
Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?

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Abstract

Common Article 1 of the 1949 Geneva Conventions is today generally seen as a 'quasi-constitutional' international law rule, premised on the doctrine of obligations erga omnes and imposing on all contracting states an obligation to take a variety of measures in order to induce not only state organs and private individuals but also other contracting states to comply with the Conventions. The phrases 'ensure respect' and 'in all circumstances' contained therein, in particular, have been understood to imply a 'state-compliance' meaning, drawing basically upon the ICRC Commentaries to the 1949 Geneva Conventions and to the 1977 Additional Protocols. However, expressions similar to 'ensure respect' in human rights treaties, in other provisions of the Geneva Conventions themselves, and in military manuals have been given an exclusive 'individual-compliance' meaning. Lists of measures available to contracting states against other contracting states deemed to be in breach of the Conventions have been suggested without investigation of whether such measures were per se lawful or unlawful and whether their adoption was legally required, or authorized, or merely recommended under common Article 1. Measures the adoption of which is expressly required or authorized by ad hoc provisions of the Geneva Conventions have been redundantly linked to Article 1. The phrase 'in all circumstances' too has a variety of meanings already found in ad hoc provisions other than Article 1. Ultimately, the purported 'quasi-constitutional' character of common Article 1 has proved a subject of speculation. Common Article 1 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.

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1 Introduction

Common Article 1 of the 1949 Geneva Conventions stipulates that '[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances'.¹ The French version of Article 1 is worded as follows: '*[l]es Hautes Parties contractantes s'engagent à respecter et à faire respecter la présente Convention en toutes circonstances*'.² An identical provision is found in Article 1(1) of the 1977 First Protocol³ – but not in the Second Protocol⁴ – and in Article 1(1) of the Third Protocol⁵ additional to the Conventions, as well as in Article 38(1) of the 1989 Convention on the Rights of the Child.⁶ No treaties prior to the 1949 Geneva Conventions contained a similar provision, although the terms 'respected . . . in all circumstances'⁷ were found in Article 25(1) of the 1929 Geneva Convention for the Protection of the Wounded

¹ Available at: www.icrc.org/ihl.nsf/CONVPRES?OpenView. For some comments see Condorelli and Boisson de Chazournes, 'Quelques Remarques à propos de l'obligation des Etats de "respecter et de faire respecter" le droit international humanitaire en toutes circonstances', in C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (1984), at 17; Obradović, 'Que faire face aux violations du droit humanitaire? Quelques réflexions sur le rôle possible du CISR', in *ibid.*, at 483; Levrat, 'Les conséquences de l'engagement pris par les Hautes Parties Contractantes de "faire respecter" les Conventions humanitaires', in F. Kalshoven and Y. Sandoz (eds), *Implementation of International Humanitarian Law* (1989), at 263; Benvenuti, 'Ensuring Observance of International Humanitarian Law: Function, Extent and Limits of the Obligations of Third States to Ensure Respect of IHL', in International Institute of Humanitarian Law, *Yearbook* (1989–1990), at 27; Gasser, 'Ensuring Respect for the Geneva Conventions and Protocols: The Role of Third States and the United Nations', in H. Fox and M. Meyer (eds), *Effecting Compliance. Armed Conflict and the New Law* (1993), at 15; Palwankar, 'Measures Available to States for Fulfilling their Obligation to Ensure Respect for International Humanitarian Law', 298 *International Review of the Red Cross (IRRC)*(1994) 9; *ibid.*, 'Measures auxquelles peuvent recourir les Etats pour remplir leur obligation de faire respecter le droit international humanitaire', 805 *Revue internationale de la Croix-Rouge* (1994) 11; Azzam, 'The Duty of Third States to Implement and Enforce International Humanitarian Law', 66 *Nordic J Int'l L* (1997) 55; Kalshoven, 'The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit', 2 *Yrbk Int'l Humanitarian L* (1999) 3; Condorelli and Boisson de Chazournes, 'Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests', 837 *IRRC* (2000) 67; B. Kessler, *Die Durchsetzung der Genfer Abkommen von 1949 in nicht-internationalen bewaffneten Konflikten auf Grundlage ihres gemeinsamen Art. 1* (2001); *ibid.*, 'The Duty to "Ensure Respect" Under Common Article 1 of the Geneva Conventions: Its Implications on International and Non-International Armed Conflicts', 44 *German Yrbk Int'l L* (2001) 498.

² Available at: www.icrc.org/ihl.nsf/CONVPRES?OpenView. English and French are the two authentic languages of the Conventions under Arts 55-I, 54-II, 133-III, and 150-IV.

³ Available at: www.icrc.org/ihl.nsf/CONVPRES?OpenView.

⁴ Available at: www.icrc.org/ihl.nsf/CONVPRES?OpenView. However, the existence of an obligation to respect and to ensure respect of international humanitarian law in non-international conflicts is generally accepted in that common Art. 1 also refers to common Art. 3 of the Geneva Conventions and Additional Protocol II constitutes an 'elaboration' and development of common Art. 3. Cf. Palwankar, 'Measures Available to States', *supra* note 1, at 12; Kalshoven, *supra* note 1, at 48; Condorelli and Boisson de Chazournes, 'Common Article 1', *supra* note 1, at 69; Benvenuti, *supra* note 1, at 28; Kessler, 'The Duty', *supra* note 1, at 508.

⁵ Available at: www.icrc.org/ihl.nsf/CONVPRES?OpenView.

⁶ Art. 38(1) reads as follows: '[s]tates parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child', available at: www.icrc.org/ihl.nsf/CONVPRES?OpenView.

⁷ 'The provisions of the present Convention shall be respected by the High Contracting Parties in all circumstances.'

and Sick⁸ and in Article 82(1) of the 1929 Geneva Convention relative to the Treatment of Prisoners of War.⁹ It is widely accepted, especially relying on the ICJ's *Nicaragua* Judgment¹⁰ as well as on the *Nuclear Weapons* and *Wall* Advisory Opinions,¹¹ that common Article 1 reflects customary international law. It has also been suggested that common Article 1 has a 'quasi-constitutional' meaning in current international law, given its reference to rules of international humanitarian law which are regarded as *jus cogens*, contemplating obligations *erga omnes*, and aimed at protecting fundamental values of the international community as a whole.¹²

The interpretation of common Article 1 and in particular of the expression 'ensure respect' has raised a variety of questions in the last decades. Two opposing approaches, restrictive and extensive respectively, have been taken. The restrictive approach may be termed 'individual-compliance', implying that under Article 1 contracting states have undertaken to adopt all measures necessary to ensure respect for the Conventions within their jurisdiction by their organs and private individuals. The extensive approach is additionally 'state-compliance' in character, meaning that under Article 1 contracting states have *also* undertaken to adopt all measures necessary to ensure respect for the Conventions *against other contracting states* which fail to comply with them. The latter no doubt reflects the prevailing view today.¹³ In particular, the term 'respect' is generally believed to refer to all the measures that contracting states are required to adopt to implement the Conventions within their legal systems, thereby imposing respect for the Conventions on both their organs and all private individuals within their jurisdiction; whereas the term 'ensure respect' is understood to imply an obligation of all contracting states to do everything in their power to induce transgressor states to abide by the Conventions.¹⁴ In a word, given the customary as well as *erga omnes* character of most norms of international humanitarian law, all states are deemed to 'have a right to ensure that any other states respects customary humanitarian law, . . . vis-à-vis any State party' to the 1949 Geneva Conventions and Additional Protocol I.¹⁵

The Commentaries of the International Committee of the Red Cross (ICRC) to the 1949 Geneva Conventions and to Additional Protocol I unequivocally support this broader interpretation and have enormously influenced the doctrinal debate. ICRC resolutions,¹⁶ Resolution XXIII on 'Human Rights in Armed Conflicts' of the 1968

⁸ Available at: www.icrc.org/ihl.nsf/FULL/300?OpenDocument.

⁹ Available at: www.icrc.org/ihl.nsf/FULL/305?OpenDocument.

¹⁰ *Infra* note 232.

¹¹ *Infra* notes 226–231.

¹² See Condorelli and Boisson de Chazournes, 'Common Article 1', *supra* note 1, at 67 and 85–86; Benvenuti, *supra* note 1, at 30–31; T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989), at 190, who regards common Art. 1 as a 'precursor of the concept of obligations *erga omnes*'.

¹³ See, e.g., Gasser, *supra* note 1, at 25; Condorelli and Boisson de Chazournes, 'Quelques Remarques', *supra* note 1, at 24; Palwankar, 'Measures Available to States', *supra* note 1, at 9; Kessler, 'The Duty', *supra* note 1, at 498.

¹⁴ See, e.g., Condorelli and Boisson de Chazournes, 'Common Article 1', *supra* note 1, at 69.

¹⁵ Cf. Palwankar, 'Measures Available to States', *supra* note 1, at 1; *ibid.*, 'Measures', *supra* note 1, at 12.

¹⁶ *Infra* notes 165–169.

Tehran Conference,¹⁷ the adoption of Article 1(1) of Additional Protocol I in 1977,¹⁸ the ICJ's jurisprudence – especially the *Wall* Advisory Opinion of 2004¹⁹ – as well as the 'special' and *erga omnes* character of most international humanitarian law rules are all elements that move in the same direction. States are also apparently agreed upon this approach. It is frequently held that not only have they made neither reservations nor interpretative declarations to Article 1,²⁰ but they have not even ever contested appeals made on this ground by the ICRC to the international community,²¹ nor have they raised concerns when inserting an identical expression – as that contained in common Article 1 – in other international instruments.²² While it is usually acknowledged that consistent practice is sparse, it is also pointed out that general acquiescence, lack of objections, and confidentiality of measures are, on balance, strongly supportive of this broader interpretation, and even capable of outweighing possible different interpretations deriving from the drafting history of the Conventions.²³ In the United Nations, the General Assembly and the Security Council (as well as other bodies) have apparently accepted this approach by adopting resolutions calling upon states to exert all efforts to ensure respect for the Conventions by other contracting states.²⁴ Furthermore, against those who see the term 'ensure respect' as redundant this interpretation seems supported by the principle *ut res magis valeat quam pereat* (also known as the '*effet utile*' principle) whereby in dubious cases it is reasonable to opt for a meaningful rather than for a meaningless interpretation of a treaty provision, assuming that the parties would not have inserted it into the treaty had they not intended to give it a meaning.²⁵ Finally, the broader approach appears grounded in sound reason: while international humanitarian law is rich in rules, the key problem remains how to make these rules actually be respected, and action taken by third parties to a conflict (although parties to the Conventions) against transgressors is apparently the most effective, if not an indispensable, means to ensure compliance.²⁶

It would then seem that the interpretation of common Article 1 is well settled and needs no further inquiry. Nevertheless, a variety of questions especially concerning the terms 'ensure respect' and 'in all circumstances' do remain unresolved. It is unclear whether common Article 1 provides for an obligation or rather a discretionary power (if not both) to take measures against transgressor states. It is also unclear – assuming

¹⁷ *Infra* note 65.

¹⁸ *Infra* note 68.

¹⁹ *Infra* notes 226 and 228–230.

²⁰ Cf. Palwankar, 'Measures Available to States', *supra* note 1, at 2, note 3.

²¹ *Infra* notes 165–169. See Condorelli and Boisson de Chazournes, 'Quelques Remarques', *supra* note 1, at 26–27; Kessler, 'The Duty', *supra* note 1, at 506–507.

²² *Infra* notes 67–69.

²³ Cf. Condorelli and Boisson de Chazournes, 'Quelques Remarques', *supra* note 1, at 26–29; Gasser, *supra* note 1, at 48; Condorelli and Boisson de Chazournes, 'Common Article 1', *supra* note 1, at 69–70; Kessler, 'The Duty', *supra* note 1, at 504–505.

²⁴ *Infra* notes 156–161 and 164.

²⁵ Cf. Condorelli and Boisson de Chazournes, 'Quelques Remarques', *supra* note 1, at 18.

²⁶ Cf. Benvenuti, *supra* note 1, at 27; Kessler, 'The Duty', *supra* note 1, at 498.

that an extensive approach should be taken – what specific measures contracting states are bound (or authorized) to adopt. Equally unclear is the role that state practice is supposed to play and how to match such an extensive approach with more restrictive positions adopted in respect of other human rights international treaties which use expressions similar to ‘respect and ensure respect’. Nor is it clear what common Article 1 adds to other specific provisions found in the 1949 Geneva Conventions, as well as in Additional Protocol I, requiring (or authorizing) states to take certain measures to tackle breaches of the Conventions. It is even far from being unquestionable that third state measures against a transgressor really constitute an effective and workable solution, given the notorious reluctance of third states (and even of international organizations such as the United Nations) to take action. If third states really have an obligation to react and yet generally they do not abide by it, it remains obscure how far a broad interpretation of common Article 1 is sensible. Finally, even assuming that third states may take measures against transgressors in accordance with the obligations *erga omnes* doctrine, it is difficult to see what role Article 1 *in itself* would play. In sum, on closer examination there seems to be room for suspicion that a broader approach may unjustifiably force common Article 1 into a given, speculative pattern such as that provided by the obligations *erga omnes* doctrine.

It is proposed, first, to see what common Article 1 was thought to stipulate in the *travaux préparatoires*. Secondly, an analysis of its early interpretation in the ICRC Commentaries is in order. Thirdly, focus will shift upon the interpretation of the phrases ‘undertake to respect’, ‘undertake to ensure respect’, and ‘in all circumstances’. Finally, a discussion will be offered of the question whether common Article 1 provides for obligations *erga omnes* and whether it may be regarded as a ‘quasi-constitutional’ international law rule.

2 Preparatory Work

It is convenient to discuss first what the drafters intended by the terms found in common Article 1. A preliminary problem is to ask whether preparatory work may be relied upon in general and with regard to common Article 1 in particular. It has been suggested that the interpretation of common Article 1 cannot but be conducted in the light of present circumstances, rather than those of the time when the Geneva Conventions were concluded.²⁷ However, it is generally accepted that the preparatory work may be relied upon when construing a treaty as a supplementary means of interpretation, pursuant to Article 32 of the Vienna Convention of 1969 on the Law of Treaties and customary international law. This supplementary character, coupled with the ‘special’ nature attributed to the 1949 Geneva Conventions,²⁸ implies that meanings

²⁷ See Condorelli and Boisson de Chazournes, ‘Common Article 1’, *supra* note 1, at 69–70, arguing that international practice, jurisprudential findings, and doctrinal opinions are more relevant than preparatory work to identify the current meaning of common Art. 1.

²⁸ *Infra* note 58.

identified in other ways, especially by way of an evolutionary interpretation,²⁹ are also to be carefully considered, but this does not prevent the interpreter from examining the preparatory work. Besides, the preparatory work can provide a helpful point of departure which can shed some light on subsequent practice and on a construction of common Article 1 actually in line with the present.

That being said, the wording and opening position of the text contained in common Article 1 were clearly designed to strengthen the formula already found in the 1929 Geneva Conventions,³⁰ and to convey the notion that the 1949 Geneva Conventions were to be regarded as endowed with a special character.

As is clearly shown,³¹ the debate about the phrase ‘respected . . . in all circumstances’ found in the 1929 Geneva Conventions was concerned with the question whether the Conventions should apply as between the parties even when one of the parties to the conflict was not party to the Convention, thereby departing from the so-called *si omnes* clause contained in earlier war treaties.³² In fact the abolition of the *si omnes* clause was strongly supported during the 1929 Geneva Conference. An early draft ICRC text included in the chapters on application and execution of the Sick and Wounded Convention a provision aimed to overcome the effects of the *si omnes* clause.³³ The United Kingdom proposed an amendment to the ICRC draft containing the words ‘respected . . . in all circumstances’.³⁴ A Drafting Committee then finalized the text of Articles 25 and 82 of the two Conventions, respectively, distinguishing two paragraphs, the first providing for ‘respect in all circumstances’ and the second stipulating the exception in the relations between a party and a non-party belligerent. The division in two paragraphs created the impression that paragraph 1 was intended to have an *autonomous*, distinct meaning, while this was not actually the case. The Commentary to the Wounded and Sick Convention, published by the ICRC in 1930,

²⁹ Cf., e.g., *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Notwithstanding Security Council Resolution 276 (1970)*, ICJ Advisory Opinion of 21 June 1971 [1971] ICJ Rep 16, at para. 53.

³⁰ *Supra* note 7.

³¹ See Kalshoven, *supra* note 1, at 7–10. We are highly indebted to Kalshoven’s valuable study for the entire account given in this para.; Condorelli and Boisson de Chazournes, ‘Quelques Remarques’, *supra* note 1, at 18–19.

³² Cf., e.g., Art. 2 of the 1899 and 1907 Hague Convention concerning the Laws and Customs of War on Land and Art. 24 of the 1906 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, whereby ‘[t]he provisions of the present Convention are obligatory only on the Contracting Powers, in case of war between two or more of them. The said provisions shall cease to be obligatory if one of the belligerent Powers should not be signatory to the Convention’.

³³ The text read as follows: ‘[L]es dispositions de la présente Convention ne sont obligatoires que pour les Puissances contractantes en cas de guerre entre deux ou plusieurs d’entre elles. Elles ne cessent de l’être qu’au cas où l’un de ces Etats se trouve avoir à combattre les forces armées d’un autre Etat qui se serait pas partie à cette Convention et à l’égard de cet Etat seulement’ (cf. *Actes de la Conférence diplomatique de Genève de 1929*, Première Commission, 16 juillet 1929, at 321–322).

³⁴ *Ibid.*, at 322: ‘Les dispositions de la présente Convention doivent être respectées par les Hautes Parties Contractantes en toutes circonstances, sauf le cas où une Puissance belligérante ne serait pas partie à cette dernière. En ce cas, les dispositions de la Convention ne seront pas applicables entre ce belligérant et ses adversaires, mais devront néanmoins être respectées dans les rapports entre les belligérants parties à la Convention’ (emphasis added).

specified that the term 'in all circumstances' in Article 25(1) was intended to mean that the Convention had a '*caractère d'obligation générale*' and applied both in time of peace and war, i.e., even before the outbreak of a war.³⁵ It was excluded that this 'character as a general obligation' also covered civil wars, although it would have been highly desirable had it been so.³⁶

Eventually, at the Stockholm Conference of the Red Cross which preceded the 1949 Geneva Conference a draft text of the Conventions was submitted in May 1948 containing, in Article 1, the phrase 'to respect and ensure respect . . . in all circumstances'.³⁷ The ICRC commented on this provision to the effect that contracting states undertook not only to respect the Convention but also to do whatever was in their power to ensure that the principles underlying the Convention were 'universally applied'.³⁸ Also expressed was the ICRC's intention to see the peoples themselves associated with the respect for such principles and with the execution of obligations resulting therefrom, which would have facilitated the application of the Convention in times of civil war, this a question which had become central at the time.³⁹ It is unclear what the term 'universally applied' was intended to mean. In the abstract, it could denote an undertaking of each contracting party to ensure respect for the Conventions by all other contracting parties. However, there is nothing suggesting that this meaning was even cursorily considered in the debates. What is apparent is that a strong trend existed to make the Conventions applicable also in internal conflicts, and hence in the contracting states' domestic sphere. It has therefore been held that 'universally' meant 'by all concerned' or 'the whole population'.⁴⁰ Draft Article 1 was approved – after

³⁵ Cf. P. des Gouttes, *La Convention de Genève du 17 juillet 1929, Commentaire* (1930), at 186. This interpretation had some basis on an incidental intervention concerning the original ICRC draft by the Chinese delegate, who noted that many provisions in the Convention were intended to apply in time of peace (such as those concerning the use of the red cross or red crescent, legislative and other measures for the instruction of armed forces, etc.) and the response by the British delegate, who underlined that the term 'in all circumstances' could be read as including time of peace: *ibid.*, at 329–330.

³⁶ Des Gouttes noted that '*il serait hautement souhaitable que les parties dressés l'une contre l'autre dans une guerre civile se souvinsent des dispositions humaines de la Convention afin de les observer entre eux*'.

³⁷ Cf. *Project de Convention révisée ou nouvelles protégeant les victimes de la guerre*, at 4. The text read as follows: '[t]he contracting Parties undertake, in the names of their peoples, to respect and to ensure respect for the Conventions in all circumstances'. The original French text read as follows: '*[l]es Hautes Parties contractantes s'engagent, au nom de leur peuple, à respecter et à faire respecter la présente Convention en toutes circonstances*'.

³⁸ According to the ICRC it was necessary '*de faire ressortir que . . . la présente Convention exige, pour être efficace, que les Hautes Parties contractantes ne se bornent pas à appliquer elles-mêmes la Convention, mais qu'elles fassent également tout ce qui est en leur pouvoir pour que les principes humanitaires qui sont à la base de cette Convention soient universellement appliqués*' (original French).

³⁹ The issue was first discussed by Mr Claude Pilloud, ICRC Head of the Legal Division, in an internal note of 18 Aug. 1947. He advocated the elimination of any reference to reciprocity and the introduction of a provision stipulating that '*les Gouvernements, en signant la Convention, s'engagent non seulement en tant que Gouvernements, mais engage aussi l'ensemble de la population dont ils sont les représentants*' so that '*toutes parties de la population d'un Etat qui entreprend une action en guerre civile est liée ipso facto par la Convention*', a formula regarded as '*analogue à celle de la Charte des Nations unies qui commence par les mots Nous les peuples des Nations unies*'. Kalshoven convincingly argues that this note foreshadowed the phrase 'to ensure respect' in the future common Art. 1 of the Geneva Convention (see Kalshoven, *supra* note 1, at 13).

⁴⁰ *Ibid.*, at 14.

the deletion of the phrase ‘in the name of their people’ proposed by the delegate of the American Red Cross and without significant discussion – by the plenary Conference for referral to the Conference planned for 1949. It must be noted that draft Article 2(3) provided for the application of the Conventions as between the parties even when a third party was involved in the conflict,⁴¹ and that Article 2(1) provided for the application of the Conventions also in times of peace.⁴² In other words, the two meanings attributed to the term ‘respected . . . in all circumstances’ contained in the 1929 Geneva Conventions⁴³ were now specifically dealt with by *specific* provisions other than common Article 1. Another *specific* provision, Article 2(4), was also introduced in the Draft providing for the application of the Conventions in internal conflicts.⁴⁴ Briefly, all possible past meanings of the term ‘respected . . . in all circumstances’ were now covered by specific provisions. Finally, at the same Conference a draft preamble for the new Civilian Convention was proposed by France and approved. Worthy of note is that, once the Conference closed, the ICRC proposed another draft preamble for all four Conventions. Its third paragraph provided that the contracting states undertook to respect, and to ensure respect for, the Conventions in all circumstances.⁴⁵ The ICRC recommended that its draft preamble should be included in Article 1 of all Conventions. Finally, both the four draft Conventions approved at the Stockholm Conference and the ICRC’s new proposals including a preamble were transmitted to the 59 Governments invited to take part in the 1949 Geneva Conference.

At the Geneva Conference, the Stockholm draft Article 1 and the ICRC’s draft preamble were very little discussed. As to the former, it was stated that draft Article 1 was along the lines of Articles 25 and 82 of the 1929 Geneva Conventions;⁴⁶ that the term ‘ensure respect’ was ‘either redundant or introduced a new concept into international law’⁴⁷ and that its ‘object . . . was to ensure respect of the Conventions by the populations as a whole’;⁴⁸ that draft Article 1 ‘emphasized that the Contracting Parties should not confine themselves to applying the Conventions themselves, but should do all in their power to see that the basic humanitarian principles of the Conventions were universally applied’.⁴⁹ In the debates about other provisions of the

⁴¹ ‘Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations.’

⁴² ‘In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.’

⁴³ *Supra* notes 33 and 35.

⁴⁴ This rule finally became common Art. 3.

⁴⁵ The proposal was submitted in a note entitled ‘Remarks and Proposals submitted by the International Committee of the Red Cross – Documents for the consideration of Governments invited by the Swiss Federal Council to attend the diplomatic Conference of Geneva (April 21, 1949).’ The French text read as follows: ‘[L]es Hautes Parties contractantes. . . s’engagent à respecter et à faire respecter celle-ci [la présente Convention] en toutes circonstances.’

⁴⁶ Final Record, vol. II B, at 26 (7th meeting, 17 May 1949).

⁴⁷ Final Record, vol. II B, at 53 (9th meeting, 25 May 1949) (Italy).

⁴⁸ *Ibid.* (Norway and US).

⁴⁹ *Ibid.*

Conventions it was also stated that draft Article 1 provided ‘for their [the Conventions] dissemination among the population through instruction’⁵⁰ and that ‘in accordance with Article 1, the Contracting State undertook to ensure respect for the Convention by its nationals’.⁵¹ On 25 May 1949 draft Article 1 was approved by the Special Committee without modification,⁵² and later adopted by the Joint Committee and the Plenary Assembly without any further discussion.⁵³ As to the draft preamble to the Civilians Convention, a Canadian proposal to omit it was approved by Committee III.⁵⁴ The ICRC’s draft preamble was discussed in Committees I and II and went through a series of votes which ultimately led to its rejection.⁵⁵

Briefly, during the preparatory work no one ever mentioned the possibility that ‘ensure respect’ could mean an undertaking of each contracting party to take measures to induce another contracting party to compliance. In contrast, those few who took the floor especially pointed out that the term ‘ensure respect’ referred to the whole population of contracting parties and was supposedly aimed at ensuring that the Conventions were respected by both governments and future insurgents parties in a civil war.⁵⁶

3 ICRC Commentaries

The ICRC Commentaries to the Conventions⁵⁷ and to the Protocols – apparently greatly indebted to the ICJ’s *Genocide* Advisory Opinion delivered in 1951⁵⁸ – have actually exerted considerable influence on the interpretation of common Article 1. Their analysis is thus helpful not only to grasp the meaning of these provisions but also to understand subsequent misunderstandings.

⁵⁰ Final Record, vol. II B, at 79 (24th meeting, 15 June 1949) (Monaco).

⁵¹ Final Record, vol. II B, at 84 (28th meeting, 24 June 1949) (France), emphasis added.

⁵² Final Record, vol. II B, at 53 (9th meeting, 25 May 1949).

⁵³ Final Record, vol. II B, at 27, 128, and 325.

⁵⁴ Final Record, vol. II A, at 777–782 (45th meeting, 9 July 1949).

⁵⁵ Cf. Kalshoven, *supra* note 1, at 24–27.

⁵⁶ *Ibid.*, at 27–28.

⁵⁷ See J.S. Pictet (ed.) for the ICRC, *Commentary – I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (1952); *ibid.*, *Commentary – II Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (1960); *ibid.*, *Commentary – III Geneva Convention Relative to the Treatment of Prisoners of War* (1960); *ibid.*, *Commentary – IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958), all available at: www.icrc.org/ihl.nsf/CONVPRES?OpenView.

⁵⁸ Cf. [1953] ICJ Rep 15, at 23 ([i]n such a convention the contracting States do not have any interest of their own; they merely have, one and all, a common interest . . . Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties). The Commentary echoes the Advisory Opinion when it refers to the “special character” of the Convention and to the fact that this latter “is not an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations” but “rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties”, ‘an imperative call of civilization’. Cf. ICRC, *Commentary – I Geneva Convention*, *supra* note 57, at 25; ICRC, *Commentary – III Geneva Convention*, *supra* note 57, at 17–18; ICRC, *Commentary – IV Geneva Convention*, *supra* note 57, at 15.

In the ICRC Commentary to the Conventions, the term ‘ensure respect’ was understood to imply that obligations arising out of the Convention were to be regarded as binding ‘all those over whom [the state] has authority, as well as the representatives of its authority’, including in particular an obligation ‘to issue the necessary orders’. This meaning was seen as stemming from the Convention *eo ipso*. The term ‘ensure respect’ was said to be only apparently ‘redundant’, its inclusion in the text being ‘deliberate’ in order to ‘emphasize and strengthen the responsibility of the Contracting Parties’.⁵⁹ Such an emphasis was aimed to denote that contracting states were bound not only to give orders to (civilians or military) authorities in the abstract, but also to supervise their concrete execution. Further, contracting states were also expected to fulfil their engagements by preparing in advance – that is to say in peacetime – all that was necessary to abide by the Conventions had an armed conflict broken out.⁶⁰ Finally, and most importantly, the term ‘ensure respect’ was not deemed ‘redundant’ to the effect that ‘in the event of a Power failing to fulfil its obligations, the other Contracting Powers (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention’.⁶¹ This phrase is highly ambiguous about the exact legal meaning of the term ‘ensure respect’. The words ‘may’ and ‘should’ let the reader think that common Article 1 merely *empowers*, and indeed *encourages*, rather than obliges contracting states to take measures against transgressor states. This reading, however, is inconsistent with the term ‘undertake’. In the Commentary contracting states are said not only to ‘undertake merely to respect’ the Conventions, ‘but also to ensure respect’.⁶² Here ‘undertake’ is clearly understood in terms of an obligation when referred to ‘respect’, and nothing suggests that it should be given a different meaning when (symmetrically) referred to ‘ensure respect’. To make matters even more convoluted, the expression ‘may, and should’ was used in commenting on Article 1 common to the First, the Second, and the Fourth Conventions, whereas in respect of the Third Convention only ‘should’ (*doit* in the French version) was used.⁶³ Besides, the Commentary to the Fourth Convention added that under common Article 1 contracting states ‘should do everything in

⁵⁹ ICRC, *Commentary – I Geneva Convention*, *supra* note 57, at 25–26; ICRC, *Commentary – II Geneva Convention*, *supra* note 57, at 25–26; ICRC, *Commentary – III Geneva Convention*, *supra* note 57, at 18; ICRC, *Commentary – IV Geneva Convention*, *supra* note 57, at 16.

⁶⁰ ICRC, *Commentary – I Geneva Convention*, *supra* note 57, at 26; ICRC, *Commentary – II Geneva Convention*, *supra* note 57, at 25; ICRC, *Commentary – III Geneva Convention*, *supra* note 57, at 18; ICRC, *Commentary – IV Geneva Convention*, *supra* note 57, at 16.

⁶¹ ICRC, *Commentary – I Geneva Convention*, *supra* note 57, at 26. In the Commentary’s French version: ‘[s]i une Puissance manque à ses obligations, les autres Parties contractantes (neutres, alliées ou ennemies) peuvent-elles et doivent-elles chercher à la ramener au respect de la Convention’ (at 27). Cf. also ICRC, *Commentary – II Geneva Convention*, *supra* note 57, at 25; ICRC, *Commentary – IV Geneva Convention*, *supra* note 57, at 16.

⁶² ICRC, *Commentary – I Geneva Convention*, *supra* note 57, at 26; ICRC, *Commentary – II Geneva Convention*, *supra* note 57, at 25; ICRC, *Commentary – III Geneva Convention*, *supra* note 57, at 18; ICRC, *Commentary – IV Geneva Convention*, *supra* note 57, at 16.

⁶³ ICRC, *Commentary – III Geneva Convention*, *supra* note 57, at 18. In the Commentary’s French version, ‘[s]i une autre Puissance manque à ses obligations, chaque Partie contractante (neutre, alliée ou ennemie) doit chercher à la ramener au respect de la Convention’ (at 24; emphasis added).

their power to ensure that the humanitarian principles underlying the Conventions are *applied universally*'.⁶⁴

Before turning to the ICRC Commentary to Additional Protocol I, it is worth noting that Resolution XXIII on 'Human Rights in Armed Conflicts' adopted in the 1968 Teheran Conference on Human Rights contained a preambular paragraph whereby '[s]tates 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 involved in an armed conflict'.⁶⁵ This text is often relied upon – unconvincingly indeed, given its sheer legal weight – as proof that post-1949 practice supports the notion that common Article 1 provides an obligation on each contracting state to take all measures in its power to induce each other contracting state to compliance.⁶⁶ Also the approval of Article 1(1) of Additional Protocol I is usually regarded as practice supportive of the broader meaning of common Article 1. In fact, in the debates at the Geneva Conference of 1974–1977 very few delegates commented on the proposal to introduce in the draft Additional Protocol I a provision similar to common Article 1 of the Geneva Conventions. They generally confined themselves to stating that the proposal was acceptable. The Nigerian delegate added that Article 1 'broke new ground in 1949 by introducing the idea of unilateral obligation not subject to reciprocity'.⁶⁷ Overall, the Conference unconditionally reaffirmed Article 1 of the Geneva Conventions and inserted a similar text in Article 1(1) of the Protocol, but did not specify the meaning to be attached to this provision.⁶⁸ The frequent assertion that Additional Protocol I confirmed the interpretation that 'ensure respect' means an obligation to take measures against other contracting states is thus little justified in itself.⁶⁹ In contrast, heated debates took place about the question whether 'in all circumstances' implied also against an 'unjust' or 'aggressor' state.

In the ICRC Commentary to Protocol I, the term 'ensure respect' was understood in terms of a 'duty' implying 'that of ensuring respect by civilians and military authorities, the members of the armed forces, and in general, by the population as a whole'. This duty 'means not only that preparatory measures must be taken to permit the

⁶⁴ ICRC, *Commentary – IV Geneva Convention*, *supra* note 57, at 16. The term was clearly drawn from the preparatory work (*supra* notes 38 and 49).

⁶⁵ Available at: www1.umn.edu/humanrts/instree/1968a.htm

⁶⁶ Along the same lines see Kalshoven, *supra* note 1, at 43–44.

⁶⁷ Cf. Meeting of Committee I, 11 Mar. 1974 (CDDH/1/SR.3), at paras 11 and 31; Meeting of Committee I, 12 Mar. 1974 (CDDH/1/SR.4), at paras 26 and 35; Meeting of Committee I, 15 Mar. 1974 (CDDH/1/SR.4), at para. 24.

⁶⁸ The original Draft Protocol did not contain a provision similar to Art. 1 of the Geneva Conventions. It was assumed, in fact, that common Art. 1 would have applied for the sole reason that the Protocol was additional to the Geneva Conventions and subject to all of their general provisions (cf. the Y. Sandoz, C. Swinarski, and B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), ICRC Commentary to Additional Protocol I, at para. 36). Art. 1(1) was adopted by 87 votes in favour, one against, and 11 abstentions.

⁶⁹ Cf. Condorelli and Boisson de Chazournes, 'Quelques Remarques', *supra* note 1, at 26–27; Gasser, *supra* note 1, at 25.

implementation of the Protocol, but also that preparatory measures should be supervised'. The duty to 'ensure respect' was then thought of – in terms of an 'obligation . . . already included in "*pacta sunt servanda*"'⁷⁰ – as essentially anticipating the measures for execution and supervision laid down in Article 80 of the Protocol.⁷¹ Quoting the ICRC Commentary to the Third Conventions, the ICRC Commentary to the Protocols accepted as 'non contested' that 'ensure respect' implies that 'in the event of a Power failing to fulfil its obligations, each of the other Contracting Parties (neutral, allied or enemy) should endeavour to bring it back to an attitude of respect for the Convention'.⁷² This quotation does not reflect the Commentary to the First, the Second, and the Fourth Conventions, which mentioned 'may, and should'.⁷³ The French version of the Commentary to the Protocols, in turn, contains the word '*doit*', suggesting that contracting states have an obligation to take measures.⁷⁴ These changes, which were reasonable owing to a desire to correct the previous Commentary and align the text with the term 'undertake', are rarely related in legal doctrine.⁷⁵ As a result, the Commentary to the Protocols is not (or no longer) supportive of the notion that contracting states 'may' take measures against transgressor states, but confirms that they 'should' (rather than 'shall') take such measures. The term 'should' is also employed – in the quotation from the Commentary to the Conventions – when clarifying that contracting states 'should do everything in their power to ensure' that the Protocols are respected universally.⁷⁶ This interpretation was said to have been often upheld by the ICRC 'to encourage states, even those not party to a conflict, to use their influence or offer their cooperation to ensure respect for humanitarian law'.⁷⁷ Here again, a double regime is apparent: while there is undisputedly an *obligation* to 'respect' (meaning an obligation of contracting states to comply themselves and to do everything in their power to comply with the Protocol), the term 'ensure respect' is understood in *recommendatory* terms when (and only when) referring to action taken against transgressor states. The above interpretation was also understood to confirm that 'humanitarian law creates for each state obligations towards the international community as a whole', i.e., obligations *erga omnes*.⁷⁸ Measures that all contracting states are supposed to take against transgressors include meetings and co-operation under Articles 7 and 89 of Additional Protocol I, respectively, with the limitations set forth by general international law, in particular the prohibition on the use of force.⁷⁹

⁷⁰ ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), at para. 42.

⁷¹ *Ibid.*, at para. 41.

⁷² *Ibid.*, at paras 42–43.

⁷³ *Supra* note 61.

⁷⁴ Cf. *supra* note 63.

⁷⁵ For an exception see Kalshoven, *supra* note 1, at 33.

⁷⁶ ICRC, *Commentary on the Additional Protocols*, *supra* note 79, at para. 42.

⁷⁷ *Ibid.*, at para. 43.

⁷⁸ *Ibid.*, at para. 45.

⁷⁹ *Ibid.*, at para. 46.

4 Interpretation of 'Undertake to Respect'

As previously noted, an express obligation to 'respect' norms of international humanitarian law 'in all circumstances' was already found in Article 25(1) of the 1929 Wounded and Sick Convention and in Article 82(1) of the 1929 Prisoners of War Convention.⁸⁰ In interpreting these provisions emphasis was placed upon the term 'in all circumstances', assuming that an obligation to 'respect' an international treaty goes without saying. Also the term 'undertake to respect' in common Article 1 of the 1949 Geneva Conventions is generally regarded, in itself, as nothing other than a restatement of the *pacta sunt servanda* principle set out in Article 26 of the 1969 Vienna Convention on the Law of Treaties.⁸¹

The interpretation of the term 'respect' in common Article 1 presents, however, some uncertainties when it is read in combination with either the term 'ensure respect' or the term 'in all circumstances'. In line with the preparatory work and the ICTR Commentaries, most writers have held that 'respect' for the Conventions denotes an obligation of contracting states not only themselves to respect the Conventions but also to ensure their respect within their jurisdiction by other entities, whether public or private. In turn, the term 'ensure respect' refers to an obligation to take measures against other contracting states.⁸² The term 'respect' is thus deemed to refer to obligations of states both to respect (themselves) and ensure respect (within their jurisdiction) for the Conventions, while the expression 'ensure respect' is reserved for measures taken against other contracting states failing to comply with the Conventions. What is striking in this reading is that the term 'respect' is also given an 'ensure-respect' meaning, while the term 'ensure respect' is given a radically different meaning. This reading has no support in the text of common Article 1, let alone (as was seen) in the preparatory work.

While international treaties may only provide for negative obligations not to hold conduct contrary to their provisions, human rights treaties are today generally construed as imposing both negative and positive obligations, thereby requiring contracting states both themselves to refrain from behaving contrary to the obligations set out in such treaties and to take positive measures to prevent encroachment from all individuals within their jurisdiction.⁸³ The *pacta sunt servanda* principle simply suggests that treaty obligations must be respected in good faith. There remains to determine what obligations a treaty really stipulates, which is a matter of construction. Taken literally, an obligation to 'respect' a treaty incumbent on a state means that the state itself (i.e., its organs) should act in conformity therewith. There is nothing in such an expression to suggest that states also have an obligation to ensure that entities other than their organs also conform to the treaty. This applies *a fortiori* if the treaty adds

⁸⁰ *Supra* note 7.

⁸¹ Cf. Condorelli and Boisson de Chazournes, 'Quelques Remarques', *supra* note 1, at 17.

⁸² This commonly accepted construction was first advanced in the ICRC Commentary to the Conventions and subsequently reiterated in the ICRC's Commentary to the Protocols: cf. *ibid.*, at 17–18; *ibid.*, 'Common Article 1', *supra* note 1, at 69.

⁸³ *Infra*, sect. 5A.

an obligation to ‘ensure respect’, as in the Geneva Conventions’ common Article 1. In the drafting history of the Conventions the notion that ‘respect and ensure respect’ were to include negative and positive obligations within the legal systems of contracting states was relatively often stated. It seems thus more reasonable to associate the term ‘respect’ with an obligation on contracting states to comply by both themselves and their organs with the Conventions and to reserve the term ‘ensure respect’ for an obligation of contracting states to take all measures in their power to have the Conventions respected by private individuals.

Thus understood, the term ‘respect’ in itself adds nothing special to the specific obligations stemming from all other provisions of the Geneva Conventions. There remains to be seen whether this term acquires a special meaning in combination with the phrase ‘in all circumstances’.⁸⁴

5 Interpretation of ‘Undertake to Ensure Respect’

While it is generally assumed that the term ‘ensure respect’ means having *others* respect the Conventions,⁸⁵ the view that such a phrase refers to an obligation of contracting states to take all measures in their power to induce other contracting states to compliance is especially grounded, as already hinted, in the *ut res magis valet quam pereat* principle, in the ICRC Commentaries, and in international practice.⁸⁶

A The Meaning Attached to the Term ‘Ensure Respect’ and to Other Similar Expressions in Universal and Regional Human Rights Treaties

An obligation ‘to ensure respect’ may be understood in many different ways, ranging from being virtually meaningless (apart from the meaning attaching to ‘respect’) to implying most fundamental obligations. It is worth reviewing at least its major meanings, drawing attention at the outset to the fact that we are dealing with an obligation on how *other* obligations are supposed to be enforced. Major human rights treaties are often regarded as instruments containing, just like the 1949 Geneva Conventions, obligations *erga omnes*, worthy as such of being intended to imply collective measures to induce compliance.⁸⁷ A comparison with other similar expressions found in human rights treaties, as interpreted by international monitoring bodies, may therefore be helpful for our purposes.⁸⁸

⁸⁴ *Infra*, sect. 6.

⁸⁵ Cf. Bettati, ‘Un droit d’ingérence’, 95 *RGDIP* (1991) 645; Obradović, *supra* note 1, at 487.

⁸⁶ Cf. Condorelli and Boisson de Chazournes, ‘Quelques Remarques’, *supra* note 1, at 18 and 24.

⁸⁷ In addition to the ICJ’s *Genocide* Advisory Opinion (*supra* note 58), the view that human rights treaties contain objective or non-reciprocal obligations has been reiterated by diverse monitoring bodies, such as the European Commission and Court of Human Rights in App. No. 788/60, *Austria v. Italy*, 7 *Reports and Decisions* (1962) 23, at 42–43 and in App. No. 5310/71, *Ireland v. UK*, Judgment of 18 Jan. 1978, available at: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, at para. 239 and the Inter-American Court of Human Rights in the *Effect of Reservations* Advisory Opinion of 24 Sept. 1982, available at: www.corteidh.or.cr/docs/opiniones/seriea_02_ing.pdf, at para. 29.

⁸⁸ See E. Klein (ed.), *The Duty to Protect and to Ensure Human Rights* (2000).

As regards universal human rights treaties, Article 2(1) of the 1966 International Covenant on Civil and Political Rights provides that '[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant'.⁸⁹ This expression is routinely interpreted as limited to an 'individual-compliance' meaning.⁹⁰ The term 'respect' is commonly taken to mean (negatively) to 'refrain' from restricting the exercise of rights, while 'ensure' is understood in terms of (positive action for) protection from *private* encroachment.⁹¹ While Article 2(1) is expressly limited to ensuring respect within the territory and jurisdiction of contracting parties, Article 4(1) of the 2007 Convention on the Rights of Persons with Disabilities stipulates that 'States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities'.⁹² This statement might, in the abstract, be understood in terms of measures which must (or may) be taken also against transgressor states to induce them to compliance. However, Article 4(1) is followed by a list of measures to be taken which have exclusively an 'individual-compliance' dimension.

Of particular relevance is Article I of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, whereby contracting states 'undertake to prevent and to punish' genocide.⁹³ In his individual opinion appended to the ICJ's 1993 Order on provisional measures in the *Genocide (Bosnia v. Serbia)* case, Judge *ad hoc* E. Lauterpacht interestingly wondered whether the duty to prevent set out in Article 1 'extends beyond the duty of each party to prevent genocide within its own territory to that of preventing genocide wherever it may occur'.⁹⁴ He then asked whether 'the duty of prevention that rests upon a party in respect of its *own* conduct, or that of persons subject to its authority or control, outside its territory also mean that every party is under an obligation individually and actively to intervene to prevent genocide outside its territory when committed by or under the authority of some other party'. In his view 'the undertaking in Article I of the Convention "to prevent" genocide is not limited by reference to person or place so that, on its face, it could be said to require every party positively to prevent genocide wherever it occurs', but '[a]t this point, however, it becomes necessary to look at State practice'. He then acknowledged that '[t]he limited reaction of the parties to the Genocide Convention in relation to these

⁸⁹ Available at: www.unhcr.ch/html/menu3/b/a_ccpr.htm

⁹⁰ See, e.g., Dennis and Surena, 'Application of the International Covenant on Civil and Political Rights in Times of Armed Conflict and Military Occupation: The Gap Between Legal Theory and State Practice', 13 *European Human Rts L Rev* (2008) 714.

⁹¹ A similar expression is found in Art. 2(1) of the 1989 Convention on the Rights of the Child, whereby 'States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction' (available at: www.unhcr.ch/html/menu3/b/k2crc.htm).

⁹² Available at: www.un.org/disabilities/documents/convention/convoptprot-e.pdf

⁹³ Available at: www.hrweb.org/legal/genocide.html. The Genocide Convention's relevance is reinforced by the fact that the ICRC Commentaries to the Geneva Conventions – in particular their reference to the 'special', non-reciprocal character of the Conventions – were presumably influenced by the ICJ's *Genocide Advisory Opinion* of 1951 (*supra* note 58).

⁹⁴ Cf. [1993] ICJ Rep 407, at 444, para. 113.

episodes may represent a practice suggesting the permissibility of inactivity'.⁹⁵ In fact, several cases of genocide have occurred since the entry into force of the Genocide Convention and contracting states have proved extremely reluctant to take steps against other states, showing that they do not feel an obligation to do so.⁹⁶

Turning to regional human rights treaties, it is worth noting that according to Article 1 of the 1950 European Convention on Human Rights (ECHR) contracting states 'shall secure' to everyone within their jurisdiction the rights defined in the Convention.⁹⁷ The term 'secure', which does not appear to be substantially different from 'ensure respect', has been construed by the European Court of Human Rights (ECtHR) to the effect that the Convention provides both negative and positive obligations. The ECHR does expressly empower contracting states to lodge a complaint against other contracting states with the ECtHR. Apart from a broad interpretation of Article 1 given in the (indeed unique) *Ilaşcu* case,⁹⁸ the term 'shall secure' has never been understood

⁹⁵ Cf. *ibid.*, at 444–445, para. 115.

⁹⁶ In its 2007 Judgment the ICJ ruled that Art. I implies not only an obligation of contracting states to prevent private individuals from committing genocide and to repress acts of genocide committed but also themselves to refrain from committing genocide. Cf. *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep. at para. 166, available at: <http://www.icj-cij.org/docket/files/91/13685.pdf>. No hint at possible measures to be taken under common Art. 1 of the Geneva Convention was made in the *Mothers of Srebrenica* case decided by the District Court of The Hague on 10 July 1998 concerning the right to compensation sought by the relatives of the victims of the Srebrenica genocide of 1995 from the Netherlands and the UN for not preventing the massacre (available at: http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=kenmerken&vrije_tekst=BD6796). For the use (or, by the Clinton Administration in 1994, the avoidance) of the term 'genocide' as a 'magic word' to galvanize international intervention in accordance with the phrase 'undertake to prevent' in Article 1 of the Genocide Convention and for the view that 'no one takes seriously anymore the idea that the Convention obligates signatories to launch military forces to prevent genocide', see G.P. Fletcher and J.D. Ohlin, *Defending Humanity: When Force is Justified and Why* (2008), at 131–132, and, previously, Straus, 'Darfur and the Genocide Debate', 84 *Foreign Affairs* (2005) 129.

⁹⁷ Available at: <http://conventions.coe.int/treaty/EN/Treaties/html/005.htm>.

⁹⁸ In App No 48787/99, *Ilaşcu and Others v. Moldova and Russian Federation*, Judgment of 8 July 2004, 2004-VII Eur Ct HR 179, the ECtHR condemned Moldova for not having taken adequate steps aimed at inducing the Russia Federation to stop its breach of the Convention against Moldovan nationals in Transdnistrian territory under Russian effective control. In the Court's view, in particular, 'even in the absence of effective control over the Transdnistrian region, Moldova still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention' (at para. 331). The Court seems to assume that a positive obligation to take such steps fell within the Moldovan 'jurisdiction' as measures to 'ensure respect' for the applicants' rights (at para. 339). The *Ilaşcu* judgment repeats that contracting states have positive obligations within their (so broadly defined) jurisdiction, on the assumption that certain steps taken by a contracting state and aimed at ensuring respect of the Convention by another contracting state may fall within the former's jurisdiction. Nothing is said, however, about an obligation of all contracting states to take such steps against an alleged transgressor. Significantly, in his dissenting opinion Judge Loucaides underscored that this conclusion 'would be stretching the concept of "jurisdiction" to an unrealistic and absurd extent'. According to him 'it would . . . be a fallacy to accept that a High Contracting Party to the Convention has "jurisdiction" over any person outside its authority simply because it does not take the political or other measures mentioned in general terms by the majority'. since '[s]uch a position would . . . lead, for instance, to the illogical conclusion that all High Contracting Parties to the Convention would have jurisdiction and responsibility for violations of the human rights of persons in any territory of a High Contracting Party, including their own, but outside their actual authority (either *de*

by the ECtHR to the effect that all contracting states have an obligation to take some action against a transgressor beyond what the ECHR specifically provides in its provisions. On the contrary, it is notorious that contracting states have only a discretionary power to do so and very rarely lodge complaints against other contracting states, an attitude which never meets with protests or reproaches.⁹⁹

A similar meaning is expressed in Article 1(1) of the 1969 American Convention on Human Rights (ACHR), whereby '[t]he States Parties to this Convention undertake to respect the rights and freedoms recognized therein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms'.¹⁰⁰ The Inter-American Court of Human Rights (IACtHR) has routinely interpreted this expression – often by making appeal to obligations *erga omnes* – to the effect that contracting states have an obligation to protect the rights set out in the Convention not only from their own acts but also from other non-state entities within their jurisdiction.¹⁰¹ There exists no case, to our knowledge, in which the Court (or other contracting states) has censured a contracting state for not having taken action against a transgressor state.

Finally, the 1999 General Comment No. 12 on the Right to adequate food set out in Article 11 of the 1966 International Covenant on Economic, Social and Cultural Rights may be of some guidance.¹⁰² Here, the Committee on Economic, Social and

facto or *de jure* or both depending on the territory), merely by virtue of not pressing to secure the Convention rights in that territory through action against the State which does in reality exercise such authority over these persons'. On this case see Nigro, 'Giurisdizione e obblighi positivi degli Stati parti alla Convenzione europea dei diritti dell'uomo: il caso *Ilascu*', 88 *Rivista di diritto internazionale* (2005) 413.

⁹⁹ In App. No. 52207/99, *Banković and Others v. Belgium and Others*, available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbk&action=html&highlight=48787/99&sessionId=44117694&skin=hudoc-en>, the defendant states contended that ECHR Art. 1 provides for positive obligations only proportional to the control exercised in any given extra-territorial situation – otherwise the drafters would have adopted wording similar to common Art. 1 of the 1949 Geneva Conventions – thereby implying that this latter provides for a 'cause-and-effect' type of responsibility (at paras 39 and 40). This approach was upheld by the Court (at para. 75), affirming that pursuant to common Art. 1 of the Geneva Conventions 'anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State'. Here the Court seems to assume that the term 'in all circumstances' in common Art. 1 of the Geneva Conventions means a 'cause-and-effect' type of responsibility but this cannot be admitted in the ECHR, Art. 1 of which does not read 'secure . . . in all circumstances'. See, more recently, Larsen, "'Territorial Non-Application" of the European Convention on Human Rights', 78 *Nordic J Int'l L* (2009) 73.

¹⁰⁰ Available at: www.cidh.org/Basicos/English/Basic3.American%20Convention.htm.

¹⁰¹ Cf. Order of 18 June 2002 of the IACtHR in the *Peace Community of San José de Apartadó* Case (available at: www.unhcr.org/refworld/publisher.IACRTHR,,,4268c86f4,0.html), where it was held that Art. 1(1) of the ACHR carries with the general obligation to respect the rights set out in the Convention 'the duty to adopt such security measures as are required for their protection', specifying that 'the State Party is under the obligation, *erga omnes*, to protect all persons who are under its jurisdiction', this implying that 'said general obligation is imperative not only with respect to the power of the State but also with respect to actions by third parties, including irregular armed groups of any type' (at paras 10 and 11). The Court has reiterated this principle in other decisions, including the Order of 7 Feb. 2006 in the *Matter of the Communities of Jiguamiandó and Curbaradó* (at paras. 4 and 6), available at: www.corteidh.or.cr/docs/medidas/jiguamiando_se_04_ing.doc.

¹⁰² Available at: www.unhchr.ch/tbs/doc.nsf/0/3d02758c707031d58025677f003b73b9?Opendocument, at para. 15.

Cultural Rights determined the existence of three levels of obligations imposed on states parties by human rights in general, including the right to adequate food. In the Committee's view such three levels corresponded to the obligations to *respect*, to *protect*, and to *fulfil*, the last incorporating both an obligation to *facilitate* and an obligation to *provide*. The duty to respect requires states not to take measures which are incompatible with human rights. In contrast, the duty to protect requires positive measures by states to ensure that private individuals or groups behave consistently with human rights. The duty to fulfil (as a duty to facilitate) requires states pro-actively to engage in activities intended to strengthen compliance, whereas the duty to fulfil (as a duty to provide) requires states to provide human rights directly.¹⁰³

To sum up, no human rights treaty provisions containing a phrase similar to 'ensure respect' in common Article 1 of the 1949 Geneva Conventions, although it is viewed as aimed at protecting fundamental values of the international community as a whole and capable of creating obligations *erga omnes*, is understood to imply that contracting states must (or may) take measures against other contracting states beyond what is expressly provided for by all other provisions of the treaty.

B The Meaning Attached to the Term 'Ensure Respect' in Other Geneva Conventions' Provisions and in Contracting States' Military Manuals

The 1949 Geneva Conventions require contracting states to 'ensure' that a certain result be attained in numerous provisions unequivocally referring to an 'individual-compliance' meaning.¹⁰⁴ The same holds true also for Additional Protocol I.¹⁰⁵ This treatment of the term 'ensure' throughout the Conventions exclusively limited to an

¹⁰³ Similar distinctions have been proposed in legal doctrine, such as that suggested in relation to the right to life between duties (negatively) 'to avoid deprivation' and (positively) 'to protect from deprivation' and 'to aid'. Cf. H. Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* (1980), at 51–55; Buergenthal, 'To Respect and To Ensure: State Obligations and Permissible Derogations', in L. Henkin (ed.), *The International Bill of Rights. The Covenant on Civil and Political Rights* (1981), at 72; Kabaalioglu, 'The Obligation to "Respect" and to "Ensure" the Right to Life', in B.G. Ramcharan (ed.), *The Right to Life in International Law* (1985), at 160.

¹⁰⁴ Cf. Arts 15(1), 17(1)(3), 19(1)(2), 34(1), 35(2), 45, and 48 of the First Convention; to Arts 18(1), 20(1), 26(1), 43(3), 46(1), 49 of the Second Convention; to Arts 20(2), 29(1), 38(1), 39(1), 43(1), 44(2), 46(3), 48(3), 51(2), 75(1), 83, 120(4), 122(1), 125(1), 128 of the Third Convention; and to Arts 24(1), 25(2), 39(2), 40(2), 49(3), 51(2), 55(2), 64(3), 85(1), 88(1), 93(1), 94(1)(2), 99(1), 111(1), 115, 121(2), 127(2), 128(4), 130(1), 131(3), 134, 142(1), 145 of the Fourth Convention.

¹⁰⁵ The very term 'ensure respect' is found in Art. 48, whereby '[i]n order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives'. In several other provisions of the Protocol the term 'ensure' is found alone but clearly has a similar meaning. For example, Art. 80(2) provides that '[t]he High Contracting Parties and the Parties to the conflict shall give orders and instructions to ensure observance of the Conventions and this Protocol, and shall supervise their execution'. Art. 12(4) stipulates that, whenever possible, the parties to the conflict 'shall ensure that medical units are so sited that attacks against military objectives do not imperil their safety' (emphasis added). Under Art. 14(1) the Occupying Power 'has the duty to ensure that the medical needs of the civilian population in occupied territory continue to be satisfied' (emphasis added). Similar provisions are found in Arts 14(1) (c), 29(4), 30(2), 31(3), 33(3), 41(3), 64(3), 66(1), 69(1), 81(1), 82, 84, 87(2), 90(1)(d), and 90(6).

'individual-compliance' meaning militates against a 'state-compliance' meaning to be attached to common Article 1. The Conventions themselves, as will be seen, provide for certain mechanisms to be activated against transgressor contracting states, but they never in this connection use the term 'ensure'.¹⁰⁶

Of some interest are contracting states' military manuals, although they are obviously concerned only with operational matters and cannot address anything touching upon possible action taken by governments to induce other contracting states to compliance. Military manuals systematically reproduce the term 'ensure respect' (rather than simply 'respect'), meaning a duty of the contracting states concerned to supervise the conduct of whoever within their jurisdiction or a similar duty of superiors to supervise the conduct of subordinates under their sphere of command. This confirms that the term 'ensure respect' in Article 1 can have (and is indeed routinely given) an 'individual-compliance' meaning and that there is no automaticity, contrary to what the ICRC Commentaries suggest, in giving the term a 'state-compliance' meaning.

For example, the Argentine *Law of War Manual* of 1989 provides that '[t]he Geneva Conventions and Protocol I expressly oblige states not only to respect . . . , but also to ensure respect by issuing orders and instructions for that purpose', clearly referring to Article 80(2) of Additional Protocol I.¹⁰⁷ According to the Australian *Commanders' Guide* of 1994 'Australia is responsible for ensuring that its military forces comply with LOAC' and 'all ADF members are responsible for ensuring that their conduct complies with the LOAC'.¹⁰⁸ The 1995 *Military Manual* of Benin stipulates that 'the commander of forces engaged in a military operation is responsible for ensuring respect for the law of war' and 'the duty of the commander is to ensure respect and the application of the law of war in all circumstances'.¹⁰⁹ The 1992 *Instructors' Manual* of Cameroon provides that 'internal discipline ensures respect for the Law of War', 'each commander ensures respect for the Law of War within his sphere of command', 'from the beginning of the hostilities, the parties to the conflict: . . . shall ensure respect for the Law of War in their sphere of authority'.¹¹⁰ Pursuant to the 1990 *Military Manual* of the Russian Federation 'the Soviet Union has accepted the obligation to ensure respect for them [the 1977 Protocols] by all State and public organisations and by its citizens, including the Armed Forces of the USSR' and 'armed forces shall be subject to a disciplinary regime that ensures respect for the rules of IHL'.¹¹¹ The Swiss *Basic Military Manual* of 1987 provides that 'the laws and customs of war must be observed by Governments, the civilian and military authorities as well as by individuals, military or civilian' and commanders 'are responsible for ensuring that their troops respect the

¹⁰⁶ See *infra*, text to notes 145–152.

¹⁰⁷ Cf. *Law of War Manual* (1989), at para. 8.01, in J.-M. Henckaerts and L. Doswald-Beck (eds), *Customary International Humanitarian Law. Volume II Practice*, Part 2 (2005), at 3157.

¹⁰⁸ Cf. *Commanders' Guide* (1994), paras 1201–1202, in *ibid.*, at 3158.

¹⁰⁹ Cf. *Military Manual* (1995), in *ibid.*, at 3158.

¹¹⁰ Cf. *Instructors' Manual* (1992), at paras 11–12, 15, and 462.22, in *ibid.*, at 3158–3159.

¹¹¹ Cf. *Military Manual* (1990), at paras 3 and 12, in *ibid.*, at 3162.

Conventions'.¹¹² The 1996 *Military Manual* of Togo stipulates that 'the commander of forces engaged in a military operation is responsible for ensuring respect for the law of war'.¹¹³ Finally, the 1976 *Air Force Pamphlet* of the United States provides that 'the US . . . ensures observance and enforcement through a variety of national means including close command control, military regulations, rules of engagement, the Uniform Code of Military Justice and other national enforcement techniques',¹¹⁴ while 'it is the responsibility of the Chief of Naval Operation and the Commandant of the Marine Corps . . . to ensure that: 1. The U.S. Navy and Marine Corps observe and enforce the law of armed conflict at all times'.¹¹⁵

The interpretation of the term 'ensure respect' with an 'individual-compliance' meaning is also upheld in two United States Departmental Directives. The Department of Defence's *Final Report to Congress on the Conduct of the Persian Gulf War* stated that '[t]he obligation "to respect and ensure respect" was binding upon all parties to the Persian Gulf War. It is an affirmative requirement to take all reasonable and necessary steps to bring individuals responsible for war crimes to justice'.¹¹⁶ The Department of Defence's *Directive on the Law of War Program No 5100.77* of 1998 provided that '[i]t is the DoD policy to ensure that: . . . the law of war obligations of the United States are observed and enforced by the DoD Components' and '[t]he Heads of the DoD Components shall: . . . ensure that the members of their Components comply with the law of war during all armed conflicts'.¹¹⁷

C Measures Available towards Other Contracting States to Induce Compliance

It is generally agreed among commentators who advocate a 'state-compliance' meaning of 'ensure respect' that measures under common Article 1 towards other contracting states include all measures in the power of each contracting states which are capable of inducing transgressors to compliance. It is unclear which measures contracting states are obliged (or empowered, or only invited) to take to induce transgressor states to comply with the Geneva Conventions. Common Article 1 stipulates a general obligation to 'ensure respect', but does not specify what measures must (or may, or should) be taken in order for this obligation to be fulfilled. In the abstract, possible measures range from steps independent of a prior breach, such as measures simply to induce new states to ratify (and hence 'respect') the Conventions or to prevent violations before they occur,¹¹⁸ to assist (particularly in peacetime) other contracting states by providing legal advisers, teaching, or information on

¹¹² Cf. *Basic Military Manual* (1987), Arts 3 and 196, in *ibid.*, at 3162.

¹¹³ Cf. *Military Manual* (1996), Fascicule II, at 14, in *ibid.*, at 3162.

¹¹⁴ Cf. *Air Force Pamphlet* of 1976, at para. 15-2(e), in *ibid.*, at 3163.

¹¹⁵ Cf. *Naval Handbook* (1995), at para. 6.1.2, in *ibid.*, at 3163.

¹¹⁶ See 31 ILM (1992) 633.

¹¹⁷ Cf. paras 1.1, 4.1 and 5(3)(1), in Henckaerts and Doswald-Beck (eds), *supra* note 107, at 3166–3167.

¹¹⁸ Cf. Gasser, *supra* note 1, at 31–32.

national implementation through international data banks,¹¹⁹ to very loose measures against breaches such as a mere commitment to ‘consider seriously’ the adoption of measures¹²⁰ or to ‘exert some kind of influence’,¹²¹ to verbal protests, to the denial of selling weapons, to supply humanitarian assistance to the victims,¹²² to exercise universal criminal jurisdiction over persons accused of breaching the Conventions, to retorsions, countermeasures, and even to armed intervention.¹²³ It is precisely this virtually unlimited variety of measures theoretically consistent with the term ‘ensure respect’ – understood in such broad terms – that calls for some criteria to distinguish those which have a legal and workable meaning from all others. These measures, which may be either lawful or unlawful *per se*, have been divided into certain general categories¹²⁴ and are worth mentioning before analysing in the next section whether and, if so, to what extent common Article 1 requires, authorizes, or simply recommends their adoption.

A first category includes *diplomatic* measures, such as protests, public denunciations of violations,¹²⁵ diplomatic pressure, appeals to an International Fact-Finding Commission under Article 90 of Additional Protocol I.¹²⁶ A second category concerns *coercive* measures,¹²⁷ from which unilateral humanitarian intervention is generally ruled out.¹²⁸ Retorsions (such as the expulsion of diplomats, severance of diplomatic

¹¹⁹ Cf. Palwankar, ‘Measures Available to States’, *supra* note 1, at 2; *ibid.*, ‘Measures’, *supra* note 1, at 13.

¹²⁰ Cf. Sandoz, ‘Appel du CISR dans le cadre du conflit entre l’Irak et l’Iran’, 29 *Annuaire français de droit international* (1983) 167; Gasser, *supra* note 1, at 32.

¹²¹ Cf. Kessler, ‘The Duty’, *supra* note 1, at 505–506.

¹²² Cf. Levrat, *supra* note 1, at 285, referring to Art. 81 of Additional Protocol I and to Art. 59 of the Fourth Geneva Convention; Kessler, ‘The Duty’, *supra* note 1, at 507, excluding a duty to assist under common Art. 1 except for ‘exceptional cases’ when a ‘serious violation’ of the Conventions occurs.

¹²³ At least within the UN framework (see Condorelli and Boisson de Chazournes, ‘Common Article 1’, *supra* note 1, at 82). For the opposite position see *infra* note 128.

¹²⁴ Cf. Palwankar, ‘Measures’, *supra* note 1; Levrat, *supra* note 1, at 283; Condorelli and Boisson de Chazournes, ‘Common Article 1’, *supra* note 1, at 76–77; Benvenuti, *supra* note 1, at 28; ICRC, ‘Improving Compliance with International Humanitarian Law’. *ICRC Expert Seminars* (2003).

¹²⁵ Examples include the US’ statement of 20 Dec. 1990 in the UN Security Council (UN Doc S/PV.2970, available at: <http://documents-dds-ny.un.org/doc/UNDOC/PRO/N90/602/01/img/N9060201.pdf?OpenElement>, at 52–53) and Res 5038/ES of the Council of League of the Arab States of 30–31 Aug. 1990, at para. 1, both ‘publicly’ condemning Israel for its breaches of the 1949 Geneva Conventions in the occupied Palestinian territories.

¹²⁶ *Infra* note 151 and accompanying text.

¹²⁷ See, in general, La Rosa, ‘Sanctions as a Means of Obtaining Greater Respect for Humanitarian Law: A Review of Their Effectiveness’, 90 *IRRC* (2008) 221.

¹²⁸ See Sandoz, ‘L’intervention humanitaire, le droit international humanitaire et le CICR’, 33 *Annals Int’l Medical L* (1986) 47 (‘unthinkable’); Palwankar, ‘Measures’, *supra* note 1, at 3; *ibid.*, ‘Measures’, *supra* note 1, at 15–16. The exclusion of military interventions from the measures envisaged by common Art. 1 is justified by these commentators on grounds that unilateral humanitarian intervention is ‘not permitted under public international law’, although they accept that countermeasures – which are equally *per se* unlawful acts – come within the scope of Art. 1. If Art. 1 has the meaning of making lawful conduct which is otherwise unlawful, such as peaceful countermeasures by third states, then it should be thought that it also potentially has the authority to make lawful an otherwise unlawful military intervention. This issue is linked to the ‘*droit d’ingérence*’ and the ‘responsibility to protect’ doctrines, on which see Focarelli, ‘Duty to Protect in Cases of Natural Disasters’, in R. Wolfrum (gen. ed.), *Encyclopaedia of*

relations, halting ongoing diplomatic negotiations or refusing to ratify agreements already signed, non-renewal of trade privileges or agreements, reduction or suspension of public aid) and countermeasures (such as restrictions or bans on commercial relations, bans on investments, freezing of capital, suspension of air transport, provided that they are *per se* incompatible with existing international obligations binding upon the parties) are usually included. A third category comprises measures adopted in *co-operation* with international organizations, such as complaints lodged with regional human rights monitoring bodies and, within the United Nations, measures taken by the Security Council either involving or not involving the use of armed force under Articles 41 and 42 of the Charter, in addition to recommendations adopted by the General Assembly.¹²⁹

D Obligation v. Discretionary Power to Take per se Lawful or Unlawful Action against Other Contracting States Failing to Comply with the Conventions

A central question that has given rise to much confusion is whether the purported ‘state-compliance’ meaning of ‘ensure respect’ is to be understood in terms of a legal obligation or of a discretionary power, if not of a mere recommendation, to take measures against other contracting states. An unqualified list of possible measures supposedly envisaged by common Article 1 is not satisfactory unless an inquiry is conducted into whether these measures are *per se* lawful or unlawful and whether contracting states are required, empowered, or only invited to take them.

As was seen earlier, the ICRC Commentaries are very confusing indeed in this regard. While the Commentary to the Third Convention – resurrected by the Commentary to Protocol I – refers only to ‘should’ (*‘doit’* in the French version), the Commentaries to the First, Second, and Fourth Conventions refer to ‘may, and should’ (*‘peuvent . . . et doivent’* in the French text). The English text thus refers to either a simple recommendation (‘should’) or to both a recommendation (‘should’) and a discretionary power (‘may’), while the French text refers either to an obligation (*‘doit’*) or to both a discretionary power (*‘peuvent’*) and an obligation (*‘doivent’*).¹³⁰ At the same time, the ICRC Commentaries underline that the term ‘undertake’ (*‘s’engagent’* in the French text) denotes a veritable legal obligation.¹³¹ Writers, presumably influenced by

Public International Law (2nd edn, forthcoming), available at: www.mpepil.com; *ibid.*, ‘The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine’, 13 *J Conflict & Security L* (2008) 191. On 12 Jan. 2009 the UN Secretary-General issued a report on implementing the responsibility to protect (available at: www.reformtheun.org/index.php?module=uploads&func=download&fileId=3564), discussed in July 2009 by the General Assembly (available at: www.un.org/ga/president/63/interactive/responsibilitytoprotect.shtml). The Assembly adopted Res 63/308 on 14 Sept. 2009 taking note of the report and deciding to continue its consideration of the responsibility to protect (available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/513/38/PDF/N0951338.pdf?OpenElement>).

¹²⁹ See Condorelli and Boisson de Chazournes, ‘Common Article 1’, *supra* note 1, at 81–82.

¹³⁰ *Supra* notes 61, 63, and 72.

¹³¹ *Supra* note 63.

the ICRC Commentaries, are equally obscure – to say the least – or tend to avoid looking too closely into the matter.¹³²

This question is of great importance. If the term ‘ensure respect’ were understood in terms of an obligation, it would follow that *all* contracting states are legally bound to take *all* measures in their power against transgressor states. That is, in each instance of alleged breach of the Conventions each contracting state would violate the Conventions if it failed to take all measures in its power capable of inducing the transgressor to compliance. It would follow that for each single breach of the Conventions – even immaterial – a potentially large number of contracting states may be held responsible for a violation of common Article 1. This radically ‘collectivist’ reading of Article 1 would become more moderate if the term ‘ensure respect’ were understood in terms of a discretionary power, since no problems would arise faced with the fact that not all (and probably not even many) contracting states would take any measures at all against the alleged transgressor. In order to clarify this point a couple of distinctions are in order, taking as reference points the legal position of third states (either an obligation or a discretionary power) and the conformity of their measures to existing international law (either lawful or unlawful). Four interpretative patterns may therefore be proposed depending on whether the interpreter reads common Article 1 as implying an obligation or a mere discretionary power, and on whether *per se* lawful or unlawful measures against the transgressor are taken. The term *per se* is necessary to indicate measures which are ‘normally’ lawful or unlawful, regardless of the fact that those which are *per se* unlawful may ‘become’ lawful as reactions to an unlawful act of the targeted state.

1 A Discretionary Power to Take *per se* Lawful Measures

A discretionary power to take *per se* lawful measures (such as protests, the interruption of diplomatic relations, etc.) is clearly irrelevant for our purposes, this being permissible regardless of the existence of common Article 1. For example, it makes no sense to say that common Article 1 empowers third states to suspend diplomatic relations entertained with the alleged transgressor state. States are always empowered to do so, regardless of both Article 1 and any other state’s breach of an international rule. In this context a combination of a discretionary power (‘may’) with a recommendation (‘should’) to take such measures, as provided in the ICRC Commentaries,¹³³ is conceivable, but adds nothing special to what international law already provides. It simply implies that all contracting states deem it advisable that as many as possible among

¹³² Gasser, e.g., understands common Art. 1 to imply indiscriminately an ‘obligation’ to ensure respect leaving contracting states the choice of the adequate means to induce other contracting states’ compliance, as well as a ‘right’, ‘even a duty’ to take their role seriously, a ‘legal interest’ in ‘a very broad meaning’, and also a ‘political interest’ in the observance of international humanitarian law which expresses the ‘concern’ of all states for full compliance. He himself, however, points out that ‘it is hard to defend the position that all third party States are under a legal obligation to take action’ and that Art. 1 ‘at the very least gives expression to a strong moral and political commitment’, ultimately to an obligation ‘governed . . . by the principle of good faith than by codified rules of law’, being ‘not necessarily weaker than a legal obligation’: Gasser, *supra* note 1, at 32 and 48.

¹³³ *Supra* note 61.

them take lawful (although unfavourable) measures against the contracting state which is deemed to be in breach of the Conventions. The advisability of such measures is perfectly understandable, given the obvious interest of all contracting states in seeing the Conventions respected by all the others, but this holds true for any multilateral treaty, even though it does not contain a provision like common Article 1.

Moreover, this interpretation is not only irrelevant but also inconsistent with the verb ‘undertake’, which clearly implies a commitment, not a discretionary power (still less a mere recommendation) to take action against the transgressor.

2 A Discretionary Power to Take *per se* Unlawful Measures

A *discretionary power* to take *per se* unlawful measures is in the abstract conceivable to give an autonomous meaning to a provision aimed at ensuring respect for international law treaty rules. Common Article 1 might be deemed to imply that not only is there an interest of all the parties that every rule of the Conventions is respected, but also that this interest goes so far as to dictate a discretionary power of third states to take *per se* unlawful measures (which consequently must be considered lawful) against the transgressor state. For example, a contracting state might suspend a treaty in force towards the alleged transgressor state and Article 1 ‘transform’ this *per se* unlawful measure into a lawful measure despite the fact – actually on the very assumption – that countermeasures by third states are otherwise prohibited. This interpretation is intertwined with the issue of third-party countermeasures as a response to breaches of obligations *erga omnes* (or, within a multilateral treaty, *erga omnes contractantes*) and with the proper interpretation to be given to Article 60(5) of the 1969 Vienna Convention on the Law of Treaties.¹³⁴ The debate over acts or reactions to violations of this kind of obligation has in fact centred on the *right*, rather than on the obligation, to take certain measures, as will be discussed later.¹³⁵ An obligation may well derive from a decision taken by the UN Security Council under Article 41 of the Charter, but in such cases contracting states would be bound to conform to the Security Council decision. Most commentators seem ultimately to have in mind this ‘discretionary’ construction when they contend that, by virtue of common Article 1, all contracting states are allowed to take measures, even *per se* unlawful, to induce transgressor states to compliance. Among *per se* unlawful measures, as will be seen, those involving reciprocity and consisting in a violation of the Geneva Conventions themselves, as provided for in Article 60(5) of the 1969 Vienna Convention on the Law of Treaties, are excluded.¹³⁶

This interpretation undoubtedly presents certain advantages. First, it assigns an autonomous meaning to common Article 1, this operating as a circumstance precluding wrongfulness. Secondly, it makes sense of the fact that when violations of the Geneva Conventions occur not all (perhaps not even many) contracting

¹³⁴ This interpretation is reinforced by the ‘special’, non-reciprocal character of the Geneva Conventions (*supra* note 58).

¹³⁵ *Infra*, sect. 7.

¹³⁶ *Infra*, sect. 6E.

states take steps to induce the transgressor to compliance, also because not necessarily all may agree on the fact that the alleged transgressor has really breached the Conventions. The unreasonable result of finding many, if not all in some cases, contracting parties in breach of common Article 1 is thus avoided. A combination of a power ('may') and a recommendation ('should') to take measures is also abstractly conceivable, but adds nothing special to what already flows from the violation and is less plausible than *per se* lawful measures since it is more difficult to think that contracting states recommend *specifically* unlawful acts against the transgressor.

However, this interpretation is again inconsistent with the term 'undertake'. Besides, certain commentators rule out that common Article 1 may justify unilateral armed measures,¹³⁷ while others seem to exclude even peaceful countermeasures.¹³⁸

3 An Obligation to Take *per se* Lawful Measures

A legal *obligation* to take *per se* lawful measures appears to be in line with the word 'undertake' present in common Article 1. Such measures as non-recognition, non-assistance, appeal to international bodies and courts, casting a given vote within international organs, interruption of diplomatic intercourse, diplomatic pressure on new states (not amounting to an interference in their affairs) to ratify the Geneva Conventions and Protocols, and many others may be mentioned.

But even this interpretation proves hardly satisfactory. The problem is that in the abstract *all* states are supposed to take *all possible* (actually countless) lawful measures against the transgressor state.¹³⁹ Practice could help determine *which* measures are supposed to be taken. Yet, the fact remains that all states would be supposed to take them, otherwise committing a breach of common Article 1. In fact, when a state is believed to have breached the Convention only *few* states, at best, take some (lawful) measures. Are all other contracting states responsible for a violation of common Article 1? E. Lauterpacht convincingly contended that there is no similar practice with respect to genocide,¹⁴⁰ and we fail to see any reason to depart from that conclusion also in respect of violations of the Geneva Conventions. It is presumably these difficulties that make interpreters often unconsciously think that Article 1 provides a right rather than an obligation.

¹³⁷ *Supra* note 128.

¹³⁸ Obradovic refers to 'means evidently authorized by international law' ('*des moyens évidemment autorisés par le droit des gens*'), leaving unclear whether countermeasures, i.e., act *per se* unlawful but to be deemed lawful as a reaction to an unlawful act by another state, are covered: Obradović, *supra* note 1.

¹³⁹ The existence of an obligation incumbent on *all* contracting states is generally underlined by commentators. See, e.g., *ibid.* at 487. Significantly, this collective obligation (along with a right of any contracting state to ensure that any other contracting state respects customary humanitarian law) is generally attached to the *erga omnes* character of the obligation set out in common Art. 1, although a distinction is to be drawn, as will be seen below in the discussion of obligations *erga omnes*, between a discretionary power and an obligation to take measures against transgressors. See Palwankar, *Measures Available to States*, *supra* note 1.

¹⁴⁰ *Supra* notes 94 and 95.

4 An Obligation to Take *per se* Unlawful Measures

An *obligation to take per se unlawful* measures, such as countermeasures, whether peaceful or armed, needless to say is still more difficult to accept. In this hypothesis *all* contracting states are supposed to take *all* feasible countermeasures, i.e., acts *per se* unlawful, to induce other contracting states to comply with the Geneva Conventions. As noted earlier, even in discussing obligations *erga omnes* the debate has centred on the right, rather than on an obligation, to take countermeasures, leaving aside decisions of the Security Council under Article 41 of the Charter, in which case the source of the obligation is the Security Council's decision and not common Article 1.

5 A 'Right-duty' to Take Measures?

It is sometimes held that contracting states have both a discretionary power and an obligation,¹⁴¹ or a '*pouvoir-devoir*',¹⁴² to respect and ensure respect of the Convention in all circumstances. There seems to be a misunderstanding in the view advocating that contracting states have both an obligation and a discretionary power to take measures against other contracting states. Common Article 1 literally sets out an obligation. To the extent that this obligation is to take all *possible* measures to ensure respect, it may appear that states have a discretionary power to take them. It may be thought that there is a *general* obligation to take measures and a discretionary power to determine what measures *in concreto* should be taken.¹⁴³ States do have an obligation to take all measures in their *power*, but this 'power' is not a legal power; it is, rather, a condition of fact. It refers to what a state *can* factually do, not to what a state *may* legally do. All measures which fall within the sphere of what a state can factually do are included in the obligation. States are supposed to take all measures that are in their power to take. Common Article 1 provides them with no choice or discretion, either about taking or not taking measures, or about which measures are to be taken. If they fail (or 'choose' not) to take certain measures which are in their power to take, they breach common Article 1. The opposite reading, which leaves states free to take or not to take measures or to choose which measures (among those in their power) are to be taken, is inconsistent with the obligation expressed by the term 'undertake'. If states remain free to take or not to take measures, there is no undertaking at all on their part. And if states are thought to have an obligation to take measures but at the same time remain free to choose what measures are to be taken, they ultimately remain free to determine the content of their obligation: it would be invariably impossible to determine if, when, and to what extent they have complied with their obligation under Article 1 and, in reverse, it would always be possible to challenge their choice as insufficient or inadequate. The only threshold is therefore whether measures are *objectively* in their power, regardless of their perception or choice.

¹⁴¹ Cf. Kessler, 'The Duty', *supra* note 1, at 499, who uses the terms 'authorization' and 'obligation'.

¹⁴² Cf. Condorelli and Boisson de Chazournes, 'Quelques Remarques', *supra* note 1, at 29.

¹⁴³ Cf. Kessler, 'The Duty', *supra* note 1, at 506, arguing that states are free to choose among the measures they are entitled to take under common Art. 1.

Another possible explanation is that contracting states have a 'minimum' obligation to take certain measures, while other measures are allowed and still others are prohibited.¹⁴⁴ However, since common Article 1 contains the word 'undertake', it requires only those measures which are thought to be compulsory, all possible others being outside its scope.

6 Summing Up

If Article 1 were construed in terms of a *discretionary power* to 'ensure respect', by way of unlawful measures, this would fly in the face of its plain wording ('undertake'). Nevertheless, if it were construed in terms of an *obligation* to 'ensure respect', by way of either lawful or unlawful measures, this would imply that all contracting states have an obligation to take all measures in their power to avoid any conduct contrary to the Conventions, that is to say a virtually unlimited meaning.¹⁴⁵ It would imply that all contracting states which take no measures at all are automatically in breach of Article 1 and that a particular contracting state may be in breach of Article 1 even though it has taken some measures, albeit not considered adequate by other contracting states, while no violation may be attributed to another contracting state which has taken no measures at all because of its inability to do so. A 'hybrid' solution, halfway between a discretionary power and an obligation to take measures, is intrinsically contradictory and cannot but be dismissed.

E Measures Specifically Provided by Ad Hoc Provisions of the 1949 Geneva Conventions as Supplemented by Additional Protocol I

Another important, often little analysed problem with the interpretation of common Article 1 is that 'measures' available against transgressor states may already flow from other provisions of the Geneva Conventions themselves. This suggests that a third distinction should be drawn between measures envisaged and not envisaged by specific provisions of the Geneva Conventions. The latter fall within what has been said in the previous paragraph. It is now time briefly to discuss the latter.

The request to convene a meeting under Article 7 of Additional Protocol I is, for example, often included among the (*per se* lawful) measures adoptable against transgressors.¹⁴⁶ However, while the depositary of the Protocol has an obligation to convene meetings under Article 7, this obligation is conditioned on the (clearly discretionary) request by one or more parties and on approval by the majority of the parties. Nothing in Article 7 suggests that there is an obligation on the parties to request the convening of

¹⁴⁴ This seems to be the position adopted by *ibid.*, at 499, although apparently in contradiction of the fact that compulsory and discretionary measures are both indicated, later in the article, as subject to an obligation and to an authorization.

¹⁴⁵ See *supra*, sect. 5C for a list of possible measures consistent in the abstract with a 'state-compliance' interpretation of common Art. 1.

¹⁴⁶ Art. 7 reads as follows: '[t]he depositary of this Protocol shall convene a meeting of the High Contracting Parties, at the request of one or more of the said Parties and upon, the approval of the majority of the said Parties, to consider general problems concerning the application of the Conventions and of the Protocol'. See Condorelli and Boisson de Chazournes, 'Common Article 1', *supra* note 1, at 76.

such meetings, nor does Article 7 deal specifically with possible collective reactions to breaches of the Conventions. True, an obligation – rather than a discretionary power, as provided for in Article 7 – might be drawn from common Article 1 precisely in cases of breach of the Conventions, but it remains unclear whether this alleged obligation is incumbent on certain or on all parties. Since no indications are given as to the parties which supposedly have this obligation, all parties may be reasonably regarded as its addressees. This, however, runs counter to the wording of Article 7, which provides for approval by the majority of contracting parties. It is contradictory to assume that all parties have an obligation to request the convening of a meeting and take for granted that a minority might be against. It should also be asked whether in cases of alleged breach of the Geneva Conventions all parties which do not request the convening of a meeting are breaching common Article 1. And what if only some parties allege that the Conventions have been breached while others do not think so? An obligation to request a meeting being wholly unreasonable, Article 7 combined with common Article 1 might still be read as implying that all states *may* propose the convening of a meeting. This, however, presupposes that such a request is either *per se* unlawful, which is hardly the case, or is lawful, but then Article 1 would add nothing special. This reading is implausible since requests to convene meetings of the parties are perfectly lawful and, indeed, possible at any time, even without common Article 1 and any previous breach of the Conventions.¹⁴⁷

Commentators also refer to co-operation measures required by Article 89 of Additional Protocol I whereby ‘[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’. Article 89 clearly provides for an obligation of contracting states to take measures, whether individual or collective, in co-operation with the United Nations and in conformity with the UN Charter when a ‘serious violation’ of the Conventions or of the Protocol occurs.¹⁴⁸ This provision applies only in cases of ‘serious violations’, thereby apparently not covering all violations of the Conventions, while neither advocates of the ‘state-compliance’ meaning of common Article 1 nor the phrase ‘ensure respect’ distinguish between different kinds of breaches. It also prescribes that measures against transgressors must conform to the UN Charter and be taken in co-operation with the Organization. It is unclear whether Article 89 imposes an obligation simply to act or, more specifically, an obligation to act in conformity with the UN Charter and in co-operation with the United Nations. In any case, even assuming that Article 89 is to be read in combination with common Article 1, it seems that Article 89 remains the controlling provision. Article 89 may well be seen as a specification of a general principle set out in common Article 1, but this simply implies that the only relevant legal

¹⁴⁷ No-one has ever objected, in particular, that requests under Art. 7 would amount to an interference in other states’ domestic affairs but are justified by virtue of common Art. 1. Requests of this kind are routinely made without the slightest protest.

¹⁴⁸ See Condorelli and Boisson de Chazournes, ‘Common Article 1’, *supra* note 1, at 77–79.

provision is Article 89, while common Article 1 remains in the background as an unqualified general principle.

Another measure frequently recalled in this connection is the establishment of an independent 15-member Fact-Finding Commission under Article 90 of Additional Protocol I.¹⁴⁹ The establishment of the Commission is conditioned on the acceptance of its competence by at least 20 contracting states.¹⁵⁰ Once established, the Commission is competent to 'inquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol' and to 'facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol'. It seems thus that the Commission may be used to 'ensure respect' for the Geneva Conventions, at least in cases of grave breaches. The problem, however, is again what common Article 1 of the Conventions adds to Article 90 of Additional Protocol I. Contracting states are free under Article 90 to accept the competence of the Commission. Once this competence is accepted, every legal obligation flows from Article 90 itself, regardless of common Article 1. Does common Article 1 imply an undertaking to appeal to the establishment and operation of the Commission? If so, such an undertaking would be very minor indeed. Besides, all contracting states which did not make such an appeal, although it is in their power to do so, would be in breach of common Article 1, unless one were willing to go so far as to attach to common Article 1 an obligation – rather than only to make an unspecified appeal – to accept the Commission's competence.¹⁵¹ This would drastically change the textual meaning of Article 90, which indisputably presupposes that contracting states remain free to accept the Commission's competence and that the Commission may be set up even if the majority is against, provided that at least 20 of them express their acceptance. If such an interpretation were endorsed, it would become mysterious why Article 90 provides otherwise. States simply do not react, by way of protests or other measures, to expound the view that the Commission's competence should be accepted in order for breaches to be investigated.

In sum, either measures supposedly envisaged in common Article 1 against other contracting states are already detailed in other *ad hoc* provisions of the Conventions, in which case Article 1 is legally redundant, or they are not specifically envisaged, but then it seems hardly possible to determine which of them fall within the scope of the undertaking to 'ensure respect'. It should also be considered that measures governed by *ad hoc* provisions usually relate to discretionary powers to take *per se* lawful

¹⁴⁹ See *ibid.*, at 77.

¹⁵⁰ As of 9 Feb. 2009 70 states had made a declaration of acceptance (see <http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/ihci.html>).

¹⁵¹ It has been suggested that 'parties to Additional Protocol I have at least a moral duty to accept, by general declaration the competence of that Commission', a duty which 'stems from the obligation "to respect and to ensure respect" for the Geneva Conventions': see Gasser, *supra* note 1, at 42. Apart from the ambiguity of terms like 'at least' and 'moral duty', it may be objected that to the extent that this argument implies a legal obligation allegedly stemming from common Art. 1(1) the question would arise whether all states parties to Additional Protocol I which have not made a general declaration of acceptance of the Commission's competence are in breach of Art. 1(1). There is clearly no support at all for reaching this (indeed extreme) conclusion.

measures, as opposed to obligations provided for in relation to measures to be taken to induce compliance by individuals. It is hardly plausible that common Article 1 may transform an express discretionary power into an obligation, thereby causing a change in meaning of other provisions of the same Conventions. In reverse, if the discretionary power contained in specific provisions is left unaltered, a connection between these provisions and common Article 1 would contradict the term ‘undertake’ found therein. Not to say that *ad hoc* measures are usually found in Additional Protocol I, such as those provided in Articles 7, 89, and 90, rather than in the Geneva Conventions. While the Protocol is aimed at supplementing the Conventions, still the meaning to be given to common Article 1 should be understood independently of the Protocol, at least in respect of the period preceding (and presumably also subsequent to) its conclusion in 1977.¹⁵²

Briefly, specific provisions of both the Geneva Conventions and Additional Protocol I appear to have been drafted in such a fashion that they are supposed to operate in their own right and not in combination with common Article 1.

F Appeals by International Bodies to Contracting States Calling for Initiatives against Transgressors

If we turn now to international resolutions, we will find that many international resolutions spell out the obligation to ‘respect’ international humanitarian law without mentioning the term ‘ensure respect’,¹⁵³ or are expressly confined to an ‘individual-compliance’ meaning of the term ‘ensure respect’.¹⁵⁴ On occasion international bodies, in particular the UN General Assembly and the UN Security Council, have referred to common Article 1, calling on states to ensure respect of the Geneva Conventions by another state,¹⁵⁵ especially Israel for its violations of the Conventions in the occupied Palestinian territories.

Just to mention a few examples, UN General Assembly Resolution 2674 of 9 December 1970 stated that ‘[s]tates violating these international instruments

¹⁵² The foregoing discussion also holds true, *mutatis mutandis*, for the system of Protecting Powers which is also routinely recalled in relation to measures to ‘ensure respect’ envisaged by common Art. 1, as well as for universal jurisdiction over war crimes (specifically envisaged in Arts 49-I, 50-II, 129-III, and 146-IV of the Geneva Conventions).

¹⁵³ Cf. e.g., UNSC Res 788 of 19 Nov. 1992 (available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N93/010/46/IMG/N9301046.pdf?OpenElement>), at para. 5, 822 of 30 Apr. 1993 (available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N93/247/71/IMG/N9324771.pdf?OpenElement>), at para. 3, and 834 of 1 June 1993 (available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N93/322/15/IMG/N9332215.pdf?OpenElement>), at para. 13.

¹⁵⁴ Cf. UN GA Res 2852 of 20 Dec. 1971, calling upon ‘all States . . . to take all the necessary measures to ensure full compliance by their armed forces of humanitarian rules applicable in armed conflicts’ (available at: <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/328/68/IMG/NR032868.pdf?OpenElement>), at para. 1 or 6, and UN Sub-Commission on Human Rights Res 1989/9 of 31 Aug. 1989 urging El Salvador ‘to take all necessary measures to ensure . . . that human rights are respected by all military, paramilitary and police forces’ (at para. 5, emphasis added).

¹⁵⁵ As for the UN Secretary General cf. the *note verbale* made during the Iran/Iraq war in UN Doc S/16648 of 26 June 1984, available at: <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N84/161/74/pdf/N8416174.pdf?OpenElement>.

[the 1925 Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare and the 1949 Geneva Conventions] *should* be condemned and held responsible to the world community'.¹⁵⁶ In Resolution 45/69 of 6 December 1990 the UN General Assembly called upon states 'to ensure respect . . . for its obligations under the [Fourth Geneva] Convention in accordance with Article 1 thereof'.¹⁵⁷ The same words were later used in UN Security Council Resolution 681 of 20 December 1990.¹⁵⁸ In Resolution 1992/2 of 14 February 1992, the Commission on Human Rights urged 'all States parties' to the Fourth Geneva Convention 'to make every effort to ensure that Israeli occupation authorities' respect for, and compliance with, the provisions of that Convention' and 'to undertake the necessary practical measures to ensure the provision of international protection . . . in accordance with . . . article 1 and other relevant articles of the Fourth Geneva Convention'.¹⁵⁹ General Assembly Resolution 58/97 of 17 December 2003 called upon all contracting states to the Fourth Geneva Convention, 'in accordance with article 1', 'to continue to exert all efforts to ensure respect for its provisions' by Israel.¹⁶⁰ In Resolution 59/122 of 10 December 2004 the General Assembly called upon 'all High Contracting Parties to the [Fourth Geneva] Convention, in accordance with article 1 . . . to continue to exert all efforts to ensure respect for its provisions by Israel' and encouraged 'the initiatives by States parties to the Convention, both individually and collectively, according to article 1 . . . aimed at ensuring respect for the Convention'.¹⁶¹

These resolutions apparently endorse the interpretation of common Article 1 whereby contracting states are under an obligation to make every effort aimed at ensuring that Israel complies with the Fourth Geneva Convention. Nevertheless, it is possible to assign to these resolutions a mere recommendatory meaning. The UN bodies may just see the term 'ensure respect' as a political commitment and do nothing other than reiterate this commitment in recommendatory terms. To underscore that action commended or recommended in such resolutions must be 'in accordance with Article 1' does not necessarily imply that such resolutions are reminding one of a legal obligation contained in common Article 1. First, also 'other relevant articles', hence

¹⁵⁶ Available at: <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/349/39/IMG/NR034939.pdf?OpenElement>, at para. 3, emphasis added.

¹⁵⁷ Available at: <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/564/58/IMG/NR056458.pdf?OpenElement>, at para. 3. In the past the UN GA had already requested 'all States parties to the [Fourth] Geneva Convention of 12 August 1949 to do their utmost to ensure that Israel respects and fulfils its obligations under that Convention' in Res 2851 of 20 Dec. 1971, available at: <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/328/67/IMG/NR032867.pdf?OpenElement>.

¹⁵⁸ Available at: <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/575/31/IMG/NR057531.pdf?OpenElement>, at para. 5.

¹⁵⁹ Available at: <http://domino.un.org/UNISPAL.NSF/9a798adbf322aff38525617b006d88d7/66824f0f98965fc505256608006d5decl?OpenDocument>, at para. 2.

¹⁶⁰ Available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N03/458/73/PDF/N0345873.pdf?OpenElement>, at para. 3.

¹⁶¹ Available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N04/483/58/PDF/N0448358.pdf?OpenElement>, at para. 3.

other autonomous provisions of the Geneva Conventions, are mentioned. Secondly, reference to Article 1 may simply mean that the recommended measures should be taken ‘in accordance’ with Article 1, i.e., without violating their obligation to ‘respect’ the Conventions. Thirdly, when ‘should’ is employed the impression is that it is much less a reminder of a pre-existing obligation than a recommendation. True, these resolutions presuppose that all parties to the Conventions have an interest in compliance by all others, but this is far from proving that each contracting state has an obligation to take measures, unless such measures are imposed by an appropriate body, such as the UN Security Council.¹⁶² In fact, they fail to condemn contracting states for not having adopted all measures in their power to induce compliance.

This seems to be confirmed by recent state practice. On the occasion of the Israeli military operations in the Gaza Strip of the end of 2008 and beginning of 2009, the United Kingdom stated that it had ‘already called for an investigation and [was] looking at all evidence and allegations’, considering ‘backing calls for a reference to the ICJ’ against Israel, which was charged with several violations of international humanitarian law. An open letter to the Prime Minister signed by prominent international lawyers and published in *The Guardian* recalled that ‘[t]he United Kingdom government . . . has a duty under international law to exert its influence to stop violations of international humanitarian law in the current conflict between Israel and Hamas’.¹⁶³ Nothing suggests, however, that the call for investigation and for possible reference to the ICJ was felt by the United Kingdom to be a legal obligation and, at the time of writing, the case has not been referred to the ICJ. The United Kingdom simply seems to inform us that in its own view certain steps are needed. Every state, regardless of common Article 1, might have stated what the United Kingdom said in respect of whatever treaty. It was lawyers who, clearly alluding to common Article 1, reminded the government of its ‘duty to exert its influence to stop violations’.

In Resolution S-9/1 of 12 January 2009 the UN Human Rights Council, strongly condemning Israeli military operations in the occupied Gaza Strip for massive violations of both human rights and international humanitarian law, reaffirmed that each state party to the Fourth Geneva Convention ‘is under the obligation to respect and ensure the respect for the obligations arising from the Convention’.¹⁶⁴ This clearly shows that Article 1 is deemed to provide for an *obligation* to ‘ensure’ compliance and not a mere discretionary power. The Council additionally called upon ‘the international community to support the current initiative at putting an immediate end to the current military aggression in Gaza’ (at paragraph 7), as well as for ‘urgent international action to put an immediate end to the grave violations committed by the occupying Power, Israel’ (at paragraph 8), and for ‘immediate international protection of the Palestinian people’ (at paragraph 9). Finally, the Council decided ‘to dispatch an urgent, independent international fact-finding Commission’ (at paragraph 14).

¹⁶² Cf. *supra*, sect. 5D2.

¹⁶³ Cf. Hirsch, ‘Israel may Face UN Court Ruling on Legality of Gaza Conflict’, *The Guardian*, 14 Jan. 2009, available at: www.guardian.co.uk/world/2009/jan/14/israel-gaza-un-court-palestine.

¹⁶⁴ Available at: www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/A-HRC-S-91-L1.doc.

It is difficult to see in such words a confirmation of the purported obligation to ensure respect under common Article 1. It seems that the Council is simply recommending that action should be taken.

Appeals to the international community to take action to stop violations of the 1949 Geneva Conventions have also been frequent on the part of the ICRC since 1979,¹⁶⁵ including those concerned with conflicts between Rhodesia and Zimbabwe¹⁶⁶ and Iran/Iraq,¹⁶⁷ as well as that in Bosnia-Herzegovina.¹⁶⁸ It is usually remarked that states do not challenge such appeals; on the contrary, they uphold them, along with their 'state-compliance' approach to common Article 1.¹⁶⁹ But this is hardly sufficient to prove that common Article 1 provides for an obligation to take action, let alone to suggest what exactly the content of such an obligation is.

In conclusion, the phrase 'respect and ensure respect' contained in common Article 1 of the Geneva Conventions is indeed frequently invoked by international bodies, but this is far from proving that common Article 1 provides for a legal obligation of all contracting states to take action against a contracting state which fails to abide by the Geneva Conventions. Appeals to the 'state-compliance' meaning of common Article 1 by international bodies are invariably contained in recommendations and, should they be contained in binding resolutions, such as those adopted by the UN Security Council under Article 41 of the UN Charter, contracting states would be bound to take action on the basis (and to the extent) of these resolutions rather than of common Article 1.

6 Interpretation of 'In All Circumstances'

As previously said, the term 'in all circumstances' was crucial in Article 25(1) of the 1929 Wounded and Sick Convention and in Article 82(1) of the 1929 Prisoners of War Convention.¹⁷⁰ These provisions were construed to the effect that the Conventions were to be respected in peace as well as in war, although not in civil wars, and as between the parties even though one party to the conflict was not party to them.¹⁷¹

The phrase 'in all circumstances' seems to be central also in common Article 1 of the Geneva Conventions. It is to be read in combination with either 'respect' or 'ensure respect'. Contracting states have undertaken both to 'respect. . . in all circumstances' and to 'ensure respect. . . in all circumstances' for the Geneva Conventions. It has been suggested in the ICRC Commentaries to the Conventions that 'in all circumstances' prohibits 'any valid pretext, legal or other, for not respecting' the Conventions in all their parts.¹⁷² The term is, however, open to a variety of *different* meanings and is easily

¹⁶⁵ Cf. 25 *IRRC* (1985) 31; 33 *IRRC* (1993) 490; 35 *IRRC* (1995) 317; 36 *IRRC* (1996) 28.

¹⁶⁶ Cf. 19 *IRRC* (1979) 87.

¹⁶⁷ Cf. 23 *IRRC* (1983) 220; 24 *IRRC* (1984) 113 and 357.

¹⁶⁸ Cf. 32 *IRRC* (1992) 492.

¹⁶⁹ Cf. 33 *IRRC* (1993) 391 and 426; 35 *IRRC* (1995) 33 and 37; 36 *IRRC* (1996) 79 and 82.

¹⁷⁰ *Supra* note 7.

¹⁷¹ *Supra* notes 31–36.

¹⁷² Cf. ICRC, *Commentary – I Geneva Convention*, *supra* note 57, at 27; ICRC, *Commentary – II Geneva Convention*, *supra* note 57, at 26; ICRC, *Commentary – IV Geneva Convention*, *supra* note 57, at 16.

found in many other *specific* provisions of the Conventions which apparently deprive common Article 1 of any autonomy.¹⁷³ We will briefly examine only those meanings that have been more discussed in the preparatory work and in legal doctrine.¹⁷⁴

A ‘Also When the Enemy Is Not Party to the Convention’

The term ‘in all circumstances’ may be intended to overcome the effects of the *si omnes* clause, commonly inserted in humanitarian conventions of the past,¹⁷⁵ whereby conventions concerning international humanitarian law were applicable (even as between the parties) only when all the parties to the conflict were also parties to the conventions. The term ‘in all circumstances’ would then mean that parties are supposed to respect the Convention as regards both parties and third states, also when third states are involved in the conflict. In the debates concerning the 1929 Geneva Conventions the phrase ‘in all circumstances’ was precisely intended to make clear that these Conventions applied also when one party to the conflict was not a party to the Conventions. Since no *si omnes* clause was included in the two Conventions, the phrase ‘in all circumstances’ was evidently inserted in the text to avoid such a clause being implied for historical reasons.¹⁷⁶ However, common Article 2(3) of the 1949 Geneva Conventions *expressly rejects* the *si omnes* clause.¹⁷⁷ As a result, even assuming that this was the meaning of ‘in all circumstances’ in the past, concerning conventions in which the *si omnes* clause could be implied, it cannot be attributed to the 1949 Geneva Conventions. From this perspective, the Geneva Conventions already apply ‘in all circumstances’ under Article 2(3), without any need for common Article 1.

B ‘Also in Time of Peace’

The term ‘in all circumstances’ may be intended to point out that the Convention at hand, despite its key character of a treaty specifically applicable in time of war, also applies in time of peace and specifically requires contracting states to take implementing measures before a war breaks out. This meaning was actually hinted at in the debates and thereafter in the Commentary concerning the 1929 Geneva Conventions.¹⁷⁸ The phrase may signal that the Convention contains certain obligations

¹⁷³ Cf. Arts 3(1), 7, 12(1), 19(1), 24, 27(3), 40(4), 49(4) of the First Convention, plus Art. 11 of Annex I (Draft Agreement Relating to Hospital Zones and Localities); Arts 3(1), 7, 12(1), 22(1), 42(4), and 50(4) of the Second Convention; Arts 3(1), 7, 14, 49(3), 84(2), 103(1), 118(5)(b), and 129(4) of the Third Convention; and Arts 3(1), 8, 18(1), 24(1), 27(1), 45(4), 100(1), and 146(4), plus Art. 11 of Annex I (Draft Agreement Relating to Hospital and Safety Zones and Localities). As regards Additional Protocol I cf. the fifth preambular para. and Arts 10(2), 12(4), 16(1), 51(1), 63(1), 64(1), 71(4), 73, and 75(1).

¹⁷⁴ Other possible meanings of the phrase ‘in all circumstances’ include ‘regardless of waiver’ (already prescribed by Arts 7-I, 7-II, 7-III, and 8-IV), ‘without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria’ (already prescribed by Arts 3-I, 12-I, 31-I, 3-II, 12-II, 3-III, 3-IV, 13-IV, and 27-IV), and a ‘cause-and-effect’ type of responsibility (*supra* note 99).

¹⁷⁵ *Supra* note 32.

¹⁷⁶ *Supra* notes 33 and 34.

¹⁷⁷ *Supra* note 41.

¹⁷⁸ *Supra* note 35.

which specifically apply in time of peace, such as the obligation to disseminate the contents of the Convention before a conflict arises so as to prepare troops beforehand for applying the Convention once the conflict has broken out. However, thus understood, the phrase adds nothing special to the specific obligations contained in the pertinent Convention if the latter is expressly to be fulfilled in time of peace. The 1949 Geneva Conventions themselves include a number of provisions specifically dealing with implementing measures to be taken in time of peace.¹⁷⁹

It might be objected that the phrase 'in all circumstances' is intended to set out a general principle going beyond express provisions and requiring contracting states to take in time of peace *all* measures in their power – beyond those provided for by specific provisions – capable of reducing the risk of breaches of the Conventions during the conflict. But this hardly matches with the existence of *ad hoc* provisions: either states are required to do what the Conventions expressly prescribe, or states are more generally required to do anything in their power. The first alternative seems far more plausible and workable in practice.

C 'Also in Internal Conflicts'

The phrase 'in all circumstances' may also imply that the pertinent Convention also applies in internal conflicts.¹⁸⁰ This was the main subject of discussion about Article 1 in the drafting history of the 1949 Geneva Conventions in order to overcome the negative answer given to the same problem in respect of the 1929 Geneva Conventions. It is evidently assumed that, had the phrase not been inserted, the Convention's obligations would have applied only to international conflicts. The phrase thus has no particular meaning where the pertinent Convention expressly applies in internal conflicts, which is precisely what occurs in the 1949 Geneva Conventions, common Article 3 of which specifically applies to internal conflicts.

Again, it could be argued that common Article 1 is designed to extend obligations contained in common Article 3 to all measures that parties are empowered to take, but this runs counter to common Article 3 itself: all obligations concerning internal conflicts, including those requiring positive action, are specifically stipulated therein. Article 3 itself points out that the obligations it envisages are considered the 'minimum': if common Article 1 had extended the scope of Article 3 to further obligations not expressly found therein, the 'minimum' requirement in Article 3 would have had no meaning. Moreover, the detailed provisions of Additional Protocol II would make little sense if common Article 1 of the Geneva Conventions had laid down a general obligation designed automatically to extend to internal conflicts what the Geneva Conventions stipulate in respect of international conflicts. Despite a trend to

¹⁷⁹ Cf. *supra* note 42. E.g., Art. 47 specifically provides that '[t]he High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population, in particular to the armed fighting forces, the medical personnel and the chaplains'.

¹⁸⁰ *Supra* notes 36, 39, and 44.

submit internal conflicts to the rules governing international conflicts – such as those concerning war crimes¹⁸¹ – still there are indisputably different rules applying to the two types of conflict and Article 1 fails to specify which of them, as opposed to others, extend to internal conflicts.

D ‘Regardless of Military Necessity’

Military necessity is an exception to the application of international humanitarian law.¹⁸² It is occasionally provided for in humanitarian law instruments. For example, Article 23(g) of the Hague Regulations annexed to the IV Geneva Convention on the Laws and Customs of War on Land provides that ‘it is especially forbidden . . . to destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war’.¹⁸³ In cases where military necessity may be relied upon to justify otherwise unlawful conduct, the term ‘in all circumstances’ is abstractly susceptible of being construed as prohibiting this conduct even though it is ‘imperatively demanded by the necessities of war’. This meaning may be reasonable in light of the outdated doctrine supporting a general principle whereby military necessity overrides existing law.¹⁸⁴ It would imply that a breach of the Geneva Conventions can never be justified in the name of military necessity. However, since the end of World War II, it has been generally accepted that military necessity has no such all-embracing scope, it being relevant only when specific provisions expressly provide for its ‘justifying’ effect.¹⁸⁵ In fact, the 1949 Geneva Conventions do not contain any provision mentioning military necessity, but even if they did it would have been hard to state that an unqualified obligation under common Article 1 would have taken precedence over a specific and express provision found in the Conventions.

E ‘Regardless of Reciprocity’

It is commonly believed that ‘in all circumstances’ implies a prohibition of (negative) reciprocity and reprisals. In the ICRC’s Commentaries to the Conventions¹⁸⁶ and to

¹⁸¹ Cf. the ICTY Trial Chamber Decision on the Defence Motion on Jurisdiction of 10 Aug. 1995 in the *Tadić* case, available at: <http://www.icty.org/x/cases/tadic/tdec/en/100895.htm>, at para. 63.

¹⁸² Military necessity is also understood, in the opposite direction, as a limit to the application of international humanitarian law, thereby implying that all acts of war which are not necessary for the achievement of legitimate goals are prohibited. We are not concerned with this meaning.

¹⁸³ Available at: www.icrc.org/ihl.nsf/FULL/195?OpenDocument.

¹⁸⁴ See, e.g., Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2004), at 18–20.

¹⁸⁵ The US Military Tribunal in *US v. List* rules that ‘military necessity or expediency do not justify a violation of positive rules’ (see *Annual Digest*, XV, at 647). The same position was adopted by other tribunals in a number of war crimes trials after World War II, such as *Manstein* (*Annual Digest*, XVI, at 511–513), *Thiele and Steinerte* (in *Law Reports Trials of War Criminals*, III, at 56), and *The Peleus* (*Law Reports Trials of War Criminals*, I, at 1). Art. 41(3) of Additional Protocol I, in particular, makes clear that military necessity can never justify the killing of prisoners of war.

¹⁸⁶ Cf. ICRC, *Commentary – I Geneva Convention*, *supra* note 57, at 346; ICRC, *Commentary – II Geneva Convention*, *supra* note 57, at 255; ICRC, *Commentary – IV Geneva Convention*, *supra* note 57, at 228.

Additional Protocol I¹⁸⁷ the term ‘in all circumstances’ is indeed understood to prohibit reprisals and reciprocal countermeasures, as envisaged in Article 60(5) of the 1969 Vienna Convention on the Law of Treaties.¹⁸⁸ A similar stance was adopted by the ICTY Trial Chamber in the *Kupreskić* Judgment of 14 January 2000 discussing the so-called *tu quoque* argument.¹⁸⁹ Three different relevant situations may arise, depending on the fact that the breach of the Geneva Conventions are allegedly justified as reactions either to a breach of an identical obligation contained in the Conventions (negative reciprocity or reprisal in kind) or to a breach of a different obligation contained in the Conventions (reprisal in general) or, finally, to a breach of an obligation not contained in the Conventions but binding upon the parties under other international law rules.¹⁹⁰ Measures of reciprocal retorsion, that is to say unfavourable but *per se* lawful acts, such as the withdrawal of privileges granted to medical personnel of the enemy beyond what is required under the Conventions, are generally excluded from the prohibition.¹⁹¹ It remains unclear whether retorsions fall within the prohibition of reprisals in cases where they are taken in reply to a *breach* – rather than to a mere withdrawal of privileges – of the Geneva Conventions (or even of international rules external to the Conventions), but it seems reasonable that they are *a fortiori* allowed. As a result, retorsions remain discretionary lawful measures on which common Article 1 has no impact.¹⁹² The term ‘in all circumstances’ is thus intended to specify that the general principle permitting reciprocity and reprisals does not apply and obligations contained in the Conventions must be respected even against breaches by the other party of obligations arising out of either the Conventions or other international law rules. If this were the case, common Article 1 would imply that *all* provisions of the 1949 Geneva Conventions are not subject to breach in reply to a breach committed by another contracting state. This interpretation, however, raises a number of difficulties.

While it is straightforward that certain provisions of the 1949 Geneva Conventions may not be breached in response to breaches committed by other contracting states, it

¹⁸⁷ See paras 49–51.

¹⁸⁸ F. Kalshoven, *Belligerent Reprisals* (2nd edn, 2005).

¹⁸⁹ The Trial Chamber affirmed that the bulk of international humanitarian law ‘lays down absolute obligations, namely obligations that are unconditional or in other words not based on reciprocity’ – a concept regarded as ‘encapsulated’ in common Art. 1 and in particular in the term ‘in all circumstances’ – and ‘towards the international community as a whole, with the consequence that each and every member of the international community has a “legal interest” in their observance and consequently a legal entitlement to demand respect for such obligations’, adding that most norms of international humanitarian law ‘are also peremptory norms of international law or *jus cogens*, i.e. of a non-derogable and overriding character’: available at: www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf, at paras 517–520.

¹⁹⁰ All three hypotheses are covered by the prohibition, which is deemed absolute, ‘no matter what the nature of the offence may be’, according to the ICRC Commentaries to the 1949 Geneva Conventions (cf. ICRC, *Commentary – I Geneva Convention*, *supra* note 57, at 345; ICRC, *Commentary – II Geneva Convention*, *supra* note 57, at 254; ICRC, *Commentary – IV Geneva Convention*, *supra* note 57, at 228). Along similar lines cf. the ICRC Commentary to Art. 20 Additional Protocol I, at para. 812.

¹⁹¹ Cf. ICRC, *Commentary – I Geneva Convention*, *supra* note 57, at 347; ICRC, *Commentary – II Geneva Convention*, *supra* note 57, at 256; ICRC, *Commentary – IV Geneva Convention*, *supra* note 57, at 229. The same solution was accepted in the ICRC comment to Art. 20 Additional Protocol I, at paras 815–816.

¹⁹² *Supra*, sects 5D1 and 3.

is equally plain that not all are like that. A criterion is needed to draw the line between the two groups, and common Article 1 fails to supply any assistance. Besides, this interpretation of ‘in all circumstances’ presupposes that the pertinent Convention does not specify which of its rules may not be breached by way of reprisal. For example, the 1929 Wounded and Sick Convention is silent on the admissibility of reprisals and the inference was thus justified that ‘respected . . . in all circumstances’ was to be understood to imply a prohibition of reprisals.¹⁹³ But the Geneva Conventions do indicate what provisions cannot be breached by way of reprisals.¹⁹⁴ They prohibit reprisals against the wounded, sick, and shipwrecked (Articles 46-I and 47-II),¹⁹⁵ against prisoners of war (Article 13(3)-III),¹⁹⁶ against civilians (Article 33(3)-IV), and against private property of civilians on occupied territory or of enemy foreigners on friendly territory (Article 33(3)-IV).¹⁹⁷ The proposal made at the 1974–1977 Geneva Conference to provide Additional Protocol I with a general prohibition of reprisals against all groups of persons and objects protected under the Conventions was rejected.¹⁹⁸ It may be added that reciprocity cannot easily be got rid of in absolute terms since it remains, for fear of symmetrical breaches, the basic reason why states are expected to (and ultimately hopefully do) fulfil their obligations.

Again, the dilemma is to determine whether common Article 1 is or is not designed to add a more general, although unqualified, obligation on a matter specifically

¹⁹³ See, e.g., Condorelli and Boisson de Chazournes, ‘Quelques Remarques’, *supra* note 1, at 18–20.

¹⁹⁴ By contrast, an explicit prohibition of reprisals against prisoners of war was provided for by Art. 2(3) of the 1929 Geneva Convention on Prisoners of War ([m]easures of reprisal against them [prisoners of war] are forbidden). The ICRC Commentaries to the 1949 Geneva Conventions specified that the omission in the 1929 Wounded and Sick Conventions was due to an oversight – a position reiterated in the ICRC comment on Art. 20 of Additional Protocol I (at para. 817) – and that the prohibition of reprisals is *a fortiori* applicable to the wounded and sick (cf. ICRC, *Commentary – I Geneva Convention*, *supra* note 57, at 344), adding that such a prohibition may justifiably be asserted ‘as already implicit’ in the Convention, in particular in the phrase ‘in all circumstances’ (cf. ICRC, *Commentary – II Geneva Convention*, *supra* note 57, at 253). If so, reference to ‘in all circumstances’ in Art. 82(1) of the 1929 Prisoners of War Convention should be reasonably given the same meaning, although this meaning is redundant since it is already and specifically covered by Art. 2(3).

¹⁹⁵ ‘Reprisals against the wounded, sick, personnel, buildings or equipment protected by the Convention are prohibited’ (Art. 46-I); ‘[r]eprisals against the wounded, sick and shipwrecked persons, the personnel, the vessels or the equipment protected by the Convention are prohibited’ (Art. 47-II). Cf. also Art. 20 of Additional Protocol I, whereby ‘[r]eprisals against the persons and objects protected by this Part [wounded, sick and shipwrecked] are prohibited’.

¹⁹⁶ ‘Measures of reprisal against prisoners of war are prohibited.’

¹⁹⁷ ‘Reprisals against protected persons and their property are prohibited.’ Art. 33(3)-IV is specified by a number of provisions contained in Additional Protocol I, namely Art. 51(6) ([a]ttacks against the civilian population or civilians by way of reprisals are prohibited), Art. 52(1) ([c]ivilian objects shall not be the object of attack or of reprisals), Art. 53(c) (whereby ‘it is prohibited: . . . to make such objects [cultural objects and places of worship] the object of reprisals’, reiterating Art. 4(4) of the 1954 Convention on the Protection of Cultural Property), Art. 54(4) ([t]hese objects [objects indispensable to the survival of the civilian population] shall not be made the object of reprisals), Art. 55(2) (‘attacks against the natural environment by way of reprisals are prohibited’), and Art. 56(4) ([i]t is prohibited to make any of the works, installations or military objectives mentioned in paragraph 1 the object of reprisals).

¹⁹⁸ Cf. Kalshoven, *supra* note 1, at 47–49. The point is also noted in the ICRC Commentary to Additional Protocol I concerning Arts 20 (at para. 810) and 51(6) (at para. 1983).

governed by the Conventions. And again a negative answer seems far more reasonable, if for no other reason than that it might otherwise even be claimed that Article 1 contains *in nuce* every other provision of the Geneva Conventions.

F 'Regardless of Being an Aggressor'

It is sometimes contended – drawing from the *bellum iustum* doctrine as developed in particular in the Middle Ages by Christian theologians¹⁹⁹ – that international humanitarian law does not apply to an 'aggressor', i.e., to the party to a conflict which is deemed to have caused an 'unjust' war, or more generally to the 'unjust' (for any reason) party to a conflict. On this premise, the phrase 'in all circumstances' may be understood to imply that the pertinent Convention is, by way of contrast and for strictly 'humanitarian' reasons, to apply also to the aggressor.²⁰⁰ This qualification seems at first glance superfluous if account is taken of the general principle of 'equality of belligerents', but might appear justified in recent times when, as a result of the prohibition of the use of force and the functioning of the centralized UN collective security system, the applicability of the principle of belligerents' equality is said to have become uncertain. Needless to say, this principle was unquestionably applicable at the time when the Geneva Conventions were concluded. In any event, post-1945 international practice does not support the proposition that states being found responsible for an armed attack or for an invasion constituting a breach of the peace by the Security Council – such as North Korea in 1950 (Resolution 82 of 25 June 1950), Argentina in 1982 (Resolution 502 of 3 April 1982), and Iraq in 1990 (Resolution 660 of 2 August 1990) – have not benefited from the application of international humanitarian law. Besides, in most conflicts there is no UN 'certification' as to which of the belligerents is the aggressor. It seems therefore that the principle of equality of belligerents is still vital.²⁰¹ But this implies that the 1949 Geneva Conventions apply also to aggressors regardless of common Article 1. Additional Protocol I specifically points out in its fifth preambular paragraph that 'the provisions of the Geneva Conventions . . . and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict'.²⁰²

In sum, the term 'in all circumstances' may be understood in a variety of legal meanings and cannot be given an 'absolute', all-pervasive scope. It is frequently included in other specific provisions of the Geneva Conventions, and more often than not its more

¹⁹⁹ Cf. S.C. Neff, *War and the Law of Nations. A General History* (2005), at 62–65.

²⁰⁰ Cf. ICRC, *Commentary – III Geneva Convention*, *supra* note 57, p. 18.

²⁰¹ See D. Fleck (ed.), *The Handbook of International Humanitarian Law* (2nd edn, 2008), at 10, recalling that a statement made by the Democratic Republic of Vietnam whereby aggressor states should not be allowed to benefit from international humanitarian law was roundly rejected.

²⁰² It is worth noting that the phrase 'in all circumstances' recurs twice, in the Preamble and in Art. 1(1) of the Protocol. While the former points out the specific meaning to be given to 'in all circumstances', Art. 1(1) remains generic. This reinforces the notion that the phrase 'in all circumstances' as contained in both common Art. 1 of the Geneva Conventions and Art. 1(1) of Additional Protocol I *cannot* have the meaning of making the Conventions and the Protocol applicable also to aggressors.

plausible meanings in relation to common Article 1 are already found in other *ad hoc* provisions of the same Conventions.

7 Common Article 1 and Obligations *Erga Omnes*

It is routinely suggested that the Geneva Conventions' 'special' character lies in the fact that they contain 'absolute', unconditional, or *erga omnes* rather than reciprocal obligations.²⁰³ These obligations are deemed to be assumed not by each contracting state towards each of the other contracting states, but rather towards all other contracting states taken as a whole.²⁰⁴ In particular, the undertaking to 'ensure respect' is intended to mean that obligations laid down in the Conventions are *erga omnes* and, consequently, that in the event of their breach all other contracting states may (or must) take action in order to induce other states to compliance. Thus understood, as noted at the outset, common Article 1 has been regarded as a 'quasi-constitutional' international law rule.²⁰⁵ It seems, however, that the consequences of the special character of the 1949 Geneva Conventions need more scrutiny. A brief account of the purported *erga omnes* character of the Conventions and of its consequences is thus helpful before coming to the conclusions of this study.

Obligations *erga omnes* were notably referred to by the ICJ in the *Barcelona Traction* case (1970)²⁰⁶ and in a few subsequent decisions, in particular in the *East Timor* (1995),²⁰⁷ *Wall* (2004),²⁰⁸ *Military Activities in the Territory of the Congo (DRC v. Rwanda)* (2006),²⁰⁹ and *Genocide Convention* (2007)²¹⁰ cases. Other international

²⁰³ *Supra* notes 58 and 87. On obligations *erga omnes* see, e.g., A. de Hoogh, *Obligations Erga Omnes and International Crimes. A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* (1996); M. Ragazzi, *The Concept of International Obligations Erga Omnes* (1997); C.J. Tams, *Enforcing Obligations Erga Omnes in International Law* (2005); P. Picone, *Comunità internazionale e obblighi 'erga omnes'*. *Studi critici di diritto internazionale* (2006); C. Tomuschat and J.-M. Thouvenin (eds), *The Fundamental Rules of the International Legal Order: 'Jus Cogens' and Obligations 'Erga Omnes'* (2006).

²⁰⁴ For an analysis of different types of international law rules imposing either objective or interdependent or *erga omnes* obligations see Tams, *supra* note 203, at 41–46 and 53–63.

²⁰⁵ *Supra* note 12.

²⁰⁶ *Barcelona Traction, Light and Power Co. Ltd. (Belgium v. Spain)* [1970] ICJ Rep 3, famously holding at para. 33 (at 32) that 'obligations of a State towards the international community as a whole . . . by their very nature . . . are the concern of all States' and 'in view of the importance of the rights involved, all States can be held to have a legal interest in their protection'.

²⁰⁷ *Case Concerning East Timor (Portugal v. Australia)* [1995] ICJ Rep 90, arguing at para. 20 (at 102) that 'the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things' and that '[w]hatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case'.

²⁰⁸ *Legal Consequences of The Construction of A Wall In The Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136, at paras 155–157. See *infra* notes 226–231 and accompanying text.

²⁰⁹ *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)* *Jurisdiction of the Court and Admissibility of the Application*, Judgment of 3 Feb. 2006, 45 ILM (2006) 562, and available at: www.icj-cij.org/docket/files/126/10435.pdf, at paras 64 and 125, affirming *East Timor* as far as obligations *erga omnes* were concerned.

²¹⁰ *Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* *supra* note 96, at paras 147 and 185.

courts – operating as human rights monitoring bodies or as international criminal tribunals – have upheld their existence, such as the ICTY in the *Kupreskić* case (2000)²¹¹ and the European Court of Human Rights in the *Jorgic* case (2007),²¹² as well as national courts.²¹³ The ILC has accepted that certain international obligations are owed to the international community as a whole or to all parties in a multilateral treaty having that character.²¹⁴ One major problem that the ILC has left open is the relationship between obligations *erga omnes* and peremptory norms of international law (*jus cogens*) as defined in Article 53 of the 1969 Vienna Convention on the Law of Treaties and in the subsequent practice, namely as substantive norms from which no derogation is permitted.²¹⁵ Both concepts relate to international law rules aimed at protecting basic values of the international community as a whole, the former by allowing collective responses to their violation (such as ICJ proceedings or counter-measures), the latter by elevating the rule to a higher than ordinary, overriding rank. While the ILC underlined that ‘there is at the very least substantial overlap between them’,²¹⁶ a widespread view is that all peremptory rules are *erga omnes*, whereas not all obligations *erga omnes* are peremptory.²¹⁷ Two questions arise for our purposes: what is meant, methodologically, by obligations *erga omnes* (in particular, by what criteria they can be identified and what consequences they produce) and what specific role, if any, common Article 1 plays in this regard.

The first point to be assessed is the very notion of obligations *erga omnes*, since it is from this very notion that a number of legal implications are generally – often

²¹¹ *Supra*, note 189. Cf. also the *Furundzija* Trial Chamber Judgment of 10 Dec. 1998, arguing that the prohibition of torture imposes upon states obligations *erga omnes*: available at: www.un.org/icty/furundzija/trialc2/judgement/fur-tj981210e.pdf, at paras 151–152.

²¹² App No 74613/01, *Jorgic v. Federal Republic of Germany*, available at: <http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=20907412&skin=hudoc-en&action=request>. A similar stance has also frequently been adopted by the international bodies monitoring the interpretation and application of the American Convention of Human Rights: see *supra* note 101.

²¹³ Domestic courts generally take for granted a complete overlap between obligations *erga omnes* and *jus cogens* (as discussed next in the text) without going into any in-depth analysis. See, e.g., the *Chile v. Arancibia Clavel* Judgment of 24 Aug. 2004 delivered by the Argentine Supreme Court of Justice, the *Scilingo Manzorro* Judgment of 19 Apr. 2005 delivered by the Spanish High Court (*Audiencia Nacional*) and the *A and Others v. Secretary of State for the Home Department* Judgment of 8 Dec. 2005 delivered by the House of Lords, all available with a comment at: www.oxfordlawreports.com/.

²¹⁴ *Infra* notes 221–222.

²¹⁵ On *jus cogens* see, e.g., R. Kolb, *Théorie du ius cogens international. Essai de relecture du concept* (2001); A. Orakhelashvili, *Peremptory Norms in International Law* (2006); Focarelli, ‘Promotional Jus Cogens: A Critical Appraisal of Jus Cogens’ Legal Effects’, 77 *Nordic J Int’l L* (2008) 429; *Ibid.*, ‘Immunità des Etats et Jus Cogens. La dynamique du droit international et la fonction du jus cogens dans le processus de changement de la règle sur l’immunité juridictionnelle des Etats étrangers’, 112 *RGDIP* (2008) 761; Kolb, ‘Observation sur l’évolution du concept de jus cogens’, 113 *RGDIP* (2009) 837.

²¹⁶ Cf. J. Crawford, *The International Law Commission’s Articles on State Responsibility. Introduction, Text and Commentaries* (2002), at 244, para. 7.

²¹⁷ See, e.g., Ragazzi, *supra* note 203, at 190–210; Tams, *supra* note 203, at 141–153. For a thorough analysis of the distinction between obligations *erga omnes* and *jus cogens* see Picone, ‘La distinzione tra norme internazionali di “jus cogens” e norme che producono obblighi “erga omnes”’, 91 *Rivista di diritto internazionale* (2008) 5.

automatically – drawn. The basic assumption is invariably that certain (treaty or customary) international law rules are so important (and/or of common concern) that all of their addressees have a legal interest in compliance. The consequence is generally drawn that all addressees have a legal interest or a right, if not an obligation, to demand compliance. From a ‘common interest’ in the protection of the underlying values a ‘legal interest’ of all states in compliance is drawn.²¹⁸ What particular course of action is allowed (if not imposed) in pursuance of the ‘legal interest’ in compliance remains obscure, however. A wide range of measures are conceivable in the abstract, as evidenced by our previous discussion. However, not all collective measures may be permitted under the same circumstances (e.g., countermeasures might not be permitted in cases in which the ICJ, or other international bodies, may be appealed to) and not all possible measures may rest on the same standing requirements (e.g., a state may be entitled in a given situation to institute proceedings before the ICJ, or other international bodies, but not to adopt countermeasures). One may think that the particular ‘legal interest’ to respond relevant to each case depends on existing rules and/or on the practice prevailing in the area of the law at hand, whether it be the ICJ’s jurisdiction or the power to adopt countermeasures or other. But it is difficult to see, then, what purposes the general category of obligations *erga omnes* may serve: the *erga omnes* effects would be derived from existing law and/or practice on a case by case basis. If obligations *erga omnes* as a general category are to be given a univocal meaning, it seems that they should *automatically* – i.e. without any possible differentiation either in their effects or in their standing requirements – produce all possible *erga omnes* effects, a conclusion which stretches the concept very far indeed and actually has little evidential foundations.²¹⁹ And if the *erga omnes* category is construed as producing a variety of different effects in diverse contexts, then a further criterion is still needed (indeed a *decisive* criterion) to identify these different legal regimes.

In fact, the line of reasoning often followed for both obligations *erga omnes* and *jus cogens* seems to proceed by three logical passages: first, an urgent common ‘need’ for certain legal rules (producing *erga omnes* and/or peremptory effects) is detected in order for the international community as a whole to see its most fundamental values adequately protected; secondly, this need generates a ‘legal interest’ to see such a need fulfilled; thirdly, the existence of an *erga omnes* and/or overriding legal rule capable of fulfilling such a need is inferred. In so doing, what is at best a need for a rule

²¹⁸ The passage from ‘importance’ and ‘common concern’ to a ‘legal interest’ in compliance is (*inter alia*) found in the *Barcelona Traction* Judgment, *supra* note 206.

²¹⁹ E.g., the ICJ has repeatedly refused to draw from the *erga omnes* concept the consequence that jurisdiction can be exercised even without the consent of the state accused in derogation from the otherwise applicable consensual rule and in the light of the ‘importance’ of the rule allegedly breached: *supra* notes 207 and 209. Another question is that of standing to institute ICJ proceedings against a state which has given its consent to be sued (*jus standi* or *intérêt à agir*), on which see, e.g., Kawasaki, ‘The “Injured State” in the International Law of State Responsibility’, 28 *Hitotsubashi J L and Politics* (2000) 27; and Tams, *supra* note 203, at 158–197.

easily becomes a 'legal interest' (in seeing the desired rule complied with) and, finally, an *erga omnes* and/or an overriding rule capable of producing effects which all other rules do not produce. If the two extremes of this reasoning are directly connected, what emerges is a syllogistic transformation of a *need* for a rule into an existing *erga omnes* and/or even overriding rule. This allows the interpreter to create a generic *erga omnes* effect or to *bypass any existing rule* simply by elaborating on the *need* for the *erga omnes* effect or for a 'superior' opposite rule. No doubt, this process may be important and even unavoidable to *change* existing law in the direction of needs and values which are felt vital to humankind, but this cannot justify mistaking a legal need for the law in force at a given moment. Underlying this approach is after all the unintended notion that international law is an *instrument* to be used in the struggle towards desirable goals, a notion which is typically advanced by major powers. If one accepts that a pressing need for certain rules (or for rules contemplating obligations *erga omnes* in particular) can *ipso facto* generate such rules, even providing them (as peremptory in particular) with an overriding force, the ultimate end is a denial of international law as a sufficiently objective legal system common to all, since every rule – despite its being in fact accepted by the generality of states as an existing legal rule – would constantly be open to be set aside by any need for a different rule (either structurally contemplating obligations *erga omnes* or substantively producing special peremptory effects), and the only relevant needs in practice are inevitably those of the strongest.²²⁰

In short, the need for greater compliance – no doubt a paramount need in the international (as well as in any) legal system – cannot automatically and logically generate obligations *erga omnes* solely because a higher degree of compliance is, rightly or wrongly, believed to follow. As mentioned, even when an obligation is proved *erga omnes*, this obligation does not necessarily entail a commitment of all states to take all possible and imaginable measures capable of inducing transgressor states to compliance.

It may be thought that the 2001 ILC Articles on the Responsibility of States provide some guidance. Article 48 stipulates that any state other than the 'injured state' may 'invoke' the responsibility of another state for a breach of an *erga omnes* obligation and, as a consequence, 'may claim' cessation of the international wrongful act, assurances and guarantees of non-repetition, as well as performance of the obligation of reparation in the interest of the injured state or of the beneficiaries of the obligation breached. In turn, Article 54 provides that states other than the injured state may take 'lawful measures'.²²¹ The comment to Article 54 takes a very cautious approach to the possibility that 'lawful measures' include countermeasures as opposed to mere retorsions, pointing out that 'there appears to be no clearly recognised entitlement of States referred to in Article 48 to take countermeasures in the collective interest' and for this very reason Article 54 'speaks of "lawful measures" rather than

²²⁰ For a more detailed analysis on the critique developed in the text see Focarelli, *supra* note 215, at 429–459. For a recent critical analysis of legal instrumentalism see B.Z. Tamanaha, *Law as a Means to an End. Threat to the Rule of Law* (2006).

²²¹ Cf. Crawford, *supra* note 216, at 276–280.

“countermeasures”²²². Overall, it is unclear what ‘third states’ may really do against breaches of obligations *erga omnes*. A mere demand for cessation or non-repetition of the breach is in itself a discretionary and *per se* lawful act which hardly violates the principle of non-interference in the domestic affairs of the transgressor state.²²³ The term ‘invoke’ is inherently ambiguous. The comment to Article 48 also uses, as synonyms, ‘request’, ‘claim’, and ‘demand’, but this may simply refer to means of compliance already provided for by a treaty, such as the possibility of appealing to monitoring bodies expressly provided by a human rights treaty, or to a mere verbal protest. Moreover, Article 48 implies that states other than the injured state have a discretionary power (as opposed to an obligation) to ‘invoke’ the responsibility of the transgressor state, as evidenced by terms like ‘entitled’ and ‘may’. It also seems to imply that measures directed to ‘invoke’ the responsibility of the transgressor state do not include *per se* lawful measures (or measures which are permitted even when the obligation is not *erga omnes*) since states may take such measures under any circumstances. By contrast, Article 41 sets out certain obligations concerning serious violations of *jus cogens* and may thus envisage an obligation to take *per se* lawful measures.

The ICJ pronounced itself on the consequences of a violation of obligations *erga omnes* especially in the *Wall* Advisory Opinion (2004).²²⁴ Here the Court held that rules of humanitarian law constituting ‘intransgressible principles of international customary law’, as referred to in the 1996 *Nuclear Weapons* Advisory Opinion,²²⁵ ‘incorporate obligations which are essentially of an *erga omnes* character’,²²⁶ adding that under Article 1 of the Fourth Geneva Convention ‘every party . . . , whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in questions are complied with’.²²⁷ Finding Israel in breach of obligations *erga omnes*, the Court spelled out the consequences to be attached to their violation, namely the obligation of all states ‘not to recognise the illegal situation resulting from the construction of the wall’ and ‘not to render aid or assistance in maintaining the situation created by such construction’.²²⁸ As is well known these consequences are those provided for in Article 41 of the ILC Articles on State Responsibility in relation to

²²² Cf. *ibid.*, at 302–305, paras 6–7. A decidedly stronger position in favour of collective countermeasures was adopted more recently by the *Institut de droit international* (IDI) in a Res on obligations and rights *erga omnes* in international law adopted in 2005 in Cracow (available at: www.idi-iil.org/idiE/resolutionsE/2005_kra_01_en.pdf). Art. 5(c) of the Res provides that ‘should a widely acknowledged grave breach of an *erga omnes* obligation occur, all the States to which the obligation is owed . . . are entitled to take non-forcible counter-measures under conditions analogous to those applying to a State specially affected by the breach’. An accurate, but ultimately not fully convincing, analysis in favour of countermeasures taken by all states as a response to breaches of obligations *erga omnes* has been developed, on the basis of state practice, by Tams, *supra* note 203, at 198–251.

²²³ Cf. Art. 1 of the IDI Res of 1989 on the Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States, available at: www.idi-iil.org/idiE/resolutionsE/1989_comp_03_en.PDF.

²²⁴ *Supra* note 208.

²²⁵ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 226, at para. 79.

²²⁶ Cf. [2004] ICJ Rep 136, at para. 157.

²²⁷ *Ibid.*, at para. 158.

²²⁸ *Ibid.*, at para. 159.

serious violations of international peremptory norms. The Court avoided mentioning the possibility of taking countermeasures and allowing all states to bring a case before it or in any case any other *positive* measures against the transgressor. The Court did recall that ‘certain participants in the proceedings contended that the states parties to the Fourth Geneva Convention are *obliged* to take measures to ensure compliance with the Convention’, that they are ‘under an *obligation* to prosecute or extradite the authors’ of breaches of the Convention and that ‘the United Nations Security Council *should* consider flagrant and systematic violation of international law norm[s] . . . particularly . . . international humanitarian law, and take all necessary measures to put an end [to] these violations’.²²⁹ However, apart from recommending the UN General Assembly and Security Council to ‘consider further action’ and to ‘take due account’ of the *Wall* Advisory Opinion itself,²³⁰ the Court carefully abstained from discussing such a contention.²³¹

In the *Nicaragua* judgment the Court had previously held that common Article 1 provides for an obligation which ‘does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression’, precisely ‘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’.²³² The obligation ‘not to encourage’ a breach of the Geneva Conventions, which might be understood as a specification of the obligation not to render aid, is different from the undertaking ‘to ensure respect’ for the Geneva Conventions set out in common Article 1, in that it does not require the taking of positive action.²³³ A state which does nothing in its power against a transgressor of the Geneva Conventions is not in breach of a duty not

²²⁹ *Ibid.*, at para. 146; emphasis added. See Kattan, ‘The Wall, Obligations *Erga Omnes* and Human Rights: The Case for Withdrawing the European Community’s Terms of Preferential Trade with Israel’, 13 *Palestine Yrbk Int’l L* (2004/2005) 71.

²³⁰ *Supra* note 226, at para. 160.

²³¹ In their individual opinions Judges Higgins and Kooijmans explained why they could not join the majority on this point. In Judge Higgins’ view, ‘[t]hat an illegal situation is not to be recognized or assisted by third parties is self-evident, requiring no invocation of the uncertain concept of “*erga omnes*”’ (at para. 38) and common Art. 1 ‘is simply a provision in an almost universally ratified multilateral Convention’ (at para. 39). Judge Kooijmans, after stating that the duty to co-operate referred to in Art. 41(1) of the ILC Articles on State Responsibility ‘does not refer to individual obligations of third States’ (at para. 42) and that ‘the duty not to recognize an illegal fact . . . amounts . . . to an obligation without real substance’ (at para. 44), concluded that a duty of abstention – such as the obligation ‘not to encourage’ breaches of the Geneva Conventions mentioned by the ICJ in the *Nicaragua* case (*infra* note 232) – ‘is completely different from a positive duty to ensure compliance with the law’ (at para. 49). He failed ‘to see what kind of positive action, resulting from this obligation [as supposedly envisaged by common Article 1], may be expected from individual States, apart from diplomatic demarches’ (at para. 50).

²³² Cf. *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits [1986] ICJ Rep 14, at para. 220. The general principle affirmed in the *Nicaragua* Judgment was assumed by the ICTY Appeals Chamber in the *Tadić* decision of 2 Oct. 1995 as laying down ‘an obligation that is incumbent, not only on States, but also on other international entities including the United Nations’ (available at: www.icty.org/x/cases/tadic/acdec/en/51002.htm, at para. 93).

²³³ Cf. Kalshoven, *supra* note 1, at 56.

to encourage the unlawful situation, while it may well be in breach of common Article 1 for having failed to take positive action.

Briefly, Article 1 is not *in itself* a rule contemplating special consequences for the violation of the Geneva Conventions. If certain special consequences of the breach of humanitarian law are provided for by current international law, this is not because of Article 1, but rather because it is provided for by another source. To state that Article 1 reflects customary international law does not assist much if its content is not clearly determined. The indeterminacy of Article 1 cannot be supplemented by elevating it to the rank of customary law, much less to the *status* of obligations *erga omnes* or of *jus cogens*. International law may provide for special consequences of the breach of international humanitarian law, but this depends on state practice and *opinio juris*, not on Article 1. Article 1 is thus not in itself a ‘quasi-constitutional’ rule; it is not even an ‘ordinary’ rule having a meaningful autonomous legal content. It is a generic reminder of an obvious obligation to abide by the Geneva Conventions and of the fact that all contracting states are expected to see to it that all others abide by the Conventions, more specifically a reminder of obligations already set out in other rules – included in the Conventions and/or customary in character – along with a recommendation to remain active in the effort by lawful measures to induce all contracting states to abide by the Conventions.

8 Conclusion

The text of common Article 1 of the 1949 Geneva Conventions is the result of a variety of concerns which were originally not linked to measures taken by contracting states against other contracting states failing to comply with the Conventions. It clearly implied an undertaking by contracting states to adopt (not only negative, but also) positive measures towards their own organs and private individuals to induce them to abide by the Conventions. It is true that states and international bodies have generally endorsed, on several occasions, the text of common Article 1, but without specifying its autonomous legal content. The phrases ‘ensure respect’ and ‘in all circumstances’ have been uncritically understood to imply a ‘state-compliance’ meaning, drawing upon the (very ambiguous) ICRC Commentaries to the 1949 Geneva Conventions and to the 1977 Additional Protocols. This interpretation has gained currency despite a widespread opposite reading of similar terms contained in human rights treaties and an ‘individual-compliance’ meaning of many other provisions of the Geneva Conventions themselves. Lists of measures ‘available’ to contracting states against other contracting states deemed to be in breach of the Conventions have been proposed without investigating whether these measures were *per se* lawful or unlawful and whether their adoption was legally required, or authorized or merely recommended under common Article 1. Hybrid, often confusing solutions, like a ‘right-duty’ or an indiscriminate mixture of formulae, as found in the ICRC Commentaries themselves, have been suggested. But the term ‘undertake’ in Article 1 excludes discretionary measures, while implying an undertaking of *all* contracting states to react, which makes this provision

highly problematic. If *all* 194 contracting states have an *obligation* to take *all positive* measures in their power to respond to the one of them which has happened to breach the Geneva Conventions, then all those which do not react turn out to be in breach of common Article 1 and, since contracting states generally do not react, one should conclude that there are 193 or so breaches of Article 1 for any breach of the Geneva Conventions, a very extreme construction which is far from being supported by state practice: allegations of a breach of the Geneva Conventions by a contracting state are virtually never accompanied by parallel allegations of breaches of Article 1 committed by all other contracting states which are deemed not to have adopted all positive measures in their power against the transgressor. Furthermore, certain measures the adoption of which is expressly required or authorized by *ad hoc* provisions of the Geneva Conventions have been redundantly linked to Article 1. This holds true also for the phrase 'in all circumstances', the scope of which cannot be all-pervasive, and specific meanings are already set out in *ad hoc* provisions other than Article 1.

Finally, the proposition that Article 1 is a 'quasi-constitutional' rule of current international law has been suggested on the basis of speculative thinking and generic practice, assuming that a pressing need for greater compliance with international humanitarian law requires that its rules are *erga omnes* in character and allow (if not impose) measures by all contracting states against transgressors. However, according to the ICJ's case law and despite a remaining unclear overlap of the consequences of their violation with those of serious violations of *jus cogens*, the breach of obligations *erga omnes* implies only negative obligations (not to recognize the unlawful act and not to aid the transgressor), in addition perhaps to a generic duty to co-operate under Article 41(1) of the ILC Articles on State Responsibility, a duty specified in any event in Article 89 of Additional Protocol I. A discretionary power to take countermeasures by all states is highly contentious, while an obligation to adopt countermeasures is generally excluded, apart from measures imposed by the UN Security Council under Article 41 of the Charter. In contrast, Article 1 in itself provides for an *undertaking* to take *positive* action. It might be objected that a construction of Article 1 devoid of any autonomous legal meaning would fly in the face of the '*effet utile*' principle. It may be replied that the '*effet utile*' principle works only when two opposite meanings of a legal provision are equally plausible and not when a new meaning is to be created *ex nihilo*. This being the case, common Article 1 is no more than a reminder of all obligations (negative and positive) to 'respect' the Geneva Conventions which has progressively acquired an unspecified recommendatory meaning for contracting states to adopt lawful measures to induce other contracting states to comply with the Conventions.