consequence of the authority conferred on the Security Council under Article 24. If members agree that the Security Council, in discharging its “primary responsibility” for the maintenance of peace and security, acts on their behalf, it is logical that they should also agree to accept and carry out the decisions taken by the Council in the discharge of that responsibility⁸⁹. While the Resolutions themselves can be interpreted as indicative of greater recognition within the UN of the need to ensure greater compliance with IHL, actual state compliance with these resolutions cannot be construed as manifesting acceptance of a broader interpretation of CA1 as such compliance is required under Article 25⁹⁰.

2.4. The Responsibility to Protect Doctrine

One of the more significant developments, that supports far wider obligations to be placed on third states, occurred in 2005 where a UN summit of State leaders endorsed the principle of R2P. Where a state causes or allows genocide, crimes against humanity, major war crimes, or ethnic cleansing R2P provides an obligation whereby States have a duty to respond in accordance with international

⁸⁵ *The uprising (intifada) of the Palestinian People* GA Res 45/69 A/RES/45/69 (1990) at para 3.

⁸⁶ For examples see *Bosnia and Herzegovina* SC Res 764 S/RES/764 (1992) and *Establishment of an International Tribunal and adoption of the Statute of the Tribunal* SC Res 955 S/RES/955 (1994).

⁸⁷ Condorelli and Boisson de Chazournes “Common Article 1 of the Geneva Conventions Revisited: Protecting Civilian Interests” (2000) 83(837) IRRC 67 at 76-78.

⁸⁸ Charter of the United Nations, art 25.

⁸⁹ Goodrich, Hambro & Simons *Charter of the United Nations: Commentary and Documents* (3rd ed, Columbia University Press, New York, 1969) at 207-208.

⁹⁰ Condorelli and Boisson de Chazournes “Common Article 1 of the Geneva Conventions Revisited: Protecting Civilian Interests” (2000) 83(837) IRRC 67 at 76-78; see also K. Dörmann and J Serralvo “Common Article 1 to the Geneva Conventions and the obligation to prevent IHL violations” (2015) 96(896) IRRC 707 at 717-718.

law⁹¹. This principle is supportive not just on wider obligations of third states, but also reflects the ideal that state sovereignty can no longer be used as a shield to permit the implementation of national policies that permit gross violations of human rights⁹².

This doctrine developed on basic principles of state responsibility and intervention in extreme situations, has been described as a new security and human rights norm to address the international community's failure to prevent and stop egregious violations of IHL⁹³. Based on the three pillars, referred to as the responsibility to prevent, the responsibility to react, and the responsibility to rebuild, the doctrine further develops the existing legal principles regarding the prevention of IHL violations⁹⁴. The Responsibility to Protect doctrine significantly expands the scope of intervention where states fail in their duty to protect human rights and expresses the shared responsibility of all states under international law to protect populations from violations of IHL⁹⁵.

Part V – Humanitarian Crisis and Intervention

1. Intervention and Common Article 1

Humanitarian intervention, that is, military intervention in response to gross violations of IHL, was seen as inherently incompatible with the prohibition on the use of force codified by Article 2(4) of the UN Charter. This prohibition has been gradually undermined by a number of precedents that are indicative of wider obligations on third states to intervene and take positive measures where states violate IHL. However, as shall be illustrated below, these examples lack the requisite *opinio juris* to support an external obligation to ensure respect under CA1.

⁹¹ 2005 World Summit Outcome GA Res 60/1 A/Res/60/1 (2005) at paras 138 and 139.

⁹² Gareth Evans *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (Brookings Institute Press, Washington D.C., 2008) at 37.

⁹³ ICISS *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (IDRC, Ottawa, 2001) at 69.

⁹⁴ Susan C. Breau “The Impact of the Responsibility to Protect on Peacekeeping” (2006) 11(3) *JC&SL* 429 at 431.

⁹⁵ Report on the High Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* (UNGA Resolution A/59/565 of 2nd December 2004) and Report of the Secretary General, *In Larger Freedom* UN Doc A/59/2005.

1.1. Pre 1990

During the Cold War, humanitarian intervention was considered beyond the pale⁹⁶. Although a number of states had justified their actions on humanitarian grounds, only three military conflicts prior to 1990 can only qualify as humanitarian interventions given that they put an end to egregious violations of IHL. These include India's intervention in East Pakistan, Vietnam's overthrow of the Khmer Rouge and Uganda's intervention in Tanzania.

An examination of these conflicts reveals that while in some instances humanitarian arguments were advanced, in most cases these arguments were either quickly abandoned or ignored altogether. India's intervention into East Pakistan is an interesting example that is emblematic of how states responded to crises prior to 1990.

While being described as an almost perfect example of humanitarian intervention, India never justified its intervention on humanitarian grounds⁹⁷. India's government advanced a legal argument of self-defence, with India's representative to the Security Council explaining, "We decided to silence their guns, to save our civilians"⁹⁸. Additionally, any humanitarian justification for India's intervention was strongly opposed by other countries. The views of these countries are given expression through statements of the representatives of Sweden and the United States. Sweden's representative emphasised that "the Charter of the United Nations forbids the use of force except in self-defence. No other purpose can justify the use of force by States"⁹⁹. These comments were supported by the United States representative who said: "The fact that the use of force in East Pakistan in March can be characterised as a tragic mistake does not, however, justify the actions of India in intervening militarily and placing in jeopardy the territorial integrity and political independent of its neighbour Pakistan"¹⁰⁰.

⁹⁶ Alexis Herclides and Ada Dialla, *Humanitarian Intervention Today: Setting the Precedent*, (Manchester University Press, Manchester, 2015) at 2.

⁹⁷ Thomas Franck and Nigel Rodley "After Bangladesh: The Law of Humanitarian Intervention by Military Force" (1973) 67 AJIL 275 at 277-278.

⁹⁸ Security Council Official Record (S/PV. 1696, 15 March 1973) at para 155.

⁹⁹ Michael Byers *War Law: Understanding International Law and Armed Conflict* (Grove Press, New York, 2005) at 94.

¹⁰⁰ Security Council Official Record (S/PV.1611, 12 December 1971) at para 19 (US).

While India's intervention did stop a horrific campaign of repression India adopted positive measures only after nine months of IHL violations in East Pakistan and after Pakistan bombed a number of Indian air fields. Furthermore, India did not justify its intervention on humanitarian grounds and most countries were in fact opposed to the war. Not one country supported the claim that India's intervention could be justified on humanitarian grounds or the IHL violations of Pakistan. Therefore, India's intervention, as well as those interventions in Cambodia and Tanzania, are deprived of the *opinio juris* that is required to change international law so to accommodate a much broader scope for the obligation to ensure respect.

1.2. Post 1990

Following the end of the Cold War, the 1990s witnessed unprecedented interventionism on humanitarian grounds¹⁰¹. Examples include safe haven for Kurds in northern Iraq (1991), Somalia (1992), Bosnia (1992-1995), the intervention of the Economic Community Of West African States (ECOWAS) in Liberia (1990-96), the United States led intervention in Haiti (1994), French-led forces in Rwanda (1994), NATO's intervention in Serbia and Kosovo (1999) and the Australian led intervention in East Timor (1999).

NATO's operation in Kosovo and Serbia controversial because of the absence of UN endorsement but also due to the measures adopted, which led to hundreds of civilian deaths, more intense ethnic cleansing, thousands of refugees, considerable destruction of infrastructure and environmental pollution. This debate sparked by this intervention was neatly summarised by former UN Secretary General Kofi Annan, who stated: "On the one hand is it legitimate for a regional organisation to use force without a UN mandate? On the other is it permissible to let gross systematic violations of human rights, with grave humanitarian consequences continue unchecked?"¹⁰². The question therefore becomes whether the state practice and *opinio juris* associated with the intervention in Kosovo constitute the broad consensus necessary to accept the broader interpretation of the obligation to ensure respect. Only two of the NATO countries, the United States and Belgium, sought to justify the Kosovo intervention on humanitarian grounds. Russia, China and India spoke out strongly against the intervention, as did Namibia, Belarus,

¹⁰¹ Alexis Herclides and Ada Dialla *Humanitarian Intervention Today: Setting the Precedent* (Manchester University Press, Manchester, 2015) at 3.

¹⁰² K. Annan "Two Concepts of Sovereignty" *The Economist* (online ed, New York, 18 September 1999) at 49.

Ukraine, Iran, Thailand, Indonesia and South Africa. While the NATO intervention is contrary to international law, it has been argued that such intervention is legitimate and in fact justified from an ethical viewpoint¹⁰³. This argument is aided by the contention that “only a thin red line separates NATO’s action in Kosovo from international legality”¹⁰⁴. This gives scope for the argument that while NATO’s intervention was illegal it may give rise to a precedent allowing States to take countermeasures in order to impede a State from committing large-scale atrocities¹⁰⁵.

The intervention in Kosovo illustrates that intervention, while not always expeditious, can be effective in halting humanitarian atrocities¹⁰⁶. However, there is a clear absence of *opinio juris* or any belief that the intervention was justified as a matter of international law. Therefore, the Kosovo War was neither consistent with international law nor is it truly effective in changing international law. What is also illustrated is a reluctance on the part of outside states to place their own military at risk to protect the human rights of others. As noted by Sadako Ogata “the international response to humanitarian crisis situations is largely determined by the degree of strategic interests held by the major states”¹⁰⁷.

1.3. The 21st Century

Whether the Kosovo War gave rise to a new precedent in international law allowing for States to respond to atrocities can violations of IHL can only be determined through an examination of States responses to contemporary armed conflicts and IHL violations. From 1999 much has changed in international relations. However the dynamics of international responses to atrocities have not. This is illustrated by the responses to middle eastern crises that have arisen out of the Arab Spring. These conflicts because of the actors involves, the reasons they

¹⁰³ Antonio Cassese “ex iniuria ius oritur: Are we Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?” 10 EJIL 1999 23 at 25.

¹⁰⁴ Bruno Simma “NATO, the UN and the Use of Force: Legal Aspects” 10 EJIL 1999 1 at 22.

¹⁰⁵ Antonio Cassese “ex iniuria ius oritur: Are we Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?” 10 EJIL 1999 23 at 27.

¹⁰⁶ David P Forsythe “Human Rights in Foreign Policy: Can Realism be Liberalised?” in S. Linton, G. Simpson and W. A. Schabas (eds) *For the Sake of Present and Future Generations* (Brill Nijhoff, Leiden, 2015) 220 at 229-230.

¹⁰⁷ Sadako Ogata *The Turbulent Decade: Confronting the Refugee Crises of the 1990s* (WW Norton & Co Inc, New York, 2005) at 318.

are fighting and the humanitarian consequences of these conflicts are very much emblematic of the difficulties currently when attempting to enforce IHL.

In response to the crisis and armed conflict in Libya many countries condemned the indiscriminate attacks resulting in the civilian deaths and urged the Libyan government to respect IHL, with the EU imposing sanctions against Libyan leaders, including an arms embargo and travel ban. Britain and France, proposed full intervention, with the US agreeing and China and Russia lending their diplomatic support in the UN Security Council for the protection of civilians. Consequently, in contrast to NATO's intervention in Kosovo the NATO led operation in Libya in 2011 was authorised by the UN Security Council through resolutions 1970 and 1973¹⁰⁸. However, the intervention, while in response to the atrocities and violations of IHL, reflected a desire of nation states to minimise their own costs¹⁰⁹. Consequently, following the removal of the Kaddafi regime the region has remained highly fragmented and fragile. Any intervention to stabilise the region would require a much more intrusive and lengthy involvement than the intervening states desired¹¹⁰.

Similarly the current armed conflict in Syria – from its beginning in anti-government protests in 2011 to its descent into a war that has drawn in regional and world powers – is emblematic of many of the challenges facing IHL and humanitarian action today¹¹¹. The features of the Syrian conflict, while complex, are not unusual amongst the protracted armed conflicts such as those in Yemen, Sudan, Somalia and Central Africa. These conflicts are characterised by complex webs of fragmented and multiplying non state asymmetric parties and armed groups, widespread disregard for the rules of IHL, and the absence of any solution to bring these crises to an end¹¹². The armed conflict in Syria has given rise to a number of situations where third states have endeavoured to ensure respect of IHL by the belligerents. Examples include the expulsion of Syrian diplomats as a

¹⁰⁸ *Peace and Security in Africa* SC Res 1970 S/RES/1970 (2011) and *Libya* SC Res 1973 S/RES/1973 (2011).

¹⁰⁹ David P Forsythe “Human Rights in Foreign Policy: Can Realism be Liberalised?” in S. Linton, G. Simpson and W. A. Schabas (eds) *For the Sake of Present and Future Generations* (Brill Nijhoff, Leiden, 2015) 220 at 231.

¹¹⁰ David P Forsythe “Human Rights in Foreign Policy: Can Realism be Liberalised?” in S. Linton, G. Simpson and W. A. Schabas (eds) *For the Sake of Present and Future Generations* (Brill Nijhoff, Leiden, 2015) 220 at 231-233.

¹¹¹ Claudia McGoldrick “The State of Conflicts today: can humanitarian action adapt?” (2015) 97(900) *IRRC* 1179 at 1180.

¹¹² Martin Van Creveld “*On Future War*” (Brassey's, London, 1991).

means of protest following the killing of civilians in the Syrian city of Houla and the various diplomatic *démarches* to put an end to the violations of IHL¹¹³. However, the legality of intervening in Syria to ensure respect of IHL remains contentious. While the British government released a document on August 29th, 2013, outlining its reasoning that exceptional measures are permitted in order to “alleviate the scale of the overwhelming humanitarian catastrophe in Syria”, the rest of the international community has been hesitant in accepting such a justification¹¹⁴.

Therefore, an examination of the intervention in Libya or Syria does not lend itself to an optimistic evaluation of third state responses to violations of IHL. These conflicts illustrate that while intervention does at times place to prevent further humanitarian violations that intervention take the form of an entitlement not a duty, whereby states may intervene in response to violations of IHL and egregious atrocities.

2. Serious Violations

While there are a number of situations in which third states have adopted positive measures in an endeavour to ensure respect of IHL by the parties engaged in a conflict, these examples are not sufficient to change the law in favour of duty on third states to adopt positive measures to ensure respect of IHL by other states. As indicated by the ICJ in the *Nicaragua Case*:¹¹⁵

In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally be treated as breaches of that rule, not as indications of a new rule

¹¹³ EU Statement, with alignment of Iceland, Montenegro, Serbia, Albania, Bosnia and Herzegovina and the countries of the Stabilisation and Association Process, *United Nations General Assembly: Humanitarian Situation in Syria*, 35th February 2014

¹¹⁴ Policy Paper “Chemical weapon use by Syrian regime: UK government legal position” , published 29th August 2013 available at <<https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version>>.

¹¹⁵ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 at 186.

In other words, merely because there are instances that can be pointed towards of certain states in particular circumstances adopting limited measures to induce compliance with IHL by other states does not expand the scope of the obligation to ensure respect by other State. In order for this to occur much more state practice and *opinio juris* would be required for such an interpretation to acquire legal force.

Such examples of third state intervention are not aided by the existence of several instances whereby the UN Nations has called upon parties to a conflict to respect IHL, and in which UN member States have contributed troops to UN authorised interventions. Examples where the UN Security Council exercised powers to authorise force in response to violations of IHL include the UN Security Council Resolutions adopted with regard to conflicts in Rhodesia, Iraq, Bosnia-Herzegovina and more recently Somalia and Sudan¹¹⁶.

Such practice, where the UN has called upon states to respect IHL or authorised third states to intervene, is more consistent with the obligation for States, under Article 89 of Additional Protocol I, to address serious violations of IHL in cooperation with the UN, rather than a broad interpretation of CA1. This is consistent with the examples discussed above whereby intervention only occurred following continuous egregious violations of IHL. Article 89 of Additional Protocol I provides that:

In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.

This provision only applies in respect of serious violations of IHL and only authorises collective sanctions or actions. The United Nations actions to which Article 89 refers consist of issuing an appeal to respect IHL, setting up enquiries on compliance with IHL, and where appropriate coercive actions which may include the use of force¹¹⁷. In addition, the General Assembly, in its Resolution 377 (V) of 1950 ("Uniting for Peace"), confirmed its competence to recommend collective measures, including the use of armed force when necessary, if the Security Council because of lack of unanimity fails to act where there appears to

¹¹⁶ See *The United Nations and the Iraq-Kuwait Conflict 1990-1996: The United Nations Blue Book Series*, vol IX (United Nations, 1996).

¹¹⁷ Charter of the United Nations, arts 10,11(2) and (3), 12, 14, 15(b), 24 and 39-51.

be a threat to the peace, breach of the peace, or act of aggression. Furthermore, the obligation under Article 89 only refers to serious violations of IHL that have already occurred, whereas a broad interpretation of the obligation to ensure respect under CA 1 would require states to take pre-emptive measures to prevent all violations¹¹⁸. It is worthwhile mentioning that the threshold of serious violations adopted by Article 89 is consistent not only with R2P but also the state practice discussed above where intervention only took place following serious IHL violations. In contrast, the broad interpretation of CA1 would enforce a much wider, and perhaps unrealistic, duty to intervene wherever there is a violation or the potential for a violation of IHL.

Part VI Conclusion

In conclusion the interpretation of the ICRC is not supported either by the initial intention of the High Contracting Parties or the subsequent practice by states. Any obligation under CA1 for third states to take measures in response to violations of IHL does not go beyond an entitlement for third states to ensure respect for IHL. As noted by the ICJ, third states have a right to act *vis-à-vis* the breach of *erga omnes* violations¹¹⁹. To hold that third states have an international legal obligation to take positive measures to ensure compliance with IHL, that includes pre-emptive action, runs contrary to the current international frameworks, in Article 89 of Additional Protocol I and Chapter VII of the UN Charter, that emphasise not only the importance of collective unified action but also the necessity of serious IHL violations.

Under Article 1 states are required to respect and ensure respect for IHL internally. This obligation applies only those within the states jurisdiction. When it comes to violations that occur outside the jurisdiction of the state, while it is certain that states are under a negative obligation not to encourage such violations, it could also be argued that states possess an entitlement to adopt measures that promote compliance with IHL. However, to argue otherwise would not only be in contravention with the initial intention of the High Contracting Parties, and the

¹¹⁸ K. Dörmann and J Serralvo “Common Article 1 to the Geneva Conventions and the obligation to prevent IHL violations” (2015) 83(896) IRRC 707 at 728-729

¹¹⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 at 158-159.

current *opinio juris* or understanding of states, but also potentially the current IHL mechanisms concerning third party intervention.

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