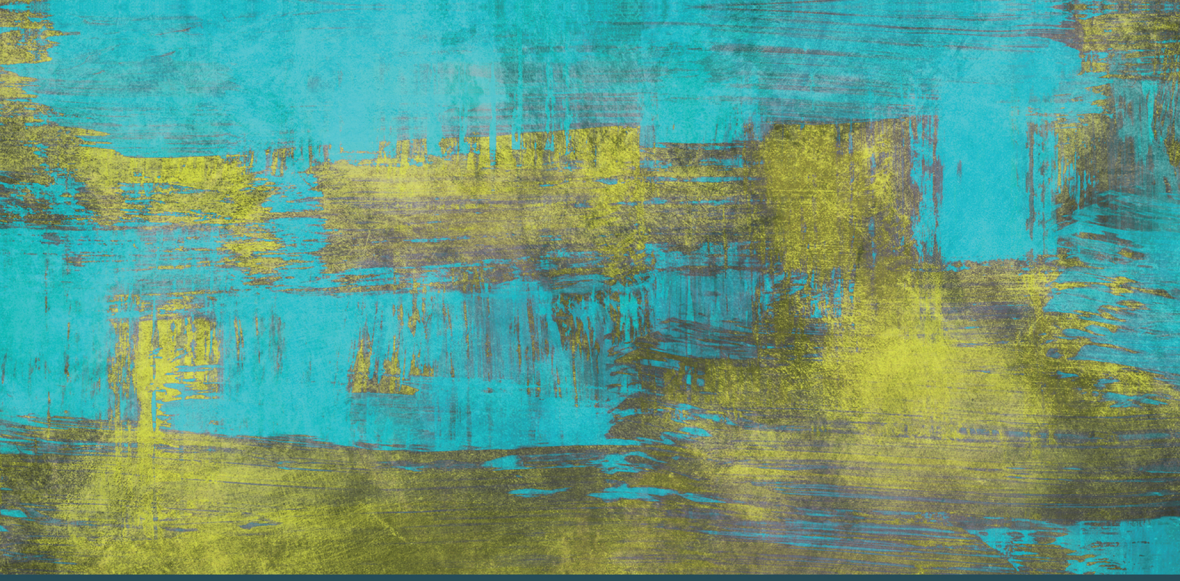
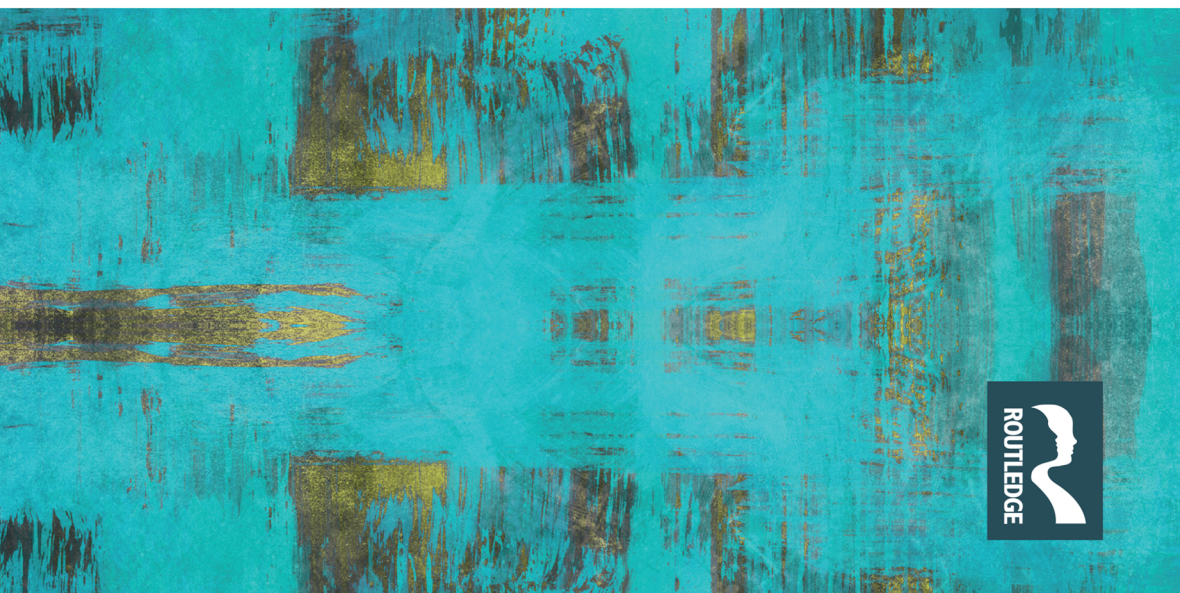


Routledge Research in the Law of Armed Conflict

ENSURING RESPECT FOR INTERNATIONAL HUMANITARIAN LAW

Edited by
Eve Massingham and Annabel McConnachie



Ensuring Respect for International Humanitarian Law

This book explores the nature and scope of the provision requiring States to 'ensure respect' for international humanitarian law (IHL) contained within Common Article 1 of the 1949 Geneva Conventions. It examines the interpretation and application of this provision in a range of contexts, both thematic and country-specific. Accepting the clearly articulated notion of 'respect' for IHL, it builds on the existing literature studying the meaning of 'ensure respect' and outlines an understanding of the concept in situations such as enacting implementing legislation, diplomatic interactions, regulating private actors, targeting, detaining persons under IHL in non-international armed conflict, protecting civilians (including internally displaced populations) and prosecuting war crimes. It also considers topical issues such as counter-terrorism and foreign fighting.

The book will be a valuable resource for practitioners, academics and researchers. It provides much needed practical reflection for States as to what ensuring respect entails, so that governments are able to address these obligations.

Eve Massingham is a Senior Research Fellow in the Law and the Future of War team at the University of Queensland School of Law. She has worked in the field of IHL for ten years with the International Red Cross and Red Crescent Movement throughout East and Southern Africa and in Australia. Eve holds a PhD from the University of Queensland and, among other qualifications, an LLM from King's College London where she attended as a Chevening Scholar. She is an Australian qualified lawyer and has published a number of book chapters and articles on IHL. Eve has also served as an Australian Army Reserve Officer.

Annabel McConnachie has worked with the IHL team at Australian Red Cross as a volunteer and staff member since 2003. Primarily involved with dissemination activities, she led the project developing a series of advocacy publications in collaboration with Pacific National Red Cross Societies for high-level engagement with parliamentarians. Annabel holds a BA (Hons) in law and history from Keele University and a Master of International Relations from Macquarie University in Sydney, where she lectured and convened units about human rights, international law and forced migration for ten years.

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Foreword

Dr Helen Durham AO

This book is a much-needed contribution to the debate on ensuring respect for IHL – a critical issue facing the world today. *Ensuring Respect for International Humanitarian Law* addresses directly key dilemmas and captures important discussions that relate to bringing humanity, safety and dignity to those caught up in the horrors of armed conflict.

Respect for IHL often occurs quietly – a wounded enemy allowed through a checkpoint, a detainee able to send a message to his or her family or humanitarian assistance provided where there is great need. These day-to-day instances do not make the headlines. Yet they prove that respect for IHL is not only possible but is happening daily in the midst of war. It is clear that more can, and must, be done to improve the protection of victims of armed conflict, and implementing the obligation to 'ensure respect' is one avenue to do so.

Ensuring Respect for International Humanitarian Law explores the nature and scope of the provision requiring States to 'ensure respect' for IHL in order to provide concrete examples of what it looks like in practice. By examining the interpretation and application of this provision in a range of contexts, it builds upon the existing literature relating to the notion of "respect" for IHL. In this regard, the collection is an innovative contribution to the contemporary debate on the meaning of 'ensuring respect'.

As a humanitarian institution with operational responsibilities under IHL and a mandated role as "guardian" of this legal framework, the International Committee of the Red Cross (ICRC) undertakes many activities to generate respect for IHL. This is a critical topic for the ICRC and it touches upon all aspects of our work, from legal and policy discussions at headquarters, to influencing in the field. From our work facilitating States to ratify and implement IHL treaties, pre-deployment training of militaries, visiting detainees or diplomatic engagement with States on the manner in which they "support" parties in a conflict, respect for IHL is at the core of the ICRC.

Ensuring respect for IHL is also a core concern for the ICRC. Since at least the 1950s the organisation has considered that according to Common Article 1 (CA1), States must exert their influence on parties to the conflict to ensure respect in case of serious violations. Recent writings by the ICRC have drawn renewed attention to this obligation. In particular, the ICRC's updated Commentary to the First Geneva Convention is the subject of ongoing discussion in this regard. It

distinguishes two aspects of the obligation to ensure respect. On the one hand, a negative obligation to refrain from encouraging or assisting violations of IHL; and on the other, a positive obligation to take feasible measures in order to influence the parties to the conflict and bring them to an attitude of respect for IHL (2016 Commentary, paras. 158–173; Cameron *et al*, 2015; Döermann and Serralvo, 2014; Droege and Tuck, October 2017). Authors have begun to respond to this work, evaluating CA1 from the perspective of their particular areas of expertise.

More recently we are witnessing that in today's world no one fights alone. Military operations are being conducted by, with, and through other States and local forces. Partnerships involve sharing intelligence, training and equipping, and providing close air support – to name just a few. Whilst this aspect of modern warfare undoubtedly comes with risks, it also provides valuable opportunities. States supporting the parties to the conflict are in a particularly strong position to influence their behaviour. In this way, they can lead from the front, to ensure respect for IHL, and secure better protection for people affected by armed conflict (Droege and Tuck, March 2017). Partnered warfare is just one illustration of the many avenues for ensuring respect for IHL in armed conflict today.

A number of chapters in this volume address new challenges in contemporary armed conflict. Gone are the days when we can look at issues exclusively through the lens of the black letter law; today we also need to provide practitioners with pragmatic advice on implementation of the law, and I am so pleased to see that the collection in this book does exactly that. For example, Catherine Drummond identifies that the focus on States and non-State armed groups by existing literature on CA1 has led to limited examination of the obligations in relation to private actors in contemporary armed conflict. She proposes that, in order to live up to their obligations to ensure respect for IHL, States must carry out a scoping exercise to map the extent of their duty to ensure respect with particular private actors, based both on specific activities (such as arms production or provision of military services), as well as actor-based criteria.

Another prominent challenge today is the role of new and emerging technologies in warfare. Hitoshi Nasu takes the topic of artificial intelligence as a case study of ensuring respect, providing expert insight into its potential application in military operations, and the considerations that States must bear in mind. Marnie Lloydd explores the topic of foreign fighters, another phenomenon in recent conflicts, asking how States should think about CA1 in relation to these fighters, and the practical difficulties with its application in this context.

The collection additionally brings a fresh perspective on many long-standing challenges. Kelisiana Thynne examines the issue of detention within non-international armed conflicts and how States, not directly involved in a conflict, are able to encourage compliance with IHL by those States that are. Linda Ngesa focuses on the obligation to ensure respect for the protections of internally displaced persons, particularly with reference to instruments on the African continent. On the topic of weapons, Eve Massingham submits that, by being strong advocates for the rule against indiscriminate effects, the rule against superfluous injury or unnecessary suffering and the rule against causing widespread, long-term and severe damage to the natural environment, States can play a leadership role in this space.

IHL, as a branch of law, cannot be disconnected from the realities to which it is meant to apply, and I am pleased to see that each author maintains a practical focus throughout. In addition, the collection outlines an understanding of 'ensure respect' in many day-to-day governmental processes, such as enacting implementing legislation, and diplomatic interactions, in the chapters by Lara Pratt and Sarah McCosker respectively. Moreover, the collation of practical examples cements the collection's utility in clarifying how to address and implement the obligation under CA1.

The topic of ensuring respect for IHL is in need of scholarship, and this contribution to the debate is certainly long overdue. With a practical and forward-looking approach, I anticipate that *Ensuring Respect for International Humanitarian Law* will further the process of reflections by many, from practitioners to academics, on how States' actions can contribute to, or detract from, ensuring respect for IHL.

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Droege, C and Tuck, D, 'Fighting Together and International Humanitarian Law: Ensuring respect for the law and assessing responsibility for violations' (*ICRC Humanitarian Law and Policy Blog*, 17 October 2017), available at: https://blogs.icrc.org/law-and-policy/2017/10/17/fighting-together-international-humanitarian-law-ensuring-respect-law-assessing-responsibility-violations-2-2/ (last accessed 2 July 2019).

Droege, C and Tuck, D, 'Fighting Together: Obligations and opportunities in partnered warfare' (*ICRC Humanitarian Law and Policy Blog*, 28 March 2017), available at: https://blogs.icrc.org/law-and-policy/2017/03/28/fighting-together-obligations-opportunities-partnered-warfare/ (last accessed 2 July 2019).

Contributors

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Professor Jonathan Crowe is a Professor of Law at Bond University. His main research interests lie in the fields of legal philosophy, constitutional law and theory, IHL and dispute resolution. He is the author or editor of nine books and more than ninety book chapters and journal articles on a range of legal and philosophical issues. His work has appeared in numerous leading international and Australian journals, including the *Modern Law Review*, the *Oxford Journal of Legal Studies*, the *Melbourne University Law Review*, the *Sydney Law Review*, the *Melbourne Journal of International Law* and the *Australian Journal of Legal Philosophy*. He is the co-author of Jonathan Crowe and Kylie Weston-Scheuber, *Principles of International Humanitarian Law* (Edward Elgar, 2013) and a long-serving member of the Queensland IHL Advisory Committee of the Australian Red Cross.

Catherine Drummond is a consultant in international law and a PhD candidate at the University of Cambridge. She was formerly an Associate at Freshfields Bruckhaus Deringer where she represented and advised clients in relation to disputes before international courts and tribunals, including the International Court of Justice, European Court of Human Rights, the International Criminal Court, the United Nations Human Rights Committee and arbitral tribunals. Catherine regularly lectures and publishes in public international law, and her consultancy work has included advising on the negotiation and implementation of the Arms Trade Treaty and providing training to the Australian Defence Forces. Catherine completed a dual Bachelor of Laws and Arts (Peace and Conflict Studies and International Relations) at the University of Queensland and a Masters of Law specialising

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Dr Helen Durham AO has been Director of International Law and Policy at the ICRC since 2014. She has over 20 years of experience in the Red Cross and Red Crescent Movement and is admitted as a Barrister and Solicitor in the Supreme Court of Victoria. Helen has been a Legal Adviser to the ICRC Delegation of the Pacific; Head of Office for ICRC Australia and held various roles with Australian Red Cross including Director of International Law and Strategy and National Manager of IHL. Helen has a PhD in IHL and international criminal law, is a Senior Fellow at Melbourne Law School and worked as the Director of Research at the Asia Pacific Centre for Military Law. She has completed missions in the field with ICRC including Myanmar, Aceh, the Philippines as well as widely in the Pacific and has been involved in international legal negotiations in New York, Rome and Geneva. In 2014 she was inducted into the Victorian Honour Roll of Women, in 2015 she was awarded as an Australian Centenary Peacewoman and in 2017 she was appointed as an Officer of the Order of Australia.

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Annabel McConnachie has worked with the IHL team at Australian Red Cross as a volunteer and staff member since 2003. Primarily involved with dissemination activities, she led the project developing a series of advocacy publications in collaboration with Pacific National Red Cross Societies for high-level engagement with parliamentarians. Annabel holds a BA (Hons) in law and history from Keele University and a Master of International Relations from Macquarie University in Sydney, where she lectured and convened units about human rights, international law and forced migration for ten years.

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Dr Kenneth Wyne Mutuma is based at the University of Nairobi's School of Law. He has more than ten years teaching experience and lends his knowledge and experience in IHL to academia, government and civil society in both East and Southern Africa. Ken has previously served as a legal officer for the Nairobi and Pretoria Delegations of the ICRC. In addition, he has worked with the Nelson Mandela Foundation developing the capacity of governmental bodies and civil society in the areas of conflict resolution and ethical leadership. Ken holds several academic qualifications including a PhD on the challenges of outsourcing war to private entities.

Professor Hitoshi Nasu is Professor of International Law at the University of Exeter, publishing widely in the field of public international law with a particular focus on international security law and the law of armed conflict. Prior to his current appointment, he held academic posts at the Australian National University, where he was also Co-Director of the Centre for Military and Security Law and the Australian Network for Japanese Law. Currently, he is also an adjunct senior fellow of S. Rajaratnam School of International Studies at Nanyang Technological University in Singapore and managing co-director of the *Woomera Manual on the International Law of Military Space Operations.*

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Dr Lara Pratt is a Senior Lecturer and Assistant Dean at the University of Notre Dame in WA, Australia. She teaches and researches in public international law, IHL and human rights. Lara has championed the University of Notre Dame's various international and humanitarian law initiatives including the introduction of 'Law and War' as an elective unit of study, and introduced an IHL Moot (run with the support of

Australian Red Cross). In addition, Lara convenes an international immersion program where law students visit Phnom Penh, Cambodia to engage with NGOs and civil society organisations. Lara is also a member of the Divisional Advisory Board and the IHL Advisory Committee of the Australian Red Cross in WA, and regularly presents at their IHL seminars in Perth. Lara holds a PhD from Macquarie University where her research focused on comparative Bills of Rights.

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Abbreviations and common list of references

Pictet Commentary	Pictet, J. S. *et al* (eds) (1960) *Commentary on the Geneva Conventions*. Geneva: ICRC.
2016 Commentary	ICRC (2016) *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd edition, Cambridge: CUP
APs Commentary	Sandoz, Y., C. Swinarski and B. Zimmermann (eds) (1987) *Commentary on the Additional Protocols*. Leiden: Martinus Nijhoff.
API	*Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978)
APII	*Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1979)
APIII	*Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem*, 8 December 2005, 2404 UNTS 261 (entered into force 14 January 2007).
APs	API, APII and APIII collectively
CA1	Common Article 1 of the Four Geneva Conventions of 1949 and Additional Protocols I and III
CIHL Study	Henckaerts, J-M. and Doswald-Beck, L. (eds), *Customary International Humanitarian Law, Volume 1: Rules* (ICRC, 2005)
GCI	*Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950)
GCII	*Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at*

	Sea, 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950)
GCIII	*Geneva Convention Relative to the Treatment of Prisoners of War,* 12 August 1949, 75 U.N.T.S. 135 (entered into force 21 October 1950)
GCIV	*Geneva Convention Relative to the Protection of Civilian Persons in Times of War,* 12 August 1949, 75 U.N.T.S. 287 (entered into force 21 October 1950)
GCs	GCI, GCII, GCIII and GCIV collectively
ICRC	International Committee of the Red Cross
IHL	International humanitarian law
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council

1 Common Article 1: an introduction

Eve Massingham and Annabel McConnachie

On 24 October 2019, before the UNSC, the United States (US) Mission's Senior Policy Advisor stated:

> We remain deeply troubled by reports that Turkish supported Opposition forces [in northern Syria] deliberately targeted civilians. If verified, these actions may constitute war crimes, and we urge our Turkish partners to immediately investigate these incidents and hold accountable any individuals or entities involved. *Turkey is responsible for ensuring its forces and any Turkish-supported entities act in accordance with the law of armed conflict* (emphasis added) (Barkin, 2019).

This statement is about encouraging another State, and non-State actors, to comply with the laws of armed conflict. The subject matter of this book is an examination of a provision of international law which obliges all States Party to the GCs to ensure that parties to an armed conflict respect IHL.

The law of armed conflict, also known as IHL, protects those not, or who are no longer, taking part in hostilities. It also limits the means and methods of warfare. The core elements of IHL, the GCs and the APs, are discussed in more detail by Crowe in Chapter 2. The GCs and APs, in conjunction with customary IHL, establish a rule, applicable in both international and non-international armed conflict whereby IHL must be respected. In addition, States must 'ensure respect' for IHL (CA1; CIHL Study Rule 139; *Nicaragua*, para. 220). Specifically, CA1 provides that '[t]he High Contracting Parties undertake to respect and to ensure respect for the […] Convention [and Protocol] in all circumstances'.

As will be seen in the discussion of the drafting history below, the meaning of CA1 was not well articulated at its inception and has not been fully settled. Debate has long existed as to whether the intention behind CA1 was to restate existing principles of international law or create specific new obligations (Meron, 1987, p. 348; Sassòli, 2002, p. 421). CA1 has been described as a 'soap bubble' doing nothing other than reminding States of their obligation to respect the GCs and which might include, 'an unspecified recommendatory meaning … to induce other contracting states to comply' (Focarelli, 2010, p. 125). It has also been labelled an 'innocuous sort of opening phrase' and, as such, not capable of imposing an international legal obligation upon the High Contracting Parties (HCPs) to ensure compliance with the law

(Kalshoven, 1999, p. 60). However, CA1 has also been called a 'ripening fruit' that emerged from a 'tiny seed' (Kalshoven, 1999, p. 3) and 'the nucleus for a system of collective responsibility' having quasi-constitutional status (Boisson de Chazournes and Condorelli, 2000, p. 68).

There is no dispute that all States are obligated, by virtue of CA1, to guarantee *respect* for the GCs within their own jurisdiction, referred to by Geiss as the 'internal-compliance dimension' of CA1 (2015, p. 420). That this includes ensuring respect for this law 'by persons under its authority and within its jurisdiction' is not disputed (Boutruche and Sassòli, 2016, p. 6). States discharge this obligation by complying with the duties to implement and adhere to the rules in good faith (APs Commentary, p. 34; Dörmann and Serralvo, 2014, p. 709). As the obligation is one that applies 'in all circumstances' it includes actions taken during times of peace, as well as in times of war. As Massingham has noted elsewhere, many of the actions required by States to respect IHL are set out in the text of the GCs and APs (2018, p. 208).

However, what is less clear is what CA1 means by '*ensure respect* … in all circumstances'. Specifically, whether it means that third States have obligations in relation to IHL violations and if so, what might those obligations look like. As is discussed in more detail below (and further in Massingham, 2018), the extent of the legal obligation CA1 encompasses has been established through subsequent practice by States and international organisations (Boutruche and Sassòli, 2016, p. 3) and 'is today unanimously understood as referring to violations by other States' (Sassòli, 2002, p. 421). It is indeed a 'nucleus for a system of collective responsibility' (Boisson de Chazournes and Condorelli, 2000, p. 68) as it falls to all States party to the Conventions to remain vigilant and address violations as they occur, and it extends to the contents of the GCs in their entirety (Geiss, 2015b, p.118). It is clear that CA1 does not authorise the application of military force against another State (Kessler, 2001, p. 500). However, the third State component of CA1 provides an extensive 'general external-compliance dimension' (Geiss, 2015, p. 421) creating a legal obligation for all States, 'in all circumstances' to make sure potential violators of IHL – whether State or non-State – comply with the rules of IHL (Boutruche and Sassòli, 2016, p. 3).

The ICRC's 2016 publication of its updated Commentary to GCI reignited interest in the meaning of CA1 and reaffirmed support for the view that 'it goes beyond an entitlement for third States to take steps to ensure respect for IHL. It establishes not only a right to take action, but also an international legal obligation to do so' (Dörmann and Serralvo, 2014, p. 723). Concern has been expressed at the extent of the ICRC's contribution to the discourse and some are wary of the move towards an expansive view of CA1 (Egan, 2016; see also, Aly, 2019). However, even where reservations are noted, there is an indication of a 'willingness to consider an interpretation of Common Article 1 of the Geneva Conventions that entails positive obligations to ensure respect of the law of armed conflict by partner states and non-state actors' (Hathaway and Manfredi, 2016). Overall therefore, there has been a 'firm consensus on a modern interpretation that involves third State interest and action in the application of the GCs by parties involved in an armed conflict' (Breslin, 2017, p. 13). This is now widely recognised and considered the dominant view

(Geiss, 2015, p. 419), even if the full scope of it is not completely agreed. As such, today, 'the question … is not so much *whether* [CA1] imposes a binding obligation, but rather *what type* of obligation lies beneath it' (emphasis added) (Dörmann and Serralvo, 2014, p. 723). What these obligations might look like in practice and their scope is the focus of this book. However, before delving into the specifics of different thematic areas, this chapter recalls the key legal components of treaty interpretation.

The *Vienna Convention on the Law of Treaties* (VCLT) provides principles for treaty interpretation which can aid understanding of a phrase or article. It is possible to discern meaning firstly, from the subsequent practice of the application of CA1 (VCLT Art. 31(3)(b)); secondly, by considering other relevant rules of international law applicable in the relations between States (VCLT Art. 31(3)(c)) and finally, by taking into account the drafting history of CA1 (VCLT Arts. 31 (4) and 32). These interpretative tools reinforce the view that CA1 is not redundant but rather imposes a specific legal obligation on third States, *vis-à-vis* States and more broadly to other actors involved in armed conflict, to help them to ensure respect for IHL (Sassòli, 2002, p. 421: Kessler, 2001, p. 505).

Subsequent practice in the application of CA1

There is 50 years' worth of State practice clarifying the meaning of ensure respect, expressing both a collective and individual responsibility to encourage compliance by State and non-State groups and an expansive responsibility to State and non-State actors. In 1968, Resolution XXIII of the Teheran Conference on Human Rights, noted the external-compliance meaning attributable to ensure respect within CA1. The resolution was adopted with no opposing votes from the 84 member States present (representing two-thirds of the membership of the UN in 1968). It noted that States 'sometimes fail to appreciate their *responsibility to take steps to ensure the respect* of these humanitarian rules *in all circumstances by other States*, even if they are not themselves directly involved in an armed conflict' (emphasis added). Further, the UNSC and UNGA have called on third States to respond to identified violations of IHL in very specific circumstances. For example, between 1990 and 2004, the HCPs were called upon to ensure respect by Israel, the occupying power, for its obligations under CA1; with the very clear instruction for all third States 'to continue *to exert all efforts to ensure respect* for [GCIV] provisions' by Israel (emphasis added). The 2004 resolution referred to the ICJ *Wall* advisory opinion to underscore the obligations that third States hold to ensure other States respect IHL (UNSC Res. 681 (1990); UNGA Res. 58/97 (2003); UNGA Res. 59/122 (2004)). Boutruche and Sassòli note that the series of resolutions relating to Israel's conduct in the Palestinian occupied territories between 1997 and 2001 develop the case for a clear understanding of an external-compliance element to CA1. They also conclude that the 'selective nature of this practice' does not diminish its capacity to influence the process of interpretive evolution of CA1 (2016, p. 10).

Specific obligations under CA1 for third States not to engage in particular conduct has also been detailed by the ICJ. The *Nicaragua* judgment held that encouraging violations of IHL constitutes a breach of the CA1 obligation to ensure respect for IHL and that this obligation was customary in nature (para. 220). As identified in UNGA

Resolution 59/122 (2004), in the *Wall* advisory opinion the ICJ held that all States were 'under an obligation … to ensure compliance by Israel with IHL as embodied in that Convention' and were not 'to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory…' or to 'render aid or assistance in maintaining the situation created by such construction' (paras. 158, 159). This finding was made considering both the *erga omnes* nature of the obligation of Israel to 'respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law' (para. 155) and the CA1 obligation (para. 158). Higgins, in her separate opinion, felt that characterisation of CA1 as *erga omnes* was perhaps less relevant in light of the longstanding view (quoting from Pictet's 1952 Commentaries) that should a State fail in its IHL obligations, the HCPs 'may, and should, endeavor to bring it back to an attitude of respect' and that HCPs 'should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally' (*Wall*, 2004, p. 217, para. 39).

Several commentators have noted the ICRC's consistent entreaties to HCPs to ensure respect of the GCs by taking action to stop violations by others (Kessler, 2001, p. 504; Breslin, 2017, p.14) and that these types of statements have been adopted by other international organisations. The failure to object to these reminders to take action has led one commentator to conclude that such acquiescence is indicative of a contribution towards the development of a formal understanding and acceptance of the expansive external-compliance meaning of CA1 (Breslin, 2017, pp. 14–15).

More recently, in response to the humanitarian crisis as a result of the conflict in Syria, the UNSC has issued a number of resolutions enabling States and international organisations to respond to the crisis without the explicit consent of the Syrian State authorities (*ie*. UNSC Res. 2165 (2014); and UNSC Res. 2449 (2018)). This practice illustrates how 'ensure respect' for IHL may manifest. Each member of the UNSC, in authorising the delivery of humanitarian assistance in this context, is simultaneously acting as a HCP of the GCs and responding, under CA1, to ensuring respect for the Conventions by the parties to the conflict. Zimmerman concludes that members of the UNSC are obligated to ensure respect for the GCs when considering resolutions aimed at preventing or halting violations of IHL, and a failure to do so will attract State responsibility (2017, p. 22). The EU also has a similar approach and in 2014, responding to the humanitarian situation in Syria the EU noted, in a statement to the UNGA, that CA1 '… is a collective obligation on all of us not only to respect but also to ensure that the parties to the conflict respect their humanitarian obligations. We need to ensure actual enforcement of the obligations' (Dörmann and Serralvo, 2014, p.722 at fn.78).

Considering other relevant rules of international law

Comparison of the ensure respect terminology of CA1 with similar provisions in international human rights law (IHRL) has been suggested to argue in favour of it representing only an internal-compliance dimension (Geiss, 2015, p. 423; Focarelli, 2010, p. 138). However, this may not be the case. Similarly worded provisions to the obligation to ensure respect in CA1, could be considered in light of

Article (3)(c) VCLT. For example, Article 2(1) of the *International Covenant on Civil and Political Rights* (ICCPR) provides that States undertake 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant'. Initially this provision was considered to limit the ICCPR to the internal affairs of a State. However, a modern interpretation identifies a clear positive duty beyond the incorporation and implementation of the terms of the ICCPR into domestic legislation. This duty includes a State ensuring that private actors are prevented from 'impeding another individual's enjoyment of his rights'. States are under a positive obligation to 'prevent, punish, investigate and redress harm' should a third actor violate another's protected rights. Subsequent developments have expanded the jurisdictional element of this treaty.

General Comment 31 clarifies, in a very similar vein to the obligation of ensure respect in CA1, that 'every State Party has a legal interest in the performance by every other State Party of its obligations' and that should a third State draw attention to another State's breach of protected rights in the ICCPR, this should be 'considered as a reflection of legitimate community interest' (UNHRC, General Comment 31 (80) para. 2). States are also not bound only to protect their own citizens or those within their own territory. An extraterritorial nature to the ICCPR is recognised where a State party has power or effective control over other individuals, most commonly when acting as an armed force outside the State's territory (whether as a State armed force or as a troop contributing nation to a UN Peacekeeping operation). The European Court of Human Rights has also rejected the notion of human rights treaties application being territorially limited (*El Masri*). It would therefore suggest that this terminology of ensure respect can, indeed, have an external-compliance aspect. Reinforced by the fact that IHL is inherently extraterritorial in its application, the consideration of other relevant rules of international law would lend weight to the external-compliance aspect of CA1.

Conceptually similar in many ways to the idea of ensure respect in CA1 are the notions of rules of State responsibility. Article 41 of the 2001 International Law Commission's *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (ARSIWA) provides that States shall cooperate to bring to an end, through lawful means, any serious breaches by States of any obligations which arise under a peremptory norm of general international law. Articles 4 and 8 have been declared customary international law (*Bosnia Genocide*), and as Hathaway *et al* have thoroughly examined, ARSIWA provides codification of the ICJ and ICTY tests of effective control and overall control respectively (2017, pp. 548–560) and identify that these tests 'have traditionally been understood as mutually inconsistent'. However, they go on to conclude that CA1 does present an opportunity to complement these approaches to State responsibility and may clarify the State attribution doctrine which presents the chance to 'embrace a broader and more integrated understanding of state responsibility doctrine' (2017, p. 560).

Drafting history of CA1

A number of commentators have referenced how the drafters in 1949 had no intention of inferring anything other than an obligation to act in good faith with respect to the contents of the GCs through the wording used in CA1. The debate about whether or not the phrase 'to ensure respect' should mean more than had been in the minds of the drafters is but one approach that can be taken. The drafters themselves appear to have been concerned, when considering the phrase 'ensure respect', with the notion that the terms of the treaty should be respected by the whole population within a State, including potential future rebel forces. It was therefore likely that the original drafters did not consider that they were imposing more than an internal-compliance requirement on the States party to the convention to disseminate the rules of the GCs. However, this strictly originalist interpretation of the law is not the only method of defining the meaning of a phrase within a treaty: subsequent practice and evolving interpretations need to be taken into account and this results in a broader understanding of the phrase 'ensure respect'. Within a few years of the GCs being opened for signature, Jean Pictet published the first ICRC Commentary about the GCs. He concluded that CA1 'ensure respect' was included to 'emphasize and strengthen the responsibility' of the HCPs and to enable all States party to the GCs to act should another State fail to fulfil its obligations. In such a circumstance, a third State 'may, and should, endeavor to bring [the State] back to an attitude of respect for the Convention' (Pictet Commentary, p. 26).

In 2016, the ICRC published the first revised Commentary to the GCs since Pictet's Commentaries were first published in 1952. As noted above, the 2016 Commentary unequivocally supports the view that there is an external-compliance dimension to CA1. Despite the suggestion that the original ICRC Commentaries have influenced the debate (Focarelli, 2010, p. 127; Geiss, 2015, p. 425) State practice, although selective, is relevant to CA1's evolution (Boutruche and Sassòli, 2016, p.10). As previously stated, there has been discussion that the interpretation rendered by the ICRC goes further than some States may be prepared to accept (Egan, 2016; see also, Aly, 2019). However, even as Brian Egan, a US State Department Legal Adviser, expressed concerns about the ICRC's 'expansive' view, he flagged an acceptance of limited positive responses by third States to ensure respect for IHL by partner States and non-State actors (2016). The issue of whether the potentially offending States or non-State actors fell within the third States' sphere of influence was clearly important to this consideration. Nevertheless, this moderate view whilst not accepting the 'expansive interpretation' provided a cautious acknowledgement that the US would not partner with a State or non-State group which violates IHL and that this position was taken 'as a matter of international law' (Hathaway and Manfredi, 2016). This interpretation of CA1 is reflected in the October 2019 comment at the beginning of this chapter by the US Mission's Senior Policy Advisor in the UNSC (Barkin, 2019).

Due Diligence

A significant focus of the ICRC's 2016 contribution to the discussion of the nature of the obligation to ensure respect in CA1 is around the concept of due diligence. In

2007, the ICJ considered this concept with respect to Article 1 of the *Convention on the Prevention and Punishment of the Crime of Genocide* which imposes an obligation on States parties to 'undertake to prevent and punish' cases of genocide. The observations about the capacity of a third State to respond and what constitutes due diligence by the ICJ in the *Bosnia Genocide* judgment are highly informative with regards to CA1. As the ICJ noted, specifically about the issue of due diligence,

> a State cannot be under an obligation to succeed, whatever its circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide as far as possible (para. 430).

This suggests two separate points which can be applied to the concept of ensure respect. The first, that to ensure respect is not to be measured by the outcome of the intervention. A State might employ 'all means reasonably available' and yet be unable to halt or prevent the violations. The obligation to ensure respect is therefore one of means or conduct, rather than one of result. The second, that those seeking to ensure respect are only obliged to undertake those steps 'reasonably' available to them in that instance, and appropriate given the third State's influence in relation to the parties to the conflict.

Tzevelekos provides a very useful summary of the principle,

> for the state to escape responsibility for lack of diligence, it needs to demonstrate that it did everything that was possible to fight wrongfulness. To comply with diligence, states need to suitably use the pertinent means at their disposal… due diligence generates obligations of means… (2013, p. 73).

As Massingham has discussed elsewhere (2018, p. 211) a third State, geographically removed from the conflict region and without strong ties to any of the parties to the conflict, would have very limited means of halting or preventing violations of IHL from occurring. As Dörmann and Serralvo would assert this State 'can only be under an *obligation to exercise due diligence* in choosing appropriate measures' to encourage the parties to the conflict to comply with the law (2014, p. 724). This might mean, individually or in concert with other States, releasing a statement denouncing the actions of the parties, or supporting UNGA resolutions calling on parties to respect IHL. Whereas,

> a State with close political, economic and/or military ties (for example, through equipping and training of armed forces or joint planning of operations) to one of the belligerents has a stronger obligation to ensure respect for IHL by its ally.
>
> (Sassòli, 2002, p. 421)

Broadly speaking responses to CA1 obligations may be termed negative or positive. On the negative side, a third State is required to refrain from encouraging violations of IHL (*Nicaragua*, para. 220) and aiding or assisting violations of IHL (2016 Commentary, para. 158). Kessler takes this further by asserting States are obligated not to have any

form of involvement or participation in violations (2001, p. 503). On the positive side States are required to both stop ongoing violations or prevent potential future violations of IHL (Dörmann and Serralvo, 2014, pp. 728–732). Boutruche and Sassòli contend that all States are obligated to take some positive action in the face of violations of IHL. Such action may depend upon the seriousness of the breach, the capacity of the third State, as well as the aforementioned influence (2016 Commentary, para. 165; Boutruche and Sassòli, 2016, p. 16). It should be noted that States' highly selective reaction (or inaction) to breaches may suggest, as Judge Lauterpacht proposed, that there is a practice of 'permissibility of inactivity' (1993, para. 115). However, there is support for the contrary view that CA1 provides that, as a minimum, States are not allowed the 'right of indifference' (Sandoz, 1992 cited in Breslin, 2017, p. 21).

What is significant therefore, and perhaps what makes the CA1 external-compliance obligation difficult to identify in concrete terms, is that the relative political, military or economic power of any third State to the parties to the conflict will be highly relevant to the measures to be adopted. Relative power will be dynamic and therefore a third State's capacity to persuade a party to a conflict to restrain behaviour may vary over a short period of time. However, it is the third State's ability to influence which needs to be assessed when determining whether the State has taken all the necessary steps available to discharge their duty to ensure respect for CA1.

Ensuring respect for IHL: State responses to CA1

Focarelli, raises the point that if CA1 imposes an obligation to ensure respect, it results in 19[6] breaches of CA1 every time the Conventions are breached – which is not the practice of States and seems implausible (2010, p. 171). Conversely, Boutruche and Sassòli, in their Expert Opinion of 2016, argue that this is precisely the case and 'CA1 requires third States to take measures, even if this means in practice making this provision one of the most oft violated IHL norms' (p. 3). The contributors to this volume have taken their own approach to defining CA1 but each has examined whether there have been State actions within their thematic area which indicate how States can or do respond to potential, suspected or confirmed violations of IHL. These State responses are then considered in the light of the external-compliance aspect of CA1 and whether these responses are attributable to the requirement to ensure respect.

There is a wide spectrum of activities which will enable a State to comply with CA1: from actions which may be considered distant temporally or geographically from armed conflict to those activities that deal with the immediacy of conflict: to prevent or halt violations. For example, the requirements to promote respect for IHL by disseminating the contents of the GCs and supporting greater understanding through the development of domestic policies or legislation. In addition, exchange of information or drafting new treaties, contributing to the building of a culture of respect for the law, through to more coercive activities such as the application of sanctions. This range of options require, as a minimum, that States have knowledge of other States actions with respect to IHL (see further Kessler, 2001, p. 506). Without such information, States

cannot fulfil their due diligence obligation or be capable of responding to prevent or halt violations where appropriate.

Conclusion

It is not necessarily a simple task for States to implement or act on all aspects of the CA1 obligation. Indeed, CA1 may not capture the full extent of any State's legal obligations, and is but one of a number of international legal obligations that a State must abide by in any particular case. Moreover, even if the obligations within CA1 are clearly understood, and efforts are made to implement the law, this does not mean that there will be perfect compliance with the law. CA1 is not 'the panacea for IHL's eternal dilemma of ensuring compliance for its provisions' (Geiss, 2015, p. 440). However, CA1's undertaking for States to ensure respect for the applicable law in all circumstances offers 'immense possibility' particularly in relation to the idea of 'collective responsibility' alluded to by Boisson de Chazournes and Condorelli (2000, p. 68). It might also close 'the gap in state responsibility for non-state actors in armed conflict situations' (Hathaway *et al*, 2017, p. 544). A greater understanding and dissemination of this requirement under IHL will remove any ambiguity about the possibility that 'outsourcing war crimes to armed groups' (Amnesty International, 2019) will allow evasion from international responsibility or that third States can remain bystanders to situations where IHL is being, or may be, violated.

This book seeks to consider a range of actions and tools available for States to fulfil their obligation to ensure respect for IHL under CA1. Irrespective of where the legal arguments ultimately fall, the practical steps required along the spectrum – from provision of humanitarian support and creating norms conducive to respect for the law, to restraint in the face of violations and action designed to prevent or repress IHL violations – demonstrate how all States are capable of participating in actions to ensure respect for CA1.

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2 The Geneva Conventions and their Additional Protocols

Jonathan Crowe

Introduction

IHL can be defined as the body of international law governing the conduct of armed conflict. It protects those not, or no longer, taking part in the hostilities and limits the means and methods of warfare. The GCs and APs are the central international treaties regulating IHL. These documents, in conjunction with customary IHL, establish a rule, applicable in both international and non-international armed conflicts (IAC and NIAC), whereby States must not only respect IHL, but also ensure respect for IHL. This requirement is stated explicitly in CA1. This provision, which appears identically in all four conventions, states that '[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances' (see also API, Art. 1(1) and APIII, Art. 1(1)). The wording does not appear in APII, although CA1 itself applies to Common Article 3 (CA3) of the GCs and therefore has application in NIAC.

The existence of an armed conflict is often said to be a prerequisite for IHL to operate (*Tadic*, para. 67). However, it should be noted that the obligation to respect and ensure respect for IHL, as enshrined in CA1, also obliges States to act during times of peace and when not directly involved in a conflict. Specifically, States are obliged not only to respect IHL within their own territory and jurisdiction at all times, but also to ensure respect for this body of law by encouraging and influencing other States and non-State actors to abide by its requirements. This requires States to actively consider the operation of IHL both before a conflict comes into existence and after its conclusion, as well as considering IHL in their dealings with other States and non-State groups which may be involved in ongoing armed conflicts.

The contributors to this volume consider the ways in which the requirement to ensure respect for IHL confers States with legal obligations in specific domains of conduct. This chapter sets the scene for those discussions by considering the historical development and key principles of IHL, focusing particularly on the GCs and APs. Together with the opening chapter, this aims to provide the necessary framework for understanding the significance of the other contributions in this volume.

The Geneva Conventions and their Additional Protocols

The GCs were preceded by several earlier Geneva conventions, beginning in 1864, which sought to address the treatment of vulnerable parties during armed conflict, particularly the sick and wounded. The 1864 Geneva Conference culminated in the *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*, which conferred protected status during armed conflicts upon ambulances, hospitals and medical personnel, imposed a duty on forces to care for wounded combatants and acknowledged and protected the distinctive emblem of 'a red cross on a white ground'. The duty to care for the wounded was imposed on all parties regardless of affiliation.

The 1864 *Geneva Convention* was followed by several further treaties attempting to broaden its scope. The 1899 *Hague Convention* adapted the 1864 agreement to protect wounded or shipwrecked sailors. A major revision of the 1864 regime occurred in the 1906 *Geneva Convention* and this was adapted in the 1907 *Hague Convention* to cover naval activities. The 1929 *Geneva Convention* then extended specific protections to prisoners of war. However, the events of the Second World War (1939–1945) and other major armed conflicts of the period, such as the Spanish Civil War (1936–1939) revealed an urgent need for further revision and expansion of the law. This major review was undertaken at an international conference instigated by the International Committee of the Red Cross (ICRC) in collaboration with the Swiss government in Geneva in 1949.

The first three GCs, drafted at this conference, superseded previous Geneva treaties. GCI protects wounded and sick combatants in conflicts on land, superseding the agreements of 1864 and 1906. GCII deals with wounded, sick and shipwrecked combatants at sea, replacing the previous Hague treaties of 1899 and 1907, while GCIII deals with prisoners of war, surpassing the earlier agreement of 1929. By contrast, GCIV on the *Protection of Civilian Persons in Time of War* broke new ground by extending detailed protections to civilians caught up in military hostilities. Although the treatment of civilians in wartime had been covered to some extent in earlier treaties, GCIV, like the 1929 Convention on prisoners of war, represented a considerable advance on the previous rules.

International awareness of the need for revisions to IHL that resulted from UN and ICRC activities during the 1960s culminated in a further diplomatic conference in Geneva in 1974. The delegates refined the ICRC documents in four annual sessions between 1974 and 1977, producing two treaties designated as API and APII to the GCs of 1949. The Protocols were adopted at the 1977 session and many States ratified them later that year. API updated and extended the rules relating to the conduct of IAC. It covers issues relating to both the means and methods of warfare and the protection of vulnerable parties. APII, meanwhile, is directed at NIAC, making it the first instrument devoted exclusively to that area, and continuing the extension of IHL that began with the adoption of CA3.

Like CA3, API and APII reinforce the principle that certain activities, such as murder, torture, taking of hostages and summary execution, are prohibited in both IAC and NIAC. A number of other protections are common to conflicts of