

# **Expert Opinion on Third States' Obligations vis-à-vis IHL Violations under International Law, with a special focus on Common Article 1 to the 1949 Geneva Conventions**

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## **RATIONALE AND SCOPE OF THE EXPERT OPINION**

This Expert Opinion was requested in the context of the recently published 2016 Updated ICRC Commentary of the 1949 Geneva Convention I (GCI), in particular with regard to Common Article 1 (CA1)<sup>2</sup> and in light of the on-going debate over the attempts to address the ineffectiveness of existing means and mechanisms to ensure compliance with International Humanitarian Law (IHL)<sup>3</sup>, notably the obligations of third States vis-à-vis IHL violations committed by a Party to a conflict.

It must be noted that this request was formulated with regard to the specific situation of Israel's continuing violations of IHL in the occupied Palestinian territory (oPt) and the question of third States' obligations under international law in that respect. However the undersigned wish to stress that, given the occurrence of multiple IHL violations in other conflicts in other parts of the world, the purpose of this legal opinion requires providing an analysis of those obligations beyond that particular case. This approach is also justified out of scientific considerations of objectiveness. The law is the same for all, but the fact that it is not implemented somewhere does not justify its violation in other cases. This is further supported by the fact that if scholarly writings and the practice of States and of international organizations on third States' obligations under IHL pertain mostly to the case of the conduct of Israel

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<sup>1</sup> The views expressed in this Expert Opinion are solely those of the authors and do not necessarily reflect those of the organizations and institutions the authors have worked for in the past or currently work for or of which they are part.

<sup>2</sup> *ICRC Updated Commentary to the Geneva Convention I*, 2016, Article 1, available at:

[https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=72239588AF\\_A66200C1257F7D00367DBD](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=72239588AF_A66200C1257F7D00367DBD)

<sup>3</sup> See for example, 32<sup>nd</sup> International Conference of the Red Cross and Red Crescent (8-10 December 2015, Geneva), Resolution 2 on "Strengthening compliance with international humanitarian law", 32IC/15/R2, available at:

[http://rcrcconference.org/wp-content/uploads/sites/3/2015/04/32IC-AR-Compliance\\_EN.pdf](http://rcrcconference.org/wp-content/uploads/sites/3/2015/04/32IC-AR-Compliance_EN.pdf) and the related *Concluding Report on Strengthening Compliance with International Humanitarian Law*, drafted following Resolution 1 on "Strengthening Legal Protection for Victims of Armed Conflicts" adopted during the 31st International Conference of 2011, available at:

<https://www.icrc.org/en/download/file/10645/concluding-report-strengthening-compliance-ihl-icrc-06-2015-.pdf>

as an occupying power, relevant practice is more diverse and relates to other conflicts, including non-international ones.<sup>4</sup> As a result, this Expert Opinion will only consider the situation of Israel in as much as it relates to the legal analysis of the issue at hand. This being said, the undersigned do acknowledge that when it comes to particular measures taken by third States, more has been done to date in the specific case of Israel than in other conflicts. Conversely, this peculiar situation does put to test the extent to which the role played by third States can impact on-going IHL violations. Finally it is important to note that this Expert Opinion is not meant to establish whether certain IHL violations attributable to Israeli authorities in the oPt did actually occur (there is plenty of credible evidence in that regard elsewhere). Hence, for the purpose of this Expert Opinion, when making references to specific IHL violations, the following analysis will do so on the basis that those violations are well documented and assumed without taking a specific position on a particular conduct.

This Expert Opinion primarily looks at the obligations of third States to address IHL violations committed in the context of an armed conflict to which they are not a party. It also aims at identifying the type of measures required by or allowed under such obligations. Otherwise, it would remain a theoretical, if not vain, exercise. In that regard, the Expert Opinion focuses on the meaning, content and scope of the obligation to ensure respect for IHL contained in CA1 to the 1949 four Geneva Conventions (GCI-IV) and restated in Article 1 para. 1 of the 1977 Additional Protocol I. Despite recurring debates over some of the exact legal implications it carries, this provision, seen as of “a quasi-constitutional nature”<sup>5</sup>, reflecting the “special character of the Conventions”<sup>6</sup>, and conferring a special status to IHL norms that are “not based on reciprocity”<sup>7</sup>, is a central legal basis for the question at hand.

The undersigned wish to stress that a measure of the unique nature of this obligation lies precisely in assessing the extent to which CA1 in its “external dimension”<sup>8</sup>, on one hand serves as a basis for third States to adopt measures to induce compliance by Parties to an armed conflict in which the third States are not involved, and on the other hand what those measures should be. Indeed, one of the fundamental questions is whether, in the absence of any explicit guidance, the obligation to ensure respect merely carries negative obligations, namely not to do certain things vis-à-vis States involved in IHL violations, or whether it also requires, as a positive obligation, third States to take certain steps. Some authors maintain that

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<sup>4</sup> K. Dörmann and J. Serralvo, “Common Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations”, *IRRC*, No. 96, 2014, p. 720, and footnote no 68.

<sup>5</sup> L. Boisson de Chazournes and L. Condorelli, “Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests”, *IRRC*, No. 837, March 2000, p. 68.

<sup>6</sup> J. Pictet, *The Geneva Conventions of 12 August 1949: Commentary IV Geneva Convention relative to the Protection of Civilians in Time of War* (1952), p. 25.

<sup>7</sup> *The Prosecutor v. Zoran Kupreskic and others*, ICTY, Trial Chamber, Judgment, 14 January 2000, Case No. IT-95-16-T, para. 517.

<sup>8</sup> R. Geiss, “The Obligation to Respect and to Ensure Respect for the Conventions”, in *The 1949 Geneva Conventions - A Commentary*, Andrew Clapham, Paola Gaeta, and Marco Sassòli (eds), OUP, Oxford, p. 120.

this provision only grants a faculty or an entitlement for third States to adopt measures in the face of IHL violations, without any legal obligation to do so, excluding any violation of that norm if no measures are taken.<sup>9</sup> However this Expert Opinion argues that CA1 requires third States to take measures, even if this means in practice making this provision one of the most often violated IHL norms. This is so based on the state of positive law, away from the recurring criticism the undersigned are fully aware of, that when trying to define the content of the obligation to ensure respect, doctrinal commentators tend to draw from CA1 excessive implications, stretching the law beyond its actual meaning.<sup>10</sup> In as much as that we concur with Robin Geiss' words that "much hope has been vested in Common Article 1"<sup>11</sup>, like him we also consider that this provision carries important obligations for third States. In light of persistent debate over CA1 though, such conclusion must result from a careful review of the current state of the law.

This Expert Opinion, while addressing mostly the obligation to ensure respect under IHL, also refers to general international law in as much as it contributes to identifying and understanding the legal scope of that obligation. First, it is widely recognized that CA1 in its external dimension acquired a legal status through the development of subsequent practice, including by the United Nations and to a certain extent States within and outside UN organs, which is a way of determining the content of any obligation under international law. Second, claims, such as the continuous lack of compliance with the duty to ensure respect, questioning the very existence of a proper obligation resulting from CA1 must be addressed by reference to international law concepts, including desuetude. Furthermore the parameters of the obligation to ensure respect and the related relevant measures required from third States are also to be found in general international law, whatever the special and unique character of that obligation is. In this respect, the general secondary rules on State responsibility, applicable in case of any violation of international law, are relevant, including in particular those on the consequences under the international law on State responsibility for a serious breach of a peremptory norm of international law. Additionally, the underlying notion of obligation *erga omnes* at the heart of third States' duty to ensure respect for IHL comes from the general rules on State responsibility. Finally CA1 could be interpreted in light of some of the international law on State responsibility obligations.

Given the wealth of literature on CA1, the undersigned wish to stress that this Expert Opinion is not meant to be exhaustive, or to merely restate existing analysis and doctrinal pronouncements on that issue. Taking such literature into account, it aims at providing an assessment of the meaning and scope of the obligation to ensure

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<sup>9</sup> See for example, R. Kolb, "Commentaires iconoclastes sur l'obligation de faire respecter le droit international humanitaire selon l'article 1 commun des Conventions de Genève de 1949", *RBDI*, No.2, 2013, pp. 513-520.

<sup>10</sup> *Ibidem*.

<sup>11</sup> R. Geiss, *op. cit.*, p. 112.

respect with a view to contribute to its operationalization, through identifying measures to be taken by third States.

As a prerequisite to identify such measures, this Expert Opinion first briefly clarifies the meaning and content of the “obligation to ensure respect”, including how it acquired a key dimension for the purpose of this analysis that was not originally envisaged by the drafters of the GCI-IV. This “external dimension”, namely the obligation for third States to act beyond the persons and entities under their jurisdiction, emerged due to the subsequent practice by States, mainly in the framework of the United Nations. The Expert Opinion then spells out the characteristics and the nature of this obligation, as a positive obligation of means to be exercised through a standard of due diligence. It furthermore considers the link between this obligation under IHL and general international law, in particular the norms on State responsibility and the limits imposed by international law. Finally, after briefly clarifying the scope and modalities of application of the obligation to ensure respect for IHL, and on the basis of those various parameters, this Expert Opinion will provide indication as to its operationalization, notably by suggesting measures third States can or cannot take.

## **THE MEANING AND CONTENT OF THE OBLIGATION TO ENSURE RESPECT FOR IHL**

It is important to stress that the following overview is not meant to provide a full analysis of the obligation to ensure respect as intended by the drafters of the GCI-IV. This section merely intends to highlight the original content of that obligation to better understand how it relates to the question of measures taken by third States and how it evolved over time through subsequent practice. In that regard, the difference in the number of pages dedicated to the analysis of CA1 in the first ICRC Commentary and in its 2016 Updated version is a symbol of the significant evolution the meaning of this provision underwent, that is not merely explained by the scarce relevant practice available in 1950’s.

### ***I. The original “internal dimension” of the obligation to ensure respect for IHL***

#### **1. Drafting history of CA1**

CA1 reads as follows: “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” The inclusion of the duty to respect the GCI-IV is widely considered as a “truism”<sup>12</sup>, in that it merely restates the general principle *Pacta sunt servanda* of the international law of treaties, codified in Article 26 of the Vienna Convention on the Law of Treaties, that binding

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<sup>12</sup> Ibid., p. 117.

treaties must be implemented in good faith. While redundant this reference not only reiterates the importance of this obligation in the context of the GCI-IV, but somehow also highlights the novel character of the second obligation undertaken by State Parties.

The obligation to “ensure respect” has no equivalent in previous IHL treaties. The 1864 and 1906 Geneva Conventions and the 1907 Hague Convention (X) only included a general provision on implementation. Similarly Article 25 para. 1 of the 1929 Geneva Convention of the Condition of the Wounded and Sick in Armies in the Field and Article 82 para. 1 of the 1929 Geneva Convention Relative to the Treatment of Prisoners of War merely referred to the terms “shall be respected (...) in all circumstances”, although this was the first time such an expression was used.

The terms “to ensure respect”, added to the obligation to respect, can be traced back to the draft Convention for the Protection of War Victims submitted by the ICRC to the XVIIth International Conference of the Red Cross (Stockholm, May 1948). The draft provision read: “The High Contracting Parties undertake, in the name of their people, to respect and ensure respect for the present Convention in all circumstances”.<sup>13</sup> The Diplomatic Conference adopted this draft provision, save for the reference to “in the name of their people” which was deleted during the Stockholm Conference.<sup>14</sup> Despite the novelty and potentially far-reaching implications of this addition, the provision did not give rise to significant debate.<sup>15</sup>

## 2. The “internal dimension” of the obligation to ensure respect

The obligation to ensure respect contained in CA1 unquestionably carries what was called an “internal compliance dimension”.<sup>16</sup> The primary purpose of including this wording in this provision during the negotiations of the GCI-IV was to highlight that the State Parties commit to guarantee the respect of those Conventions by both their own organs as well as their population as a whole.

The obligation to respect the GCI-IV reflects the existing general rule under the international law on State responsibility that any breach, by act or omission of those treaties attributable to that State triggers its international responsibility, under the well established grounds for attribution, such as its organs or by individual or groups of persons under its control.<sup>17</sup> The obligation to ensure respect however goes a step further in requiring the States to proactively take measures to prevent

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<sup>13</sup> Draft Resolution on New Conventions for the Protection of War Victims”, XVIIth International Red Cross Conference (Stockholm, August 1948), quoted by R. Geiss, *op. cit.*, p. 114, footnote no 19.

<sup>14</sup> *Ibid.*, R. Geiss, *op. cit.*, p. 114.

<sup>15</sup> F. Kalshoven, “The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit”, *YIHL*, Vol. 2, 1999, p. 27.

<sup>16</sup> R. Geiss, *op. cit.*, p. 117

<sup>17</sup> *Articles on the Responsibility of States for internationally wrongful acts*, annexed to UN General Assembly Resolution 56/83, 12 December 2001, Articles 4-6 and 8-11.

violations.<sup>18</sup> In that regard the obligation not to violate the GCI-IV (obligation to respect) is strengthened by a positive obligation to ensure respect.<sup>19</sup> This duty is also complemented by specific measures envisaged explicitly in the GCI-IV that States must respect, such as criminalizing and punishing grave breaches to the Conventions (Articles 49/50/129/146).

Most importantly the obligation to ensure respect in its internal dimension also extends to a duty to guarantee the respect for the GCI-IV by the whole population under the jurisdiction of a State Party. This understanding was already recognised by the State delegations during the Diplomatic Conference in 1949.<sup>20</sup> This is also widely confirmed in the majority of the doctrine<sup>21</sup> and the Updated ICRC Commentary.<sup>22</sup> As noted by an author, this obligation “applies to and is activated by any private activity that impairs the enjoyment of the protection granted by the Geneva Conventions” and such an interpretation is further supported by the object and purpose of CA1.<sup>23</sup> State Parties are therefore required to act against “lower-level interferences”.<sup>24</sup>

Furthermore the undersigned wish to stress, as highlighted in the 2016 ICRC Updated Commentary<sup>25</sup>, that the GCI-IV contain specific provisions aimed at ensuring respect by private individuals, including the dissemination of the Conventions among the civilian population (Articles 47/48/127/144).

A crucial issue remains whether the broad scope of the internal dimension of the obligation to ensure respect is at all relevant to address and govern measures taken by third States in the face of IHL violations by other states, and if it is, the extent to which it carries concrete legal consequences.

### 3. Legal implications for measures taken by third States of the “internal dimension” of the obligation to ensure respect

The undersigned do acknowledge that by definition the internal scope of the obligation to ensure respect appears to have no relevance to regulate measures taken by third States in the face of IHL violations committed *by other States*. This pertains to the “external dimension” of this duty, which will be discussed later in this Expert Opinion. The internal dimension relates to steps to be taken by a State to ensure respect *by the persons under its authority or jurisdiction*. Furthermore this obligation is about guaranteeing respect both by preventing violations and through active measures to safeguard the enjoyment of the protections provided by IHL. However

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<sup>18</sup> ICRC Updated Commentary, op. cit., para. 145 and J. Pictet, 1952 Commentary, op. cit., pp. 25-26.

<sup>19</sup> R. Geiss, op. cit., p. 119.

<sup>20</sup> Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II-B, p. 53.

<sup>21</sup> See for example, F. Kalshoven, op. cit.

<sup>22</sup> ICRC Updated Commentary, op. cit., para. 150.

<sup>23</sup> R. Geiss, op. cit., p. 118.

<sup>24</sup> Ibidem.

<sup>25</sup> Ibidem.

the undersigned contend that the latter positive nature of that obligation in its internal manifestation may carry some legal implications, though limited in scope, when combined with its external dimension.

The case of legislatives or administrative measures adopted by States to prevent or prohibit persons under their jurisdiction, in particular private individuals, to call for peaceful measures, such as boycott of products, in response to IHL violations by another State offers a prime example of this link between the internal and external dimensions of the obligation to ensure respect. As discussed further below, the undersigned argue that such measures adopted by States, primarily amount to a violation of the obligation to ensure respect for IHL in its external dimension. This being said, such finding can also be supported by reference to the internal dimension.

Indeed, considering the positive nature of that obligation, it would not be unreasonable to claim that if a State must ensure that its population as a whole does not interfere with the protections afforded by the GCI-IV, such as stopping private individuals from hampering medical aid deliveries to the wounded and sick<sup>26</sup>, it should not frustrate efforts by its population to ensure respect for IHL. It may also be argued that in as much as a State has a specific obligation to disseminate the content of the GCI-IV to its civilian population, the positive obligation to take measures to guarantee those conventions are respected would prohibit a State from adopting legislations that ban its population to use the very knowledge it acquired about those treaties to call for a better respect of IHL, this being somehow a result of the State implementing its obligation of dissemination.

## ***II. The progressive recognition of an “external dimension” to the obligation to ensure respect for IHL***

States did not seem to have envisaged giving any “external dimension” to CA1 in 1949, i.e. did not consider that it would carry authorizations and obligations for State Parties to adopt measures to induce the respect of the GCI-IV by other States, in particular those involved in an armed conflict. However, the meaning of this provision evolved over time to include such a dimension. In that regard CA1 is a key example of how subsequent practice can contribute to amend the meaning of a treaty provision.

Article 31 para. 3 (b) of the Vienna Convention on the Law of Treaties explicitly provides for this possibility, though within a more restricted context, when stating that “[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” must be taken into account as a method of interpretation. This is particularly so in the case at hand in which such interpretation is based upon the literal meaning of the provision. While a

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<sup>26</sup> Ibidem.

minority of the doctrine and few States still challenge the existence of an external component within the obligation to ensure respect, the prevailing view acknowledges such dimension and current debates revolve, among others, around whether this dimension bears a mere “faculty” or entitlement for the third States or a proper obligation. The undersigned wish to stress that they adhere to the latter interpretation. Furthermore even if a mere entitlement were to be favoured, it would not affect the actual measures to be considered under the expression “ensure respect”. The fundamental difference rather lies in the way the failure to take measures would be characterised, amounting or not in itself to a violation of the separate obligation to ensure respect for IHL. The obligation to ensure respect being of a conventional nature, the question is less about proving that under customary law based on State practice such an obligation exists (or is not only a faculty to act), but rather to show that this treaty obligation is not obsolete, which is clearly not the case in light of States’ declarations and references to CA1.

#### 1. The intention of the drafters of CA1

As noted above the inclusion of the expression “ensure respect” in CA1 was not meant, based on the few delegations who expressed a position during the Diplomatic Conference in 1949, to go beyond the commitment taken by States Parties to guarantee the respect of the Geneva Conventions internally, by their organs and population. Frits Kalshoven’s categorical statement leaves little room for interpretation or doubt:

Despite my thorough investigations, I have not found in the records of the Diplomatic Conference even the slightest awareness on the part of government delegates that one might ever wish to read into the phrase ‘to ensure respect’ any undertaking of a contracting state other than an obligation to ensure respect for the Conventions by its people ‘in all circumstances’.<sup>27</sup>

Although the *travaux préparatoires* are only a subsidiary means for the interpretation of treaty provisions, the scarcity of evidence pointing towards an “external dimension” of the obligation to ensure respect at the time of the adoption of CA1 must be recognized. The incorporation of a similar provision (Article 1 para. 1) in the Additional Protocol I of 1977 and in Additional Protocol III of 2005 did not give rise to any discussion clarifying the meaning of that obligation as including a duty for States Parties to induce compliance with IHL from other States. It is nevertheless interesting to note that no similar provision was introduced into Protocol II applicable to non-international armed conflicts.

Against this backdrop, the extensive reading of CA1 in the first ICRC Commentary appears isolated and rather as an early attempt to proceed with a

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<sup>27</sup> F. Kalshoven, op. cit., p. 28.



dynamic interpretation of a treaty provision as described by the ICJ in the Namibia case.<sup>28</sup> The Commentary refers to:

The proper working of the system of protection provided by the Convention [that] demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally.<sup>29</sup>

The need to ensure the effective protections afforded by the Geneva Conventions would command such a broad interpretation. However the ICJ, while recognizing that certain concepts included in the provision of a treaty are “by definition evolutionary”, and that they must have been accepted as such by States, noted that this dynamic interpretation remains based on their intentions at the time and requires time for such concepts to have evolved.<sup>30</sup>

It is therefore reasonable to conclude that CA1 when it was adopted did not mean to confer an external dimension to the obligation for State Parties to ensure respect of the GCI-IV by other states.<sup>31</sup>

2. The development of subsequent practice conferring an “external dimension” to the obligation to ensure respect

The following developments intend to show that the expression “ensure respect” today contains an external dimension and carries a proper legal obligation for States to take measures to also induce compliance with IHL by other States. This Expert Opinion will later review the scope and specific content of this obligation.

This extensive reading of CA1 is confirmed by the subsequent practice of States, international organizations, international jurisprudence and doctrinal analysis. This being said the undersigned are aware that some authors continue to either dismiss the very “external dimension” of the obligation to ensure respect<sup>32</sup>, or to challenge the existence of an obligation, insisting it is rather an entitlement or a “faculty”.<sup>33</sup>

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<sup>28</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, para. 53.

<sup>29</sup> J. Pictet, *Commentary: Geneva Convention relative to the Protection of Civilian Persons in Times of War*, ICRC, Geneva, 1958, p. 16.

<sup>30</sup> See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, para. 53.

<sup>31</sup> R. Geiss, *op. cit.*, p. 121.

<sup>32</sup> C. Focarelli, “Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?”, *EJIL*, Vol. 21., No. 1, 2010, p. 170.

<sup>33</sup> R. Kolb, *op. cit.*, p. 513.

Despite the original restrictive understanding of the obligation to ensure respect, subsequent practice over the past three decades account for an evolution of what this duty entails. The UN Security Council, the UN General Assembly and an overwhelming majority of the State Parties to the GCIV have relied on this obligation to call on third States to react to Israeli violations of that Convention in the oPt.<sup>34</sup> In particular the process launched by the UN General Assembly between 1997 and 2001 gave an opportunity to States to consider various measures to give effect to their obligation in the context of the IHL violations committed by Israel in the oPt.<sup>35</sup> Furthermore, in other conflicts, although to a much lesser extent than the Israeli-Palestinian conflict, States also referred to that obligation as a basis to induce respect for IHL by other States.<sup>36</sup> The preamble of the Resolution XXIII on “Human Rights in Armed Conflicts”, adopted at the 1968 Teheran Conference on Human Rights explicitly mentioned the obligation to ensure respect for IHL “by other States”.<sup>37</sup> The highly selective nature of this practice does not impact on its relevance for the purpose of establishing an evolution of the meaning of the obligation under review.

The ICJ confirmed the “external dimension” of that obligation as well as its customary law status.<sup>38</sup> It is true that two Judges challenged that assertion either by questioning that this is “a statement of positive law”<sup>39</sup> or by qualifying CA1 as “simply a provision in an almost universally ratified multilateral Convention”.<sup>40</sup> This could be seen as evidence of the doubtful nature of any external dimension. However such an approach fails to consider that those opinions were expressed, in part, for

<sup>34</sup> See for example, UN Security Council Resolution 681 (1990), operative para. 5; UN General Assembly Resolutions ES-10/2 of 5 May 1997, ES-10/3 of 30 July 1997, ES-10/4 of 19 November 1997, ES-10/6 of 24 February 1999 and the Report of the Chairman of an Experts’ meeting held on the Fourth Geneva Convention in Geneva, 27-29 October, 1998 (all of them reproduced in M. Sassòli and A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 2011, pp. 1196 and ff., and the Declaration adopted by a Conference of the High Contracting Parties to the Fourth Geneva Convention convened on the basis of common Article 1 in Geneva, 5 December 2001, available at: <http://www.eda.admin.ch/eda/e/home/foreign/hupol/4gc.html>, in which 114 States Parties participated. For more recent related practice, see M. Lanz, E. Max and O. Hoehne, *The Conference of High Contracting Parties to the Fourth Geneva Convention of 17 December 2014 and the duty to ensure respect for international humanitarian law*, IRRC, No. 96, 2014, pp. 1115-1133.

<sup>35</sup> See for example, P-Y. Fux and M. Zambelli, “Mise en œuvre de la Quatrième Convention de Genève dans les territoires palestiniens occupés: historique d’un processus multilatéral (1997-2001)”, IRRC, No. 847, 2002, pp. 661-691.

<sup>36</sup> For a comprehensive review of the relevant practice, see *ICRC Customary International Humanitarian Law Study*, Online updated version, Rule 144, available at: [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule144#\\_VIOTNaPr](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule144#_VIOTNaPr). See also R. Geiss, “Common Article 1 of the Geneva Conventions : scope and content of the obligation to 'ensure respect' - 'narrow but deep' or 'wide and shallow'?” in H. Krieger (ed.) *Inducing Compliance with International Humanitarian Law : Lessons from the African Great Lakes Region*, Cambridge University Press, pp. 417-440.

<sup>37</sup> Resolution XXIII adopted by the International Conference on Human Rights (Teheran), “Human Rights in Armed Conflicts”, 12 May 1968, Preamble, para. 9.

<sup>38</sup> See ICJ, *Legal Consequences of the Construction of a Wall*, *op. cit.*, para. 158., and *Military and paramilitary activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment, *ICJ Reports*, 1986, paragraph 220.

<sup>39</sup> ICJ, *Legal Consequences of the Construction of a Wall*, *op. cit.*, Separate Opinion of Judge Kooijmans, para. 50.

<sup>40</sup> *Ibid.*, Separate Opinion of Judge Higgins, para. 39.

different reasons, respectively that the Court had not provided proper grounds to explain its statement<sup>41</sup> and that it confused that provision with “the erga omnes principle”.<sup>42</sup> Therefore by themselves these opinions cannot reverse the state of the practice examined above. Furthermore although some States had a restrictive interpretation of this obligation limited to the parties to a conflict<sup>43</sup>, the ICJ in its 2004 Advisory Opinion on the Wall rejected such interpretation. It held that every High Contracting Party to the Conventions, regardless of whether they are parties to a conflict, is bound by this obligation.<sup>44</sup>

Finally the majority of the doctrine recognizes the existence of this external dimension.<sup>45</sup> This is also confirmed in the 2016 Updated ICRC Commentary of the GCI that provides much more evidence of this, based on decades of practice, than the 1952 Commentary of Article 1 to the GCI.<sup>46</sup>

It cannot be ignored that some thorough scholarly analyses continue to refute the full external scope of the obligation to ensure respect or at least that it has the character of a legal duty.<sup>47</sup> For example Carlo Focarelli, while listing all the legal arguments briefly mentioned above in favour of a broad interpretation, wonders whether CA1 “provides for an obligation or rather a discretionary power (if not both) to take measures against transgressor states”<sup>48</sup> and asserts that it “is a reminder of obligations, negative and positive, to ‘respect’ the Geneva Conventions (according to the general *pacta sunt servanda* rule) which has progressively been given the meaning of a mere recommendation to adopt lawful measures to induce transgressors to comply with the Conventions.”<sup>49</sup> However, despite valid arguments, some of the key reasons put forward to support this finding appear to be linked to a pragmatic view of

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<sup>41</sup> Ibid., Separate Opinion of Judge Kooijmans, para. 47.

<sup>42</sup> Ibid., Separate Opinion of Judge Higgins, para. 39.

<sup>43</sup> ‘UK Policy on the Occupied Palestinian Territories’, Letter to Hickman and Rose by Nick Banner, UK Foreign and Commonwealth Office, 20 September 2005.

<sup>44</sup> See ICJ, *Legal Consequences of the Construction of a Wall*, *op. cit.*, para. 158.

<sup>45</sup> M. Bothe, K.J. Partsch and W.A. Solf, *New Rules for Victims of Armed Conflicts*, Nijhoff, The Hague/Boston/London, 1982, p. 43; L. Boisson de Chazournes and L. Condorelli, “Quelques remarques à propos de l'obligation des États de 'respecter et faire respecter' le droit international humanitaire 'en toutes circonstances'”, in C. Swinarski (ed) *Études et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet*, ICRC, Geneva, 1984, pp. 26-35; L. Condorelli and L. Boisson de Chazournes, “Common Article 1 of the Geneva Conventions revisited: Protecting collective interests”, *IRRC*, No. 837, 2000, pp. 67-87; N. Levrat, “Les conséquences de l'engagement pris par les Hautes Parties contractantes de “faire respecter” les Conventions humanitaires” in F. Kalshoven and Y. Sandoz (dir.) *Mise en oeuvre du droit international humanitaire*, Dordrecht, Martinus Nijhoff, 1989, pp. 263-296; U. Palwankar, “Measures available to States for fulfilling their obligations to ensure respect for international humanitarian law”, *IRRC*, No. 298, 1994, pp. 9-25; R. Geiss, *op. cit.*, p. 123.

<sup>46</sup> *ICRC Updated Commentary to the Geneva Convention I*, 2016, Article 1, paras 153 and ff, available at:

[https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=72239588AF A66200C1257F7D00367DBD#77\\_B](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=72239588AF A66200C1257F7D00367DBD#77_B)

<sup>47</sup> F. Kalshoven, *op. cit.*

<sup>48</sup> C. Focarelli, *op. cit.*, p. 128.

<sup>49</sup> Ibid., p. 125.

the far-reaching and still unclear consequences such an extensive interpretation would have.<sup>50</sup> Similarly Robert Kolb contends, relying on an extensive review of the relevant practice conducted in a doctoral thesis, that the external dimension of the expression only provides for a mere “faculty”, and not an obligation, for third States to take measures.<sup>51</sup> First the undersigned stressed earlier that this would not affect the actual measures a State could take on that basis. Second this interpretation is difficult to reconcile with the fact that the text of CA1 clearly indicates the existence of an obligation and that the evolution supported by subsequent practice (partly explained by the need to complement means of compliance for IHL) only extended the scope of that duty, not its very nature. No one claims that the parallel obligation to respect or the internal dimension of the obligation to ensure respect is only a faculty and not an obligation, although they appear in the same treaty text and with the same wording as the external dimension of the obligation to ensure respect.

This being said, despite a pronouncement by the ICJ in the Nicaragua case, whereby the obligation contained in CA1 also derives “from the general principles of humanitarian law”<sup>52</sup>, it may be argued that State practice on taking measures to ensure respect of IHL is not widespread enough to conclude that a parallel obligation exists under customary international law. The treaty obligation, however, does not disappear because of a mere lack of respect. Only *desuetudo*, i.e. consistent contrary State practice accompanied by a clear indication that States consider that an obligation no longer exists, could achieve such a result.<sup>53</sup> This was for example confirmed by the ICJ in the Namibia case<sup>54</sup> with regard to article 27(3) of the UN Charter and the subsequent practice by States that abstention by a permanent member does not prevent the adoption of a Security Council resolution if it was adopted with nine affirmative votes. With respect to CA1 however States have consistently referred to the *obligation* under Article 1 common, in particular in the context of the United Nations Security Council and General Assembly resolutions and the process of collective efforts to ensure respect of GCIV by Israel including through the convening of “Conferences of High Contracting Parties to the Fourth Geneva Convention”.<sup>55</sup> In that regard the process initiated within the UN by the General Assembly in 1997 and

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<sup>50</sup> Ibid., pp. 128-129.

<sup>51</sup> R. Kolb, op. cit.

<sup>52</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Reports 1986, para. 220.

<sup>53</sup> J. Wouters and S. Verhoeven, “Desuetudo”, *MPEPIL*, 2008, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1027?rskey=FuiWUJ&result=1&prd=EPIL>

<sup>54</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, para. 22.

<sup>55</sup> See for example, United Nations Security Council Resolution 681, S/RES/681, 20 December 1990, UN General Assembly Resolution ES-10/2, UN Doc. A/RES/ES-10/2 (May 5, 1997), and Declaration adopted at the Conference of High Contracting Parties to the Fourth Geneva Convention, 5 December 2001, published in IRRC, No. 847 (2002). For a more detailed overview of relevant documents, see *How Does Law Protect in War?*, 3rd edition, op. cit., pp. 1196 and ff as well as P-Y. Fux and M. Zambelli, op. cit.

that culminated with the Conference of High Contracting Parties to the Fourth Geneva Convention provided a new framework under which States gave effect to their obligation to ensure respect.<sup>56</sup>

In light of the above, the undersigned conclude that the obligation to ensure respect includes an obligation for States to adopt measures to induce other States to comply with IHL in case of breach.

## **NATURE AND CHARACTERISTICS OF THE OBLIGATION TO ENSURE RESPECT**

The types of measures to be taken by States to fulfil their obligation to ensure respect in its external dimension are not precisely defined. This leads an author to note that “it may not always be entirely clear what kind of reactions one has to look for, in order to support an obligatory external compliance dimension”.<sup>57</sup> Consequently the undersigned wish to stress that any attempt to operationalize this duty through identifying potential measures requires carefully taking into account the nature and characteristics of that obligation, and how it relates to general international law.

### ***I. Features of the obligation to ensure respect***

#### **1. A positive obligation of means/conduct**

Unlike the obligation to respect and most of the corresponding substantive obligations foreseen by IHL, that are negative obligations of result (not to violate those norms), the obligation to ensure respect is a positive obligation of means or conduct, including in its external dimension.<sup>58</sup>

The 2016 Updated ICRC Commentary of the GC I derives negative obligations from the obligation to ensure respect (such as that High Contracting Parties may neither encourage, nor aid or assist in violations of the Conventions by Parties to a conflict).<sup>59</sup> However, and most importantly, the duty to ensure respect is primarily positive in nature, demanding proactive steps to be taken, or in the words of the 2016 Updated ICRC Commentary, States “must do everything reasonably in their power to prevent and bring such violations to an end”.<sup>60</sup>

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<sup>56</sup> See P-Y. Fux and M. Zambelli, *op. cit.*

<sup>57</sup> R. Geiss, *op. cit.*, p. 122.

<sup>58</sup> M. Sassòli, “State responsibility for violations of international humanitarian law”, *IRRC*, No. 846, 2002, p. 412, N. Levrat, *op. cit.*, pp. 274-291, and R. Geiss, *op. cit.*, pp. 118 and 133.

<sup>59</sup> *ICRC Updated Commentary to the Geneva Convention I*, Article 1, *op. cit.*, paras. 158 and ff. This interpretation has been questioned by R. Geiss, *op. cit.*, p. 130.

<sup>60</sup> *ICRC Updated Commentary to the Geneva Convention I*, Article 1, *op. cit.*, para. 154.

In the same vein, the Human Rights Committee articulated the positive nature of the undertaking by States Parties to the ICCPR “to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant” as carrying a set of positive obligations, including the adoption “of legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations”. It also highlighted that such obligations “will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights”.<sup>61</sup> While the undersigned are aware that this interpretation refers more to the internal dimension of the obligation to ensure respect under IHL, it helps to understand what the positive character of an obligation entails.

The positive obligation to ensure respect, including by other States, presupposes that some measures be taken, and that the complete passivity of a State in the face of IHL violations would unquestionably amount to a breach of that duty.

Closely linked to that positive nature is the fact that this obligation is one of means or conduct. It requires the adoption of certain measures for the obligation to be fulfilled, as opposed to obligations of result, whereby the means matter less than the obligation to achieve a particular result. Violations of the former category of obligations might be found if no or inadequate measures have been taken. However the obligation to ensure respect would not be breached if the State does not prevent all IHL violations by its population or does not achieve compliance by other States. In that regard the undersigned concur with Robin Geiss’ comment that while the scope of application of this obligation is “wide”, “this should not be perceived as unrealistic imposition”, not least because this obligation is an obligation of conduct.<sup>62</sup> As such it is crucial to note that this obligation is to be exercised with due diligence and therefore to clarify what this standard of conduct means for the sake of better identifying the measures to be adopted by States.

## 2. An obligation to be fulfilled through a standard of due diligence

As an obligation of conduct or means, the obligation to ensure respect, both in its internal and external dimensions, is to be applied on the basis of a standard of due diligence.<sup>63</sup> CA1 establishes this standard with regard to private actors if the latter find themselves under the jurisdiction of a State, or with regard to breaches of IHL by

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<sup>61</sup> HRC, General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, (hereinafter HRC, General Comment No.31), paras. 7-8.

<sup>62</sup> R. Geiss, *op. cit.*, p. 133.

<sup>63</sup> For a definition and application of due diligence in various field of international law, see T. Koivurova, “Due Diligence”, *MPEPIL*, 2010, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1034>

States and non-State actors abroad whose conduct could be influenced by a third State.<sup>64</sup>

The undersigned wish to stress from the outset that even if this standard, by nature, leaves a margin of appreciation to the States as to which measures are required to fulfil this obligation, and that such measures also depend on a range of factors, this does not negate the character of a proper obligation to the undertaking to ensure respect, as reiterated by the ICJ in the context of a similar language used in the 1948 Genocide Convention.<sup>65</sup>

The concept of due diligence is not peculiar to IHL, and can be found in various fields of international law, such as international environmental law and international human rights law (IHRL). For example, with regard to the International Law Commission (ILC) Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, the ILC Commentary notes that the obligation to take preventative measures is one of due diligence, “manifested in reasonable efforts by a State to inform itself of factual or legal components that relate foreseeably to a contemplated procedure and to take appropriate measures in timely fashion, to address them”.<sup>66</sup> With respect to IHRL, the Human Rights Committee specified, in its General Comment No 31 on the Nature of the General Legal Obligation on States Parties to the Covenant (ICCPR) that:

There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.<sup>67</sup>

The understanding and scope of due diligence could obviously vary from one set of norms to another, this concept under IHRL being closer to the due diligence expected with regard to the internal dimension of the obligation to ensure respect under IHL. Nevertheless, it is undisputed that the international responsibility of a State arises from the violation of an obligation of due diligence, despite the flexibility of that standard.

Under IHL, in addition to the obligation to ensure respect, other specific norms are to be realised on the basis on the standard of conduct of due diligence, such as with regard to the rules on precautions to be taken by an attacker before launching an attack (Article 57 of Additional Protocol I). With respect to CA1 it is essential to highlight that the various parameters to be considered and the leeway left to States do

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<sup>64</sup> M. Sassòli, 2002, op. cit., p. 412.

<sup>65</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, para. 162.

<sup>66</sup> ILC, *Report of the International Law Commission*, 53<sup>rd</sup> Session, A/56/10 (2001), p. 154.

<sup>67</sup> HRC, General Comment No.31, para. 8.

influence the types of measures expected from them, such measures will also vary from one situation to another.

With regard to the internal dimension of the obligation to ensure respect, an author summarizes the standard of due diligence as follows, using the ICJ's interpretation in the Genocide case:

[S]tates are obliged to take such steps as can reasonably be expected of them in the given circumstances, in order to stop or prevent private actors under their authority infringing the protections granted in the Geneva Conventions. What exactly is owed by states in a given situation depends on a variety of parameters, including the kind and extent of the harm occurring, the imminence of further violations, and available resources.<sup>68</sup>

Similarly for the external dimension, the 2016 Updated ICRC Commentary of the GC I stressed that “its content depends on the specific circumstances, including the gravity of the breach, the means reasonably available to the State, and the degree of influence it exercises over those responsible for the breach”.<sup>69</sup>

The need to consider various elements to assess in a flexible way this standard of due diligence and the measures owed by States is also supported by international jurisprudence. For example already in 1872 the Alabama Claims Arbitration established a due diligence standard for neutral States in fulfilling their obligation of neutrality “to be exercised by neutral governments in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfil the obligations of neutrality on their part”.<sup>70</sup> The content of due diligence therefore varies depending on the circumstances of each specific case.

The relative character of the due diligence standard is of particular importance to the issue at hand. Given that the obligation to ensure respect only requires from third States what can be reasonably expected from them in the specific circumstances of a situation, many considerations can come into play as noted above. The ICJ in the Genocide case, in addition to parameters related to the harm and the violations themselves, also refers to the State's link with the one breaching the obligation, and its capacity to exert influence, the latter being also highly dependent on geographical and political factors.<sup>71</sup> In other words, third States, being under different circumstances, owe different conducts to fulfil their due diligence obligation.

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<sup>68</sup> R. Geiss, op. cit., p. 118.

<sup>69</sup> 2016 Updated ICRC Commentary, op. cit., para. 165.

<sup>70</sup> *Alabama Claims Arbitration* (United States/Great Britain) (1872) 29 *RIAA*, p. 129. See also *Military and Paramilitary Activities in and against Nicaragua*, op. cit., para. 157.

<sup>71</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, op. cit., para. 430, discussed by R. Geiss, op. cit., p. 127.



This being said it also means that if measures taken under CA1 turned out to be ineffective in stopping the continuous violations, States are expected to take other measures within the limit of what they can reasonably do. The continuous character of violations and the appropriateness of the measures taken in order to end such violations are therefore relevant to assess whether third States comply with their obligation to ensure respect. This interpretation is in line with the standard of due diligence as applied in other areas of international law. For example, under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the CEDAW Committee, following a communication against Georgia, found that, despite the adoption of the 2006 “Law on Domestic Violence”, the State should adopt more measures to ensure access to justice and protection for women under the Convention.<sup>72</sup>

Therefore, even if the measures to be considered by third States under their obligation to ensure respect must remain within the limits of what is proportionate to the violation it is aimed to stop, and reasonable given the specific circumstances and available resources, more measures can be expected of certain States if the measures they took remained ineffective in stopping IHL violations.

At first these contingent elements can appear to dilute the obligation to ensure respect, in particular when considering its external dimension, for which by definition a State will have less means than when considering its sovereign authority over its territory in the internal aspect of that obligation. However the undersigned wish to stress that taking into account the position and political weight of certain States, those factors require more than mere diplomatic protests, especially in the face of continuing violations. In other words, the obligation to ensure respect being an obligation of means, States having stronger ties with a transgressor State must be deemed to have more means than other States.

### 3. The obligation to ensure respect for IHL and obligations *erga omnes*

While it goes beyond the ambit of this Expert Opinion to provide a detailed analysis of the relationship between the obligation to ensure respect and obligations *erga omnes*, few remarks are necessary as this concept has the potential to influence the adoption of measures by third States to induce compliance by another State violating IHL norms.

The undersigned note that CA1 precedes the emergence of the notion of obligation *erga omnes*. The ICJ first referred to that type of obligations in its famous *obiter dictum* in the Barcelona Traction case in 1970. It held that:

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<sup>72</sup> *X and Y v Georgia*, CEDAW Communication No 24/2009, CEDAW/C/61/D/24/2009 (2015).

[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.<sup>73</sup>

If the doctrine is divided as to the exact link between that concept and the obligation to ensure respect under IHL, from dismissing any relationship to conferring the character of an obligation *erga omnes* to that duty<sup>74</sup>, the undersigned argue that at the very least the broad content of the obligation to ensure respect supports the view that most of key IHL norms carry obligations *erga omnes*.<sup>75</sup> Indeed in light of the established meaning of that obligation, it is obvious that the State injured by a violation is concerned by and entitled to take measures to stop it. However it also means that all other States not only may, as provided by article 48 of the ILC Articles on State Responsibility if the obligation breached is owed to the international community as a whole, but must under CA1, take measures. Hence, under article 48(1) and CA1 combined, in the event of IHL violations, all States must claim cessation from the responsible State as well as “reparation (...) in the interest of the injured State or of the beneficiaries of the obligation breached” (article 48 para. 2). At least the entitlement aspect reflects the essence of the obligations *erga omnes*. This line of reasoning was also recognized by the ICJ in its advisory opinion in the Wall case.<sup>76</sup>

It may furthermore be contended that due to the special nature and content of the obligation to ensure respect for IHL, this duty also acquired a character *erga omnes*.<sup>77</sup> Indeed in as much as the obligation to ensure respect of IHL accounts for the *erga omnes* nature of fundamental IHL substantive norms, this obligation itself could be considered as having such a character as well, considering that all States have a legal interest in the performance of the duty enshrined in CA1. This is more so given that the obligation to ensure respect is an essential condition for both the effective

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<sup>73</sup> *Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain)*, 1970, I.C.J., para. 33. See for a more detailed analysis, J. A Frowein, “Obligations erga omnes”, *MPEPIL*, 2008, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1400?rskey=bfd0yJ&result=1&prd=EPIL>

<sup>74</sup> For a brief overview of the various doctrinal positions in that regard, see R. Geiss, *op. cit.*, p. 123.

<sup>75</sup> L. Condorelli and L. Boisson De Chazournes, “Quelques remarques à propos de l’obligation des États de ‘respecter et faire respecter’ le droit international humanitaire en toutes circonstances”, *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ICRC, Martinus Nijhoff Publishers, The Hague, 1984, p. 29; M. Ragazzi, *The Concept of International Obligations Erga Omnes*, Clarendon, Oxford, 1997, pp. 152-153; T. Kamenov, “The origin of State and entity responsibility for violations of international humanitarian law in armed conflicts”, F. Kalshoven and Y. Sandoz (eds), *Implementation of International Humanitarian Law*, Dordrecht, Martinus Nijhoff Publishers, 1989, p. 206; and Updated ICRC Commentary, Common Article 1, *op. cit.*, para. 119.

<sup>76</sup> See ICJ, *Legal Consequences of the Construction of a Wall*, *op. cit.*, paras. 158-159.

<sup>77</sup> B. Kessler, “The Duty to ‘Ensure Respect’ under Common Article 1 of the Geneva Conventions: Its Implications on International and Non-International Armed Conflicts”, *German Yearbook of International Law*, Vol. 44, 2001, p. 501.

functioning of the protection system set up by the GCs and its universal application as demonstrated, despite the selective nature of its invocation, by the fact that States constantly refer to this duty. Most importantly, relying on the wording of the ICJ in its advisory opinion on the Nuclear Weapons case, also used in the Wall case to determine the *erga omnes* nature of certain IHL rules, the obligation to ensure respect is so fundamental to give effect to the respect of the human person during armed conflicts that it can be argued that it is intrinsically linked to elementary considerations of humanity reflected in those IHL norms.<sup>78</sup>

In any case, whether or not CA1 itself contains an *erga omnes* obligation, it demonstrates that the obligations the respect of which it wants to ensure have an *erga omnes* character. This *erga omnes* effect of the obligation to ensure respect therefore means that all States can take measures envisaged under the international law on State responsibility and article 48 of the ILC articles mentioned above in case of violation of that obligation by another State.

## ***II. The interaction between the obligation to ensure respect under IHL and general international law***

The undersigned wish to highlight in particular two aspects of how the obligation to ensure respect for IHL relates to general international law that are relevant with regard to measures to be taken by third States to guarantee respect of IHL by another State. First the norms of the international law on State responsibility serve as a guidance to understand and implement this specific obligation. Second, the obligation to ensure respect under IHL only requires third States to take measures that are not in breach of other international obligations, despite a growing practice pointing to the recourse to countermeasures by States and international organisations against serious violations of IHRL or IHL even when those violations do not injure them. In that regard, general international law also plays a limitative function to what third States can – and therefore must - do, despite a specific entitlement recognized under IHL.

### **1. The complementarity between the obligation to ensure respect and the international law on State responsibility**

Under the international law on State responsibility, the origin of the responsibility of a State is an international wrongful act consisting of two cumulative elements, a conduct amounting to breach of an international obligation, which is attributable to that State.<sup>79</sup> Those norms on State responsibility, called secondary rules

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<sup>78</sup> See ICJ, *Legal Consequences of the Construction of a Wall*, *op. cit.*, para. 157.

<sup>79</sup> *Articles on the Responsibility of States for internationally wrongful acts*, annexed to UN General Assembly Resolution 56/83, 12 December 2001, Article 2.

of international law, describe under which conditions a State can be responsible for the violation of a primary rule of international law, in other words substantive norms.

Against this backdrop CA1 in some respects applies the general rules on State responsibility, in other respects establishes a special secondary rule, but it may also be considered to be itself a primary rule in that this obligation prescribes as such a particular conduct of States that are required to take certain steps to guarantee the respect of IHL and that if they fail to do so, this would amount to a violation of this primary norm. CA1 in any case does not merely provide for specific consequences of a breach of IHL primary rules by other States. In that regard an analogy can be made with the obligation to protect and fulfill human rights under IHRL that requires States to take positive measures to ensure the enjoyment of rights by persons under their jurisdiction. If they do not adopt such measures, this failure would constitute a violation of those rights as primary rules.<sup>80</sup>

The undersigned conclude that the obligation to ensure respect is a primary and a secondary rule and that if one or the other is violated, the rules on State responsibility will apply.<sup>81</sup> In that regard it is argued that when considering the obligation not to encourage or aid or assist the commission of violations by others, this obligation has a different content depending on whether it is envisaged under the international law on State responsibility or under the specific remit of the obligation to ensure respect contained in CA1. In other words the latter might be more demanding of States than what is commonly understood under the former set of norms.

The Articles on State Responsibility include a provision whereby a State is responsible for the aid or assistance it gives to another state in the commission of an internationally wrongful act if it does so with knowledge of the circumstances of the internationally wrongful act and if the act would also be internationally wrongful if committed by that state.<sup>82</sup>

The ILC Commentary of the Articles on State Responsibility, while not providing specific elements of the form this aid or assistance must take, specify that this article “limits the scope of responsibility”, in particular through the fact that a “State is not responsible for aid or assistance under article 16 unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the

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<sup>80</sup> See HRC, *General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 8.

<sup>81</sup> M. Sassòli, 2002, op. cit., p. 422.

<sup>82</sup> *Articles on the Responsibility of States for internationally wrongful acts*, op. cit. Article 16. See also, for a statement of the customary nature of this norm, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Bosnia and Herzegovina v. Serbia and Montenegro, Judgment of 26 February 2007, ICJ, Rep. 2007, 43, para. 419.

wrongful conduct”.<sup>83</sup> One of the examples given relates to financing the activity in question.<sup>84</sup> As noted by an author, “some form of causality between the support given and the actual wrongful act” is necessary<sup>85</sup> with the ILC Commentary stressing that the aid or assistance given be “clearly linked” to that act and that “it contributed significantly to that act”.<sup>86</sup> Some case law in the international jurisprudence also clarified that the mere fact that a State is associated with a breach of an international obligation by another state does not trigger international responsibility.<sup>87</sup>

In that regard, the negative obligation not to encourage, aid or assist in violations of the CGI-IV contained in CA1 appears to go beyond what international law on State responsibility foresees.<sup>88</sup> This provision first provides for international responsibility in cases of mere encouragement as opposed to article 16. For example the ICJ specified in the Nicaragua case that States have 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”.<sup>89</sup> This is also reflected in Rule 144 of the ICRC Customary IHL Study according to which “States may not encourage violations of international humanitarian law by parties to an armed conflict”.<sup>90</sup> With regard to the duty not to aid or assist, it is also argued that CA1 prohibits broader circumstances and acts of support than under the international law on State responsibility.<sup>91</sup> This may have far reaching consequences on what third State must refrain from doing under CA1, in particular in the field of arms transfers to States involved in widespread IHL violations.<sup>92</sup>

Indeed the undersigned argue that as soon as a State knows, as opposed to proving the intent under article 16, that the State benefiting from the arms transfer systematically commits violations of international humanitarian law with certain weapons, the aiding State has to deny further transfers thereof, even if those weapons could also be used lawfully.<sup>93</sup> It is submitted that the condition of knowledge, a much less demanding standard than intent, is not to be found in an extensive interpretation

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<sup>83</sup> ILC Commentary, attached to the *Articles on the Responsibility of States for internationally wrongful acts*, op. cit., Article 16, para. 5.

<sup>84</sup> *Ibid.*, para. 1.

<sup>85</sup> H. P. Aust, “Complicity in violations of international humanitarian law”, in Heike Krieger (ed), *Inducing Compliance with International Humanitarian Law - Lessons from the African Great Lakes Region*, CUP, Cambridge, 2015, p. 450

<sup>86</sup> ILC Commentary, op. cit., para. 5.

<sup>87</sup> ECtHR, *Saddam Hussein v. Albania, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Turkey, Ukraine and the United Kingdom*, Application no. 23276/04, Decision of 14 March 2006, quoted by H. P. Aust, op. cit., p. 450, footnote 37.

<sup>88</sup> R. Geiss, op. cit., pp. 130-132.

<sup>89</sup> ICJ, *Military and Paramilitary Activities in and against Nicaragua case*, op. cit., para. 220.

<sup>90</sup> CIHL Study at: [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule144](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule144)

<sup>91</sup> *ICRC Updated Commentary to the Geneva Convention I*, Article 1, op. cit., para. 160.

<sup>92</sup> For a detailed analysis of the interaction between article 16 and CA1, see T. Ruys, “Of Arms, Funding and “Non-lethal Assistance”—Issues Surrounding Third-State Intervention in the Syrian Civil War”, *Chinese Journal of International Law* (2014) 13 (1), pp. 13-53.

<sup>93</sup> M. Sassòli, 2002, op. cit., p. 413.

of article 16 of the ILC Article on State responsibility but lies in the obligation to ensure respect under CA1.

Furthermore Article 41 of the Articles on State Responsibility spells out the specific consequences of a serious breach of peremptory norms (and as manifested by Arts 6/6/6/7 common to the GCs, the rules of the GCs may be considered to have a peremptory character)<sup>94</sup>: 1) states shall cooperate to bring to an end through lawful means any serious (gross or systematic) breach of a peremptory norm of general international law; 2) no State shall recognize as lawful a situation created by such a serious breach, nor render aid or assistance in maintaining that situation.

According to the ILC Commentary, the latter paragraph refers to a “duty of abstention”<sup>95</sup> consisting of two obligations. The first obligation takes the form of an “obligation of collective non-recognition by the international community as a whole of the legality of situations resulting directly from serious breaches”.<sup>96</sup> In the case at hand this would require States not to consider as lawful the situations created by the IHL violations committed by other States, in as much as most of IHL norms have a peremptory character<sup>97</sup>, but also prohibit “acts which would imply such recognition” as noted by the ILC Commentary.<sup>98</sup> The second obligation relates to the “conduct “after the fact” which assists the responsible State in maintaining a situation” and “extends beyond the commission of the serious breach itself to the maintenance of the situation created by that breach”.<sup>99</sup>

The undersigned conclude that international law on State responsibility provides additional and more specific obligations to take into account when identifying what the obligation to ensure respect means. However this latter duty to ensure respect also carries its own obligations that go further and allows States to adopt further measures or prohibits other measures that may have been considered lawful by third States under other international law norms.

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<sup>94</sup> See for example, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, July 8, 1996, ICJ Reports 1996, para. 79; United Nations, International Law Commission, Report on the Work of its Fifty-third Session (23 April–1 June and 2 July–10 August 2001), General Assembly, Official Records, Fiftyfifth Session, Supplement No. 10 (A/56/10), p. 284 (para. 5 on Art. 40); “Report of the International Law Commission on the work of its thirty-second session”, Yearbook of the International Law Commission 1980, Vol. II, Part Two, p. 46, para. 28; *The Prosecutor v. Zoran Kupreskic and others*, ICTY Trial Chamber, Judgment, 14 January 2000, Case No. IT-95-16-T, para. 520; L. Condorelli and L. Boisson De Chazournes, 1984, op. cit., pp. 33-34; and Draft Art. 19(3)(c) as adopted on first reading by the ILC, Yearbook of the ILC 1976, Vol. II, Part Two, p. 95.

<sup>95</sup> ILC Commentary, op. cit., Article 41, para. 4.

<sup>96</sup> *Ibid.*, para. 5.

<sup>97</sup> ICJ, *Legal Consequences of the Construction of a Wall*, op. cit., para. 157.

<sup>98</sup> *Ibidem.*

<sup>99</sup> ILC Commentary, op. cit., Article 41, para. 11.

## 2. Limits arising from the need to respect other international obligations

The IHL obligation to ensure respect, both in its internal and external dimensions, is commonly seen as only requiring third States to take measures that are not in violation of other international norms.<sup>100</sup> It is generally argued that this obligation does not create its own rule that would justify measures otherwise contrary to international law, i.e. that it does not make every State Party a State injured by every violation of IHL<sup>101</sup>, while injured States are the only ones entitled to take countermeasures.

However the emergence of recent State practice, notably in the case of sanctions taken by Western States and by the EU against Libya, Syria, and Russia, may point to a more nuanced picture when it comes to countermeasures of a non-coercive or non-forcible nature, deemed *per se* unlawful but that do not trigger the responsibility of a State in that they respond to a previous violation of international law and are aimed at inducing compliance.

Article 49 (1) of the Articles on State Responsibility for Wrongful Acts provides that “An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations”. As a result only those States that qualify as injured States can take countermeasures. As stressed above, it is generally argued that CA1 does not make all States injured States.

Despite this restriction as to which States can take countermeasures, it has been debated whether, under both the law on State responsibility and IHL, “States other than the injured State” may (or - under CA1 - must) resort to countermeasures. Article 54 of the ILC Articles adopted in 2001, entitled “Measures taken by States other than an injured State” is framed as a safety clause but remains strictly worded:

This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

In its Commentary at the time, the ILC had reviewed various precedents to conclude that “the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present there appears to be no clearly recognized entitlement (...) to take countermeasures in the collective interest.”<sup>102</sup>

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<sup>100</sup> ICRC 2016 Update Commentary, op. cit., para. 174.

<sup>101</sup> See for example, M. Sassòli, 2002, op. cit., pp. 423-424.

<sup>102</sup> United Nations, International Law Commission, Report on the Work of its Fifty-third Session (23

While some scholars challenge this assessment of State practice by the ILC already in 2001<sup>103</sup>, they also point more recently to a growing number of cases, in particular with regard to third States' countermeasures taken against Libya, Syria and Russia<sup>104</sup> that accounts for a significant evolution, even though it is not always easy to determine whether the rationale of such measures lies in a response to IHL violations.

In that regard Martin Dawidowicz reviewed some the specific countermeasures adopted against the three above-mentioned States. For example he refers to some of the European Union (EU) Member States that imposed various unilateral sanctions against Syria, the related EU sanctions regime, and similar measures taken by other States, such as the freezing of assets belonging to President Al-Assad, his government and the Central Bank of Syria and the Council of the League of Arab States' decisions on the suspension of Syria's membership and on a flight ban running against obligations in the field of civil aviation. This scholar also looks at the measures taken against Russia following its intervention in Ukraine and its annexation of Crimea, in the financial, energy and defence sectors of the Russian economy.<sup>105</sup> He notes for example:

The financial measures taken by EU Member States against Russia are covered by Article I(2)(b) GATS [General Agreement on Trade in Services] and as such appear to violate the general obligation to provide MFN [Most-favoured-Nation] treatment in Article II GATS. No exemption to the application of Article II GATS seems applicable. EU Member States also did not invoke the national security exception in Article XIV *bis* GATS. The limited export embargo applicable to energy-related goods also amounts to a quantitative trade restriction which is *prima facie* unlawful under Article XI GATT [General Agreement on Tariffs and Trade]. Again, EU Member States did not invoke the national security exception in Article XXI GATT as possible justification for their otherwise unlawful conduct.<sup>106</sup>

While mindful of the challenges in identifying a corresponding *opinion juris* with regard to this new practice<sup>107</sup>, he concludes that such “practice appears to be sufficiently widespread, representative as well as consistent to form the basis of a rule of customary international law.”<sup>108</sup> In the undersigned's view this emerging new

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April - 1 June and 2 July - 10 August 2001), General Assembly, Official Records, Fifty-fifth Session, Supplement No. 10 (A/56/10), p. 355 (para. 6 on Art. 54).

<sup>103</sup> M. Dawidowicz, “Third-party countermeasures: A progressive development of international law?”, in *QIL, Zoom-in* 29 (2016), pp. 4-5 and footnote no 8.

<sup>104</sup> *Ibid.*, p. 5 and footnote no 9.

<sup>105</sup> *Ibid.*, pp. 6-10.

<sup>106</sup> *Ibid.*, p. 10. For a more detailed analysis of the implications of those measures under the World Trade Organisation's obligations and in particular article XXI of GATT, see D. Desierto, “The EU/US v. Russia Trade Wars: Revisiting GATT Article XXI and the International Law on Unilateral Economic Sanctions”, *EJIL: Talk!*, Blog, 22 September 2014, available at:

<http://www.ejiltalk.org/the-eu-us-v-russia-trade-wars-revisiting-gatt-article-xxi-and-the-international-law-on-unilateral-economic-sanctions-2>

<sup>107</sup> M. Dawidowicz, *op. cit.*, pp. 11-14.

<sup>108</sup> *Ibid.*, p. 11.



practice cannot be dismissed despite some uncertainty as to whether it is accepted as law, a challenge that exists for the identification of most of customary law norms. It may be part of an evolution of the third States' practice with regard to countermeasures even if the law is not fully settled. For the time being it may however be safer to consider that Article 54 remains relevant and only refers to lawful measures to be taken. Otherwise, the distinction between injured States and States other than injured States would have no consequences in case of violations of *erga omnes* obligations. Nevertheless, even if Article 54 is interpreted in this way, CA1 could be considered to constitute a *lex specialis* in this respect. However, this remains debated as one author concludes that "at this stage there is no indication that – as far as countermeasures are concerned – Common Article 1 has developed beyond the general rules on State responsibility as codified by the ILC".<sup>109</sup>

Even if countermeasures were to be accepted they should consist neither of the threat or use of force, nor of violations of fundamental human rights as explicitly stated in Article 50 para. 1 of the Articles on State responsibility.<sup>110</sup> They should also be targeted as much as possible at the authorities responsible for the violations and not amount to a collective punishment of the entire population of the transgressor State.

The same limits apply to multilateral sanctions adopted for example in the context of UN Security Resolutions within the framework of its principal responsibility to maintain international peace and security. Such sanctions are implicitly referred to in Article 89 of Additional Protocol I that envisages 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". These measures, mostly of an economic nature, are envisaged in Article 41 of the UN Charter and include "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication (...)". Under this framework, States applying sanctions might have to violate some of their treaty obligations. In that regard, even if the ICJ held that obligations resulting from Security Council decisions enjoy similar primacy over other conventional obligations than the UN Charter itself in case of conflict of obligations through an interpretation combining Article 103 with Article 25 of the Charter<sup>111</sup>, when considering peremptory norms of international law, a growing jurisprudence rejected the possibility that UN Security Council related sanctions prevail over the violations of such norms.<sup>112</sup>

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<sup>109</sup> R. Geiss, *op. cit.*, p. 128.

<sup>110</sup> M. Sassòli, 2002, *op. cit.*, p. 426.

<sup>111</sup> See *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie*, (Lybian Arab Jamahiriya v United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, para 39, p. 16.

<sup>112</sup> See for example, Judgments of the Court of first Instance of the European Communities, ECJ, 2005, Case T-306/01, Ahmed Ali Yusuf and Al Barakaat International Foundation, v Council of the

The undersigned conclude that to date, under the obligation to ensure respect for IHL, third States can only take measures that are lawful under their respective other international obligations, such as retorsion measures, although there exists a growing trend by States other than injured States to engage in countermeasures.

### ***III. Brief overview of the scope and modalities of application***

As a way of introduction the undersigned wish to recall that as shown above an obligation for third States to ensure respect by belligerent States exists, although considering the number of States concerned by CA1, and the number of cases to which it applies, this article is the most frequently violated provision of IHL.

Few observations relevant to the issue at hand on the scope and modalities of application of the obligation to ensure respect are necessary. First, it is undisputed that the obligation applies to both international armed conflicts, including situation of occupation, and to non-international armed conflicts. Furthermore, due to the external dimension of this obligation and the content of GCI-IV, the duty to ensure respect also applies in times of peace.<sup>113</sup>

A central question revolves around identifying what types of violations trigger the obligation to ensure respect. The term “respect” would by nature require all obligations be complied with and therefore that any violations of the GCI-IV would activate this duty. It has been argued that “such a sweeping interpretation (...) would simply lead to unrealistic results”<sup>114</sup> when it comes to the obligation to ensure respect by other States. However the undersigned believe that in light of the patterns of serious IHL violations commonly occurring during armed conflicts and the inherent selectivity of States when resorting to measures, the reality could also dictate that establishing a criterion based on the gravity of the violations to identify a triggering threshold might not yield more results.<sup>115</sup> This is more so in light of the difficulty in determining whether a State that remained passive did consider a violation was committed in the first place.

This being said the factors to be taken into account<sup>116</sup> to assess whether States comply with their obligation of due diligence, such as the gravity of the violations and

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European Union and Commission of the European Communities [2005], paras. 277 ff. and 343, and Case T-315/01, Yassin Abdullah Kadi, v Council of the European Union and Commission of the European Communities [2005], paras 226 ff and 288.

<sup>113</sup> For a more detailed analysis on this question, see R. Geiss, op. cit., pp. 115-116.

<sup>114</sup> Ibid., p. 124.

<sup>115</sup> Ibid., pp. 124-126.

<sup>116</sup> See for example, ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, op. cit., paras. 430-431. In particular the ICJ referred to article 14 (3) of the ILC Articles on State Responsibility that provide that “The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation”.

their pattern,<sup>117</sup> would tend to point in the direction of only certain types of violations being truly relevant for the obligation under review to require a minimum set of measures. Considering that the extent to which a State complied with its duty of due diligence depends on the specific circumstances of that State and on what should be reasonably expected, the more serious and extended the violation is, the more likely due diligence would demand at least some form of measures to be taken.

However, the undersigned still consider that, in light of the fact that all States parties share a common interest in seeing the GCI-IV respected and that CA1 itself is framed as a proper obligation, it is possible to argue that any violation of the GCI-IV, and of IHL for that matter, potentially triggers the obligation to ensure respect. This is further confirmed by the reference to the expression “in all circumstances” in CA1. And if obviously such duty arises as soon as a violation occurs, long-lasting violations would place greater pressure on third States to adopt more measures. The gravity of the violation would then only matter for the determination whether a certain measure taken under CA1 is proportionate to the violation it is meant to stop.

#### **APPLYING THE PARAMETERS OF THE OBLIGATION TO ENSURE RESPECT TO IDENTIFY MEASURES TO BE TAKEN OR UNLAWFUL MEASURES**

While the question of the type of measures expected from States to meet their obligation to ensure respect remains unclear, not least due to the flexible and relative nature of the due diligence standard, based on the practice or what is lawful under international law, attempts to identify main categories or types of steps exist.<sup>118</sup> These are traditionally based on the distinction between individual and collective measures as provided under Article 89 of Additional Protocol I.

The purpose of this section is not to offer an exhaustive list of all measures that can be envisaged, such an exercise could even be vain if one considers the fact that the due diligence conduct allows for a variation of measures depending on the circumstances. Rather it aims at applying the parameters identified above to address some of the key measures and how the parameters of due diligence impact on those measures and the relationship between them. Furthermore, the undersigned wish to stress that this section also addresses some measures not designed to be a response by a third State to a violation by another State, but amount to a violation of the obligation to ensure respect.

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<sup>117</sup> Ibid., para. 430. With special relevance to the question of patterns and continuing violations, the ICJ specifically noted, with respect to the obligation to prevent genocide that one must take into account the fact that “the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result — averting the commission of genocide — which the efforts of only one State were insufficient to produce”.

<sup>118</sup> See for example, U. Palwankar, *op. cit.*, paras. 180-183, and M. Sassòli, 2002, *op. cit.*, pp. 426-432.

### *I. The parameters of due diligence and their impact on the measures expected from States*

Before addressing the parameters to be considered in giving effect to the third States' obligation to ensure respect, the undersigned wish to stress that this Expert Opinion fundamentally demonstrates the need from States to engage in a process to clarify the content of this obligation and the types of measures to be taken, in order to make the compliance with this duty more effective. This could take the form of referring a legal question on this obligation to the ICJ to obtain an advisory opinion. Furthermore the nature of the obligation to ensure respect for IHL requires States to consider measures, including the resort to IHL specific mechanisms or international law forum such as the ICJ, to address violations of this very obligation by third States.

This being said, and in light of the parameters discussed above, in the undersigned's view, the factors to be taken into account in the assessment of whether a State discharged its obligation to ensure respect of IHL by other States through the due diligence standard should include the following elements in full and as a minimum, but not as an exhaustive list. This derives from the very essence of the due diligence standard that depends on the specific circumstances of each State and each case. *A contrario*, this means that all factors relevant for a State to discharge its obligation and that may contribute to ensuring respect for IHL must be considered:

- The kind and extent of the harm occurring or the gravity of the breach;
- The unlawful character of the conduct triggering the obligation to ensure respect. While international law, and in particular IHL, is largely a self-applied system, the unlawful character of the conduct has obviously to be assessed objectively and the mere fact that a third State does not acknowledge the IHL violations committed by another State cannot absolve it from its obligations under CA1;
- The need for the third State to recognize the unlawful character of the conduct triggering the obligation to ensure respect, requesting the application of relevant IHL norms if their applicability is contested by the transgressor State. Depending on the context and related effectiveness, this could result in a confidential intervention of a State, based on a proper legal assessment and determination of the violations, towards the transgressor State or a public denunciation of the relevant IHL violations by classifying them as such rather than relying on political or diplomatic language, especially if the third State concerned had already made a determination as to the unlawful nature of the conduct in the past;
- The imminence of further violations;
- The resources and means reasonably available to the State;
- The degree of influence it exercises over those responsible for the breach or the capacity to influence effectively the action. As noted by the ICJ, with

regard to the obligation to prevent genocide “[t]his capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State’s capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law.”<sup>119</sup>

- Focusing on specific fields and consider related measures for which a given third State wields more influence than others vis-à-vis the transgressor State, such as when the State concerned is a significant economic partner or receive significant military assistance;
- Whether existing partnerships and cooperation measures contradict the obligation to ensure respect, such as those that may facilitate ongoing IHL violations, in particular in the field of military assistance in order to change those measures accordingly;
- The proportionality between the measure envisaged and the violation it is aimed to stop;
- The link between the measure envisaged and the violation. Measures which may and must be taken are not limited to those which are linked to the violation (e.g. limiting imports from settlements to ensure respect of the prohibition to establish settlements). However, when a choice between several measures exists, those having a direct impact on the unlawful activity and being the most adequate to achieve the intended result are to be preferred over measure which generally affect the responsible State and its activities not linked to the violation to be stopped. These include the specific measures provided for under IHL and designed to ensure its implementation as well as other remedies available for the States concerned either under IHL or under international law, such as setting up an inquiry procedure in accordance with the GCs when possible, when States have made declarations accepting the jurisdiction of the International Humanitarian Fact-Finding Commission under article 90 of Additional Protocol I or when the ICJ may be seized because it has jurisdiction, the obligation to ensure respect making the resort to those mechanisms a duty for the relevant States;
- The effectiveness of the measures envisaged in achieving the goal of inducing compliance. This includes considering both the adoption of positive measures as well as refraining from engaging in a particular conduct, such as cancelling or not renewing a military assistance agreement. On the other hand, whether the measures that could have been taken would have been sufficient to restore

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<sup>119</sup> ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, op. cit., para. 430.

respect for IHL is irrelevant when assessing whether CA1 has been respected;  
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- The persistence of the IHL violations and whether measures taken in the past to stop such violations were effective. If they were not, other, more effective, though proportionate, measures must be taken until the violations end. This would mean that in the gradual scale of measures, ranging from the most friendly and diplomatic ones to countermeasures, an influential State has a duty under CA1 to consider other types of measures when the least disruptive ones in terms of cooperation and friendly relations failed. The gradation of measures taken is reflected in the process initiated by the UN General Assembly in 1997 with regard to persistent violations by Israel, resulting in the adoption of successive resolutions containing additional and increasingly specific measures;
- The impact of measures taken on persons not involved in the violation;
- Taking into account all the relevant obligations under general international law and how such obligations may contribute to better implement the obligation to ensure respect under IHL, in particular under the international law on State responsibility, without prejudice for additional measures allowed under CA1; and
- The lawfulness or not of the measures envisaged, taking into account the growing practice by States to adopt countermeasures that amount to violations of existing obligations, in particular under WTO agreements, to respond to IHL violations.

The undersigned wish to stress that these elements should not be used to dismiss any possibility to identify relevant measures that, if not adopted, would trigger the responsibility of the State for violation of its obligation to ensure respect. First, the complete absence of measures is a clear indication that even the least demanding step has not been taken and therefore that the State is in breach of its duty. Second, what could be seen as an unreasonable measure to be taken for one State could be the minimum another State has the capacity to do given the circumstances pertaining to that State.

Furthermore, some of those parameters must be carefully applied. The gravity of a pattern of violations would not turn a measure that is not possible for one State into something that is legally expected from it. However in as much as the due diligence standard is relative and to be applied *in concreto*, there are numerous circumstances that may not be legally relevant for one State for assessing that

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<sup>120</sup> As highlighted by the ICJ with regard to the obligation to prevent genocide, “it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question (...)”, *Ibidem*.

standard, which are in reality to be taken into account for assessing whether another State has respected the standard. For example, the existence of a tribunal having jurisdiction over that case and being accessible to a State would require that State to consider bringing a complaint.<sup>121</sup> In the undersigned's view, it is again important to note that even in a largely self-applied system such as international law, the assessment of what is possible or not to do for a given State is an objective assessment, not entirely left to the State concerned alone and not to be based on political or policy related motivations. By definition the existence of a legal duty in the form of the obligation to ensure respect requires an objective assessment and prevents a State from using mere political considerations to claim that no step can be taken under that obligation. The fact that the fulfilment of an international obligation can prove to be politically difficult cannot serve as a ground to refuse to take any measure in the implementation of that obligation. This would run against the very nature of a legal obligation as opposed to a mere political preference. This is even more so when considering the purpose of the obligation to ensure respect for IHL. In that regard even a claim by a State dismissing certain measures because they would undermine its national security could not be taken in face value. There should be a genuine reason for that claim to be accepted under the objective standard of due diligence, especially when considering that actions aimed at inducing compliance with IHL cannot in themselves be seen as damaging national security.

## ***II. Specific measures amounting to a breach of the obligation to ensure respect***

The undersigned wish to stress that the duty to ensure respect can also carry legal implications with regard to measures a State took in the context of IHL violations committed by another State.

A prime example of this is the recent debate over some national decisions, legislations and other measures prohibiting or limiting activities related to calls for a boycott of certain countries, in particular Israel.<sup>122</sup> The undersigned do not want to

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<sup>121</sup> While not resulting from a complaint by a State, the General Court of the European Union's judgment in the *Frente Polisario v Council* case regarding a trade agreement between the EU and Morocco and its implications with regard to the Western Sahara, where the Court partially annulled the EU Council decision adopting that agreement, stressed the obligation for the EU to ensure respect for the fundamental rights of non EU-nationals in non-EU territories. See EU General Court, *Frente Polisario v Council*, Judgment, 10 December 2015, Case T-512/12, paras. 231, 241, and 247.

<sup>122</sup> See for example, although the related measure is generic and not limited to the boycott of Israel, V. Azarova, "Boycotts, International Law Enforcement and the UK's 'Anti-Boycott' Note", *Jurist*, 12 April 2016, available at:

<http://www.jurist.org/forum/2016/04/valentina-azarova-uk-note.php>; E. Kontorovich, "Illinois passes historic anti-BDS bill, as Congress mulls similar moves", *Washington Post*, 18 May 2015, available at: [https://www.washingtonpost.com/news/voikh-conspiracy/wp/2015/05/18/illinois-passes-historic-anti-bds-bill-as-congress-mulls-similar-moves/?utm\\_term=.9ad28c5707de](https://www.washingtonpost.com/news/voikh-conspiracy/wp/2015/05/18/illinois-passes-historic-anti-bds-bill-as-congress-mulls-similar-moves/?utm_term=.9ad28c5707de); and N. Macdonald, "Ottawa cites hate crime laws when asked about its 'zero tolerance' for Israel boycotters", *CBCNews*, 11 May 2015, available at:

<http://www.cbc.ca/news/politics/ottawa-cites-hate-crime-laws-when-asked-about-its-zero-tolerance-for-israel-boycotters-1.3067497>

pronounce themselves in favour of such boycotts nor are we in a position to evaluate whether such boycotts genuinely aim at stopping violations of IHL by Israel. We are not either in a position to decide whether such boycotts, resulting in restriction to trade, be they officially decided by States or entities within a State, amount to a violation of WTO law by those States, unless based on national security grounds, under article XXI of GATT.<sup>123</sup> In our opinion, WTO law never requires a State to prohibit private persons under its jurisdiction to induce consumers to engage in practices, which would be discriminatory if they were adopted by the State party. In any case, prohibiting private persons to call for proportionate boycotts in view of stopping violations of IHL constitutes in our view a violation of the negative aspect of the obligation to ensure respect for IHL.

The two decisions by the French Cassation Court on 20 October 2015 to uphold the convictions of twelve activists of the Boycott, Divestment, and Sanctions (BDS) campaign, calling for the boycott of Israeli goods, for the misdemeanor of a call to national discrimination illustrates the issue at hand.<sup>124</sup> In particular, the French court rejected the argument that the freedom of expression should allow such calls. Beyond the debate over the assessment of whether restrictions to freedom of expression were justified under international human rights law, these decisions can be seen in violation of the obligation to ensure respect for IHL.

In that regard the undersigned wish to stress that if the declared aim of such boycotts or related calls is to induce the targeted State to respect its obligations under IHL, both the internal and external dimensions of the obligation to ensure respect require a State to allow its population to adopt measures that promote the respect of the GCI-IV. While CA1 requires States to take measures according to the gravity of the violations and their potential degree of influence, nothing hinders private individuals to take such measures selectively and those measures remain protected from State interference by CA1 as long as their aim is to ensure respect of IHL and that they are proportionate and not in violation of other fundamental norms of international law (e.g. the prohibition of racial or religious discrimination). Even if a debate exists as to whether the duty to ensure respect includes negative obligations, it is reasonable to think that a State banning boycott activities from private individuals aimed at inducing compliance would not be in line with the general obligation to ensure respect by others.

Furthermore, even in case a given boycott amounts to a breach of the principle of non-discrimination under WTO law, this raises the question of whether the obligation contained in CA1 should prevail over other obligations found in other

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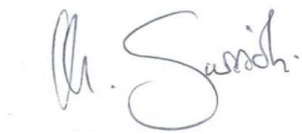
<sup>123</sup> V. Azarova, op. cit. And for a more in depth analysis, Analytical Index of the GATT, Article XXI, p. 600 and ff, available at: [https://www.wto.org/english/res\\_e/booksp\\_e/gatt\\_ai\\_e/art21\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art21_e.pdf)

<sup>124</sup> For an analysis of the decisions, see G. Poissonnier, "According to the Court of Cassation, freedom of expression does not authorize the call to boycott Israeli products", *AURDIP*, 1 November 2015, available at: <http://www.aurdip.fr/according-to-the-court-of.html?lang=fr>



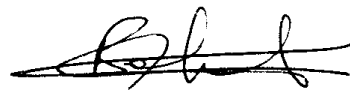
treaties such as the GATT. If such conflict of norms were to occur, the obligation to ensure respect of IHL peremptory norms, to which no derogation is permitted would prevail over the obligations to respect WTO law.

The undersigned conclude that CA1 also prevents third States from adopting measures limiting or prohibiting actions, including by its own population, that would frustrate the full implementation of the obligation to ensure respect, as long as their aim is to ensure respect of IHL and they are proportionate and not in violation of other fundamental norms of international law.



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Prof. Marco Sassòli  
Signature



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Dr. Théo Boutruche  
Signature

Date: 8 November 2016