

# *Common Article 1 and the duty to “Ensure Respect”*

Article

Published Version

Schmitt, M. ORCID: <https://orcid.org/0000-0002-7373-9557>  
and Watts, S. (2020) Common Article 1 and the duty to  
“Ensure Respect”. *International Law Studies*, 96. pp. 674-706.  
ISSN 2375-2831 Available at  
<https://centaur.reading.ac.uk/95350/>

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Publisher: Stockton Center for International Law

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# INTERNATIONAL LAW STUDIES

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## Common Article 1 and the Duty to “Ensure Respect”

*Michael N. Schmitt and Sean Watts*

96 INT'L L. STUD. 674 (2020)

Volume 96



2020

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*Published by the Stockton Center for International Law*

ISSN 2375-2831

# Common Article 1 and the Duty to “Ensure Respect”

*Michael N. Schmitt\* and Sean Watts\*\**

## CONTENTS

|      |                                                                |     |
|------|----------------------------------------------------------------|-----|
| I.   | Introduction.....                                              | 675 |
| II.  | The Original Meaning of Common Article 1 and Its Progeny ..... | 680 |
|      | A. Development and Negotiation of Common Article 1.....        | 680 |
|      | B. Common Article 1 in Context.....                            | 684 |
| III. | Subsequent Actions .....                                       | 687 |
|      | A. Subsequent Agreement.....                                   | 688 |
|      | B. Subsequent State Practice .....                             | 689 |
| IV.  | Reimaginings of Common Article 1 .....                         | 693 |
|      | A. The International Court of Justice.....                     | 694 |
|      | B. International Organizations .....                           | 696 |
|      | C. Private Publications.....                                   | 697 |
| V.   | Conflict Not of an International Character .....               | 700 |
| VI.  | Customary Obligation to Ensure Respect.....                    | 702 |
| VII. | Concluding Thoughts.....                                       | 705 |

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\* Professor of Public International Law, University of Reading; Francis Lieber Distinguished Scholar, Lieber Institute for Law and Land Warfare, West Point; Charles Stockton Distinguished Scholar-in-Residence, U.S. Naval War College; Distinguished Scholar, Strauss Center for International Law and Security, University of Texas.

\*\* Professor of Law, Department of Law, United States Military Academy at West Point; Co-Director, Lieber Institute for Law and Land Warfare, West Point.

The thoughts and opinions expressed are those of the authors and not necessarily those of the U.S. government, the U.S. Department of the Navy, or the U.S. Naval War College.

## I. INTRODUCTION

The 1949 Geneva Conventions are remarkable achievements of international law. They reflect hard-won, finely tuned, and time-tested common ground between the broadest possible array of States. The Conventions united States—wealthy and poor, developed and developing, democratic and authoritarian, theocratic and secular, peaceful and bellicose. Although voluminous, these treaties have generated relatively few reservations or caveats from States Parties despite taking on the deeply fraught subject of how to regulate war.

It is hardly surprising then that projects to update or reimagine the law of war would seize upon the Geneva Conventions as a mechanism for doing so. They offer auspicious potential for reform, for few international legal instruments promise the extensive reach and legitimacy that the Conventions do.<sup>1</sup> To channel reform through them is to bind every State in the international system and to leverage a legal tradition backed by over 150 years of iterative and largely proven regulation of war. Additionally, by virtue of the Conventions’ incorporation into domestic implementing legislation and the constitutive documents of major international criminal tribunals, reforms fed through the Conventions enjoy compounded impact in national and international judicial proceedings.<sup>2</sup>

Rather than through adoption of an additional protocol to the instruments, as has occurred three times since 1949, such efforts to reform regulation of the conduct of hostilities can manifest as a reinterpretation of the existing text of the Geneva Conventions.<sup>3</sup> Reform in the guise of

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1. While customary international law also binds all States, it is rarely supported by the clear and overt indicia of State consent and consensus that is evidenced by 194 ratifications and accessions made to the Conventions.

2. The ICRC maintains a survey of national legislation implementing the Geneva Conventions and their Protocols. See *National Implementation of IHL: Documentation*, ICRC, <https://www.icrc.org/en/war-and-law/ihl-domestic-law/documentation>. The Conventions also feature in the subject matter jurisdiction of international criminal tribunals such as the International Criminal Court. See Rome Statute of the International Criminal Court art. 8(a), 2187 U.N.T.S. 90 [hereinafter Rome Statute].

3. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed

interpretation—at least as conceived in some circles—avoids the arduous diplomatic and procedural trappings of treaty formation or amendment. “Amendment by interpretation” can be accomplished by comparatively efficient means. Securing consensus among prominent academics, endorsement by an active private organization, or adoption by a panel of experts or jurists can—again as conceived in some circles—stand in the place of a full diplomatic conference. Just such an effort to reinterpret Common Article 1 of the four 1949 Geneva Conventions is underway. That effort is gaining acceptance in influential, if not authoritative, spheres of the law of war.

Common Article 1 rests atop each of those instruments in identical text and is mirrored in a nearly indistinguishable form in Protocols I and III to the Conventions.<sup>4</sup> It simply states, “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.”<sup>5</sup> The article performs double duty, both opening each of the 1949 Conventions, which lack substantial preambles, and imposing the Conventions’ first obligation of conduct on States.

A plain reading of Common Article 1 does not provoke particularly noteworthy comment. Indeed, a pillar of the law of war community, the late Frits Kalshoven, observed over two decades ago that the article “may look like a perfect example of a truism.”<sup>6</sup> It largely expresses a corollary to the

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Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem, Dec. 8, 2005, 2404 U.N.T.S. 261 [hereinafter Additional Protocol III].

4. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 1, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 1, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 1, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 1, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]. See also Additional Protocol I, *supra* note 3, art 1(1); Additional Protocol III, *supra* note 3, art. 1.

5. Article 1(1) of both Additional Protocol I and Additional Protocol III, *supra* note 3, substitute “this Protocol” for “this Convention” in the 1949 Conventions.

6. Frits Kalshoven, *The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit*, 2 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 3, 7 (1999).

general international legal obligation of States to honor their treaty commitments as binding, expressed classically in the maxim *pacta sunt servanda*.<sup>7</sup>

Yet, Common Article 1 has garnered increasing attention from academics and private organizations as a vessel for a reimagination of States’ enforcement obligations under the Geneva Conventions. Inspired by a judgment of the International Court of Justice,<sup>8</sup> as well as by an advisory opinion by that tribunal,<sup>9</sup> academic writers and private organizations have iteratively reinterpreted the article well beyond its original and established meaning. They chiefly claim that subsequent practice has modified the obligation to “ensure respect” for the Conventions to apply beyond a State’s own organs and groups it controls during an international armed conflict.<sup>10</sup> For them, the article includes a novel and additional “external” obligation—a duty on the part of *all* States to use *all* available means to ensure respect for *all* provisions of the Conventions by *all other* States during *all* armed conflicts, even those to which the State in question is not a party.<sup>11</sup> Adding weight to the claim, the International Committee of the Red Cross (ICRC) has adopted this view in three successive volumes of its influential updated commentaries on the 1949 Geneva Conventions.<sup>12</sup>

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7. Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

8. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14 (June 27) [hereinafter *Paramilitary Activities*].

9. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9) [hereinafter *Wall*].

10. See e.g., Robin Geiss, *The Obligation to Respect and Ensure Respect for the Conventions*, in THE 1949 GENEVA CONVENTIONS: A COMMENTARY 109 (Andrew Clapham, Paola Gaeta & Marco Sassoli eds., 2016); Oona A. Hathaway et al., *Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors*, 96 TEXAS LAW REVIEW 539, 569–77 (2017).

11. Laurence Boisson de Chazournes & Luigi Condorelli, *Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests*, 82 INTERNATIONAL REVIEW OF THE RED CROSS 67 (2000).

12. INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY TO GENEVA CONVENTION III RELATIVE TO THE TREATMENT OF PRISONERS OF WAR ¶¶ 153–222 (forthcoming 2021) [hereinafter ICRC, 2021 UPDATED COMMENTARY TO GENEVA CONVENTION III]; INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY TO GENEVA CONVENTION II FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED, SICK, AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA ¶¶ 147–48, 175–79, 186–95 (2017) [hereinafter ICRC, 2017 UPDATED COMMENTARY TO GENEVA CONVENTION II]; INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY TO GENEVA CONVENTION I FOR THE AMELIORATION OF THE CONDITION OF THE

Despite its putatively humanitarian motivation, this reworking of Common Article 1 warrants caution. The law of war is meant to reflect not only what is desirable in terms of humanity. It is also always sensitive to preservation of States' military interests during armed conflict, as well as the realities of sovereignty in the international system.<sup>13</sup> Significant reinterpretation of the carefully struck, and often hard-won, bargains struck by States at treaty conferences, especially when the resulting instruments enjoy universal adoption, calls for comparably compelling supporting evidence.

Although the 2016 and 2017 updated commentaries to, respectively, Geneva Conventions I and II Geneva Convention 1 took a categorical approach to the assertion that Common Article 1 includes an external obligation, the recently released 2020 updated commentary to Geneva Convention III has correctly conceded that "[t]here is disagreement as to the legal nature of the positive component of the duty to ensure respect by others because the content of the obligation is not clearly defined and its concretization to a large extent left to the High Contracting Parties."<sup>14</sup> In light of that acknowledgment, this article takes a fresh look at the meaning of Common Article 1.<sup>15</sup>

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WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD ¶¶ 125–26, 153–79 (2016) [hereinafter ICRC, 2016 UPDATED COMMENTARY TO GENEVA CONVENTION I].

13. See Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VIRGINIA JOURNAL OF INTERNATIONAL LAW 795 (2010).

14. ICRC, UPDATED COMMENTARY TO GENEVA CONVENTION III, *supra* note 12, ¶ 202.

15. For discussions of Common Article 1, see, *inter alia*, Verity Robson, *The Common Approach to Article 1: The Scope of Each State's Obligation to Ensure Respect for the Geneva Conventions*, 25 JOURNAL OF CONFLICT AND SECURITY LAW 101 (2020) [hereinafter Robson]; Hathaway et al., *supra* note 10; Geiss, *supra* note 10; Knut Dörmann & Jose Serralvo, *Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations*, 96 INTERNATIONAL REVIEW OF THE RED CROSS 707 (2014); Robert Kolb, *Commentaires Iconoclastes sur L'obligation de Faire Respecter le Droit International Humanitaire Selon L'article 1 Commun des Conventions de Genève de 1949*, 46 REVUE BELGE DE DROIT INTERNATIONAL 513 (2013); Carlo Focarelli, *Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?*, 21 EUROPEAN JOURNAL OF INTERNATIONAL LAW 125 (2010); Tomasz Zych, *The Scope of the Obligation to Respect and to Ensure Respect for International Humanitarian Law*, 27 WINDSOR YEARBOOK OF ACCESS TO JUSTICE 251 (2009); Maya Brehm, *The Arms Trade and States' Duty to Ensure Respect for Humanitarian and Human Rights Law*, 6 JOURNAL OF CONFLICT AND SECURITY LAW 359 (2008); Alexandre Devillard, *L'obligation de Faire Respecter le Droit International Humanitaire : L'article 1 Commun aux Conventions de Genève et à Leur Premier*

We reject claims that the various obligations to ensure respect ever encompassed an external obligation or that their meaning has changed since the adoption of the relevant treaties. State practice engaged in out of a sense of legal obligation that is necessary to support the reimagined obligations is quite simply lacking. Indeed, sufficient “negative State practice” exists to preclude any possibility that Common Article 1 obligations extend to ensuring respect by other States or that it applies outside the context of an international armed conflict.

In our view, the Common Article 1 obligation to “ensure respect” refers to the legal duty of States that are party to an international armed conflict, and Party to the instruments, to take those measures that are required to ensure their nationals and others under their control comply with the 1949 Geneva Conventions and Protocols I and III. During those conflicts, they impose no obligations on States that are not party to an armed conflict, apart from those few obligations that expressly bind States during peacetime. Instead, obligations set forth in those instruments are shouldered chiefly by, and owed to, belligerent States—not to individuals and only rarely to non-belligerent States—as a matter of law. For the time being, we call for fidelity to the established meaning of “ensure respect.”

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*Protocole Additionnel, Fondement d'un Droit International Humanitaire de Coopération?*, 20 REVUE QUÉBÉCOISE DE DROIT INTERNATIONAL 75 (2007); Marco Sassòli, *State Responsibility for Violations of International Humanitarian Law*, 84 INTERNATIONAL REVIEW OF THE RED CROSS 401 (2002); Birgit Kessler, *The Duty to “Ensure Respect” under Common Article 1 of the Geneva Conventions: Its Implications on International and Non-International Armed Conflicts* 44 GERMAN YEARBOOK OF INTERNATIONAL LAW 498 (2001); Kalshoven, *supra* note 6, at 8; Azzam, Fateh, *The Duty of Third States to Implement and Enforce International Humanitarian Law*, 66 NORDIC JOURNAL OF INTERNATIONAL LAW 55 (1997); Hans-Peter Gasser, *Ensuring Respect for the Geneva Conventions and Protocols: The Role of Third States and the United Nations*, in 2 ARMED CONFLICT AND THE NEW LAW: EFFECTING COMPLIANCE 15 (Hazel Fox & Michael Meyer eds., 1993); Paolo Benvenuti, *Ensuring Observance of International Humanitarian Law: Function, Extent and Limits of the Obligations of Third States to Ensure Respect of IHL*, YEARBOOK OF THE INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW 27 (1989–90); Luigi Condorelli & Laurence Boisson de Chazournes, *Quelques Remarques à Propos de L'obligation des Etats de “Respecter et Faire Respecter” le Droit International Humanitaire “en Toutes Circonstances”, in ETUDES ET ESSAIS SUR LE DROIT HUMANITAIRE ET SUR LES PRINCIPES DE LA CROIX-ROUGE EN L'HONNEUR DE JEAN PICTET* 17 (Christophe Swinarski ed., 1984).

## II. THE ORIGINAL MEANING OF COMMON ARTICLE 1 AND ITS PROGENY

As indicated above, the 1949 Geneva Conventions, and to a great extent their Protocols, are remarkable accomplishments of legal consensus. Although universally ratified (or acceded to), the Conventions are not uniformly understood; varying interpretations of certain key provisions have been proffered by States, jurists, academics, and international and private organizations. Indeed, properly discerning their actual meaning often involves the delicate and challenging task of treaty interpretation. The first step in that process is to ascertain the original meaning of the provision in question. Only once that task is accomplished satisfactorily can any contemporary interpretation be confirmed as authoritative.

### *A. Development and Negotiation of Common Article 1*

The obligation to “respect” the terms of a law of war treaty first appeared in Article 82 of the 1929 Geneva Convention on the Treatment of Prisoners of War and Article 25(1) of the 1929 Geneva Convention on the Amelioration of the Condition of the Wounded and Sick in Armies in the Field.<sup>16</sup> Those provisions provided that the 1929 Geneva Conventions “shall be respected by the High Contracting Parties in all circumstances.” The “in all circumstances” clause largely confirmed the notion of “non-reciprocity.” In other words, the instruments continued to bind belligerents that were Party to them even when an adversary had violated their terms. It further emphasized that the Conventions’ obligations applied regardless of the Parties’ legal justification, or lack thereof, for resorting to war.

States later reproduced the 1929 Conventions’ references to “respect” and “in all circumstances” in Common Article 1 of the 1949 Geneva Conventions and Article 1(1) of the 1977 Additional Protocol I and 2005 Additional Protocol III. There is no apparent disagreement as to the meaning of the term “respect;” the obligation requires States to honor the provisions of the respective instruments. Even without this provision, the actions of a State’s armed forces or other organs, as well as the activities of armed groups under the State’s “effective control” pursuant to the law of

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16. Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, July 27, 1929, 47 Stat. 2074, 118 L.N.T.S. 303.

State responsibility,<sup>17</sup> would qualify as internationally wrongful acts of the State should they contravene its duties under the treaties.<sup>18</sup> The respect provision simply serves to make this point within the four corners of the treaties.

The fact that the 1949 Geneva Conventions’ and their Protocols’ incorporated the term “in all circumstances” in an unamended manner requires the phrase’s original meaning to be borne in mind. There is no indication that the drafters of, or the States Parties that adopted, those instruments intended a different meaning. Nor does practice evince any subsequent agreement among the States Parties to embrace a changed or expanded meaning of the term. Accordingly, the phrase can only be interpreted as having the meaning originally attributed to it in the 1929 Conventions. It simply denotes an obligation on the part of Parties to an armed conflict to respect and ensure respect for the Conventions even in situations in which the enemy does not do so and regardless of *casus belli*. It in no way operates to extend the obligations found in Common Article 1 and its progeny beyond international armed conflict or to States that are not party to the conflict.

Common Article 1 of the 1949 Geneva Conventions and Article 1(1) of Additional Protocols I and III deviate, however, from the 1929 texts through the addition of an obligation to “ensure respect.” As is apparent from the negotiating history, the addition of the term was designed to broaden the “respect” obligation to the population as a whole. In other words, States Parties now shouldered an obligation to take measures necessary to ensure those under their control also complied, as appropriate, with the instruments.<sup>19</sup> There is no indication that the phrase was meant to have “external effect” in the sense of imposing on Parties an obligation to take

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17. G.A. Res. 56/83, annex, art. 8, Responsibility of States for Internationally Wrongful Acts (Jan. 28, 2002) [hereinafter Articles on State Responsibility]. Although Article 8 refers to direction or control, the commentary thereto encompasses them in the widely accepted notion of “effective control.” *Report of the International Law Commission to the General Assembly*, 53 U.N. GAOR Supp. No. 10, at 47, U.N. Doc. A/56/10 (2001), reprinted in [2001] 2 Yearbook of the International Law Commission 48, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

18. Internationally wrongful acts require (1) breach of a legal obligation, whether based in treaty or customary international law, that is (2) attributable to a State pursuant to the law of State responsibility. Articles on State Responsibility, *supra* note 17, art. 2.

19. 2B FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 53 (1951).

positive steps to ensure respect by belligerent States even when the former do not exercise effective control over belligerents and are not party to the armed conflict themselves. On the contrary, States like France, Norway, and the United States objected to a broad understanding of the obligation.<sup>20</sup>

Indeed, as Professor Sir Adam Roberts noted in 1995, there “appears to be little or nothing in the records of the 1949 Diplomatic Conference to suggest an awareness on the part of government delegates, or indeed ICRC participants, that the phrase ‘to ensure respect’ implied anything beyond internal observance.”<sup>21</sup> This view is shared by the late Professor Frits Kalshoven in what is the most in-depth inquiry into the subject to date.<sup>22</sup> After an exhaustive study of the matter, Professor Kalshoven concluded:

The point remains that the primary legal obligation arising from common Article 1 is for States Parties to impose respect for the applicable rules of international humanitarian law, ‘in all circumstances’, on their armed forces, including armed groups under their control, and on their populations: for the implementation of this obligation they can be held legally responsible. No such legal liability attaches to their moral duty to endeavour to ensure respect by their peers. Since it is their right to do this under the law of treaties, they cannot be reproached for doing so either.<sup>23</sup>

The original commentaries to the 1949 Geneva Conventions prepared under the general editorship of Jean Pictet and published in the authors’ private capacities between 1952 and 1960 are likewise supportive of this position.<sup>24</sup> Appearing soon after the Conventions entered force, the so-called

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20. See the compelling discussion of how the matter was addressed at the conference in Robson, *supra* note 15, at 112–13.

21. Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6 DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW 11, 30 (1995).

22. Kalshoven, *supra* note 6, at 11–38.

23. *Id.* at 60.

24. INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY TO II GENEVA CONVENTION RELATIVE TO THE WOUNDED AND SICK AT SEA (Jean Pictet ed., 1960) [hereinafter 1960 COMMENTARY ON GENEVA CONVENTION II]; INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY TO III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (Jean Pictet ed., 1960) [hereinafter 1960 COMMENTARY ON GENEVA CONVENTION III]; INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY TO IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (Jean Pictet ed., 1958) [hereinafter 1958 COMMENTARY ON GENEVA CONVENTION IV]; INTERNATIONAL COMMITTEE OF THE RED

“Pictet Commentaries” are not official, authoritative, or binding documents.<sup>25</sup> They amount to a commendable effort to explain the treaties based on the participation of the authors in the diplomatic negotiations.

Addressing the inclusion of the “ensure respect” provision, the commentary the Geneva Convention I provided:

The use of the words “and to ensure respect” was, however, deliberate: they were intended to emphasize and strengthen the responsibility of the Contracting Parties. It would not, for example, be enough for a State to give orders or directives to a few civilian or military authorities, leaving it to them to arrange as they pleased for the details of their execution. It is for the State to supervise their execution. Furthermore, if it is to keep its solemn engagements, the State must of necessity prepare in advance, that is to say in peacetime, the legal, material or other means of loyal enforcement of the Convention as and when the occasion arises.<sup>26</sup>

Thus, the authors understood “ensure respect” to be an internal duty shouldered by parties to an armed conflict to take action to supervise compliance with the Conventions by individuals they controlled, including by virtue of territorial control.<sup>27</sup> There is no disagreement that this was at least the intention of the States that adopted the four Conventions at the Diplomatic Conference in 1949.

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CROSS, COMMENTARY TO II GENEVA CONVENTION RELATIVE TO THE WOUNDED AND SICK (Jean Pictet ed., 1952) [hereinafter 1952 COMMENTARY ON GENEVA CONVENTION II].

25. The foreword to each of the four original commentaries includes the following passage:

Although published by the International Committee, the Commentary is the personal work of its authors. The Committee, moreover, whenever called upon for an opinion on a provision of an international Convention, always takes care to emphasize that only the participant States are qualified, through consultation between themselves, to give an official and, as it were, authentic interpretation of an intergovernmental treaty.

1960 COMMENTARY ON GENEVA CONVENTION II, *supra* note 24, at 1; 1960 COMMENTARY ON GENEVA CONVENTION III, *supra* note 24, at 1; 1958 COMMENTARY ON GENEVA CONVENTION IV, *supra* note 24, at 1; 1952 COMMENTARY ON GENEVA CONVENTION I, *supra* note 24, at 1.

26. 1952 COMMENTARY ON GENEVA CONVENTION I, *supra* note 24, at 26.

27. For instance, the International Court of Justice has acknowledged an obligation to ensure respect on the part of a party in occupation of territory. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 168, ¶ 211 (Dec. 19).

Yet, Pictet and his colleagues did not understand the term to create any binding external obligation for States that were not party to the conflict. If they had, they would have continued to express themselves in obligatory terms. They did not. On the contrary, when addressing the external factor in the context of the ensure respect obligation, they characterized “ensure respect” in hortatory terms. For instance, the same commentary observed, “in the event of a Power failing to fulfill its obligations, the other Contracting Parties (neutral, allied or enemy) *may, and should, endeavor* to bring it back to an attitude of respect for the Convention.”<sup>28</sup> The other three commentaries contain similar language.<sup>29</sup>

What the Pictet Commentaries clarified with respect to the original meaning of Common Article 1 was that attempts by States that are uninvolved in an armed conflict (neutral States) to bring belligerent States into compliance with the Conventions would not constitute prohibited intervention into the latter’s internal or foreign affairs.<sup>30</sup> They cannot be read in context to suggest the existence of any legal duty on the part of States that are not party to an international armed conflict to seek compliance by belligerent States, even in circumstances in which such efforts would likely be successful.

#### B. Common Article 1 in Context

To fully assess the meaning and scope of a treaty provision, it is also necessary to apply “secondary” rules of international law governing their interpretation. The generally accepted rules of interpretation are set forth in the Vienna Convention on the Law of Treaties, even for States that are not Party to that instrument, such as the United States.<sup>31</sup> According to Article 31(1) of that instrument, “A treaty shall be interpreted in good faith in

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28. 1952 COMMENTARY ON GENEVA CONVENTION I, *supra* note 24, at 26 (emphasis added).

29. 1960 COMMENTARY ON GENEVA CONVENTION II, *supra* note 24, at 25–26; 1960 COMMENTARY ON GENEVA CONVENTION III, *supra* note 24, at 18; 1958 COMMENTARY ON GENEVA CONVENTION IV, *supra* note 24, at 16 (emphasis added).

30. On the prohibition of such intervention, see *Paramilitary Activities*, *supra* note 8, ¶¶ 202–5.

31. *Vienna Convention on the Law of Treaties*, U.S. DEPARTMENT OF STATE, <https://2009-2017.state.gov/s/l/treaty/faqs/70139.htm#:~:text=Is%20the%20United%20States%20a,and%20consent%20to%20the%20treaty.>

accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>32</sup>

As to the ordinary meaning of “ensure respect,” it is appropriate to look to other rules of international law when interpreting a provision.<sup>33</sup> Imbuing the term with an “external component” would be unusual from an international law perspective. States are seldom responsible for ensuring *other* States’ compliance with international law, and almost never to such an extent that failure to take feasible measures to preclude another State’s internationally wrongful act would itself be a violation. Rather, they must act to ensure their own compliance by controlling the activities of State organs and others for whom the State is legally responsible. One possible exception is the so-called “due diligence” duty to put an end to ongoing hostile activities by other States from the one’s territory if they seriously affect a third State’s international law right. However, that somewhat unsettled obligation derives from the right to sovereignty over territory and therefore cannot be analogized to the purported ensure respect external obligation, which implicitly rejects limitation based on territorial control.<sup>34</sup>

To discern treaty context, particular note must be taken of the structure and text of the instrument in question.<sup>35</sup> In this regard, most of the obligations set forth in the Geneva Conventions are imposed only on States that are party to the conflict, and the instruments are, with the notable exception of Common Article 3 and limited peacetime obligations,<sup>36</sup> largely

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32. Vienna Convention, *supra* note 7, art. 31(1).

33. *Id.* art. 31(3)(c).

34. See discussion in TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 550–51 (Michael N. Schmitt gen. ed., 2017). A State may, however, be responsible for internationally wrongful acts of another State if it directs and controls the commission of the latter’s internationally wrongful act. It may also be responsible for its own aid and assistance in another State’s unlawful conduct. See Articles on State Responsibility, *supra* note 17, arts. 16–17.

35. Vienna Convention, *supra* note 7, art. 31(2).

36. These include disseminating the Conventions and training one’s own armed forces. Geneva Convention I, *supra* note 4, art. 47; Geneva Convention II, *supra* note 4, art. 48; Geneva Convention III, *supra* note 4, art. 127; Geneva Convention IV, *supra* note 4, art. 144. They also include enacting legislation to provide penal sanctions for violations of the Conventions and for preventing and repressing misuse of the distinctive protective emblems. Geneva Convention I, *supra* note 4, art. 49; Geneva Convention II, *supra* note 4, art. 50; Geneva Convention III, *supra* note 4, art. 129; Geneva Convention IV, *supra* note 4, art. 146.

applicable only during international armed conflicts.<sup>37</sup> The Conventions also expressly set forth the situations in which States must or may act *vis-à-vis* the activities of other States. For instance, Article 12 of Geneva Convention III imposes a duty to monitor the treatment accorded prisoners of war who have been transferred to another State.<sup>38</sup> Additionally, the instruments specifically contemplate roles for certain States in fostering compliance by belligerent States. Most significant among these is service by neutral States as Protecting Powers on behalf of belligerent States.<sup>39</sup> Finally, the negotiating history of the Conventions contains examples of situations in which the role of States that are not party to an armed conflict was discussed. Article 52 of the Geneva Convention I, for instance, provides for an enquiry procedure in case of violation by a belligerent State.<sup>40</sup> During the Diplomatic Conference that led to the adoption of the Geneva Conventions, the delegates agreed that only belligerent States, and not any Party to the Convention, could initiate such an enquiry.<sup>41</sup>

It also bears noting that the obligations set forth in the Geneva Conventions tend to specify whether they apply in peace, during armed conflict, or both. For example, States are obliged to engage in dissemination and training during peacetime to ensure respect by their armed forces and the civilian population.<sup>42</sup> Yet, the sole “external” peacetime obligation is to search for and prosecute or extradite those individuals who have committed a grave breach of the Conventions.<sup>43</sup> Therefore, a broad contextual reading of the treaties augurs against an interpretation that would incorporate a

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37. Of course, Additional Protocol I is inapplicable in non-international armed conflict and therefore its “ensure respect” provision cannot be interpreted otherwise. *See* Additional Protocol I, *supra* note 3, art. 1(3).

38. Geneva Convention III, *supra* note 4, art. 12.

39. *See* Geneva Convention I, *supra* note 4, art. 10; Geneva Convention II, *supra* note 4, art. 10; Geneva Convention III, *supra* note 4, art. 10; Geneva Convention IV, *supra* note 4, art. 11. *See also* Additional Protocol I, *supra* note 3, art. 5.

40. The remaining Conventions also provide for enquiry procedures between belligerent States. Geneva Convention II, *supra* note 4, art. 53; Geneva Convention III, *supra* note 4, art. 132; Geneva Convention IV, *supra* note 4, art. 149.

41. 1952 COMMENTARY ON GENEVA CONVENTION I, *supra* note 24, at 375–77.

42. *See, e.g.,* Geneva Convention I, *supra* note 4, art. 47; Geneva Convention II, *supra* note 4, art. 48; Geneva Convention III, *supra* note 4, art. 127; Geneva Convention IV, *supra* note 4, art. 144; Additional Protocol I, *supra* note 3, art. 83; Protocol Additional II, *supra* note 5, art. 19.

43. Geneva Convention I, *supra* note 4, art. 49; Geneva Convention II, *supra* note 4, art. 50; Geneva Convention III, *supra* note 4, art. 129; Geneva Convention IV, *supra* note 4, art. 146; Additional Protocol I, *supra* note 3, art. 85(1).

peacetime external obligation to ensure respect, especially when no specific mention has been to that effect.

It is, therefore, counter-contextual to suggest that upon ratification of the 1949 Geneva Conventions, States understood they were impliedly shouldering legal obligations regarding the activities of other States beyond those already expressly set forth in the Conventions. Instead, they understood that “ensure respect” was meant to impose purely internal obligations and that, with limited exceptions like the obligation to prosecute or extradite war criminals, those obligations applied only to States that were parties to an international armed conflict. A more expansive obligation is also illogical given the very significant burden the purported obligation would have imposed, a burden far greater than that they assumed pursuant to an ensure respect provision that was limited to an international armed conflict to which they were party. Had States intended to accept an obligation to ensure respect for the Conventions by parties to an armed conflict to which they themselves were not a party, the obligation would have been set forth in explicit terms.

### III. SUBSEQUENT ACTIONS

It remains to be determined, however, whether the meaning of the Common Article 1 and Article 1(1) obligations to “ensure respect” has changed since their adoption by States in the Geneva Conventions. According to Article 31(3) of the Vienna Convention on Treaties, in addition to context,

There shall be taken into account, together with the context:

- (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation....<sup>44</sup>

This requires consideration of those subsequent agreements and the practice of States as to their understanding of the term.

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44. Vienna Convention, *supra* note 7, art. 31(3)(b).

*A. Subsequent Agreement*

The two Additional Protocols of 1977 and that of 2005 were meant to supplement the 1949 Geneva Conventions, which continued to apply fully.<sup>45</sup> This being so, it is noteworthy that while Article 1(1) of Additional Protocols I and III replicates the text of Common Article 1 of the Geneva Conventions, and therefore serves to reiterate the obligations contained in the earlier articles with respect to international armed conflict, Additional Protocol II, which applies only in non-international conflict, contains no comparable provision. This distinction between Additional Protocols I and II is especially relevant to the issue of whether Common Article 1 applies to non-international armed conflicts, a matter discussed more fully below.

The inclusion of the “ensure respect” obligation in Article 1(1) of Protocols I and III raises the question of whether the understanding of that duty, at least on the part of States Parties to the two instruments, had evolved to encompass an external obligation. It had not. In particular, and as accurately noted by Professor Kalshoven, there is no indication that the States that adopted Additional Protocol I at the final Diplomatic Conference in 1977 intended it to encompass a new external obligation.<sup>46</sup> Even advocates of an external component to the “ensure respect” duty concede this point. For instance, in a 2016 article, Professor Robin Geiss acknowledged that “the drafting history of the Additional Protocols, in and of itself, is rather inconclusive on the matter, and if viewed in combination with the *travaux préparatoires* of the 1949 Conventions, would rather seem to militate against acceptance of an external compliance dimension of the obligation to ensure respect.”<sup>47</sup>

As with the 1949 Geneva Conventions, the text of Article 1(1) must be read in the context of the entire instruments. Additional Protocol I’s text bears directly on the matter. Articles 7 and 89 set forth mechanisms for ensuring respect by other States. Article 7 provides for meetings of the Parties to the Protocol in the event of “general problems concerning the

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45. Additional Protocol I, *supra* note 3, pmb.; Additional Protocol II, *supra* note 3, pmb.; Additional Protocol III, *supra* note 3, pmb.

46. Kalshoven, *supra* note 6, at 45–54.

47. Geiss, *supra* note 10, at 121. As to Additional Protocol III, Verity Robson of the United Kingdom’s Foreign and Commonwealth Office, writing in her personal capacity, has convincingly dispensed with any notion that the “ensure respect” text in that instrument had that meaning. Robson, *supra* note 15, at 106–7.

application” of the Conventions or the Protocol.<sup>48</sup> Article 89 further 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 co-operation with the United Nations and in conformity with the United Nations Charter.”<sup>49</sup> It would be illogical to suggest that States believed it necessary to specifically provide for cooperation with the United Nations (which was already lawful pursuant to Chapters VI and VII of the U.N. Charter<sup>50</sup>) in the face of violations by other States during international armed conflicts to which the former were not party but saw no need to affirm a far less settled obligation to act on their own accord in such situations. This is especially so given that the text of Article 1(1) of Additional Protocol I tracked that of Common Article 1, which did not encompass such an obligation, with nearly surgical precision. Simple logic compels the conclusion that Article 1(1) was not meant to alter or supplement the Common Article 1(1) meaning of the term “ensure respect.”

Furthermore, Additional Protocol I provides for an optional International Humanitarian Fact-Finding Commission in Article 90. The Commission may investigate a situation alleged to involve a grave breach or other serious violation of the Geneva Conventions or Additional Protocol I. An investigation is mandatory if the States concerned are Parties to the Protocol and have made a formal declaration accepting the Commission’s competence. The parties to a conflict may also agree to refer the matter to the Commission on an *ad hoc* basis. As with the corresponding articles of the 1949 Conventions, these provisions are compelling evidence that States resolved to enumerate means for external enforcement for Additional Protocol I rather than rely on Article 1 or any other provision to imply such remedial measures.

#### B. *Subsequent State Practice*

When interpreting a treaty provision, consideration of State practice that indicates agreement as to its interpretation is likewise appropriate.<sup>51</sup> By the same token, a lack of practice consistent with a claimed interpretation, or contrary practice by one or more Parties to the treaty in question, demonstrates the absence of agreement among the Parties as to the validity

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48. Additional Protocol I, *supra* note 3, art. 7.

49. *Id.* art. 49.

50. U.N. Charter chs. VI–VII.

51. Vienna Convention, *supra* note 7, art. 31(3)(b).

of a new interpretation. Such practice can consist of a failure to take feasible measures supposedly required by the purported norm, activities that would run counter to it, and verbal practice in the form of statements that dispute the existence of the claimed new interpretation.

For subsequent State practice to bear on a proposed interpretation of a treaty obligation, it must be clear that the activities engaged in (or refrained from) were the product of the State's sense of legal obligation and not, for instance, political concerns, national interests, or ethical commitments. Absent this sense of *opinio juris*, the practice in question is not evidence of the meaning of the provision in question.<sup>52</sup>

Subsequent State practice has not substantiated agreement among the Parties to the respective instruments that the term "ensure respect" now includes an external element.<sup>53</sup> To begin, States that are not party to a conflict regularly fail to take affirmative measures that are feasible in the circumstances, or indeed any measures at all, to ensure that belligerent States respect the relevant instruments. For example, it is almost always feasible for States Parties to publicly condemn belligerent States that have breached the Geneva Conventions or Additional Protocol I during an international armed conflict. Yet many, indeed most, States remain silent in the face of patent violations.<sup>54</sup> If States are under an obligation to take feasible measures to ensure respect by other States involved in an armed conflict to which they are not party, every such failure to condemn would be itself an internationally wrongful act. In fact, given the frequency of armed conflict, most States would be in violation of their purported ensure respect obligation most of the time during an international armed conflict in which they were not involved.

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52. As has been noted in an unofficial commentary to the Vienna Convention, The active practice should be consistent rather than haphazard and it should have occurred with a certain frequency. However, the subsequent practice must establish the agreement of the parties regarding its interpretation. Thus, it will have been acquiesced in by the other parties; and no other party will have raised an objection.

MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 431 (2009).

53. For criticism of the State practice cited by the ICRC in its updated commentaries, see Robson, *supra* note 15, at 107–8.

54. To take one example, consider the relative silence by States during the armed conflict between Georgia and Russia in 2008 in the face of repeated law of war violations. See 2 INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON THE CONFLICT IN GEORGIA, REPORT 430–31 (2009), [http://www.mpil.de/files/pdf4/IIFFMCG\\_Volume\\_III1.pdf](http://www.mpil.de/files/pdf4/IIFFMCG_Volume_III1.pdf).

States do not see themselves or other States as acting unlawfully when they fail to speak out or take other feasible measures to ensure respect. Even when States do condemn violations, they frequently forgo other measures that might prove effective to draw a belligerent State into compliance with its obligations under the law of war, including those appearing in treaties with ensure respect provisions. For instance, a State may condemn breaches by a belligerent State but continue to trade with that State. As an example, in 2015, the United States accused Russia of engaging in serious violations during its international armed conflict with Ukraine.<sup>55</sup> Yet, that same year, Russian imports to the United States totaled over \$16 billion.<sup>56</sup>

Similarly, consider the case of Saudi Arabia and arms trade. Saudi-led operations in support of the government of Yemen began in 2015. Since then, its operations repeatedly have been condemned as violating many law of war rules.<sup>57</sup> Yet, in July 2019, President Trump vetoed a bipartisan attempt by Congress to ban the sale of arms to Saudi Arabia,<sup>58</sup> while the United Kingdom decided to renew the issuance of arms export licenses for the sale or transfer of arms to the country following litigation in the Court of Appeals.<sup>59</sup> Indeed, Saudi Arabia is today the biggest arms importer in the world,<sup>60</sup> with such countries as Canada, France, Spain, Serbia, Georgia, South

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55. See, e.g., BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2015: UKRAINE (2016), <https://2009-2017.state.gov/documents/organization/253123.pdf>.

56. *Trade in Goods with Russia*, U.S. CENSUS BUREAU, <https://www.census.gov/foreign-trade/balance/c4621.html#2015> (last visited Dec. 18, 2020).

57. See generally *Reports of the Group of Eminent International and Regional Experts (on Yemen)*, U.N. Doc. A/HRC/39/43, pt. 1 (Aug. 17, 2018), U.N. Doc. A/HRC/42/17 (Aug. 9, 2019), U.N. Doc. A/HRC/45/6 (Sept. 28, 2020).

58. Merrit Kennedy, *Trump Vetoes Bills Intended to Block Arms Sales to Saudi Arabia*, NPR (July 25, 2019), <https://www.npr.org/2019/07/25/745200244/trump-vetoes-bills-intended-to-block-arms-sales-to-saudi-arabia>.

59. Elizabeth Truss, Secretary of State for International Trade, United Kingdom, Statement to Parliament: Trade Update (July 7, 2020), <https://questions-statements.parliament.uk/written-statements/detail/2020-07-07/HCWS339>.

60. *USA and France Dramatically Increase Major Arms Exports; Saudi Arabia is Largest Arms Importer, Says SIPRI*, SIPRI (Mar. 9, 2020), <https://www.sipri.org/media/press-release/2020/usa-and-france-dramatically-increase-major-arms-exports-saudi-arabia-largest-arms-importer-says#:~:text=Saudi%20Arabia%20was%20the%20world's,arms%20imports%20in%202015%E2%80%93319>.

Africa, and Turkey supplying major weapons.<sup>61</sup> While the Saudi case is not directly on point because the conflict in Yemen is non-international in character, it is indicative of the attitude of many States toward pressuring States to desist in law of war violations. This is not to say that they countenance such violations, but rather to observe that other national interests may militate against enforcement measures in particular cases.

Not only does State practice fail to establish an external component to the Conventions' "ensure respect" obligation, but some State legal advisers assert that their States do not shoulder such an obligation as a matter of law. Writing a half-century after adoption of the 1949 Geneva Conventions, for instance, Professor Kalshoven noted:

[S]everal legal advisers, when asked whether they regarded common Article 1 as imposing an obligation upon their governments to ensure respect of the Conventions by other states, all answered in the negative. They did however believe that their governments, as parties to the Geneva Conventions, were definitely entitled to appeal to parties to armed conflicts to respect the applicable humanitarian law.<sup>62</sup>

His discussions of the matter with the then senior lawyer of the ICRC (and lead author of the ICRC's commentary to the Additional Protocols), as well as the organization's president, also suggested that for other States, "ensure respect" was primarily hortatory in nature and the obligation essentially moral, as distinct from legal.<sup>63</sup>

In a more unambiguous expression of *opinio juris*, then U.S. State Department Legal Advisor, Brian Egan spoke directly to the issue at the April 2016 meeting of the American Society of International Law. He asserted:

Some have argued that the obligation in Common Article 1 of the Geneva Conventions to "ensure respect" for the Conventions legally requires us to undertake such steps and more vis-à-vis not only our partners, but all States and non-State actors engaged in armed conflict. Although we do not share this expansive interpretation of Common Article 1, as a matter of policy,

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61. Angela Dewan, *These Are the Countries Still Selling Arms to Saudi Arabia*, CNN (Nov. 23, 2018), <https://www.cnn.com/2018/11/22/middleeast/arms-exports-saudi-arabia-intl/index.html>.

62. Kalshoven, *supra* note 6, at 59–60.

63. *Id.* at 60.

we always seek to promote adherence to the law of armed conflict generally and encourage other States to do the same. As a matter of international law, we would look to the law of State responsibility and our partners’ compliance with the law of armed conflict in assessing the lawfulness of our assistance to, and joint operations with, those military partners.<sup>64</sup>

With respect to the 1949 Geneva Conventions, Egan’s statement negates the existence of agreement among the States Parties regarding any new external component to the Common Article 1 ensure respect obligation. Australia,<sup>65</sup> Canada,<sup>66</sup> and the United Kingdom are among other States publicly taking, or unofficially indicating, a similar position.<sup>67</sup>

#### IV. REIMAGININGS OF COMMON ARTICLE 1

As noted, international tribunals, international organizations, and the ICRC have sought to reframe the ensure respect obligation to include an external component. Their arguments are tenuous, for they ignore extensive negative State practice and expressions of *opinio juris* that preclude reinterpretation of the concept of ensure respect as a matter of treaty law.

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64. Brian Egan, Legal Adviser, U.S. Department of State, Keynote Address at the American Society for International Law: International Law, Legal Diplomacy, and the Counter-ISIL Campaign, (Apr. 1, 2016), <https://www.justsecurity.org/wp-content/uploads/2016/04/Egan-ASIL-speech.pdf>; audio available at <https://www.asil.org/resources/audio/2016-annual-meeting>.

65. John Reid, *Ensuring Respect: The Role of State Practice in Interpreting the Geneva Conventions*, ILA REPORTER (Nov. 2016), <http://ilareporter.org.au/2016/11/ensuring-respect-the-role-of-state-practice-in-interpreting-the-geneva-conventions-john-reid/>. At the time, Reid was Head of the Office of International Law in the Attorney-General’s Department.

66. *Turp v. Minister of Foreign Affairs*, [2017] F.C. 84 (Can.) (Affidavit of Michael N Schmitt in support of the Ministry of Foreign Affairs position).

67. Writing in her personal capacity, although, tellingly, an attorney at the Foreign and Commonwealth Office, Robson noted

There is no general duty to prevent or bring to an end breaches by other parties to conflict. Responsibility for compliance lies with the parties themselves, and other States may choose, as a matter of policy, to take such steps as are appropriate in each conflict to encourage universal respect.

Robson, *supra* note 15, at 115.

*A. The International Court of Justice*

Proponents of the expansive approach to Common Article 1 argue that the International Court of Justice endorsed external application of the “ensure respect” obligation in its *Paramilitary Activities* judgment.<sup>68</sup> The case examined U.S. support of the Contras, an insurgent group involved in a non-international armed conflict with Nicaragua's government.<sup>69</sup> Although the Court took notice of the Common Article 1 “ensure respect” obligation, at issue in the case was US “encouragement” of law of war violations by the Contras, who were funded, trained, and equipped by the United States. Of particular note was dissemination by the Central Intelligence Agency of a psychological warfare manual that contained advice on how to engage in activities, including the assassination of certain civilians, that were manifestly unlawful.<sup>70</sup>

States undoubtedly are obliged by international law to refrain from actively encouraging violations of either treaties to which they are Party or “cardinal” rules of the law of war, such as the prohibition on attacking civilians, that are, in the words of the International Court of Justice, “intransgressible.”<sup>71</sup> However, that obligation stems from general principles of international law, such as the obligation to carry out treaty obligations in good faith,<sup>72</sup> not from Common Article 1. For instance, by encouraging violations by the Contras, the United States breached its obligation to respect the Conventions and other rules of the law of war.<sup>73</sup> Moreover, in the facts of the *Paramilitary Activities* case, the obligation not to encourage violations also derived from the customary international law prohibitions of intervention into the internal affairs of other States and of the use of force (both of which the Court concluded the United States violated).<sup>74</sup> The point is that the Court addressed the issue of encouragement of non-State actors; it never dealt with the issue of whether States have a legal obligation to take

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68. *Paramilitary Activities*, *supra* note 8.

69. On the prohibition of such intervention, see *id.* ¶ 219.

70. *Id.* ¶ 122.

71. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶¶ 78–79 (July 8) [hereinafter *Nuclear Weapons*].

72. Vienna Convention, *supra* note 7, art. 26. See also Villiger, *supra* note 49, at 366–67.

73. *Paramilitary Activities*, *supra* note 8, ¶ 220.

74. *Id.* ¶ 228.

affirmative measures to ensure respect by other States that are party to an armed conflict.

A second International Court of Justice case typically cited in discussions of the term “ensure respect” is the *Wall* advisory opinion. In a fractured opinion, the Court suggested other States were obliged to act to influence Israel to respect its obligations in “occupied Palestinian territory” pursuant to Article 1 of Geneva Convention IV.<sup>75</sup> Although the facts of *Wall* are more directly on point than those of the *Paramilitary Activities* case, the opinion has proved highly controversial in light of the very politicized nature of the subject matter.

The *Wall* case is of particular relevance in that it opines that the obligations found in Common Article 1 are *erga omnes*,<sup>76</sup> and therefore all States had an obligation “to ensure compliance by Israel with international humanitarian law as embodied in [Geneva Convention IV].”<sup>77</sup> This is a misapplication of the notion. *Erga omnes* obligations are allegedly owed to all States without the requirement of reciprocity. Accordingly, while all States are entitled to invoke the “responsible” State’s responsibility for having engaged in an internationally wrongful act,<sup>78</sup> purported *erga omnes* status of a rule does not impose any obligation of enforcement on other States, the breach of which would itself be internationally wrongful.

Further detracting from the significance of the Court’s work is the fact that neither the *Paramilitary Activities* judgment nor the *Wall* advisory opinion provided any substantive analysis of the ensure respect obligation. Surely the Court would have been aware of the well established and agreed original meaning of Common Article 1. To depart from that meaning should have

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75. *Wall*, *supra* note 9, ¶ 158.

76. *Erga omnes* obligations are “[O]bligations of a State towards the international community as a whole. . . . By their very [they] 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 . . .” *Barcelona Traction, Light and Power Company, Limited (Second Phase)*, Judgment, 1970 I.C.J. 3, ¶ 33 (Feb. 5).

77. *Wall*, *supra* note 9, ¶¶ 157–58. On the *erga omnes* characterization of Common Article 1, see also *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Judgment, ¶ 519 (Int’l Crim. Trib. for the former Yugoslavia Jan. 14, 2000). The ICRC shares this view. ICRC, 2021 UPDATED COMMENTARY TO GENEVA CONVENTION III, *supra* note 12, ¶ 210.

78. Articles on State Responsibility, *supra* note 17, art. 48(1)(b). See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.)*, Order, 2020 I.C.J. ¶ 41 (Jan. 23).

required the Court to survey State practice extensively for evidence of agreement to expand the meaning of Article 1.

Yet, the Court's judgment and advisory opinion include no such effort or evidence. Rather, its assertions are highly conclusory. As noted by Judge Kooijmans in his separate opinion in the *Wall* case:

The Court does not say on what ground it concludes that [Article 1] imposes obligations on third States not party to a conflict. The *travaux préparatoires* do not support that conclusion.

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Since the Court does not give any argument in its reasoning, I do not feel able to support its finding. Moreover, I fail to see what kind of positive action, resulting from this obligation, may be expected from individual States, apart from diplomatic démarches.<sup>79</sup>

Additionally, it must be stressed that advisory opinions are non-binding, while judgments in contested cases like the *Paramilitary Activities* case bind only the States before the Court.<sup>80</sup> In light of the shallow analysis, disagreement among the judges, and the nonbinding nature of the findings on States other than those before the Court, the judgment and opinion represent unreliable evidence of an external element to the ensure respect obligation.

#### B. International Organizations

Proponents of the expansive interpretation of Common Article 1 point to other sources that also fail to establish the requisite foundation for interpretive deviation from the original meaning of Common Article 1.<sup>81</sup> For instance, United Nations General Assembly resolutions, which are nonbinding and may reflect political and other considerations on the part of States that support them, are sometimes cited. However, States have formally and correctly objected to reliance on such instruments as examples

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79. *Wall*, *supra* note 9, at 230–31, ¶¶ 47, 50 (separate opinion by Kooijmans, J.). Judge Kooijmans spoke approvingly of, and cited from, the Kalshoven analysis. Additionally, Judge Higgins noted that the “Final Record of the diplomatic conference . . . offers no useful explanation of that provision.” *See id.* at 217, ¶ 39 (separate opinion by Higgins, J.).

80. Rome Statute, *supra* note 2, art. 59.

81. Dörmann & Serralvo, *supra* note 15, at 717.

of State practice or *opinio juris*.<sup>82</sup> And to the extent that such resolutions do not reflect State practice or are opposed by some States, they, as explained above, cannot serve authoritatively as evidence that States Parties to the Conventions have reinterpreted the ensure respect obligation.

Similarly, advocates of the expansive interpretation cite United Nations Security Council resolutions in support of their view.<sup>83</sup> Although such resolutions may sometimes qualify as State verbal practice for those States sitting on the Council that vote for them, they do not constitute evidence of the position of other States because those States are expressing no view at all. Nor do they even necessarily reflect dispositive evidence of the legal position of the States voting for them. As with General Assembly resolutions, they are often the product of political, policy, and other motivations, rather than definitive expressions of a State’s views regarding the existence of a particular legal norm or its appropriate interpretation. For instance, the United States voted for a Security Council resolution that “call[ed] 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.”<sup>84</sup> However, as clearly illustrated by State Department Legal Adviser Egan’s statement above, the United States rejects any obligation to ensure respect *vis-à-vis* States that are party to a conflict to which the United States is not party.

### C. Private Publications

Unsurprisingly, private proponents of an expansive interpretation of Common Article 1 often accord undue weight to purported evidence in their work. A number of examples illustrate this tendency.

In both its 2005 *Customary International Humanitarian Law* study and the three updated commentaries, the ICRC highlighted the 1968 Teheran International Conference on Human Rights as a significant example of

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82. Letter from John B. Bellinger III, Legal Adviser, U.S. Department of State & William J. Haynes II, General Counsel, U.S. Department of Defense to Jakob Kellenberger, President, International Committee of the Red Cross (Nov. 3, 2006), *reprinted as A US Government Response to the International Committee of the Red Cross Study on Customary International Humanitarian Law*, 89 INTERNATIONAL REVIEW OF THE RED CROSS 443 (2007).

83. Dörmann & Serralvo, *supra* note 15, at 717–18.

84. S.C. Res. 681, ¶ 5 (Dec. 20, 1990).

subsequent practice.<sup>85</sup> The Conference adopted Resolution XXIII, which stated that Parties to the Geneva Conventions sometimes failed “to appreciate their responsibility to take steps to ensure the respect of these humanitarian rules in all circumstances by other States, even if they are not themselves directly involved in an armed conflict.”<sup>86</sup> Yet, as Professor Kalshoven pointed out, the participants “accepted without debate a text that was so weak as to be almost meaningless.”<sup>87</sup> Indeed, as Knut Dörmann, the senior legal advisor to the ICRC, noted in 2014, “it is not absolutely clear whether the term ‘responsibility’ referred to a legal obligation or something less.”<sup>88</sup>

Similarly, the *Customary International Humanitarian Law* study pointed to a NATO Parliamentary Assembly resolution as evidence of such an obligation, as did the aforementioned ICRC legal advisor in an academic article.<sup>89</sup> In fact, all the NATO resolution does is remind States of their “obligation, under the Geneva Conventions, not only to ‘respect’ but also to ‘ensure respect’ of the Conventions in all circumstances.”<sup>90</sup> It is true that States shoulder an obligation to ensure respect for the Conventions in all circumstances. The question, however, concerns the substantive content of the obligation. There is no indication in the NATO resolution that the Assembly was referring to any binding obligation that non-Parties to the Kosovo conflict take action to ensure respect of IHL by parties to that conflict.

As noted above, treaty interpretation admits subsequent agreements that bear on the meaning of the provision in question. However, private proponents of the expansive view of Common Article 1 sometimes apply this rule of treaty interpretation inappropriately. For example, citing the

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85. ICRC, 2016 UPDATED COMMENTARY TO GENEVA CONVENTION I, *supra* note 12, ¶ 156; ICRC, 2017 UPDATED COMMENTARY TO GENEVA CONVENTION II, *supra* note 12, ¶ 178; ICRC, 2020 UPDATED COMMENTARY TO GENEVA CONVENTION III, *supra* note 12, ¶ 189; 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 510 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter CUSTOMARY IHL STUDY].

86. FINAL ACT OF THE INTERNATIONAL CONFERENCE ON HUMAN RIGHTS 18, U.N. Doc. A/CONF.32/41, U.N. Sales No. E.68. XIV. 2 (1968).

87. Kalshoven, *supra* note 6, at 43.

88. Dörmann & Serralvo, *supra* note 15, at 707, 717.

89. CUSTOMARY IHL STUDY, *supra* note 85, at 510; Dörmann & Serralvo, *supra* note 15, at 717.

90. North Atlantic Treaty Organization, Parliamentary Assembly, Civilian Affairs Committee Resolution No. 287, ¶ 7 (Nov. 15, 1999).

aforementioned Tehran Resolution XXIII and a U.N. General Assembly resolution,<sup>91</sup> the 2016 ICRC *Commentary on Geneva Convention I* notes:

It was in full knowledge of these developments that the [ensure respect] clause was reaffirmed in Article 1(1) of Additional Protocol I, and later in Article 38(1) of the 1989 Convention on the Rights of the Child and Article 1(1) of the 2005 Additional Protocol III. The 2013 Arms Trade Treaty, which subjects arms transfer decisions to respect for humanitarian law by the recipient, refers explicitly to the obligations to respect and to ensure respect.<sup>92</sup>

However, as explained, Article 1(1) of Additional Protocol I cannot be read as suggested. And with regard to the Convention on the Rights of the Child, a careful reading of that instrument yields the opposite conclusion. Article 38(1) provides “States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.”<sup>93</sup> The text “applicable to them in armed conflicts” demonstrates that “ensure respect” in the case of this instrument refers to obligations borne by States that are parties to an armed conflict. Moreover, Article 2(1) provides that “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction.”<sup>94</sup> The “within their jurisdiction” clause denotes an obligation of States that exercise control over the territory or persons in question, not an obligation with respect to the activities of other States.

As to Additional Protocol III, which establishes a new distinctive emblem in addition to the Red Cross and Red Crescent, Article 1(1) simply replicates the ensure respect language found in the Geneva Conventions and Additional Protocol I.<sup>95</sup> Despite the fact that the question of ensuring respect for the Conventions and Protocols by other States had surfaced by 2005, neither the preamble to the instrument nor its articles goes beyond the requirement to ensure respect found in the earlier instruments. Moreover, the subject is left undeveloped in the ICRC *Commentary* to Protocol III

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91. G.A. Res. 2851 (XXVI) (Dec. 20, 1971).

92. ICRC, 2016 UPDATED COMMENTARY TO GENEVA CONVENTION I, *supra* note 12, ¶ 156.

93. Convention on the Rights of the Child art. 38(1), Nov. 20, 1989, 1577 U.N.T.S. 3.

94. *Id.* art. 2(1).

95. Additional Protocol III, *supra* note 3, art. 1(1)

produced two years later.<sup>96</sup> Had States wished to expand the scope of the notion of ensure respect, Additional Protocol III would have represented an excellent opportunity to do so; but apparently, they did not.

Beyond such overstatements, advocates of an external component in Common Article 1 seldom cite actual examples of States having taken affirmative measures to ensure respect for the Conventions by other States. Nor do they even proffer significant examples of situations in which one State criticizes another for its failure to comply with a purported legal duty to take measures to ensure a third State complies with the Conventions obligations during armed conflict. Finally, and perhaps most critically, they offer no account of rampant “negative practice,” that is, those instances in which States fail to take measures to ensure respect by other States.

In light of the thin support for a legally binding external element in the ensure respect obligation, as well as significant State practice to the contrary, it is clear that the expansive view cannot be supported as a matter of the extant law. State practice shows that the obligation to “ensure respect” in the Geneva Conventions and Additional Protocols I and III does not apply to a State that is not a party to an armed conflict.

## V. CONFLICT NOT OF AN INTERNATIONAL CHARACTER

Those who support an expansive interpretation of ensure respect also suggest that the obligation applies in non-international armed conflict.<sup>97</sup> Of course, Additional Protocol I is limited to international armed conflicts, including conflicts against “colonial domination and alien occupation and against racist regimes in the exercise of . . . self-determination . . .”<sup>98</sup> Thus, only the question of the applicability of Common Article 1 of the 1949 Geneva Conventions to non-international armed conflicts is at issue.

In interpreting Common Article 1, it is essential to bear in mind the historical circumstances in which States negotiated and adopted the 1949 Geneva Conventions. Until adoption of the Conventions, international law

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96. Jean-François Que’guiner, *Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III)*, 89 INTERNATIONAL REVIEW OF THE RED CROSS 175 (2007).

97. See, e.g., ICRC, 2016 UPDATED COMMENTARY TO GENEVA CONVENTION I, *supra* note 12, ¶ 125; ICRC, 2017 UPDATED COMMENTARY TO GENEVA CONVENTION II, *supra* note 12, ¶ 147; ICRC, 2020 UPDATED COMMENTARY TO GENEVA CONVENTION III, *supra* note 12, ¶ 158.

98. Additional Protocol I, *supra* note 3, art. 1(4).

was generally silent with respect to internal conflicts. Such conflicts were deemed to be the concern, consistent with the principle of sovereignty, of the State in which they took place. However, in light of such conflicts as the Spanish Civil War and Greek Civil War, States participating in the diplomatic conference leading to adoption of the Geneva Conventions agreed that some degree of regulation, albeit far less than that which was to apply in international armed conflicts, was necessary. That step was cautiously taken, with only a single substantive article devoted to such conflicts in each of the four Conventions—Common Article 3.

The Pictet commentaries confirm that Common Article 1 was not meant to apply to the non-international armed conflict situations addressed by Common Article 3. For example, the *Commentary* to Geneva Convention I, published just three years after adoption of the Conventions, provides “[i]f the Convention was to include provisions applicable to all non-international conflicts, it was necessary, as we have seen, to give up any idea of insisting on the application to such conflicts of the Convention in its entirety.”

Legally, therefore, the parties to the conflict are only bound to observe Article 3 and may ignore all the other Articles. It is obvious, however, that each one of them is completely free—and should be encouraged—to declare its intention of applying all or part of the remaining provisions.<sup>99</sup>

Proponents of an external component to Common Article 1 typically point to the “in all circumstances” phrase in the article to support extension to non-international armed conflicts. However, as explained above, they misunderstand the purpose of that phrase. Indeed, the 1929 Conventions, in which the phrase initially appeared, dealt only with what is today labeled international armed conflict. That the 1949 Conventions’ “in all circumstances” text was not intended to extend the reach of the Common Article 1 obligations to non-international armed conflicts is equally apparent. For example, the 1952 Geneva Convention I *Commentary* succinctly provides, “the words ‘in all circumstances’ do not relate to civil war.”<sup>100</sup> Eight years later, the *Commentary* to Geneva Convention IV again confirmed that Common Article 1 is inapplicable to non-international armed conflicts: “The words ‘in all circumstances’ which appear in this Article, do not, of course, cover the case of civil war, as the rules to be followed in such conflicts are laid down by the Convention itself, in Article 3.”<sup>101</sup>

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99. 1952 COMMENTARY ON GENEVA CONVENTION I, *supra* note 24, at 59.

100. *Id.* at 27.

101. 1958 COMMENTARY ON GENEVA CONVENTION IV, *supra* note 24, at 16.

Perhaps most compelling in support of the position that the Common Article 1 obligation to ensure respect does not apply in non-international armed conflicts is the fact that although Additional Protocol I on international armed conflict includes such an obligation, Additional Protocol II, which is the first treaty to exclusively address non-international armed conflict, does not. Had the States participating in the 1973-1977 Diplomatic Conference that produced two Additional Protocols meant the ensure respect obligation set forth in Common Article 1 to apply in non-international armed conflicts, they would have taken the opportunity to reiterate the point in Additional Protocol II, as they did for international armed conflict in Additional Protocol I. This omission of the obligation in Additional Protocol II, therefore, operates as a subsequent agreement demonstrating that there was no intention to encompass non-international conflict in the Common Article 1 obligations of the Geneva Conventions themselves.

#### VI. CUSTOMARY OBLIGATION TO ENSURE RESPECT

It is clear that Common Article 1 neither contains an external element that obligates States that are not party to an international armed conflict to take measures to ensure respect by belligerent States nor applies the ensure respect obligation as it is properly understood in non-international armed conflict. However, the related question of whether such obligations exist as a matter of customary law merits brief attention.

There is widespread consensus that the Conventions now reflect customary international law.<sup>102</sup> This was acknowledged by the International Court of Justice in its *Nuclear Weapons* advisory opinion, where the Court observed, “these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.”<sup>103</sup> The U.N. Secretary-General reached the same conclusion in the report introducing the Statute of the International Criminal Tribunal for the

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102. See, e.g., discussion in Frederic Megret, *The Universality of the Geneva Conventions*, in THE 1949 GENEVA CONVENTIONS: A COMMENTARY, *supra* note 10, at 668; Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AMERICAN JOURNAL OF INTERNATIONAL LAW 348 (1987).

103. *Nuclear Weapons*, *supra* note 71, ¶ 79.

Former Yugoslavia,<sup>104</sup> which was subsequently approved by the Security Council.<sup>105</sup> That there is a customary international law obligation to ensure respect mirroring that contained in the 1949 Geneva Conventions would appear uncontroversial.

However, as the International Court of Justice observed in its *Paramilitary Activities* judgment, a customary norm that is reflected in a treaty, even if identical in meaning at the time, enjoys a separate existence.<sup>106</sup> That being so, the content of the customary variant may evolve over time. Yet, for the same factual reason that attribution of an external element to Common Article 1 fails, a similar evolution in meaning cannot have occurred with regard to the customary obligation to ensure respect—there is insufficient State practice or expressions of *opinio juris* to support such an interpretation.<sup>107</sup> Indeed, negative practice and contrary *opinio juris* serve as dispositive confirmation that an external component of the ensure respect purported norm has not crystallized into customary international law.

And it must be recalled in this regard that the State practice concerned, “including that of States whose interests are specially affected, should have been both extensive and virtually uniform.”<sup>108</sup> State practice evidencing an external element is neither. Moreover, the United States’ opposition to the notion is particularly important. Given the frequency and intensity with which it engages in armed conflict, as well as its unparalleled ability to influence the actions of other States that find themselves on the battlefield, it surely qualifies as “specially affected” in this regard.

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104. U.N. Secretary-General, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), ¶ 35, U.N. Doc. S/25704 (May 3, 1993).

105. S.C. Res. 827 (May 25, 1993).

106. *Paramilitary Activities*, *supra* note 8, ¶¶ 176–79.

107. The universally accepted requirements of State practice and *opinio juris* derive from Article 38(1)(b) of the Statute of the International Court of Justice, which includes as sources of international law “international custom, as evidence of a general practice accepted as law.” Statute of the International Court of Justice art. 38(b)(1), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 99; *see also* S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7); North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶¶ 71, 77 (Feb. 20); Continental Shelf (Libya v. Malta), Judgment, 1985 I.C.J. 13, ¶ 27 (1985).

108. *North Sea Continental Shelf*, *supra* note 107, ¶ 74. *See also* International Law Commission, Report on the Work of Its Seventieth Session, U.N. Doc. A/73/10, ¶ 7 (2018); G.A. Res. 73/203, ¶¶ 1, 7 (Jan. 11, 2019) (Having considered the International Law Commission’s report and taken note of its recommendations, the U.N. General Assembly welcomed the conclusions and acknowledged the utility of wide dissemination of the recommendations.).

Aside from the issue of the existence of an external element, the question also remains as to whether a customary law obligation to ensure respect, whatever its parameters, has crystallized for application in non-international armed conflict. That States are obliged as a matter of customary law to respect those rules that apply during a non-international armed conflict is self-evident. A State, and therefore both its organs and non-State actors whose actions are attributable to the State pursuant to the law of State responsibility, must abide by the customary law of war irrespective of whether any treaty provision requires it to do so.

The absence of an obligation to respect and ensure respect in Additional Protocol II is instructive on this issue. In that States bear a general international legal duty to honor their legal obligations (whether contained in law of war or other international law regimes), it was not imperative to codify the obligation to respect in Additional Protocol II. However, international law generally does not require States to ensure the respect of international law rules by entities or individuals whose conduct is not attributable to a State as a matter of law. That being so, it seems States would have codified, as they often do in treaties, any distinct customary law obligation to “ensure respect” during a non-international armed conflict in Additional Protocol II so as to emphasize its existence, exactly as they did for the ensure respect obligation during international armed conflicts in Additional Protocol I. Moreover, no State practice supports the proposition that the legal obligation to ensure respect applies in non-international armed conflicts.

Any assertion that an ensure respect obligation exists in customary law during a non-international armed conflict also runs counter to the general reticence of States to accept obligations with respect to non-international armed conflicts. Such conflicts have been regarded by States as primarily matters of internal concern. It, therefore, would be counterintuitive to presume that States are of the legal view (the *opinio juris* required for the crystallization of a customary rule) that they are required under customary law to ensure respect in such conflicts. Indeed, the hesitancy of States to accept limitations on their activities during a non-international armed conflict is well illustrated by the fact that only Common Article 3 expressly applies to non-international armed conflicts in the 1949 Geneva Conventions, and that while Additional Protocol I on international armed conflict has 102 articles, Additional Protocol II contains only twenty-eight for non-international armed conflicts.

Even if an ensure respect obligation applied during non-international armed conflict, the obligation would not include an external element. After all, there is even less justification for a conclusion that under customary law non-parties to a non-international armed conflict must take measures to ensure respect by the parties to the conflict than is the case of international armed conflict. The internal nature of the former tends to pose comparatively less risk to international security and stability than the latter and is, therefore, generally of lesser international concern. Moreover, and as just noted, States jealously guard their internal prerogatives. For these reasons, if a customary international law obligation to ensure respect existed for non-international armed conflict, its scope would not exceed that applicable in international armed conflicts and therefore would include no duty on the part of States that are not party to a non-international armed conflict to ensure respect by those States that are party to the conflict.

## VII. CONCLUDING THOUGHTS

The 1949 Geneva Conventions' unique place in the law of war presents both opportunity and obligation. Their status as unrivaled common ground between States during armed conflict makes the Conventions an attractive vehicle for reform. Reform-minded efforts have seized upon them, particularly Common Article 1, as an opportunity to give greater humanitarian force to their already formidable regulation of hostilities. While reformers' motives are perhaps laudable, they have, to date, offered insufficient evidence to support their claim that the Common Article 1 "ensure respect" obligation includes an external component.

First, their accounts do not accord with or account for the original meaning of the article. The negotiating history of Common Article 1 makes it clear that States understood the Article would only impose internal compliance obligations on States for the conduct of their own armed forces and groups under their control during international armed conflicts to which they are a party. Second, expansive accounts of Common Article 1 misjudge the practice of States subsequent to adoption of Common Article 1. Assessment of the seventy years of practice reveals neither explicit subsequent agreement by States to modify their Common Article 1 obligation nor sufficient subsequent State practice to establish agreement to that effect. In fact, negative State practice concerning external obligations establishes the Article's original meaning as its currently established meaning.

If the Conventions offer unparalleled humanitarian opportunity, they surely demand comparable obligations of reverence and care in their interpretation. To sustain the Conventions' reach and reputation as legal common ground requires meticulous attention to the bargains struck and consented to by States. Reform through immoderate interpretation rather than formal amendment or other established processes threatens not only to distort the meaning of carefully considered and formulated legal doctrine. It threatens to divide the community of States and erode the Conventions' status as vital legal common ground between States during armed conflict.