Non-refoulement between Common Article 1 and Common Article 3

Reuven (Ruvi) Ziegler, Esq.
NON-REFOULEMENT BETWEEN ‘COMMON ARTICLE 1’ AND ‘COMMON ARTICLE 3’

Reuven (Ruvi) Ziegler*

1. INTRODUCTION

This chapter considers the question of whether non-refoulement obligations in armed conflicts arise for non-belligerent States. According to Article 1 Common (CA1) to the 1949 Geneva Conventions, all High Contracting Parties (HCPs) undertake to ‘respect and to ensure respect’ for the Conventions ‘in all circumstances’.1 CA1 was described as ‘the humanitarian law analogue to the human rights erga omnes principle’.2 It will be argued that CA1 applies both in international armed conflicts (IACs) and in non-international armed conflicts (NIACs). In turn, the terms of Article 3 Common (CA3) to the 1949 Geneva Conventions, which regulates NIACs, serve as a ‘minimum yardstick’3 which ‘must a fortiori be respected in the case of international conflicts’.4

This chapter concerns situations where persons ‘taking no active part in hostilities’ flee from territories where, due to an armed conflict, they are exposed to real risk of violations of CA3, to the territory of a HCP that is not party to that armed conflict. It is contended that the undertaking to ‘ensure respect’ for the Conventions in an armed conflict extends to HCPs that are not parties to that conflict; and, in particular, that CA1 entails that non-belligerent States should not refoule such persons back to territories where they are exposed to real risk of

* Lecturer in Law, University of Reading, School of Law (r.ziegler@reading.ac.uk). Earlier versions were presented at the RLI/RSC ‘Refuge from Inhumanity’ International Conference (All Souls College, Oxford, 11-12 February 2013); the International Studies Association Annual Conference (San Francisco, 3-6 April 2013); and the University of Bonn Institute for Public International Law Lunchtime Lectures Series (Bonn, 2 September 2013). The author is grateful for the participants’ helpful comments and suggestions. The author thanks the editors for their illuminating insights and perspectives. All errors and omissions remain his.


violations of CA3.\textsuperscript{5} Notably, this \textit{IHL-based} obligation is undertaken notwithstanding assessments of whether such persons should be recognised as refugees pursuant to Article 1A(2) of the Refugee Convention\textsuperscript{6} or as beneficiaries of complementary or subsidiary forms of protection.\textsuperscript{7} Likewise, the analysis does not affect the explicit (limited) protection from \textit{refoulement} that the Fourth Geneva Convention accords to ‘protected persons’ in belligerent States.\textsuperscript{8} This chapter also does not consider the question of the circumstances under which IHL permits or prohibits internal and external displacement of persons during an armed conflict.

An ‘undertaking’ as per CA1 ‘is not merely hortatory or purposive’: rather, ‘[t]o undertake means to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation’.\textsuperscript{9} The undertaking in CA1 should be read in tandem with other obligations of non-belligerent States arising under the 1949 Geneva Conventions. Most pertinently, all HCPs are required to take specific (lawful) measures to repress ‘grave breaches’ of the conventions and to take measures necessary for the suppression of all acts contrary to the conventions other than the grave breaches. Non-refoulement is clearly a lawful measure.\textsuperscript{10} In view of the general requirement to fulfil treaty obligations in good

\begin{itemize}
  \item \textsuperscript{5} Cf Walter Kälin, ‘Flight in Times of War’ (2001) 83 (843) \textit{Int’l Rev. Red Cross} 629, 633 (positing that IHL ‘does not apply to refugees who are citizens of a belligerent State and flee to a State that is not party to the conflict they seek to escape…[and] does not specifically address the plight of those who escape internal armed conflicts by fleeing abroad. It is in these two situations that the Refugee Convention becomes particularly important’. This chapter challenges the unequivocal nature of this statement).
  \item \textsuperscript{6} Convention Relating to the Status of Refugees, Art 1A(2), Geneva, 28 July 1951, entered into force on 22 April 1954, 189 U.N.T.S. 137 (hereinafter: \textit{Refugee Convention}).
  \item \textsuperscript{7} See e.g. Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast) (hereinafter: \textit{EUQD}), art 2(f) (the recognition by a Member State of a third country national or a stateless person as eligible for subsidiary protection which, in turn, is defined in art 2(e)). For discussion of the EUQD in the context of armed conflicts, see generally Hélène Lambert and Theo Farrell, ‘The Changing Character of Armed Conflict and the Implications for Refugee Protection Jurisprudence’ (2010) 22(2) \textit{IJRL} 237.
  \item \textsuperscript{8} Fourth Geneva Convention, arts 45, 49(5) (these provisions are considered in Section 4 below). For discussion see e.g. David J. Cantor, ‘Does IHL Prohibit the Forced Displacement of Civilians during War?’ (2013) 24(4) \textit{IJRL} 840.
  \item \textsuperscript{9} \textit{Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Merits} (26 February 2007), [162] (hereinafter: \textit{Genocide}).
  \item \textsuperscript{10} See e.g. United Nations Declaration on Territorial Asylum, art 1(1), (3), GA/Res/2312 (XXII) (14 December 1967) U.N. Doc. A/6716 (‘Asylum granted by a State, in the exercise of its sovereignty, to persons entitled to invoke Article 14 of the Universal Declaration of Human Rights, including persons struggling against colonialism, shall be respected by all other States… It shall rest with the State granting asylum to evaluate the grounds for the grant of asylum’).
\end{itemize}
faith. HCPs that are capable of protecting displaced persons from exposure to real risks of violations of CA3 and nonetheless refuse them to face such risks are failing to take lawful measures at their disposal in order to suppress acts contrary to the Conventions; more generally, they also fail to ensure respect for the Conventions.

The potential legal significance of an international humanitarian law protection framework should be recognised: 195 States are HCPs of the 1949 Geneva Conventions, including the world’s newest State, South Sudan, which joined on 25 January 2013; by comparison, the Refugee Convention has 148 State Parties. Hence, the CA3 stipulation that, in order to trigger its application, a NIAC must occur ‘in the territory of a High Contracting Party’ is redundant: any armed conflict between governmental armed forces and armed groups or between such groups necessarily takes place on the territory of a HCP. Moreover, by their very nature, IHL rules cannot be renounced or derogated from: they already reflect a compromise between military necessity and humanity. Pragmatically, the likelihood that persons taking no active part in hostilities will flee to a non-belligerent State (often a neighbouring state) to escape a risk of exposure to violations of CA3 is significant; the rise in numbers of displaced persons emphasises the pertinence of addressing their predicament. Finally, most contemporary armed conflicts are NIACs.

However, the limits of IHL-based non-refoulement should also be acknowledged. First, CA1 of the 1949 Geneva Conventions becomes applicable when one of the situations in Articles 2 or 3 occurs: designation of a conflict as either an IAC or a NIAC is sine qua non. In turn, regarding NIACs, such designation may be delayed: for instance, the conflict in Syria was qualified as a NIAC by the ICRC seventeen months after the uprising began (at the time of writing, over two million persons have fled Syria, and violations of CA3 have allegedly been committed by both sides). Since CA3 does not stipulate an applicability threshold for

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11 Vienna Convention on the Law of Treaties, art 26, 23 May 1969, entered into force 27 January 1980, 1155 U.N.T.S. 331 (hereinafter: VCLT) (stipulating that ‘[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith’).

12 The analysis complements considerations of ‘humanitarian’ non-refoulement; see e.g. in this volume Jennifer Moore, ‘Protection against the Forced Return of War Refugees: An Interdisciplinary Consensus on Humanitarian Non-refoulement’.


16 ICRC, ‘Syria: ICRC and Syrian Arab Red Crescent maintain aid efforts amid increased fighting’ (17 July 2012) (‘…there is currently a non-international (internal) armed conflict occurring in Syria opposing Government Forces and a number of organised armed opposition groups operating in several parts of the country…hostilities between these parties wherever they may occur in Syria are subject to the rules of international humanitarian law’), available at: http://www.icrc.org/eng/resources/documents/update/2012/syria-update-2012-07-17.htm. The latest data regarding displacement from (and in) Syria is available at:
NIACs, the challenge is particularly acute. Nevertheless, it can be argued that this ‘gap’ has been filled by the Tadić judgment of the International Criminal Tribunal for the Former Yugoslavia (ICTY). Moreover, factual uncertainty is hardly unique to IHL: refugee status determination (RSD) processes require determination of (a well-founded fear of) persecution, whereas the United Nations High Commissioner for Refugees (UNHCR) notes that ‘[t]here is no universally accepted definition of “persecution”’.  

Secondly, the general IHL framework aims to balance military necessity and humanity. IHL (also commonly referred to as the ‘law of armed conflict’) as the legal framework regulating the conduct of hostilities in situations of armed conflicts is based on the premise that persons not (or no longer) taking active part in hostilities, including displaced persons, must be treated humanely. However, even in situations where non-refoulement is explicitly required, rights of persons protected from refoulement are not fully ascribed, and the question whether a (legal) protection gap is filled by reference to general human rights law or (also) by

17 Anthony Cullen, The Concept of Non-International Armed Conflict in International Humanitarian Law (CUP: Cambridge, 2010), 50 (arguing that the undefined phrase ‘armed conflict not of an international character’ in CA3, and the non-use of the terms ‘civil war’ and ‘belligerent’ have ‘allowed the scope of CA3 to evolve beyond the drafters’ intentions’).

18 ICTY, Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber (2 October 1995), [70] (hereinafter: Tadić). For a non-exhaustive list of instances where the Tadić formula has been applied, see Cullen (fn 17), 120-2. See also Statute of the International Criminal Court, Rome, art 8(2)(c), 8(2)(f), 17 July 1998, entered into force 1 July 2002, 2187 U.N.T.S. 90 (hereinafter: ICC Statute) (referring respectively to serious violations of CA3, and to the Tadić formula for defining ‘an armed conflict not of an international character’. References to the ICC Statute are illustrative of the general acceptability of the Tadić formula. Notably, individual criminal responsibility falls outside the scope of this chapter. For similar reasons, the chapter does not consider the extent to which non-state belligerent forces as such incur responsibility for violations of CA3. Finally, questions relating to potential departure from an essentially territorial approach to NIACs are less relevant for the situations considered in this chapter (see e.g. discussion in the Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, [62-65], submitted to the UNGA, 18 September 2013, A/68/38).


20 See e.g. in this volume François J. Hampson, ‘The Scope of the Obligation Not to Return Fighters’ (arguing that ‘the law of armed conflict is not designed as an instrument of refugee protection’).
reference to international refugee law is contested.\textsuperscript{21} In contradistinction, the Refugee Convention outlines a host of rights and entitlements of persons falling within its purview.

This chapter’s analysis should therefore be seen as complementing the on-going debate regarding the extent to which RSD processes should borrow from, be instructed by, or follow IHL terminology and legal frameworks in situations of armed conflict.\textsuperscript{22} Serious violations of IHL ‘can constitute persecution’,\textsuperscript{23} and persons displaced by conflict may be ‘refugees’ pursuant to Article 1A(2) of the Refugee Convention;\textsuperscript{24} indeed, it is possible to conceive of refugee law, \textit{inter alia}, as ‘a response for non-respect for IHL’\textsuperscript{25} While not all persons fleeing armed conflict will satisfy the Refugee Convention definition, they may require

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\textsuperscript{24} UNHCR, \textit{Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees} (UNHCR: Geneva, 2001), [22] (rejecting both the ‘exceptionality’ approach and the ‘normalcy’ approach); Vanessa Holzer, \textit{The 1951 Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence} (UNHCR: Geneva, September 2012) (noting that IHL violations can indicate the presence of a causal link between a claimant’s predicament and a Refugee Convention ground, but they cannot provide a definite assessment). See also in this volume Hugo Storey, ‘The War-Flow and why it matters’. Regarding the NIAC in Syria, see UNHCR, \textit{International Protection Considerations with regard to people fleeing the Syrian Arab Republic, Update II} (22 October 2013), [14] (‘UNHCR considers that most Syrians seeking international protection are likely to fulfill the requirements of the refugee definition contained in Article 1A(2) of the…Refugee Convention, since they will have a well-founded fear of persecution linked to one of the Convention grounds), available at: http://www.refworld.org/docid/5265184f4.html (hereinafter: \textit{UNHCR Syria update}).

\textsuperscript{25} Stephane Jaquemet, ‘The Cross-Fertilization of International Humanitarian Law and International Refugee Law’ (2001) 83 (843) \textit{IRRC} 651, 665. See also \textit{UNHCR Syria update} (fn 24), [6] (noting the ‘disregard for the protection of civilians as parties to the conflict have repeatedly violated international humanitarian law…”').
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protection on other grounds, and receive it through, *inter alia*, regional protection regimes in Africa, Latin America, and the European Union.

The analysis proceeds in three main steps: *first*, the phrase ‘in all circumstances’ in CA1 should be interpreted inclusively to apply in both IACs and NIACs; in turn, the stipulations of CA3 serve as a ‘minimum yardstick’ in both IACs and NIACs. *Second*, the undertaking in CA1 to ‘ensure respect’ engages non-belligerent States. *Third*, non-refoulement obligations may arise when the non-belligerent State cannot be unaware that refouled persons will be exposed to real risk of violations of CA3. CA1 should be interpreted in concert with other obligations to be undertaken by non-belligerent States, based on a harmonised interpretation of the 1949 Geneva Conventions.

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26 See e.g. *UNHCR Syria update* (fn 24), [11] (‘UNHCR appeals to all States to ensure Syrian civilians are protected from *refoulement* and afforded international protection, the form of which may vary depending on the processing and reception capacity of countries receiving them, while guaranteeing respect for basic human rights’). See also James C. Hathaway, *Rights of Refugees under International Law* (CUP: Cambridge, 2005) 369-70 (‘[T]he insufficiency of the *non-refoulement* guarantee set by Art. 33 of the Refugee Convention is effectively remedied by the ability to invoke other standards of international law’).


28 See e.g. in this volume David J. Cantor and Diana Trimiño Mora, ‘A Simple Solution to War Refugees? The Latin American Expanded Definition and its relationship to IHL’ (considering the Cartagena Declaration on Refugees, conclusion III (3), Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Cartagena de Indias, 22 November 1984).

29 Much of the discussion regarding subsidiary protection in the EU centres on whether the reference to serious harm in EUQD, art 15(C) as consisting, *inter alia*, of ‘serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict’ should be given an autonomous or an IHL-based meaning. See e.g. in this volume Evangelia (Lilian) Tsourdi, ‘The Impact of the CJEU and the ECtHR Jurisprudence on the Understanding of the EU Subsidiary Protection Regime’; Céline Bauloz, *The Misuse of International Humanitarian Law under Article 15(C) of the EU Qualification Directive*; Violeta Moreno-Lax, ‘Back to Basics: Articulating the Relationship between EU Asylum Law and International Humanitarian Law’. See also Jean-François Durieux, ‘Of War, Flows, Laws and Flaws, A Reply to Hugo Storey’ (2012) 31(3) RSQ 161, 173 (contending that the relevant question is ‘what rights and/or interests, threatened by armed violence, are protected by Article 15(c) that are not covered by Article 1A(2) of the 1951 Refugee Convention’).

30 This chapter is employing, *mutatis mutandis*, the stipulation of the Court of Justice of the European Union in C-411/10 and C-493/10 *NS and others v. Secretary of State for the Home Department* (Grand Chamber) (21 December 2011), [123(2)], and the stipulation of the European Court of Human Rights in *MSS v. Belgium and Greece* (Grand Chamber) (22 January 2012), [358], [366]-[367].
2. SCOPE OF APPLICATION OF CA1 AND CA3

2.1 Types of Armed Conflicts Regulated by the 1949 Geneva Conventions

The Four Geneva Conventions regulate two types of armed conflict, IACs and NIACs, defined in Article 2 Common (CA2) and CA3 thereof, respectively.

CA2 stipulates that

…the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them...[a]lthough one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof (my emphasis)

In turn, CA3 pronounces that

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions…persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples (my emphasis)

The ICTY held in Tadić31 that ‘[a]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State’. The first leg of the Tadić stipulation relates to IACs; there is no minimum level of intensity required to bring the rules into effect, and no need for formal declaration of war. The second leg of the Tadić stipulation relates to NIACs; depending on the situation, hostilities may occur between governmental armed forces and non-governmental armed groups or between such groups only. Notably,

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31 Tadić (fn 18), [70].
CA3 binds non-State belligerent forces.\textsuperscript{32} Pictet observed that ‘[t]he term “Party”…has the broadest possible meaning: a Party need neither be a signatory of the Convention nor even represent a legal entity capable of undertaking international obligations.’\textsuperscript{33}

The International Law Commission opined that ‘significant State practice and \textit{opinio juris} establish that, as a matter of customary international law, a situation of armed conflict depends on the satisfaction of two essential minimum criteria, namely: the existence of organised armed groups that are engaged in fighting of some intensity’.\textsuperscript{34}

The Second Additional Protocol to the 1949 Geneva Conventions sets its own \textit{higher} threshold of applicability.\textsuperscript{35} However, pertinently for the purposes of this chapter, CA3 ‘retains an autonomous existence i.e. its applicability is neither limited nor affected by the material field of application of the…Protocol’.\textsuperscript{36} The ICRC posited that the Second Additional Protocol ‘develops and supplements’ CA3 ‘without modifying its existing conditions of application’.\textsuperscript{37}

\textbf{2.2 Scope of Application of CA3}

The ICJ held in \textit{Nicaragua} that ‘[t]here is no doubt that, in the event of international armed conflicts, these rules [of CA3] also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts…they are rules which…reflect…elementary considerations of humanity’.\textsuperscript{38}

The judgment corresponds to Pictet’s observation that ‘[t]he value of the provision [CA3] is not limited to the field dealt with in Article 3…its terms must \textit{a fortiori} be respected in the

\textsuperscript{32} CA3 states that ‘each party to the conflict shall be bound to apply’ the provisions. Non-State belligerents are, by definition, at least one of the parties to a NIAC. Note, for instance, the (October 2013) estimation that at least 1,200 different groups are active in the Syrian NIACs; \textit{UNHCR Syria update} (fn 24), [5].

\textsuperscript{33} Pictet: \textit{GC-IV} (fn 4), 37.

\textsuperscript{34} International Law Association, Use of Force Committee, \textit{Final Report on the Meaning of Armed Conflict in International Law} (The Hague, August 2010), 32-3.

\textsuperscript{35} See Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of Non-International Armed Conflicts, art 1(1), 8 June 1977, entered into force 7 December 1978 (stipulating that, the insurgents be under a responsible command, and have control over part of the territory that enables them to carry out sustained and concerted military operations and to implement the Protocol) (hereinafter: \textit{Second Additional Protocol}).


\textsuperscript{37} International Committee of the Red Cross, \textit{How is the Term “Armed Conflict” Defined in International Humanitarian Law} (ICRC: Geneva, 2008).

\textsuperscript{38} \textit{Nicaragua} (fn 3), [218].
case of international conflicts proper, when all the provisions of the Convention are applicable. For "the greater obligation includes the lesser".

The U.S. Supreme Court held in *Hamdan v. Rumsfeld*, that "[l]imiting language that would have rendered Common Article 3 applicable "especially to" cases of civil war, colonial conflicts, or wars of religion" was omitted from the final version of the Article which coupled broader scope of application with a narrower range of rights than did earlier proposed iterations.

It was noted in the introduction that essentially all States have ratified the 1949 Geneva Conventions; consequently, the requirement that conflicts must take place on the territory of a HCP is satisfied in all armed conflicts. Furthermore, the ICJ held in its *Nuclear Weapons Advisory* that the rules of the 1949 Geneva Conventions are ‘fundamental to the respect of the human person and “elementary considerations of humanity”’ and ‘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’.

### 2.3 Scope of Application of CA1

HCPs undertake in the 1949 Geneva Conventions ‘to respect and ensure respect for the present convention in all circumstances’ (emphasis added). There is no *si omnes* clause.

Pictet observed that the undertaking to ensure respect ‘is not an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations. It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties’.

Pictet’s Commentary to the Fourth Geneva Convention suggests that ‘[t]he words "in all circumstances"…do not, of course, cover the case of civil war…as the rules to be followed in such conflicts are laid down by the Convention itself, in Article 3’. However, the...
commentary considers the scope of ‘in all circumstances’ in the framework of CA1 generally; as such, it restates that CA3 specifically addresses NIACs, and that consequently States do not have to apply all the provisions of the 1949 Geneva Conventions. CA1 precedes CA2 and CA3, so there is no systematic or contextual ground for excluding CA3 from the scope of CA1. A more sensible proposition is that in IACs the whole body of law is applicable, whereas in NIACs the specific obligations are outlined in CA3.

Moreover, there is no reason to exclude CA3 from the scope of the obligation to ensure respect ‘for the present Convention’. After all, the provision does not proclaim that States should ‘ensure respect for the provisions of the present Convention that are applicable in international armed conflicts.’ This chapter’s interpretation of the applicability of CA1 accords with the undertaking of all HCP ‘in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries’ (emphasis added). Notably, this interpretation was adopted by the ICTY in Kupreskic.

3. THE UNDERTAKING TO ‘ENSURE RESPECT’: THREE APPROACHES

All HCPs undertake in CA1 ‘to respect and to ensure respect’ for the Conventions. According to the ICRC’s customary law study, State practice establishes as a norm of customary international law applicable in both IACs and NIACs that ‘each party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control.’ Indeed, this assertion seems uncontroversial.

Nevertheless, it can be plausibly argued that the undertaking ‘to respect’ simply states the generally acceptable principle that ‘[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith’. Hence, the principle of effectiveness (effet utile),


45 Fourth Geneva Convention, art 144; Third Geneva Convention, art 127; Second Geneva Convention, art 48; First Geneva Convention, art 47.

46 ICTY, Prosecutor v. Kupreskic (Trial Chamber) (Judgment of 14 January 2000), [517] (concluding that the CA1 obligation applies not only to IACs, but also to NIACs insofar as they are covered by CA3).


49 VCLT, art 26.
which requires that a treaty be interpreted ‘in such a way that a reason and a meaning can be attributed to every word in the text’ dictates that the phrase ‘and to ensure respect’ entails an additional undertaking by HCPs.\textsuperscript{50}

However, neither the Diplomatic Conferences which drafted the 1949 Geneva Conventions and the First Additional Protocol, nor these instruments, defined very closely the measures that the Parties to these treaties should take to execute the obligation to “ensure respect”. The key consideration for this chapter’s purposes is whether CA1 engages non-belligerent States; it gives rise to three main interpretive approaches.

The first approach is that CA1 does not engage (legal) entitlements and obligations of non-belligerent States. On this view, CA1 merely ‘gives expression to a strong moral and political commitment’ on their part.\textsuperscript{51} Based on a thorough exploration of the records of the diplomatic conference, Kalshoven concludes that there was no ‘awareness on the part of government delegates that one might ever wish to read into the phrase “to ensure respect” any undertaking by a contracting State other than an obligation to ensure respect for the [1949 Geneva] Conventions by its people “in all circumstances”’.\textsuperscript{52} According to Kalshoven, ‘to respect’ was aimed at a State’s agents whereas ‘to ensure respect’ was meant to oblige a State to ensure respect of the treaty provisions by its entire population.

Nevertheless, notwithstanding the presumed accuracy of Kalshoven’s historical account, it should not ‘freeze’ our understanding of the scope of CA1. Meron’s appraisal of the evolving interpretation of Article 118 of the Third Geneva Convention provides an insightful analogy.\textsuperscript{53} The provision, concerning post-conflict repatriation of prisoners of war, POWs, enunciates that ‘[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities’. According to Meron, in 1949, no State condemned forced repatriation of POWs; however, over time, positions have shifted towards respect for individual autonomy, to the effect that no POWs should be refouled to their State against their will.

\textsuperscript{50} See e.g. Territorial Dispute (\textit{Libyan Arab Jamahiriya v. Chad}) (Judgment) [1994] ICJ Rep. 1994, 6, [51] (‘[i]n international law, \textit{effet utile} is regarded as ‘one of the fundamental principles of interpretation of treaties’). See also Whaling in the Antarctic (\textit{Australia v. Japan}) (New Zealand intervening), authorised in the order of 6 February 2013, opinion of Justice Cançado Trindade: ‘[w]hen it comes to protection (of the human person, of the environment, or of matters of general interest), the principle of \textit{effet utile} assumes particular importance in the determination of the (enlarged) scope of the conventional obligations of protection.’ See also \textit{Anglo-Iranian Oil Co. case (UK v. Iran)}, Jurisdiction, [1952] ICJ Rep. 93, at 105.


\textsuperscript{53} Meron (fn 2), 256.
Focarelli offers a second interpretive possibility, namely that CA1 authorises non-belligerent States to take (lawful) measures to address violations of the Conventions, contending that this approach appears grounded in sound reason, as actions taken by non-belligerent States may be ‘the most effective, if not indispensable means to ensure compliance’. 54

Now, IHL norms arguably ‘lay down obligations towards the international community as a whole, with the consequence that each and every member of the international community has a “legal interest” in their observance and consequently a legal entitlement to demand respect for such obligations’; 55 In line with Pictet’s commentaries, UNGA and UNSC resolutions, and ICJ jurisprudence, this chapter endorses a third interpretive approach according to which CA1 requires non-belligerent States to act lawfully to ensure respect for the 1949 Geneva Conventions when such action is within their power. As Jørgenson puts it, all States, whether or not they are involved in a particular conflict, have a duty to help secure the implementation of the Conventions in any situation where there is a violation (or, by extension, a real risk of violation). 56

Proponents diverge as to whether the undertaking is an obligation of conduct 57 or an obligation of result. 58 The obligations which this chapter considers (non-refoulement of persons to territories where they may be exposed to real risks of violations of CA3) are obligations of conduct. Further divergence concerns whether non-belligerent States should act to ensure respect by belligerent parties. 59 Interestingly, the ICRC study asserts that ‘State practice shows an overwhelming use of (i) diplomatic protest and (ii) collective measures through which States exert their influence, to the degree possible, to try and stop violations of international humanitarian law.’ 60 Nevertheless, by virtue of its subject-matter, this chapter


59 Compare e.g. Marco Sassòli, ‘Interpretation of International Humanitarian Law by the UN Security Council’ (International Institute of Humanitarian Law, International Conference, Sanremo, 8-10 September 2005) with James Crawford, Opinion, Third Party Obligations with Respect to Settlements in the Occupied Palestinian Territories (July 2012), [39] (the latter proposing a ‘due diligence’ standard for the application of CA1 to non-belligerent States, limiting it to actions within the jurisdiction or control of the State).

60 CIL Study (fn 47), Rule 144; available at: http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule144.
adopts a modest approach to the scope of obligation: whether non-belligerent States should *directly* influence the behaviour of belligerent parties falls outside its scope of inquiry.\(^{61}\)

Pictet posited that ‘[t]he proper working of the system of protection provided by the Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally.’\(^{62}\) It is also noteworthy that no HCP of the 1949 Geneva Conventions has made a reservation or an interpretive declaration regarding CA1 nor raised concern when an identical provision was included in Article 1(1) of the First Additional Protocol, notwithstanding Pictet’s interpretation.

Focarelli notes the fact that, while the Pictet commentaries to the First,\(^{63}\) Second,\(^{64}\) and Fourth\(^{65}\) Geneva Conventions conclude that ‘[i]n the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention’, the commentary to the Third\(^{66}\) Geneva Convention omits the ‘may, and’ component. Nevertheless, it seems plausible that an *obligation* to act (‘should’) which appears in all four commentaries subsumes a permission to do so (‘may’).

Various international declarations and resolutions have acknowledged relevant obligations of non-belligerent States. The 1968 International Conference on Human Rights in Tehran ‘[e]mphasise[d] that the obligation to ensure respect for the Conventions is incumbent even upon States that are not directly involved in an armed conflict’.\(^{67}\) On 5 December 2011, 114 HCPs of the Fourth Geneva Convention (joined by eight observers) convening in Geneva adopted a declaration ‘call[ing] upon all parties, directly involved in the conflict or not, to respect and to ensure respect for the Geneva Conventions in all circumstances’.\(^{68}\)

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\(^{62}\) Pictet: *GC-III* (fn 44), 18; also cited in *Commentary, Additional Protocols* (fn 36), §45. Note VCLT, art 31(1) (proclaiming that ‘[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’).

\(^{63}\) Pictet: *GC-I* (fn 44), 26.

\(^{64}\) Pictet: *GC-II* (fn 44), 25.

\(^{65}\) Pictet: *GC-IV* (fn 4), 16.

\(^{66}\) Pictet: GC-III (fn 44), 18.

\(^{67}\) Res. XXIII, art 1.

\(^{68}\) Available at: [http://unispal.un.org/UNISPAL.NSF/0/8FC4F064B9BE5BAD85256C1400722951](http://unispal.un.org/UNISPAL.NSF/0/8FC4F064B9BE5BAD85256C1400722951).
In 1978, the UNGA urged ‘…all States parties to [the Fourth Geneva Convention] to exert all efforts in order to ensure respect for and compliance with the provisions thereof in all the Arab territories occupied by Israel since 1967, including Jerusalem’. An oft-cited UNSC resolution concerning deportations from territories occupied by Israel to Lebanon ‘[c]all[ed] upon the High Contracting Parties…to ensure respect by Israel, the occupying power, for its obligations under the Convention in accordance with Article 1 thereof’.

The ICJ held in its Nicaragua judgment that CA1 obliged the U.S. government ‘to “respect” the Conventions and even “to ensure respect” for them “in all circumstances”. [It is] thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 Common’.

While the ICJ’s Nicaragua stipulation could arguably be agreeable even to advocates of a restrictive interpretation of CA1, its Wall advisory opinion went much further. The Court held that ‘[i]t follows from [CA1] 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’. Moreover, the ICJ 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 as embodied in that Convention.’

Judge Kooijmans noted that the main opinion specified (only) two concrete measures that State should undertake: non-recognition of Israel’s acts and a requirement not to render aid or assistance in maintaining the situation created by Israel’s serious breach. He refused to join the main opinion’s general stipulation (outlined above) which, he suggested, was simply asserted by the Court rather than reasoned. However, importantly, Judge Kooijmans

69 GA Res 33/113A (18 December 1978), [4]. Note also the final preambular paragraph, ‘[t]aking into account that States parties to [the Fourth Geneva Convention] undertake, in accordance with Article 1 thereof, not only to respect but also to ensure respect for the Convention in all circumstances.’

70 SC/Res/681: Territories Occupied by Israel (20 December 1990), [5]. See also GA Res. 45/69 (6 December 1990).

71 Nicaragua (fn 3), [220].

72 Crawford (fn 59), [15] notes that advisory opinions constitute declarations of international law for states to take into account in conducting their affairs and their ratio is likely to be followed by the court in subsequent case-law.

73 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, [2004] ICJ Rep. 136, [158].

74 ibid, [159]. See also Hamdan v. Rumsfeld, 415 F. 3d 33 (18 July 2005) (U.S. Court of Appeals, D.C. Circuit) (reversed on other grounds by 548 U.S. 557 (29 June 2006) (U.S. Supreme Court)) (holding that ‘[CA1]…imposed upon signatory nations the duty not only of complying themselves but also of making sure other signatories complied’). Cf an earlier case in a lower court: American Baptist Churches in the USA v. Meese, 712 F. Supp. 756 (N.D. Cal. 1989), 769-70 (holding that ‘Article 1 of the Geneva Convention is not a self-executing treaty provision. The language used does not impose any specific obligations on the signatory nations, nor does it provide any intelligible guidelines for judicial enforcement….’).
emphasised that he was ‘[n]ot in favour of [a] restrictive interpretation such as may have been envisaged in 1949’. Hence, none of the fifteen ICJ judges endorsed an interpretation of CA1 which does not impose some obligations on non-belligerent States.\(^7^5\)

Scobbie argues that the absence of concrete guidance in the advisory opinion regarding the practical consequences that the unlawful situation engenders and the material steps that should be taken is due to the fact that the ICJ left it to States to implement in their specific relationship with Israel.\(^7^6\) Indeed, the advisory opinion can be seen as an endorsement of a potentially wider scope of CA1 by refraining from mentioning specific provisions of the Fourth Geneva Convention that concern non-belligerent States’ obligations.\(^7^7\)

This section presented three approaches regarding whether the CA1 undertaking to ‘ensure respect’ for the Four Geneva Convention engages non-belligerent States and, if so, which types of actions may be required in pursuance thereof. It concluded that a restrictive interpretation should be rejected both on a literal and on a purposive reading of CA1. The next section queries whether the CA1 undertaking entails non-refoulement obligations.

### 4. NON-REFOULEMENT OBLIGATIONS OF NON-BELLIGERENT STATES

#### 4.1 The interrelations between CA3 and CA1

Section 2 asserted that CA1 applies in both IACs and NIACs and that, in turn, the stipulations of CA3 apply in IACs and NIACs. Section 3 concluded that the CA1 undertaking to ‘ensure respect’ engages the actions of non-belligerent States. This section contends that, in the course of either an IAC or a NIAC, a non-belligerent State violates its CA1 undertaking to ensure respect when it exposes refouled persons to real risk of violations of CA3.\(^7^8\) The non-
belligerent State substantially enables an external actor to violate these persons’ IHL-protected rights.

The obligation is one of conduct: a State must \textit{try} to ensure respect, and take reasonable (lawful) measures toward that end, but the State cannot and so needs not guarantee it.\textsuperscript{79} By failing to satisfy its CA1 undertaking, the non-belligerent State commits an internationally wrong act.\textsuperscript{80} It \textit{is not} contended that the non-belligerent State should incur responsibility for the potential violations of CA3 that may occur following \textit{refoulement}.\textsuperscript{81} Analogously, a signatory to the Refugee Convention that \textit{refoules} a ‘refugee’ to ‘the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion’ acts in contravention of its obligation under Article 33(1) and incurs responsibility for that act; nonetheless, \textit{refoulement} as such does not make it complicit in persecution (that may or may not occur) in the territory to which the refugee is \textit{refouled}.

Focarelli asserts that it is ‘unclear’ whether CA1 ‘provides for an obligation or rather a discretionary power’; he contends that, if an extensive approach were to be adopted, it is unclear ‘what specific measures contracting states are bound (or authorised) to adopt’.\textsuperscript{82} He accepts that ‘a legal obligation to take per se lawful measures appears to be in line with…‘undertake’’. Nonetheless, he argues, since ‘in the abstract all States are supposed to take all possible (actually countless) lawful measures against the transgressor State’ whereas ‘when a State is believed to have breached the Convention only few States, at best, take some (lawful) measures’, it may follow that all other HCPs can be considered responsible for a violation of CA1.\textsuperscript{83}
This chapter’s proposition tackles Focarelli’s (pragmatic) challenge by linking non-belligerent States’ obligations to particular circumstances; it identifies a specific HCP that has the capacity to take specific lawful measures (non-refoulement). Hence, when a non-belligerent State is confronted with persons displaced from armed conflict, its CA1 obligations are engaged in a materially different way than the CA1 obligations of other non-belligerent States.

Turning to CA3, the provision does not address displacement and, consequently, does not engage non-refoulement; neither do the Second Additional Protocol and the ICRC’s customary law study. In contradistinction, in IACs, the Fourth Geneva Convention engages the responsibility of belligerent States towards ‘protected persons’ in a displacement context. Article 4 defines ‘protected persons’ as persons who find themselves ‘in case of conflict or occupation in the hands of a party to the conflict or Occupying Power of which they are not nationals’. Article 45(4) pronounces that ‘[i]n no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs’. In turn, Article 49(5) prohibits ‘the Occupying Power’ from ‘dettain[ing] protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand’.

The above provisions should not be read as to deny similar protections in non-belligerent States to persons not taking an active part in hostilities. Rather, it was thought necessary at the time of drafting to shield ‘protected persons’ from exposure to persecution or, indeed, the dangers of war, given their vulnerable position as displaced persons or detainees in a (likely hostile) belligerent State. Indeed, the explicit references to persecution and the dangers of war should be considered to be indicative of an underlying humanitarian premise of the Four Geneva Conventions and guide the interpretation of the CA1 undertaking.

The European Court of Human Rights (ECtHR)’s consistent jurisprudence regarding the scope of obligations under Article 3 of the European Convention on Human Rights offers a helpful analogy. Article 3 does not mention refoulement: rather, it enunciates that ‘[n]o one


85 Notably, the non-refoulement grounds are narrower than those accorded by the Refugee Convention; this may be attributed to the 1949 Geneva Conventions predating the Refugee Convention. For discussion, see Meron (fn 3), 254. Note also Fourth Geneva Convention, art 44, prohibiting States from treating refugees as enemy aliens ‘exclusively on the basis of their nationality de jure of an enemy State’. For discussion, see Karen Hulme, ‘Armed Conflict and the Displaced’ (2005) 17(1) IJRL 91, 108.

86 Cf in this volume Stefanie Haumer and Ryszard Piotrowicz, ‘The Concept of “Protection” Under (the Influence of) IHL’.

shall be subjected to torture or to inhuman or degrading treatment or punishment’. Since
1989, in cases involving expulsion and extradition, the ECtHR has repeatedly found States
in violation of their Article 3 obligations. For instance, in a case involving expulsion from
the UK to India, the court held that ‘expulsion by a Contracting State…engage[s] the
responsibility of that State under the Convention where substantial grounds have been shown
for believing that the person in question, if expelled, would face a real risk of being subjected
to treatment contrary to Article 3 in the receiving country, the responsibility of the
Contracting State to safeguard him or her against such treatment is engaged in the event of
expulsion.’ Lambert suggests that the non-refoulement obligation derived from Article 3
should be seen as a component of the more general obligation of a State to do everything that
it can reasonably be expected to do to protect an individual from a harm about which it
knows or ought to know.

A 2011 judgment concerning expulsion from the UK to Somalia is quite pertinent for this
chapter’s purposes. In *Sufi and Elmi*, the ECtHR found that the general situation of violence
in Somalia (at that time) was of sufficient intensity to create a real risk of ill-treatment
simply by virtue of being exposed to such level of violence on return. The court held that
‘the violence in Mogadishu is of such a level of intensity that anyone in the city, except
possibly those who are exceptionally well-connected to “powerful actors”, would be at real
risk of treatment prohibited by Article 3 of the Convention’.

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88 Walter Kälin, ‘Aliens, Expulsion and Deportation’ (Max Plank Encyclopaedia of Public International Law, October 2010), [10] (noting that ‘[T]he terminology used at the domestic or international level is not uniform
but there is a clear tendency to call expulsion the legal order to leave the territory of a State, and deportation the
actual implementation of such order in cases where the person concerned does not follow it voluntarily’).


91 Hélène Lambert, ‘The European Convention on Human Rights and the Protection of Refugees: Limits and
(2013) 62(3) ICLQ 523.

92 In September 2013, the ECtHR rejected a challenge against expulsion from Sweden to Somalia: *K.A.B v. Sweden*, App. No. 886/11 (Fifth Section Chamber) (5 September 2013), [72]. Citing *Sufi and Elmi*, ibid, [216],
the ECtHR recalled that such finding would be made only “in the most extreme cases”, and that circumstances
in Somalia have changed since 2011.


94 ibid, [250].
Additional interpretive guidance for the scope of obligations under CA1 can be sought from the reasoning employed by the ICJ in *Genocide*. According to Article 1 of the Genocide Convention, the Contracting Parties undertake ‘to prevent and to punish’ genocide. The ICJ found that Serbia ‘manifestly failed to take all measures to prevent genocide [committed by Bosnian Serbs] which were within its power and which might have contributed to preventing the genocide’ as it ‘was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed’. The ICJ noted that ‘due diligence’ is ‘of critical importance’, and that States are expected to make ‘the best efforts within their power to try and prevent the tragic events then taking shape’. By contrast, corresponding to this chapter’s reasoning, the ICJ rejected the claim that Serbia was complicit in the Genocide, noting that complicity required that the aider or assistor was aware of the specific intent (*dolus specialis*) of the principal perpetrator.

In conclusion, persons fleeing an IAC or a NIAC to the territory of a non-belligerent State are not ‘protected persons’ within the meaning of Article 4 of the Fourth Geneva Convention. Nevertheless, that State has to determine whether it would be lawful to *refoule* them. It is submitted that, if the State is aware (or cannot be unaware) that such persons would be exposed to real risk of violations of CA3 upon returning to such territories, then *refoulement* would breach the State’s CA1 undertaking to ensure respect for the 1949 Geneva Conventions.

### 4.2 The obligations of non-belligerent States to repress and suppress breaches

The 1949 Geneva Conventions explicitly engage non-belligerent States in a general effort to repress ‘grave breaches’ thereof (outlined in subsequent provisions). All HCPs are required to enact legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention; to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches;
and to bring such persons, regardless of their nationality, before its own courts or hand such persons over for trial to another HCP (the principle of aut dedere aut judicare).

In addition, pertinently for this chapter, all HCPs are required to ‘take measures necessary for the suppression of ‘all acts contrary to the…Convention[s] other than the grave breaches’. Pictet opined that, while ‘the wording is not very precise’ this provision ‘covers everything which can be done by a State to avoid acts contrary to the Convention being committed or repeated.’ It may be argued that, by refouling persons to risk of violations of CA3, a non-belligerent State would be failing to undertake ‘measures necessary for suppression’ of such acts that are contrary to the Conventions.

The preventative dimension of the obligations to repress and suppress is fundamental. Violations of CA3 in an armed conflict may have not affected a displaced claimant prior to her departure. Non-belligerent States’ adherence to non-refoulement obligations prevents such a claimant qua potential victim from being exposed to CA3 violations.

5. CONCLUDING REMARKS

Displacement caused by conflict is often quite sensibly addressed from a refugee law perspective; scholars attempt to identify legal (and physical) protection spaces in third States that are not involved in the conflict by engaging in interpretation of international and regional instruments, as well as by exploring the evolution of customary international law norms. This chapter has followed a parallel path by considering the extent to which the undertaking in CA1 of the Four Geneva Conventions vests non-refoulement obligations in non-belligerent States.

The chapter has argued that a protection-based interpretation of the CA1 undertaking to ‘ensure respect’ for the Four Geneva Conventions goes towards addressing non-refoulement needs of some persons displaced by armed conflict. The central case concerns non-refoulement as a lawful act undertaken by a non-belligerent State in the exercise of its sovereignty, without requiring that State to directly engage the behaviour of belligerent parties. As such, the proposed framework is a measured application of the prevailing interpretation of CA1 as entailing obligations of non-belligerent States to ensure respect for the 1949 Geneva Conventions ‘in all circumstances’. It is hoped that, in current and future armed conflicts, IHL will be rightfully seen as a potential source of protection from non-refoulement.

100 Fourth Geneva Convention, arts 146(1-2); Third Geneva Convention, arts 129(1-2); Second Geneva Convention, arts 50(1-2); First Geneva Convention, arts 49(1-2).

101 Fourth Geneva Convention, art 146(3); Third Geneva Convention, art 129(3); Second Geneva Convention, art 50(3); First Geneva Convention, art 49(3). For discussion see e.g. Amichai Cohen and Yuval Shany, ‘Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts’ in Michael N. Schmitt and Louise Arimatsu (eds) (2011) 14 Y.B. Int’l Hum. L. 37, 42.

102 Pictet GC-IV (fn 4), 594.
While an IHL-centred approach has shortcomings, its potential lies in the nature of undertakings therein: the applicability of this chapter’s principles to all armed conflicts is mandated by a universal (de jure) adherence to the Four Geneva Conventions, coupled with the non-reciprocal nature of required conduct. Unconstrained by demands for individualised assessments, and immune from the difficulties entailed by references to IHL terminology in refugee law contexts, the chapter’s framework is well-placed to engage current protection challenges.