



**Center for  
Global Legal Challenges**

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**YALE LAW SCHOOL**

**COMMON ARTICLE 1 AND DUTY TO “ENSURE RESPECT”**

**A Report of the Center for Global Legal Challenges<sup>1</sup>**

**December 7, 2015**

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## Executive Summary

This paper investigates whether the “to ensure respect” clause of Common Article 1 of the 1949 Geneva Conventions creates third state obligations. Third state obligations could impose both negative and positive duties on states to ensure that other states and some non-state actors comply with the Conventions. This issue has gained salience in light of the imminent publication of new set of commentaries on the Conventions by the International Committee for the Red Cross. The new commentaries will likely suggest that third state obligations under Common Article 1 are robust.

This paper assesses the anticipated ICRC position in light of both the drafting history of Common Article 1 and subsequent interpretations by major international tribunals and states. It concludes that Common Article 1 provides for some third state obligations, but that their scope and content remains underspecified and highly contested.

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## INTRODUCTION

Common Article 1 (CA1) of the 1949 Geneva Conventions stipulates that: “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.”<sup>2</sup> This paper provides an overview of the potential scope of state obligations under CA1.

The imminent publication of a new set of International Committee of the Red Cross (ICRC) commentaries on the Conventions has brought renewed attention to CA1. In particular, the ICRC commentaries are anticipated to focus on the appropriate scope of state obligations under its “to ensure respect” provision. The most contentious issue is likely to be whether, and to what extent, CA1 obligates states to ensure that other states also comply with the Conventions. In other words, does CA1 create “third state” obligations?

Thus far, precedent has largely characterized the duties imposed by CA1 as negative obligations to avoid taking actions that might assist in other actors’ violations of international humanitarian law (IHL). It is likely that the ICRC will argue that CA1 also imposes positive obligations for states to undertake action in order ensure that other states respect the Geneva Conventions. Such positive obligations pose a number of potential concerns for states that engage in military operations outside their own territory; in particular, states may be interested in the scope of potential liability for partner states’ actions in non-international armed conflicts. The remainder of this paper provides an overview of the state of play of debates regarding third state obligations under CA1. It introduces CA1 obligations generally and functions as a primer for the discussion likely to ensue on third state obligations after the publication of the ICRC commentaries.

The paper comes to three central conclusions. First, the text, past ICRC interpretations, drafting history of the Conventions, scholarly commentary, and limited case law indicate that CA1 imposes some minimal third state obligations. Second, the precise content and scope of the third state obligations remain unclear and greatly underspecified in international law. The application of these obligations will thus likely be highly contested—particularly insofar as they pertain to positive duties to “halt” and “prevent” third state violations of IHL. As a result, it will prove difficult to assess the possible scope of CA1 third state obligations both (1) prior to the publication of the ICRC commentaries, and (2) without specific fact patterns or scenarios to analyze. Third, there is little guidance as to what actions may discharge CA1 third state obligations. The ICRC has proposed application of the “due diligence” standard as framework for determining state responsibility under CA1. However, this standard has rarely been applied

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<sup>2</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 1, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 1, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War art. 1, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 1, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; *see also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 1, June 8, 1977, 1125 U.N.T.S. 3.

extraterritorially. Moreover, it appears that the due diligence requirements under CA1 may differ from—and likely require more extensive duties than—the standard for state responsibility specified by the International Law Commission’s Draft Articles on State Responsibility (the Draft Articles),<sup>3</sup> which are generally accepted as customary international law.<sup>4</sup>

This paper proceeds in five parts. First, it presents a short overview of the broader scope of obligations provided for by CA1. Second, it probes the likely ICRC interpretation of CA1 third state obligations based on available evidence. This part contains both an account of the proposed scope of the third state obligations, including their positive and negative character, and a brief description of the “due diligence” framework outlined by ICRC representatives to determine state responsibility for discharging these obligations. Third, the paper examines the drafting history of CA1 in order to assess the strength of the ICRC interpretation. Fourth, the analysis considers relevant international case law. Fifth, the paper offers a brief conclusion that emphasizes the absence of precedential guidance for determining the scope of CA1 third state obligations.

## I. OBLIGATIONS UNDER CA1 OF THE GENEVA CONVENTIONS

It is widely accepted that compliance with IHL is the responsibility of parties to any international or non-international armed conflict and that CA1 is customary international law.<sup>5</sup> Duties to respect IHL apply directly to states and their organs.<sup>6</sup> The obligation “to respect” the Geneva Conventions established by CA1 requires that states must make sure their own organs do not commit violations. CA1 also requires states “to ensure respect” for the Conventions “in all circumstances.” Duties “to respect” and “to ensure respect” are arguably distinguishable.<sup>7</sup> As a result, CA1 duties to “ensure respect” likely expand the scope of state responsibility beyond liability for the conduct of non-state actors under

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<sup>3</sup> Int’l Law Comm’n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, in REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTY-THIRD SESSION, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001) [hereinafter Draft Articles].

<sup>4</sup> The Draft Articles “are considered by courts and commentators to be in whole or in large part an accurate codification of the customary international law of state responsibility.” JAMES CRAWFORD, *STATE RESPONSIBILITY: THE GENERAL PART* 43 (2013).

<sup>5</sup> See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* 509-13 (2005). (“Rule 144”).

<sup>6</sup> See CRAWFORD, *supra* note 4, at 43-45..

<sup>7</sup> For an overview and discussion, see Knut Dörmann & Jose Serralvo, *Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations*, 97 INT’L REV. RED CROSS 1 (2015). For the most directly relevant and significant contributions to the literature on “to ensure respect” duties, see Fateh Azzam, *The Duty of Third States to Implement and Enforce International Humanitarian Law*, 66 NORDIC J. INT’L L. 55 (1997); Laurence Boisson de Chazournes & Luigi Condorelli, *Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests*, 82 INT’L REV. RED CROSS 67 (2000); Carlo Focarelli, *Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble*, 21 EUR J. INT’L LAW 125 (2010); Frits Kalshoven, *The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit*, 2 Y.B. INT’L HUMANITARIAN L. 3 (1999); Birgit Kessler, *The Duty to ‘Ensure Respect’ under Common Article 1 of the Geneva Conventions: Its Implications on International and Non-International Armed Conflicts*, 44 GERMAN Y.B. INT’L L. 498 (2001).

control of the state.<sup>8</sup> The duty to ensure respect also creates obligations for states to not assist other states (or non-state actors) violate their obligations under the Geneva Conventions; the International Court of Justice (ICJ) has largely characterized this obligation negatively, as an obligation not to “encourage” IHL violations.<sup>9</sup> For instance, CA1 requires that a state not assist a non-state actor in the violation of its own obligations under Common Article 3 of the Geneva Conventions.<sup>10</sup>

Recent writings by ICRC legal staff, however, have also suggested that duties “to ensure respect,” might also be characterized “positively” in the form of third state obligations to prevent and halt other states violations of the Conventions.<sup>11</sup> There has not, however, been significant discussion as to whether this kind of third state obligation would also create positive obligations regarding the conduct of non-state actors. If these duties do apply to the conduct of other states, they also likely apply to non-state actors.

Additionally, Article 16 of the Draft Articles renders states responsible for aiding or assisting another state in the commission of an internationally wrongful act. The relationship between state responsibility under Article 16 and CA1, however, remains ambiguous.<sup>12</sup>

## II. THE (ANTICIPATED) ICRC INTERPRETATION

This section outlines and assesses the positions recently espoused by various legal advisors connected with the ICRC. None of the positions or articles discussed here has been formally accepted as officially representing the ICRC interpretation of CA1, but they do offer insight into some of the likely arguments in the anticipated commentaries.

Historically the ICRC has offered interpretations of IHL through its various publications. The new commentaries, however, are anticipated to be on a scale

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<sup>8</sup> As it pertains to control of non-state actors, the relevant test for determining state responsibility “to respect” the conventions may be found in the Draft Articles, *supra* note 3, arts. 4, 8, and their codifications of the “effective control” and “overall control” tests articulated by the ICJ and the International Criminal Tribunal for the Former Yugoslavia (ICTY). Here state responsibility reflects whether non-state actors function “as if” they were state organs or instruments under the control of a state. Under these tests the relevant inquiries concern the degree to which actors or acts, can be seen as attributable to the state itself. For example, a state incurs responsibility directly for the “internationally wrongful acts” of non-state actors as if such actions had been committed by the state. The tests for state responsibility codified in the Draft Articles and articulated in the jurisprudence of the ICJ and ICTY for this kind of state responsibility thus constitute a relatively high bar of attribution. *See* Prosecutor v. Tadić, Case No. IT-94-1A, Appeal Judgment, (Int’l Crim Trib. for the Former Yugoslavia July 15, 1998) (arguing a state may be held responsible for the actions of organized paramilitary or military units if the state exercises overall control over the group); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 ¶ 110 (June 27) (articulating the “effective control” standard for state responsibility for non-state actors’ conduct).

<sup>9</sup> For the clearest statement, see *Nicar. v. U.S.*, 1986 I.C.J. 14, ¶ 220.

<sup>10</sup> For a discussion—and the notion that non-state actors have more expansive human rights obligations—see Andrew Clapham, *Human Rights Obligations of Non-State Actors in Conflict Situations*, 88 INT’L REV. RED CROSS 491, 493 (2006).

<sup>11</sup> Dörmann & Serralvo, *supra* note 7, at 1-3.

<sup>12</sup> *See infra* Part II (4).

comparable to the more extensive 1958 Jean Pictet commentaries—which were highly influential for the interpretation of the Geneva Conventions in the decades following their initial entry into force.<sup>13</sup>

## A. Overview of the (Anticipated) ICRC Position

### 1. The Textual Basis of Third State Obligations under CA1

In an April 2015 paper, Knut Dörmann (the head of the ICRC legal division) and Jose Serralvo (the ICRC legal adviser) argued that CA1 provisions to “ensure respect” also entail an “external component” that imposes third state obligations:

CA 1 goes one step further by introducing an undertaking to ensure respect in all circumstances, which, in turn, consists of an internal and an external component. The internal component implies that each High Contracting Party to the Geneva Conventions must ensure that the Conventions are respected at all times not only by its armed forces and its civilian and military authorities, but also by the population as a whole. . . . *The external component postulates that third States not involved in a given armed conflict – and also regional and international organizations – have a duty to take action in order to safeguard compliance with the Geneva Conventions, and arguably with the whole body of IHL, by the parties to the conflict.*<sup>14</sup>

Dörmann and Serralvo further suggest that obligations under CA1 are *erga omnes* obligations owed to the international community as a whole.<sup>15</sup> Such obligations typically have been construed as a general grant of authority for third states to act to ameliorate grave breaches of the Conventions or other *jus cogens* violations (including breaches of the 1949 Genocide Convention<sup>16</sup>).<sup>17</sup>

Additionally, they argue that CA1 imposes *specific* obligations on all states, and state failure to discharge those obligations may result in liability:

CA 1 goes beyond an entitlement for third States to take steps to ensure respect for IHL. It establishes not only a right to take action, but also an international legal obligation to do so. The words “ensure respect” imply *an active duty and the term “undertake” suggests a genuine obligation,*

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<sup>13</sup> See JEAN S. PICTET, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 15-16 (1958).

<sup>14</sup> Dörmann & Serralvo, *supra* note 7, at 2-3 (emphasis added).

<sup>15</sup> *Id.* at 16.

<sup>16</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnian Genocide*) (Bosn. & Herz. v. Serb. & Montenegro), Judgment, Merits, 2007 I.C.J. 43, ¶ 161-162 (Feb. 26).

<sup>17</sup> See CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS ERGA OMNES IN INTERNATIONAL LAW 117-57 (2010).

and this applies to all aspects of CA 1 – both the internal and the external component.<sup>18</sup>

Under this new reading, CA1 obligations are never merely discretionary rights to action, but duties that impose rules of liability on states. This interpretation moves beyond the earlier construction of CA1 from the Pictet commentaries that contained the ambiguous construction of “may and should,” rather than asserting an affirmative duty.<sup>19</sup>

## 2. Proposed Scope of CA1 Obligations: Negative and Positive Duties

Dörmann and Serralvo do not offer significant detail as to the precise scope of the third state obligations, but they indicate such obligations are far reaching.<sup>20</sup> They also intimate that CA1 imposes greater potential liability on third states for the conduct of their allies in a non-international armed conflict. In this sense, the asserted scope of obligations imposed by CA1 is *context dependent*, insofar as it is determined in part by the relationship between the third state and the state violating the convention:

[T]he intricateness of international relations, including the political dynamics to which a State might be subject, does not diminish the validity of this obligation. In fact, the opposite is true: *a State with close political, economic and/or military ties (for example, through equipping and training of armed forces or joint planning of operations) to one of the belligerents has a stronger obligation to ensure respect for IHL by its ally.* This is precisely the underlying logic of CA 1, as well as of other IHL rules in which close ties between two States lead to the reinforcement of their existing obligations.<sup>21</sup>

Significantly, on this interpretation, CA1 obligations to third states entail positive duties in addition to negative duties not to assist states in the violation of IHL. This construction also implies “positive” duties extend to preemptive actions taken to avoid Convention breaches by allies<sup>22</sup>:

CA 1 uses the term “ensure” in the active voice, indicates that the scope of the obligation to ensure respect is “undoubtedly larger than simply ‘not encouraging,’” and also includes a series of positive obligations . . . . High Contracting Parties have a duty to exert their influence/take appropriate

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<sup>18</sup> Dörmann & Serralvo, *supra* note 7, at 17 (emphasis added).

<sup>19</sup> See PICTET, *supra* note 13, at 15-16. This translation, however, may not reflect the original French meaning of the term. See *infra* notes 67-68.

<sup>20</sup> Dörmann & Serralvo, *supra* note 7, at 19-20.

<sup>21</sup> *Id.* at 18 (emphasis added).

<sup>22</sup> *Id.* at 22-24. The ICRC refers to the ICJ’s *Bosnian Genocide* ruling to substantiate this claim, although it is not facially obvious how that ruling’s “due diligence” standard would apply to the assessment of liability for CA1 violations. Moreover, it is not immediately clear that the ICRC’s reading can be supported by the text of the decision, and certainly more narrow constructions are conceivable (more discussion below in appraisal of ICJ precedent).

measures to put an end to ongoing IHL violations . . . the obligation to ensure respect should clearly be seen through the prism of prevention.<sup>23</sup>

These duties imply that states will take action both *to prevent* breaches of the Conventions in addition *to stop ongoing* IHL violations.<sup>24</sup> Dörmann and Serralvo also suggest that a state does not avoid liability for its allies' breaches of the Conventions simply by ex post intervention; it must take steps to ensure such violations never occur in the first place.<sup>25</sup> The full scope of these duties remains underspecified in the ICRC legal staff commentaries. Dörmann and Serralvo do indicate, however, that duties to prevent violations will also be more extensive when states have close ties.<sup>26</sup>

Dörmann and Serralvo also distinguish third state obligations under CA1 from a "right to intervention." CA1 obligations are not to be used as a means to justify unilateral humanitarian interventions:

CA 1 should not be used to justify a so-called "*droit d'ingérence humanitaire*". In principle, permitted measures must be limited to "protest, criticism, retorsions or even non-military reprisals". Armed intervention may only be decided within the context of the UN, and in full respect of the UN Charter. The rules on the resort to armed force (*jus ad bellum*) govern the legality of any use of force, even if it is meant to end serious violations of IHL. The content of CA 1 is not part of *jus ad bellum* and thus cannot serve as a legal basis for the use of force.<sup>27</sup>

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<sup>23</sup> *Id.* at 21-22, 24.

<sup>24</sup> *Id.* at 23-24.

<sup>25</sup> This issue was elaborated by ICRC representative Tracy Begley during her roundtable discussion with the Columbia Law School Human Rights Institute. *See* Tracey Begley, Session III: Common Article 1 to the Geneva Conventions and Article 16 of the Draft Articles on State Responsibility in the Context of Co-Belligerency, Roundtable on Legal Challenges Arising in Contemporary Non-International Armed Conflicts, Hosted by the International Committee of the Red Cross (ICRC) and Columbia Law School Human Rights Institute (HRI) 4 (Oct. 30-31, 2014) ("As articulated by the ICJ, the ICRC's CIHL Study, and the ICRC's 2011 *Challenges Report*, the stronger the influence a State has over another State or non-State actor, the greater the ability to implement the obligation to stop, or prevent, IHL violations. States that have more influence over another State or non-State actor have a higher responsibility to take action, than States that have little, or less, influence. Therefore, States that are conducting joint operations in an armed conflict, whether they are a party to the conflict or not, may have an enhanced obligation to stop violations, since it would be more reasonably within their power to take some sort of action to influence the violating State. States that are conducting joint operations presumably have a strong political, diplomatic and possibly geographic connection to their co-operating States, which would therefore allow them to more effectively influence these States. During joint operations, a State may provide another State with financing, weapons, logistics support, intelligence information, training, detention facilities and strategic advice, amongst other types of cooperation.").

<sup>26</sup> Dörmann & Serralvo, *supra* note 7, at 18-19.

<sup>27</sup> *Id.* at 20.



Dörmann and Serralvo suggest that general prohibition on the use of force of Article 2(4) of the U.N. Charter provides the upper limit on actions states may take to discharge their CA1 obligations.<sup>28</sup>

### 3. Application of the Due Diligence Standard

This section investigates the proposed “due diligence” standard for determining state responsibility for CA1 “to ensure” duties. The section begins with an overview of this standard and the possible sources of international law that may support its application in the CA1 context. This section also assesses how this standard might contrast with the Draft Articles.

#### a. CA1 State Responsibility as a Due Diligence Requirement

In the available publications believed to foreshadow its new commentaries, ICRC legal staff have endorsed “due diligence” as the standard for CA1 third state obligations:

In summary, “the obligation of result is an obligation to ‘succeed’, while the obligation of diligent conduct is an obligation to ‘make every effort.’” . . . [T]hird States can only be under an obligation to exercise due diligence in choosing appropriate measures to induce belligerents to comply with the law. This does not turn the duty to ensure respect into a vacuous norm, since States are under the obligation, depending on the influence they may exert, to take all possible steps, as well as any lawful means at their disposal, to safeguard respect for IHL rules by all other States. If they fail to do so, they might incur international responsibility.<sup>29</sup>

None of the ICRC commentaries has offered precise details regarding how states might fulfill their CA1 obligations under this standard. They suggest only that states are required to take “all possible steps, as well as any lawful means at their disposal” to “ensure” all other states respect the Geneva Conventions.<sup>30</sup> Accordingly, the ICRC argues that due diligence imposes obligations on the conduct of states, but does not require them to attain specific outcomes<sup>31</sup>: states will not be held responsible for failures to prevent other states from violating the Conventions as long as they can show that they “made every effort” to prevent the violation.<sup>32</sup>

Additionally, Dörmann and Serralvo cite the *Bosnian Genocide* case to characterize “due diligence” as a context dependent standard of obligation.<sup>33</sup>

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<sup>28</sup> *Id.* For an extended, and speculative discussion of possible options a state may take to discharge “to ensure” CA1 duties, see Umesh Palwankar, *Measures Available to States for Fulfilling their Obligation to Ensure Respect for International Humanitarian Law*, 33 INT’L REV. RED CROSS 1, 9-25 (1993).

<sup>29</sup> Dörmann & Serralvo, *supra* note 7, at 18.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 18-19.

<sup>32</sup> See Riccardo Pisillo-Mazzeschi, *The Due Diligence Rule and the Nature of the International Responsibility of States*, 35 GERMAN Y.B. INT’L L. 9, 47-48 (1992).

<sup>33</sup> Dörmann & Serralvo, *supra* note 7, at 19 (citing *Bosnian Genocide*, 2007 I.C.J 43, ¶ 430).

Accordingly, significant ties (whether diplomatic, geographic, social, or economic) between states increase the due diligence responsibility that arises vis-a-vis other states under the CA1 obligation to ensure respect for the Conventions.<sup>34</sup> It is unclear, however, if obligations based on “context” are derived merely from the third-party state’s capacity for influence in a given situation. On this reading, a state might incur greater CA1 obligations in any given conflict simply by virtue of its pervasive worldwide military, economic, and diplomatic influence.<sup>35</sup> In alternative construction, a state might be required to take voluntary steps to engage another state or non-state actor in order to increase its CA1 due diligence requirements. At the least, direct support for another state’s involvement in an armed conflict would increase a third state’s responsibility under CA1. Beyond direct support for a state’s engagement in an armed conflict, it remains unclear how exactly close relations between states would translate to increased CA1 state responsibility.

As a general principle, Dörmann and Serralvo conclude that states are obligated to employ all means short of the use of force in exercising due diligence to prevent or halt breaches of the Conventions. In their discussions of due diligence, the ICRC legal staff have applied guidelines derived from *Bosnian Genocide*. As a matter of legal precedent, however, it remains unclear whether the ICJ would hold that the due diligence standard applies to other violations of IHL in addition to the Genocide Convention. Moreover, Dörmann and Serralvo observe that there is a lack of precedent for the application of the due diligence standard to third state obligations under CA1, stating, “It remains to be seen what elements compose that standard.”<sup>36</sup>

#### 4. Due Diligence Distinguished From Articles 16-18 of the Draft Articles

As a standard for discharging international legal obligations, due diligence has been applied in a non-systematic way over many decades in a variety of contexts.<sup>37</sup> Most notably, due diligence standards have been used in international environmental law, investment law, and the law of the sea.<sup>38</sup> Applications of due diligence in the context of IHL and international human rights law have either focused on state obligations in their own conduct during armed conflict<sup>39</sup> or on state obligations to provide adequate protections to individuals within their territory from violations of human rights.<sup>40</sup> The Draft Articles have more often been cited when determining whether states are responsible for the conduct of other states’ IHL violations. The International Law Association (ILA) study on due diligence also notes that “[t]he omission of due diligence

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<sup>34</sup> *Id.* at 18.

<sup>35</sup> *Id.* at 19.

<sup>36</sup> *Id.* at 20.

<sup>37</sup> See Robert P. Barnidge, *The Due Diligence Principle Under International Law*, 8 INT’L COMMUNITY L. REV. 181 (2006).

<sup>38</sup> See DUNCAN FRENCH & TIM STEPHENS, ILA STUDY GROUP ON DUE DILIGENCE IN INTERNATIONAL LAW: FIRST REPORT (2014) [hereinafter ILA STUDY GROUP].

<sup>39</sup> *Id.* at 11-12.

<sup>40</sup> See, e.g., Lee Hasselbacher, *State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, and International Legal Minimums of Protection*, 8 NW. J. INT’L HUM. RTS. 190 (2010).

from the Articles on State Responsibility in relation to state wrongs generally.”<sup>41</sup> However, notable ICJ cases—such as *Bosnian Genocide* and *Corfu Channel*—apply due diligence requirements to assess state conduct toward other states.<sup>42</sup>

On its face, the ICRC reading of the scope of CA1 obligations goes a step beyond the Draft Articles’ Chapter IV state obligations in enumerating positive duties to prevent and halt ongoing violations of IHL.<sup>43</sup> Chapter IV of the Draft Articles addresses the responsibility of states in connection with acts taken by another state.<sup>44</sup> Article 16 details state responsibility for “aid or assistance in the commission of an internationally wrongful act”<sup>45</sup>; Article 17 addresses state responsibility when a state directs or controls another state in the commission of an internationally wrongful act; and Article 18 covers state responsibility for coercion of a state to commit an internationally wrongful act. The Draft Articles primarily deal with state responsibility as it relates to “negative duties” not to encourage or otherwise enable violations of IHL.<sup>46</sup>

Moreover, each of the Chapter IV articles contains a “knowledge” element, under which state responsibility may only be attributed if that “[s]tate [commits the action in question] with knowledge of the circumstances of the internationally wrongful act.”<sup>47</sup> Dörmann and Serralvo provide a concrete example of how CA1 obligations differ from the obligations found in Article 16 of the Draft Articles:

[I]n the context of arms transfers, CA 1 also prescribes a series of positive obligations that go beyond the wording of Article 16 of the Draft Articles on Responsibility of States. According to the International Law Commission, aid or assistance are only unlawful when the assisting State has knowledge of the circumstances that make the conduct illegal and decides to carry out such conduct with a view to facilitating the violation. In the case of arms exports, Draft Article 16 can be translated in the following manner: State C would only incur international responsibility if it sells weapons to State A in order to facilitate the infringement of IHL against State B, and with knowledge that the weapons will be used for such purpose. In contrast, *CA 1 would require State C to assess* whether State A *is likely* to use the weapons to violate IHL in an armed conflict

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<sup>41</sup> ILA STUDY GROUP, *supra* note 38, at 5.

<sup>42</sup> See *Bosnian Genocide*, 1995 I.C.J. 595; *United Kingdom of Great Britain and Northern Ireland v. Albania (Corfu Channel)*, 1949 I.C.J. 4.

<sup>43</sup> See Dörmann & Serralvo, *supra* note 7, at 18 (“Third states can only be under an obligation to exercise due diligence in choosing appropriate measures to induce belligerents to comply with the law.”).

<sup>44</sup> Draft Articles, *supra* note 3, art. 16-19; *see also* Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (Dec. 12, 2001) (taking note of the Draft Articles generally).

<sup>45</sup> Draft Articles, *supra* note 3, art. 16.

<sup>46</sup> See Marco Sassòli, *State Responsibility for Violations of International Humanitarian Law*, 84 INT’L REV. RED CROSS 401, 401 (2002) (“For a branch of law that applies in a fundamentally anarchic, illegal and often lawless situation such as armed conflicts, the focus of implementing mechanisms is and must always be on prevention.”).

<sup>47</sup> See Draft Articles, *supra* note 3, art. 16(a). For a discussion relevant to the ICRC context, see Begley, *supra* note 25.

with State B, and to refrain from transferring the arms if there is a *substantial or clear risk* that they could be used in that manner.<sup>48</sup>

It is significant to note two things about this interpretation: First, it imposes obligations to take action to prevent the sale of weapons; second, it does not regard “lack of knowledge” as reason for states to avoid responsibility for the wrongful actions of other states. Rather, the interpretation implies that states are obligated to investigate the actions of other states, and that states will bear responsibility for cases in which they also should have known that other states might violate IHL.<sup>49</sup> In order to avoid liability for other states’ violations of IHL, CA1 may require states to assess probabilities of risk that Article 16 does not. This interpretation would parallel the standard the ICJ articulated in *Nicaragua* for CA1 duties not “to encourage” violations of IHL that are “likely or foreseeable.”<sup>50</sup> This standard for liability remains ambiguous, however, and the secondary literature has not thoroughly addressed the relationship between CA1 and Article 16.

Scholars have indicated that exercising due diligence under CA1 will likely entail a thorough investigatory process by states. For example, Hannah Tonkin suggests that CA1 should provide the source of state responsibility for the conduct of hired Private Military and Security Contractors (PMSCs).<sup>51</sup> Parallel to ICRC legal staff view of state-to-state due diligence requirements, Tokin argues that a state’s due diligence obligations towards PMSC will vary with context.<sup>52</sup> In her analysis, three factors are relevant for determining a state’s due diligence requirements: the level of control a state exercises over a PMSC, the risk the PMSC will violate IHL, and the state’s actual or constructive knowledge of this risk.<sup>53</sup> Under such a framework, a state dealing with a non-state actor will need to take additional measures to insure compliance with IHL when any one factor is present to a significant degree.<sup>54</sup> In exercising due diligence Tokin also suggests that state’s should be held responsible not only if they “knew” of the risk of a non-state actor’s violation of IHL, but also if they “ought to have known” of the likelihood of such violations.<sup>55</sup>

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<sup>48</sup> Dörmann & Serralvo, *supra* note 7, at 28 (emphasis added).

<sup>49</sup> *Id.* at 28-29.

<sup>50</sup> *Nicar. v. U.S.*, 1986 I.C.J. 14, ¶ 181.

<sup>51</sup> Hannah Tonkin, *Common Article 1: A Minimum Yardstick for Regulating Private Military and Security Companies*, 22 LEIDEN J. INT’L L. 779 (2009).

<sup>52</sup> *Id.* at 794.

<sup>53</sup> *Id.* (“Just as the measures necessary to discharge the due diligence obligation may vary between states, so too may the measures required of a particular state vary with the circumstances. Three factors are particularly pertinent to this assessment: first, the level of influence or control that the hiring state in fact exercises over the PMSC in question; second, the risk that the company’s activities will give rise to a violation of IHL; and third, the state’s actual or constructive knowledge of that risk.”).

<sup>54</sup> See Dörmann & Serralvo, *supra* note 7 at 27-29; Tonkin, *supra* note 51, at 794-95.

<sup>55</sup> Tonkin, *supra* note 51, at 796 (“The third key consideration is whether the hiring state was aware, or ought to have been aware, of the enhanced risk of violation by the PMSC. Although the law of state responsibility contains no general requirement of fault, obligations of prevention frequently require some degree of knowledge or constructive knowledge on the part of the state in order to establish breach. For example, in assessing responsibility for a failure to protect life, the European Court of Human Rights employs a test of ‘foreseeability of the event’: the state is responsible if the authorities knew or ought to

In general, the ICRC's anticipated framework for CA1 will likely entail greater third state responsibility for violations of IHL than the Draft Articles. Moreover, the positive duties implied by the ICRC staff interpretation of CA1 would impose a greater burden of investigation on states to assess potential violations of IHL.

### III. THE DRAFTING HISTORY OF CA1

This section evaluates the possible basis of support for the anticipated ICRC interpretation. First, it turns to the drafting history of the Convention and the scholarly controversies over its interpretation. Second, it examines the Pictet and later ICRC commentaries that interpreted CA1. While the drafting histories remain ambiguous and disputed as to the scope of CA1 "to ensure respect" duties, later ICRC interpretations and international legal precedent offer support for the anticipated ICRC position.

#### A. Drafting History and *Travaux Préparatoires*

There appears to be a limited scholarly consensus that the drafting debates on CA1 did not explicitly contemplate its application to third state obligations.<sup>56</sup> ICRC staff publications have, however, offered pushback against this understanding.<sup>57</sup> While the record does not definitively establish that the drafting parties contemplated third state obligations, there are sufficient ambiguities and gaps in the record that render the drafting history inconclusive.<sup>58</sup>

The obligation to ensure respect was initially introduced in the opening articles of the Draft Revised Conventions for the Protection of War Victims, submitted by the ICRC to the Stockholm International Conference of the Red Cross in 1949.<sup>59</sup> The ICRC disseminated a booklet with the proposed article changes and commentaries to all state participants in the Convention drafting process.<sup>60</sup> In recent publications, Dörmann and Serralvo have emphasized the following line of commentary on the draft of CA1: "[T]he High Contracting Parties cannot confine themselves to implementing the Convention. They must also do everything in their power to ensure that the humanitarian principles on which the Convention is founded shall be universally applied."<sup>61</sup> According to Dörmann and Serralvo, this commentary supports third state obligations; additionally they cite a

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have known of the risk to life and failed to take measures which, judged reasonably, might have prevented the occurrence of the fatal event. In similar vein, in the Genocide case the ICJ held that the obligation to prevent and punish genocide applies wherever a state is aware, or should normally be aware, of a serious risk that genocide will occur." (citations omitted)

<sup>56</sup> See Focarelli, *supra* note 7; Kalshoven, *supra* note 7. But see Azzam, *supra* note 7, at 57-62 (arguing that the drafting history of CA1 and *opinio juris* support finding third state obligations).

<sup>57</sup> Dörmann & Serralvo, *supra* note 7, at 6-10.

<sup>58</sup> See *id.* at 8-9; see also Boisson de Chazournes & Condorelli, *supra* note 7, at 84-86.

<sup>59</sup> INT'L COMM. RED CROSS, DRAFT REVISED OR NEW CONVENTIONS FOR THE PROTECTION OF WAR VICTIMS 4, 34 (1948) [hereinafter DRAFT REVISED].

<sup>60</sup> David A. Elder, *The Historical Background of Common Article 3 of the Geneva Convention of 1949*, 11 CASE W. RES. J. INT'L L. 37 (1979) (discussing the booklet and drafting process); see also Dörmann & Serralvo, *supra* note 7, at 6-9; Kalshoven, *supra* note 7, at 5-16.

<sup>61</sup> DRAFT REVISED, *supra* note 59, at 5.

preface to the disseminated booklet that indicated the 1949 Conventions “widened” the scope of CA1 from its prior instantiation in the 1929 Convention.<sup>62</sup>

Critical here is the interpretation of the word “universally” in the commentary. In contrast to Dörmann and Serralvo, Frits Kalshoven reads the addition of the term as an attempt to ensure that the new Conventions would apply domestically, i.e., to conflicts now classified as non-international armed conflicts.<sup>63</sup> Additionally, scholarly review of the drafting debates notes an absence of explicit discussion of third state obligations and finds further reference to the “domestic application” of the Conventions, supporting Kalshoven’s interpretation.<sup>64</sup>

Dörmann and Serralvo have made two arguments to rebut Kalshoven’s reading of the drafting history. First, they note that the draft of Article 2 present at the Stockholm Conference of 1949 independently addressed the issue of civil war and non-reciprocity; given that the commentary on Article 1 also stipulated it “widened” the scope of the Article 1 from the 1929 version, Dörmann and Serralvo infer that it would be redundant (and implausible) for “universally applied” to mean the Conventions applied domestically.<sup>65</sup> Second, they argue that “[t]he ordinary meaning of the term ‘universal’ used in the ICRC remarks is particularly univocal and one can comfortably assert that, at least in the domain of international law, it means the very opposite of domestic.”<sup>66</sup>

Neither of these arguments conclusively show that the drafters intended the “ensure respect” clause to entail third state obligations. In order for the first argument to persuade, it would need to be shown that the 1929 version of the Conventions already contemplated their application to civil war. Given that the Article 2 comments were instead introduced concurrently with the Article 1 draft comments in 1949,<sup>67</sup> it is plausible that both revisions contemplated the same scope of application. If the ICRC hoped to “widen” the scope of the new Conventions to apply to domestic contexts, it is likely that it would have introduced multiple revisions designed to achieve this end, since it had no guarantee states parties would approve each proposed revision. Additional evidence would be required to indicate the impossibility of redundancy or overlap between the Article 1 and Article 2 amendments.

The second argument is more difficult to challenge, but is also more speculative. It seems plausible to suggest only that “universal” application is not limited to domestic contexts.<sup>68</sup> However, given that the Conventions already contemplated “international”

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<sup>62</sup> Dörmann & Serralvo, *supra* note 7, at 7-8.

<sup>63</sup> Kalshoven, *supra* note 7, at 16 (“For [the new draft Article 1’s] authors, its main *raison d’être* now appeared to lie in getting populations involved in the process of creating and maintaining respect for the principles embodied in the Conventions, thus binding them to such respect even in time of civil war or non-international armed conflict.”).

<sup>64</sup> See, e.g., Focarelli, *supra* note 7, at 131.

<sup>65</sup> Dörmann & Serralvo, *supra* note 7, at 8.

<sup>66</sup> *Id.*

<sup>67</sup> See Focarelli, *supra* note 7, at 128-132; Kalshoven, *supra* note 7, at 10-16.

<sup>68</sup> ERIC DAVID, *PRINCIPES DE DROIT DES CONFLITS ARMÉS* 3, 13 (2008) (“[U]ne application universelle ne se limite évidemment pas à une application nationale.”).

application, “universal” in the commentary on Article 1 could still be read as filling in the “gap” of domestic application. In other words, “universal” means simply domestic plus international application, and the 1929 Conventions only lacked a domestic component in order to meet this formulation of universal application. A definitive assessment of the drafting history would require much more precise evidence to be dispositive.

The *travaux préparatoires* from the Stockholm conference document very little discussion of CA1. Only four states (the United States, France, Norway, and Italy) and the ICRC took part in the deliberations of the Special Committee on CA1.<sup>69</sup> During that discussion, the Italian representative observed that the obligation to “ensure respect” was “either redundant or introduced a new concept into international law.”<sup>70</sup> In response, the ICRC representative argued that “the Contracting Parties should not confine themselves to applying the Conventions themselves, but should do all in their power to see that the basic humanitarian principles of the Conventions were universally applied.”<sup>71</sup> Although this comment has not been elaborated upon by the ICRC representative, or responded to—affirmatively or negatively by the states represented—it does provide the best evidence from the drafting history that third state obligations were contemplated in the context of CA1. At the very least, it distinguishes self-compliance with the conventions from universal application. It would be a leap, however, to construe this distinction as unequivocal evidence that universality implied obligations to ensure the compliance of other states, rather than merely compliance of private (non-state) actors for whom states may also have been responsible. The latter reading would square with discussion of applying the Conventions to the “population as a whole” in the drafting record.<sup>72</sup> In short, the drafting history is ambiguous.

## B. The Pictet Commentaries and Later ICRC Interpretations

Ambiguity in the drafting record may ultimately strengthen the ICRC’s anticipated new interpretation of CA1. First, Pictet’s later ICRC commentary on CA1 supports a more expansive interpretation of “to ensure respect” duties:

[I]n the event of a Power failing to fulfill its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavor to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally.<sup>73</sup>

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<sup>69</sup> See 2.B FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 53, *available at* [https://www.loc.gov/rr/frd/Military\\_Law/RC-Fin-Rec\\_Dipl-Conf-1949.html](https://www.loc.gov/rr/frd/Military_Law/RC-Fin-Rec_Dipl-Conf-1949.html) [hereinafter Final Record]; Dörmann & Serralvo, *supra* note 7, at 8.

<sup>70</sup> Final Record, *supra* note 69, at 53.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> See PICTET, *supra* note 13, at 16.

In this commentary, “universal application” applies precisely to the efforts of Contracting Parties to ensure that other Parties to the Convention respect its provisions. The English language version, however, does not clearly distinguish between an obligation and a right in its use of the terms “may, and should”; the original French text, however, only includes the word “*doit*,” which more clearly conveys an obligation rather than permission.<sup>74</sup>

Additionally, the ICRC has observed that, in accordance with Article 32 of the Vienna Convention on the Law of Treaties, drafting histories serve only as supplemental means of interpretation.<sup>75</sup> Article 31(3)(a-c) of the Vienna Convention indicates that subsequent state practice, later agreements between parties, and internationally applicable rules are likely to be more significant in determining a treaty’s interpretation than drafting documents.<sup>76</sup>

In light of the ambiguity of the drafting history, international bodies are likely to rely more heavily on state practice and international case law to determine whether CA1 entails third state obligations. The next section of the memo discusses relevant ICJ cases.

#### IV. INTERNATIONAL LAW SUPPORT FOR CA1 THIRD STATE OBLIGATIONS

This penultimate section examines the relevant international law precedent for evaluating CA1 third state obligations. The ICJ has offered the most direct support for CA1 third state obligations in *Nicaragua* and the *Wall* Advisory Opinion. Neither opinion, however, provides a clear sense of the scope of these obligations or their associated standard. This section then examines possible state interpretations of CA1. While state practice shows little to no evidence of attempts to hold states accountable for third state obligations, there is an abundance of U.N. committee reports and state declarations indicating support for the interpretation that CA1 provides for minimal third state obligations.

##### A. ICJ Interpretations of CA1

Modern interpretations of CA1 as imposing third state obligations were arguably first recognized at the U.N. 1968 International Conference on Human Rights in Tehran.<sup>77</sup> Resolution XXIII of the conference stated, “States parties to the Red Cross Geneva Conventions sometimes fail to appreciate their responsibility to take steps to ensure the respect of these humanitarian rules in all circumstances by other States, even if they are not themselves directly involved in an armed conflict.”<sup>78</sup> At the time of the Conference, sixty-seven states adopted this resolution with only two abstentions and no nay votes.<sup>79</sup>

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<sup>74</sup> *Id.* (source includes French and English text).

<sup>75</sup> Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331.

<sup>76</sup> *Id.* art. 31(3)(a-c); *see also* Dörmann & Serralvo, *supra* note 7, at 5-6.

<sup>77</sup> Human Rights in Armed Conflict, pmb., International Conference on Human Rights Resolution XXIII (May 12, 1968), *available at* [www1.umn.edu/humanrts/instree/1968a.htm](http://www1.umn.edu/humanrts/instree/1968a.htm).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* Kalshoven has expressed doubts on construing Resolution XXIII as an implicit acceptance of the legal obligation enshrined in CA1. Kalshoven, *supra* note 7, at 43. Other authors do not hesitate to support the opposite view. *See* Azzam, *supra* note 7, at 62.



ICJ rulings in both *Nicaragua*<sup>80</sup> and the *Wall* Advisory Opinion<sup>81</sup> have also been interpreted to endorse a third state obligation under CA1. In *Nicaragua*, the ICJ held that the United States had obligations under CA1 to ensure that the paramilitary forces it supported abided by Common Article 3 obligations—even when the United States was not itself a party to the conflict:

The Court considers that there is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to “respect” the Conventions and even “to ensure respect” for them “in all circumstances”, since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression. The United States is thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions.<sup>82</sup>

Significantly, the ICJ did not explicitly declare that the U.S. has “positive” obligations in *Nicaragua*, but only that it must not “encourage persons or groups engaged in conflict” to violate their own obligations under IHL.<sup>83</sup> However, the ruling also does not explicitly state that CA1 third state obligations exclude positive duties. It only concludes that it need not address such a question to find the United States responsible.<sup>84</sup> The case could be read to support the ICRC position that “significant ties” incur greater CA1 responsibility.

In its *Wall* Advisory Opinion, the ICJ adopted a reading of CA1 third state obligations that suggests CA1 imposes some positive duties.<sup>85</sup> There, the ICJ interpreted CA1 to imply that “every state party” to the Fourth Geneva Convention had an obligation to “ensure that the requirements” of the Convention are upheld:

The Court would also emphasize that Article 1 of the Fourth Geneva Convention, a provision common to the four Geneva Conventions, provides that “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” It follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.<sup>86</sup>

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<sup>80</sup> See *Nicar. v. U.S.*, 1986 I.C.J. 14, ¶¶ 115-119, 220-21.

<sup>81</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (*Wall* Advisory Opinion), Advisory Opinion, 2004 I.C.J. 131 (July 9).

<sup>82</sup> *Nicar. v. U.S.*, 1986 I.C.J. 14, ¶ 220.

<sup>83</sup> *Id.* ¶ 220-21.

<sup>84</sup> *Id.*

<sup>85</sup> *Wall* Advisory Opinion, 2004 I.C.J. 136, ¶¶ 156-60.

<sup>86</sup> *Id.* ¶ 158.

In its application of this principle, the Court held that “all the States parties to the Geneva Convention . . . are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.”<sup>87</sup> The Court explicitly found that CA1 imposed third state obligations on all High Contracting Parties to halt Israeli’s violation of the Fourth Convention. The Court implies that this is a positive duty, given that many state parties do not have direct ties to Israeli’s military action in Palestine. Moreover, the inclusion of the caveat that third state obligations must be discharged “while respecting the UN Charter” may further the ICRC’s interpretation that Article 2(4) of the Charter imposes the limit on what actions must be taken to ensure compliance with CA1.

In a dissenting opinion, Judge Kooijmans clarified that he disagreed with the majority *precisely because* it interprets CA1 as entailing positive duties:

Finally, I have difficulty in accepting the Court’s finding that the States parties to the Fourth Geneva Convention are under an obligation to ensure compliance by Israel with humanitarian law as embodied in that Convention (paragraph 159, operative subparagraph (3) (D), last part). In this respect the Court bases itself on common Article 1 of the Geneva Convention . . . .

Although I certainly am not in favour of a restricted interpretation of common Article 1, such as may have been envisaged in 1949, *I simply do not know whether the scope given by the Court to this Article in the present Opinion is correct as a statement of positive law*. Since the Court does not give any argument in its reasoning, I do not feel able to support its finding. Moreover, *I fail to see what kind of positive action, resulting from this obligation, may be expected from individual States, apart from diplomatic démarches*.<sup>88</sup>

The separate opinion helps clarify two points: first, that the ruling does impose some positive third party obligations on states; and second, that the scope of these obligations remains under-specified.

While limited, the available ICJ case law on CA1 makes clear that it will likely be interpreted to impose some minimal third state obligations. It may be that the finding in *Nicaragua* indicates only the “floor” or most minimal conditions that would suffice to establish a violation of “to ensure respect” duties. Furthermore, the *Wall* Advisory Opinion indicates that third states may be liable for their failure to take preventative action against foreseeable IHL violations by other states.<sup>89</sup>

These cases still leave a number of important issues unaddressed. At minimum, they do not address the appropriate standards for assessing state responsibility for CA1 duties

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<sup>87</sup> *Id.* ¶ 159.

<sup>88</sup> *Id.* ¶¶ 46, 50 (separate opinion by Kooijmans, J.) (emphasis added).

<sup>89</sup> See *supra* notes 81-86.

in relation to the Draft Articles, nor do they distinguish between the scopes of these duties as applied to the actions of non-state actors. While these cases do offer direct support for the central conclusion of the anticipated ICRC position, they leave a great deal of ambiguity regarding the precise scope of CA1 “to ensure respect” duties.

## B. Additional U.N. Precedent and State Practice

In addition to ICJ precedent, a number of U.N. Security Council and General Assembly resolutions imply third state obligations exist under CA1.<sup>90</sup> In a 1987 report to the Security Council, the Secretary General explicitly endorsed the third state obligation approach to CA1 (again with regard to Israel-Palestine):

Under [the Fourth Geneva Convention], each Contracting State undertakes a series of unilateral engagements, vis-à-vis itself and at the same time vis-à-vis the others, of legal obligations to protect those civilians who are found in occupied territories following the outbreak of hostilities. . . . [T]he Security Council should consider making a solemn appeal to all the High Contracting Parties to the Fourth Geneva Convention that have diplomatic relations with Israel, *drawing their attention to their obligation under article 1 of the Convention* to “. . . ensure respect for the present Convention in all circumstances” and *urging them to use all the means at their disposal to persuade the Government of Israel to change its position as regards the applicability of the Convention*.<sup>91</sup>

A number of General Assembly resolutions reflect a similar interpretation of CA1,<sup>92</sup> as do many reports by the U.N. Commission on Human Rights and its successor the Human Rights Council.<sup>93</sup>

With regard to state practice, there is additional acknowledgement of general third state obligations under CA1.<sup>94</sup> The European Union, for example, has invoked CA1 as a reason for taking diplomatic action with regard to violations of IHL in Syria:

The lack of respect for international humanitarian law and human rights is appalling and concerns us all. . . . Common article 1 of the Geneva Conventions clearly requires that all the contracting Parties, and I quote,

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<sup>90</sup> For a detailed discussion of U.N. practice on CA1, see Boisson de Chazournes & Condorelli, *supra* note 7, at 76-78. See also Toni Pfanner, *Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims*, 91 INT’L REV. RED CROSS 279, 305-06, 314-23 (2009).

<sup>91</sup> U.N. Secretary General, *Report Submitted to the Security Council by the Secretary-General in Accordance with Resolution 605*, ¶¶ 24-27, U.N. Doc. S/19443 (Jan. 21, 1988) (emphasis added).

<sup>92</sup> See, e.g., G.A. Res. 45/69, ¶ 3, U.N. Doc. A/RES/45/69 (Dec. 6, 1990); G.A. Res. 60/105, ¶ 3, U.N. Doc. A/RES/60/105 (Jan. 18, 2006); G.A. Res. 62/107, ¶ 3, U.N. Doc. A/RES/62/107 (Jan. 10, 2008); G.A. Res. 68/82, ¶ 7, U.N. Doc. A/RES/68/82 (Dec. 16, 2013).

<sup>93</sup> See, e.g., U.N. Comm’n on Human Rights Res. 2005/7, U.N. Doc. E/CN.4/RES/2005/7, pmbl. (Apr. 14, 2005). For a longer list of such reports, see Dörmann & Serralvo, *supra* note 7, at notes 54-58.

<sup>94</sup> Dörmann & Serralvo, *supra* note 7, at 14-17.

“undertake to respect and to ensure respect” for the conventions “in all circumstances”. Thus, it is a collective obligation on all of us not only to respect but also to ensure that the parties to the conflict respect their humanitarian obligations. We need to ensure actual enforcement of the obligations.<sup>95</sup>

There are a number of significant sources of international law precedent—ICJ case law, U.N. resolutions, declarations, committee reports, and past state practice<sup>96</sup>—that support the ICRC’s central conclusion that compliance with CA1 entails some affirmative third state obligations. None of these sources, however, provide detailed guidance as to the precise scope of these obligations or the standard of state responsibility required to discharge them. Given ICJ precedent, however, it is likely that when international courts do hear cases concerning potential violations of CA1, they will find third state obligations exist. The record of state practice provides limited support for the ICRC’s anticipated new commentaries.<sup>97</sup>

#### IV. Conclusion

The anticipated ICRC commentaries on CA1 will likely make a viable case that the duty to “ensure respect” imposes some third state obligations. Despite scholarly disagreement about the drafting history of CA1, there is evidence in both the drafting history and historical ICRC interpretations to support a finding of third state obligations. Additionally, key—but limited—international law precedent in *Nicaragua* and the *Wall* Advisory Opinion support a broader reading of CA1. Further evidence from U.N. Security Council and General Assembly resolutions and declarations by states also supports a finding of minimal third state obligations.

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<sup>95</sup> Ambassador Thomas Mayr-Harting, Head of the Delegation of the European Union to the U.N., Statement at the United Nations General Assembly on the Humanitarian Situation in Syria (Feb. 25, 2014), available at [www.eu-un.europa.eu/articles/en/article\\_14647\\_en.htm](http://www.eu-un.europa.eu/articles/en/article_14647_en.htm) (emphasis added).

<sup>96</sup> In its compendium on the “rules of customary international humanitarian law,” the ICRC has already argued extensively that state practice shows a basis for third state responsibility when considering accountability for violations of IHL. According to Rule 144, “States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law.” HENCKAERTS & DOSWALD-BECK, *supra* note 5, at 509. In commentaries on this rule, the ICRC argues that years of state practice support a customary international law obligation not “to encourage” violations of IHL. While *Nicaragua* remains the clearest and most compelling articulation of a standard of responsibility for “not encouraging” violations of IHL, the ICRC also makes a compelling case that state practice, ICTY cases, U.N. resolutions, and U.N. committee reports support its judgment. *Id.* at 509-512 (“The Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia stated in its judgments . . . that the norms of international humanitarian law were norms *erga omnes* and therefore all States had a ‘legal interest’ in their observance and consequently a legal entitlement to demand their respect. State practice shows an overwhelming use of (i) diplomatic protest and (ii) collective measures through which States exert their influence, to the degree possible, to try and stop violations of international humanitarian law.”).

<sup>97</sup> Notably, while many states have made public declarations regarding CA1 that appear to endorse third state obligations, *supra* note 96, there does not appear to be much available evidence of states taking active steps to enforce these obligations. For a discussion of this issue—and the difficulties of locating documentation due to diplomatic concerns—see Dormann & Serralvo, *supra* note 7, at 13-16.

Beyond the basic claim that states have some duty to ensure other states and non-state actors do not violate the Conventions, little is definitive about the scope of CA1's duty "to ensure respect." ICRC representatives have proposed that such duties include both negative obligations (supported by *Nicaragua's* "not to encourage" holding) and positive duties to halt and prevent violations of IHL (supported by *Bosnian Genocide* and the *Wall* Advisory Opinion). The precise scope of these duties remains underspecified, and there exists little consensus as to their upper limit (except perhaps the view that such duties must not conflict with Article 2(4) of the U.N. Charter). Further questions remain unanswered about the nature of state responsibility for discharging CA1 duties; in particular, there are complicated questions about the possible divergence between CA1 responsibility and the standards for state responsibility for aiding or assisting and internationally wrongful act under the Draft Articles.<sup>98</sup> Moreover, while the anticipated ICRC commentaries will likely encourage a more expansive reading of CA1 duties, there will likely be extensive and robust continued debate about how precisely those obligations should be characterized. Despite continued scholarly disagreements, the anticipated ICRC commentaries should provide some—and perhaps the only—concrete guidance as to how states may discharge their "to ensure respect" duties under CA1.

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<sup>98</sup> See Emily Chertoff, Lara Domínguez, Zak Manfredi, Peter Tzeng, *State Responsibility for Non-State Actors* (Ctr. for Global Legal Challenges, Report, 2015).

