Chapter 31
The Undertaking to Respect and Ensure Respect in all Circumstances: From Tiny Seed to Ripening Fruit*

1 Preparing the Ground

The four Geneva Conventions of 1949 for the protection of war victims open with an unusual provision: it is the undertaking of the contracting States “to respect and to ensure respect for [the Conventions] in all circumstances”.

Why reaffirm that contracting States are bound to “respect” their treaty obligations? Does “all circumstances” add anything special to this fundamental rule of the law of treaties? And what about “ensure respect”: should that not be regarded as implicit in “respect”, in the sense of a positive counterpart to the negative duty not to violate the terms of the Conventions?

I readily admit that common Article 1 was not the first provision of the Conventions to capture my attention: there was, after all, so much to discover in these impressive structures that Article 1 could easily be passed over as an innocuous sort of opening phrase. Two things have changed this. One was the insistence of the International Committee of the Red Cross (ICRC) that a State Party to the Conventions is not only itself bound to comply with its obligations under these instruments but is under a legal obligation to make sure that other States Parties do likewise. The more this thesis of the ICRC was forced upon us, the less likely it seemed to me that this could indeed be an international legal obligation upon contracting States.

* Published earlier in 2 YIHL (1999) pp. 3-61. Two initial footnotes have been removed.

In the second note, the author thanked Jean Pictet and René-Jean Wilhelm, lawyers with the ICRC during World War II, for their support, and Catherine Brown, US State Department, involving him in the Medina case. He dedicated the study “to the memory of Claude Pilloud, idealistic realist for long years in the service of the ICRC, who may have been guilty of ‘creative interpretation’ but doubtless was morally right.”

The other factor was an American case that was brought to my attention. A Salvadoran woman, Ms Jesus del Carmen Medina, had fled her war-torn country in November 1980 and “entered the United States without inspection by a US Immigration Officer.” In 1984, brought before the Immigration Court in Texas, she applied for asylum. It was also argued on her behalf, in the alternative, that the U.S. was precluded from deporting her to El Salvador, as that would mean exposing her to violations of Article 3 common to the Geneva Conventions and thus, by virtue of common Article 1, involved the responsibility of the United States to ensure respect for the Fourth or Civilians Convention, and notably for common Article 3.

The judge found that the Fourth Convention gave him jurisdiction to grant to a respondent relief in deportation proceedings over and above any relief available under the provisions of the Immigration and Nationality Act, as implemented by regulation. He also, surprisingly, held that Ms Medina, “a Salvadoran citizen who [was] not taking an active part in the hostilities, [was] a protected person under the minimum provisions set forth in Article 3.” Even more surprisingly, he concluded from the evidence she had submitted that she had not met her burden of proof in showing that El Salvador was currently violating Article 3. He therefore denied her Request for Withholding of Deportation but granted her the privilege of voluntary departure. He moreover certified his decision to

2 The quotations concerning the case (which has not been published) are from documents in the author’s possession. It appeared in the first instance before the Executive Office for Immigration Review, Harlingen, Texas, upon an Order to Show Cause, filed by the Immigration and Naturalization Service, on 29 March 1984, in reference to the respondent. The Immigration Judge rendered his decision on 25 July 1985 (Case No. A26 949 415: In the Matter of Jesus del Carmen Medina, in Deportation Proceedings), ordering moreover that it be certified to the Board of Immigration Appeals because this case involves unusually complex and novel questions of law. The Board handed down its Decision on 7 Oct. 1988 (Case No. A26 949 415 – Harlingen, In re Jesus del Carmen Medina, in Deportation Proceedings: Certification).

3 Common Article 3 provides in relevant part that in the event of an internal armed conflict, “each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (i) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” (etc.)