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COMMON ARTICLE 1 OF THE GENEVA CONVENTIONS AND THE METHOD OF TREATY INTERPRETATION

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Abstract In its updated Commentaries on the 1949 Geneva Conventions, the International Committee of the Red Cross (ICRC) embraces the 'external' interpretation of Article 1 common to the four Geneva Conventions, according to which States have certain negative (complicity-type) and positive (prevention/response) obligations to 'ensure respect' for the Conventions by other actors. This interpretation has been gaining support since the 1960s, though the ICRC's new Commentaries have served as a catalyst for some States recently to express contrary views. This article focuses on two major methodological shortcomings in the existing literature, offering a much firmer foundation for the external obligation under common Article 1. First, it demonstrates the overwhelming support in subsequent practice for external obligations. Previous studies have failed to explain the method by which this practice is taken into account, given the existence of some inconsistent practice. This article addresses this general question of treaty interpretation, critiquing the approach of the International Law Commission that relegates majority practice to supplementary means of interpretation and proposing instead a principled approach that better fits and justifies the judicial practice here. Secondly, the article challenges two common assumptions about the *travaux*: first, that an original, restrictive meaning was intended, and secondly that the *travaux* of Additional Protocol I offer no support for external obligations. Given the ubiquity of military assistance and partnering, these findings have far-reaching consequences for the liability of States.

Keywords: public international law, international humanitarian law, treaty interpretation, consent, ensuring respect, common article 1, intention.

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I. INTRODUCTION

Following the adoption in 1949 of the four Geneva Conventions,[1] the International Committee of the Red Cross (ICRC), a key driver behind the Conventions, set to work on four Commentaries to assist with their interpretation.[2] These Commentaries, known as the *Pictet Commentaries* after Jean Pictet (the ICRC lawyer that led the project), and the Commentaries on the two 1977 Additional Protocols,[3] are frequently relied on as influential, even authoritative, accounts of the drafting histories of the Conventions and Protocols.[4]

The four Commentaries are now the subject of an ongoing updating project by the ICRC Legal Division, with the first three updated Commentaries having been released, respectively, in 2016, 2017 and 2020 (and the fourth due in 2024).[5] A key rationale for the project was 'to reflect the experience gained in applying the Conventions and Protocols during the decades since their adoption … [and thereby] ensure that the new editions of the Commentaries reflect contemporary reality and legal interpretation'.[6] One of the aims, in other words, was to take account of subsequent practice.

An example that was recognized early on in the revision process as being a provision in need of an updated interpretation in light of subsequent practice was Article 1 common to all four Conventions (restated *mutatis mutandis* in Article 1(1) of the First (API) and Third Additional Protocols to the

[1] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, opened for signature 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (GC I); Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (adopted 12 August 1949, opened for signature 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (GC II); Geneva Convention (III) Relative to the Treatment of Prisoners of War (adopted 12 August 1949, opened for signature 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (GC III); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, opened for signature 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GC IV).

[2] JS Pictet (ed), *Commentary to Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (ICRC 1952) (GC I Commentary); JS Pictet (ed), *Commentary to Geneva Convention II for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea* (ICRC 1960) (GC II Commentary); JS Pictet (ed), *Commentary to Geneva Convention III Relative to the Treatment of Prisoners of War* (ICRC 1960) (GC III Commentary); JS Pictet (ed), *Commentary to Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War* (ICRC 1958) (GC IV Commentary).

[3] Y Sandoz, C Swinarski and B Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC/Martinus Nijhoff 1987).

[4] J-M Henckaerts, 'Bringing the Commentaries on the Geneva Conventions and their Additional Protocols into the Twenty-First Century' (2012) 94 IRRC 1551, 1553. See, eg, *Abd Ali Hameed Al-Waheed and Serdar Mohammed v Ministry of Defence* [2017] UKSC 2, para 264 (per Lord Reed).

[5] ICRC, *Commentary on the First Geneva Convention* (CUP 2016); ICRC, *Commentary on the Second Geneva Convention* (CUP 2017); ICRC, *Commentary on the Third Geneva Convention* (CUP 2021) (Commentary to GC III).

[6] Henckaerts (n 4) 1553.

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Conventions (APIII).[7] According to this provision, '[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances'. As the project lead on the updated Commentaries stated, '[t]he application of the obligation to 'ensure respect' for humanitarian law has significantly expanded since the 1950s, and current practice in this area indicates more clearly that this obligation extends to both international and non-international armed conflicts'.[8] Consistent with this view, common Article 1 is given a broader interpretation in the updated Commentaries than in the *Pictet Commentaries*, which were more equivocal (and certainly less detailed) regarding this provision.[9] Thus, in the latest Commentaries, whilst the obligation to 'respect' is interpreted as reiterating the principle of *pacta sunt servanda*,[10] the undertaking to 'ensure respect' is said to generate obligations for States regarding both persons subject to their authority, such as their populations (the internal dimension),[11] and other (State and non-State) actors (the external dimension).[12] The external dimension itself is then said to comprise both negative and positive obligations:

> Under the negative obligation, High Contracting Parties may neither encourage, nor aid or assist in violations of the Conventions by Parties to a conflict. Under the positive obligation, they must do everything reasonably in their power to prevent and bring such violations to an end. This external dimension of the obligation to ensure respect for the Conventions goes beyond the principle of *pacta sunt servanda.*[13]

It must be emphasized that this interpretation by the ICRC is not novel, and the notion that common Article 1 contains 'external' obligations for States parties in relation to the conduct of others has been gaining momentum in State and judicial practice, particularly since the 1960s.[14] Nonetheless, this purported external dimension of the 'ensure respect' obligation continues to divide

[7] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I; AP I); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III) (adopted 8 December 2005, entered into force 14 January 2007) 2404 UNTS 261 (Additional Protocol III; AP III). [8] Henckaerts (n 4) 1553.

[9] On the Pictet Commentaries and common Article 1, see the discussion below in the text to nn 184–8. [10] ICRC, Commentary to GC III (n 5) paras 176–177. [11] ibid, para 183.

[12] ibid, para 186. [13] ibid, para 187.

[14] Notable milestones in this development include the 1968 Tehran Conference on Human Rights (see the text to n 189); responses to the ICRC questionnaire in 1973 (see the text to nn 191–2); the 1974–1977 diplomatic conference (see the text to nn 193–8); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits, Judgment) [1986] ICJ Rep 14, para 220; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, paras 158–9 (though cf Separate Opinion of Judge Kooijmans ibid, paras 46–50). External obligations under common art 1 are now frequently acknowledged by United Nations (UN) special procedures and investigations, for example: Human Rights Council (HRC), 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (17 August 2022) UN Doc A/HRC/51/45, para 111.

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opinion. Indeed, whilst scholarly disagreement over what exactly is required by common Article 1 has long existed,[15] there has been a very notable reaction to the ICRC's recent pronouncement.[16] Though many scholars support the notion of an external obligation,[17] there are also some strong dissenters, many of whom argue that the obligation to 'ensure respect' refers solely to the internal dimension of ensuring respect by those within the State's jurisdiction and acting on its behalf.[18]

A number of States have also recently taken explicit positions on the purported external obligation.[19] Some have done so specifically in response to the ICRC's updated Commentaries.[20] Others have expressed their views in the context of the recently concluded work of the International Law Commission (ILC) on the protection of the environment in armed conflict,

[15] Compare, eg, F Kalshoven, 'The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit' (1999) 2 YIntlHL 3 (dismissing the expansive interpretation); L Boisson de Chazournes and L Condorelli, 'Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests' (2000) 82 IRRC 67 (arguing in favour of an external obligation and viewing the article as playing a 'constitutional role' in the enforcement of international humanitarian law (IHL)); U Palwankar, 'Mesures auxquelles peuvent recourir les Etats pour remplir leur obligation de fair respecter le droit international humanitaire' (1994) 76(805) IRRC 11 (assuming an external obligation and considering the precise measures required thereunder).

[16] For recent scholarship engaging with the updated commentaries, see C Wiesener and A Kjeldgaard-Pederson, 'Ensuring Respect by Partners: Revisiting the Debate on Common Article 1' (2022) 27 JC&SL 135; M Zwanenburg, 'The "External Element" of the Obligation to Ensure Respect for the Geneva Conventions: A Matter of Treaty Interpretation' (2021) 97 IntlLStud 621; MN Schmitt and S Watts, 'Common Article 1 and the Duty to "Ensure Respect"' (2020) 96 IntlLStud 674; V Robson, 'The Common Approach to Article 1: The Scope of Each State's Obligation to Ensure Respect for the Geneva Conventions' (2020) 25 JC&SL 101; E Massingham and A McConnachie (eds), *Ensuring Respect for International Humanitarian Law* (Routledge 2020).

[17] See, eg, Zwanenburg ibid; Wiesener and Kjeldgaard-Pederson ibid; Boisson de Chazournes and Condorelli (n 15); B Demeyere and T Meron, 'How International Humanitarian Law Develops: Towards an Ever-Greater Humanization? An Interview with Theodor Meron' (2022) 104(920–921), IRRC 1523, 1547–9; R Geiss, 'The Obligation to Respect and to Ensure Respect for the Conventions' in A Clapham et al (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015); K Dörmann and J Serralvo, 'Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations' (2014) 95 IRRC 707; B Kessler, 'The Duty to "Ensure Respect" under Common Article 1 of the Geneva Conventions: Its Implications on International and Non-International Armed Conflicts' (2001) 44 GYIL 491; F Azzam, 'The Duty of Third States to Implement and Enforce International Humanitarian Law' (1997) 66(1) ActScandJurisGent 55.

[18] See, eg, Kalshoven (n 15); Schmitt and Watts (n 16); Robson (n 16); C Focarelli, 'Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?' (2010) 21 EJIL 125.

[19] State practice is explored in detail in Section III.

[20] See, eg, the rejection of an external obligation in P Ney, General Counsel, U.S. Department of Defense, 'Keynote Address to Israel Defense Forces' Third International Conference on the Law of Armed Conflict' (28 May 2019) 11 <https://ogc.osd.mil/Portals/99/Law%20of%20War/Practice%20Documents/GC%20Ney%20-%20Keynote%20Address%20to%20Israel%20Defense%20Forces'%20Third%20International%20Conference%20on%20the%20Law%20of%20Armed%20Conflict%20-%20May%2028%202019.pdf?ver=-xctef4R4jHTomMKofyNBQ%3D%3D>.

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during which a stark division emerged between States supportive and critical of the purported external obligation under common Article 1.[21]

Academic and governmental disagreement over the content of common Article 1 thus now appears greater than ever. This is particularly concerning in the light of the ever-growing phenomenon of partnered warfare, in which operations by States and non-State actors are inter-connected through cooperation and assistance. The updated ICRC commentaries refer precisely to this situation, where States potentially have a significant influence over the behaviour of their partners, as an example of a situation where the purported external obligation under common Article 1 bites most strongly.[22] This context no doubt partly explains the positions recently taken by certain States on this. Coalition forces in Iraq and Afghanistan and the Saudi-led coalition in Yemen immediately come to mind as examples of close partnering in military operations where common Article 1 might especially be relevant. Yet the negative and positive obligations according to the ICRC's interpretation would also be relevant to the vast array of other, less direct forms of assistance commonly given by States to allies, such as intelligence sharing,[23] and provision of weapons and training.[24] The ICRC's (and others') reading of common Article 1 would also extend to State support for non-State armed groups, such as Western support for groups in Syria.[25] Moreover, the context-sensitive nature of the due diligence standard with which the ICRC defines the positive obligations thereunder is such that broader attempts to prevent and respond to international humanitarian law (IHL) violations would be required in many other situations.[26]

A potentially very extensive set of duties would thus follow from an external obligation under common Article 1. States that reject this interpretation argue that it is the secondary rules on State responsibility that determine their ancillary responsibility in relation to the conduct of others.[27] As shown below, these

[21] Compare, eg, Israel's rejection and Switzerland's acceptance of an external obligation: ILC, 'Protection of the Environment in Relation to Armed Conflicts: Comments and Observations Received from Governments, International Organizations and Others' (17 January 2022) UN Doc A/CN.4/749, 36 (Israel), 37 (Switzerland).

[22] ICRC, Commentary to GC III (n 5) para 200. The discussion throughout this article focuses on military cooperation and assistance falling short of that entailing joint responsibility for violations of international law.

[23] eg the United States' (US) intelligence sharing and other support provided to Saudi Arabia in relation to Yemen: The White House, *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations* (December 2016) 18.

[24] eg the provision of weapons by many States to Ukraine since Russia's February 2022 invasion: C Mills, 'Military Assistance to Ukraine Since the Russian Invasion', House of Commons Library Research Briefing (23 May 2023).

[25] Such support is reported to have included military support, training and support in detention camps: Rights & Security International, *Europe's Guantanamo: The Indefinite Detention of European Women and Children in North-East Syria* (Susak Press 2020, reprinted 2021).

[26] ICRC, Commentary to GC III (n 5) para 198.

[27] B Egan, 'International Law, Legal Diplomacy, and the Counter-ISIL Campaign: Some Observations' (2016) 92 IntlLStud 235, 245.

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secondary rules are much more limited in their scope and content than the purported external obligation under common Article 1 and would fail to capture many of the examples of assistance given above.[28] Whether such an external obligation reflects the current *lex lata* therefore has significant consequences for States' obligations in armed conflict, especially in light of the increasingly diverse forms of military partnership and assistance.

It is on this question that this article focuses, and it argues that common Article 1 does indeed contain external obligations in relation to the conduct of other actors. The purpose here is not to rehearse the arguments that have already been made in the many contributions on this topic. Rather, the focus is on two fundamental points of method that have been misunderstood or ignored entirely in previous studies, including accounts otherwise supportive of external obligations under common Article 1. The failure to consider these points undermines the reliability of the conclusions those previous studies reach regarding the content of that provision.

The first, and most significant, concerns the role of subsequent practice in interpreting common Article 1. Given the lack of clarity regarding the content of common Article 1 that is left by the text, context and object and purpose, previous studies rely heavily (often decisively) on subsequent State practice.[29] Whilst State practice does overwhelmingly support an external element to common Article 1, as explored below, there is also some clearly inconsistent State practice that challenges that interpretation. On the orthodox account of subsequent practice in treaty interpretation, such inconsistency prevents the majority, supportive practice from being taken into account under Article 31(3)(b) of the Vienna Convention on the Law of Treaties (VCLT), given the lack of 'agreement' amongst the parties to the Conventions (as required by Article 31(3)(b)).[30] Many previous studies relying on subsequent practice to found an external obligation under common Article 1 do not consider this apparently fatal methodological flaw.[31] The few that do, follow the approach of the ILC in its draft conclusions on subsequent agreements and subsequent practice,[32] arguing that supportive State practice is

[28] See below in the text to nn 235–9.

[29] See, eg, ICRC, Commentary to GC III (n 5) paras 189, 204; Zwanenburg (n 16) 638–43; Boisson de Chazournes and Condorelli (n 15) 69–70; Geiss (n 17) 115; Kessler (n 17) 504; Dörmann and Serralvo (n 17) 716–20; Azzam (n 17) 62–4; Wiesener and Kjeldgaard-Pederson (n 16) 141–7.

[30] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 31(3) ('[t]here shall be taken into account, together with the context: … (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'). For an example of that orthodoxy, see ILC, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries', UNYBILC, vol II (2018) Part Two, Commentary to Conclusion 10, paras 1–3.

[31] See, eg, Boisson de Chazournes and Condorelli (n 15); Geiss (n 17); Kessler (n 17) 504; Dörmann and Serralvo (n 17) 716–20; Azzam (n 17).

[32] ILC (n 30) Commentary to Draft Conclusion 2, para 9.

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still admissible under Article 32 of the VCLT notwithstanding the existence of some dissent, but with the necessary consequence that it carries less weight than practice establishing the agreement of *all* the parties and admissible under Article 31(3)(b).[33] This is also said to be the ICRC's general method in its updated Commentaries.[34] Yet the lesser interpretive weight to be given to such practice according to that method sits uneasily with the apparently decisive weight given by those previous studies to practice supportive of the external obligation.

This article engages squarely with this general question of treaty interpretation. It argues that the approach adopted by the ILC with respect to subsequent practice that includes some dissent is conceptually flawed and misreads previous judicial practice on which it purports to be based. The consequence, it is argued, is that such practice can still be admissible as an authentic means of interpretation under Article 31(3)(b) of the VCLT, instead of relegating it to Article 32 of the VCLT. In this respect, the findings in the article are significant for the role of subsequent practice in treaty interpretation generally, with a novel and principled account offered of the admissibility and weight of subsequent practice where some dissent is present. Indeed, this methodological issue regarding subsequent practice arises frequently across different regimes of international law.[35] Regarding common Article 1, the argument made in this article offers, for the first time, a principled basis for taking account of subsequent practice that supports the external obligation in a way that other studies have failed to do, thereby placing that obligation on a much firmer footing.

The second key contribution of this article relates to the *travaux* of common Article 1 and Article 1(1) of AP I. Whilst it is often said that the *travaux* show little or no support for the external obligation, they are re-examined here with clear support unearthed for the external obligation, particularly during the drafting of AP I. Though necessarily carrying less interpretive weight than the authentic means under Article 31 of the VCLT, these findings regarding the *travaux* offer an important rebuttal to those who make claims for an original restrictive meaning of 'ensure respect' under common Article 1 and Article 1(1) of AP I.

In elaborating upon these under-explored issues, the article has two goals: first, to consider the precise meaning of the obligations in common Article 1; secondly, and more broadly, to use common Article 1 as a case study on the

[33] Zwanenburg (n 16) 638–9; Wiesener and Kjeldgaard-Pederson (n 16) 143.

[34] ICRC, Commentary to GC III (n 5) paras 92–93.

[35] Compare, eg, the different approaches taken in *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* (Judgment) [2014] ICJ Rep 226, para 83; Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R, adopted 9 May 2006, para 7.218; *Loizidou v Turkey* App No 15318/89, Judgment (Preliminary Objections) (ECtHR, 23 March 1995) paras 79–82. These and other examples are discussed below in Section III.

relevance of consent and dissent in treaty interpretation. The argument proceeds as follows. Section II considers some preliminary matters for the interpretation of common Article 1 (and Article 1(1) of AP I) (the ordinary meaning, context and object and purpose) before moving on in Section III to the analysis of subsequent practice. Section IV then considers the *travaux* of the two provisions, as supplementary means for their interpretation. For completeness, Section V then considers the other key question regarding the scope of common Article 1, namely its application in non-international armed conflicts. Section VI concludes the analysis with an alternative way of thinking about the precise elements of the external obligation.

II. ORDINARY MEANING, CONTEXT, AND OBJECT AND PURPOSE

As often noted in the literature, the fundamental importance of subsequent practice, and potentially the *travaux* (as supplementary means), for interpreting common Article 1 arises from the uncertainties flowing from the application of the other authentic means of interpretation (codified in Article 31 of the VCLT).[36] The purpose of this section is to confirm this uncertainty, whilst clarifying certain misunderstandings that pervade the existing literature.

It must immediately be acknowledged that little can be gleaned regarding the scope of the undertaking to 'ensure respect' for the Conventions and Protocols from any 'ordinary' meaning alone.[37] Both the restrictive interpretation (that views this duty as being entirely internal, but which goes beyond *pacta sunt servanda* and the duty to 'respect', ie to ensure respect by the State's own armed forces and population) and the expansive interpretation (that views this duty as also having an external dimension) can reasonably be read into the term 'ensure respect'.[38] Similar language in human rights treaties[39] has been interpreted as requiring States to take positive steps to protect individuals from rights violations by others (including other States).[40] Yet that can hardly form the basis for suggesting that the same interpretation constitutes the ordinary

[36] See examples above at n 29.

[37] That is to say, resort to dictionary definitions cannot assist with determining the scope of the obligation to ensure respect: cf *Oil Platforms (Islamic Republic of Iran v United States of America)*, (Preliminary Objection, Judgment) [1996] ICJ Rep 803, para 45.

[38] In this respect, Azzam's claim that the external obligation flows naturally from common Article 1's wording is unconvincing: Azzam (n 17) 57.

[39] American Convention on Human Rights 'Pact of San José, Costa Rica' (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, art 1(1); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 2(1); Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008), reprinted in (2005) 12 IHRR 893, art 3(1).

[40] See, eg, Human Rights Committee, 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add. 13, para 8; *Velásquez-Rodríguez v Honduras*, Judgment, Inter-American Court of Human Rights Series C No 4 (29 July 1988) para 166. See also jurisprudence of the European Court of Human Rights (ECtHR) on the similarly interpreted obligation under art 1 of the European Convention on Human Rights to 'secure' rights to those within their jurisdiction: eg

(or special[41]) meaning to be given to the term in common Article 1.[42] Most fundamentally, positive obligations under human rights treaties frequently extend only to victims who are within the jurisdiction of the State, as opposed to creating general obligations which can be enforced against other contracting parties.[43]

In truth, Article 31(1) of the VCLT speaks not of a stand-alone 'ordinary meaning', but rather of the 'ordinary meaning *to be given*' to the provisions of the treaty 'in their context and in light of its object and purpose'.[44] Regarding the context, some have argued that the Conventions and AP I explicitly set out elsewhere when States have obligations in relation to the conduct of others, apparently suggesting a more restrictive interpretation of common Article 1 and Article 1(1) of AP I.[45] In truth, those other provisions are much more specific regarding their scope and content, and they in no way undermine the claim that common Article 1 contains broader, less prescriptive obligations on all States. Focarelli, for example, refers to Article 7 of AP I, which states that the depositary 'shall convene a meeting of the High Contracting Parties, at the request of one or more of the said Parties and after the approval of the majority of the said Parties, to consider general problems concerning the Application of the Conventions and of the Protocol'.[46] Yet this differs from Article 1(1) of AP I, not only in its focus on multilateral meetings of States parties, but also in its limitation to 'general' problems concerning the application of the Conventions and Protocol, which, as the drafting history confirms, refers to issues of application *other than* specific conflicts or violations.[47]

Article 89 of AP I (providing for individual or joint action in response to serious violations[48]) is similarly looked to when arguing *a contrario* that Article 1(1) of AP I could not have been intended to contain broad external obligations.[49] Yet that provision was intended to confirm that States could

Sandu and others v Republic of Moldova and Russia App Nos 21034/05 and 7 others, Judgment (Second Section) (ECtHR, 17 July 2018) paras 34–36.

[41] R Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 334 (on the frequent conflation of ordinary and special meanings in interpretation).

[42] As a general point, one must be cautious about over-analogizing to interpretations of similar, even identical, extraneous rules: *MOX Plant (Ireland v United Kingdom)*, Provisional Measures, Order of 3 December 2001 [2001] ITLOS Rep 95, para 51.

[43] See also discussion in Focarelli (n 18) 138–42.

[44] Gardiner (n 41) 184; *Kasikili/Sedudu Island (Botswana/Namibia)* (Judgment) [1999] ICJ Rep 1045, Declaration of Judge Higgins, paras 3–4.

[45] Schmitt and Watts (n 16) 686; Focarelli (n 18) 151–4.

[46] Focarelli ibid 151–2; Schmitt and Watts ibid 688–9.

[47] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977)* vol VIII (Federal Political Department, Bern 1978) 185 (Pakistan), 187 (Federal Republic of Germany), 188 (Switzerland), 189 (ICRC).

[48] 'In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.'

[49] Focarelli (n 18) 152–3; Schmitt and Watts (n 16) 688–9.

not act inconsistently with the United Nations (UN) Charter (eg by reprisal) when responding to violations of the Protocol.[50] As discussed below, the *travaux* of AP I more generally confirm that many of these specific enforcement provisions were seen as particular mechanisms for 'ensuring respect' for IHL.[51] This understanding of common Article 1 (and Article 1(1) of AP I) is supported by their being the first provisions of the Conventions and Protocol, suggestive of their having a broad and general character.[52]

With respect to the object and purpose of the Conventions and Protocol, it is often said that they reflect a careful balance between humanitarian considerations and considerations of military necessity.[53] There is some truth in this. It is the fact of the underlying armed conflict which helps to explain the presence of considerations of military necessity in IHL and its more permissive approach to targeting and detention than under human rights law, for example.[54] Yet such general claims regarding the underlying values of IHL are not necessarily normatively helpful as factors influencing interpretation.[55] To use Gardiner's terminology, this balancing that is said to underpin IHL might be seen more as its 'spirit' than as its legally relevant object and purpose.[56]

The object and purpose should rather be sought from the text itself, including, in particular, the preamble.[57] Though the Geneva Conventions do not contain any substantive preambles, both the idea and possible content of a preamble to

[50] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977)* vol VI (Federal Political Department, Bern, 1978) 385 (Syrian Arab Republic).

[51] See below in the text to nn 193–8.

[52] It should be noted that other uses of the term 'ensure' in the Conventions create obligations specifically for conflict parties and thus offer little aid in interpreting the general undertaking by all contracting parties to 'ensure respect': Zwanenburg (n 16) 633; cf Focarelli (n 18) 142–3.

[53] MN Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' (2010) 50(4) VaJIntlL 795; N Melzer, 'Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' (2010) 42 NYUJIntlL&Pol 831, 831.

[54] L Hill-Cawthorne, 'The Role of Necessity in International Humanitarian and Human Rights Law' (2014) 47 IsLR 225.

[55] Apparently taking a different view on this, see ICRC, Commentary to GC III (n 5) paras 87–91; J-M Henckaerts and E Pothelet, 'The Interpretation of IHL Treaties: Subsequent Practice and Other Salient Issues' in H Krieger and J Puschmann (eds), *Law-Making and Legitimacy in International Humanitarian Law* (Edward Elgar 2021) 157.

[56] Gardiner (n 41) 213–14 ('[c]aution, however, is advisable on this as the "spirit" may suggest a nebulous formulation of what animates the treaty. "Object and purpose" is a more specific point of reference.')

[57] ILC, Guide to Practice on Reservations to Treaties, Report of the ILC, 63rd session (26 April to 3 June and 4 July to 12 August 2011) UN Doc A/66/10/Add.1, 359 (Guideline 3.1.5.1); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v UAE)* (Preliminary Objections, Judgment) [2021] ICJ Rep 71, para 84; I Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984) 130. Some caution should, of course, be noted in the possible futility of seeking a single object and purpose from the preamble or elsewhere in the treaty: see, eg, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, para 17.

each Convention were discussed at great length at the 1949 diplomatic conference, and the various proposals all referred in an unqualified way to the humanitarian goals of the Conventions.[58] In the end, no substantive preambles were adopted due to disagreement over the degree to which they should include specific prohibitions, as well as whether they should include a reference to a divine source for the rules.[59] But there appeared to be no disagreement on the solely humanitarian aims of the Conventions.[60] Indeed, their full titles are suggestive of this.[61] The substantive provisions of the Conventions (and AP I) also clearly focus on protecting individual war victims,[62] along with mechanisms for monitoring and enforcement.[63] Similarly, it has persuasively been argued that the object and purpose of AP I are entirely humanitarian, notwithstanding that it contains so-called 'Hague rules' on the conduct of hostilities that are seen as being tempered by considerations of military necessity.[64] This is supported by the preamble to AP I, which did make its way into the final treaty.[65] This reading of the Conventions' and Protocol's object and purpose cannot alone indicate how to interpret common Article 1. Yet an interpretation that recognizes the existence of external obligations for States to ensure respect by others for the Conventions and Protocol certainly advances their humanitarian aims by offering a potentially far-reaching means of enforcement.[66]

[58] See, eg, *Final Record of the Diplomatic Conference of Geneva of 1949: vol II, Section A* (Federal Political Department, Bern) 164 (referring to 'respect for the personality and dignity of the human being' as the 'principle' underpinning GC I and GC II); *Final Record of the Diplomatic Conference of Geneva of 1949: vol III* (Federal Political Department, Bern) 57 (the United Kingdom's (UK) proposal for a preamble to GC III, approved by a majority before the decision not to include a preamble was taken, which began, '[i]nspired by the desire to do everything in their power to mitigate the sufferings inseparable from war'). See also ibid 95–9 (the various proposals for a preamble to GC IV); *Final Record of the Diplomatic Conference of Geneva of 1949: vol I* (Federal Political Department, Bern) 113 (containing the original draft of the preamble to GC IV submitted by the Stockholm International Red Cross Conference).

[59] See, eg, *Final Record: vol II, Section A* ibid 813 (on the eventual rejection of a preamble to GC IV). The content of many of the proposals would make their way into common art 3 (and common art 1).

[60] See the comprehensive assessment in K Mačák and E Policinski, 'In Pursuit of a Treaty's Soul: A Study of the Object and Purpose of the Fourth Geneva Convention' (draft, on file with the author).

[61] A Cullen, 'The Characterization of Remote Warfare in International Humanitarian Law' in JD Ohlin, *Research Handbook on Remote Warfare* (Edward Elgar 2017) 127–8.

[62] Mačák and Policinski (n 60).

[63] eg the system of oversight by Protecting Powers and humanitarian organizations under, inter alia, GC IV (n 1) arts 9–11; the grave breaches regime under, inter alia, GC IV, arts 146–7; as well as AP I (n 7) arts 7 and 89, noted above in the text to nn 46–50.

[64] K Mačák, 'Military Objectives 2.0: The Case for Interpreting Computer Data as Objects under International Humanitarian Law' (2015) 48 IsLR 55, 77–8.

[65] eg '*Believing* it necessary nevertheless to reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application' (emphasis in original).

[66] Similarly, see Zwanenburg (n 16) 634–5. I am grateful to reviewer 1 for the important analogy here to art 41 of the ILC Articles on State Responsibility, which recognizes a link between fundamental values of the international community and collective enforcement by that community. Art 41 is considered briefly in Section VI below.

Finally, as regards the other authentic means of interpretation, Article 31 (3) of the VCLT refers, in addition to subsequent practice (discussed below), to subsequent agreements (Article 31(3)(a)) and other relevant rules of international law (Article 31(3)(c)). In the case of the Geneva Conventions and AP I, no subsequent agreements exist,[67] and no extraneous rules can be drawn on to provide a useful indicator of the intention of the States parties (as the discussion above regarding similar concepts found in certain human rights treaties demonstrates). Some commentators have drawn on Article 31(3)(c) of the VCLT to suggest that, since it is rare for international law to place obligations on States in relation to the conduct of others, common Article 1 should be read restrictively.[68] However, this is not an accurate application of Article 31(3)(c).[69] Rather, the principle requires a consideration of specific extraneous rules that are relevant to the interpretation of the treaty terms at issue.[70] It does not enable such general claims (much less general claims concerning the *absence* of rules) to influence interpretation, and in this case such an approach is all the more untenable given that similar obligations *do* exist elsewhere in international law.[71]

The above analysis confirms that the text, context and object and purpose leave the content of the 'ensure respect' obligation unclear, and this remains unresolved by recourse to extraneous agreements or rules. Therefore, subsequent State practice takes on a crucial role when interpreting common Article 1 and Article 1(1) of AP I/AP III. This is recognized by others who argue in favour of the external obligation and who rely heavily (sometimes decisively) upon subsequent practice.[72] It is, therefore, essential that any analysis of subsequent practice is based on a sound, principled methodology. Previous studies have failed to do this.[73] The following section explores these issues in detail.

[67] The Additional Protocols are sometimes erroneously treated as subsequent agreements relevant to the interpretation of the Conventions: Schmitt and Watts (n 16) 688–9. These, however, are separate, if related, treaties establishing new or more detailed obligations amongst some of the States parties to the Geneva Conventions *inter se*. They cannot be said to reflect 'an agreement as to the interpretation of a provision reached after the conclusion of the [Geneva Conventions]': ILC, 'Draft Articles on the Law of Treaties, with Commentaries', UNYBILC, vol II (1966) 221, para 14; *Kasikili/Sedudu Island* (n 44) para 49.

[68] Robson (n 16) 104; Schmitt and Watts ibid 685.

[69] The same can be said of those claims that a broad interpretation of common art 1, imposing an *obligation* to ensure respect on all States, follows from other distinct concepts, such as the notion that IHL imposes obligations *erga omnes* (thereby creating a *right* for all States to invoke the responsibility of a violating State): see, eg, Azzam (n 17) 64–9.

[70] C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279, 290–1.

[71] On analogous obligations elsewhere in international law, see below in the text to nn 235–9.

[72] See above at n 29.

[73] See above in the text to nn 31–4.

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III. SUBSEQUENT PRACTICE

A. State Practice Regarding Common Article 1

It is well established that subsequent State practice can shed light both on the original common intentions of the parties in adopting a particular treaty term and on any later intention, which may have developed over time.[74] With this in mind, this section will demonstrate that the notion of external obligations under common Article 1 finds overwhelming support in State practice, which has been growing particularly since the 1960s.[75] Previous studies have drawn on examples of State practice, which show support amongst States for a reading of common Article 1 that requires the international community to ensure respect for IHL by others, although some of the examples referenced are not clearly linked to common Article 1.[76] Without repeating relevant examples given in that literature, the purpose of this section is to evidence this support in subsequent practice more fully. It will demonstrate the true extent of support for at least a positive external obligation that requires States to *respond* to IHL violations. The focus here is on recent practice, and it is especially instructive that practice continues to support this external obligation, given the growing attention placed on common Article 1 in light of the ICRC's updated commentaries and the ILC's work on the protection of the environment in armed conflict.

Clear support for the external element under common Article 1 can be found in many UN General Assembly (UNGA) resolutions. For example, in UNGA Resolution 77/126, adopted in December 2022, States asserted the following:

> *Recalls*, in this regard, the statement of 15 July 1999 and the declarations adopted on 5 December 2001 and on 17 December 2014 by the Conference of High Contracting Parties to the Fourth Geneva Convention on measures to enforce the Convention in the Occupied Palestinian Territory, including East Jerusalem, welcomes in this regard initiatives by States parties, both individually and collectively, in accordance with article 1 of the Convention, aimed at ensuring respect for the Convention and accountability, and calls upon all High Contracting Parties to the Convention to continue, individually and collectively, to exert all efforts to ensure respect for its provisions by Israel, the occupying Power, in the Occupied Palestinian Territory, including East Jerusalem, and other Arab territories occupied by Israel since 1967.[77]

[74] *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgment) [2009] ICJ Rep 213, para 64; I Buga, *Modification of Treaties by Subsequent Practice* (OUP 2018) 18.

[75] The widespread nature of this practice, as detailed below, is sometimes underappreciated both by supporters and critics of the purported external element: eg Zwanenburg (n 16) 636; Focarelli (n 18) 128.

[76] eg Dörmann and Serralvo (n 17) 716–22. For a good summary of practice, see Zwanenburg ibid 639–43.

[77] UNGA Res 77/126 (15 December 2022) UN Doc A/RES/77/126, para 15 (voting 141-7-21) (emphasis in original).

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This same position has been taken in many other recent UNGA resolutions relating to Israel and Palestine.[78] These resolutions have a long pedigree, with similar resolutions referencing common Article 1 having been adopted by the UNGA for decades.[79] Focarelli argues that 'it is possible to assign to these resolutions a mere recommendatory meaning', given the lack of prescriptiveness in the phrase 'in accordance with article 1'.[80] Such a reading, however, is difficult to reconcile with the clear, prescriptive language of common Article 1 ('undertake'). Moreover, some of these UNGA resolutions explicitly refer to an external *obligation* on States to ensure respect by others under common Article 1. For example, in UNGA Resolution ES-10/4, adopted in 1997, the UNGA:

> Reiterate[d] its recommendation to the High Contracting Parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War, to take measures on a national or regional level, *in fulfilment of their obligations under article 1 of the Convention*, to ensure respect by Israel, the occupying Power, of the Convention, as well as its recommendation to Member States to actively discourage activities that directly contribute to any construction or development of Israeli settlements in the Occupied Palestinian Territory, including Jerusalem, as these activities contravene international law.[81]

Other UNGA resolutions refer positively to the *Wall* advisory opinion of the International Court of Justice (ICJ), in which the same external, obligatory reading was given to common Article 1.[82]

Through their explicit endorsement by large majorities in these UNGA resolutions, States have consistently reaffirmed that common Article 1 contains external obligations requiring all States to respond to and attempt to halt IHL violations committed by others. It is well established that States' voting patterns in the UNGA can constitute subsequent practice for the

[78] See, eg, UNGA Res 76/82 (15 December 2021) UN Doc A/RES/76/82, para 15 (voting 146-7-20); UNGA Res 75/97 (10 December 2020) UN Doc A/RES/75/97, para 14 (voting 150-7-17); UNGA Res 74/88 (13 December 2019) UN Doc A/RES/74/88, para 14 (voting 157-7-15); UNGA Res 73/98 (7 December 2018) UN Doc A/RES/73/98, para 13 (voting 154-6-15); UNGA Res 73/97 (7 December 2018) UN Doc A/RES/73/97, para 3 (voting 158-6-14).

[79] See eg, UNGA Res ES-10/5 (20 March 1998) UN Doc A/RES/ES-10/5, para 3 (voting 120-3-5); UNGA Res ES-10/6 (9 February 1999) UN Doc A/RES/ES–10/6, para 6 (voting 115-2-5); UNGA Res 53/54 (10 February 1999) UN Doc A/RES/53/54, paras 3, 4 (voting 155-2-2).

[80] Focarelli (n 18) 155.

[81] UNGA Res E-10/4 (13 November 1997) UN Doc A/RES/ES-10/4, para 3 (voting 139-3-13) (emphasis added).

[82] UNGA Res ES-10/15 (20 July 2004) UN Doc A/RES/ES-10/15, para 3 (voting 150-6-10) (see also preambular para 19, which quotes from the operative parts of the ICJ's *Wall* advisory opinion (n 14), including in relation to the external, positive obligation under common art 1). See also UNGA Res 62/107 (10 January 2008) UN Doc A/RES/62/107, para 3 (voting 169-6-3); UNGA Res 63/96 (18 December 2008) UN Doc A/RES/63/96, para 3 (voting 173-6-1); UNGA Res 64/92 (19 January 2010) UN Doc A/RES/64/92, para 3 (voting 168-6-4).

purposes of treaty interpretation.[83] This is accepted in scholarship[84] and in the practice of international tribunals.[85] The limits on what is to be admitted as subsequent practice come from the other elements of Article 31(3)(b) of the VCLT, ie that practice must be 'in the application of the treaty' and must establish 'the agreement of the parties regarding its interpretation'.[86] The former is clearly met, given the explicit reference to common Article 1 in the above resolutions and the fact that the very act of condemning IHL violations or collectively demanding non-assistance in such resolutions might partly fulfil the obligation to ensure respect.

As regards the requirement of 'agreement of the parties', not all States parties need actively participate in the particular practice but may instead be presumed to acquiesce through silence 'when the circumstances call for some reaction'.[87] Such circumstances include voting in particular fora where non-objecting States are aware of the position of others, particularly where that position has a bearing on their own rights and obligations.[88] Abstentions to UNGA resolutions recognizing external obligations for *all* States under common Article 1 can, therefore, reasonably be counted as practice supporting those external obligations where abstaining States have not otherwise dissented.[89] Whether the few negative votes, together with other dissenting practice, nonetheless prevents an interpretive 'agreement' from arising is explored in detail below.

[83] ILC (n 30) Commentary to Draft Conclusion 6, para 22.

[84] Gardiner (n 41) 255 (noting the analogy to the broad array of materials evidencing State practice for the purposes of identifying custom); Buga (n 74) 24–6; S Raffeiner, 'Organ Practice in the *Whaling* Case: Consensus and Dissent between Subsequent Practice, Other Practice and a Duty to Give Due Regard' (2016) 27 EJIL 1043, 1048.

[85] *Nicaragua* (n 14) para 188; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403, para 80; *Wall* (n 14) paras 27–28; *Legal Consequences of States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, para 22; *Prosecutor v Duško Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995) para 30. Whether this might also constitute practice of the international organization as such for the purpose of interpreting its constituent instrument is beyond the scope of this article: on this, see Buga (n 74) 35–43; Raffeiner ibid.

[86] ILC (n 30) Draft Conclusion 5(1); MG Kohen, 'Keeping Subsequent Agreements and Practice in their Right Limits' in G Nolte (ed), *Treaties and Subsequent Practice* (OUP 2013) 34.

[87] *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)* (Merits, Judgment) [1962] ICJ Rep 6, 22–3; ILC (n 30) Draft Conclusion 10(2); Buga (n 74) 61–2.

[88] ILC (n 30) Commentary to Draft Conclusion 10, para 14; Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, adopted 27 September 2005, para 272.

[89] Those abstaining from the resolutions cited above did not object to the invocation of common art 1 during the drafting of those resolutions, eg regarding UNGA Res 76/82 (n 78), see the discussions in the UNGA plenary and Fourth Committee that proposed the resolution: UNGA, '49th Plenary Meeting (Thursday, 9 December 2021, 3p.m., New York)' (9 December 2021) UN Doc A/76/PV.49; relevant summary records of the Special Political and Decolonization (Fourth) Committee are A/C.4/76/SR.2, A/C.4/76/SR.8, A/C.4/76/SR.9, A/C.4/76/SR.10, A/C.4/76/SR.11, A/C.4/76/SR.12, A/C.4/76/SR.13, A/C.4/76/SR.14 and A/C.4/76/SR.15.

States have continued to express support for external *obligations* under common Article 1 in other fora also, including the UN Human Rights Council (HRC). In Resolution 52/35, adopted in April 2023, the HRC reminded 'all States of their legal obligations as mentioned in the advisory opinion of the ICJ of 9 July 2004 … including … to ensure compliance by Israel with international humanitarian law as embodied in the Fourth Geneva Convention'.[90] Member States of the European Union (EU) similarly endorsed the external reading of common Article 1 in the 'User's Guide' to its Common Position on arms exports.[91] The limited membership of the HRC and EU means that these particular outputs do not themselves represent sufficient practice for interpreting common Article 1 (and one arguably could not expect non-Member States to respond should they object).[92] However, such examples from the HRC and EU offer further support for the external obligation alongside the UNGA resolutions.

In addition to confirming their interpretation of common Article 1 through resolutions and other outputs of different institutions, a number of States also continue to do so in intergovernmental debates. As already noted, the recently concluded work of the ILC on the protection of the environment in armed conflict, for example, was a catalyst for some States to express their views concerning the content of common Article 1.[93] For example, Switzerland and Palestine expressed support for the view that it contains

[90] HRC Res 52/35 (20 April 2023) UN Doc A/HRC/RES/52/35, preambular para 25 and operative para 10 (voting 38-4-5). Similarly, see HRC Res 52/3 (13 April 2023) UN Doc A/HRC/RES/52/3, para 17 (voting 38-2-7); HRC Res 49/29 (11 April 2022) UN Doc A/HRC/RES/49/29, preambular para 25 and operative para 10 (voting 38-4-5); HRC Res 49/4 (11 April 2022) UN Doc A/HRC/RES/49/4, para 16 (voting 37-3-7); HRC Res 46/3 (31 March 2021) UN Doc A/HRC/RES/46/3, para 15 (voting 32-6-8); HRC Res 43/3 (19 June 2020) UN Doc A/HRC/RES/43/3, preambular para 4 and operative para 9 (voting 22-8-17). See also HRC Res S-30/1 (27 May 2021) UN Doc A/HRC/RES/S-30/1, preambular para 4 and para 2(g) (voting 24-9-14) (creating the Independent International Commission of Inquiry regarding the Occupied Palestinian Territories and tasking it with, inter alia, assessing third-State measures adopted pursuant to their obligations under common art 1).

[91] Council of the European Union, 'User's Guide to Council Common Position 2008/944/CFSP Defining Common Rules Governing the Control of Exports of Military Technology and Equipment', 10858/15 COARM 172, CFSP/PESC 393 (Brussels, 20 July 2015) 55.

[92] ILC (n 30) Commentary to Draft Conclusion 13, para 16; Raffeiner (n 84) 1047–8. The discussion above regarding abstentions to UNGA resolutions reasonably being counted amongst the supportive practice applies for the same reasons to HRC resolutions: see above in the text to nn 87–9. Again, abstaining States did not object to the invocation of common art 1 in these resolutions: eg regarding HRC Res 52/35 (n 90), see HRC, A/HRC/52/L.42 Vote Item 7 - 57th Meeting, 52nd Regular Session (4 April 2023) <https://media.un.org/en/asset/k13/k13d215ddn>.

[93] This was in response to the ILC's draft commentary, which noted that common art 1 'is also interpreted to require that States, to the extent possible, exert their influence to prevent and stop violations of the law of armed conflict', noting in the footnotes the contention with this: ILC, 'Draft Principles on the Protection of the Environment in Relation to Armed Conflicts, with Commentaries', UNYBILC, vol II (2022) Part II, Commentary to Principle 3, para 6. The special rapporteur herself supported this interpretation on the basis of State practice: ILC, 'Second Report on Protection of the Environment in Relation to Armed Conflicts by Marja Lehto, Special Rapporteur (27 March 2019) UN Doc A/CN.4/728, 58 (fn 461).

external obligations for all States.[94] Similarly, during a January 2022 UN Security Council (UNSC) debate concerning the protection of civilians in urban conflict, Sweden, Denmark, Finland, Iceland and Norway jointly expressed their position as follows:

> We share the concerns of the Secretary-General and call upon all parties to armed conflict to prevent civilian harm resulting from the use in populated areas of explosive weapons, particularly those with wide-area effects … That increasingly pressing problem deserves the full attention of the Security Council and adequate monitoring of the implementation of the relevant Security Council resolutions. The Council and the international community as a whole have a shared responsibility to fully uphold and respect international law, including international humanitarian law and international humanitarian principles. We recall our joint obligation to respect and ensure respect for international humanitarian law, as enshrined in article 1 common to the Geneva Conventions.[95]

Here, UNSC monitoring of armed conflicts is clearly seen in the context of the obligation of *all* States under common Article 1, which is thus read as including an external element. During a May 2021 UNGA debate on the situation in the Middle East, Azerbaijan, on behalf of the Coordinating Bureau of the Non-Aligned Movement, similarly stated:

> The Movement calls for action to ensure accountability for all of Israel's violations against the Palestinian people. Israel's continued non-compliance with the law warrants collective action in line with various obligations under international law, including article 1 of the Fourth Geneva Convention, on respecting and ensuring respect for the Convention in all circumstances.[96]

In a June 2020 UNSC debate on children in armed conflict, Peru also argued that common Article 1 obliges all States and the UNSC to adopt measures aimed at 'revers[ing] the trend' of IHL violations involving children.[97] Belgium too expressed strong support for there being an external obligation on all States to ensure respect for IHL in an August 2019 UNSC debate on IHL.[98] These

[94] ILC (n 21) 37 (Switzerland); UNGA, 'Sixth Committee, Summary Record of the 25th Meeting (New York, 27 October 2022, 3p.m.)' (12 December 2022) UN Doc A/C.6/77/SR.25, para 86 (Palestine).

[95] UNSC, '8953rd Meeting, 25 January 2022, 3p.m.' (25 January 2022) UN Doc S/PV.8953 (Resumption 1) 10/21.

[96] UNGA, '67th Plenary Meeting, Thursday 20 May 2021, 10a.m.' (20 May 2021) UN Doc A/75/PV.67, 23/34.

[97] UNSC, 'Letter dated 26 June 2020 from the President of the Security Council addressed to the Secretary-General and Permanent Representatives of the Members of the Security Council' (6 July 2020) UN Doc S/2020/594, 103, Annex 56.

[98] UNSC, '8596th Meeting, Tuesday 13 August 2019, 10 a.m.' (13 August 2019) UN Doc S/PV.8596, 17.

are just recent examples in a long history of debates during which States express support for external obligations under common Article 1.[99]

Finally, States have also expressed support for the external obligation outside particular fora or debates. For example, Armenia appeared to do so when it submitted reports from the human rights ombudsman and Ministry of Foreign Affairs of the so-called Republic Artsakh to the UN Secretary-General (requesting that they be forwarded to Member States) in relation to its 2020 conflict with Azerbaijan. Both reports referred to external obligations of the international community under common Article 1 to ensure respect for IHL by Azerbaijan.[100]

In contrast to this widespread, repeated support over time for the existence of an external obligation under common Article 1, negative practice that unequivocally rejects this has been relatively rare and is, partly, a recent phenomenon. Again in the context of the ILC's work on the protection of the environment in armed conflict, Canada, Israel, the United States (US) and United Kingdom (UK) argued against there being an external element to common Article 1.[101] Canada[102] and the US[103] have expressed this same view elsewhere in recent years, with Israel apparently having taken this position for some time now.[104] Yet there is some inconsistency, with

[99] To take some examples from just a few debates in the UNGA, see, eg, UNGA, 'Official Records, 6th Committee, 16th Meeting, New York, Wednesday 17 October 2018, 10 a.m.' (17 October 2018) UN Doc A/C.6/73/SR.16, 2 (El Salvador); UNGA, 'Tenth Emergency Special Session, 7th Plenary Meeting, Thursday 13 November 1997, New York, 3 p.m.' (13th November 1997) UN Doc A/ES-10/PV.7, 10 (Syria), 7 (Namibia); UNGA, 'Tenth Emergency Special Session, 12th Plenary Meeting, Tuesday 9 February 1999, 3.30 p.m., New York' (9 February 1999) UN Doc A/ES-10/PV.12, 3 (Egypt), 8 (Saudi Arabia), 15 (Switzerland); UNGA, 'Tenth Emergency Special Session, 10th Plenary Meeting, Tuesday 5 February 1999, 10 a.m., New York (5 February 1999) UN Doc A/ES-10/PV.10, 19 (Pakistan), 21 (Cuba), 13 (Malaysia), 16 (Indonesia and Bahrain), 20 (Saudi Arabia on behalf of the Non-Aligned Movement); UNGA, 'Official Records, Sixty-Fourth Session, 36th Plenary Meeting, Wednesday 4 November 2009, 10 a.m., New York' (4 November 2009) UN Doc A/64/PV.36, 3 (Egypt on behalf of the Non-Aligned Movement).

[100] UNGA/UNSC, 'Letter Dated 3 December 2021 from the Permanent Representative of Armenia to the United Nations Addressed to the Secretary-General' (20 December 2021) UN Doc A/76/581–S/2021/1010; UNGA/UNSC, 'Letter Dated 4 March 2021 from the Permanent Representative of Armenia to the United Nations addressed to the Secretary-General' (4 March 2021) UN Doc A/75/799–S/2021/220.

[101] UNGA, 'Sixth Committee, Summary Record of the 22nd Meeting, New York, 25 October 2022, 3 p.m.' (12 December 2022) UN Doc A/C.6/77/SR.22, 4 (Canada); ILC (n 21) 36 (Israel), 38 (UK), 39 (US).

[102] *Daniel Turp v Minister of Foreign Affairs* [2017] FC 84, para 22 (the government arguing, contrary to the survey of practice in this section, that '[t]here is no evidence that the State Parties to the Conventions subscribe to the interpretation of this provision put forward by the applicant's expert, and state practice does not support it') (the Court itself did not resolve this question).

[103] See above in the text to n 20.

[104] Israel had earlier expressed a similar view rejecting (though arguably not as broadly as it did in the recent ILC context) the external obligation under common art 1: UNSC, '3980th Meeting, Monday 22 February 1999, 3.15 p.m., New York' (22 February 1999) UN Doc S/PV.3980 (Resumption 1) 11.

Canada,[105] the US,[106] Israel[107] and the UK[108] at other times all expressing *support* for the external obligation under common Article 1.

Australia's practice is more equivocal, but it might still be considered a dissenting State. It appeared to reject the notion of an external obligation under common Article 1 when responding to an ICRC questionnaire in 1973 and has abstained from voting on many of the UNGA resolutions cited above.[109] More recently, Australia seems to have rejected the purported positive obligations under the external element of common Article 1.[110] It has, however, been inconsistent, voting in favour of some earlier resolutions invoking common Article 1 in the Israel–Palestine conflict.[111] Even so, it is clear that only a small minority of States explicitly dissent from the proposition that common Article 1 contains external obligations applicable to all States in relation to the conduct of others. This interpretation of common Article 1 thus has widespread support.

Finally, it has been argued that the failure of States to allege that other States which do not respond to breaches of substantive IHL rules are themselves in breach of common Article 1 is an indication that it does not, in fact, include external obligations.[112] However, States frequently do condemn alleged violations of IHL in specific conflicts and call on the parties to comply with IHL.[113] Indeed, as the many examples above confirm, common Article 1 is

[105] eg Canada voted in favour of UNSC Res 681 (1990) (20 December 1990) UN Doc S/RES/681 (1990) para 5 of which states '[c]alls upon the High Contracting Parties to the said Convention to ensure respect by Israel, the occupying Power, for its obligations under the Convention in accordance with article 1 thereof'. No objections to para 5 of that resolution were noted in Canada's intervention during the UNSC debates: UNSC, 'Provisional Verbatim Record of the Two Thousand Nine Hundred and Seventieth Meeting (Part II), New York, Thursday 20 December 1990, 10.30 a.m.' (2 January 1991) UN Doc S/PV.2970 (Part II) 23–5.

[106] See, eg, affirmative vote by the US again for UNSC Res 681 (1990) ibid. No reference was made in the US's detailed comments at that UNSC meeting of draft para 5, notwithstanding the caveats with respect to other parts of the resolution: see UNSC, Provisional Verbatim Record ibid 48–55. See also the US's reply to the ICRC questionnaire, below in the text to n 192.

[107] See below in the text to n 192.

[108] For example, the UK frequently votes in favour of those UNGA resolutions recognizing external obligations under common art 1: eg UNGA Res 76/82 (above in the text to n 78). It did not express any concerns with the reference to common art 1 in either the UNGA plenary or the Fourth Committee which proposed that resolution: see the relevant meeting records above at n 89.

[109] On the ICRC questionnaire, see below in the text to n 192. See, eg, UNGA Res 76/82 (n 78) from which Australia abstained.

[110] J Reid, 'Ensuring Respect: The Role of State Practice in Interpreting the Geneva Conventions', *ILC Reporter*, 9 November 2016 (John Reid was at the time Head of the Office of International Law at the Commonwealth Attorney-General's Department, Australia).

[111] See, eg, UNGA Res 53/54 (n 79). Australia made no objection to the invocation of common art 1 in the draft resolution in either the UNGA plenary or the Fourth Committee: UNGA, 'Seventy-Eighth Plenary Meeting, 3 December 1998, 3 p.m., New York' (3 December 1998) UN Doc A/53/PV.78; for relevant summary records of the Fourth Committee, see UN Docs A/C.4/53/SR.22–24.

[112] Focarelli (n 18) 171; Schmitt and Watts (n 16) 690–2.

[113] As recent examples, see UNGA Res ES-11/1 (2 March 2022) UN Doc A/RES/ES-11/1, para 11 (in relation to Ukraine); UNGA Res 77/10 (4 November 2022) UN Doc A/77/L.11 (in relation to Afghanistan).

specifically invoked by States when calling on others to respond to IHL violations.

More generally, there are various political or strategic reasons why States who are silent in the face of substantive IHL violations are not censured for their own apparent breach of common Article 1. As noted above, silence can constitute acquiescence (and thus subsequent practice) 'when the circumstances call for some reaction'.[114] Drawing an analogy with custom, such circumstances might include cases where practice (or the lack of practice condemning substantive IHL violations) 'affects interests and rights of an inactive state'.[115] This is unlikely to be the case here. Whilst it is often said that common Article 1 (and other IHL rules) create obligations owed *erga omnes partes*, this merely creates a legal right to invoke the wrongdoing State's responsibility;[116] it does not mean that all States have an actual interest in the way other States respond to substantive IHL violations. Thus, one cannot reasonably assign normative weight to the failure of a State to condemn others for allegedly violating common Article 1.

B. Consent and Dissent in Treaty Interpretation

There is therefore widespread and long-standing practice at least in support of a positive, external obligation under common Article 1 requiring States to respond to and seek the cessation of violations of the Conventions.[117] But how far might the existence of the contrary, dissenting practice noted above affect the extent to which this supportive practice can influence the interpretation of common Article 1?

The orthodox reading of Article 31(3)(b) of the VCLT is that practice is inadmissible thereunder if there is explicit dissent, given its requirement that subsequent practice 'establish[] the agreement of the parties'.[118] As Georg

[114] See above in the text to n 87.

[115] GM Danilenko, *Law-Making in the International Community* (Martinus Nijhoff 1993) 108.

[116] M Longobardo, 'The Contribution of International Humanitarian Law to the Development of the Law of International Responsibility Regarding Obligations *Erga Omnes* and *Erga Omnes Partes*' (2018) 23 JC&SL 383.

[117] The status of the other elements in the ICRC's interpretation of common art 1 (ie the negative elements and the positive duty of prevention) is discussed below in the text to nn 226–34.

[118] *Whaling in the Antarctic* (n 35) para 83 ('many IWC [International Whaling Commission] resolutions were adopted without the support of all States parties to the Convention and, in particular, without the concurrence of Japan. Thus, such instruments cannot be regarded as … subsequent practice establishing an agreement of the parties regarding the interpretation of the treaty'); ibid Separate Opinion of Judge Greenwood, para 6; ILC (n 30) Commentary to Conclusion 10, paras 1–3; *European Communities – Customs Classification of Frozen Boneless Chicken Cuts* (n 88) paras 251–273; *United States – "Zeroing"* (n 35) para 7.218; Case C-432/92 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte SP Anastasiou (Pissouni) Ltd and others* [1994] ECR 3087, paras 50–53. For scholarly support, see A Aust, *Modern Treaty Law and Practice* (CUP 2000) 195; Gardiner (n 41) 270; Buga (n 74) 61–3; J Crawford, 'A Consensualist Interpretation of Article 31(3) of the Vienna Convention on the Law of Treaties' in Nolte (ed) (n 86) 30.

Nolte, the ILC's special rapporteur on subsequent agreements and subsequent practice, put it in his Hague Lectures, subsequent practice under Article 31(3)(b) embodies 'the will of *all* parties to a treaty. Thus, a practice by only one party, or even the practice of *almost* all parties, is *not* subsequent practice under Article 31, paragraph 3.'[119] Indeed, at the time of drafting what became Article 31(3)(b), the ILC viewed it as referring to practice that reflects the understanding of 'the parties as a whole', justifying its inclusion amongst the authentic means of interpretation on the basis that 'it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty'.[120] On this basis, the widespread practice supporting the external element of common Article 1 would not be admissible under Article 31(3)(b) due to the inconsistent dissenting practice.[121]

Notwithstanding the considerable weight placed on subsequent practice in other studies supporting the external element to common Article 1, most fail to acknowledge this potentially fatal methodological flaw.[122] The few that do acknowledge this problem adopt the approach of the ILC in its draft conclusions on subsequent agreements and subsequent practice.[123] Here, the ILC argued that subsequent practice that does not establish the agreement of all of the parties to the treaty (eg where some dissent is present) can still be admissible as a supplementary means of interpretation under Article 32 of the VCLT.[124] Two key consequences follow from this. First, as the ILC argues, if practice is admissible under Article 32 of the VCLT, it would be accorded less interpretive weight as a supplementary means of interpretation than it would as an authentic means under Article 31(3)(b).[125] Secondly, in contrast to Article 31(3)(b), practice under Article 32 could only be drawn on to confirm an interpretation reached by the other authentic means, or where those other means yield an unclear or manifestly absurd result.[126]

The ILC's bifurcation of subsequent practice into Articles 31(3)(b) and 32 finds some support amongst scholars.[127] Indeed, during the drafting of what eventually became Articles 31 and 32 of the VCLT, the ILC alluded to the

[119] G Nolte, 'Treaties and Their Practice – Symptoms of Their Rise or Decline' (2018) 392 RCADI 219, 340.

[120] ILC, 'Report of the International Law Commission on the Work of its Eighteenth Session, 4 May–19 July 1966', UNYBILC, vol II (1966) 222, para 15.

[121] Arguing that this supportive practice is, therefore, entirely irrelevant to the interpretation of common art 1, Schmitt and Watts (n 16) 696–7.

[122] See above in the text to n 31.

[123] Zwanenburg (n 16) 638–9; Wiesener and Kjeldgaard-Pederson (n 16) 143; ICRC, Commentary to GC III (n 5) paras 92–93.

[124] ILC (n 30) Commentary to Draft Conclusion 2, para 9.

[125] ILC (n 30) Commentary to Draft Conclusion 4, para 33.

[126] VCLT (n 30) art 32; *Application of the Interim Accord of 13 September 1995 (the Former Yugoslav Republic of Macedonia v Greece)* (Judgment) [2011] ICJ Rep 644, para 102.

[127] O Dörr, 'Article 31' in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2nd edn, 2018) 603; M Fitzmaurice, 'Subsequent Agreement and Subsequent Practice' (2020) 22 ICLR 14, 20–2; I Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press 1973) 138.

possibility that practice establishing the agreement of only some parties concerning the interpretation of a treaty provision might be considered a supplementary means under draft Article 70 (which would become Article 32).[128] By reinvoking this argument in its recent work on subsequent practice, the ILC sought to explain the tendency of many international courts and tribunals to refer to State practice as an interpretive aid even where that practice does not represent the agreement of all States parties.[129] Sometimes, one can infer that this is the sense in which a tribunal relies upon subsequent practice, for example, when it is invoked to confirm an interpretation reached by other means.[130] In many cases, however, including most of those on which the ILC relies, international courts and tribunals appear to rely on subsequent practice that is explicitly not accepted by all parties pursuant to Article 31(3)(b) of the VCLT.

In *Loizidou v Turkey*, for example, the question for the European Court of Human Rights (ECtHR) was whether Articles 25 and 46 of the European Convention on Human Rights, providing for acceptance of the jurisdiction of the Commission and Court, permitted territorial restrictions of the type found in Turkey's declarations. The Court referred to the practice of the vast majority of Convention parties of not including territorial restrictions in their Article 25 and 46 declarations as 'confirm[ing]'[131] the interpretation that was 'strongly support[ed]'[132] by other factors, such that territorial restrictions were not permitted. Though this might suggest that the Court was referring to such practice as supplementary means under Article 32 of the VCLT, its stated methodology indicated that it took account of subsequent practice only in the sense of Article 31(3)(b).[133] This was so, even though the practice clearly did not reflect an interpretation shared by all parties. Importantly, the respondent State, to whom the Court's interpretation was opposable, explicitly rejected it, and had done so consistently in its own practice (in the form of the territorial restrictions contained in its declarations). The Court did not think

[128] ILC, 'Report of the International Law Commission Covering the Work of its Sixteenth Session, 11 May–24 July 1964', UNYBILC, vol II (1964) 204, para 13. In the commentaries to the final draft articles, however, this point was omitted: ILC (n 120) 222, para 15.

[129] ILC, 'First Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation by Georg Nolte, Special Rapporteur' (19 March 2013) UN Doc A/CN.4/660, paras 92–110; ILC (n 30) Commentary to Draft Conclusion 4, paras 23–35.

[130] *Kasikili/Sedudu Island* (n 44) paras 78–80 (referring to practice that it did not consider to constitute subsequent practice to confirm the meaning already arrived at); Panel Report, *United States – Section 110(5) of the US Copyright Act*, WT/DS160/R, adopted 27 July 2000, para 6.55 (fn 68) (referring to practice to confirm an interpretation whilst refusing to take a position on whether the practice satisfies art 31(3)(b)).

[131] *Loizidou* (n 35) para 79.

[132] ibid, para 78. The other factors to which the Court points concern principally the object and purpose of the Convention and *a contrario* reasoning from the explicit enumeration of permitted restrictions.

[133] ibid, para 73. There is some inconsistency in the ILC's treatment of *Loizidou*, apparently referring at different points in its draft commentaries on subsequent practice to it as an example of art 31(3)(b) and art 32 practice: compare ILC (n 30) Commentary to Draft Conclusion 4, paras 25, 27; ibid, Commentary to Draft Conclusion 10, para 6.

this prevented it from relying on the (lack of) practice of the other Contracting Parties, apparently on the basis of Article 31(3)(b). For the Court, Turkey's contrary practice, together with the unclear practice of two other States, 'do not disturb the evidence of a practice denoting practically universal agreement amongst Contracting Parties that Articles 25 and 46 … do not permit territorial or substantive restrictions'.[134]

In other cases, the ECtHR has also drawn on general, though not universally supported, practice of Contracting States as evidence of a 'European consensus',[135] apparently considering it admissible under Article 31 of the VCLT. Thus, in *Magyar Helsinki Bizottság v Hungary*, a case concerning the right to information, the Court stated that '[t]he consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases', considering this as practice under Article 31 of the VCLT, and looking separately at 'supplementary' means in the following paragraph.[136] The Court concluded that, 'since the Convention was adopted the domestic laws of the overwhelming majority of Council of Europe member States … along with the relevant international instruments, have indeed evolved to the point that there exists a broad consensus, in Europe (and beyond) on the need to recognise an individual right of access to State-held information'.[137] Importantly, this interpretation was rejected by Hungary (the respondent) and, as intervenor, the UK. The ECtHR thus takes a broader view of subsequent practice under Article 31(3)(b) than is permitted by the orthodox account.[138] This seems to be a consistent approach of the Strasbourg Court.[139]

[134] *Loizidou* (n 35) para 80.

[135] The precise basis of 'European consensus' is controversial: for early criticism, see LR Helfer, 'Consensus, Coherence and the European Convention on Human Rights' (1993) 26 CornellIntlLJ 133. The Court at times appears to refer to it in the context of arts 31(3)(b) and (c) interchangeably: I Ziemele, 'European Consensus and International Law' in A van Aaken and I Motoc (eds), *The European Convention on Human Rights and General International Law* (OUP 2018). Arguing that it should be conceptualized as subsequent practice under art 31(3)(b) of the VCLT, see P Minnerop, 'European Consensus as Integrative Doctrine of Treaty Interpretation: Joining Climate Science and International Law under the European Convention on Human Rights' (2023) 40 BerkeleyJIntlL 207. This conceptual confusion need not detain us here, however, as the reference to Strasbourg case law is simply to show reliance on State practice as an authentic means of interpretation, notwithstanding the presence of contrary practice.

[136] *Magyar Helsinki Bizottság v Hungary* App No 18030/11, Judgment (Grand Chamber) (ECtHR, 8 November 2016) para 124.

[137] ibid, paras 138–148.

[138] The Court has refused to give interpretive effect to State practice where it is insufficiently widespread: eg *Khamtokhu and Aksenchik v Russia* Apps No 60367/08 and 961/11, Judgment (Grand Chamber) (ECtHR, 24 January 2017) para 83 (the Grand Chamber did not feel able to conclude that there was a European consensus against life imprisonment on the grounds that only nine Contracting States did not provide for such sentences); cf Dissenting Opinion of Judge Pinto de Albuquerque ibid, para 36.

[139] A Seibert-Fohr, 'The Effect of Subsequent Practice on the European Convention on Human Rights' in van Aaken and Motoc (eds) (n 135) 72–4; VP Tzevelekos and K Dzehtsiarou, 'International Custom Making and the ECtHR's European Consensus Method of Interpretation'

The Inter-American Court of Human Rights (IACtHR) has also explicitly relied on widely shared practice amongst States parties pursuant to Article 31(3)(b), even in the face of some minority dissent. In *Artavia Murillo v Costa Rica*, the Court referred to the 'generalized practice' of 'most' States parties permitting in vitro fertilization (IVF) as a basis for concluding that Article 4(1) of the American Convention on Human Rights on the right to life should not be interpreted as prohibiting IVF, referring explicitly to Article 31(3)(b) of the VCLT:

> The Court considers that, even though there are few specific legal regulations on IVF, most of the States of the region allow IVF to be practiced within their territory. This means that, in the context of the practice of most States Parties to the Convention, it has been interpreted that the Convention allows IVF to be performed. The Court considers that this practice by the States is related to the way in which they interpret the scope of Article 4 of the Convention, because none of the said States has considered that the protection of the embryo should be so great that it does not permit assisted reproduction techniques and, in particular, IVF.[140]

Again, this interpretation was opposable to the respondent State, Costa Rica, whose own practice in prohibiting IVF on the basis of its alleged violation of the right to life was inconsistent with this majority position.[141]

The International Criminal Tribunal for the former Yugoslavia (ICTY) also at times took a much broader view of admissible subsequent practice under Article 31(3)(b) than the orthodox approach would permit. In its 1999 *Tadić* judgment, for example, the Appeals Chamber, when interpreting the requirement in Article 4A(2) of the Third Geneva Convention (GC III) that paramilitary groups must 'belong[] to a party to the conflict' to benefit from prisoner of war status, placed decisive weight on its reading of State practice, which it considered to set a 'control' test for this purpose.[142] It did not, however, examine the extent to which State practice converged here and referred only to a single domestic court judgment as evidence.[143] Nonetheless, in other cases the Appeals Chamber has been stricter in its application of Article 31(3)(b).[144]

(2016) 16 EurYBHumRts 313; J Arato, 'Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations' (2013) 38 YaleJIntlL 289, 336–7.

[140] *Case of Artavia Murillo* et al *("In Vitro Fertilization") v Costa Rica*, Judgment (Preliminary Objections, Merits, Reparations, Costs) (28 November 2012) para 256 (citing art 31(3)(b) of the VCLT in the footnote).

[141] ibid, paras 68–77. At the time, Costa Rica was said to be the only State in the world that absolutely prohibited assisted reproduction techniques: ibid, para 67. Following the judgment (against Costa Rica) and the initiation of compliance proceedings, Costa Rica overturned its ban in 2015: M Solano Carboni, 'The Role of National Human Rights Institutions in Implementing Decisions of the Inter-American System: Three Recent Examples from Costa Rica' (2020) 12 JHumRtsPrac 217.

[142] *Prosecutor v Duško Tadić* (Judgment, Appeals Chamber) IT-94-1-A (15 July 1999) paras 93–95.

[143] ibid, para 93. Also noting that the ICTY's approach to subsequent practice did not follow the orthodoxy, see A Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY' in G Boas and W Schabas (eds), *International Criminal Law Developments in the Case Law of the ICTY* (Brill 2003) 279–80.

[144] *Tadić* (n 85) paras 83–84; cf Separate Opinion of Judge Georges Abi-Saab (n 85) 6.

This practice of the ECtHR, IACtHR and ICTY might be viewed as representing a *sui generis* approach to treaty interpretation in the context of international tribunals performing a broader rule of law function, in contrast to traditional inter-State dispute settlement tribunals.[145] However, the more liberal approach to Article 31(3)(b) is also to be found in some ICJ jurisprudence. Thus in the *Namibia* advisory opinion, when interpreting Article 27 of the UN Charter, the Court placed decisive (indeed, exclusive) weight on the consistent practice of the (limited) UNSC membership whereby abstention by a permanent member was not treated as barring the adoption of a resolution.[146] Although it referred to this practice as being 'generally accepted by Members of the United Nations', the Court cited no evidence indicating the acceptance of *all* members, as one would have expected if the Court was adhering to the orthodox reading of Article 31(3)(b).[147] Similarly, in the *Wall* advisory opinion, the Court recognized a change in the interpretation to be given to Article 12(1) of the Charter arising from subsequent practice, such that the UNGA and UNSC could deal with matters simultaneously.[148] The Court relied, again decisively, on UNGA resolutions that had received a number of negative votes.[149] The decisive weight given to subsequent practice in these cases (and the automatic recourse thereto) suggest that the Court drew on it pursuant to Article 31(3)(b), rather than Article 32.

Various explanations have been given for these ICJ cases. Arato views them (and the similar approach of the ECtHR) as examples of international courts interpreting their own constituent instruments, though the different approach of the World Trade Organization Appellate Body militates against generalizing this argument.[150] Whilst this might explain the stricter approach of the ICJ in *Whaling in the Antarctic*,[151] there is nothing in the Court's (or ECtHR's) reasoning that implies such a distinction, and it is not clearly grounded in principle. It has also been argued that the distinctive feature of

[145] On the taxonomy of different dispute settlement mechanisms, see, eg, CPR Romano, 'A Taxonomy of International Rule of Law Institutions' (2011) 2 JIDS 241, 265; RO Keohane, A Moravcsik and A-M Slaughter, 'Legalized Dispute Resolution: Interstate and Transnational' (2000) 54(3) IntlOrg 457.

[146] *Namibia* (n 85) 22. Art 27 refers to UNSC decisions by 'an affirmative vote of nine members including the concurring votes of the permanent members'.

[147] ibid.

[148] *Wall* (n 14) paras 27–28. Art 12(1) reads: While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.

[149] ibid, citing UNGA Res 1600 (XV) (15 April 1961) UN Doc A/RES/1600 (voting 60-16-23); UNGA Res 1913 (XVIII) (3 December 1963) UN Doc A/RES/1913 (voting 91-2-11). Raffeiner (n 84) 1051 suggests that these resolutions should be treated, notwithstanding the negative votes, as agreements established by silence given the absence of any evidence of 'substantive dissent' (in contrast to Japan's dissenting practice in *Whaling in the Antarctic* (n 35), for example). Presuming agreement in the face of a negative vote, however, particularly where explanations of votes often are not given, would seem in principle difficult to sustain. Moreover, nothing in the judgment suggests that this was the Court's reasoning.

[150] Arato (n 139). On the Appellate Body's approach, see above in the text to n 118.

[151] Above at n 118.

these cases is that they invoke the practice of organs of international organizations (not *State* practice as such), either as an element in interpreting those organizations' constituent instruments,[152] or as 'established practice' of the organization influencing its internal rules.[153] This may explain the similar approach of the Court in the *Certain Expenses* advisory opinion, in which it explicitly noted its methodology of relying on the consistent practice of UN organs,[154] and went on to rely on UNGA resolutions with significant negative votes.[155] Yet in the *Namibia* and *Wall* advisory opinions the Court's focus seemed clearly to be on the practice of *States* (as opposed to the practice of *organs*), in the form of their voting on and reaction to resolutions.[156]

Two points are clear from this survey of case law. First, it is wrong to suggest, as have some,[157] that subsequent practice is inadmissible as a means of interpreting a treaty provision where there is a small amount of inconsistent practice. Secondly, and contrary to the understanding of the ILC and others,[158] the practice of a majority of States parties (even in the face of some explicit dissent) has often been treated by international tribunals as an authentic means of interpretation under Article 31(3)(b), rather than a supplementary means under Article 32 of the VCLT. That the ILC's approach cannot explain this practice is especially clear in those cases where the respondent was one of the dissenting States, since the interpretation reached is opposable to them. If, as the ILC (and others subscribing to the orthodox account) argue, this cannot happen under Article 31 (3)(b), it is difficult to see how it can happen under Article 32.[159]

It is submitted that this judicial practice should be accepted on its own terms and that it should be recognized that subsequent practice may be admissible as

[152] Arato (n 139) 328–9; Buga (n 74) 39–43.

[153] For slightly different versions of this approach, see C Peters, 'Subsequent Practice and Established Practice of International Organizations: Two Sides of the Same Coin?' (2011) 3 GoJIL 617, 637–40; R Barber, 'Revisiting the Legal Effect of General Assembly Resolutions: Can an Authorising Competence for the Assembly be Grounded in the Assembly's "Established Practice", "Subsequent Practice" or Customary International Law?' (2021) 26 JC&SL 9, 23–5.

[154] *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the UN Charter)* (Advisory Opinion) [1962] ICJ Rep 151, 157.

[155] ibid 174–5. Hence the strong criticism in Judge Spender's separate opinion: Separate Opinion of Judge Sir Percy Spender ibid 192–7.

[156] In *Namibia* (n 85) 22, the Court's focus seemed entirely on the actual practice of Member States, referring to 'the positions taken by members of the Council' in accepting that abstention by a permanent member does not preclude the adoption of a UNSC resolution, which 'has been generally accepted by Members of the United Nations'. In *Wall* (n 14) para 28 the Court referred to the '*accepted* practice of the General Assembly' (emphasis added).

[157] In the context of common art 1, see above at n 121. For another context, see, eg, *Whaling in the Antarctic* (n 118).

[158] See, eg, above in the text to nn 124–9.

[159] The ILC's suggestion that some practice might be admissible under art 32 has been criticized on other grounds also, eg that art 32 was never intended to cover future acts and that it is unclear why, if accepting broader *State* practice under art 32, it did not accept practice of other entities too: H Ascensio, 'Faut-il mettre la pratique dans des catégories? (à propos des travaux de la CDI sur l'interprétation des traités dans le temps)' (2018) 46 QuestIntlL 19; S Kadelbach, 'The International Law Commission and Role of Subsequent Practice as a Means of Interpretation under Articles 31 and 32 VCLT' (2018) 46 QuestIntlL 5.

an authentic means for interpreting widely ratified multilateral treaties, even where there is a small amount of dissenting practice. Several reasons justify this. First, whilst it is sensible that universal (or widely supported) practice carries more weight than practice that is supported only by a small minority of States parties, this does not depend on a binary approach of classifying practice under Articles 31(3)(b) or 32 of the VCLT. Indeed, treating only practice from which there is no dissent as authentic, and relegating all other practice to Article 32 (thus according it less interpretive weight), gives a false impression of the weight of subsequent practice under Article 31(3)(b). The ILC itself recognizes that the weight accorded to Article 31(3)(b) practice depends on a number of factors,[160] even referring at one point in its commentary to the extent of consensus amongst the States parties as one such factor.[161] Moreover, subsequent practice in the Article 31(3)(b) sense is not necessarily decisive; rather, its influence depends on its interaction with the other means of interpretation under Article 31 of the VCLT.[162]

Secondly, the categorical distinction drawn by the ILC does not create a workable framework. According to the ILC, categorizing practice that does not establish the agreement of *all* parties to the treaty under Article 32 means that less weight must be accorded to it than is given to practice which does establish such agreement. Yet it is not known how to quantify this lesser weight.[163] This approach thus introduces additional questions, without providing any tools for discovering the answers. Indeed, when considering the factors that might influence the weight to be given to different types of subsequent practice, the ILC draft conclusions appear to draw no particular distinction between practice under Articles 31(3)(b) and 32.[164]

The third reason in favour of a broader reading of Article 31(3)(b) relates to the role of consent in treaty interpretation. The broader reading proposed here might be objected to on the basis that the strict, orthodox account protects party intentions and the consensual nature of treaty obligations.[165] Whilst it is true

[160] ILC (n 30) Draft Conclusion 9.

[161] ibid, Commentary to Draft Conclusion 9, paras 10–11.

[162] ILC (n 30) Commentary to Draft Conclusion 3, para 4; J Arato, 'Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation Over Time and Their Diverse Consequences' (2010) 9 LPICT 443, 452 (fn 34); *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* (Preliminary Objections, Judgment) [2017] ICJ Rep 3, para 64 ('[t]hese elements of interpretation — ordinary meaning, context and object and purpose — are to be considered as a whole').

[163] Similarly see M Hayashi, 'Non-Proliferation Treaty and Nuclear Disarmament: Article VI of the NPT in Light of the ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice' (2020) 22 ICLR 84, 102.

[164] ILC (n 30) Draft Conclusion 9(3). Making the point that this blurs the distinction the ILC itself creates, see Ascensio (n 159) 23–4.

[165] Buga (n 74) 61–3 ('… the agreement established by the practice must be opposable to all the parties. Thus, Article 31(3)(b) of the VCLT appears to impose a high threshold for practice, in line with a "consensualist" notion of the law of treaties'); Arato (n 139) 353 (noting that a broader reading of art 31(3)(b) would challenge consent as the 'fundamental tenet' of the law of treaties); A Roberts, 'Subsequent Agreements and Practice: the Battle over Interpretive Power' in Nolte (ed) (n 86)

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that determining party intentions is the goal of treaty interpretation, it is an objective or presumed, common intention that is to be determined through the application of the Vienna rules.[166] Indeed, the move away from the pre-Vienna interpretive approach that relied heavily on subjective State will (eg the *travaux*) towards objective rules for determining this presumed or objectivized collective intent was key to the evolution of the ILC's project on the law of treaties and the final VCLT.[167] No enduring, dispositive function therefore resides in the subjective will of individual parties.[168] As such, to argue that the consistent practice of a large majority of parties might not provide an authentic means of interpreting widely ratified multilateral treaties due to the dissent of a small minority of States appears to endow the subjective will of those few States with considerable weight and is arguably at odds with the general approach reflected in the VCLT rules.[169] The requirement of an 'agreement' in Article 31(3)(b) should thus be read more broadly than under the orthodox account. Indeed, there does not appear to be any principled basis for determining a particular degree of 'agreement' that is necessary for admissibility under Article 31(3)(b); as long as there is some agreement between at least two of the States parties, it is submitted that the influence (or weight) of that practice should be determined by the extent of the agreement and its interaction with the other means of interpretation.[170]

(viewing subsequent practice as the means by which States retain interpretive power and control); Crawford (n 118) 30–1 (similarly speaking of opposability and party control).

[166] ILC (n 30) Commentary to Draft Conclusion 8, para 9; *Dispute Regarding Navigational and Related Rights* (n 74) para 48; Gardiner (n 41) 465–7; E Bjorge, *The Evolutionary Interpretation of Treaties* (OUP 2014) 2–3.

[167] J Wyatt, 'Signs of a Subjective Approach to Treaty Interpretation in Investment Arbitration: A Justified Divergence from the VCLT?' in E Shirlow and KN Gore (eds), *The Vienna Convention on the Law of Treaties in Investor-State Disputes: History, Evolution and Future* (Kluwer 2022) 89, 94–8; M Fitzmaurice, 'Interpretation of Human Rights Treaties' in D Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 739, 745; E Bjorge, 'The Vienna Rules, Evolutionary Interpretation and the Intention of the Parties' in A Bianchi, D Peat and M Windsor (eds), *Interpretation in International Law* (OUP 2015) 189, 194–201.

[168] Similarly, see the entertaining expert evidence of Professor Schreuer in *Wintershall Aktiengesellschaft v Argentine Republic*, ICSID Case No ARB/04/14, quoted in AH Qureshi, *Interpreting WTO Agreements: Problems and Perspectives* (2nd edn, CUP 2015) 139–40. Even art 31(4) of the VCLT (requiring a special meaning to be given to a term if it is established that the parties so intended), which is sometimes seen as a vestige of the subjective school of interpretation, only refers to subjective State will to determine whether a special meaning was intended, but the actual content of that special meaning falls to be determined via the art 31 rules: J Wyatt, *Intertemporal Linguistics in International Law: Beyond Contemporaneous and Evolutionary Treaty Interpretation* (Hart 2020) 209–11.

[169] Similarly, see J d'Aspremont, 'The International Court of Justice, the Whales and the Blurring of the Lines between Sources and Interpretation' (2016) 27 EJIL 1027 (criticizing the Court's approach in *Whaling in the Antarctic* (n 35) for its focus on Japan's dissent from the relevant IWC resolutions, though still appearing to subscribe to the ILC's approach of seeing such resolutions as practice outside the scope of art 31(3)(b)).

[170] It follows that the argument here is limited to multilateral treaties. Practice can only be relevant when interpreting bilateral treaties where both parties are in (express or implied) agreement: *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile)* [2018] ICJ Rep

The problems with the ILC's approach become particularly clear when applied to the practice set out above regarding the external obligation under common Article 1. Those that apply the ILC's approach categorize the majority practice supporting the external element under Article 32, claiming to accord it less interpretive weight than practice under Article 31(3)(b).[171] Yet no further indication of the relative weight to be given to this practice is offered and it is simply argued that '[o]n balance, the available practice is sufficient' to prove the existence of the external element.[172] Ultimately, subsequent practice is given decisive weight, which sits uneasily with the requirement that *less* weight be attached to it than if it were admissible under Article 31(3)(b). This is a necessary consequence of the ILC's binary approach, which requires lesser weight to be attached to Article 32 practice without explaining what that actually means.

Moreover, if dissent does indeed render practice inadmissible under Article 31(3)(b), it is not clear why it should be admissible under Article 32. One cannot reconcile the supportive and dissenting practice regarding external obligations under common Article 1; there is no compromise solution which allows for lesser weight to be given to the supportive practice under Article 32. The risk is that Article 32 essentially becomes a way of circumventing the stringent requirements of Article 31(3)(b), whilst claiming to show fidelity to State consent, with practice ostensibly admitted under the former having precisely the same interpretive effect as it would under the latter.

The approach proposed here avoids these methodological problems by recognizing that the requirements of Article 31(3)(b) are less stringent than the orthodox account suggests. Thus, it has been seen that practice in support of external obligations under common Article 1 is extensive and long-established, with dissenting practice constituting a small minority. It therefore seems reasonable automatically to consider such practice alongside the other authentic means of interpretation, rather than referring to it only if the conditions of Article 32 are met.[173] Moreover, treating such practice as admissible under Article 31(3)(b), as opposed to under Article 32, means the starting point need no longer be that such practice somehow carries less weight. Instead, this approach allows for a more nuanced consideration of its weight, based on the usual factors, including the level of support or dissent and the interaction with the other authentic means of interpretation.

Given the widespread nature of the supporting practice and the relatively recent (and inconsistent) nature of the dissenting practice, there does appear to be broad agreement in favour of external obligations under common Article 1. As regards the interaction of this practice with the other means of

507, para 132; *National Grid plc v Argentina*, UNCITRAL, Decision on Jurisdiction (20 June 2006) para 85.

[171] Zwanenburg (n 16) 643.

[172] ibid 650. Similarly, see Wiesener and Kjeldgaard-Pedersen (n 16) 149.

[173] See above in the text to n 126.

interpretation, the weight assigned to subsequent practice may be influenced by its consistency with those other means of interpretation, meaning that practice which is inconsistent with the object and purpose of a treaty, for example, might be expected to require the support of all parties to the treaty if it is to influence interpretation.[174] As shown above, an external obligation under common Article 1 that is supported by subsequent practice is fully consistent with the object and purpose of the Conventions (as well as with the other authentic means of interpretation).[175] In the light of this, the most persuasive interpretation of common Article 1 is one that recognizes that it contains external obligations relating to the conduct of others.

This argument means that it is not strictly necessary to consider the drafting history of common Article 1 or Article 1(1) of AP I. However, the following section will investigate the *travaux* given that some claim that there was an original, restrictive meaning to common Article 1. Such an original meaning might be another factor influencing the weight of non-universal subsequent practice (in contrast to universal practice).

IV. *TRAVAUX PRÉPARATOIRES*

Previous analyses of common Article 1 tend to conclude that the *travaux* either do not reveal any intention either way regarding an external element to that provision,[176] or that they demonstrate that such an obligation was explicitly rejected by the negotiating States (with the words 'ensure respect' referring to obligations vis-à-vis a State's own population).[177] As regards the *travaux* of Article 1(1) of AP I, this question is often ignored altogether.

The draft of common Article 1 received very little attention at the 1949 diplomatic conference, and the few interventions that were made do not establish a clear consensus for or against an external obligation. Italy's delegate to the conference argued that 'the terms "undertake to ensure respect" should be more clearly defined. According to the manner in which they were construed, they were either redundant, or introduced a new concept into international law.'[178] Moreover, whereas the delegates for Norway, the US, France and Monaco (the only other States to comment) said that they 'considered that the object of this Article was to ensure respect of the

[174] eg where subsequent practice appears to weaken rights conferred on individuals by a treaty: Arato (n 162) 486–7; E Methymaki and A Tzanakopoulos, 'Masters of Puppets? Reassertion of Control Through Joint Investment Treaty Interpretation' in A Kulick (ed), *Reassertion of Control over the Investment Treaty Regime* (CUP 2016) 171; Y Hamamoto, 'Possible Limitations to the Role of Subsequent Agreements and Subsequent Practice – Viewed from Some State Parties' (2020) 22 ICLR 61.

[175] See above in the text to nn 57–66.

[176] Zwanenburg (n 16) 643–6; Wiesener and Kjeldgaard-Pedersen (n 16) 140.

[177] Kalshoven (n 15) 27–8; Schmitt and Watts (n 16) 681–2; Focarelli (n 18) 133; Robson (n 16) 112–13.

[178] *Final Record of the Diplomatic Conference of Geneva of 1949: vol II, Section B* (ICRC 1963) 53 (Italy). The 'new concept', presumably, referred to the idea of an external obligation.

Conventions by the population as a whole',[179] the ICRC delegate noted in reply that 'the Contracting Parties should not confine themselves to applying the Conventions themselves, but should do all in their power to see that the basic humanitarian principles of the Conventions were universally applied'.[180] Though there is some disagreement as to what was meant here by 'universal application', it seems that it was used in contradistinction (and in addition) to application within a specific State and thus referred to promoting compliance by others.[181]

As is often the case, the *travaux* do not resolve the conundrum of how to interpret common Article 1.[182] There is value, nonetheless, in noting this, as it demonstrates, contrary to the claims of some, that there was no 'original [restrictive] meaning' of common Article 1 agreed by the parties.[183]

The original ICRC commentaries on the Geneva Conventions, which might be seen as an elaboration of the official *travaux*,[184] offer some further support for the external element. Thus, the Commentaries on the First, Second and Fourth Conventions state that it follows from the undertaking to 'ensure respect', 'that in 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'.[185] Whilst this has been read as recommendatory, rather than binding,[186] the Commentary on GC III omits the word 'may' altogether: 'each of the other Contracting Parties (neutral, allied or enemy) should endeavour to bring it back to an attitude of respect for the Convention'.[187] Even though these references reflect the ICRC's endorsement of an external element, rather than that of States, they do indicate the crystallization of the idea at the time.[188]

In the years between the adoption of common Article 1 and its restatement in Article 1(1) of AP I, two developments confirmed the growing acceptance of

[179] ibid (Norway, US and France) and 79 (Monaco). [180] ibid 53.

[181] This is indicated by the ICRC's explanation of its draft when first proposed to governments and others at the 1948 Stockholm International Conference of the Red Cross: Dörmann and Serralvo (n 17) 712–14. cf Focarelli (n 18) 131; Kalshoven (n 15) 14 (arguing that 'universal application', and 'ensure respect' generally, were simply included as confirmation that States ratify the Conventions on behalf of their populations, thereby encouraging compliance even in civil wars).

[182] P Allott, 'The Concept of International Law' (1999) 10 EJIL 31, 43 (concluding that treaties are not the 'end of a process, but the beginning of another process').

[183] Schmitt and Watts (n 16) 696; Geiss (n 17) 115. In this sense, it is not accurate to speak of those supporting the external reading of common Article 1 as seeking to 'reinterpret' the provision: Schmitt and Watts (n 16) 678.

[184] Whilst not constituting the official *travaux*, the *Pictet* Commentaries are valuable as a contemporaneous elaboration and, at times, progressive development, of those *travaux*: Henckaerts and Pothelet (n 55) 150.

[185] GC I Commentary (n 2) 26; GC II Commentary (n 2) 25–6; GC IV Commentary (n 2) 16.

[186] Kalshoven (n 15) 32–3.

[187] GC III Commentary (n 2) 18. The French-language version is even more explicit: J Pictet, *Commentaire III – Convention de Genève relative au traitement des prisonniers de guerre* (CICR 1960) 24: 'chaque Partie contractante (neutre, alliee ou ennemie) *doit* chercher à la ramener au respect de la Convention' (emphasis added).

[188] The 'beginning of another process' in Allott's (n 182) terms.

there being an external dimension to the undertaking to 'ensure respect'. First, common Article 1 was no doubt what States had in mind when they adopted the preambular paragraph to Resolution XXIII at the 1968 Tehran Conference on Human Rights, which stated that 'States parties to the Red Cross Geneva Conventions sometimes fail to appreciate their responsibility to take steps to ensure the respect of these humanitarian rules in all circumstances by other States, even if they are not themselves directly involved in an armed conflict.'[189] Whilst this language has been said by some to be equivocal ('responsibility' as opposed to 'duty'),[190] its adoption prior to the reiteration of the obligation in Article 1(1) of AP I is instructive.

Secondly, even more fundamental for understanding what was in the minds of the delegates when adopting Article 1(1) of AP I are the responses of States to an ICRC questionnaire in 1973 concerning means of encouraging compliance with the Conventions, issued following a recommendation by the first session of the 1971 Conference of Government Experts, and which informed the 1974–1977 diplomatic conference.[191] Many of the responses from States made clear that not only was the external element of common Article 1 taken for granted, but it was also considered to be a legal obligation binding all contracting parties; this was the case even for States that more recently have rejected this interpretation.[192]

The *travaux* of AP I itself have either been overlooked in previous scholarship on the subject or noted only in passing, given the very limited substantive discussion of Article 1(1) at the 1974–1977 diplomatic conference.[193] However, a number of delegates at other points in the negotiations gave clear indications of the measures that common Article 1 (and Article 1(1) of AP I) required. In particular, when discussing drafts of what became the 'external' enforcement provisions in AP I,[194] some delegates made it clear that they considered these to be methods for 'ensuring respect' for the Conventions and Protocol.[195] Indeed, the delegate of Pakistan explicitly stated that common Article 1 imposed on States parties an obligation

[189] International Conference on Human Rights, Human Rights in Armed Conflict, Resolution XXIII, Tehran (12 May 1968) preambular para 9.

[190] Kalshoven (n 15) 43.

[191] ICRC, *Questionnaire Concerning Measures Intended to Reinforce the Implementation of the Geneva Conventions of August 12, 1949: Replies Sent by Governments* (ICRC 1973).

[192] ibid 20 (Federal Republic of Germany), 21 (Belgium), 22–3 (Canada), 23 (Republic of Korea), 24–5 (US), 25 (Israel), 27 (Malaysia), 30–1 (UK) (albeit slightly less clear). Responses from certain other States, however, suggested a rejection of an external element or a rejection of an obligation to take *collective* measures against a violating State: eg 20 (Australia), 20 (Argentina), 24 (Denmark), 33 (Yugoslavia).

[193] Zwanenburg (n 16) 637–8; Schmitt and Watts (n 16) 688; Kalshoven (n 15) 45–8; Wiesener and Kjeldgaard-Pedersen (n 16) 140; Focarelli (n 18).

[194] eg AP I (n 7) art 7; AP I, art 80; AP I, art 90.

[195] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977*) vol VII (Federal Political Department, Bern 1978) 212–13 (Finland); *Official Records*, vol VIII (n 47) 273 (Vietnam); *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–*

to ensure respect for the Conventions by others: 'Article 1 common to the four Geneva Conventions of 1949 … implied that, if a Party failed to carry out its obligations, the other Contracting Parties were bound to endeavour to bring it back to an attitude of respect for its engagements.'[196] Elsewhere, the Pakistan delegate referred approvingly to the ICRC's commentary on common Article 1 (though without specifying which commentary) when explaining Pakistan's own detailed proposal for a permanent commission,[197] which would investigate alleged violations by States and 'endeavour to bring back to an attitude of respect for and obedience to the provisions of the Conventions and this Protocol'.[198] No other delegate appeared to reject this view. The idea that 'ensure respect' contains an external dimension thus appears to have been assumed by many States during the drafting of these new enforcement provisions of AP I.

This reading of the *travaux* of AP I is supported in the ICRC Commentary on the Additional Protocols, which quotes the more resolute language from the GC III Commentary.[199] Some still maintain that the use of the word 'should' (as opposed to 'shall') in that Commentary means that the 'ensure respect' element of common Article 1 and Article 1(1) of AP I is recommendatory, in contrast to the obligatory 'respect' element.[200] However, not only is this inconsistent with the use of the word 'undertake' in relation to both elements, but the ICRC Commentary on the Additional Protocols explicitly referred to the 'ensure respect' element of Article 1(1) of AP I as a 'duty' for contracting States.[201]

These findings relate to the earlier discussion of subsequent practice in two ways. First, the *travaux* of common Article 1 show that there was never an original, restrictive meaning to the provision.[202] Subsequent practice under Article 31(3)(b) of the VCLT can certainly lead to a change in the meaning of a treaty term from that originally intended.[203] However, it might be argued that where subsequent practice is accompanied by some dissenting practice which reflects the original meaning and has been consistent over time, then that subsequent (majority) practice should have less weight.[204] In the case of

1977) vol IX (Federal Political Department, Bern 1978) 65 (Belgium), 91 (Holy See), 199–200 (Norway), 203 (Spain).

[196] *Official Records*, vol VIII ibid 185.

[197] *Official Records*, vol IX (n 195) 193.

[198] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977*) vol III (Federal Political Department, Bern 1978) 340.

[199] Sandoz, Swinarski and Zimmerman (eds) (n 3) para 42. See the quote above in the text to n 187.

[200] Focarelli (n 18) 136.

[201] Sandoz, Swinarski and Zimmerman (eds) (n 3) para 44.

[202] See above in the text to n 183.

[203] *Dispute Regarding Navigational and Related Rights* (n 74) para 64; ILC (n 30) Draft Conclusion 7(1).

[204] Of course, one could only factor such an original meaning into the determination of the weight to be accorded to subsequent practice if there is a reason justifying recourse to art 32.

common Article 1 there is no such original meaning,[205] and thus the value of the majority practice is undiminished.

Secondly, it is clear that the idea of an external obligation, at least in the sense of an obligation to respond to violations, became increasingly accepted by many States in the period leading up to the adoption of Article 1(1) of AP I, including States that have more recently rejected that interpretation. The *travaux* may thus be taken as confirming the interpretation of Article 1(1) of AP I to which the other, authentic means point.[206]

V. APPLICATION IN RELATION TO NON-INTERNATIONAL ARMED CONFLICTS

Before turning to the precise content of the external element of common Article 1, attention must be paid to the other key controversy concerning its interpretation, namely its application in relation to non-international armed conflicts.[207] This is important given the contemporary prevalence of such conflicts.[208]

The text of common Article 1 certainly appears comprehensive, calling on States to 'respect and ensure respect for *the present Convention in all circumstances*' (emphasis added), suggesting no limit to the substantive provisions or situations to which the obligation attaches. Moreover, its place as the first provision, followed by common Articles 2 (international armed conflicts) and 3 (non-international armed conflicts) supports a broad reading of its scope of application. In addition, extending common Article 1 (including its external dimension) to non-international armed conflicts is clearly consistent with the humanitarian purpose of the Conventions, offering a means of enforcement in relation to what are today the prevalent types of armed conflict.[209] Indeed, that purpose would be frustrated if the obligation to ensure respect does not apply in the majority of armed conflicts.

[205] Indeed, its broad terms might be read as an (intended) openness to evolutionary interpretation: *Dispute Regarding Navigational and Related Rights* (n 74) para 66.

[206] For non-parties to AP I, its *travaux* might still be relevant as additional subsequent practice in the interpretation of common art 1.

[207] Disagreement on this question exists even between those that otherwise agree that common art 1 does not contain external obligations: see, eg, Kalshoven (n 15) 28 (arguing that the notion of 'ensure respect' was originally intended to promote compliance by populations with the Conventions in non-international armed conflicts); Schmitt and Watts (n 16) 700–2 (arguing that States are only obligated to 'ensure respect' for the Conventions by those subject to their authority in international armed conflicts). Those that view common art 1 as comprising an external element tend to agree that it also applies in relation to non-international armed conflicts: eg ICRC, Commentary to GC III (n 5) para 158; Wiesener and Kjeldgaard-Pedersen (n 16) 150–2; OA Hathaway et al, 'Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors' (2016) 95 TexLRev 539, 543 (fn 11); Kessler (n 17).

[208] See, eg, the latest analysis from the Uppsala Conflict Data Program comparing the number of interstate and intrastate conflicts (albeit defined non-legally) since 1946: S Davies, T Pettersson and M Öberg, 'Organized Violence 1989–2021 and Drone Warfare' (2022) 59 JPeaceRes 593, 597 (figure 3).

[209] See the discussion on object and purpose above in the text to nn 57–66.

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However, whilst there is ample subsequent practice in support of an external obligation under common Article 1, most of this concerns international armed conflicts (particularly, though not exclusively, the Israeli occupation of Palestinian territory). Nonetheless, there is some State practice supporting the applicability of the external obligation under common Article 1 to all armed conflicts.[210] Practice rejecting this is also very limited. It was in the context of the non-international armed conflict in Yemen that both the Canadian government and the Federal Court of Canada appeared to express the view that common Article 1 did not apply to such conflicts.[211] Yet the Court's conclusion here was unreasoned, and both the government and Court (citing prior Canadian case law) appear to have recognized that there might be circumstances in which common Article 1 imposed obligations on States concerning the conduct of others in non-international conflicts.[212]

The supporting practice here is certainly more limited and less well established than in the case of international armed conflicts. Whilst explicit negative practice is minimal, it is unclear whether the silence of many States amounts to acquiescence in the supporting practice (and thus constitutes supporting practice itself).[213] The degree of 'agreement' (in the Article 31(3)(b) sense) reflected in this practice thus appears to be considerably less than in the general practice supporting the external element. Importantly, however, the application of common Article 1 in relation to internal armed conflicts clearly furthers the object and purpose of the Conventions, and this might help to compensate for the more limited supporting practice.

[210] Recent examples include UNSC, 8953rd Meeting (n 95) (Scandinavian States); UNSC, 8596th Meeting (n 98) (Belgium); UNGA, A/C.6/73/SR.16 (n 99) 2 (El Salvador); Council of the European Union (n 91); ILC (n 21) 37 (Switzerland); UNGA (n 94) para 86 (Palestine); UNSC (n 97) 103 (Peru). For less recent support, see ICRC, '30th International Conference 2007: Resolution 3: Reaffirmation and Implementation of International Humanitarian Law: Preserving Human Life and Dignity in Armed Conflict', para 2.

[211] *Turp* (n 102) para 22 (on the government's submissions) and para 71 (on the Court's view).

[212] The Federal Court of Canada in the *Turp* case rejected the claimant's common art 1 submissions as 'Canadian case law has determined that Article 1 does not impose any obligation in the context of non-international armed conflicts': *Turp* (n 102) para 71. In truth, the authority on which the Court relied (a deportation case concerning a Sri Lankan national in the context of the civil war) did not give any reasoning for its position on common art 1 and in any event held that, '[s]ince Canada has no involvement whatsoever in that dispute, common Article 1 of the Geneva Conventions, 1949 does not impose upon our country an obligation to ensure that the parties to that conflict respect common Article 3': *Sinnappu v Canada (Minister of Citizenship and Immigration)* [1997] 2 FC 791, 834. The government and Court in *Turp* repeated this formulation: *Turp* (n 102) para 22 (government) and para 73 (Court). This practice could, therefore, be read not as opposing common art 1's application in non-international armed conflicts altogether but rather as supporting a restrictive reading that views it as applying in such contexts only where the relevant State is involved.

[213] See the discussion above, where the forum in which practice arises (particularly the UNGA, with its universal membership, voting on a resolution) was considered important in determining the normative value of silence: text to nn 87–9. However, one could take a broader view of when silence constitutes supportive practice: see, eg, U.S. Department of Defense, *Law of War Manual* (Office of Department of Defense General Counsel, June 2015, updated December 2016) 481–2.

The *travaux* shed little light on this point, as the possibility of common Article 1's application in non-international armed conflicts did not seem to occur to the delegates at the 1949 diplomatic conference. Indeed, the *travaux* indicate that the reference to 'in all circumstances' in common Article 1 was a vestige of the 1929 Conventions, intended to reinforce the omission of the *clausula si omnes*,[214] and to emphasize that the Conventions applied in both peace and war.[215] Nonetheless, it does appear that common Article 1 was inspired in part by the ICRC's desire leading up to the 1949 conference to see States encourage their populations to respect IHL, thereby promoting its application in civil wars.[216] This suggests that the application of common Article 1 in non-international armed conflicts might have some basis in its drafting history.[217] The absence of an identical provision in Additional Protocol II (AP II) (in contrast to AP I) does not, as some have suggested,[218] contradict this, given that the AP II draft was significantly reduced in scope at the eleventh hour of the 1974–1977 diplomatic conference in order to avoid the negotiations collapsing.[219] As such, one cannot place much weight on the absence of particular provisions from AP II.[220]

To conclude, it is not immediately clear from State practice that common Article 1 extends to non-international armed conflicts. However, the text and context of the provision, together with the object and purpose of the Conventions, all point in favour of it doing so, with some practice supporting this. An arguable case can thus be made for this interpretation. This is also supported by the ICJ and others.[221] To be clear, the applicability of common Article 1 to non-international armed conflicts does not affect the scope of application of substantive provisions of the Conventions.[222] It simply means that States must respect the provisions of the Conventions themselves and ensure that they are respected by others in accordance with their defined

[214] See, eg, Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entry into force 26 January 1910) art 2: 'The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention.'

[215] Kalshoven (n 15) 6–10; Focarelli (n 18) 130–1.

[216] Kalshoven ibid 13.

[217] Caution must be exercised when relying on the views of the ICRC unless they can also be shown to have been shared by negotiating States. In this respect, Kalshoven places too much weight on this pre-1949 internal ICRC practice when suggesting that the preoccupation of the ICRC lawyer, Claude Pilloud, with promoting compliance with the Conventions in civil wars fully explains the entire meaning of 'ensure respect': Kalshoven ibid 13–14.

[218] Schmitt and Watts (n 16) 702.

[219] S Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 50–1.

[220] For the same point in a different context, see N Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC 2009) 29.

[221] See, eg, *Nicaragua* (n 14) para 220; HRC, Syria (n 14) para 111; HRC, 'Situation of Human Rights in Yemen, including Violations and Abuses since September 2014' (9 August 2019) UN Doc A/HRC/42/17, para 11.

[222] There has been some confusion around this: see, eg, Schmitt and Watts (n 16) 701 (suggesting that the consequence would be that the entirety of the Conventions apply in non-international armed conflicts, referring, allegedly in support, to GC I Commentary (n 2) 26).

scope of application (which, in the context of non-international armed conflicts, is limited to common Article 3).[223] What is more, and as explained below, the due diligence standard by which the positive obligations under common Article 1 must be defined, means that those obligations would often easily be discharged in non-international armed conflicts for third States that have no involvement therein.[224]

VI. CONCLUDING REMARKS

This article has addressed some significant limitations with the existing literature on common Article 1 and the purported external obligation of States parties to ensure respect for the Geneva Conventions and AP I/III by others. The most significant concerned the decisive weight placed on subsequent practice by those studies supportive of the external obligation, notwithstanding the dissent of some States. These previous studies have failed to justify the relevance placed on such practice, given that orthodox accounts of subsequent practice require that it establishes the agreement of *all* States parties. This is partly due to the inadequacy of attempts to rationalize this issue more generally in international law, as exemplified by the ILC's bifurcation of practice into Articles 31(3)(b) and 32 of the VCLT. The major part of this article has engaged squarely with this general question of treaty interpretation, offering a principled account of the interpretive relevance of subsequent practice that includes some dissent, according to which such practice can still be admissible under Article 31(3)(b), with its weight then determined by the usual factors, including its consistency and interaction with the other means of interpretation. Importantly, it has been shown that this approach better fits and justifies existing jurisprudence than the ILC's approach, allowing for a more nuanced analysis of interpretive weight. This novel approach is important for treaty interpretation generally, beyond common Article 1.

The second key contribution involved reassessing the *travaux* of common Article 1 and Article 1(1) of AP I. Previous studies suggest that there was an original, restrictive meaning to common Article 1, with the drafting history of AP I rarely considered in detail. Section IV has challenged these accounts, demonstrating that no such original restrictive meaning existed and,

[223] The best reading of GC I Commentary (n 2) 26, particularly given the absence of any actual discussion of the application of common art 1 in non-international armed conflicts at the 1949 diplomatic conference, is as a restatement of this point: that applying common art 1 in internal conflicts cannot have the effect of extending every substantive provision to those situations, rather than that the provision itself cannot apply. Indeed, this was the ICJ's approach in *Nicaragua*, in which it held the US to be under an obligation not to encourage others in the non-international armed conflict to violate common art 3: *Nicaragua* (n 14) para 220.

[224] This helps to address the probable concerns of the Canadian government and Federal Court in those cases that rejected the applicability of common art 1 to non-international armed conflicts abroad 'in which Canada has no involvement whatsoever': see above in the text to nn 211–12.

importantly, that there was clear support for the external element during the drafting of AP I. This was shown to be important, particularly in relation to the interaction between such findings from the *travaux* and the other means of interpretation.

This article has therefore placed the purported external obligation under common Article 1 on a much firmer footing. There remains, however, the question of what exactly is required of States under the external obligation.[225] The ICRC takes a taxonomic approach, arguing that the 'ensure respect' element of common Article 1 contains both negative (no encouragement/aid/assistance) and positive (prevention and response) obligations.[226] Given that the external obligation is grounded heavily in subsequent practice, its precise content should ideally be manifest in that practice.[227] Most of the recent practice explored supports the claim that common Article 1 requires all States to take action in the face of ongoing violations of the Conventions with a view to cessation, but the specific context of much of that practice means that the other purported elements are often not mentioned.

Moreover, whilst this obligation to respond to violations was, as noted above, supported in the *travaux* of AP I, the purported negative obligations, and the obligation of prevention, were apparently not considered. These additional negative and positive obligations certainly seem consistent with the object and purpose of the Conventions and Protocol.[228] Indeed, the obligation not to aid or assist in violations seems to follow *a fortiori* from the obligation to respond to and bring to an end violations.[229] And whilst much of the practice referred to concerns responses to specific violations, some does provide support for a broader set of obligations under common Article 1.[230]

As an alternative to seeking support in practice for each purported element of the external obligation under common Article 1, its content could instead be framed by generalizing from the specific instances of practice identified, in a manner similar to the inductive method typically applied when identifying

[225] Some scholars avoid answering this question altogether: Zwanenburg (n 16) 623; Kessler (n 17).

[226] See above in the text to nn 10–13. Similarly, see Wiesener and Kjeldgaard-Pederson (n 16) 152–7; Geiss (n 17) 120–32.

[227] In a similar way to the content of custom: M Lando, 'Identification as the Process to Determine the Content of Customary International Law' (2022) 42 OJLS 1040.

[228] Geiss (n 17) 126–7. cf Kessler (n 17) 507 (taking the view that no duty of prevention exists under common Article 1).

[229] Geiss (n 17) 130.

[230] UNSC, 8953rd Meeting (n 95) (support amongst Scandinavian States for an obligation of prevention); HRC Res S-30/1 (n 90) para 2(g) (viewing the prohibition of aid or assistance as part of common art 1); UNSC, 8596th Meeting (n 98) (Belgian support for an obligation of prevention); Council of the European Union (n 91) (EU State support for the full set of negative and positive obligations); ILC (n 21) 37 (Swiss support for the full set of negative and positive obligations); UNGA (n 94) para 86 (Palestinian support for a prohibition of recognizing IHL violations as lawful); ICRC, 30th International Conference 2007, Resolution 3 (n 210) para 2.

rules of custom.[231] On this basis, it could be argued that practice offers general support for the existence of 'external' obligations of States under common Article 1 (and Article 1(1) of AP I/III) to ensure respect for IHL by other actors. Rather than attempting to delimit the specific elements of this obligation, one might instead accept that its content remains open and that the obligation to 'ensure respect' might be engaged by a number of different actions (or omissions), both forward-looking (preventive) and backward-looking (responsive), depending on the particular context.[232] Moreover, as noted, many of the policy and pragmatic concerns to which the positive (prevention and response) elements of the obligation give rise could be mitigated by their context-sensitive nature as obligations of conduct (whose content is determined by a due diligence standard).[233] How onerous such obligations will be therefore depends on a number of factors. Where a State is a co-party to a conflict with another State or non-State actor, for example, their positive obligations will justifiably require more of them in relation to the conduct of their co-parties than would be required of a third State adopting a posture of neutrality.[234]

These negative and positive obligations are familiar to international lawyers, and yet the interpretation endorsed in this article goes beyond other primary and secondary rules that arise for States in relation to the conduct of others. The idea of negative obligations prohibiting aid or assistance mirrors similar obligations found, for example, in the Chemical Weapons Convention,[235] and in the secondary rules on State Responsibility.[236] Yet common Article 1 is broader than both in various ways. For example, it extends to all obligations under the Conventions (in contrast to the narrower aid/assistance prohibitions under specific primary rules), and it places obligations on States in relation to the conduct of other States *and* non-State actors (in contrast to Article 16 of the ILC Articles, which is generally seen as applying only in the inter-State context).[237] The latter is especially (though not only) important in non-

[231] S Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26 EJIL 417; MH Mendelson, 'The Formation of Customary International Law' (1998) 272 RCADI 155, 181.

[232] The ICJ's determination that the US's encouragement of IHL violations by Contra rebels constituted a violation of common Article 1 can be read in this way, given that it did not define the content of that provision more generally: *Nicaragua* (n 14).

[233] ICRC, Commentary to GC III (n 5) para 198; Geiss (n 17) 124–6. See, by analogy, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v Serbia)* [2007] ICJ Rep 43, para 430.

[234] See especially A Wentker, 'Partnered Operations and the Positive Duties of Co-Parties' (2022) 27 JC&SL 159, 175–7.

[235] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (adopted 3 September 1992, entered into force 29 April 1997) 1975 UNTS 45, art 1(1)(d).

[236] ILC, 'Articles on the Responsibility of States for Internationally Wrongful Acts', UNYBILC, vol II (2001) Part 2, 26, art 16.

[237] H Moynihan, *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism* (Chatham House Research Paper, 2016) 23. There is some support, *de lege lata* and *de lege*

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international armed conflicts, where an arguable case can be made that common Article 1 applies.

Positive obligations of prevention and response are similarly found in other rules, including human rights treaties and under the special regime of responsibility for serious breaches of peremptory norms set out in Article 41 of the ILC Articles on State Responsibility.[238] Again, however, the positive obligations that might be required in particular circumstances under common Article 1 go beyond these existing rules. Common Article 1 is not limited by jurisdiction clauses as are human rights treaties,[239] and it applies in relation to any rule under the Conventions and not only those considered to contain the most important obligations.

That common Article 1 places obligations on States in relation to the conduct of others thus represents a significant addition to existing rules of international law. As explained at the outset, States increasingly assist partners in the planning and execution of military operations in a myriad of ways. It is essential, now more than ever, that they consider these potential avenues of liability when making decisions on military cooperation.

ferenda, for a non-State analogue to art 16: see, eg, M Jackson, *Complicity in International Law* (OUP 2015) 214; R Goodman and V Lanovoy, 'State Responsibility for Assisting Armed Groups: A Legal Risk Analysis' (2016) *Just Security*, 22 December 2016.

[238] See above in the text to nn 39–40 (on human rights treaties); ILC (n 236) art 41.

[239] cf the *Green Desert Case* in the Supreme Court of Denmark: A Kjeldgaard-Pedersen and R Gronwed Nielsen, 'Case Note on the Supreme Court of Denmark's Judgment in *Green Desert*' (2022) 91 ActScandJurisGent 349.