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The “External Element” of the Obligation to Ensure Respect for the Geneva Conventions: A Matter of Treaty Interpretation

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I. INTRODUCTION

In 1949, the drafters of the Geneva Conventions decided to place the obligation for States parties to “respect and ensure respect” for the Conventions upfront. The obligation was codified as the very first article of the four Conventions, which is why it is generally referred to as “common Article 1.”¹

How the obligation to “respect and ensure respect” should be interpreted has been the subject of debate for many years. This debate has focused in particular on the meaning to be attributed to the words “ensure respect.” Some see these words as playing an important role in ensuring compliance with international humanitarian law (IHL). In particular, they argue that the obligation to ensure respect has an external element or dimension which obliges States parties to the Geneva Conventions to take positive steps to ensure compliance with those conventions by other States and even organized armed groups.² Others suggest that the obligation to ensure respect is a “soap bubble” devoid of any autonomous legal meaning.³

The debate has been reinvigorated by the publication of the updated International Committee of the Red Cross (ICRC) commentaries to Geneva Conventions I, II, and III. These commentaries attribute an expansive meaning to common Article 1.⁴ A number of commentators have taken issue with

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

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

3. Carlo Focarelli, *Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?*, 21 EUROPEAN JOURNAL OF INTERNATIONAL LAW 125, 171 (2010).

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

this reading and argue for a much less far-reaching interpretation of the article. They suggest that in recent years the international courts, the ICRC, and academic commentators have “reimagined” common Article 1.⁵

The answer to the question of whether Article 1 contains an external element is important because if this is the case the potential responsibility of States parties under the Geneva Conventions is greater than if it is not. Such an obligation would go beyond the bases for responsibility under the law of State responsibility, in particular Article 16 of the International Law Commission’s (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts.⁶ Just how much further depends on the scope of the obligation: does it only require States not to do something, or does it also impose positive obligations, and does it apply only in international armed conflicts (IACs) or also in non-international armed conflicts (NIACs)? This article will not address these questions. Instead, it focuses on whether an interpretation of common Article 1 leads to the conclusion that it contains an external element in the first place. If the answer to that question is in the affirmative, it is, of course, important to determine the scope of such an element.

It is interesting to note that the *travaux préparatoires* of the Geneva Conventions, as well as State practice, play an important part in the argumentation used by both sides of the debate. Yet, those sides draw very different conclusions from the same information. This suggests that it is worthwhile to take a fresh look at the drafting history of common Article 1 and State practice regarding the provision. That is the objective of this article, which will place those two elements in the broader framework of treaty interpretation. Common Article 1 is a treaty provision and establishing its meaning is thus a matter of treaty interpretation. Therefore, the article will focus on applying the rules of treaty interpretation to common Article 1 to determine whether it has an external element.

COMMENTARY TO GENEVA CONVENTION II]; INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD ¶¶ 125–26, 153–79 (2016) [hereinafter ICRC, 2016 UPDATED COMMENTARY TO GENEVA CONVENTION I].

5. See Michael N. Schmitt & Sean Watts, *Common Article 1 and the Duty to “Ensure Respect,”* 96 INTERNATIONAL LAW STUDIES 674, 679 (2020); see also Verity Robson, *The Common Approach to Article 1: The Scope of Each State’s Obligation to Ensure Respect for the Geneva Conventions*, 25 JOURNAL OF CONFLICT AND SECURITY LAW 101 (2020).

6. G.A. Res. 56/83, annex, art. 16, Responsibility of States for Internationally Wrongful Acts (Jan. 28, 2002).

The article proceeds from two premises. First, that determining the meaning of common Article 1 is a matter of treaty interpretation. This means that the rules on treaty interpretation are to be applied. Those rules have been codified in the Vienna Convention on the Law of Treaties (VCLT).⁷ They are generally considered to reflect customary international law, including by the International Court of Justice (ICJ).⁸ These rules are not always applied equally consistently in writings on common Article 1, however. In particular, a narrow focus on the *travaux préparatoires* of a treaty provision does not fully take into account all the elements that play a role in the interpretation of a treaty provision. The second premise is that the writing on common Article 1 has not to date considered all available State practice. It will be shown that there is additional practice available from a number of States.

Proceeding from these premises, the article attempts to establish the meaning of common Article 1. It focuses, in particular, on the obligation to ensure respect, specifically on whether that obligation contains an external element. The article will not discuss whether the obligation to ensure respect constitutes an obligation under customary international law. This is a consequence of the article's focus on the interpretation of the treaty provision in the Geneva Conventions. As stated above, it will also not enter into the debate on the precise content of an external element, if there is one. Views on the content that others have put forward range from an obligation not to encourage parties to an armed conflict to commit violations of IHL to a duty to take far-reaching measures to prevent and sanction such violations.⁹ Finally, the article will not address whether the obligation to ensure respect only applies in IACs or also applies in NIACs.

The article is structured as follows. Part II will introduce the obligation to ensure respect, followed by a discussion of the relevant rules of treaty interpretation in Part III. In Part IV, the general rule of treaty interpretation

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

8. *See, e.g.*, Jadhav (India v. Pak.), Judgment, 2019 I.C.J. Rep. 418, ¶ 71 (July 17); Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. Rep. 12, ¶ 83 (Mar. 31); Immunities and Criminal Proceedings (Eq. Guinea v. Fr.), Judgment, ¶ 61 (Dec. 11, 2020), <https://www.icj-cij.org/public/files/case-related/163/163-20201211-JUD-01-00-EN.pdf>.

9. The ICJ in the *Nicaragua* case held that common Article 1 prohibited the United States from encouraging violations of IHL by the Contras. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 114 (June 27). For further reaching views on what is required under common Article 1, see, e.g., ICRC, 2021 UPDATED COMMENTARY TO GENEVA CONVENTION III, *supra* note 4.

will be applied to common Article 1. Part V will consider supplementary means of interpretation, including the *travaux préparatoires* of the provision. The article concludes with several final considerations.

II. INTRODUCTION OF THE OBLIGATION TO “ENSURE RESPECT”

The obligation to ensure respect was not part of an IHL treaty before 1949. In that year, it was inserted in common Article 1 of the Geneva Conventions. The rest of the Article had previously been included in the 1929 Geneva Convention relative to the Treatment of Prisoners of War¹⁰ and the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field of the same year.¹¹ Articles 82 and 25, respectively, of these two Conventions, provide, *inter alia*, that “The provisions of the present Convention shall be respected by the High Contracting Parties in all circumstances.”

The words “ensure respect” originated from a draft submitted by the ICRC in May 1948 to the XVIIth International Conference of the Red Cross and Red Crescent.¹² They were included in the drafts discussed at the diplomatic conference that drafted the 1949 Conventions. That conference adopted what is now common Article 1 with minor changes and little discussion.¹³

10. Convention relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, T.S. No. 846, 118 L.N.T.S. 343 [hereinafter 1929 Prisoner of War Convention].

11. Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, July 27, 1929, 47 Stat. 2074, T.S. No. 847, 118 L.N.T.S. 303 [hereinafter 1929 Convention for the Wounded and Sick in the Field].

12. INTERNATIONAL COMMITTEE OF THE RED CROSS, DRAFT REVISED OR NEW CONVENTIONS FOR THE PROTECTION OF WAR VICTIMS 4, 34, 51, 222 (1948), https://www.loc.gov/rr/frd/Military_Law/pdf/RC_Draft-revised.pdf.

13. Knut Dörmann & Jose Serralvo, *Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations*, 96 INTERNATIONAL REVIEW OF THE RED CROSS 707, 714 (2014).

In 1977, the obligation to “respect and ensure respect” was also inserted in Additional Protocol I to the Geneva Conventions,¹⁴ but not in Additional Protocol II.¹⁵ In 2005, it was included in Additional Protocol III.¹⁶

As little discussion as there was concerning common Article 1 at the diplomatic conference that adopted the Geneva Conventions, there has been much debate in subsequent years concerning how to interpret the phrase. The heart of the debate is whether the “ensure respect” provision obliges States to ensure respect by their people as a whole or whether it also contains an “external dimension.” “External dimension” or “external element” refers to an obligation for States to ensure respect for the Conventions, not only internally (i.e., by their nationals), but also by other States, and possibly even by organized armed groups involved in extraterritorial NIACs.¹⁷ The debate was fueled by the ICJ’s reference to common Article 1 in its judgment in the *Nicaragua* case in 1986.¹⁸

The invocation of the provision by the ICJ in its advisory opinion in the *Wall* case in 2004 further stimulated the debate.¹⁹ More recently, the provision has again become the center of attention following the publication of updated ICRC commentaries to the Geneva Conventions from 2016 onward. In those, the ICRC takes what has been referred to as an “expansionist” position on how the obligation to ensure respect should be interpreted.²⁰ The ICRC considers that the obligation includes an external dimension related to ensuring respect for the Conventions by other States: “Accordingly, States, whether neutral, allied or enemy, must do everything reasonably in

14. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 1(1), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

15. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

16. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem art. 1(1), Dec. 8, 2005, 2404 U.N.T.S. 261 [hereinafter Additional Protocol III].

17. See Geiss, *supra* note 2, at 126.

18. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 220 (June 27).

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

20. See *supra* note 4 and accompanying text.

their power to ensure respect for the Conventions by others that are Party to a conflict.”²¹

A few States and commentators have taken issue with this position. They have stated that they do not believe that the obligation to ensure respect has an external dimension. In particular, the United States has made this clear. In remarks by the then-U.S. State Department Legal Adviser Brian Egan delivered at the 2016 annual meeting of the American Society of International Law, he stated:

Some have argued that the obligation in Common Article 1 of the Geneva Conventions to “ensure respect” for the Conventions legally requires us to undertake such steps and more vis-à-vis not only our partners, but all States and non-State actors engaged in armed conflict. Although we do not share this expansive interpretation of Common Article 1, as a matter of policy, we always seek to promote adherence to the law of armed conflict generally and encourage other States to do the same.²²

III. THE RULES OF TREATY INTERPRETATION

As seen above, there are different views on the correct interpretation of common Article 1 and, in particular, on the obligation to ensure respect. This raises the question of what rules should be applied to interpret this provision. The starting point for the answer is that the Geneva Conventions, as well as Additional Protocols I and III, are treaties; consequently, they are to be interpreted using the rules of treaty interpretation. These rules have been codified in the VCLT. It does not matter that the VCLT was adopted twenty years after the Geneva Conventions, because the interpretation of those Conventions takes place in the present. Article 31 VCLT sets out the general rule of treaty interpretation:

21. ICRC, 2017 UPDATED COMMENTARY TO GENEVA CONVENTION II, *supra* note 4, at 48.

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

Article 31
General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

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

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.²³

Article 31 does not provide a hierarchy between the various means of interpretation that are part of the general rule. It follows from this that the various means set forth in Article 31 are of equal value; none are of an inferior character. They are to be considered in one (and the same) process of application: they are part of one “single combined operation.”²⁴ Or, as the ILC’s special rapporteur on the law of treaties put it: “the process of

23. Vienna Convention, *supra* note 7, art 31.

24. MARK VILLIGER, COMMENTARY ON THE VIENNA CONVENTION ON THE LAW OF TREATIES 435 (2009); *see also* draft conclusion 2 (5) of the Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties adopted by the International Law Commission in 2016. Int’l Law Comm’n, Report of the Work of its Sixty-Eighth Session, U.N. Doc. A/71/10, at 119, 120 (2016) [hereinafter ILC Draft Conclusions].

interpretation was essentially a simultaneous one, though logic might dictate a certain order of thought.”²⁵

With respect to Article 31(3), it bears noting that the ILC initiated a study in 2008 on the topic of “treaties over time.” In 2012, the topic was changed to subsequent agreements and subsequent practice in relation to the interpretation of treaties. In 2016, the ILC adopted a set of draft conclusions on this topic on first reading, as well as commentaries on the draft conclusions.²⁶ The objective of the draft conclusions is to explain the role that subsequent agreements and subsequent practice play in the interpretation of treaties. They situate subsequent agreements and subsequent practice within the framework of the VCLT rules on interpretation by identifying and elucidating relevant authorities and examples and addressing certain questions that may arise when applying those rules.²⁷ In other words, the draft conclusions clarify certain aspects of Article 31(3).

Article 32 VCLT provides for supplementary means of interpretation. These may be used to confirm the meaning resulting from the application of Article 31 or to determine the meaning when the interpretation, according to Article 31, (a) leaves the meaning ambiguous or obscure, or (b) leads to a result that is manifestly absurd or unreasonable. Article 32 does not provide an exhaustive list of supplementary means of interpretation but merely states that these include the preparatory work of the treaty and the circumstances of its conclusion. What supplementary means may be considered along with those mentioned in the text has not yet been established conclusively in practice or doctrine.²⁸ It is commonly agreed that the subsequent practice of States not meeting the criteria of Article 31 qualifies as another supplementary means of interpretation.²⁹ This has been accepted by the ICJ.³⁰

25. [1966] 2 Y.B. Int'l Law Comm'n ¶ 36, at 206, U.N. Doc. A/CN/SER.A/1966/Add.1.

26. ILC Draft Conclusions, *supra* note 24.

27. *Id.* at 124.

28. Oliver Dörr & Kirsten Schmalenbach, *Article 32: Supplementary Means of Interpretation*, in *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 617, 626 (Oliver Dörr & Kirsten Schmalenbach eds, 2012).

29. *Id.* at 627.

30. *Kasikili/Sedudu Island (Bots./Namib.)*, Judgment, 1999 I.C.J. Rep. 1045, ¶¶ 79–80 (Dec. 13).

The rules laid down in Articles 31 and 32 have been held by international courts and tribunals to reflect customary international law, including by the ICJ and the International Tribunal for the Law of the Sea.³¹

As stated above, the means of interpretation set forth in Article 31 are intended to be applied in one single, combined operation. As a practical matter, however, the interpreter of a treaty provision will have to start somewhere and proceed step by step. Only after all the steps have been taken can a final conclusion be drawn because all the elements are to be evaluated together.³² The logical first step is to consider the ordinary meaning of the term.³³

This is of particular importance because some commentators, in their interpretation of common Article 1, attach great importance to its *travaux préparatoires*. Mainly based on this drafting history, they conclude that the intention of parties that adopted the Article was not to include an external dimension.³⁴

It is true that the objective of treaty interpretation is to give effect to the presumed intention of the parties. However, this presumed intention is to be established by applying the various means of interpretation recognized in Articles 31 and 32. As the ILC states,

The “presumed intention” is thus not a separately identifiable original will, and the *travaux préparatoires* are not the primary basis for determining the presumed intention of the parties, but they are only, as article 32 indicates, a supplementary means of interpretation. And although interpretation must seek to identify the intention of the parties, this must be done by the interpreter on the basis of the means of interpretation that are available at the time of the act of interpretation and that include subsequent agreements and subsequent practice of parties to the treaty. The interpreter thus has to answer the question of whether parties can be presumed to have intended, upon the conclusion of the treaty, to give a term used a meaning that is capable of evolving over time.³⁵

31. *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgement, 2010 I.C.J. Rep. 14, ¶ 64 (Apr. 20); *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, 2011 ITLOS Rep. 10, ¶ 57.

32. RICHARD GARDINER, *TREATY INTERPRETATION* 30 (2008).

33. VILLIGER, *supra* note 24, at 436.

34. See, e.g., Frits Kalshoven, *The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit*, 2 *YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW* 3, 54 (1999).

35. ILC Draft Conclusions, *supra* note 24, at 183–84.

The parties' intention can thus be defined as the result one reaches if the general rule of interpretation is applied correctly.³⁶ Correct application means that the *travaux préparatoires* may be considered in certain circumstances but are far from the only thing to consider. Notably, subsequent practice is also relevant. This article takes as its starting point that, in this sense, treaty interpretation can be evolutionary.³⁷

IV. THE RULES OF TREATY INTERPRETATION APPLIED TO COMMON ARTICLE 1

A. Ordinary Meaning

The element of ordinary meaning of terms implies a textual approach. The starting point in the process of interpretation is a linguistic and grammatical analysis of the text of the treaty, looking for meaning that is regular, normal, or customary.³⁸ It is usual to look at the dictionary meaning of a term when trying to ascertain its ordinary meaning. The dictionary meaning of "ensure" is "make certain that (something) will occur or be so."³⁹ The meaning of "respect" is "to have respect for; avoid harming or interfering with; agree or recognize and observe (a law, rule, etc)."⁴⁰ These definitions do not shed much light on the meaning of the term "ensure respect" in common Article 1.

Some authors assert that when interpreting a treaty provision's ordinary meaning it is appropriate to look to other rules of international law.⁴¹ However, this does not appear to be the usual way the ordinary meaning element is understood. Other rules of international law do play a role in treaty interpretation under Article 31(3)(c), but the only relevant rules are those applicable between the parties to the treaty being interpreted. In other words, as

36. EIRIK BJORGE, *THE EVOLUTIONARY INTERPRETATION OF TREATIES* 63 (2013).

37. For the purposes of this article, it is not necessary to elaborate further on the debate concerning evolutionary interpretation of treaties. For further information, see, e.g., Pierre-Marie Dupuy, *Evolutionary Interpretation of Treaties: Between Memory and Prophecy*, in *THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION* 123 (Enzo Cannizzaro ed., 2011); Martin Dawidowicz, *The Effect of the Passage of Time on the Interpretation of Treaties: Some Reflections on Costa Rica v. Nicaragua*, 24 *LEIDEN JOURNAL OF INTERNATIONAL LAW* 201 (2011).

38. GARDINER, *supra* note 32, 164.

39. *NEW POCKET OXFORD DICTIONARY* 297 (Catherine Soanes ed., 2001).

40. *Id.* at 769.

41. Schmitt & Watts, *supra* note 5, at 685.

part of a step that is normally taken later in the process of treaty interpretation.

B. Context

The element of context in treaty interpretation directs attention to the whole text of the treaty, its preamble, and, where applicable, annexes.⁴² Some authors note that most of the obligations set forth in the Geneva Conventions are imposed only on States that are party to the conflict. They suggest that this points toward an interpretation of common Article 1 that does not include an external element.⁴³ However, where provisions of the Geneva Conventions impose obligations only on parties to the conflict, they generally use the term “Party to the conflict” or “belligerent.”⁴⁴ This suggests that where the term “High Contracting Parties” is used, such as in common Article 1, this means something other than parties to the conflict. Michael Schmitt and Sean Watts put forward that the Conventions “expressly set forth the situations in which States must or may act *vis-à-vis* the activities of other States.”⁴⁵ As an example, they point to Article 12 of Geneva Convention III, which imposes a duty to monitor the treatment accorded prisoners of war who have been transferred to another State.⁴⁶

It is certainly true that this and several other provisions in the Geneva Conventions refer clearly to the relationship between different parties to the Conventions. This does not mean that this is the case for all their provisions, however. For instance, Article 131 of Geneva Convention III provides that “[n]o High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party” for grave breaches. Article 131 does not mention the State that would hold the High Contracting Party concerned liable, even though there clearly must be such other State.

Some commentators maintain that the instruments specifically contemplate roles for certain States in fostering compliance by belligerent States. Most significant among these roles is service by neutral States as Protecting Powers on behalf of belligerent States.⁴⁷ It could well be argued, however,

42. GARDINER, *supra* note 32, at 177.

43. *See, e.g.*, Schmitt & Watts, *supra* note 5, at 679.

44. *See, e.g.*, Geneva Convention I, *supra* note 1, arts. 12–16.

45. Schmitt & Watts, *supra* note 5, at 686.

46. *Id.*

47. *Id.*

that Protecting Powers are given a number of very specific responsibilities and powers, which do not exclude the more general obligations of High Contracting Powers.⁴⁸ In addition, an argument that only (or at least primarily) Protecting Powers are charged with ensuring compliance by parties to a conflict would be stronger if it were obligatory for parties to a conflict to appoint a Protecting Power. If there were such an obligation, it would ensure there would always be a State monitoring compliance. However, this is not how common Article 8 (Article 9 of Geneva Convention IV) of the Conventions is presently understood.⁴⁹ Since 1949 the appointment of Protecting Powers has been the exception rather than the rule in IACs.⁵⁰ It would seem that the failure to appoint a Protecting Power is not, at least in the eyes of most States, seen as a violation of their treaty obligations.⁵¹

The Geneva Conventions use the term “ensure” in a number of other articles beyond common Article 1. Examples from Geneva Convention IV include Articles 24, 39, 49, 93, 127, and 130. In these other articles, “ensure” clearly refers only to compliance by the State itself, excluding an external element. This, it has been argued, militates against an external element being included in common Article 1.⁵² On the other hand, these articles generally describe the holder of the obligation concerned as “the Party to the conflict,” “the Detaining Power,” or a similar term which makes clear that these obligations are imposed only on States directly involved in the conflict. In that sense, these articles differ from common Article 1, which imposes an obligation on all the High Contracting Parties, so it is doubtful that the meaning of the term “ensure” in those articles is instructive for determining its meaning in common Article 1.

Article 31(2) VCLT provides that the context for the purpose of treaty interpretation includes any agreement relating to the treaty made between all the parties in connection with the conclusion of the treaty, as well as any instrument made by one or more parties in connection with the conclusion

48. In this sense, see Laurence Boisson de Chazournes & Luigi Condorelli, *Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests*, 82 INTERNATIONAL REVIEW OF THE RED CROSS 67, at 76 (2000).

49. See, e.g., ICRC, 2017 UPDATED COMMENTARY TO GENEVA CONVENTION II, *supra* note 21, at 380–81.

50. See, e.g., Toni Pfanner, *Various Mechanisms and Approaches for Implementing International Humanitarian law and Protecting and Assisting War Victims*, 91 INTERNATIONAL REVIEW OF THE RED CROSS 279, 287 (2009).

51. ICRC, 2021 UPDATED COMMENTARY TO GENEVA CONVENTION III, *supra* note 4, ¶ 1227.

52. Focarelli, *supra* note 3, at 142–43.

of the treaty and accepted by the other parties as an instrument related to the treaty. There are no agreements or instruments that fit this description in relation to the Geneva Conventions.

C. *Object and Purpose*

According to the general rule of treaty interpretation, the terms of a treaty must be read in the light of their object and purpose. This is essentially a teleological exercise.⁵³ It gives expression to the assumption that a provision is intended to advance the general objective of the treaty of which it is a part.⁵⁴ There are different ways to determine the object and purpose of a treaty. It is common to refer to the preamble; the title may also be of assistance. In other cases, the type of treaty may itself give rise to an assumption of a particular object and purpose.⁵⁵

The titles of the four Geneva Conventions provide some indication of their object and purpose, that is the protection of specific groups of persons, either members of armed forces who have been placed *hors de combat* or civilians. Such an object and purpose militate in favor of an external element because doing so contributes to the implementation of the Conventions and thus lessens the suffering of the groups they protect.

The four Geneva Conventions do not contain a preamble to provide information on the motivations of the drafters. However, for Geneva Conventions I and III, reference may be had to the 1929 Geneva Conventions that preceded them. This is because, as expressed in Articles 59 and 134, respectively, their purpose is to replace the 1929 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field and the 1929 Convention relative to the Treatment of Prisoners of War. The 1929 Conventions do contain preambles, which underline the humanitarian nature of those Conventions.⁵⁶ It may be inferred that this was also the

53. GARDINER, *supra* note 32, at 189.

54. Oliver Dörr, *Article 31: General Rule of Interpretation*, in *THE VIENNA CONVENTION ON THE LAW OF TREATIES*, *supra* note 28, at 557, 584.

55. *Id.* at 585.

56. 1929 Prisoners of War Convention, *supra* note 10, pmb. (“to mitigate as far as possible, the inevitable rigours [of war] thereof and to alleviate the condition of prisoners of war”); 1929 Convention for the Wounded and Sick in the Field, *supra* note 11, pmb. (“to ameliorate the condition of the wounded and sick of armies in the field”).

motivation of the drafters of the 1949 Conventions I and III.⁵⁷ Such an object and purpose suggest an external element because such an element contributes to achieving humanitarian aims.

D. Agreements and Instruments Made in Connection with Conclusion of a Treaty

Article 31(2) VCLT provides that the context for the purpose of interpretation of a treaty includes any agreement relating to the treaty that was made between all the parties in connection with the conclusion of the treaty, as well as any instrument made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. There are no agreements or instruments that fit this description to assist in interpreting the Geneva Conventions.

E. Subsequent Agreements and Subsequent Practice

Article 31(2) VCLT refers to treaties and instruments concluded contemporaneously with the treaty being interpreted. Article 31(3) provides that subsequent agreements and practice are also part of the context.

At first sight, Additional Protocols I, II, and III would seem to qualify as relevant subsequent agreements. However, on closer inspection, this is not the case. This is because the only relevant subsequent agreements are those concluded between “the Parties.” “The Parties” means all the parties to the treaty being interpreted.⁵⁸ None of the Additional Protocols have been ratified by all of the High Contracting Parties to the 1949 Conventions. Therefore, these agreements cannot be considered in establishing the context of the terms of the Geneva Conventions.

Subsequent practice that may be considered is limited to practice in the application of a treaty that establishes the agreement of the parties regarding its interpretation. As in the case of subsequent agreements, “parties” refers to all parties to the treaty. This does not mean that all parties to the treaty must have contributed to the practice. What is required is not that the practice is in fact the practice of all parties, but that the practice establishes the

57. ICRC, 2016 UPDATED COMMENTARY TO GENEVA CONVENTION I, *supra* note 4, ¶ 112; ICRC, 2021 UPDATED COMMENTARY TO GENEVA CONVENTION III, *supra* note 4, ¶ 144.

58. ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES: THE MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 162 (2007).

agreement of all parties regarding its interpretation. Such a practice will not necessarily be a practice to which all parties themselves have contributed. All parties must, however, have acquiesced in the interpretation.⁵⁹ If the circumstances justify the assumption that a party has consented, even though the party itself did not contribute to the practice, then this is sufficient.⁶⁰ The ILC's draft conclusions on treaty interpretation have further clarified that for there to be "agreement of the parties" in the sense of Article 31(3)(b), a "common understanding" is required "regarding the interpretation of a treaty which the parties are aware of and accept."⁶¹ Subsequent practice in the sense of Article 31(3)(b) needs to be "concordant, common, and consistent" to be taken into account.⁶²

There is practice of the High Contracting Parties in the application of common Article 1 that supports the existence of an external element. This practice is not abundant, but the abundance of practice is not necessary for such practice to be included in the interpretation of the provision. What is required, again, is that this practice establishes the agreement of the parties. Because a small number of State parties to the Geneva Conventions have expressly rejected an interpretation that includes an external element, the available practice does not meet this requirement.⁶³

F. *Relevant Rules of International Law*

Relevant rules of international law applicable to the relations between the parties must also be considered in interpreting a treaty. The reference to international law must be understood as international law as it stands at the time the treaty is being interpreted, not at the time it was concluded.⁶⁴ The obligation to take international law into account is limited to rules that are relevant. It is not clear whether "parties" refers to all parties to the treaty being interpreted or only the parties to a specific dispute.⁶⁵ The former would limit the number of rules of international law that must be considered, particularly in interpreting treaties like the Geneva Conventions that have been universally ratified.

59. *Id.* at 167.

60. *Id.*

61. ILC Draft Conclusions, *supra* note 24, at 193.

62. GARDINER, *supra* note 32, at 227.

63. Schmitt & Watts, *supra* note 5, at 689–93.

64. GARDINER, *supra* note 32, at 251.

65. *Id.* at 269–75.

A number of authors opposing an interpretation of common Article 1 that includes an external dimension refer to the broader system of international law of which the Geneva Conventions are part. One commentator, for example, proffers that “States do not ordinarily assume responsibility for ensuring other States’ compliance with international law.”⁶⁶ Others consider that imbuing the term “ensure respect” with an external component would be unusual from an international law perspective. In their view, States are seldom responsible for ensuring *other* States’ compliance with international law.⁶⁷ This statement is true, but it does not necessarily lead to the conclusion that common Article 1 does not have an external dimension.

The Geneva Conventions also differ from many international agreements in other ways. Consider, for example, common Article 3, which imposes obligations specifically on non-State actors. In addition, it may be unusual for a treaty to impose an obligation relating to respect by other States, but there are examples of such treaties. A case in point is the Convention on the Prevention and Punishment of the Crime of Genocide. Article I of this Convention contains an undertaking by the Contracting Parties to prevent and punish genocide.⁶⁸ The ICJ has found that the obligation to prevent genocide includes an external element, in that it places States under positive obligations to do their best to ensure that genocidal acts do not occur.⁶⁹ It is noteworthy that the Genocide Convention was adopted in December 1948; in other words, in the same period that the Geneva Conventions were being drafted. It is unlikely that the drafters of those Conventions would have been unaware of the Genocide Convention.

If, and only if, the term “parties” as used in Article 31(3)(c) VCLT is read as not encompassing all parties to a treaty, can relevant treaties that have not been as widely ratified as the Geneva Conventions be taken into consideration. Under that reading, Additional Protocols I and III would then be relevant because the drafters of these treaties copied the wording of common Article 1 verbatim.⁷⁰ There was, however, little discussion of the meaning of this Article during the negotiation of the Protocols. As a consequence, the

66. Robson, *supra* note 5, at 104.

67. Schmitt & Watts, *supra* note 5, at 685.

68. Convention on the Prevention and Punishment of the Crime of Genocide art. 1, Dec. 9, 1948, 78 U.N.T.S. 277.

69. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶ 432 (Feb. 26).

70. Additional Protocol I, *supra* note 14, art. 1(1); Additional Protocol III, *supra* note 15, art. 1(1).

drafting history is somewhat inconclusive on the matter.⁷¹ In the words of Frits Kalshoven, there is almost nothing in the drafting history of Additional Protocol I “that could be relied upon one way or another in explaining the meaning of its text.”⁷²

It has been suggested that because Additional Protocol I sets forth several specific mechanisms for ensuring compliance by other States, this is evidence that its drafters did not rely on Article 1 to imply such remedial measures.⁷³ The fact that the Protocol includes specific measures does not in and of itself exclude the possibility of an overarching obligation that may be implemented both through those measures and the use of others not mentioned.

G. *Supplementary Means: Other Practice*

Whereas Article 31 VCLT deals with the general rule on treaty interpretation, Article 32 provides for the use of supplementary means of interpretation. Unlike in Article 31, these means do not have to be used but merely may be used, and then only in two situations. First, in “order to confirm the meaning resulting from the application of article 31,” or second, to “determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.” Given the discussion in the preceding Sections, it appears that the application of the elements of interpretation in Article 31 leaves the meaning of common Article 1 ambiguous. Different elements point in different directions concerning whether or not the article has an external dimension. This justifies using supplementary means of interpretation.

Article 32 does not contain a list of supplementary means. It only provides that they include the preparatory work of the treaty and the circumstances of its conclusion. It appears that State practice that does not meet the criteria of Article 31 also falls within this category. According to the ILC special rapporteur on subsequent agreements and subsequent practice in relation to the interpretation of treaties, Georg Nolte: “The taking into account of other treaty practice by States for the purpose of interpretation should not be excluded at the outset, since it may in some situations serve as a supplementary means of interpretation in the sense of article 32 of the

71. Geiss, *supra* note 2, at 121.

72. Kalshoven, *supra* note 34, at 47.

73. Schmitt & Watts, *supra* note 5, at 489.

Convention.”⁷⁴ This view was accepted by the ILC. Conclusion 2 paragraph 4 of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties provides that “Recourse may be had to other subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32.”⁷⁵

This is confirmed in the literature on Article 32.⁷⁶ It is also supported by the case law of various international courts and tribunals, including the ICJ.⁷⁷ Thus, the fact that practice does not establish the agreement of all parties does not necessarily exclude it from being taken into account.⁷⁸

There is a body of practice that fits this description in relation to common Article 1, although to say that it is abundant may be overstating the case.⁷⁹ Part of this practice suggests that States parties to the Geneva Convention accept that the article has an external dimension.

First, there is the practice of individual State parties to the Geneva Conventions. The government of the Netherlands, for example, has on several occasions referred to an external dimension. In 2016, the Minister of Defense stated in response to questions from Parliament concerning the alleged use of intelligence provided by the Netherlands to the United States in unlawful killings, that:

On the basis of international humanitarian law, the government has a duty to observe and enforce international humanitarian law. This means that if the government knows that a partner uses or will use information provided by the Netherlands to commit violations of international law and / or international humanitarian law, the question whether such information is shared with that partner will have to be answered again.⁸⁰

74. Georg Nolte (Special Rapporteur), *First Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties*, ¶ 107, U.N. Doc. A/CN.4/660 (Mar, 19, 2013).

75. ILC Draft Conclusions, *supra* note 24, at 120.

76. *See, e.g.*, Dörr & Schmalenbach, *supra* note 28, at 627.

77. Kasikili/Sedudu Island (Bots./Namib.), Judgment, 1999 I.C.J. Rep. 1045, ¶¶ 55, 80 (Dec. 13). For other case law of international courts and tribunals, see ILC Draft Conclusions, *supra* note 24, at 126–28.

78. Luigi Sbolci, *Supplementary Means of Interpretation*, in *THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION*, *supra* note 37, at 145, 158.

79. For a statement that practice is abundant, see Geiss, *supra* note 17, at 121.

80. Parliamentary Papers (Appendix) 2015-2016, No. 1177 (Jan. 18, 2016), <https://zoek.officielebekendmakingen.nl/ah-tk-20152016-1177.html> (original in Dutch; translation provided by Google Translate).

In another set of answers to questions from Parliament, the Dutch government stated, “The Netherlands does not cooperate with parties that use child soldiers. This policy is based among other things on the obligation in International Humanitarian Law to ensure respect for that body of law.”⁸¹

State practice by France also supports an external element. As noted by Birgit Kessler,

[in 1977] members of the POLISARIO kidnapped several French citizens on Mauritanian territory. In order to resolve the crisis, the French Foreign Minister addressed Algeria which openly supported the POLISARIO. By referring to common Article 1, France reminded Algeria of its duty as a Member State of the Geneva Conventions to respect and to “ensure respect” of the Conventions under all circumstances. Algeria would, therefore, have been obliged not to support a violation of the prohibition on kidnapping.⁸²

Another statement to the effect that common Article 1 has an external dimension was made by Oman in the Special Political Committee of the UN General Assembly.⁸³

Other State practice can be found in written submissions made to the ICJ in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case. In its submission, Switzerland referenced the Conference of High Contracting Parties to the Fourth Geneva Convention held on July 15, 1999. It noted that the Conference discussed action to be taken to apply the Convention in the Occupied Palestinian Territory, including East Jerusalem, and to ensure respect for its provisions in accordance with common Article 1 of the four Geneva Conventions.⁸⁴ In the same case, the League of Arab States submitted a written statement that supports an external element. The statement notes that other States have a right to “take lawful measures against Israel to ensure the cessation of the breach and reparation in the

81. Parliamentary Papers 2014–2015, no. 3337 (Kamerstukken 2014- 2015, Aanhangsel, nr. 3337, Sept. 10, 2015).

82. Birgit Kessler, *The Duty to Ensure Respect under Common Article 1 of the Geneva Conventions: Its Implications on International and Non-international Conflicts*, 44 GERMAN YEARBOOK OF INTERNATIONAL LAW 498, 503 (2001).

83. Oman, Statement in the Special Political Committee of the UN General Assembly, U.N. Doc. A/PSC/35/SR.27 (Nov. 11, 1980), *cited in* ANDREAS KOLB, THE UN SECURITY COUNCIL MEMBERS’ RESPONSIBILITY TO PROTECT: A LEGAL ANALYSIS 311 (2017).

84. Wall Advisory Opinion, Written Statement by the Swiss Confederation 8, <https://www.icj-cij.org/public/files/case-related/131/1577.pdf> (last visited Mar. 11, 2021).

interest of the injured State or of the beneficiaries of the obligation breached.”⁸⁵ It continues by stating, “In relation to international humanitarian law, this right even constitutes a duty according to common article 1 of the Conventions.”⁸⁶

The Member States of the European Union (EU) have adopted a so-called “Common Position,” defining common rules governing the control of exports of military technology and equipment.⁸⁷ The EU Council endorsed a “user’s guide” to the Common Position on July 20, 2005.⁸⁸ This guide summarizes agreed guidance for the interpretation and implementation of the Common Position’s articles. It contains the following reference to Common Article 1:

Common Article 1 of the Geneva Conventions is generally interpreted as conferring a responsibility on third party states not involved in an armed conflict to not encourage a party to an armed conflict to violate international humanitarian law, nor to take action that would assist in such violations, and to take appropriate steps to cause such violations to cease. They have a particular responsibility to intervene with states or armed groups over which they might have some influence. Arms producing and exporting states can be considered particularly influential in “ensuring respect” for international humanitarian law due to their ability to provide or withhold the means by which certain serious violations are carried out. They should therefore exercise particular caution to ensure that their export is not used to commit serious violations of international humanitarian law.⁸⁹

Other relevant practice are the declarations adopted by the Conference of High Contracting Parties to Geneva Convention IV. Such a conference was convened in 1999, only to be adjourned. It reconvened in 2001 and again

85. Wall Advisory Opinion, Written Statement by the League of Arab States 105, <https://www.icj-cij.org/public/files/case-related/131/1545.pdf> (last visited Mar. 11, 2021).

86. *Id.*

87. Council Common Position (EC) No. 2008/944/CFSP of 8 December 2008 Defining Common Rules Governing Control of Exports of Military Technology and Equipment, 2008 O.J. (L 335).

88. General Secretariat of the Council, 10858/15 COARM 172, CFSP/PESC 393, User’s Guide to Council Common Position 2008/944/CFSP Defining Common Rules Governing the Control of Exports of Military Technology and Equipment (July 20, 2015), <https://data.consilium.europa.eu/doc/document/ST-10858-2015-INIT/en/pdf>.

89. *Id.* at 55.

in 2014.⁹⁰ Both in 2001 and 2014, the Conference adopted a declaration. For the purposes of this article, the Declaration adopted by the 2001 Conference, in which 114 States participated, is particularly relevant. It states, *inter alia*, “The participating High Contracting Parties call upon all parties, *directly involved in the conflict or not*, to respect and to ensure respect for the Geneva Conventions in all circumstances, to disseminate and take measures necessary for the prevention and suppression of breaches of the Conventions.”⁹¹

Other relevant practice has been described by others, including, in particular, Knut Dörmann and Jose Serralvo.⁹² It includes certain statements by States, as well as resolutions of the UN Security Council and General Assembly. A description of this practice need not be repeated here.

It must be noted that the practice is not uniform, however. There is some recent practice by States parties to the Geneva Conventions that interprets common Article 1 as not including an external dimension, including the statement by the then-U.S. State Department Legal Adviser Brian Egan cited previously.⁹³

In *Daniel Turp v. the Minister of Foreign Affairs*, the Canadian government argued before the Federal Court of Canada, among other things, that common Article 1 does not have an external dimension.⁹⁴ The court’s judgment did not address this issue because it considered that the obligation in common Article 1 is limited to IACs. As the case concerned the conflict in Yemen, which the court held to be a NIAC in which Canada was not involved, it concluded that the obligation to ensure respect was not applicable.⁹⁵

Practice rejecting an external dimension appears at this moment to be much more limited than the practice referred to above that supports an

90. See Matthias Lanz, Emilie Max & Oliver Hoehne, *The Conference of High Contracting Parties to the Fourth Geneva Convention of 17 December 2014 and the Duty to Ensure Respect for International Humanitarian Law*, 96 INTERNATIONAL REVIEW OF THE RED CROSS 1115 (2014).

91. Conference of High Contracting Parties to the Fourth Geneva Convention, Declaration, ¶ 4 (Dec. 5, 2001) (emphasis added), <https://unispal.un.org/DPA/DPR/unispal.nsf/0145a8233e14d2b585256cbf005af141/8fc4f064b9be5bad85256c1400722951?OpenDocument>.

92. Dörmann & Serralvo, *supra* note 13, at 716–19.

93. *See supra* note 22 and accompanying text.

94. *Daniel Turp v. Minister of Foreign Affairs*, [2017] F.C. 84, ¶ 22 (Can.).

95. *Id.* ¶ 72.

external dimension.⁹⁶ This raises the question of how consistent and widespread practice must be in order to be taken into account in treaty interpretation. The standard in this context must be distinguished from the requirements for the formation of new international customary law.⁹⁷ It was pointed out above that State practice must be concordant, common, and consistent in applying Article 31(2) VCLT. In the broader sense in which State practice is used in Article 32, however, this standard does not appear to apply. The ILC lists several examples in which international courts and tribunals have taken into account State practice that was neither frequent nor necessarily uniform.⁹⁸ The ILC also stressed, however, that the distinction between agreed subsequent practice under Article 31(3)(b), as an authentic means of interpretation, and other subsequent practice (in a broad sense) under Article 32, implies that a greater interpretative value should be attributed to the former.⁹⁹

H. *Supplementary Means: Travaux Préparatoires*

As discussed above, Article 32 VCLT allows the use of the *travaux préparatoires* to interpret a treaty to confirm the meaning resulting from the application of Article 31 or to determine the meaning when the interpretation under Article 31, (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.¹⁰⁰

96. Note that some authors also refer to an online contribution by an Australian government adviser as opposing an external dimension. The text of the contribution does not include such a statement, however. Rather, it discusses issues surrounding the scope and content of an external dimension, suggesting the existence of such a dimension in the first place. John Reid, *Ensuring Respect: The Role of State Practice in Ensuring Respect for the Conventions*, ILA REPORTER, <http://ilareporter.org.au/2016/11/ensuring-respect-the-role-of-state-practice-in-interpreting-the-geneva-conventions-john-reid/> (last visited Mar. 11, 2021).

97. This distinction is not made by Robson, who states:

The preponderance of subsequent State practice in the application of the Geneva Conventions supports the view that there is no legal obligation to bring an end to others' breaches. To support a rule of custom, State practice must be "sufficiently widespread and representative, as well as consistent", where "consistent" means "extensive and virtually uniform."

Robson, *supra* note 5, at 107.

98. ILC Draft Conclusions, *supra* note 24, at 83–85.

99. *Id.* at 148.

100. On subsidiary means, see generally Sbolci, *supra* note 78, at 145.

It can be argued that the application of the general rule of treaty interpretation leaves the meaning of common Article 1 ambiguous. And to the extent a meaning does emerge after its application, it is useful to determine whether the *travaux préparatoires* confirm this meaning.

The *travaux préparatoires* of the Geneva Conventions do not contain much concerning common Article 1. The insertion of the obligation to ensure respect was proposed by the ICRC in its draft of the four conventions submitted to the Stockholm International Conference of the Red Cross in 1948. The text was included in a booklet, which also contained remarks on the text by the ICRC, made available to all National Red Cross Societies and governments participating in the Stockholm Conference.

After the Stockholm Conference closed, the ICRC proposed a draft preamble for all four conventions. The third paragraph provided that the contracting States undertook to respect, and to ensure respect for, the conventions in all circumstances. The recommendation from the ICRC was that its draft preamble be included in article 1 of all the conventions. The four draft conventions approved at the Stockholm Conference and the ICRC's new proposals, including a preamble, were transmitted to the governments invited to participate in the 1949 Geneva Conference.¹⁰¹

When the final version of common Article 1 was discussed at the Geneva Conference in 1949, only a handful of delegations made a statement. The Italian delegate, Mr. Maresca, stated that he felt that "the terms 'undertake to ensure respect' should be more clearly defined. According to the manner in which they were construed, they were either redundant, or introduced a new concept into international law."¹⁰²

The Norwegian and U.S. delegates stated that they considered that the object of this article was to ensure respect of the conventions by the population as a whole.¹⁰³ The French delegate stated that he considered that the term "ensure respect" had the same purpose as the expression "in the name of their peoples" that had been deleted in Stockholm.¹⁰⁴ The ICRC representative pointed out that in submitting its proposals to the Stockholm Conference, the ICRC emphasized that the contracting parties should not be confined to applying the conventions to themselves but should do all in their

101. Focarelli, *supra* note 3, at 132.

102. 2B FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 53 (1951).

103. *Id.*

104. *Id.*

power to see that the basic humanitarian principles of the conventions were universally applied.¹⁰⁵

The statements by the Norwegian and United States representatives do not suggest an external dimension, nor does that of the French representative. The statement by the ICRC representative, in particular the use of the word “universal,” can be read as indicating an external dimension. It has been argued by Kalshoven, however, that the word “universal” was used as a way to ensure compliance with the Geneva Conventions by all parties to a NIAC, rather than as implying an external dimension.¹⁰⁶ In contrast, Dörmann and Serralvo argue that some aspects of the *travaux préparatoires* may prompt a different understanding.¹⁰⁷ They point, in particular, to the remarks made by the ICRC in the booklet referred to above. They interpret those remarks as referring to an external dimension, and state that since these remarks had been distributed to all the participants it is unlikely that delegates had a narrow understanding of the undertaking to ensure respect. Dörmann and Serralvo conclude the delegates “chose a broad formulation that accommodates an external scope, be it in terms of an entitlement or a duty.”¹⁰⁸

Taking into account the diametrically opposed conclusions that different commentators draw from the *travaux préparatoires*, it is clear they do not provide a conclusive answer to the question of whether the drafters considered that common Article 1 had an external dimension.¹⁰⁹

In any event, it must be remembered that the *travaux préparatoires* are not the only means to determine the drafters’ intention. As the ILC states in its commentary to the draft conclusions on subsequent agreements and subsequent practice in relation to treaties:

the *travaux préparatoires* are not the primary basis for determining the presumed intention of the parties, but they are only, as article 32 indicates, a supplementary means of interpretation. And although interpretation must seek to identify the intention of the parties, this must be done by the interpreter on the basis of the means of interpretation that are available at the time of the act of interpretation and that include subsequent agreements

105. *Id.*

106. Kalshoven, *supra* note 34, at 28.

107. Dörmann & Serralvo, *supra* note 13, at 714.

108. *Id.* at 715.

109. Commentators who conclude from the *travaux préparatoires* that no external dimension was envisaged include Focarelli, *supra* note 3, at 133, and Kalshoven, *supra* note 34, at 28. Commentators who conclude that such a dimension was envisaged include Dörmann & Serralvo, *supra* note 13, at 714.

and subsequent practice of parties to the treaty. The interpreter thus has to answer the question of whether parties can be presumed to have intended, upon the conclusion of the treaty, to give a term used a meaning that is capable of evolving over time.¹¹⁰

The *travaux préparatoires* do not appear to exclude the possibility that the meaning of ensure respect could develop over time. And as was discussed above, there is a body of practice that “supports the interpretation of Common Article 1 as a rule that compels all States, whether or not parties to a conflict, not only to take active part in ensuring compliance with rules of international humanitarian law by all concerned, but also to react against violations of that law.”¹¹¹

I. *The International Court of Justice*

The ICJ’s pronouncements on common Article 1 are often referred to by commentators. Strictly speaking, such pronouncements do not have an autonomous role to play in the interpretation of the Geneva Conventions. They do not constitute “subsequent practice” for the purposes of Articles 31(3)(b) and 32 VCLT.¹¹² Judgments and other pronouncements of international courts, tribunals, and expert treaty bodies, however, may be indirectly relevant to the identification of subsequent agreements and subsequent practice as authentic means of interpretation if they reflect, give rise to, or refer to such subsequent agreements and practice of the parties themselves.¹¹³ Notwithstanding these apparent limitations on the utility of the ICJ’s pronouncements, its views are generally accorded great weight and warrant discussion.

The ICJ first referred to the obligation to ensure respect in its judgment in the *Nicaragua* case. In it, the Court considered that the United States had an obligation

in the terms of Article 1 of the Geneva Conventions to “respect” the Conventions and even “to ensure respect” for them “in all circumstances”. . . . The United States is thus under an obligation not to encourage persons or

110. ILC Draft Conclusions, *supra* note 24, at 183–84.

111. *See, e.g.*, Boisson de Chazournes & Condorelli, *supra* note 48, at 70.

112. ILC Draft Conclusions, *supra* note 24, at 233–34.

113. *Id.*

groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions.¹¹⁴

The formulation used by the Court leaves no doubt that it considered that the obligation to ensure respect encompasses an external element.

The ICJ came back to common Article 1 in its advisory opinion in the *Wall* case. It held that: “all the States parties to the [fourth] Geneva Convention . . . are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law.”¹¹⁵

It has been argued that the *Wall* case is of particular relevance in that the Court opined that the obligations found in common Article 1 are *erga omnes*, and, therefore, all States had an obligation to ensure Israel’s compliance with Geneva Convention IV.¹¹⁶ This appears to be a misreading of the advisory opinion. In that opinion, the Court made a distinction between the consequences of IHL obligations being *erga omnes* in nature on the one hand and the obligation to “ensure respect” on the other.¹¹⁷ The Court discussed the notion of obligations *erga omnes* (in paragraphs 155–157) and then applied the notion to the field of IHL (in paragraph 157). First, the Court recalled its holding in its *Nuclear Weapons* advisory opinion:

[A] great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and “elementary considerations of humanity” . . . , that they are “to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.”¹¹⁸

The Court then continued by stating, “In the Court’s view, these rules incorporate obligations which are essentially of an *erga omnes* character.”¹¹⁹

The next paragraph of the advisory opinion dealt with common Article 1 and merits to be recited in full:

114. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶ 220 (June 27).

115. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶ 159 (July 9).

116. Schmitt & Watts, *supra* note 5, at 695; Robson, *supra* note 5, at 109.

117. *Legal Consequences of the Construction of a Wall*, 2004 I.C.J. 136, ¶ 155.

118. *Id.* ¶ 157.

119. *Id.*

The Court would also emphasize that Article 1 of the Fourth Geneva Convention, a provision common to the four Geneva Conventions, provides that “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” It follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.¹²⁰

The formulation used by the Court implies that it considers the obligation in common Article 1 to be an autonomous, treaty-based obligation, independent of whether IHL includes obligations *erga omnes*. Otherwise, it would not have been logical for the Court to refer only to an obligation that is borne by States parties to Geneva Convention IV. *Erga omnes* obligations are, after all, owed to all States.

The conclusion is supported elsewhere in the advisory opinion where the Court specifically noted that “Certain participants in the proceedings further contended that the States parties to the Fourth Geneva Convention are obliged to take measures to ensure compliance with the Convention.”¹²¹ This is a reference to the written statements made by Switzerland and the League of Arab States discussed earlier. Those statements did not link the issue of *erga omnes* to the obligation in common Article 1. If the Court disagreed with the contention made in those statements, it would have been logical for it to so state at this point.

A second indication is found in paragraph 159 of the advisory opinion. Here, the Court started by stating “[g]iven the character and the importance of the rights and obligations involved” it “is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory.”¹²² This reference to the character of the rights is undoubtedly a reference to their *erga omnes* character. The Court deals with the obligation to ensure respect further in the same paragraph, without linking this obligation to the character of IHL obligations:

In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under

120. *Id.* ¶ 158.

121. *Id.* ¶ 146.

122. *Id.* ¶ 159.

an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.¹²³

It seems that the Court maintained a distinction between the consequences that follow from the violation of obligations *erga omnes* on the one hand and the obligation to ensure respect in common Article 1 on the other. This also follows from the dissenting opinion of Judge Kooijmans. He disagreed with the Court's interpretation that common Article 1 has an external dimension but stated his understanding that the Court based its interpretation on the treaty itself.¹²⁴

V. CONCLUSION

This article has attempted to establish the meaning of the term “ensure respect” in common Article 1 of the Geneva Conventions, specifically whether it includes an external element. It has done this by applying the rules on treaty interpretation set out in Articles 31 and 32 VCLT. While the methodology used may seem somewhat formalistic, it is submitted that such formalism helps by drawing out the different elements that play a role in treaty interpretation. Some of the literature on common Article 1 does not even acknowledge that establishing the meaning of the Article is a matter of treaty interpretation for which specific rules exist. Some commentators, as noted above, apply certain rules of treaty interpretation in a questionable way.¹²⁵

Applying the rules of treaty interpretation correctly to common Article 1, however, does not necessarily mean that an unequivocal answer can be provided to the question of whether that Article contains an external dimension. In the framework of the general rule of interpretation (Article 31 VCLT), arguments concerning common Article 1's scope were analyzed and discarded. Others were found to be valid but not sufficient to avoid ambiguity on the question of whether common Article 1 contains an external dimension.

123. *Id.*

124. *Id.* ¶¶ 46–51, at 232–34 (separate opinion by Kooijmans, J.); *see also* Hathaway et al, *supra* note 2, at 570.

125. One example is the need to distinguish between the criteria for the formation of customary international law on the one hand, and the criteria for taking into account subsequent practice in the context of treaty interpretation on the other. *See supra* Section IV.G. Another is the fact that Additional Protocols I and III do not constitute subsequent agreements in the sense of Article 31(3)(a) VCLT.

Consequently, supplementary means of interpretation were resorted to, as set out in Article 32 VCLT. These include the *travaux préparatoires* and State practice. Although it has been argued that the *travaux préparatoires* make it clear that the drafters did not intend to include an external element, here too, analysis of the available material failed to provide a conclusive answer as to whether common Article 1 has an external element. Even if it is concluded from the *travaux* that the drafters did not have an external dimension in mind, this does not mean that an interpretation in 2021 must lead to the same result since, under Article 32, State practice occurring since 1949 may be considered.

In that regard, it was shown that the majority of State practice appears to accept such an external dimension to common Article 1, although there are a few States that have rejected such an interpretation. Thus, State practice cannot be considered in the context of Article 31(3)(b)'s standard requiring practice be consistent and widespread. Practice may, however, be used as a supplementary means. The question is then how much State practice there needs to be in order to draw conclusions from it. The rules of treaty interpretation do not provide an answer to this question, although international courts and tribunals have considered practice by only one or a few States.

On balance, the available practice is sufficient to conclude that common Article 1 includes an external dimension. In this context, the premise in the introduction of this article that there is additional State practice beyond that generally referred to in the literature in common Article 1 was confirmed. The additional practice was found from, *inter alia*, the Netherlands, Switzerland, and all the Member States of the European Union. This supports the conclusion that an understanding of common Article 1 that includes an external dimension has come to prevail.¹²⁶

As was stated in the introduction, this article has not addressed the content of an external obligation to ensure respect; in other words, what the obligation requires of High Contracting Parties to the Geneva Conventions. Obviously, the answer to that question is of great importance in determining the precise impact of such an obligation. If, for example, it only requires States not to encourage other States to commit violations of IHL, the impact is relatively limited. If it requires positive action, on the other hand, the impact will be greater.

Some commentators point to the negative practical consequences that they consider an external dimension to common Article 1 would have. These

126. KOLB, *supra* note 83, at 314.

consequences would only play a role in interpreting the Article if they led to the conclusion that an interpretation that common Article 1 has an external element would be manifestly absurd or unreasonable. As became clear above, in such a case, Article 32 VCLT permits recourse to subsidiary means of interpretation. Those means were already taken into account in the analysis above, however.

In any event, the negative consequences that are referred to are not convincing. They boil down to the suggestion that an obligation for States to ensure respect by other parties to the Geneva Conventions will harm rather than help to increase compliance. It is difficult to see how States taking action to strengthen compliance by other States would “erode the Conventions’ status as vital legal common ground between States during armed conflict.”¹²⁷ On the contrary, at a time when IHL is under strain, it is more important than ever that States, as Claude Pilloud stated at the 1949 Geneva Conference when addressing common Article 1, “should do all in their power to see that the basic humanitarian principles of the Conventions . . . [are] universally applied.”¹²⁸

127. Schmitt & Watts, *supra* note 5, at 706.

128. See FINAL RECORD, *supra* note 102, at 53. Claude Pilloud was the ICRC representative who took part in the conference committee of the 1949 Geneva Conference that discussed what later became common Article 1.