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A LA MEJOR TESIS DOCTORAL A LA PROMOCIÓN DE LOS DERECHOS HUMANOS

Ensuring compliance with International Humanitarian Law

The EU, France, and Spain

Bettina Steible

upna
Universidad Pública de Navarra
Nafarroako Unibertsitate Publikoa

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Que la fascination intellectuelle
suscitée par le droit humanitaire
ne nous fasse jamais oublier
ce qu'il est censé protéger :
une humanité compromise par la guerre.

Jean d'Aspremont & Jérôme de Hemptinne
(*Droit international humanitaire*, Paris, Pedone, 2012)

Jaime Brunet Romero was born in Bayonne (France) on 20 July 1926 and died on 4 January 1992 in San Sebastián (Gipuzkoa). Born into a family of Catalan businesspeople who had moved to Gipuzkoa in the 18th century (where they performed significant industrial work), he was educated in a liberal environment, critical of the times in which he lived. He was encouraged to study law by his father, Jaime Brunet Goitia, the local head of the Republican Party and former deputy mayor of San Sebastián, where both his grandfather and great-grandfather had previously held the post of mayor. He studied at the University of Valladolid, where he worked for a time as assistant professor.

His love of reading was only matched by that of learning languages, which allowed him to get by with ease on his many travels, which took him, despite the difficulties of the day, to more than thirty countries. It was during his travels, he recounted, that he realised the degree of abuse of and discrimination and violence against the weak by the powerful still present in the 20th century and the ease with which the most elementary of human rights were infringed on a daily basis. During the later years of his life, his sensitivity towards human rights and the defence of civil freedom, often in the face of governmental abuse, became a constant concern for him.

In the absence of heirs, and stirred by a disgust for injustice, he decided to leave his fortune in order that a foundation bearing his name be created on his death devoted to disseminating human rights and rewarding those whose work in their defence should merit such recognition. This led to the creation of the Jaime Brunet Romero Foundation, based at the Public University of Navarre, in accordance with his last will and testament.

★ ★ ★

The Jaime Brunet Foundation, based at the Public University of Navarre, was created at the express wish of Jaime Brunet Romero to encourage respect for human dignity, basic freedoms and human rights, and to contribute to the eradication of inhumane and degrading situations and treatment. Since 1998, the principal activity of the foundation has been to hold the Prize bearing Brunet's name to distinguish the track records or work of people or institutions that have excelled in the defence of human rights. Coming with a significant monetary prize, it has, to date, been awarded on 19 occasions to people and institutions of international renown, which in turn has consolidated the prestige of the prize.

Given the important relationship between the Foundation and the Public University of Navarre, it seemed appropriate to strengthen the ties between the objectives of the foundation and the academic activity conducted at the university, chiefly research, and within that field that of young researchers in training. In this regard, the Board of Trustees of the Foundation decided to establish a new award to recognise doctoral thesis work whose content was directly related to human rights, their defence and advocacy.

In addition to the recognition itself and the prize money, the award also entails the publication of the doctoral thesis in question. The copy you are holding is the winning entry from the 2018 edition, the third in a collection which will, logically, focus on the subject of human rights.

At the Brunet Foundation, we are convinced that this initiative will contribute very positively to the ends of the foundation and incentivise the careers of many young researchers.

Ramón Gonzalo García
Chair of the Jaime Brunet Foundation
Rector of the Public University of Navarre

Jaime Brunet Romero nació en Bayona (Francia) el 20 de julio de 1926 y falleció el 4 de enero de 1992 en San Sebastián (Gipuzkoa). Nacido en el seno de una familia de emprendedores catalanes que se había asentado en el siglo XVIII en Gipuzkoa (donde desarrollaron una importante actividad industrial), fue educado con un talante liberal y crítico con la época que le tocó vivir. Fue encaminado a la carrera de Derecho por su padre, Jaime Brunet Goitia, jefe local del partido republicano que llegó a ser teniente de alcalde del ayuntamiento de San Sebastián, donde ya habían ocupado la alcaldía su abuelo y bisabuelo. Cursó sus estudios en la Universidad de Valladolid, en la que ejerció por un tiempo como profesor ayudante.

Su afición destacada por la lectura se acompañó por el interés de aprender idiomas, con los que pudo desenvolverse con facilidad en sus numerosos viajes, que le llevaron, a pesar de las dificultades de su tiempo, a recorrer más de treinta países. En estos viajes, según confesaba, captó y comprendió cuánta discriminación y violencia, cuánto abuso de los poderosos sobre los débiles existen aún en nuestro siglo, y con qué facilidad se conculcan diariamente los derechos más elementales de la persona humana. En los últimos años de su vida su sensibilidad por la situación de los derechos humanos y la defensa de la libertad del ciudadano, también ante los abusos de la Administración pública, se convirtieron en su constante preocupación.

Al no tener descendencia directa, y movido por sus sentimientos que le rebelaban contra las actuaciones injustas, decide legar su fortuna para crear a su fallecimiento la fundación que con su nombre se dedique a divulgar los derechos humanos y a premiar a quienes por su trabajo en defensa de los mismos se hicieran merecedores de este reconocimiento. De este modo, se crea la Fundación Jaime Brunet Romero, con residencia en la Universidad Pública de Navarra, según su voluntad testamentaria.

★ ★ ★

La Fundación Jaime Brunet, residente en la Universidad Pública de Navarra, fue creada por expreso deseo de Jaime Brunet Romero con el objetivo de fomentar el respeto a la dignidad humana, las libertades fundamentales y los derechos humanos, así como la erradicación de situaciones y tratos inhumanos y degradantes. La actividad fundamental de la fundación, desde 1998, ha sido la convocatoria del Premio homónimo para distinguir la trayectoria u obra de personas o instituciones que se hayan destacado por la defensa de los derechos humanos. El premio, con una importante dotación económica, ha sido concedido hasta el momento en 19 ocasiones a personas e instituciones de gran prestigio internacional, lo que a su vez ha consolidado el renombre del premio.

Dada la importante relación entre la Fundación y la Universidad Pública de Navarra, parecía oportuno ligar mejor la conexión entre los objetivos fundacionales y la propia actividad académica universitaria, fundamentalmente la investigadora, y dentro de esta la de jóvenes investigadores en formación. En ese sentido, el Patronato de la Fundación tomó la decisión de instaurar un nuevo premio que reconociera trabajos de tesis doctoral cuyo contenido tenga una relación directa con los derechos humanos y su defensa y promoción.

Aparte del reconocimiento y de la dotación económica, el premio conlleva la publicación de la tesis doctoral. El ejemplar que tiene en sus manos corresponde al trabajo premiado en la convocatoria de 2018, es el tercero de una colección que lógicamente se construirá en torno al tema de los derechos humanos.

Desde la Fundación Brunet estamos convencidos de que esta iniciativa contribuirá muy positivamente a los fines fundacionales, a la par que permitirá incentivar la carrera de muchos jóvenes investigadores.

Ramón Gonzalo García
Presidente de la Fundación Jaime Brunet
Rector de la Universidad Pública de Navarra

Acknowledgements

I would like to express my deepest gratitude to Prof. Dr. Teresa Freixes for her personal and professional guidance and for the trust she placed in me. She served not only as a Director, but also provided me with great support throughout my academic career. I also take this opportunity to thank the members of the jury, Prof. Dr. Francisco Balaguer Callejón, Prof. Dr. Alessandra Silveira, and Prof. Dr. José Carlos Remotti, as well as Prof. Dr. Pasquale Policastro, for their insightful comments.

Furthermore, this thesis could not have been written without the financial support of the Autonomous University of Barcelona. The last four years at the UAB have been enriching as well as challenging, and it has been a pleasure working in this environment. My thanks go also to the Department of Political Science and Public Law of the Autonomous University of Barcelona, for giving me the opportunity to participate in this PhD program.

I would like to thank Prof. Dr. Laurent Mayali and Prof. Dr. Olivier de Frouville for accepting me at their respective research centers in the USA and in France, as well as for their intelligent and useful insights on this thesis. The libraries at UC Berkeley and Paris I have also proven to be extremely resourceful. I keep excellent memories of the respective research stays.

I would like to express my gratitude to my colleagues and friends, especially those from the area of constitutional law, for their support in my efforts to complete this thesis and for their advice. Special mention should be made to Ana, Júlia, and Nuria.

Finally, special thanks to my family as well as to my partner for their unconditional support and love.

TABLE OF CONTENTS

LIST OF ABBREVIATIONS AND ACRONYMS

1952 Official Commentary	Jean Pictet (dir.), *The Geneva Conventions of 12 August 1949: Commentary. Volume I: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, International Committee of the Red Cross, 1952b.
2016 Official Commentary	Jean-Marie Henckaerts (dir.), *Updated Commentary on the First Geneva Convention*, Geneva, International Committee of the Red Cross, 2016.
Additional Protocol I	Additional Protocol I relating to the Protection of Victims of International Armed Conflicts, 8 June 1977.
Additional Protocol II	Additional Protocol I relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977.
Advisory Opinion on the Wall	ICJ, Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.
Advisory Opinion on Nuclear Weapons	ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1. ICJ Reports 1996, p. 226.
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts.
AU	African Union.
Basic Principles and Guidelines	UNGA, Resolution 60/147. Basic principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of IHRL and Serious Violations of IHL.
BOE	Boletín Oficial del Estado.
Bosnian Genocide Case	ICJ, Application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, ICJ Reports 2007, p. 43.
CCP	Common Commercial Policy.
Common Article 1	Common Article 1 to the four Geneva Conventions of 1949.

Common Article 3	Common Article 3 to the four Geneva Conventions of 1949.
CFSP	Common Foreign and Security Policy.
CJEU	Court of Justice of the European Union.
Commentary to ARSIWA	ILC, Report on the work of its fifty-third session (23 April-1June and 2 July-10 August 2001), General Assembly, Official Records, Fifty-fifth Session, Supplement no. 10 (A/56/10).
CSDP	Common Security and Defence Policy.
EC	European Community.
ECHO	European Commission's Humanitarian Aid and Civil Protection Office.
ECHR	European Convention for the Protection of human Rights and Fundamental Freedoms, 4 November 1950.
ECtHR	European Court of Human Rights.
EEAS	European External Action Service.
EPC	European Political Cooperation.
EU	European Union.
EU Genocide Network Strategy	Strategy of the EU Genocide Network to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States, 2014, 15581/1/14 Rev 1.
GC I	Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949.
GC II	Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949.
GC III	Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949.
GC IV	Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949.
Geneva Conventions	Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949; Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949.
IAC	International Armed Conflict.
ICC	International Criminal Court.
ICISS	International Commission on Intervention and State Sovereignty.

ICJ	International Court of Justice.
ICL	International Criminal Law.
ICRC	International Committee of the Red Cross.
ICTR	International Criminal Tribunal for Rwanda.
ICTY	International Criminal Tribunal for the former Yugoslavia.
IHFFC	International Humanitarian Fact-Finding Commission.
IHL	International Humanitarian Law.
IHRL	International Human Rights Law.
ILC	International Law Commission.
JORF	Journal Officiel de la République Française.
MICT	Mechanism for International Criminal Tribunals.
NATO	North Atlantic Treaty Organization.
NIAC	Non-International Armed Conflict.
Nicaragua case	ICJ, Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits, Judgment, 27 June 1986, ICJ Reports 1986, p. 114.
OJ	Official Journal of the European Union.
R2P	Responsibility to Protect.
Strategy	Ministère des affaires étrangères, Stratégie humanitaire de la République française, Paris, 06.07.2012.
TEU	Consolidated version of the Treaty on the European Union.
TFEU	Consolidated version of the Treaty on the Functioning of the European Union.
UN	United Nations.
UNGA	United Nations General Assembly.
UNSC	United Nations Security Council.
VCLT	Vienna Convention on the Law of Treaties, 23 May 1969.

INTRODUCTION

Contemporary armed conflicts in different parts of the world, most notably in Syria, have shown that one of the greatest challenges of International Humanitarian Law (hereafter, 'IHL') is the lack of a centralized monitoring mechanism in charge of ensuring that it is correctly applied and enforced. While it is difficult to have access to reliable figures on the number of civilian casualties in armed conflicts, there is no doubt that too many men, women, and children are killed unlawfully every day in blatant violation of IHL. Against this background, the involvement of the European Union (hereafter, 'EU') in this field, formalized with the adoption of the Guidelines on Promoting Compliance with IHL in 2005[1], constitutes a promising development for the respect and promotion of IHL. The objective of this thesis is therefore to analyze to what extent the EU and two of its Member States – France and Spain – ensure respect for IHL pursuant to Common Article 1 to the 1949 Geneva Conventions.

1. BACKGROUND AND CONTEXT OF RESEARCH

IHL, also called the law of armed conflicts or *jus in bello*, is a branch of public international law. It reaffirms and develops the traditional international laws of war and covers «all those rules of international law which are designed to regulate the treatment of the individual – civilian or military, wounded or active – in international armed conflicts»[2]. A pragmatic set of norms, it came into existence, not to outlaw the state of war, but rather to regulate it and to

1 Council of the European Union, Updated European Union Guidelines on promoting compliance with international humanitarian law (IHL) (2009/C 303/06) (hereafter, 'IHL Guidelines').

2 Mary Ellen O' Connell, «I. Historical development and legal basis», in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd ed., Oxford, Oxford University Press, 2013, p. 11.

reduce as much as possible the loss of lives. As the International Committee of the Red Cross (hereafter, 'ICRC') puts it, IHL «seeks, for humanitarian reasons, to limit the effects of armed conflicts»[3]. «As a set of norms, IHL is the expression of an international consensus. It could be seen as a "social contract" between States to protect human life and dignity even in times when mortal peril could seem to justify all acts of violence»[4].

IHL is subtended by the principle of 'Human Law', a principle formulated by Jean Pictet in the following terms: «[m]ilitary necessity and the maintenance of public order must always be compatible with respect for the human person»[5]. Three other principles spring from this principle, all of them being foundational to IHL treaties and conventions. First, there is the principle of 'Humanitarian Law' according to which «[b]elligerents shall not inflict harm on their adversaries out of proportion with the object of warfare, which is to destroy or weaken the military strength of the enemy»[6]. Second, the principle of the 'Law of Geneva' is defined as follows: «[p]ersons placed *hors de combat* and those not directly participating in hostilities shall be respected, protected and treated humanely»[7]. Finally, the principle of the 'Law of War' provides that «the right of the parties to the conflict to choose methods or means of warfare is not unlimited» and is the cornerstone of The Hague Law[8].

In the words of Jean Pictet, these principles «inspire the entire substance of the documents» and serve «as the bone structure» of IHL, insofar as they provide «guidelines in unforeseen cases»[9]. As an expression of the usage of peoples, they are «valid at all times, in all places and under all circumstances»[10]. They therefore constitute non-derogable rights, at the heart of the international legal order, that have inspired IHL.

3 Swiss/ICRC Initiative on Strengthening Compliance with International Humanitarian Law, January 2015.

4 Vincent Bernard, «Editorial. Time to take prevention seriously», *International Review of the Red Cross,* vol. 96 (895/896), 2014, p. 689.

5 Jean Pictet, *Development and principles of International Humanitarian Law*, Dordrecht/Geneva, Martinus Nijhoff Publishers/Institut Henry Dunant, 1985, p. 61.

6 *Ibid*., p. 62.

7 *Ibid*., p. 63.

8 *Ibid*.

9 *Ibid*., p. 57.

10 *Ibid*.

Since the adoption of the first Geneva Conventions, about 150 years ago, IHL has become one of the pillars of public international law. It finds its origins both in treaty and customary international law. The former traditionally comprises two streams, already identified by Jean Pictet: the so-called 'Hague Law' and 'Geneva Law'. In addition to these bodies of law, several specialized treaties and conventions have been adopted, especially on the regulation of weapons and arms[11].

The Hague Law is the most ancient *juris corpus* of IHL and mainly regulates the conduct of hostilities. Based on the observation that war cannot be eradicated, The Hague Conventions, adopted in 1899[12] and 1907[13], aim at organizing warfare in accordance with some established principles and rules. These principles do not seek the eradication of violence but intend to limit abuses by establishing thresholds of tolerance, determining what is necessary to conduct hostilities, and providing for the limits of the use of lethal force[14].

As for Geneva Law, it emerged in response to various convergent factors. Its origins date back to the nineteenth century, when Henri Dunant witnessed the atrocities committed during the Battle of Solferino[15]. After that terrible event, he wrote '*Un souvenir de Solférino*' where he exposed the ideas that would lead to the creation of the ICRC and the adoption of the first Geneva Convention, in 1864[16]. Nonetheless, this instrument and the following ones – such as The Hague Conventions – proved to be unsuccessful in impeding the commission of other mass exactions.

World War II highlighted the limits of these instruments, especially with regard to non-combatants and civilians. Indeed, at the time, the protection of non-combatants came down to the Convention for the Amelioration of the

11 See, e.g.: Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October 1980.

12 Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land. The Hague, 29 July 1899.

13 Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907.

14 Mario Bettati, *Droit humanitaire*, Paris, Editions du Seuil, 2000.

15 Official website of the ICRC, *Solferino and the International Committee of the Red Cross*, 01-06-2010. Available at: https://www.icrc.org/eng/resources/documents/feature/2010/solferino-feature-240609.htm (Accessed: 01.04.2017).

16 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, 22 August 1864.

Conditions of the Wounded and Sick in Armies in the Field[17], Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention[18] and the Convention relative to the Treatment of Prisoners of War[19]. Japan and the USSR had not ratified the latter and no convention encompassed the protection of civilians as such. The atrocities committed during World War II therefore underlined the important gaps of the existing legal framework, hence the adoption of the four Geneva Conventions of 1949: the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (hereafter, 'GC I'), the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (hereafter, 'GC II'), the Geneva Convention relative to the Treatment of Prisoners of War (hereafter, 'GC III'), and the Geneva Convention relative to the Protection of Civilian Persons in Time of War (hereafter, 'GC IV')[20]. The Geneva Conventions have reached universal ratification. They mainly intend to protect and safeguard the persons that do not take part in hostilities, those who are *hors de combat*. In 1949, the objective was to instill humanity in international law as a whole and in IHL specifically, in order to prevent barbarities from occurring again.

The role of the ICRC in the development, application, and enforcement of IHL should be highlighted. Established in 1863, it is an «independent, neutral organization ensuring humanitarian protection and assistance for victims of armed conflict and other situations of violence»[21]. The work of the ICRC is based on the 1949 Geneva Conventions, their Additional Protocols, its Statutes, and the resolutions of the International Red Cross and Red Crescent Movement.

17 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 27 July 1929.

18 Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, The Hague, 18 October 1907.

19 Convention Relative to the Treatment of Prisoners of War, Geneva, 27 July 1929.

20 Although three of them were already under discussion before World War II.
Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention (III) Relative to the Treatment of Prisoners of War; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War.

21 Official website of the ICRC, The ICRC's mandate and mission, 29.10.2010. Available at: http://www.icrc.org/eng/who-we-are/mandate/overview-icrc-mandate-mission.htm (Accessed: 11.05.2017).

Its action is twofold as it responds to emergencies but also promotes respect for IHL and its implementation in national law. It is therefore possible to consider that there are operational and legal aspects in the work conducted by the ICRC.

At operational level, the ICRC is entrusted with many tasks; one of them is to serve as an intermediary between the parties to the conflict and to assist war victims, in particular, to visit and conduct individual interviews with prisoners of wars and interned civilians[22]. At the beginning of an armed conflict, the ICRC sends a note to the belligerent parties to remind them of their duties stemming from IHL. Then, during the armed conflict, the ICRC intends to enhance respect of IHL through procedures that often are confidential. It formulates constructive propositions while pressuring the parties to respect IHL. Finally, it proposes countless spontaneous humanitarian initiatives that go far beyond its specific rights conferred upon by the Geneva Conventions[23]. It discreetly performs considerable work and is the actor *par excellence* of IHL.

At legal level, the original Geneva Convention of 1864 was adopted on the ICRC's initiative and the ICRC has developed IHL ever since, adapting the legal framework to modern developments. Furthermore, the universal ratification of the Geneva Conventions may be credited to this organization and the ICRC continues to advocate for the ratification of other IHL treaties. In this context, one of the ICRC's principal missions is to ensure respect for the Geneva Conventions and their additional Protocols in international and non-international armed conflicts, as stated in article 4 of its statute[24].

22 Robert Kolb, *Jus in bello, le droit international des conflits armés*, 2nd ed., Brussels, Bruylant, 2009, p. 491.

23 *Ibid*.

24 Statutes of the International Committee of the Red Cross adopted on 19 November 2015 and came into force on 1 January 2016, article 4:
«1. The role of the ICRC shall be in particular:
(a) to maintain and disseminate the Fundamental Principles of the Movement, namely humanity, impartiality, neutrality, independence, voluntary service, unity and universality;
(b) to recognize any newly established or reconstituted National Society which fulfils the conditions for recognition set out in the Statutes of the Movement, and to notify other National Societies of such recognition;
(c) to undertake the tasks incumbent upon it under the Geneva Conventions, to work for the faithful application of international humanitarian law applicable in armed conflicts and to take cognizance of any complaints based on alleged breaches of that law;
(d) to endeavour at all times – as a neutral institution whose humanitarian work is carried out particularly in time of international and other armed conflicts or internal strife – to ensure the protection of and assistance to military and civilian victims of such events and of their direct results;

As a result, IHL would not be as important as it is today without the ICRC's work[25].

It should be noted that the Geneva Conventions are, predominantly, State-centered. They regulate extensively international armed conflicts (hereafter, 'IAC'), thus opposing two or more States. Conversely, the regulation of non-international armed conflicts (hereafter, 'NIAC') is scarce as a result of a strict interpretation of the principles of non-intervention and State sovereignty. Hence, article 3 common to the four Geneva Conventions (hereafter, 'Common Article 3') enshrines a set of rules applicable to NIACs, often called a 'mini-convention' itself.

As international relations and forms of armed conflicts evolved, new treaties were adopted. In this context, the High Contracting Parties adopted in 1977 Protocol Additional I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (hereafter, 'Additional Protocol I') as well as Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (hereafter, 'Additional Protocol II')[26]. These protocols enshrine the convergence of The Hague and Geneva Law, as they establish rules regarding the conduct of hostilities and the protection awarded to persons *hors de combat*. IHL is therefore a well-established branch of international law, developed by an important number of treaties and conventions, and benefits from general acceptance.

Nonetheless, armed conflicts have importantly changed since the adoption of the Geneva Conventions. Nowadays, most armed conflicts are

(e) to ensure the operation of the Central Tracing Agency as provided in the Geneva Conventions;
(f) to contribute, in anticipation of armed conflicts, to the training of medical personnel and the preparation of medical equipment, in cooperation with the National Societies, the military and civilian medical services and other competent authorities;
(g) to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof;
(h) to carry out mandates entrusted to it by the International Conference.

2. The ICRC may take any humanitarian initiative which comes within its role as a specifically neutral and independent institution and intermediary, and may consider any question requiring examination by such an institution».

25 Kolb, *Jus in bello, le droit international des conflits armés*, *op. cit.*, 2009, p. 491.

26 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

internal[27], and therefore involve non-State armed groups, which do not necessarily have access to IHL knowledge. In addition, while the principle of distinction between combatants and civilians is the cornerstone of IHL, civilians have become the main target in numerous conflicts[28]. These elements, together with other factors, lead to widespread violations of IHL. It is commonly accepted that IHL itself remains fit for purpose and still represents the appropriate framework to regulate armed conflicts. Consequently, finding ways to ensure greater compliance with IHL represents one of IHL's greatest important challenges. In this respect, an important weakness of such a well-established corpus of law is – paradoxically – that IHL treaties and conventions do not establish a centralized oversight mechanism[29]. As observed by the ICRC:

> [T]he Geneva Conventions of 1949 are an exception among multilateral treaties in that they do not establish a Conference of State Parties or another similar type of institutional forum, in which States can discuss the application of IHL or current and emerging challenges to compliance with it[30].

This question is of utmost importance and high on the agenda. Indeed, the ICRC and Switzerland jointly consulted States and other stakeholders in order to «enhance and ensure the effectiveness of mechanisms of compliance with international humanitarian law»[31]. This process culminated with the 32nd International Conference of the Red Cross and Red Crescent, which took place in Geneva in December 2015. In accordance with the proposal put forward by the ICRC and the Swiss Government, an annual meeting of the State parties to the Geneva Conventions would have been established, «a non-politicized forum for them to share best practices and technical expertise»[32]. However, the results of the Conference did not match the expectations, as no agreement was reached

27 Annyssa Bellal, *The War Report. Armed conflicts in 2016*, The Geneva Academy of International Humanitarian Law and Human Rights, 2017, pp. 27-30.

28 *Ibid*.

29 Sharon Weill, *The role of national courts in applying International Humanitarian Law*, Oxford, Oxford University Press, 2014, p. 6.

30 Swiss/ICRC Initiative on Strengthening Compliance with International Humanitarian Law, January 2015.

31 31st International Conference of the Red Cross and Red Crescent, Resolution 1. Strengthening legal protection for victims of armed conflicts, 01.12.2011.

32 News release: «No agreement by states on mechanism to strengthen compliance with rules of war», ICRC, Geneva, 10.07.2015.

on the creation or development of an efficient compliance mechanism. Instead, it was agreed to pursue the «inclusive, State-driven intergovernmental process» and to submit its outcome to the 33rd International Conference[33].

Thus, in the absence of centralized system, the responsibility to ensure the proper enforcement of IHL falls on States. Pursuant to Common Article 1 to the four Geneva Conventions of 1949, the State parties have the obligation, not only to respect, but also to ensure respect for IHL. Nowadays, this obligation is considered as comprising a positive obligation: that to use all the legal means available to induce the other members of the international community to comply with IHL. On this basis, State parties have a duty to take all the necessary and reasonable measures to prevent violations of IHL from occurring, to put an end to them when they indeed occur, and to punish their perpetrators when such violations amount to war crimes. Thus, this obligation is understood as providing «the nucleus for a system of collective responsibility»[34].

One of the risks of international treaties and conventions is that they can end up being deprived of practical effect in the absence of norms of transposition or implementation at national level. In the case of IHL, this risk is particularly high in the absence of any specific mechanism of enforcement of IHL at international level. Consequently, it is necessary to effectively enforce Common Article 1 to the four Geneva Conventions of 12 August 1949, which establishes an obligation to 'ensure respect' IHL.

2. RESEARCH PROBLEM

In this context, one may wonder whether there is any part to play for the EU in ensuring respect for IHL. Indeed, the EU has progressively entered into the field of IHL through practice. The cornerstone of the EU's practice can be found in the Declaration on the occasion of the 50th anniversary of the

33 32nd International Conference of the Red Cross and Red Crescent, Resolution 32IC/15/R2 on Strengthening Compliance with International Humanitarian Law, Geneva, Switzerland, 8-10 December 2015.

34 Laurence Boisson de Chazournes and Luigi Condorelli, «Common Article 1 of the Geneva Conventions revisited: Protecting collective interests», *International Review of the Red Cross,* vol. 82(837), 2000, pp. 67-87.

adoption of the Geneva Conventions[35], as it marks the first time the EU refers exclusively to IHL[36]. After this fundamental declaration, references to IHL in EU acts have become more frequent and explicit and have been included in legally binding acts[37]. This interest in IHL gained momentum with the adoption of the EU Guidelines on promoting compliance with IHL (hereafter, 'IHL Guidelines') in 2005, revised in 2009[38].

Furthermore, with the entry into force of the Treaty of Lisbon, establishing and maintaining the rule of law has become an essential aspect of the EU's policies; in the EU's view, IHL is seen as part of the rule of law and the respect for human rights. The Treaty of Lisbon therefore extends the possibilities of interaction between IHL and the EU, so that these interactions constitute an interesting field of research to be explored. Nevertheless, it should be borne in mind that IHL falls under the remit of the Member States and does not constitute an integrated competence of the EU. Consequently, an analysis of the relationship between the EU and IHL fields would be more accurate if it were accompanied with an analysis of the legal framework of – at least – some Member States.

In this context, the concept of 'multilevel constitutionalism'[39] is a useful instrument to analyze the interactions between the international, European, and domestic levels on this issue. This concept was introduced by Ingolf Pernice, who argued that the European Union did not need a formal constitution,

35 Declaration of the Presidency on behalf of the EU on the occasion of the 50th anniversary of the adoption of the Geneva Conventions of 1949, BUE 7/8-1999, 12.08.1999.

36 Tristan Ferraro, «Le droit international humanitaire dans la politique étrangère et de sécurité commune de l'Union européenne», *Revue Internationale de la Croix Rouge,* vol. 84(846), 2002, p. 436.

37 Josiane Auvret-Finck, «L'utilisation du DIH dans les instruments de la PESC», in Anne-Sophie Millet-Devalle, *L'UE et le droit international humanitaire, Colloque Nice 18-19 juin 2009*, Paris, Pedone, 2010, pp. 45-74.

38 IHL Guidelines.

39 See, e.g.: Joakim Nergelius, Pasquale Policastro and Kenji Urata (eds.), *Challenges of Multi-Level Constitutionalism*, Kraków, Polpress, 2004; Teresa Freixes, Yolanda Gómez Sánchez and Antonio Viñas (dir.), «Constitucionalismo multinivel e integración europea», in *Constitucionalismo multinivel y relaciones entre Parlamentos: Parlamento Europeo, Parlamentos nacionales, Parlamentos regionales con competencias legislativas*, Madrid, CEPC, 2011; Yolanda Gómez Sánchez, *Constitucionalismo multinivel. Derechos fundamentales*, 3rd ed., Madrid, Editorial Sanz y Torres, 2011; Alessandra Silveira, «Interconstitucionalidade: normas constitucionais em rede e integraçáo europeia na sociedade mundial», in Alexandre Walmott Borges and Saulo Pinto Coelho (coord.), *Interconstitucionalidade E Interdisciplinaridade. Desafios, âmbitos e níveis de integraçáo no mundo global*, Uberlândia/MG, Ediçáo Laboratório Americano de Estudos Constitucionais Comparado/LAECC, 2015.

insofar as it already possessed a 'multilevel constitution', entailing the EU founding treaties together with the EU Member States' constitutions[40]. As noted by Francisco Balaguer Callejón, the process of European integration has created new constitutional spaces and a constitutional dialogue among the different agents at stake, which inevitably have an impact both at EU and domestic levels[41]. In this context, the underpinning of multilevel is that powers and competences are distributed among various levels of governance – international, regional, national, and local – «in a flexible manner, depending on considerations of effectiveness, subsidiarity, culture and so on»[42].

Paraphrasing Teresa Freixes, the multilevel approach constitutes an autonomous paradigm in the process of European integration, as it allows explaining the legal complexities applicable to the systems integrated into sub-systems[43]. As observed by Yolanda Gómez[44], the multilevel interpretation of the legal order is not centered exclusively on the European and national levels of legal production. Conversely, it also integrates the other levels found internally (such as the legislation produced by sub-national entities[45]) and, for present purposes, externally. As Teresa Freixes has shown, «multilevel is all-pervasive, as it is present in both vertical (hierarchy), horizontal (competences) and network relations (cooperation and subsidiarity)»[46].

Multilevel constitutionalism is therefore especially relevant for present purposes, as it offers a flexible legal framework of interactions between the international, European, and domestic levels on the issue of ensuring respect for IHL.

Against this background, the general objective of this thesis is to analyze whether the EU and two Member States – France and Spain – enforce their

40 Teresa Freixes, «Multilevel constitutionalism as general framework for the ascertainment of the legal regulations in the European Union», in Joan Lluís Pérez Francesch (coord.), *Libertad, Seguridad y Transformaciones del Estado*, Barcelona, Institut de Ciències Polítiques i Socials, 2010, p. 71.

41 Francisco Balaguer Callejón, *Manual de Derecho Constitucional*, vol. 1, 7th ed., Madrid, Tecnos, 2012, p. 246.

42 Anne Peters, «Humanity as the A and Ω of sovereignty», *European Journal of International Law*, vol. 2(3), 2009, p. 535.

43 Freixes, Gómez Sánchez and Viñas (dir.), «Constitucionalismo multinivel e integración europea», in *Constitucionalismo multinivel y relaciones entre Parlamentos*, *op. cit.*, 2011, p. 26.

44 Gómez Sánchez, *Constitucionalismo multinivel*, *op. cit.,* p. 46.

45 See, e.g.: Josep María Castellá Andreu, «Hacia una protección «multinivel» de los derechos en España. El reconocimiento de derechos en los estatutos de autonomía de las comunidades autónomas», *Boletín Mexicano de Derecho Comparado,* vol. XL(120), 2007, pp. 723-741.

46 Freixes, «Multilevel constitutionalism as general framework for the ascertainment of the legal regulations in the European Union», p. 71.

obligation to ensure respect for IHL. It seeks to scrutinize how two *juris* corpuses, namely IHL and EU law, which used to follow separate paths, appeared to converge and be interlinked.

More specifically, the question is whether the emergence of a new IHL actor on the international scene will lead to IHL becoming better respected as well as lending to its further development and its ability to adapt to current issues. Consequently, this thesis will aim to study the current legal framework of the obligation to ensure respect for IHL, its authority, significance, and content and assess if and to what extent the EU, France, and Spain are bound by Common Article 1. Furthermore, it will seek to analyze the practice of the EU, France, and Spain on this matter and assess whether it is consistent with the principles proclaimed. Lastly, it will scrutinize whether France and Spain align with the EU policy on IHL. In particular, it will intend to examine when their positions converge and when they diverge, in order to see the impact – if any – of EU policy on IHL at national level.

3. INNOVATIVE ASPECTS

This research is innovative in different aspects. Given the fact that the EU's concerns in the field of IHL are relatively recent, the academic and institutional literature on the relationship between Common Article 1 to the 1949 Geneva Conventions and the EU is scarce.

Some authors have touched upon questions regarding the EU and IHL. In this respect, the interest on this matter probably dates back to 2001, as Tristan Ferraro submitted a PhD thesis on IHL and the EU («Droit international humanitaire et l'Union européenne»[47]). A year after, he published a groundbreaking article on IHL in the EU's Common Foreign and Security Policy[48]. As the EU's practice on the matter and involvement in security questions have developed, so has the interest in the scholarship.

47 Tristan Ferraro, «Droit international humanitaire et l'Union européenne», PhD thesis, Université de Nice-Sophia Antipolis, December 2001. Available at: http://revel.unice.fr/pie/?id=68 (Accessed: 01.04.2017).

48 Tristan Ferraro, «Le droit international humanitaire dans la politique étrangère et de sécurité commune de l'Union européenne», *Revue Internationale de la Croix Rouge,* vol. 84(846), 2002, pp. 435-461.

In particular, the applicability of IHL to the EU, with a special focus on CSDP operations[49], is a growing concern among scholars. In the same way, some book chapters[50], one book[51], and at least one research project[52] have focused on the relationship between the EU and IHL[53]. Nonetheless, such literature fails to directly address the question of the obligation to ensure respect for IHL at EU level. It should likewise be noted that while some articles and book chapters have been published on the EU Guidelines on promoting compliance with IHL[54], they are either outdated or incomplete. In particular, they fail to situate the issue in a broader context and to articulate it with EU legal issues.

Finally, a PhD thesis on 'The role of the European Union in ensuring respect for International Humanitarian Law'[55] was submitted by Andrea Breslin in 2011; however, it fails to directly address the multilevel dimension

49 See, e.g.: Tristan Ferraro, «The Applicability and Application of International Humanitarian Law to Multinational Forces», *International Review of the Red Cross*, vol. 95(891/892), 2013, pp. 561-612; Frederik Naert, *International Law Aspects of the EU's Security and Defence Policy, with a particular focus on the law of armed conflicts and human rights*, Intersentia, 2010; Valentina Falco, «Symposium on complementing international humanitarian law: exploring the need for additional norms to govern contemporary conflict situation: the internal legal order of the European Union as a complementary framework for its obligations under IHL», *Israel Law Review*, vol. 42, 2009, pp. 168-205; Gian-Luca Beruto, *International Humanitarian Law, Human Rights and Peace Operations, 31rst Round Table on Current Problems of International Humanitarian Law*, San Remo, International Institute of Humanitarian Law, 2008.

50 Marco Sassòli and Djemila Carron, «EU Law and International Humanitarian Law», in Dennis Patterson and AnnaSödersten, *A companion to European Union Law and International Law*, John Wiley and Sons, 2016, pp. 413-426; Faria Medjouba and Justine Stefanelli, «La prise en considération du Droit international humanitaire par l'Union européenne – Une introduction», in Jean-Marc Sorel and Corneliu-Liviu Pepescu, *La protection des personnes vulnérables en temps de conflit armé*, Brussels, Bruylant, 2010, pp. 87-130.

51 Anne-Sophie Millet-Devalle, *L'UE et le droit international humanitaire, Colloque Nice 18-19 juin 2009*, Paris, Pedone, 2010.

52 ATLAS project. See: http://www.philodroit.be/-FP7-ATLAS-?lang=fr (Accessed: 01.04.2017).

53 At the time of writing.

54 Pål Wrange, «The EU Guidelines on Promoting Compliance with International Humanitarian Law», *Nordic Journal of International Law*, vol. 78(4), 2009, pp. 543-544; Andrea Breslin, «Ensuring respect: the European Union's Guidelines on promoting compliance with International Humanitarian Law», *Israel Law Review*, vol. 43(2), 2010, pp. 381-413; Éric David, «Rapport introductif», in Millet-Devalle, *L'UE et le droit international humanitaire, op. cit.*, 2010, pp. 7-16; Morten Knudsen, «Les lignes directrices de l'UE concernant la promotion du respect du DIH et leur mise en œuvre», in Millet-Devalle, *L'UE et le droit international humanitaire*, *op. cit.*, 2010, pp. 175-182.

55 Andrea Breslin, «The role of the European Union in ensuring respect for International Humanitarian Law», PhD thesis, National University of Ireland Galway, 2011. Available at: https://aran.library.nuigalway.ie/bitstream/handle/10379/2727/PhD%20Thesis%20-%20Andrea%20Breslin.pdf?sequence=1&isAllowed=y (Accessed: 01.04.2017).

of the obligation to ensure respect in the European context. Furthermore, it does not systematically address the implementation of the obligation to ensure respect for IHL in the EU, French and Spanish legal systems. In addition, the present thesis, presented six years later, brings updated data on the matter.

'It should nonetheless be noted that this thesis is the result of a research process that finalized in May 2017.

4. STRUCTURE OF THE STUDY

In this thesis, it is sustained that the EU has established itself as an important actor of IHL on the international scene. The EU – a self-proclaimed leader in human rights matters – and its Member States are not only bound by Common Article 1 but have also accepted their mandate to effectively enforce it on the international scene. This thesis takes the view that the enforcement of IHL must rely not only on national law, its transposition, and enforcement at national level to be truly effective[56], but that it must further be analyzed from a multilevel perspective. In accordance with this view, Member States remain primary enforcers of Common Article 1, but the EU is considered an additional level, both of guarantee and action.

Indeed, with the recognition of Common Article 1 in EU law, a threefold movement is pursued. First, it reinforces the legal authority of Common Article 1 on the international scene and participates in the creation of *opinio juris* in this sense. As such, it recognizes IHL's special position in public international law and contributes to the process of strengthening IHL at international level. Second, it strengthens the self-assigned assumption that the EU is a leader in human rights matters, in accordance with articles 2, 3, and 21 of the Treaty on the European Union (hereafter, 'TEU'). Third, it establishes an additional duty for EU Member States, who are bound by Common Article 1 by virtue of international law, but also by EU law. As a result, it participates in the process of generating respect for IHL at domestic level. In turn, the EU serves as an additional level of action for EU Member States where they can coordinate a common response to violations of IHL. Consequently, enshrining Common

56 Weill, *The role of national courts in applying International Humanitarian Law*, *op. cit.*, 2014, p. 6.

Article 1 in EU law develops a virtuous circle with legal consequences at international, European, and domestic levels.

This thesis is divided into two parts, which are further divided into two chapters. As explained below, Common Article 1 is an obligation with three dimensions: preventing violations of IHL from occurring, adopting measures to end them when they effectively occur, and punishing the violations of IHL that are tantamount to war crimes. The first two dimensions are contained in Common Article 1, while the third one is a necessary corollary thereof, whose original regulation is found in other provisions of the Geneva Conventions. As a consequence, the first two dimensions – preventing and ending violations of IHL – are analyzed together, whereas the punitive dimension is examined separately.

On the one hand, the objective of Part I is to analyze the meaning of the obligation to ensure respect for IHL and how it has been implemented at EU, French, and Spanish levels with regard to its first two dimensions: preventing violations of IHL from occurring and adopting measures to put an end to them if they actually occur.

On the other hand, the third dimension of Common Article 1 is analyzed in the second part of this thesis, since it is arguably the one that has activated most legal developments in recent decades. Therefore, Part II deals with the corresponding mechanisms of international responsibility and criminalization that may be triggered in the event of violations of IHL. It should be noted in this regard that while most of such developments deal with individual criminal responsibility, both at national and international levels, the mechanisms of State responsibility are also touched upon, even though they are not punitive in a strict sense.

Part I
ENSURING RESPECT: PREVENTING AND ENDING VIOLATIONS OF IHL

INTRODUCTION

Traditionally, public international law has evolved around the Westphalian system of international relations, which protects State sovereignty and the principle of non-interference. The law governing armed conflicts traditionally respects this conception of international relations. Indeed, the 'Law of War' originally regulated IACs only, and was more inspired by the conduct of hostilities than by the necessity to alleviate suffering.

Nonetheless, World War II entailed dramatic changes in this regard, as international human rights and the necessity to protect human beings started to erode the traditional system of international relations. In particular, the principle of humanity has fueled in international law following World War II with the adoption of several human rights treaties and conventions, such as the 'Universal Declaration of Human Rights'[1] or the 'Convention on the Prevention and Punishment of the Crime of Genocide'[2]. In line with this concern, the update of the four 'Geneva Conventions of 12 August 1949' (hereafter, 'Geneva Conventions') has humanized the law of war; human rights have entered into its sphere and now constitute an axis determining the conduct of hostilities. One manifestation of this process is the fact that the principle of military necessity must always be balanced with the principle of humanity.

This concern for human beings at international level has therefore deviated the 'raison d'État', insofar as geopolitical interests shall no longer have an exclusive role in international affairs. Conversely, States must also respect and

1 Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

2 Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 U.N.T.S., 277.

call for the respect of international legal instruments protecting human beings. This idea was already highlighted by Christian Tomuschat (1999) on the occasion of the 'General Course on Public International Law' at The Hague Academy of International Law in the following terms:

> The international legal order cannot be understood anymore as being based exclusively on State sovereignty [...]. States are no more than instruments whose inherent function is to serve the interests of their citizens as legally expressed in human rights[3].

This shift is reflected in the Geneva Conventions, which enshrine the obligation 'to respect and ensure respect' into Common Article 1 to the four Geneva Conventions of 12 August 1949 (hereafter, 'Common Article 1').

The objective of this first part is to analyze the meaning of the obligation to ensure respect for IHL, and how it has been implemented at EU, French, and Spanish levels with regard to its first two dimensions: preventing violations of IHL from occurring and adopting measures to put an end to them if they actually occur.

Firstly, the content and meaning of the obligation to ensure respect for IHL is provided. Common Article 1 is at the heart of public international law and stipulates an *erga omnes* obligation, according to which the international community has the duty to act in case of serious or repeated violations of IHL. This system of collective responsibility is further reinforced by the crystallization of the concept of Responsibility to Protect as a norm of international law, as well as with the development and consolidation of International Human Rights Law.

Secondly, the implementation at EU, French, and Spanish levels is addressed. In this context, the implementation at EU level is inevitably different from the one at domestic level, as the EU cannot be a party to the Geneva Conventions. Bearing this element in mind, the integration of Common Article into the EU, French, and Spanish legal orders is analyzed and followed by the practice of the three actors.

3 Christian Tomuschat, «International Law: Ensuring the survival of mankind in the eve of a new century: General course on Public International Law», in *Recueil des Cours: Collected Courses of the Hague Academy of International Law*, The Hague/Boston, Mass./London, Martinus Nijhoff, 1999, p. 161.

Chapter 1
INTERNATIONAL LEGAL FRAMEWORK

In this first chapter, the international legal framework regulating the obligation to ensure respect for IHL is analyzed, with a special focus on its preventive and reactive dimensions. It is sustained that the obligation to ensure respect for IHL has gained prominence in the general architecture of public international law and has become one of its essential components. While Common Article 1 establishes a perfectible system of collective responsibility, it entails an external legal obligation falling upon the international community to ensure respect for IHL by other States.

In the first section of this chapter, a definition of the obligation to ensure respect for IHL is provided. This obligation was first considered a «tiny seed»[4], but it has considerably evolved to the point that it is now commonly accepted that it enshrines a system of «collective responsibility»[5], which binds the international community as a whole in case of violations of IHL by one of the warring parties. Far from being a stylistic clause, Common Article 1 imposes an obligation on the State parties to the Geneva Conventions to ensure respect for IHL by other States.

Traditionally, this obligation entails two dimensions[6]: to prevent violations of IHL from occurring and to react to violations of IHL when they indeed occur in order to put an end to them. To do so, State parties have an extensive arsenal of tools at their disposal, which have been created in the Geneva Conventions themselves, but also in other branches of international law.

4 Frits Kalshoven, «The Undertaking to Respect and Ensure Respect in All Circumstance: From Tiny seed to Ripening Fruit», *Yearbook of International Humanitarian Law*, vol. 2, 1999, pp. 3-61.

5 Boisson de Chazournes and Luigi Condorelli, «Common Article 1 of the Geneva Conventions revisited», *op. cit.*, 2000, pp. 67-87.

6 There is a third dimension, that to punish the violations of IHL which amount to war crimes. However, it has been importantly developed within the frame of international criminal law and is therefore addressed in the second part of this study.

In the second section of this chapter, it is argued that the authority of the obligation to ensure respect for IHL has been reinforced with the creation of sophisticated international legal tools that complement it. In particular, the tremendous development of International Human Rights Law and the appearance of the concept of 'Responsibility to Protect' contribute to the development of a system of collective responsibility whose objective is to ensure respect for IHL.

Section 1
COMMON ARTICLE 1 TO THE FOUR GENEVA CONVENTIONS

> *[I]t is evident that Article 1 [common to the four Geneva Conventions] is no mere stylistic clause, but is deliberately invested with imperative force, and must be obeyed to the letter*[7].

Common Article 1 to the Geneva Conventions reads as follows: «The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances»[8]. This obligation, placed at the forefront of the Conventions, emphasizes the importance that the High Contracting Parties wanted to confer upon it. It stipulates a two-fold responsibility: «to respect» and «to ensure respect» for the Conventions. One may therefore wonder whether the second aspect of the obligation, to «ensure respect», should be understood as a mere repetition, an obligation binding upon State parties to ensure that their armed forces comply with IHL, or as an obligation entailing a broader meaning.

Establishing an «obligation to respect» may seem superfluous insofar as States are supposedly willing to respect the treaties that they ratify. This idea refers to the fundamental principle of international law, *pacta sunt servanda,* pursuant to which agreements must be kept. In accordance with the 1969 'Vienna Convention on the Law of Treaties' (hereafter, 'VCLT'), international treaty law is «binding upon the parties to it and must be performed by them in good faith»[9]. This basic principle of international law means that the parties to a treaty must comply with it and respect the obligations contained therein.

However, this principle is broader, since the parties to the Geneva Conventions must also «ensure respect» for IHL. The meaning of this provision is far from being clear, as the Geneva Conventions themselves do not offer additional details. Following the evolution of the international case-law and

7 Jean Pictet (dir.), *The Geneva Conventions of 12 August 1949: Commentary. Volume IV: Geneva Convention relative to the Protection of Civilian Persons in Times of War*, Geneva, International Committee of the Red Cross, 1958, p. 17.

8 Article 1 Common to the four Geneva Conventions of 12 August 1949.

9 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331 (hereafter, 'VCLT'), article 26.

dominant scholarship, it is argued that the obligation to ensure respect for IHL has acquired a larger scope, to the point that it now places a duty on the international community as a whole to take all the necessary steps to ensure that the warring parties comply with IHL.

Indeed, while the obligation to ensure respect for IHL is an innovation of the Geneva Conventions, originally conceived as an obligation with internal effects, it also entails an external dimension. Moreover, Common Article 1 has acquired the status of customary obligation and constitutes an obligation of quasi-constitutional character in the international legal order. Lastly, its scope has considerably enlarged, in terms of applicability, content, and implementing measures.

1. AN OBLIGATION WITH INTERNAL AND EXTERNAL EFFECTS

When it was formulated, the obligation to ensure respect for IHL was probably understood as an obligation with an internal dimension only. According to this interpretation, State parties to the Geneva Conventions are placed under the obligation to ensure that their armed forces indeed respect IHL. However, an external dimension to that obligation has emerged, most likely because of the absence of any centralized monitoring system contemplated in IHL. Pursuant to this external dimension, the obligation to ensure respect for IHL likewise applies to third States to armed conflicts, which must take all the necessary and reasonable measures to ensure that the warring parties comply with IHL.

The origins of the obligation to ensure respect for IHL date back to the 1929 Geneva Conventions, as article 87 already provided for the obligation to «respect» the Convention «in all circumstances»[10]. The wording of the article highlights the willingness to create a permanent, non-derogable obligation. No condition may be interposed in order to justify any infringement upon the 1929 Geneva Conventions, not even the traditional principle of reciprocity. Already at that moment, abandoning reciprocity was a clear manifestation of the substitution of the bilateral logic, typical of the traditional law of war, with

10 Convention relative to the Treatment of Prisoners of War, Geneva, 27 July 1929: «The provisions of the present Convention shall be respected by the High Contracting Parties in all circumstances. In time of war if one of the belligerents is not a party to the Convention, its provisions shall, nevertheless, remain binding as between the belligerents who are parties thereto».

the more imperative necessity to protect human beings[11]. As the ICRC official Commentary to the Geneva Conventions of 1952 (hereafter, '1952 official Commentary') put it:

> It is not an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations. It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties. Each State contracts obligations 'vis-à-vis' itself and at the same time 'vis-à-vis' the others. The motive of the Convention is such a lofty one, so universally recognized as an imperative call of civilization, that one feels the need for its assertion, as much because of the respect one has for it oneself as because of the respect for it which one expects from one's opponent, and perhaps even more for the former reason than for the latter[12].

In 1949, the obligation takes a new turn with the adoption of the four Geneva Conventions, as State parties also have the duty to «ensure respect» for IHL. With the enshrinement of Common Article 1 in the Geneva Conventions, it is the first time that the obligation to ensure that third parties comply with IHL is stipulated. This principle was later reaffirmed in Additional Protocol I[13], thus reinforcing its authority.

Nevertheless, the scope of the obligation used to be more restricted than it is today. It is reasonable to believe that, when it was drafted, the obligation to ensure respect for IHL was not understood as an instrument binding upon third States to an armed conflict. It rather referred to the obligation to ensure

11 Alexandre Devillard, «L'obligation de faire respecter le droit international humanitaire: l'article 1 commun aux Conventions de Genève et à leur premier Protocole Additionnel, fondement d'un droit international humanitaire de coopération?», *Revue québécoise de droit international*, vol. 20(2), 2007, p. 78.

12 Pictet (dir.), *The Geneva Conventions of 12 August 1949: Commentary. Volume I: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,* Geneva, International Committee of the Red Cross, 1952b, pp. 27-29.

13 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (hereafter, 'Additional Protocol I'), June 8, 1977, 1125 U.N.T.S. 3, article 1(4).
This general obligation was reproduced in Additional Protocol I but not in Additional Protocol II relating to the Protection of Victims of Non-International Armed Conflicts. However, it is clear that this obligation is valid for non-international armed conflicts as well since it explicitly covers the conflicts defined by Common Article 3 (see *infra*).

that the nationals of the warring parties respect IHL. The records of the *travaux préparatoires* demonstrate that the adoption of this provision did not lead to much discussion:

> M. MARESCA [Italie] pense qu'il conviendrait de préciser les termes «s'engagent à faire respecter», qui selon l'interprétation qu'on leur donne, sont un pléonasme ou introduisent une idée nouvelle en droit international.
>
> M. CASTBERG [Norvège] estime qu'il s'agit de faire respecter les Conventions par l'ensemble de la population.
>
> M. YINGLING [États-Unis d'Amérique] partage la manière de voir du délégué de la Norvège. Il estime que l'article I n'implique pas l'obligation d'édicter des sanctions pénales.
>
> [...]
>
> M. LAMARLE [France] estime que les termes «faire respecter» tendent au même but que l'expression «au nom de leurs peuples», qui a été supprimée à Stockholm.
>
> L'article I est ainsi adopté sans changements[14].

On the basis of these comments, it has been argued that Common Article 1 should be restricted to its internal dimension, so that the State parties should not solely comply with IHL in times of war, but also take all the necessary measures in times of peace in order to ensure that the relevant rules can effectively be enforced in case of armed conflict[15]. It should be noted in this regard that, as the French delegate observed, the wording of Common Article 1 proposed at the 17th International Conference of the Red Cross was slightly different from the final version of the Geneva Conventions as it included the expression «au nom de leurs peuples» (on behalf of their peoples). The ICRC considered at the time that the latter expression should be understood as associating the peoples themselves in the respect of the fundamental principles

14 Conférence diplomatique de Genève 1949. Acte final de la Conférence diplomatique de Genève 1949, annexe 2, section B de la Convention de Genève relative au traitement des prisonniers de guerre, p. 51.

15 See: Isabelle Moulier, «L'obligation de 'faire respecter' le droit international humanitaire», in Michael J. Matheson and Djamchid Momtaz (eds.), *Les règles et institutions du droit international humanitaire à l'épreuve des conflits armés récents/Rules and institutions of International Humanitarian Law put to the test of recent armed conflicts*, Leiden/Boston, Martinus Nijhoff Publishers, 2010b, pp. 701-704.

contained in the Geneva Conventions in order to facilitate its application at all times, including in case of civil war:

> En invitant les Hautes Parties Contractantes à déclarer solennellement qu'elles s'engagent au nom de leur peuple, le Comité International de la Croix Rouge a eu l'intention d'associer les peuples eux-mêmes au respect des principes qui sont à la base de la présente Convention et à l'exécution des obligations qui en découlent. Le texte aura, en outre, l'avantage de faciliter l'application de la Convention, notamment en cas de guerre civile[16].

It could therefore be understood that the intent of the parties when the Geneva Conventions were drafted was to stipulate an obligation with internal effects only[17].

Nevertheless, international law is to be interpreted in accordance with the current state of the international community. In particular, the *travaux préparatoires* can be seen as no more than supplementary means of interpretation, so that the intent of the parties expressed at the moment of the 17th International Conference of the Red Cross is not decisive. It is indeed necessary to refer to subsequent State practice[18] on this matter to comprehend the whole meaning and implications of Common Article 1. In the words of Frits Kalshoven, the international community planted a «tiny seed», but it has considerably evolved afterward. Indeed, different elements suggest that the valid interpretation of Common Article 1 is an extensive one, as Common Article 1 actually establishes a two-fold duty, with both internal and external effects.

First, it could be objected that the intent of the parties was not to stipulate an obligation with internal effects only. As Isabelle Moulier demonstrates, a restrictive interpretation would mean that the expression «to ensure respect»

16 CICR, Projets de Conventions révisées ou nouvelles protégeant les victimes de la guerre établis par le Comité international de la Croix Rouge avec le concours d'experts des gouvernements, des sociétés nationales de la Croix-Rouge et d'autres associations humanitaires, XVIIe Conférence internationale de la Croix-Rouge (Stockholm, août 1948), n° 4, 2è ed., Genève, mai 1948, p. 4. Quoted in Moulier, «L'obligation de 'faire respecter' le droit international humanitaire», *op. cit.*, 2010b, pp. 703-704.

17 Kalshoven, «The Undertaking to Respect and Ensure Respect in All Circumstance: From Tiny seed to Ripening Fruit», *op. cit.*, 1999, pp. 3-61.

18 In accordance with article 31(3)(b) VCLT: «Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation» shall be taken into account, together with the context when interpreting treaties».

is a repetition of the duty «to respect»; it would therefore be unnecessary, as this duty already exists as a consequence of the ratification of the Geneva Conventions:

> Si l'obligation de faire respecter le droit international humanitaire ne s'étend pas à l'ordre international, elle ne constitue alors qu'un 'doublet' de l'obligation de respecter les Conventions qu'il était finalement inutile d'exprimer puisqu'elle découle ipso jure de la ratification des Conventions[19].

Consequently, if the State parties decided to add this clause to the four Geneva Conventions, it is more logical to look for a different meaning. In this line of reasoning, the ICRC delegate's comment during the debate on Common Article 1 should not be forgotten:

> M. PILLOUD [Comité international de la Croix-Rouge] rappelle qu'en présentant ses propositions à la Conférence de Stockholm le Comité international de la Croix-Rouge releva que les Parties contractantes doivent non seulement appliquer elles-mêmes les Conventions, mais encore faire tout ce qui est en leur pouvoir pour que les principes humanitaires qui sont à leur base soient universellement appliqués[20].

It thus seems that the extensive interpretation of Common Article 1 could be inferred at the time when the Geneva Conventions were adopted. As Éric David observes, since the ICRC delegate's declaration was not contradicted, it was understood that the obligation to ensure respect for IHL should go beyond the scope of State parties' populations; otherwise, it would not make sense to refer to a universal application of IHL[21]. As a consequence, it seems

19 Moulier, «L'obligation de 'faire respecter' le droit international humanitaire», *op. cit.*, 2010b, p. 705.

20 Acte final de la Conférence diplomatique de Genève 1949, annexe 2, section B de la Convention de Genève relative au traitement des prisonniers de guerre, p. 51.

21 Éric David, *Principes de droit des conflits armés*, 3rd ed., Brussels, Bruylant, 2002, pp. 562-563: «Cette déclaration, qui n'a pas été contredite à l'époque, montre que, dans l'esprit de ses auteurs, l'obligation mise à la charge de l'Etat partie avait une portée qui dépassait largement le cadre de sa seule population puisqu'il s'agissait de veiller à ce que les Conventions de Genève fussent «universellement appliquée»; une application universelle ne se limite évidemment pas à une application nationale». Quoted in Moulier, «L'obligation de 'faire respecter' le droit international humanitaire», *op. cit.*, 2010b, p. 706.

plausible to consider that the delegates chose a wording that could accommodate a broad understanding of Common Article 1 «be it in terms of an entitlement or a duty»[22]. The 1952 official Commentary, published only three years after the adoption of the Conventions, endorsed such interpretation:

> The Contracting Parties do not undertake merely to respect the Convention, but also to ensure respect for it [...] It follows therefore that in the event of a Power failing to fulfill 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[23].

As Knut Dörmann and José Serralvo note[24], the original version in French of the 1952 official Commentary clearly distinguishes between the entitlement to act (*pouvoir*) and the obligation to do so (*devoir*):

> Ainsi encore, si une Puissance manque à ses obligations, les autres Parties contractantes [...] *peuvent*-elles – et *doivent*-elles – chercher à la ramener au respect de la Convention[25] [emphasis added].

Volume II of the Commentaries ratified this interpretation and provided the following details:

> The proper working of the system of protection provided by the Convention demands in fact that the States which are parties to it should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that it is respected universally[26].

The 1952 official Commentary thus signed the «birth certificate» of the obligation to ensure respect for IHL, as it is commonly interpreted today.

22 Knut Dörmann and José Serralvo, «Common Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations», *International Review of the Red Cross*, vol. 96(895-896), 2015, p. 715.

23 Pictet (dir.), *The Geneva Conventions of 12 August 1949: Commentary. Volume I*, *op. cit*, 1952b, pp. 25-26.

24 Dörmann and Serralvo, «Common Article 1 to the Geneva Conventions», *op. cit*., 2015, p. 715.

25 Pictet (dir.), *Commentaires des Conventions de Genève du 12 août 1949. Volume I*, *op. cit*, 1952a, p. 25.

26 Jean Pictet (dir.), *The Geneva Conventions of 12 August 1949: Commentary. Volume* II*: Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea,* Geneva, International Committee of the Red Cross, 1960, pp. 25-26.

Moreover, subsequent practice, coupled with international case-law and scholarship, has endorsed to some extent the 'broad' interpretation of the obligation to ensure respect for IHL. It cannot be solely understood as ensuring that the nationals of a State party to an armed conflict respect IHL, but rather as an external obligation falling upon third States to ensure that the warring parties comply with IHL norms, i.e. an obligation to ensure respect for IHL by others[27].

In this sense, the Diplomatic Conference that led to the adoption of the Additional Protocols in 1977 used the exact same wording as that of the Geneva Conventions, without further debate, thus seemingly acknowledging the interpretation proposed by the ICRC[28]. Actually, the extensive interpretation of the obligation to ensure respect for IHL was referred to and taken for granted by national delegates, as evidenced in the official records of the Diplomatic Conference:

> [l]ors de la première session, plusieurs experts ont souligné le caractère impératif du droit humanitaire applicable dans les conflits armés. On s'est notamment référé à l'article premier, commun aux Conventions qui fournit une base juridique aux actions collectives de la communauté internationale. On peut considérer que l'ensemble des Hautes Parties Contractantes ont reçu un mandat supérieur, celui de concourir à l'application des Conventions – et certains ont parlé à ce sujet de responsabilité collective. Dans une proposition, des experts ont prié le CICR d'étudier le rôle que doivent jouer les Parties aux Conventions pour donner effet à l'intérêt qu'a la communauté des Etats à voir ces Conventions dûment respectées[29].

In the same way, the adoption of the 1977 Additional Protocols was the occasion to complement Common Article 1. Indeed, article 7 of Additional Protocol I provides the possibility for Switzerland – the depositary of the

27 Dörmann and Serralvo, «Common Article 1 to the Geneva Conventions», *op. cit.*, 2015, pp. 707-736.

28 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, International Committee of the Red Cross, 1987, p. 36.

29 CICR, Conférence d'experts gouvernementaux sur la réaffirmation et le développement du droit international humanitaire applicable dans les conflits armés (Genève, 3 mai-3 juin 1972), Commentaire, vol. II, première partie, Genève, janvier 1972, p. 7. Quoted in Moulier, «L'obligation de 'faire respecter' le droit international humanitaire», *op. cit.*, 2010b, p. 708.

Protocol – to convene meetings of the State parties to discuss general problems concerning the application of the Geneva Conventions and of Additional Protocol I[30]. An expert to the second session of the 1972 'Experts Conference on the reaffirmation and development of IHL applicable in armed conflicts' indeed underlined that this article elaborates in detail the collective commitment undertaken by the State parties pursuant to Common Article 1[31]. In the same way, article 89 of Additional Protocol I completes Common Article 1 and enshrines the State parties' consensus on its broad interpretation:

> 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.

Here, the obligation to ensure respect for IHL by others is explicitly recognized and the connection between third States and the wrongful behavior of the belligerent parties is clearly established.

Another important aspect of this article is the reference to the United Nations (hereafter, 'UN'), as it entails the mutual recognition of *jus ad bellum* and *jus in bello* in an international treaty. In the same line, the International Court of Justice (hereafter, 'ICJ') confirmed the existence of a link between the obligation to ensure respect for IHL and the UN in the 'Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory' (hereafter, 'Advisory Opinion on the Wall'). It expressly referred to the responsibility of the UNSC and the General Assembly in this regard:

> The United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion[32].

30 Additional Protocol I, article 7.

31 Moulier, «L'obligation de 'faire respecter' le droit international humanitaire», *op. cit.*, 2010b, p. 710.

32 ICJ, Legal Consequences of the Construction of a wall in the Occupied Palestinian Territory, Advisory Opinion (hereafter, 'Advisory Opinion on the Wall'), ICJ Reports 2004, para. 163.

Different UN bodies have embraced this new concern. By way of example, the UNSC has scrutinized IHL violations on different occasions, including in Kuwait, Bosnia, Rwanda, Kosovo, East Timor, Sierra Leone, Congo, and Sudan[33]. This also holds true regarding the Secretary-General, the General Assembly and even the Human Rights Council[34].

The idea that the international community as a whole is involved in a universal mechanism of responsibility to ensure respect for IHL is therefore clear. States may act individually, but also in cooperation with the UN, provided that their action complies with the UN Charter. Actually, article 89 of Additional Protocol I has gained increasing relevance as most of the measures adopted by the State parties to ensure respect for IHL are now conducted under the UN umbrella.

This broad interpretation of Common Article 1 is further confirmed by practice. By way of example, the ICRC has based its action on this interpretation of Common Article 1 in order to encourage the respect for IHL of the parties to an armed conflict:

> [i]t is on this interpretation that the ICRC has taken a number of steps, confidentially or publicly, individually or generally, to encourage States, even those not Party to a conflict, to use their influence or offer their cooperation to ensure respect for humanitarian law. (9) Leaving aside any bilateral or multilateral measures taken by States, which rarely become known, it should be pointed out that the organized international community has frequently and emphatically manifested its concern that humanitarian law should be respected[35].

In this regard, the fact that the European Union, an international organization representing 28 Member States, decided to adopt 'Guidelines on promoting compliance with IHL'[36] is revealing. Indeed, these Guidelines, which

33 Michael J. Matheson, «The New International Humanitarian Law and its Enforcement», in Michae J. Matheson and Djamchid Momtaz (eds.), *Les règles et institutions du droit international humanitaire, op. cit.,* 2010, p. 153.

34 Robin Geiβ, «The Obligation to Respect and to Ensure Respect for the Conventions», in Andrew Clapham, Paola Gaeta and Marco Sassòli, *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, 2015, p. 121.

35 Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols of 8 June 1977, op. cit.*, 1987, p. 36.

36 IHL Guidelines.

express the consensus of the EU Member States on this matter, specifically focus on the EU action «to address compliance with IHL by third States, and as appropriate, non-State actors operating in third States». This way, they endorse the broad interpretation of Common Article 1 according to which State parties – EU Member States – are under a duty to ensure respect for IHL by other States.

Nowadays, the dominant view among scholars[37] is that Common Article 1 entails an obligation, «both on State parties to an armed conflict and on third States not involved»[38]. The obligation to ensure respect for IHL entails consequences not only regarding the active subjects of the violation, i.e. the States that infringe upon IHL or suffer from the violation, but also of third States to the armed conflict[39]. The State parties to the Geneva Conventions therefore commit themselves to negative obligations, not to infringe upon them, but also to positive obligations, to ensure that third States respect them. In the event that a State fails to fulfill its obligations, the other States must act to bring it back to an attitude of respect for the Conventions.

This interpretation is also consistent with the current international case-law. In particular, the ICJ applied Common Article 1 in the Advisory Opinion on the Wall in the following terms:

> The Court would also emphasize that Article 1 of the Fourth Geneva Convention, a provision common to the four Geneva Conventions, provides that «The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstance». It follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with[40].

37 See contra: Tomasz Zych, «The scope of the obligation to respect and to ensure respect for International Humanitarian Law», *Windsor Yearbook Access to Justice*, vol. 27, 2009, pp. 251-270.

38 ICRC, Improving compliance with IHL – ICRC Experts seminar, Geneva, ICRC, October 2003.

39 Nicolas Levrat, «Les conséquences de l'engagement pris par les Hautes Parties Contractantes de 'faire respecter' les Conventions humanitaires», in Frits Kalshoven and Yves Sandoz (eds.), *Implementation of International Humanitarian Law/Mise en oeuvre du droit international humanitaire*, Dordrecht, Martinus Nijhoff Publishers, 1989, p. 269.

40 ICJ, Advisory Opinion on the Wall, *op. cit.*, para. 15.

The wording used by the ICJ leaves no doubt and the duty to ensure respect for IHL by others is clearly established. State parties are placed under a duty not only to respect IHL but also to ensure that third States engaged in an armed conflict comply with IHL. This duty has become universalized and is the responsibility of all. As evidenced in the ICRC Study on 'Customary International Humanitarian Law', the obligation to ensure respect for IHL by other States has become a norm of customary law, sustained by extensive practice in this sense. It is on this basis that the authors of the Study stipulate Rule 144, according to which States must «exert their influence, to the degree possible, to stop violations of international humanitarian law»[41]. It is interesting to note in this regard that despite a certain number of objections to the ICRC Study, no State has ever objected to Rule 144[42], thus seemingly confirming the consensus existing on the external aspect of the obligation to ensure respect for IHL. As such, this obligation constitutes «the nucleus for a system of collective responsibility» in the words of Laurence Boisson de Chazournes and Luigi Condorelli[43]. The «tiny seed» has indeed evolved, and the scope of Common Article 1 has been extended over the years.

However, it should be made clear that the obligation to ensure respect for IHL is a 'best effort obligation', or 'obligation of due diligence'. Pursuant to the system established by Common Article 1, States are placed under an obligation with external effects, that is, to ensure that the parties to an armed conflict respect IHL. By its very nature, this obligation cannot be an absolute obligation, i.e. an obligation to achieve a specific result as it would be idealistic and impossible to enforce. If that were the case, third States to armed conflicts could incur responsibility in case of failure to take action or if they have been unable to succeed in bringing back to an attitude of compliance the warring parties at stake. On the contrary, the obligation to ensure respect for IHL is conceived as a best effort obligation. States must take all the necessary measures to prevent and stop IHL violations, but realistically, it is impossible to require this result in order to conclude to the fulfillment of this obligation.

41 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. 1, Brussels, Bruylant, 2005, rule 144.

42 Geiβ, «The Obligation to Respect and to Ensure Respect for the Conventions», *op. cit.*, 2015, p. 122.

43 Boisson de Chazournes and Condorelli, «Common Article 1 of the Geneva Conventions revisited», *op. cit.*, 2000, p. 68.

This interpretation is in line with the standard applied to the obligation to prevent genocide by the ICJ in the case on the 'Application of the Convention on the prevention and punishment of the crime of genocide' (hereafter, 'Bosnian Genocide Case'):

> Secondly, it is clear that the obligation in question is one of conduct and not of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of State parties is rather *to employ all means reasonably available to them*, so as to prevent genocide so far as possible[44] [emphasis added].

As Knut Dörmann and José Serralvo observe, «[t]his does not turn the duty to ensure respect into a vacuous norm»[45]. States are still bound by the obligation but only to the extent that they are able to take action, and this action has some potential to influence either warring party. In this respect, the ICJ goes on to consider the following:

> A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide[46].

Therefore, the fact that the obligation to ensure respect for IHL by others is an obligation of due diligence does not mean that States are completely exempt from acting or that they are solely authorized to take action. Conversely, it is possible to apply the reasoning of the ICJ to Common Article 1 and consider that their responsibility will depend on their capacity to influence the infringing party to the armed conflict. In this regard, Knut Dörmann and José Serralvo even argue that if a State has clos ties to one of the warring

44 ICJ, Application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, ICJ Reports 2007, p. 43, para. 430.

45 Dörmann, and Serralvo, «Common Article 1 to the Geneva Conventions», *op. cit.*, 2015, p. 724.

46 ICJ, Application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, ICJ Reports 2007, p. 43, para. 430.

parties, its duty to ensure respect is reinforced[47]. It is indeed interesting to note that the ICJ calls for an assessment *in concreto* in order to determine whether a State has duly discharged the obligation at stake[48].

Thus, the obligation to respect and to ensure respect was initially formulated as a simple yet important reaffirmation of the *pacta sunt servanda* principle. Nevertheless, it has substantially evolved, notably thanks to the ICRC's intense work in this sense. The external dimension of the obligation to ensure respect has been recognized by the ICJ and the scholarship. Common Article 1 therefore establishes a decentralized monitoring system whereby all State parties are guardians of the Geneva Conventions and are bound by it at all times, even when they do not participate in hostilities themselves. Besides, the legal authority of Common Article 1 has been strengthened thanks to State practice and further jurisprudential developments. The Geneva Conventions, including Common Article 1, have acquired customary status upon their universal ratification. Common Article 1 is also considered an *erga omnes* obligation, and some IHL norms are even recognized *jus cogens* status, thus bestowing upon Common Article 1 a special role in the preservation of the international legal order. The underpinning is that a violation of IHL entails consequences for the international community as a whole. This idea has been stated and confirmed by various international and regional tribunals on several occasions, thus high-

47 Dörmann and Serralvo, «Common Article 1 to the Geneva Conventions», *op. cit.,* 2015, p. 724.

48 ICJ, Application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, ICJ Reports 2007, p. 43, para. 430: «Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the actions of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide. On the other hand, it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result – averting the commission of genocide – which the efforts of only one State were insufficient to produce».

lighting the general consensus on the special role of IHL in the international legal order. The special nature of IHL therefore reinforces the authority of Common Article 1 and actually constitutes the legal grounds that entitle third States to act in case of violation of IHL by others.

2. AN OBLIGATION OF «QUASI-CONSTITUTIONAL»[49] CHARACTER

Some scholars have argued that Common Article 1 is a stylistic clause devoid of legal authority, which merely serves as an introduction to the Geneva Conventions[50]. However, this assertion does not stand up to analysis. Conversely, it is argued that Common Article 1 stipulates an obligation of quasi-constitutional character in international law.

2.1. Common Article 1 is a legal obligation

Firstly, it clearly appears that Common Article 1 cannot be a moral duty instead of a legal obligation, as it is enshrined within the body of the Geneva Conventions. State parties always have the possibility to include the general principles that sustain the content of the treaties and conventions they ratify into a preamble, but in the case of the Geneva Conventions, it was decided not to include a preamble. If one looks at the records of the 17th International Conference of the Red Cross, a preamble that included the content of Common Article 1 was proposed. However, as Nicolas Levrat observes, national delegates rejected this proposal and decided to enshrine the obligation to ensure respect for IHL within the body of the Conventions[51]. The inclusion of this obligation in the legally binding clauses of the Geneva Conventions

49 Boisson de Chazournes and Condorelli, «Common Article 1 of the Geneva Conventions revisited», *op. cit.*, 2000, p. 68.

50 See, e.g.: Paul de la Pradelle,«Jus Cogens et Conventions humanitaires», *Annales de droit international médical*, nº 18, 1968, p. 24. Quoted in Moulier, «L'obligation de 'faire respecter' le droit international humanitaire», *op. cit.,* 2010b, p. 703.

51 Levrat, «Les conséquences de l'engagement pris par les Hautes Parties Contractantes», *op. cit.*, 1989, p. 268.

thus appears to be a deliberate choice; it is indeed an obligation that all State parties must comply with.

Furthermore, the wording of Common Article 1 is imperative. As Robin Geiβ notes, the ICJ held that the expression «to undertake» means «to accept an obligation [...] it is not merely hortatory or purposive»[52]. Therefore, the content of Common Article 1 cannot be interpreted as a moral duty; conversely, it stipulates a legally binding obligation that the State parties must fulfill. In this sense, Knut Dörmann and José Serralvo highlight that a change was made between the 1929 and the 1949 formulas, as Common Article 1 is written in the active voice in contrast with the 1929's wording («shall be respected by the High Contracting Parties»)[53]. In linguistic terms, this change denotes a stronger authority and seems to endorse the idea that Common Article 1 is an obligation that States must actively comply with. It can even be argued that the fact that Common Article 1 opens the four Geneva Conventions actually underlines its importance[54].

2.2. Common Article 1 is a customary obligation

Secondly, the Geneva Conventions have achieved universal ratification and have become customary law, thus binding upon the international community as a whole. In this regard, the ICJ acknowledged that some IHL norms enshrined in the Geneva Conventions and other IHL treaties are not ordinary treaty law to the extent that these conventions and treaties have merely given specific expression to the general principles of IHL, the latter being autonomous obligations in the international legal order.

The customary nature of IHL has been affirmed on different occasions and by different international tribunals, thus demonstrating the consensus in this regard. The ICJ started such process in the Corfu Channel Case where it referred indirectly to the customary nature of humanitarian law treaties. The

52 Geiβ, «The Obligation to Respect and to Ensure Respect for the Conventions», *op. cit.*, 2015, p. 112.

53 Dörmann and Serralvo, «Common Article 1 to the Geneva Conventions», *op. cit.,* 2015, p. 711.

54 Moulier, «L'obligation de 'faire respecter' le droit international humanitaire», *op. cit.*, 2010b, p. 714.

ICJ relied on the customary nature of The Hague Convention of 1907 to apply it to Albania, a State that had not ratified the Convention. In particular, it held that some norms of The Hague Convention VII of 1907 express «elementary considerations of humanity»[55] and are therefore declaratory of a general principle of international law. The ICJ reiterated such reasoning in the Nicaragua v. United States of America Case of 27 June 1986 (hereafter, 'Nicaragua Case')[56] as well as in its 'Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons' of 8 July 1996 (hereafter, 'Advisory Opinion on Nuclear Weapons')[57]. In the Nicaragua Case, the ICJ held that the Geneva Conventions «are in some respects a development, and in other respects no more than the expression of such principles»[58]. In the Advisory Opinion on Nuclear Weapons, the Court was even more explicit:

> It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and «elementary considerations of humanity» as the Court put it in its Judgment of 9 April 1949 in the Corfu Channel case (1. C. J. Reports 1949, p. 22), that The Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law[59].

The interpretation of the ICJ leaves little room for doubt as the customary character is unequivocally affirmed, as a result of the international consensus on these norms and of their fundamental nature in the international legal order. As Vincent Chetail notes, «the generality of the formula seems to postulate the customary nature of the Geneva Conventions as such, or at least

55 ICJ, Corfu channel case, 9 April 1949, ICJ Reports 1949, p. 22.

56 ICJ, Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), (hereafter. 'Nicaragua Case') Merits, Judgment, 27 June 1986, ICJ Reports 1986, p. 114.

57 ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1, ICJ Reports 1996, p. 226.

58 ICJ, Nicaragua Case, *op. cit.,* para. 218.

59 ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1, ICJ Reports 1996, p. 226, para. 79.

of the great majority of their provisions»[60]. Consequently, stating that States are under a duty to ensure respect for norms of customary character provides more authority to that duty. Moreover, Common Article 1 itself is customary, as recognized by the ICJ in the Nicaragua Case:

> The Court considers that there is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to «respect» the Conventions and even «to ensure respect» for them «in all circumstances», since such obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression[61].

Common Article 1 is only the conventional expression of the more general principles of IHL. It thus binds upon all States, regardless of the status of ratification of the Geneva Conventions in their domestic legal orders. This approach is further confirmed by the ICRC Study on 'Customary International Humanitarian Law' where it is stated that State practice establishes Common Article 1 as a norm of customary international law[62].

This interpretation was taken up by the European Court of Human Rights (hereafter, 'ECtHR') in the Kononov v. Latvia case of 17 May 2010 where the Grand Chamber resorted to IHL as a source of interpretation to solve the case and confirmed the customary nature of the Geneva Conventions[63]. In this case, the appellant considered that his conviction of war crimes in 2004 for his behavior during World War II infringed upon article 7 of the ECHR (no punishment without law). In particular, he alleged that the crimes he was charged with did not constitute an offense at the time of their commission and that he could not have foreseen his prosecution for war crimes as a result. Therefore, the ECtHR had to decide whether there was a sufficiently clear legal basis in 1944 for the crimes of which Mr. Kononov

60 Vincent Chetail, «The contribution of the International Court of Justice to international humanitarian law», *International Review of the Red Cross*, vol. 85(850), 2003, p. 244.

61 ICJ, Nicaragua Case, *op. cit.*, para. 220.

62 Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *op. cit.*, 2005, rules 139-144.

63 ECtHR, Grand Chamber, Kononov v. Latvia (application nº 36376/04), Judgment of 15 May 2010.

had been convicted. The Court upheld the approach of domestic courts in considering the following:

> there was a plausible legal basis for convicting the applicant of a separate war crime as regards the burning to death of Mrs. Krupniks [an expectant mother]. The Court finds this view confirmed by the numerous specific and special protections for women included immediately after the Second World War in the Geneva Conventions (I), (II) and (IV) of 1949, notably in Article 16 of the last-mentioned Convention[64].

To reach this conclusion, the ECtHR referred to the case-law of the ICJ on the customary nature of IHL. It thus acknowledged that women already benefitted from a special protection derived from the laws and customs of war before 1944 – a protection confirmed by the Geneva Conventions in the aftermath of the war. Therefore, customary law already protected women at the time when Mr. Kononov perpetrated those acts, and a clear legal basis to convict him existed.

2.3. Common Article 1 is an «erga omnes» obligation

Thirdly, Common Article 1 is not an ordinary legal obligation, insofar as it has acquired the status of *erga omnes* obligation. The concept of *erga omnes* obligation was introduced in international law in the 1970 Barcelona Traction case, in the following famous *obiter dictum*:

> When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protec-

64 ECtHR, Grand Chamber, Kononov v. Latvia (application nº 36376/04), Judgment of 15 May 2010, para. 218.

> tion. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes[65].

This means that there are *inter partes* obligations, which induce traditional bilateral relationships, and *erga omnes* obligations, which bind States towards the international community as a whole. As the International Law Commission (hereafter, 'ILC') puts it, «some obligations enjoy a special status owing to the universal scope of their applicability»[66]. This entails two consequences: «[t]hese rules concern all States and all States can be held to have a legal interest in the protection of the rights involved»[67]. Therefore, as Isabelle Moulier explains, the violation of an *erga omnes* obligation entails effects not only with regard to the States affected by the violation but also with regard to all States. Consequently, any State is allowed to seek the respect for this norm, even in the relationship between other States. Accordingly, the breach of an *erga omnes* obligation allows an extension of the right to take legal action not only to the State whose subjective interests have been prejudiced but also to all States, without requiring a personal prejudice. The legal interest to ensure respect for an *erga omnes* obligation is therefore universal and objective[68].

While the *erga omnes* nature of IHL rules in general has been recognized in different cases[69], Common Article 1 has been explicitly recognized as such by the ILC. Indeed, it is provided as the only example of an *erga omnes* obligation, for which «every State may invoke the responsibility of the State violating

65 ICJ, Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Second Phase), ICJ Reports 1970, p. 3, para. 33.

66 International Law Commission (hereafter, 'ILC'), Report of the Study Group of the International Law Commission on Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law, A/CN.4/L.682, 13.04.2006. Available at: http://legal.un.org/docs/?symbol=A/CN.4/L.682 (Accessed: 22.05.2017).

67 ILC, Report of the Study Group of the International Law Commission on Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law, A/CN.4/L.682, 13.04.2006. Available at: http://legal.un.org/docs/?symbol=A/CN.4/L.682 (Accessed: 22.05.2017).

68 Moulier, «L'obligation de 'faire respecter' le droit international humanitaire», *op. cit.*, 2010b, pp. 720-721.

69 See, e.g.: ICTY, Prosecutor v. Anto Furundzija, Case IT-95-17/1-T10, judgment, 10 December 1998, para. 151-152; ICTY, Prosecutor v. Zoran Kupreskić et al., Case IT-95-16-T, Judgement, 14 January 2000, para. 23; ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1. ICJ Reports 1996, para. 157.

such obligation[s]»[70] in the 'Conclusions of the work of the Study Group on the Fragmentation of International Law'. The International Criminal Tribunal for the former Yugoslavia (hereafter, 'ICTY') ratified this interpretation in the Kupreskić Judgment of 14 January 2000 by considering e followingth:

> [...] the bulk of this body of law lays down absolute obligations, namely obligations that are unconditional or in other words not based on reciprocity. This concept is already encapsulated in Common Article 1 of the 1949 Geneva Conventions [...].
>
> As a consequence of their absolute character, these norms of international humanitarian law do not pose synallagmatic obligations, i.e. obligations of a State vis-à-vis another State. Rather [...] they law down obligations towards the international community as a whole, with the consequence that each and every member of the international community has a 'legal interest' in their observance and consequently a legal entitlement to demand respect for such obligations[71].

In this judgment, the ICTY underlines the consequences of the *erga omnes* character of the Geneva Conventions, i.e. they do not only bind all international actors at all times, but all States have an interest in ensuring their respect. The ICTY recalls that the Geneva Conventions are absolute and hold a special position in international law; hence the principle of reciprocity does not apply. These provisions aim to protect common interests so that each State has a 'legal interest' in ensuring their respect and to put an end to their violation.

In this regard, it is worth mentioning that public international law already recognizes the particular status of the Geneva Conventions. Article 60 VCLT, which deals with the principle of reciprocity, States that in the case of breach by one of the State parties, the termination or suspension of the operation of the treaty normally accepted in international law:

> do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties[72].

70 ILC, Report of the Study Group of the International Law Commission on Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law, A/CN.4/L.682, p. 182, 13.04.2006. Available at: http://legal.un.org/docs/?symbol=A/CN.4/L.682 (Accessed: 22.05.2017),

71 ICTY, Prosecutor v. Zoran Kupreskić et al., Case IT-95-16-T, Judgement, 14 January 2000, paras. 517 and 519.

72 VCLT, article 60.

Thus, the Geneva Conventions, including Common Article 1, stipulate rules so fundamental that they do not obey to the same regime are general treaty norms. The exception stated by article 60 VCLT is a manifestation of the special value granted to the legal interest protected by the Geneva Conventions. The latter regulates armed conflicts and aims to instill some humanity in the conduct of hostilities; the protection of humanity is deemed so important that IHL does not enunciate relative rules that may or may not be complied with depending on the conduct of the remaining parties to the conflict. Conversely, IHL establishes a body of rules that shall be unconditionally observed by the warring parties.

Another element that underlines the legal force of Common Article 1 *vis-à-vis* the international community as a whole is the already mentioned involvement of and corresponding action undertaken by the United Nations in the IHL field. In addition to the duty of cooperation with the United Nations in addressing the serious violations of the Geneva Conventions foreseen in article 89 of Additional Protocol I, serious and repeated violations of IHL may be interpreted as «threats» to the international peace as provided by Chapter VII of the UN Charter. If that were the case, the UNSC may, in turn, adopt resolutions binding upon the international community aiming at stopping them, pursuant to Article 39[73] of the UN Charter, even in the case of non-international armed conflict. The ICRC had already highlighted the connection between IHL violations and international peace and security in its 1993 'Report on the Protection of War Victims':

> There are lastly situations in which total or partial failure must be admitted, despite all efforts to ensure application of international humanitarian law. While these must certainly be maintained, violations are of such magnitude that their very continuation would represent an additional threat to peace within the meaning of Article 39 of the United Nations Charter.

It is then the responsibility of the United Nations Security Council to make such an assessment and recommend or decide on what measures are to be taken in accordance with Articles 41 and 42 of the Charter[74].

73 «The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security».

74 Report on the Protection of War Victims, Prepared by the ICRC, Geneva, June 1993, para. 3.1.2.

Against this background, the UNSC has adopted such resolutions on different occasions whereby IHL violations have been treated as «threats» to the international peace. In this regard, as Michael J. Matheson explains, the UNSC has analyzed serious IHL violations occurring in Rwanda, Bosnia, Kosovo, Sierra Leone, and Sudan as threats to the peace, thus triggering Chapter VII and its corresponding wide-ranging powers to deal with such violations[75].

It has also authorized the resort to force in order to stop violations of IHL on this basis, most notably to protect civilians. By way of example, in reaction to the violations of IHL perpetrated by the Libyan authorities in 2011, the UNSC decided to act under Chapter VII authorizing Member States «to take all necessary measures [...] to protect civilians under threat of attack in the country» while demanding that «the Libyan authorities comply with their obligations under international law, including international humanitarian law»[76]. The same holds true regarding the conflict in the Central African Republic in 2013 where the UNSC, acting under Chapter VII of the UN Charter, authorized the deployment of the African-led International Support Mission in the Central African Republic (MISCA) and of French troops in order «to help protect civilians, stabilize the country and restore State authority over the territory, as well as create conditions conducive to the provision of humanitarian assistance»[77]. The UNSC largely refers to IHL in this resolution, by, *inter alia*, condemning its infringement and calling upon the parties to comply with specific IHL obligations.

The UNSC has also resorted to other aspects of Chapter VII to enforce Common Article 1. In this regard, as Michael J. Matheson notes, the UNSC has imposed arms embargos and other trade and financial sanctions on offending States or armed groups[78]. In the same way, it created *ad hoc* international

75 See: UNSC S/RES/771 (1992), UNSC S/RES/1199 (1998), UNSC S/RES/1315 (2000), UNSC S/RES/1593 (2005). Quoted in Matheson, «The New International Humanitarian Law and its Enforcement», *op. cit.*, 2010, pp. 153-154.

76 UNSC S/RES/1973 (2011), 'No-Fly Zone' over Libya, authorizing 'All Necessary Measures', 17 March 2011, para. 3.

77 UNSC, S/RES/2121 (2013), Situation in Central African Republic, 10 October 2013.

78 Matheson, «The New International Humanitarian Law and its Enforcement», *op. cit.*, 2010, p. 155.

criminal tribunals in ex-Yugoslavia[79] and in Rwanda[80] in order to punish some serious violations of IHL and prosecute the high-level individuals responsible for the atrocities committed during these armed conflicts[81].

The obligation to respect and ensure respect for IHL is therefore a general and unconditional obligation. The 1952 official Commentary emphasizes that the Geneva Conventions constitute «a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties»[82]; they are not ordinary instruments of international law but constitute special ones. This means that the obligation applies not only in times of armed conflict, but also before and after. Actually, States must «prepare in advance, that is to say in peacetime, the legal, material or other means of loyal enforcement of the Convention»[83]. The expression «in all circumstances» further means that, as soon as one of the conditions of application of Article 2 is fulfilled, no Power bound by the Convention can offer any valid pretext, legal or other, for not respecting the Convention in all its parts. It also means that the application of the Geneva Conventions does not depend on the nature of the conflict, which is therefore applicable both to IACs and NIACs[84].

2.4. Common Article 1 protects «jus cogens» norms

Fourthly, some of the Geneva Conventions rules have been recognized the status of *jus cogens* in some instances, thus bestowing upon Common Article 1 a particular role in international law.

Jus cogens rules, or peremptory norms, are enshrined as 'constitutional' norms of the international legal order and are non-derogable. While the main sources of international law are normally not organized hierarchically, some

79 UNSC S/RES/827 (1993), Establishment of an International Criminal Tribunal for the former Yugoslavia, 25 May 1993.

80 UNSC S/RES/955 (1994), Establishment of an International Tribunal and adoption of the Statute of the Tribunal, 8 November 1994.

81 The penal repression of IHL violations is extensively addressed in Part II of this thesis.

82 Pictet (dir.), *The Geneva Conventions of 12 August 1949: Commentary. Volume I*, *op. cit*, 1952b, p. 25.

83 *Ibid*.

84 Pictet (dir.), *The Geneva Conventions of 12 August 1949: Commentary. Volume I*, *op. cit*, 1952b.

limited rules of international law are deemed more important than others; consequently, they enjoy a «superior position» in the international legal system because of the importance of their content and the universal acceptance of their superiority[85]. The VCLT defines peremptory norms at article 53 in the following terms:

> [a] norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character[86].

While the definition of *jus cogens* norms is settled by the VCLT, its content is subject to debate. However, there are several signs to be found in the international case-law and in the ILC's work on the codification of international law that make think that some IHL norms belong to *jus cogens*.

In particular, the ICJ recognized on different occasions the *jus cogens* character of some IHL norms. Drawing upon the reasoning of the Corfu Channel Case, it held in the Nicaragua Case that Common Articles 1 and 3 reflect «elementary considerations of humanity»[87]. Then, the idea that some IHL rules are peremptory norms became more explicit in the Advisory Opinion on Nuclear Weapons, where the ICJ stated that The Hague and Geneva Conventions constitute «intransgressible principles of international customary law»[88]. While the expression '*jus cogens*' is not used in either case, the choice of the wording is noteworthy insofar as the ICJ acknowledges the fundamental importance of the Geneva Conventions in the international legal system. This interpretation is confirmed by the ILC, which considers that *jus cogens* «is sometimes expressed by the designation of some norms as 'fundamental' or as expressive of 'elementary considerations of humanity' or

85 ILC, Report of the Study Group of the International Law Commission on Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law, A/CN.4/L.682, p. 182, 13.04.2006. Available at: http://legal.un.org/docs/?symbol=A/CN.4/L.682 (Accessed: 22.05.2017).

86 VCLT, article 53.

87 ICJ, Nicaragua Case, *op. cit.*, p. 114.

88 ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, p. 226, para. 79.

'intransgressible principles of international law'»[89], thus referring explicitly to the cases involving IHL. The ICTY endorsed this interpretation in the above-mentioned Kupreskić case of 14 January 2000, where it did not hesitate to use the expression '*jus cogens*' itself:

> [m]ost norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law of jus cogens, i.e. of a non-derogable and overriding character[90].

Lastly, the ILC refers to «basic rules of international humanitarian law applicable in armed conflict» as one the most frequently cited examples of *jus cogens* norms[91].

Consequently, the Geneva Conventions undoubtedly have a special status in the international legal order and constitute some of the fundamental norms thereof. They have not only reached customary status, but they also contain peremptory norms of international law in accordance with the case-law of the ICJ, later confirmed by the ICTY. This demonstrates the special nature of some of the provisions contained in the Geneva Conventions, which hold a special position in the hierarchy of the international legal system. In line with this reasoning, infringing upon IHL norms does not constitute an ordinary violation of international law; instead, these are violations of customary norms of international law, or even in some cases, violations of *jus cogens* norms and therefore of the very essence of the international legal order. This means, as far as Common Article 1 is concerned, that the obligation falling upon the international community to «ensure respect for IHL» is even more authoritative as its purpose is to protect these fundamental norms. Ensuring respect for IHL is thus of utmost importance insofar as it constitutes one of the safeguards of

89 ILC, Report of the Study Group of the International Law Commission on Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law, A/CN.4/L.682, p. 182, 13.04.2006. Available at: http://legal.un.org/docs/?symbol=A/CN.4/L.682 (Accessed: 22.05.2017).

90 ICTY, Prosecutor v. Zoran Kupreskić et al., Case IT-95-16-T, Judgement, 14 January 2000, para. 520.

91 ILC, Report of the Study Group of the International Law Commission on Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law, A/CN.4/L.682, p. 128, 13.04.2006. Available at: http://legal.un.org/docs/?symbol=A/CN.4/L.682 (Accessed: 22.05.2017).

some of the most elementary norms of international law. Nonetheless, if the legal authority of Common Article 1 is ascertained, its content and consequences are more difficult to grasp.

3. AN OBLIGATION WITH AN EXTENDED SCOPE

While Common Article 1 establishes a fundamental obligation in the international legal order, it does not provide indications on how to implement it. As a result, any attempt to gather the different types of measures at the disposal of the State parties is faced with difficulties, especially when considering the secrecy in which States often need to operate in case of violation of IHL. Despite this difficulty, it is possible to identify the different measures available to State parties thanks to an analysis of State practice, international case-law and scholarship[92]. Concretely, States benefit from a wide set of measures, ranging from diplomacy to military action.

The scope of Common Article 1 is extensive. Firstly, its scope of applicability has broadened, as it is now acknowledged that Common Article 1 is applicable both in times of international and non-international armed conflicts and that its recipients are not States only. Secondly, it entails the necessity to end but also to prevent IHL violations, with prevention increasingly being recognized a key issue in the enforcement of Common Article 1. Finally, international actors benefit from a wide range of tools, more or less effective, to implement this obligation.

3.1. Applicability

As a preliminary comment, the question as to whether any violation of the Geneva Conventions may trigger Common Article 1 arises. Given the fact that Common Article 1 applies in all circumstances, it could be inferred that

92 See, e.g.: Umesh Palwankar, «Measures available to States for fulfilling their obligation to ensure respect for IHL», *International Review of the Red Cross*, nº 298, 1994; Djamchid Momtaz, «Les défis des conflits armés asymétriques et identitaires au droit international humanitaire», in Michael J. Matheson and Djamchid Momtaz, *Les règles et institutions du droit international, op. cit.*, 2010, pp. 85-101; Moulier, «L'obligation de 'faire respecter' le droit international humanitaire», *op. cit.*, 2010b, pp. 732-782.

each violation to the Geneva Conventions could indeed activate Common Article 1. However, it seems more plausible to apply this reasoning to the sole internal dimension of Common Article 1, as applying it to the external dimension would entail unrealistic results and deprive the provision of any practical relevance[93]. Otherwise, it could be argued that the duty of third countries is triggered by the commission of serious violations of IHL. This line of reasoning is arguably coherent, insofar as infringing upon such provisions would undermine the international public order and may entail the criminal responsibility of their perpetrators[94]. Nonetheless, as Robin Geiβ observes, two elements nuance this assertion: the fact that Common Article 1 is an obligation of due diligence and the uncertainty regarding the threshold of gravity or seriousness of the violations.

Since State parties are subject to an obligation of due diligence, they are not required to take measures as soon as any violation of the Geneva Conventions occurs; conversely, «States are in any case obliged to do only what can reasonably be expected in the circumstances of each particular instance, e.g. to exert their influence». And in this respect, the level of seriousness of the offence modulates the level of intervention expected from third States, instead of conditioning it. That is, «the more serious and imminent a breach, the more will be required of States», a graduation which is actually allowed by the due diligence nature of Common Article 1. Consequently, if minor violations of IHL are repeatedly taking place, they could trigger Common Article 1 even though they do not constitute serious violations strictly speaking. In the words of Robin Geiβ «[i]t follows that any breach of the Geneva Conventions by another State, irrespective of where and when it occurs, activates the obligation to ensure respect»[95].

Against this background, the scope *ratione temporis* of Common Article 1 has been extended. Even though IHL applies to situations of armed conflicts only, the same does not hold true regarding Common Article 1, as a result of

93 Geiβ, «The Obligation to Respect and to Ensure Respect for the Conventions», *op. cit.*, 2015, p. 124.

94 These serious violations of IHL now also include war crimes as specified under Article 8 of the Rome Statute of the International Criminal Court and the other war crimes existing under customary international humanitarian law. See: ICRC, What are «serious violations of international humanitarian law»? Explanatory note, Geneva, ICRC, 2014.

95 Geiβ, «The Obligation to Respect and to Ensure Respect for the Conventions», *op. cit.*, 2015, pp. 124-126.

its permanent nature. In this regard, it appears clearly from the wording of Common Article 1 that the State parties must ensure respect for the Geneva Conventions «in all circumstances». Therefore, Common Article 1 equally applies in peacetime and must be read in conjunction with the provisions of the Geneva Conventions that expressly apply during peacetime. As the 2016 ICRC 'Updated Commentary on the First Geneva Convention' (hereafter, '2016 official Commentary') notes, «[o]therwise, the obligation could have been addressed to the 'Parties to the conflict' rather than to the 'High Contracting Parties' more generally»[96].

Secondly, the scope *ratione materiae* of Common Article 1 has also been enlarged. The obligation to ensure respect is not limited to the Geneva Conventions and Additional Protocol 1, but rather extends to IHL in general. This assertion is confirmed by State practice, as evidenced in the ICRC Study on 'Customary International Humanitarian Law':

> For example, the ICRC's appeals in relation to the conflict in Rhodesia/Zimbabwe in 1979 and to the Iran–Iraq War in 1983 and 1984 involved calls to ensure respect for rules not found in the Geneva Conventions but in the Additional Protocols (bombardment of civilian zones and indiscriminate attacks) and the countries alleged to be committing these violations were not party to the Protocols. It is significant that these appeals were addressed to the international community, that no State objected to them and that several States not party to the Additional Protocols supported them[97].

In the same line of reasoning, Common Article 1 applies to both IACs and NIACs. Indeed, even though Common Article 1 was not reproduced in Additional Protocol II, Common Article 3, which governs NIACs, certainly applies to them. The ICJ endorsed this interpretation in the Nicaragua Case in the following terms:

> The Court considers that there is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to «respect» the Conventions and even «to ensure respect» for them «in al1

96 See: Marie Henckaerts (dir.), *Updated Commentary on the First Geneva Convention*, Geneva, International Committee of the Red Cross, 2016, «Article 1: Respect and Ensure Respect».

97 Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *op. cit.*, 2005, rule 144.

> circumstances» [...]. The United States is thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions[98].

As Laurence Boisson de Chazournes and Luigi Condorelli observe, it can be argued that NIACs, as defined by Additional Protocol II, fall indirectly within the scope of Common Article 1, to the extent that article 1(1) provides that the Protocol «develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949»[99]. Therefore, the obligation to ensure respect could apply to Additional Protocol II by means of this indirect reference to Common Article 3, which is undeniably subject to Common Article 1.

Thirdly, the scope *ratione personae* has also importantly been extended, so as to include the State parties when they participate in multinational operations and international organizations, besides State parties themselves[100]. In this respect, the 2016 official Commentary emphasizes the idea that State parties cannot hide behind the shield of multinational operations in order to evade their obligations stemming from IHL. This entails two consequences. On the one hand, State parties are compelled to ensure respect for the Geneva Conventions by their contingents, as they still retain some authority over them. According to the 2016 official Commentary, this means that they are able to do so:

> by ensuring that their troops are adequately trained, equipped and instructed; by exercising the disciplinary and criminal powers remaining to them; by attempting to ensure their coalition partners desist in potentially unlawful conduct; and, ultimately, by opting out of specific operations if there is an expectation that these operations may violate the Conventions[101].

98 ICJ, Nicaragua Case, *op. cit.*, para. 220.

99 Boisson de Chazournes and Condorelli, «Common Article 1 revisited: Protecting collective interest», *op. cit.*, 2000, p. 69.

100 See Henckaerts (dir.), *Updated Commentary on the First Geneva Convention*, *op. cit.*, 2016, «Article 1: Respect and Ensure Respect».

101 *Ibid*.

On the other hand, it means that State parties should ensure that the State or international organization leading the operation at stake complies with IHL, thus making guarantees of compliance a condition for the transfer of command[102]. As for international organizations, while they cannot be bound formally by the Geneva Conventions, they remain bound by customary international law, and therefore by Common Article 1.

Finally, one aspect of the obligation to ensure respect for IHL that should not be overlooked is the necessity to reach out to non-State armed groups. If one reads Common Article 1 literally, it appears that it is addressed to the «High Contracting Parties», instead of the «parties to the conflict». As a result, non-State armed groups participating in NIACs are excluded from its scope of application. However, an important number of IHL violations are committed by non-State armed groups, which have never received any IHL training in many cases. Furthermore, as the 2016 official Commentary to the Geneva Conventions underlines, all parties to a NIAC, including non-State armed groups, must respect the guarantees contained in Common Article 3 and ensure respect for it internally[103]. Consequently, non-State armed groups are not completely exempted from compliance with IHL and efforts must be conducted in this sense.

Djamchid Momtaz, who considers that incentives to respect IHL are lacking for armed groups, underlines this idea. He notes that many States are quite reluctant to actually fill in this gap to the extent that they consider these groups as terrorists and are reticent to take measures that would allow them to be properly trained in IHL. In addition, the behavior of these groups during warfare does not constitute a ground for liability at international level, except if they manage to overthrow the government and replace it or create a new State structure within the territory of the State at stake. This concern thus becomes more worrying when the intent of these armed groups is not to take over the power, but rather to control natural resources, hence the necessity to overcome obstacles such as the terrorist label and to find original solutions to reach out to them[104].

102 *Ibid*.

103 *Ibid*.

104 Momtaz, «Les défis des conflits armés asymétriques et identitaires au droit international humanitaire», *op. cit*., 2010, p. 93.

3.2. Content

As regards the content of the obligation to ensure respect for IHL, the ICJ brought some elements of clarification on two occasions and enounced principally negative obligations. However, Common Article 1 also entails positive obligations, i.e. ending and preventing IHL violations. In addition, it includes the obligation to punish perpetrators and refers to the existing mechanisms of international responsibility, but those aspects are extensively addressed in the second part of this study.

Firstly, in the above-mentioned Nicaragua Case of 1986, the ICJ held that the obligation to ensure respect for IHL entails the duty not to encourage disrespect for IHL:

> The Court considers that there is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to «respect» the Conventions and even «to ensure respect» for them «in al1 circumstances» [...] The United States is thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions[105].

This judgment highlights a negative obligation stemming from Common Article 1, the obligation not to encourage persons or groups engaged in the conflict to infringe upon IHL. In this case, the Court considered that the US government's support for the 'contras' forces against the Nicaraguan government constituted a violation of the Conventions. *Inter alia*, the publication by the CIA of a military textbook entitled 'Psychological operations in guerrilla war' (*Operaciones sicológicas en guerra de guerrillas*), which encouraged to neutralize specific targets such as judges or security officers after gathering the local population for them to participate in the event and present their accusations, constituted an illegal encouragement in violation of Common Article 3 to the four Geneva Conventions.

Secondly, Common Article 1 prohibits recognizing an illicit situation deriving from a violation of IHL. In this regard, the ICJ ruled in the Advisory

105 ICJ, Nicaragua Case, *op. cit.*, para. 220.

Opinion on the Wall of 9 July 2004 that third States cannot recognize the illegal situation resulting from the construction of the wall and cannot render aid or assistance in maintaining the situation created by such edification[106]. It also recalled the general duty of all the State parties to the Geneva Conventions to ensure compliance with IHL by Israel, while respecting the UN Charter and international law:

> [A]ll the State parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention[107].

Besides recalling the necessity to ensure respect for IHL, the ICJ identifies negative obligations deriving from it. Nonetheless, if Common Article 1 did not exist, these negative obligations could be inferred from other norms of public international law[108]. They may be considered an extension of the application of the *pacta sunt servanda* principle, to the extent that State parties have the obligation to execute in good faith the treaties that they ratify and cannot undermine the objectives thereof[109]. In the same way, third States are also subject to a duty not to knowingly aid or assist in the commission of IHL violations pursuant to the general regime of State responsibility[110].

As observed by Alexandre Devillard, these negative obligations cannot by themselves constitute the basis of a true obligation to ensure respect for IHL; however, the existence of this obligation necessarily entails such obligations, as they constitute its minimum threshold[111]. It is therefore necessary to identify the positive obligations that derive from the obligation to ensure respect for IHL, as they probably constitute the most interesting aspect of the obligation to ensure respect for IHL.

106 ICJ, Advisory Opinion on the Wall, *op. cit.*, para. 136.
107 *Ibid.*, para. 159.
108 Dörmann and Serralvo, «Common Article 1 to the Geneva Conventions», *op. cit.*, 2015, p. 727.
109 VCLT, article 26.
110 ILC, «Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries», *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, article 16.
111 Devillard, «L'obligation de faire respecter le droit international humanitaire», *op. cit.*, 2007, p. 92.

The first aspect of these positive obligations is that State parties are subject to a duty to end IHL violation. In this respect, the ICJ held in the Advisory opinion on the Wall the following:

> Al1 States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction; all State parties [...] have *in addition* the obligation, while respecting the United Nations Charter and international law, to ensure compliance with international humanitarian law as embodied in that Convention[112] [emphasis added].

It appears clearly from this ruling that States are subject to a positive duty to stop IHL violations, besides the negative obligations stemming from Common Article 1. Laurence Boisson de Chazournes and Luigi Condorelli already highlighted this aspect in the following terms:

> [i]l ne s'agit pas seulement de ne pas reconnaître les situations illégales, mais il faut aussi que chacun agisse positivement pour les faire cesser, en utilisant dans ce but tous les moyens disponibles et juridiquement admissibles[113].

It is also the approach adopted by the ICRC Study on 'Customary International Humanitarian Law' in Rule 144, which provides that States «must exert their influence, to the degree possible, to stop violations of international humanitarian law»[114]. As Knut Dörmann and José Serralvo note, this aspect of the obligation to ensure respect for IHL implies that a violation of IHL has already been committed[115]. There is extensive State practice that sustains the legally binding nature of this obligation.

The second aspect of these positive obligations is the duty to prevent IHL violations. In this respect, the issue surrounding whether Common Article 1 entails an obligation to prevent is difficult to answer, insofar as Common Article 1 is supposed to bind third States in the case of serious or repeated

112 ICJ, Advisory Opinion on the Wall, *op. cit.*, para. 163.

113 Laurence Boisson de Chazournesand and Luigi Condorelli, «De la responsibilité de protéger ou d'une nouvelle parure pour une notion déjà bien établie», *Revue générale de droit international public*, vol. 1, 2006, p. 15.

114 Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *op. cit.*, 2005, rule 144.

115 Dörmann and Serralvo, «Common Article 1 to the Geneva Conventions», *op. cit.*, 2015, p. 728.

violations of the Geneva Conventions. However, several elements support the existence of a duty to prevent IHL violations.

It could be argued that the obligation to prevent derives from the *erga omnes* nature of Common Article 1. In this regard, it seems logical to tie preventive measures to the obligation to ensure respect for IHL, insofar as the consequences of violating IHL are too serious to merely intervene *a posteriori*[116]. Furthermore, as the official Commentary to the Geneva Conventions so underline, Common Article 1 stipulates a permanent obligation. It therefore applies at all times, including before the commission of IHL violations:

> If it is to fulfill the solemn undertaking it has given, the Government must of necessity prepare in advance, that is to say in peace-time, the legal, material or other means of ensuring the faithful enforcement of the Convention when the occasion arises[117].

The idea according to which Common Article 1 entails a duty of prevention is supported by subsequent practice. By way of example, the State parties endorsed this interpretation of Common Article 1 on the occasion of the 30th International Conference of the Red Cross and the Red Crescent in 2007 in the following terms:

> The obligation of all States to refrain from encouraging violations of international humanitarian law by any party to an armed conflict and to exert their influence, to the degree possible, *to prevent and end violations*, either individually or through multilateral mechanisms, in accordance with international law[118] [emphasis added].

Several scholars likewise share this approach[119]. In this regard, Marco Sassòli even considers that the prevention of IHL violations should actually be the main focus of IHL implementing measures:

116 Devillard, «L'obligation de faire respecter le droit international humanitaire», *op. cit.,* 2007, p. 96.

117 Pictet (dir.), *Commentaire aux Conventions de Genève du 12 août 1949. Volume I, op. cit.*, 1952a.

118 30th International Conference of the Red Cross and the Red Crescent, Resolution 3, 2007, para. 2. Quoted in Dörmann and Serralvo, «Common Article 1 to the Geneva Conventions», *op. cit.,* 2015. p. 730.

119 See, e.g., Devillard, «L'obligation de faire respecter le droit international humanitaire», *op. cit.,* 2007, pp. 75-131; Dörmann and Serralvo, «Common Article 1 to the Geneva Conventions», *op. cit.,* 2015, pp. 707-736; Levrat, «Les conséquences de l'engagement pris par les Hautes Parties Contractantes», *op. cit.*, 1989, pp. 31-32.

> For a branch of law that applies in a fundamentally anarchic, illegal and often lawless situation such as armed conflicts, the focus of implementing mechanisms is and must always be on prevention[120].

In any event, the obligation to prevent IHL violations can only be tied to some degree of predictability. As highlighted by Dörmann and Serralvo, «under international law, due diligence obligations involving the need to prevent a particular event can only be triggered if the event in question is actually foreseeable»[121].

3.3. A variety of implementing measures

Even though the ICJ has not provided further details concerning the content of the positive obligations falling upon the State parties to the Geneva Conventions, different types of reactive measures can be identified in response to serious violations of IHL. Some of them are explicitly provided by IHL, while others can be deduced from State practice. Against this background, different scholars have intended to detail the different measures available for the States parties to fulfill their obligation to ensure respect for IHL[122], which are presented below.

Firstly, State parties may adopt measures of prevention. In order to prevent IHL violations from occurring, States may resort to both soft and hard law. Soft law measures include training, promoting and disseminating IHL in general both among armed forces and the civilian population[123], as well as cooperation in the field of IHL with other States and international organizations. Even though most of these measures could seem trivial, they actually play a role of

120 Marco Sassòli, «State Responsibility for Violations of International Humanitarian Law», *International Review of the Red Cross,* vol. 84(846), 2002, p. 401.

121 Dörmann and Serralvo, «Common Article 1 to the Geneva Conventions», *op. cit.*, 2015, p. 730.

122 See e.g.: Palwankar, «Measures available to States for fulfilling their obligation to ensure respect for IHL», *op. cit.*, 1994; Momtaz, «Les défis des conflits armés asymétriques et identitaires au droit international humanitaire», *op. cit.*, 2010, pp. 85-101; Moulier, «L'obligation de 'faire respecter' le droit international humanitaire», *op. cit.*, 2010b, pp. 732-782.

123 Dissemination of the Geneva Conventions' content is actually referred to by articles 47/48/127/144 of the four Geneva Conventions. The wording expressly refers to an obligation valid «in time of peace as in time of war».

utmost importance with regard to Common Article 1 as they establish the structures which allow for the effective application of IHL in times of war. Hard law measures refer to the relationship between IHL and the fight against impunity, such as the criminalization of the violation of IHL norms, notably to create a deterrent effect[124]. They may also refer to an interesting aspect of prevention, which is the use of conditionality clauses in bilateral and multilateral agreements. By way of example, Knut Dörmann and José Serralvo emphasize the role played by the Arms Trade Treaty in preventing IHL violations[125].

Secondly, State parties may also resort to measures in reaction to IHL violations, in order to stop them. They include diplomatic action aiming at putting an end to these violations, including the expulsion of diplomats or the severance of diplomatic relations, the non-renewal of trade agreements, etc. State parties and international organizations can also publicly condemn the violations of IHL in order to bring opprobrium on the belligerent parties at stake, with a view to exerting pressure on them. In this respect, diplomatic measures constitute arguably one of the softest means to end violations of IHL. Consequently, their impact is limited, and their efficiency will depend on a variety of factors, including the cultural and political affinities of the States at stake.

In this context, the legality of unilateral countermeasures[126] arises[127]. Indeed, it is not self-evident that third States to armed conflicts are allowed to adopt such countermeasures unilaterally on the basis of Common Article 1. On the one hand, it could be argued that third States to armed conflicts are indeed allowed to resort to such measures, insofar as *erga omnes* or even *jus cogens* obligations have been breached. This reasoning is logical to the extent that it is acknowledged that all States have a legal interest in ensuring their respect. Following this line of argument, no difference would be established between the States affected by the violations of IHL and third States. This is, for example, the approach followed by the Institute of International Law (*Insti-*

124 This type of action is extensively addressed in Part II of this thesis.

125 Dörmann and Serralvo, «Common Article 1 to the Geneva Conventions», *op. cit.*, 2015, pp. 732-735.

126 Measures adopted by a State (A) in response to a wrongful act committed by another State (B) towards the former (A), and which would be considered illegal in other situations.

127 Momtaz, «Les défis des conflits armés asymétriques et identitaires au droit international humanitaire», *op. cit.*, 2010, pp. 92-93; Moulier, «L'obligation de 'faire respecter' le droit international humanitaire», *op. cit.*, 2010b, pp. 746-749.

tut de Droit International)[128]. In particular, article 5 of the 2005 Resolution on 'Obligations erga omnes in international law' States the following:

> Should a widely acknowledged grave breach of an erga omnes obligation occur, *all the States* to which the obligation is owed: (a) shall endeavour to bring the breach to an end through lawful means in accordance with the Charter of the United Nations; (b) shall not recognize as lawful a situation created by the breach; (c) *are entitled to take non-forcible counter-measures under conditions analogous to those applying to a State specially affected by the breach*[129] [emphasis added].

The Institute of International Law therefore pushes the argument to its conclusion and makes no distinction between States specially affected by the breach and third States acting in the collective interest.

On the other hand, it could be argued that the third States not specially affected by the breach cannot adopt countermeasures individually and are allowed to adopt them collectively only, that is, under the UN auspices. Although this approach contradicts some of the logical consequences of granting some IHL rules *erga omnes* status, it is probably the most reasonable conclusion given the current state of international law and practice. As some scholars note[130], the ILC explicitly distinguishes between injured States and third States in the 'Articles on Responsibility of States for Internationally Wrongful Acts' (hereafter, 'ARSIWA')[131]. Therefore, while third States are required to react,

128 Institut de Droit International, «The Application of International Humanitarian Law and Fundamental Human Rights, in Armed Conflicts in which Non-State Entities are Parties», 14th Commission, Rapporteur Mr. Milan Šahoviæ, Berlin Session, 1999; Institut de Droit International, «Obligations and rights erga omnes in international law», 5th Commission, Rapporteur Mr. Giorgio Gaja, Krakow Session, 2005.

129 Institut de Droit International, «Obligations and rights erga omnes in international law», Fifth Commission, Rapporteur Mr. Giorgio Gaja, Krakow Session, 2005.

130 Momtaz, «Les défis des conflits armés asymétriques et identitaires au droit international humanitaire», *op. cit.*, 2010, pp. 92-93; Moulier, «L'obligation de 'faire respecter' le droit international humanitaire», *op. cit.*, 2010b, pp. 746-749; Geiβ, «The Obligation to Respect and to Ensure Respect for the Conventions», *op. cit.*, 2015, pp. 128-129.

131 ILC, «Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries», *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, article 48: «Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole. 2. Any State

they must do so within the UN framework if they want to adopt countermeasures.

The case of the resort to force is particularly clear, as States are not allowed to resort unilaterally to the use of lethal force in order to ensure respect for IHL[132]. Common Article 1 does not constitute a legal basis for military action, and it appears clearly from international law and practice that Common Article 1 must be read in conjunction with international law and the UN Charter. In addition, according to ARSIWA, countermeasures cannot affect:

> (a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;
> (b) obligations for the protection of fundamental human rights;
> (c) obligations of a humanitarian character prohibiting reprisals;
> (d) other obligations under peremptory norms of general international law[133].

entitled to invoke responsibility under paragraph 1 may claim from the responsible State: (a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and (b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached».

132 This question has gained renewed interest in light of the 2017 US missile attack on Syria. See *inter alia*: Marko Milanovic, «The clearly ilegal US missile strike in Syria», *EJIL: Talk*!, 07.04.2017, available at: https://www.ejiltalk.org/the-clearly-illegal-us-missile-strike-in-syria/ (Accessed: 25.05.2017); Harold Koh Koh, «Not illegal: But now the hard part begins», *Just Security*, 07.04.2017, available at: https://www.justsecurity.org/39695/illegal-hard-part-begins/ (Accessed: 25.05.2017); Emmanuel Goffi, «Analyse: Syrie: Peut-on violer le droit international pour sanctionner une violation du droit international?», *MULTIPOL*, 11.04.2017, available at: http://reseau-multipol.blogspot.com.es/2017/04/analyse-syrie-peut-on-violer-le-droit.html (Accessed: 25.05.2017); Jure Vidmar, «Excusing Illegal Use of Force: From Illegal but Legitimate to Legal Because it is Legitimate?», *EJIL: Talk!*, 14.04.2017, available at: https://www.ejiltalk.org/excusing-illegal-use-of-force-from-illegal-but-legitimate-to-legal-because-it-is-legitimate/ (Accessed: 25.05.2017); Kevin Jon Heller, «Why Unilateral Humanitarian Intervention Is Illegal and Potentially Criminal», *Opinio Juris*, 20.04.2017, available at: http://opiniojuris.org/2017/04/20/against-unilateral-humanitarian-intervention-and-why-it-can-be-criminal/ (Accessed: 25.05.2017); Nancy Simons, «The legality surroundings the US strikes in Syria», *Opinio Juris*, 25.04.2017, available at: http://opiniojuris.org/2017/04/25/the-legality-surrounding-the-us-strikes-in-syria/ (Accessed: 25.05.2017); Jennifer Trahan, «In defense of humanitarian intervention», *Opinio juris*, 19.04.2017, available at: http://opiniojuris.org/2017/04/19/in-defense-of-humanitarian-intervention/ (Accessed: 25.05.2017).

133 ILC, «Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries», *op. cit.*, article 50.

It is therefore unambiguous that the resort to force is not an option for States acting individually. Nonetheless, States can turn to the UNSC and adopt implementing measures collectively, which may include the resort to force.

Lastly, the international mechanisms of compliance with IHL must be mentioned, despite their doubtful success. IHL specifically refers to a mechanism of prevention of IHL violations: the system of Protecting Powers and of their substitute. In particular, the Geneva Conventions and their Additional Protocols refer to the Protecting Powers[134], i.e., neutral States that must be designated by either belligerent party and accepted by the adverse party to the armed conflict. The underlying idea of such mechanism is that the Protecting Power must safeguard the interests of the belligerent party that designated it. Consequently, a support is provided to the parties to the armed conflict, with a view to preventing violations of IHL from occurring[135]. However, as Isabelle Moulier notes, the system established by the Geneva Conventions is not mandatory, and the parties to the armed conflict actually have the choice to designate or not a Protecting Power[136]. It is only with the adoption of the Additional Protocols of 1977 that the mandatory character of the designation was formalized. The system nonetheless relies on an agreement between the Protecting Powers, and the parties to the armed conflict at stake. In case of failure, it is foreseen that the ICRC or any other impartial humanitarian organization shall fulfill this role.

This mechanism creates the possibility to continuously monitor the parties to the armed conflict as the Protecting Powers or their substitute are in charge of a wide range of activities aiming at ensuring respect for IHL taking place throughout the armed conflict. Indeed, the Protecting Powers or their substitute are responsible for, *inter alia*, the communication between the parties to the armed conflict in relation to the application of the Geneva Conventions and their Additional Protocols; support and protection activities; as well as the monitoring of the enforcement of the parties' obligations under IHL. The Protecting Powers therefore fulfill a preventive role, but they may also play a reactive role if they see that one of the warring parties is not complying with

134 Articles 8/8/8/9 of the four Geneva Conventions of 12 August 1949.

135 Moulier, «L'obligation de 'faire respecter' le droit international humanitaire», *op. cit.*, 2010b, p. 737.

136 *Ibid.*, p. 738.

IHL. Nonetheless, this system has not been used recently and, in practice, the ICRC has been recognized as a substitute.

Besides, IHL itself foresees the possibility to submit the case to the International Humanitarian Fact-Finding Commission (hereafter, 'IHFFC') in accordance with article 90 of Additional Protocol I[137]. The IHFFC was established in 1991 and is competent to «enquire into any facts alleged to be a grave breach or other serious violation of the Geneva Conventions or Additional Protocol I» and to «facilitate the restoration of an attitude of respect for these instruments through its good offices»[138]. Upon an investigation, the IHFFC must present its conclusions and its recommendations on the situation at stake. The IHFFC's report is made public only if all the belligerent parties agree to do so[139].

It thus appears that this mechanism was established in order to enforce Common Article 1 and for the international community to benefit from some sort of monitoring mechanism. Furthermore, as Djamchid Momtaz observes, there is no obligation to be affected by the violation of IHL for a State to refer the situation to the IHFFC. The system established by article 90 of Additional Protocol I therefore reinforces the idea that some IHL norms are *erga omnes*, and that any State has a legal interest in ensuring their respect.

Although this mechanism is promising regarding the enforcement of Common Article 1, it is subject to important limitations and has never been activated. One first obstacle to the use of the IHFFC is the fact that its competence is mandatory only if the relevant States have ratified the Protocol and made a formal declaration in this sense, and one of the State parties to the IAC requests its services[140]. Thus, the competence of the IHFFC is importantly limited and leaves aside armed conflicts not of an international character. Even though the IHFFC's services may be requested on an *ad hoc* basis too, then all the warring parties must give their consent. Another important obstacle is the fact that the State parties seem not to be very keen on resorting to it,

137 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, article 90.

138 Marcel Stutz, Leonard Blazeby and Netta Goussac, «Strengthening compliance with International Humanitarian Law: The work of the ICRC and the Swiss Government», *The University of Western Australia Law Review*, vol. 39, Issue 1, 2015, p. 56.

139 *Ibid*.

140 *Ibid*.

even when they have had the opportunity to do so. By way of example, the UNSC preferred to request an *ad hoc* fact-finding commission to the Secretary General in reaction to the widespread violations of IHL in Darfur, albeit it had previously considered that it could refer cases to the IHFFC[141].

Another means to enforce Common Article 1 foreseen by IHL is the mechanism provided by article 7 of Additional Protocol I:

> The depositary of this Protocol shall convene a meeting of the High Contracting Parties, at the request of one or more of the said Parties and upon the approval of the majority of the said Parties, to consider general problems concerning the Application of the Conventions and of the Protocol.

This mechanism has already been implemented on different occasions, but not on the basis of this provision. So far, the State parties have met on three occasions: in 1999, 2001, and 2014 in order to scrutinize some questions surrounding the respect by Israel of its obligations under IHL. The UN General Assembly triggered this mechanism in two resolutions whereby it called on Switzerland to organize those meetings with regard to GC IV'[142], even though the Geneva Conventions themselves do not establish a similar system to the one provided by Additional Protocol I. The objective of such meetings was to reaffirm the illegality of colonization in the occupied territories in order to stop it. While the results of the 1999 Conference were mitigated, the 2001 Conference led to the adoption of a declaration whereby the 115 participating States not only affirmed the *de jure* applicability of GC IV but also:

> the obligations of all States based on common Article 1, the obligations of the parties to the conflict reflected in the Fourth Geneva Convention and the specific obligations of Israel as the Occupying Power[143].

It is worth noting that the ICJ used these declarations when it recognized the illegality of the construction of the wall by Israel in the Advisory Opinion

141 Momtaz, «Les défis des conflits armés asymétriques et identitaires au droit international humanitaire», *op. cit.*, 2010, pp. 89-90.

142 *Ibid.*, p. 88.

143 Matthias Lanz, Emilie Max and Oliver Hoehne, «The Conference of High Contracting Parties to the Fourth Geneva Convention of 17 December 2014 and the duty to ensure respect for international humanitarian law», *International Review of the Red Cross*, vol. 96(895/896), p. 1120.

on the Wall of 9 July 2004[144]. What is more, these conferences have had an impact on the Israeli case-law. Indeed, the Supreme Court considered that the destructions derived from the construction of the wall were disproportionate in comparison with the military advantages so that it had to be redesigned in order to cause the least possible damages to civilians[145]. It is therefore an example of the indirect effect on the ground as a domestic court used these conferences as sources of interpretation of the law.

Another conference was convened by the Swiss Government on the basis of further General Assembly resolutions adopted between 2009 and 2011 in order to identify «the measures to enforce the Convention in the Occupied Palestinian Territory, including East Jerusalem, and to ensure its respect in accordance with article 1»[146]. While consultations seemed not to provide successful results, 2014 marked a turning point as tensions were increasing and Palestine requested the Swiss Government to intensify their efforts to convene such a conference. Eventually, 128 States participated in the Conference of High Contracting Parties held on 17 December 2014. It is interesting to note that while the outcome of the former conferences was used by the ICJ in the Advisory Opinion on the Wall, the 2014 final declaration in turn referred to the Advisory Opinion to recall the illegality of the construction of the wall in the Occupied Palestinian Territory and its associated regime. As emphasized by Matthias Lanz, Emilie Max, and Oliver Hoehne, the outcome of this Conference is particularly important with respect to Common Article 1 for a number of reasons, including the high number of participating countries, or its level of details regarding the specific alleged violations and duties falling upon both the Occupying Power and Palestinian actors[147].

Common Article 1 thus establishes an *erga omnes* obligation, binding upon the international community as a whole. It is an unconditional and general

144 Momtaz, «Les défis des conflits armés asymétriques et identitaires au droit international humanitaire», *op. cit.*, 2010, p. 89.

145 Menaske Mara'abe v. Prime Minister of Israel, HCJ, 7957/04, Supreme Court of Israel Judgment of 15 September 2005, Tadkin-Supreme, 2005, vol. 3, p. 3333. Quoted in Momtaz, «Les défis des conflits armés asymétriques et identitaires au droit international humanitaire», *op. cit.*, 2010, p. 89.

146 UNGA, Res. 64/10, 5 November 2009, *op. cit.*, para. 5. Quoted in Lanz, Max and Hoehne, «The Conference of High Contracting Parties to the Fourth Geneva Convention of 17», *op. cit.,* p. 1120.

147 Lanz, Max and Hoehne, «The Conference of High Contracting Parties to the Fourth Geneva Convention of 17», *op. cit,* pp. 1121-1127.

obligation that may be implemented thanks to a variety of tools at States' disposal, and it may even be sanctioned by an intervention of the Security Council, acting under Chapter VII of the UN Charter. Vincent Chetail is therefore correct when he affirms that:

> Common Article 1 is not a stylistic clause devoid of any real legal weight, but a norm firmly anchored in customary law and entailing obligations for every State, whether or not they have ratified the treaties in question[148].

While Common Article 1 may be implemented by resorting to various types of measures aimed at preventing or stopping IHL violations, it also highlights one of the main issues regarding IHL: «the need to enhance the effectiveness of mechanisms of compliance»[149]. Indeed, the Protecting Powers mechanism has been underused; the IHFFC has never been triggered, so that, in practice, the institution in charge of monitoring compliance with IHL during warfare has become the ICRC. However, some of these activities, such as public denunciations, cannot be undertaken by the ICRC because of the principles that underpin its action[150]. Consequently, there clearly is a gap that needs to be addressed.

Against this background, the ICRC and the Swiss Government undertook a consultation process between 2012 and 2015 in order to improve compliance with IHL precisely in order to develop more effective international mechanisms. This process culminated with the 32nd International Conference of the Red Cross and Red Crescent, which took place in Geneva in December 2015. In accordance with the proposal put forward by the ICRC and the Swiss Government, an annual meeting of the State parties to the Geneva Conventions would have been established, «a non-politicized forum for them to share best practices and technical expertise»[151]. Unfortunately, the results of the Conference did not match the expectations, as no agreement was reached on the creation or development of an efficient compliance mechanism. State

148 Chetail, «The contribution of the International Court of Justice to international humanitarian law», *op. cit.*, 2003, p. 263.

149 Stutz, Blazeby and Goussac, «Strengthening compliance with International Humanitarian Law», *op. cit.*, 2015, p. 51.

150 *Ibid.*, p. 57.

151 News release, «No agreement by states on mechanism to strengthen compliance with rules of war», ICRC, Geneva, 10/07/2015.

parties thus agreed to continue the «inclusive, State-driven intergovernmental process» and to submit its outcome to the 33rd International Conference[152].

Despite those limitations, further international developments have reinforced the obligation to ensure respect for IHL. In this regard, it is difficult to talk about Common Article 1 to the Geneva Conventions without referring to the concept of 'Responsibility to Protect' too, formalized in 2005 on the occasion of the World Summit. This concept echoes the obligation to ensure respect for IHL, as it foresees that in the case of default from the relevant State, the international community has the duty to use all the diplomatic, humanitarian and other appropriate means to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In addition, the emergence and consolidation of International Human Rights Law in the aftermath of World War II is promising also with regard to IHL, insofar as it offers jurisdictional forawhere IHL may be used as a norm of reference.

152 32nd International Conference of the Red Cross and Red Crescent, Resolution 32IC/15/R2 on Strengthening compliance with international humanitarian law, Geneva, Switzerland, 8-10 December 2015.

Section 2
AN OBLIGATION REINFORCED BY FURTHER INTERNATIONAL LEGAL DEVELOPMENTS

As explained in the first section of this chapter, Common Article 1 has compensated to some extent the lack of centralized monitoring system of IHL. Nonetheless, it arguably constitutes a perfectible mechanism of compliance. In this regard, other means to ensure respect for IHL have developed in the international arena, outside of IHL, which may be used to reinforce Common Article 1. Hereafter, particular attention is paid to International Human Rights Law (hereafter, 'IHRL') and the 'Responsibility to Protect' (hereafter, 'R2P').

1. INTERNATIONAL HUMAN RIGHTS LAW

Even though traditionally, IHL and IHRL have been two distinct bodies of law, with divergent origins, field, extent of application, they are getting closer insofar as they pursue a common objective: the protection and safeguard of the human being. In this respect, IHRL have proved to be an interesting instrument to ensure respect for IHL.

1.1. An increasing convergence of IHL and IHRL

Originally, IHL and IHRL were meant to apply to different situations. Traditional public international law used to distinguish between peace law and war law so that the applicable legal framework depended on the belligerent situation in a determined place: IHL would apply to war times while IHRL would apply to peace times. This difference in the scope of application *ratione temporis* was grounded on several differences.

The essence of IHRL is to prevent the State from infringing individuals' freedoms and promote the well-being of its people during peacetime, whereas the objective of IHL goal is to regulate the conduct of hostilities and to protect human beings in times of armed conflict. In the latter case, the individual is an object of the rule, in contrast with IHRL, whose subject is the individual. Hence, IHL does not have the specificities of IHRL, i.e. objectivity and

non-reciprocity[153]. In the same line, the addressees are different. The Law of War traditionally ties a specific branch of the State, the military one, whereas IHRL apply to all State authorities.

These differences result from the fundamental difference of nature of both corpuses. Indeed, IHL has always pretended to be universal. It is one of the oldest branches of international law and has been importantly codified through international treaties and conventions since the nineteenth century. On the contrary, human rights were first developed within the national arena: the British Bill of Rights, the American Constitution, or the French Declaration of human rights, all these legal frameworks were created in order to grant rights to their citizens. It is only during the twentieth century that they got internationalized, and even universalized, most notably with the adoption of the UN Universal Declaration of Human Rights of 1948[154] and other treaties thereafter.

Furthermore, these corpuses' philosophical sources are divergent. The IHL's philosophical sources go back to chivalry times when honor, loyalty and the protection of the weak prevailed. It also draws its ideas from religious principles. It often refers to the notion of 'Civilization' as opposed to 'Barbary'[155]. The Law of War used to be seen as military rather than humanitarian law[156]. Conversely, IHRL is the product of the Enlightenment movement of the eighteenth century and has been linked to Western liberal revolutions[157]. It used to refer to the political and social organization of the State[158]. Therefore, the Law of War comprised technical rules regulating belligerent relationship with foreigners while human rights used to be led by associative movements invoking liberal or socialist ideals (although it changed after World War II)[159].

153 Frédéric Sudre, *Droit européen et international des droits de l'homme*, 9th ed., Paris, Presses Universitaires de France, 2008, p. 32.
However, this statement should be nuanced with regard to the principle of non-reciprocity, which also applies to IHL. In contrast, reprisals are authorized.

154 Universal Declaration of Human Rights, GA Res. 217A (III), UN Doc. A/810 at 71, 10 December 1948.

155 For an insight into the diverse religious, philosophical and cultural origins of IHL, see Christophe Greenwood, «Historical development and legal basis», in Dieter Fleck, *The handbook of international humanitarian law*, 2nd ed., New York, Oxford University Press, 2008, pp. 15-27.

156 Kolb, *Jus in bello, le droit international des conflits armés*, *op. cit.*, 2009, p. 143.

157 *Ibid*.

158 *Ibid*.

159 *Ibid*.

Another important difference between IHL and IHRL is that they are regulated at international level in very different ways. The latter is regulated by numerous universal and regional declarations and conventions as well as all specific ones, such as the UN Convention of the Rights of the Child. A consequence is that most of them are short and simple texts. On the contrary, IHL is described in a limited number of treaties and conventions that are extremely detailed. In the same line, their control is different as most of the human rights conventions refer to their own monitoring systems, which may be universal or regional. This is in contrast with IHL, which establishes a decentralized monitoring system[160].

Lastly, the ICRC and the UN used to consider each other with mistrust, as the former feared that the instillation of human rights in IHL would lead to its politicization and therefore undermine it. As for the UN, it was established in order to maintain global peace and security. As a consequence, it was rather hostile to develop IHL, a law necessary in times of war, as it would entail acknowledging that it had failed in maintaining international peace and security[161]. Nonetheless, the position of the UN has evolved. In 1967, the United Nations Security Council (hereafter, 'UNSC') referred expressly to the 'Geneva Convention relative to the Treatment of Prisoners of War' for the first time and established a connection between IHL and human rights[162]. This new involvement of the UN was further confirmed on the occasion of the Tehran International Conference on Human Rights in 1968[163].

Indeed, despite these differences, IHL and IHRL share a common principle: they both aim to protect and safeguard human beings. World War II represents an important change in this respect. After horrendous atrocities were committed, the international community established international legal instruments so as to prevent such dramatic exactions from occurring again. As mentioned above, human rights were internationalized, notably with the adoption of the UN Charter in 1945, the Universal Declaration of Human Rights in 1948, or the UN Convention on the Prevention and Punishment of the Crime of Genocide in that same year. As some kind of mirroring effect,

160 Mario Bettati, *Droit humanitaire,* Paris, Editions du Seuil, 2000, p. 21.

161 *Ibid*.

162 UNSC S/RES/237 (1967).

163 UN Doc. A/CONF.32/41, Final act of the International Conference on Human Rights, Tehran, 22 April to 13 May 1968.

IHL got humanized. The adoption of the four Geneva Conventions in 1949, particularly GC IV, marks this philosophy as it introduced the «humanitarian» notion in the Law of Armed Conflicts and contributed to building bridges between both corpuses. The result today is that both bodies of law are applicable to armed conflicts. One manifestation of such process is that the statuses of civilians in IHL and of human beings in IHRL are converging[164].

Various possibilities exist in order to conciliate the application of IHL and IHRL. According to the first interpretation – the most cautious one – IHL and IHRL are complementary. Indeed, IHRL ensures the protection of human beings in ordinary times while IHL does so in very exceptional times, i.e. in times of armed conflict. However, according to this theory, IHL and IHRL are bodies of law that maintain their specificities and differences.

Another theory conciliating IHL and IHRL is the so-called 'convergence' theory. This is notably the subject-matter of the ICRC's work, which focuses on the convergence of some core rights of both corpuses. And indeed, although they have different material scopes of application, they converge on some points: the obligation to protect the individual regardless of nationality, the impossibility to invoke the non-performance defence, as well as the obligation to respect some substantial rights in all circumstances[165]. The ICJ seemed to endorse this movement of convergence between IHL and IHRL, insofar as it considered in its Advisory Opinion on Nuclear Weapons that human rights are applicable at all times, including in war time:

> The protection of the International Covenant of Civil and Political Rights [ICCPR] does not cease in times of war. [...] In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities[166].

It further confirmed this position on 9 July 2004 in the Advisory Opinion on the Palestinian Wall[167]. This approach goes further than the «comple-

164 Kolb, *Jus in bello, le droit international des conflits armés*, *op. cit.*, 2009, p. 22.

165 Sudre, *Droit européen et international des droits de l'homme*, *op. cit.*, 2008, p. 33.

166 ICJ, 8 July 1996, Legality of the Threat or Use of Nuclear Weapons, Advisory opinion, ICJ Reports 1996, para 24.

167 ICJ, 9 July 2004, Legal consequences of the construction of a wall in the occupied Palestinian territory, Advisory opinion, ICJ Reports 2004, p. 136. Confirmed in subsequent cases: ICJ, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), 19 Dec. 2005, para. 216; ICJ, Application of the International Convention on the Elimina-

mentary theory» as it seeks to grant human beings the best protection through the cumulative application of both *juris corpuses*[168].

As Heintze underlines it, this case-law is in line with current international human rights treaties, which contain provisions applicable to war times[169]. An example at the European level is article 15 ECHR, as it refers to the application of human rights norms «in time of war or other public emergency threatening the life of the nation»[170]. In this case, the State party at stake is allowed to derogate from the obligations included in the Convention. Nevertheless, some rights of this Convention cannot be suspended and are intransgressible rights. This inviolability illustrates the convergence between IHL and IHRL as they both define some essential rights, which cannot be derogated from in any circumstances. Therefore, the convergence theory participates in the creation of a set of rights and principles that transcend all legal branches, a perspective confirmed by the ICTY, which held in the Delalic case of 20 February 2001 that:

> the two legal regimes share a common 'core' of fundamental standards which are applicable at all times, in all circumstances and to all parties, and from which no derogation is permitted[171].

This convergence is particularly noticeable regarding Common Article 3 insofar as it details a list of rights that must be safeguarded in any circumstances. In this respect, the rights contained in Common Article 3 are to be interpreted in relation with human rights. For instance, the «judicial guarantees which are recognized as indispensable by civilized peoples» are to be understood in light of human rights instrument, e.g. Article 6 ECHR, for which the ECtHR has developed an important case-law[172]. In the same line, it is difficult to under-

tion of All Forms of Racial Discrimination, Order, 15 Oct. 2008, para. 112. Quoted in Christian Tomuschat, «Human Rights and International Humanitarian Law», *European Journal of International Law*, vol. 21(1), 2010, p. 18.

168 Hans-Joachim Heintze, «On the Relationship between Human Rights Law Protection and International Humanitarian Law», *International Review of the Red Cross*, vol. 86(856), 2004, p. 793.

169 William Abresch, «The human rights law of internal armed conflicts: the ECHR in Chechnya», *European Journal of International Law*, vol. 16(4), 2005, pp. 741-767.

170 Convention for the Protection of Human Rights and Fundamental Freedoms, article 15.

171 ICTY, Prosecutor v. Zejnil Delalic, Zdravko Mucic (aka «Pavo»), Hazim Delic and Esad LandŽo (aka «Zenga») (hereafter, 'Celebici Case'), Case IT-96-21-A, Appeals Judgment, 20 February 2001, para. 149.

172 See Sudre, *Droit européen et international des droits de l'homme*, *op. cit.*, 2008, p. 33.

stand the human right not to be subjected to inhuman treatment – found in IHRL – without taking account of its interpretation in the context of IHL, especially in the context of GC III[173].

Moreover, IHL and IHRL mutually enrich themselves. IHRL reinforces IHL norms to the extent that it formulates with further details the States' obligations[174]. In the same way, IHL updates IHRL, as the problem of disappearances underlines it. Although they constitute a serious human rights violation, in times of war, Geneva Conventions III and IV impose on the Occupying Party some detailed obligations concerning their prisoners so as to avoid the problem of disappearances[175].

In order to solve the problems of applicability between IHL and HRL, it has been sustained that IHL may be considered the *lex specialis* toward IHRL. The philosophy at the origin of the *lex specialis* theory is that a «special rule is more to the point ("approaches more nearly the subject in hand") than a general one and it regulates the matter more effectively ("are ordinarily more effective") than general rules do»[176]. Thus, a State that is party to both IHRL and IHL treaties must interpret their provisions in a consistent way[177]. This approach was exposed in the ICJ Advisory Opinion on the Legality of the Use or Threat of Nuclear Weapons where, after having said that IHRL applies in times of war as well, the Court held the following:

> The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus, whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to

173 Heintze, «On the Relationship between Human Rights Law Protection and International Humanitarian Law», *op. cit.*, 2004, p. 795.

174 *Ibid*.

175 *Ibid*.

176 Martti Koskenniemi, Fragmentation of International Law: Topic (a): The function and scope of the lex specialis rule and the question of «self-contained regimes»: an outline, prepared for the Study Group on Fragmentation of International Law of the International Law Commission. Available at: http://www.un.org/law/ilc/sessions/ 55/fragmentation_outline.pdf, para. 2.2. Quoted in Abresch, «The human rights law of internal armed conflicts: the ECHR in Chechnya», *op. cit.*, 2005, p. 5.

177 Abresch, «The human rights law of internal armed conflicts: the ECHR in Chechnya», *op. cit.*, 2005, p. 746.

> Article 6 of the Covenant, *can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself*[178] [emphasis added].

In this case, the Court considered that the right to life is non-derogable, so that no one can be arbitrarily deprived of their life even in times of war. It also recognized the primacy of IHL over IHRL in situations of armed conflicts, as it constitutes *lex specialis*, so that the word 'arbitrarily' shall be read in light of IHL. Moreover, in its Advisory Opinion on the Wall, the Court demonstrated even more clearly that the right to life in situations of armed conflicts is to be interpreted in accordance with IHL[179]. Indeed, it held the following:

> As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law[180].

Thus, IHL and IHRL, originally two distinct corpuses have converged to the point that some authors talk about the «human rights law of internal armed conflicts»[181]. The application of human rights to non-international conflicts is undeniably important, especially when the State refuses to recognize that an armed conflict is taking place, or to fill in the gaps of IHL. In this regard, the *lex specialis* approach might prove to be an effective instrument of delimitation of applicability of both bodies of legal norms, although its practical application is difficult[182].

178 ICJ, 8 July 1996, Legality of the Threat or Use of Nuclear Weapons, Advisory opinion, ICJ Reports 1996, p. 226, para 25.

179 Heintze, «On the Relationship between Human Rights Law Protection and International Humanitarian Law», *op. cit.,* 2004, p. 796.

180 ICJ, 9 July 2004, Legal consequences of the construction of a wall in the occupied Palestinian territory, Advisory opinion, ICJ Reports 2004, para. 106.

181 Heintze, «On the Relationship between Human Rights Law Protection and International Humanitarian Law», *op. cit.*, 2004, p. 796.

182 Breslin, «The Role of the European Union in Ensuring Respect for International Humanitarian Law», *op. cit.*, 2011, p. 121.

1.2. Resorting to IHRL to ensure respect for IHL

Against this background, IHRL can prove to be useful in relation with accountability mechanisms «to compensate for the deficits of» IHL[183]. As observed by Hans-Joachim Heintze:

> [I]t comes as no surprise that both the ICRC and academics have on numerous occasions attempted to use the implementation mechanisms of the UN human rights treaties, disarmament treaties and environmental treaties as examples of possible systems to ensure compliance with international humanitarian law and to make them appealing to States[184].

In this context, the reporting mechanisms existing under the UN may be used to promote ratifications and monitor them. By way of example, the UNGA has established a system of biennial resolutions on the status of the Additional Protocols. It is worth referring to the last resolution adopted within this framework:

> [Resolution A/RES/71/144 of 13 December 2016 w]elcomes the universal acceptance of the Geneva Conventions of 1949, and notes the trend towards a similarly wide acceptance of the two Additional Protocols of 1977 in the context of their upcoming fortieth anniversary[185].

In this resolution, the General Assembly foreseeably calls upon the States that have not yet ratified the protocols to do so. It likewise addresses recommendations to the States that are parties to Protocol I to recognize the IHFFC and to consider making use of its services. The resolution goes beyond the scope of the additional protocols strictly speaking, insofar as it also encourages the ratification of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, its two protocols, the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in

183 Heintze, «On the Relationship between Human Rights Law Protection and International Humanitarian Law», *op. cit.*, 2004, p. 798.

184 *Ibid*.

185 UNGA, Resolution A/RES/71/144 of 13 December 2016, Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts.

armed conflict, as well as «other relevant treaties on international humanitarian law relating to the protection of victims of armed conflict».

For present purposes, Resolution A/RES/71/144 dedicates a few paragraphs to the improvement of the implementation of IHL. In particular, it

> notes with appreciation the 10 resolutions adopted at the Thirty-second International Conference of the Red Cross and Red Crescent, held in Geneva from 8 to 10 December 2015, in particular resolutions 1 to 4, recalls their importance, as well as the recommendations for further actions therein, in strengthening international humanitarian law, and notes with appreciation in this regard resolution 2, entitled «Strengthening compliance with international humanitarian law», in which the Conference, inter alia, recommended the continuation of an inclusive, State-driven intergovernmental process based on the principle of consensus and in line with the guiding principles of the consultation process to find agreement on features and functions of a potential forum of States and to find ways to enhance the implementation of international humanitarian law[186].

It likewise welcomes the activities of the ICRC Advisory Service on IHL, the increasing number of national commissions for the implementation of IHL and their work. Interestingly, it requests the Secretary General to submit a «comprehensive report on the status of the Additional Protocols [...] as well as on measures taken to strengthen the existing body» of IHL. There is therefore a willingness to associate the UN, the ICRC, and the State parties, in order to create synergies contributing to the effective implementation of IHL.

Furthermore, individuals may decide to bring legal action before courts dedicated to human rights, since they may be deprived from legal standing in the IHL field. In this context, it is worth mentioning the case of the European Court of Human Rights, to the extent that it has increasingly referred to IHL in its case-law and has recognized the «cumulative and direct application of IHL»[187]. Indeed, it has issued judgments on numerous situations relating to armed conflicts such as the conflict in Chechnya[188], the conflict oppos-

186 *Ibid.,* para. 8.

187 Heintze, «On the Relationship between Human Rights Law Protection and International Humanitarian Law», *op. cit.*, 2004, p. 801.

188 As of February 2017, the ECtHR had issued more than 250 judgments finding violations of the ECHR in connection with the armed conflict in Chechnya. See ECtHR, Factsheet 'Armed

ing Cyprus to Turkey[189], the conflict between the Turkish security forces and the Workers' Party of Kurdistan (PKK)[190], the Balkan wars[191], NATO operations in the former Yugoslavia[192], the Armenian-Azerbaijani conflict over Nagorno-Karabakh[193], international military operations in Iraq[194], the conflict between Ukraine and Russia[195], as well as some sporadic cases relating to acts

conflicts', February 2017. Available at: http://www.echr.coe.int/Documents/FS_Armed_conflicts_ENG.pdf (Accessed: 15.05.2017).
See also Abresch, «The human rights law of internal armed conflicts: the ECHR in Chechnya», *op. cit.*, 2005, pp. 741-767.

189 ECtHR, Grand Chamber, Cyprus v. Turkey, Judgment of 10 May 2011; ECtHR, Grand Chamber, Varnava and other v. Turkey, Judgment of 18 September 2009; ECtHR, Andreou v. Turkey, Judgment of 27 October 2009; ECtHR, Charalambous and Others v. Turkey and Emin and Others v. Cyprus, Decision on the admissibility of 3 April 2012. Quoted in ECtHR, Factsheet 'Armed conflicts', *op. cit.*, February 2017.

190 See e.g.: ECtHR, Mentes and others v. Turkey, Judgment of 28 November 1997; ECtHR, Orhan v. Turkey, Judgment of 18 June 2002; ECtHR, Er and others v. Turkey, Judgment of 31 July 2012; ECtHR, Meryem Çelik and Others v. Turkey, Judgment of 16 April 2013; ECtHR, Benzer and Others v. Turkey, Judgment of 12 November 2013. Quoted in ECtHR, Factsheet 'Armed conflicts', *op.* cit., February 2017.

191 Concerning the war in Croatia: ECtHR, Grand Chamber: Marguš v. Croatia, Judgment of 27 May 2014; Concerning the war in Bosnia and Herzegovina: ECtHR, Palić v. Bosnia and Herzegovina, Judgment of 15 February 2011; ECtHR, Stichting Mothers of Srebrenica and Others v. the Netherlands, Decision on the admissibility of 11 June 2013; ECtHR, Grand Chamber: Maktouf and Damjanović v. Bosnia and Herzegovina, Judgment of 18 July 2013; ECtHR, Mustafić-Mujić and Others v. the Netherlands, Decision on the admissibility of 30 August 2016. Quoted in ECtHR, Factsheet 'Armed conflicts', *op. cit.*, February 2017.

192 ECtHR, Grand Chamber, Banković and Others v. Belgium and 16 Other Contracting States, Decision on the admissibility of 19 December 2001; ECtHR, Grand Chamber: Markovic and others v. Italy, Judgment of 14 December 2006; ECtHR, Grand Chamber,
Behrami and Behrami v. France and Saramati v. France, Germany and Norway, Decision on the admissibility of 31 May 2007. Quoted in ECtHR, Factsheet 'Armed conflicts', *op. cit.*, February 2017.

193 ECtHR, Grand Chamber, Chiragov and Others v. Armenia, Judgment of 16 June 2015; ECtHR, Grand Chamber, Sargsyan v. Azerbaidjan, Judgment of 16 June 2015. Quoted in ECtHR, Factsheet 'Armed conflicts', *op. cit.*, February 2017.

194 ECtHR, Al-Saadoon & Mufdhi v. the United Kingdom, Judgment of 2 March 2010; ECtHR, Grand Chamber, Al-Skeini and Others v. the United Kingdom, Judgment of 7 July 2011; ECtHR, Grand Chamber, Al-Jedda v. the United Kingdom, Judgment of 7 July 2011; ECtHR, Pritchard v. the United Kingdom, Strike-out decision of 18 March 2014; ECtHR, Grand Chamber, Hassan v. the United Kingdom (Application nº 29750/09), Judgment of 16 September 2014; ECtHR, Jaloud v. the Netherlands, Judgment of 20 November 2014. Quoted in ECtHR, Factsheet 'Armed conflicts', *op. cit.*, February 2017.

195 ECtHR, Ukraine v. Russia (III), Strike-out decision of 1 September 2015; ECtHR, Lisnyy and Others v. Ukraine and Russia, Decision on the admissibility of 5 July 2016. Furthermore, five inter-State applications lodged by Ukraine against Russia (Ukraine v. Russia (nº 20958/14);

that occurred during World War II[196]. In those cases, the interplay between IHL and IHRL is evident, as the Court applies the rights contained in the ECHR, especially the right to life (article 2) or the right to liberty and security (article 5), in light of IHL.

A clear example can be observed in the Hassan v. The United Kingdom case of 2014[197]. It concerned the acts of British armed forces in Iraq, in the context of an international armed conflict, against the applicant's brother. The latter alleged that his brother had been arbitrarily deprived of liberty and found dead, bearing marks of torture and execution. For present purposes, the case raised issues regarding the right to liberty and security in times of armed conflicts (article 5 ECHR) and the interplay between IHL and IHRL. In particular,

> this is the first case in which a respondent State has requested the Court to disapply its obligations under Article 5 or in some other way to interpret them in the light of powers of detention available to it under international humanitarian law[198].

Consequently, the Court had to clarify the rules of applicability between IHL and IHRL in order to determine whether the existence of an international armed conflict entailed the disapplication of article 5 ECHR. On this basis, the Court based its reasoning on article 31(3) VCLT, which required that the interpretation of treaty norms should take into account subsequent State practice as well as other relevant rules of international law applicable to the case. In this instance, the interpretation of article 5 ECHR shall therefore take into account subsequent State practice and IHL. Accordingly, the Court refused to rely on the *lex specialis* rule. It added that it should interpret and apply the provisions contained in the ECHR in a manner which is «consistent

Ukraine v. Russia (II) (nº 43800/14); Ukraine v. Russia (IV) (nº 42410/15); Ukraine v. Russia (V) (nº 8019/16) and about 4000 individual applications relating to the events in Crimea or the hostilities in Eastern Ukraine are pending before the ECtHR. Quoted in ECtHR, Factsheet 'Armed conflicts', *op. cit.*, February 2017.

196 ECtHR, Grand Chamber, Janowiec and Others v. Russia, Judgment of 21 October 2013; ECtHR, Kononov v. Latvia (Application nº 36376/04), Judgment of 17 May 2010.

197 ECtHR, Grand Chamber, Hassan v. the United Kingdom (Application nº 29750/09), Judgment of 16 September 2014.

198 *Ibid.*, para. 99.

with the framework under international law delineated by the [ICJ]» regarding the interplay between IHL and IHRL[199]. It further considered both IHL and the ECHR provide safeguards from arbitrary detention in time of armed conflicts, so that article 5 ECHR should be interpreted in light of the Geneva Conventions:

> even in situations of international armed conflict, the safeguards under the Convention continue to apply, albeit interpreted against the background of the provisions of international humanitarian law. By reason of the co-existence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict, the grounds of permitted deprivation of liberty set out in subparagraphs (a) to (f) of that provision *should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions*[200] [emphasis added].

On this basis, the Court concluded that since the internment of the applicant's brother complied with IHL, it shall not be considered non-arbitrary and article 5 ECHR had not been violated.

In addition to IHRL, the emergence of the notion of 'Responsibility to Protect' echoes the system established by Common Article 1, thereby providing it with greater authority.

2. THE RESPONSIBILITY TO PROTECT

A corollary of the obligation to ensure respect for IHL as provided by Common Article 1 is the principle of the Responsibility to Protect, a concept developed under the auspices of the UN in 2005[201]. While these are not equivalent concepts, they are deeply linked and it is difficult to talk about Common Article 1 without referring to the R2P, a broader and recent concept that has gained much importance in the recent years.

199 *Ibid*., para. 102.

200 *Ibid*., para. 104.

201 UN 2005 World Summit of the UN concept of the Responsibility to Protect (R2P) populations from genocide, war crimes, ethnic cleansing and crimes against humanity (paras. 138-139 of A/RES/60/1 – 2005 World Summit Outcome Document).

The R2P was a Canadian idea, which was eventually endorsed by UN Member States on the occasion of the 2005 World Summit. It is defined in the Final Document of the 2005 International Summit as a responsibility falling upon States to protect their own populations from genocide, war crimes, ethnic cleansing and crimes against humanity. It foresees that in the case of default from the relevant State, the international community has the duty to use all the diplomatic, humanitarian and other appropriate means to protect populations. This may entail the resort to force.

In this regard, one may wonder whether this 'new' concept reinforces the legal authority of Common Article 1 or if it is a demonstration of the impotence of the international community to prevent these crimes, especially considering its uncertain legal value.

It is argued that in a strictly legal sense, the creation of the concept of R2P reinforces the obligation to ensure respect for IHL and actually develops upon it, by adding other international crimes. Indeed, even though the R2P has an uncertain legal value, it is a recent concept that develops upon Common Article 1.

2.1. A recent concept that develops upon Common Article 1

The absence of reaction from the international community when exactions were committed in Rwanda or in ex-Yugoslavia led the Canadian government to form the International Commission on Intervention and State Sovereignty (hereafter, 'ICISS'), an *ad hoc* commission founded by Gareth Evans and Mohamed Sahnoun and composed of members of the UN General Assembly. The purpose of such commission was to provide tools to the international community in case of crimes of genocide, ethnic cleansing, crimes against humanity, and war crimes. The outcome of this process was the publication of the report on the concept of 'Responsibility to Protect' in December 2001[202]. This report also intended to provide a new framework that could combine antagonist views on what should be the international community's response in case of international crimes. In this context, some advocated for the concept of 'right to intervene' or '*droit d'ingérence*' in the words of Ber-

[202] International Commission on Intervention and State Sovereignty (hereafter, 'ICISS'), The Responsibility to Protect, Ottawa: International Development Research Centre, 2001.

nard Kouchner, while others feared that the implementation of such principle could lead to abuse and neocolonial interventions.

The concept of Responsibility to Protect was later enshrined in the final Document of the 2005 World Summit. The Heads of State and Government therefore committed themselves to protect their own population, but also to prevent the most horrendous crimes – genocide, war crimes, ethnic cleansing and crimes against humanity – by helping other States to comply with this responsibility. The R2P is defined in the 2005 World Summit Final Document as follows:

> 138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.
>
> 139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out[203].

[203] UN 2005 World Summit of the UN concept of the Responsibility to Protect (R2P) populations from genocide, war crimes, ethnic cleansing and crimes against humanity (paras. 138-139 of A/RES/60/1 – 2005 World Summit Outcome Document).

Thus, in accordance with the 2005 UN World Summit, States have the R2P their populations from genocide, war crime, ethnic cleansing and crimes against humanity. The R2P is based on three pillars: 1) the State's responsibility to protect its own population; 2) the international assistance and reinforcement of capacities; and 3) the action of the international community in the event that a State fails to protect its own population. The issue of reaction is therefore a consequence only if prevention has failed[204], and it also includes the responsibility to rebuild, besides the responsibility to act when crimes are committed. The international community has the duty to use appropriate diplomatic, humanitarian and other peaceful means to help protect populations from these crimes; this may imply in last resort the use of coercive force.

While the first two pillars have been approved without much discussion, the third one is more controversial, as some countries have expressed fears of another formulation of the so-called *droit d'ingérence*. This is not surprising as it constitutes the most extreme form of intervention and may entail irreparable damages. Moreover, the experience in Libya demonstrates that it is difficult to fulfill the objectives assigned – protecting civilian populations and ensure respect for the law, or to strictly stick to the mandate. Nevertheless, all three pillars are equally important, so that the third one shall be activated solely in last resort. It should therefore be recalled that the prior objective of the R2P is to provide a peaceful solution and focuses on prevention. Further, the ICISS Report enumerates several conditions that must be fulfilled for a military intervention to fall under the R2P: right intention, last resort, proportional means, and reasonable prospects. Finally, the third pillar remains subject to the respect of international law. In particular, any military action undertaken in this respect shall be taken in accordance with Chapter VII of the UN Charter, by referral to the Security Council.

One may wonder whether the implementation of the R2P as described above might not entail an infringement upon the fundamental principle of State sovereignty. Yet, as emphasized in the report of the ICISS, one of the aims of the R2P is to make the concept of sovereignty enter into a new paradigm, that of 'sovereignty as responsibility'[205]. Traditionally, sovereignty is defined as

204 Gareth Evans, «The Responsibility to Protect: consolidating the norm», *Da favorite papers*, vol. 1, 2010, p. 73.

205 ICISS, The Responsibility to Protect, *op. cit.*, 2001.

the absolute and unconditional authority of the State to govern itself. This concept has consequences both internally and externally. Internally, this means that the State has the power to do everything it deems necessary to govern itself, although internal sovereignty has also evolved as a result of democratization, thus finding its legitimacy in the people. Externally, the concept of sovereignty provides rights and obligations to the State. In particular, sovereignty underlies the principles enshrined in the Charter of the United Nations, namely the sovereign equality of all States, and the principle of non-intervention in the internal affairs of other States[206], with all the consequences that they entail.

However, the R2P intends to change this paradigm, by associating the concept of external sovereignty with that of responsibility: «Sovereignty as responsibility has become the minimum content of good international citizenship»[207], so that internal sovereignty implies the obligation to protect one's inhabitants' dignity and basic rights. As Anne Peters puts it[208]:

> As internal sovereignty has evolved from a primarily power-based to a legitimacy-impregnated concept and from the idea of uniformity to the division of powers, so is external sovereignty now evolving. Notably, the new concept of sovereignty as responsibility to protect infuses external sovereignty with elements of internal sovereignty, because it conditions non-intervention (a consequence or corollary of external sovereignty) on the capability properly to discharge the internal functions of a sovereign, and postulates the sovereign's accountability vis-à-vis the population[209].

Pursuant to this approach, sovereignty cannot be understood as an absolute and unconditional power anymore, insofar as humanity becomes the element that legitimizes it. Humanity has become the «normative source and end of sovereignty»[210]. The word 'responsibility' is not an empty concept but entails a responsibility to protect basic human rights. If the State fulfills correctly that responsibility, then it acquires legitimacy. However, if a State is unable to prevent the commission of the most horrendous crimes, namely the crimes of genocide, crimes against humanity, war crimes, or ethnic cleansing, it does not properly

206 Charter of the United Nations, 26 June 1945, U.N.T.S. nº 993, article 2.
207 ICISS, The Responsibility to Protect, *op. cit.*, 2001, para. 135.
208 Peters, «Humanity as the A and Ω of sovereignty», *op. cit.*, 2009, pp. 513-544.
209 *Ibid.*, p. 517.
210 *Ibid.*, p. 518.

assume its responsibility as sovereign, thus allowing third States to take over that responsibility. Anne Orford summarized well this idea in the following terms:

> [i]f a government could no longer guarantee the security and welfare of the population, it might no longer be recognizable as the lawful authority over a territory. Sovereignty, understood in that sense of an obligation to preserve life, had become a pooled function. If local claimants to authority in Africa – whether they be governments, rebel leaders, militia leaders, civil society, or the general population – fail to exercise the responsibility to protect citizens, «they cannot legitimately complain against international humanitarian intervention». A government that cannot protect its citizens may no longer even be recognizable as the lawful authority in a territory[211].

The infringement upon the internal sovereignty thus activates a reaction at international level, to the extent that the «obligation to protect basic rights of all persons within the State is owed not only to them but also to the international community»[212]. Hence, if the international community decides to take action on the basis of the R2P, it would not amount to an infringement of the principle of State sovereignty, but rather as a consequence of the incorrect fulfillment of sovereignty by the State at stake. In Gareth Evans' words, «the core theme is not intervention but protection»[213].

Thus, in the same way as Common Article 1, the R2P foresees a system of collective responsibility in case of international crimes. In this respect, Laurence Boisson de Chazournes and Luigi Condorelli already observed in 2006[214] that the R2P, far from being a new concept, actually covers the same content as already existing concepts such as the late '*droit d'ingérence*' or more importantly, the obligation to respect and ensure respect for IHL. Semantics change, but the content does not, as the 'Responsibility to Protect' merely assembles several legal concepts into a single framework[215].

In particular, both concepts follow the same logic. Both establish a system of collective responsibility at international level pursuant to which third

211 Anne Orford, «Moral responsibility and the Responsibility to Protect», *European Journal of International Law*, vol. 24(1), 2013, p. 101.

212 Peters, «Humanity as the A and Ω of sovereignty», *op. cit.*, 2009, p. 526.

213 Evans, «The Responsibility to Protect: consolidating the norm», *op. cit.*, 2010, p. 73.

214 Boisson de Chazournes and Condorelli, «De la Responsabilité de Protéger ou d'une nouvelle parure», *op. cit.*, 2006, pp. 11-18.

215 *Ibid*.

States may intervene in the event of a failure from another State. In the case of Common Article 1, third States must take all the possible measures necessary to put an end to repeated or serious violations of IHL, while the R2P requires third States to protect the basic rights of the inhabitants of a State if the latter fails to do so.

While the logic is the same, there are some differences. The R2P is indeed a broader concept *ratione materiae*. It may be activated in the event of violations of both IHL and IHRL, as it intends to protect populations from war crimes, but also genocides, crimes against humanity, and ethnic cleansing without requiring the nexus of an armed conflict. It is also a broader concept *ratione temporis* insofar as it explicitly includes prevention and the responsibility to rebuild. As shown by Anne Peters, the «emphasis on protection corresponds to the evolution of the contemporary human rights discourse, in which protection has become the overarching doctrinal paradigm»[216].

Furthermore, the wording of the R2P is more precise than that of Common Article 1, as the latter is written in broad terms, without even specifying the means to achieve the purpose of ensuring respect for IHL. Specifically, the R2P explicitly envisages measures, from prevention to military intervention. That being said, the measures available for States to ensure respect for IHL and to implement the R2P are *de facto* similar and shall always be undertaken in accordance with international law.

Consequently, the R2P is a recent concept which is structurally similar to Common Article 1. It goes further than the latter by protecting populations from the most serious violations of IHL and IHRL, thanks to a progressive interpretation of the principle of sovereignty. The content of sovereignty shifts from the notion of power to that of responsibility for the protection of peoples' basic rights. In the same way as Common Article 1, it is intended to be at the basis of the international legal order, as it aims to preserve the international public order through the establishment of a system of collective responsibility binding upon the international community. This principle has become popular in the last years and has been implemented on several occasions by the UNSC to justify the use of force. Nevertheless, the implications of such concept are far from being clear to the extent that its legal status is subject to debate.

216 Peters, «Humanity as the A and Ω of sovereignty», *op. cit.*, 2009, p. 525.

2.2. An uncertain legal status

The R2P's legal status is far from being crystal clear as evidenced by the number of scholarly publications on this matter. In this respect, calling it a 'concept', a 'principle', or a 'norm' entails different consequences[217].

It could be argued that it is an instrument of soft law and that it cannot be considered in any way as legally binding. In this sense, the inclusion of the R2P principle in a General Assembly's resolution does not necessarily confer a compulsory legal effect to it so that it should normally be considered as non-binding. However, this approach might be too radical.

A more nuanced approach to the issue considers that not all the elements of the R2P benefit from the same legal status. In this respect, Anne-Laure Chaumette notes that even if we considered the R2P as a legal norm, it could not be interpreted as a duty falling upon third States, but rather as a possibility, the responsibility to protect being a secondary obligation. Indeed, she demonstrates that the R2P is twofold. First, the State in question must protect its own population, and there is here a classical obligation, a duty. Second, third States are authorized to take action, so that the R2P does not actually enunciate a positive obligation, but a legal authorization. The R2P authorizes a particular behavior but does not punish the absence thereof. The objective of the R2P, in Anne-Laure Chaumette's view, is not to punish the defaulting State, but rather to find a mechanism to restore the legality and effectively protect civilians[218]. This approach is shared by Alain Pellet, who considers that the State in question indeed has a duty to protect, this duty being a customary obligation; however, he also considers that the duty falling upon the international community is soft[219].

In this line of argument, it could also be argued that the different pillars of the R2P benefit from differing legal effects. A representative from Pakistan expressed this idea on the occasion of the 2009 UN General Assembly debate

217 Anne-Laure Chaumette, «La responsabilité de protéger, interrogations sémantique», in Anne-Laure Chaumette and Jean-Marc Thouvenin (dir.), *La responsabilité de protéger, dix ans après, Actes du colloque du 14 novembre 2011*, CEDIN, Pedone, 2013, p. 17.

218 Chaumette, «La responsabilité de protéger, interrogations sémantique», *op. cit.*, 2013, pp. 17-18.

219 Alain Pellet, «What normativity for the Responsibility to Protect?», in Chaumette and Thouvenin (dir.), *La responsabilité de protéger, dix ans après, op. cit.*, 2013, pp. 185-191.

on the R2P in the following terms: «If members have not noticed, let me point out that everyone agrees to pillars one and two»[220].

Nevertheless, others purport that the R2P as a whole has effectively become a legal norm:

> the reiteration of the principle of sovereignty as implying responsibility to protect, and its limited, but partly inconsistent application in practice, has promoted its ongoing process of crystallization into hard international law[221].

As observed by Jean-Marc Thouvenin, the case-law of the ICJ also stresses that «[it] is well recognized that declarations [...] may have the effect of creating legal obligations», and «the sole relevant question is whether the language employed in any given declaration does reveal a clear intention [...]»[222]. In this context, the Resolution was approved unanimously, thus reaching universal endorsement. In the view of Alex J. Bellamy, the inclusion of the R2P concept in the World Summit Outcome:

> transformed the principle, from a commission proposal actively supported by a relatively small number of like-minded States' to a concept 'endorsed by the entire UN membership[223].

Furthermore, as demonstrated above, the R2P has two recipients, not only the population but also the international community. It consequently aims to become an *erga omnes* norm[224], whose violation is in the interest of the international community as a whole. Be that as it may, endorsing the R2P as an *erga omnes* obligation cannot give rise to an entitlement to the use of lethal force, as the R2P always remain subject to international law, including the UN Charter.

220 UN GAOR, 63rd Session, 98th plen. mtg, p. 4, UN Doc. A/63/PV.98, 24/07/2009. Quoted in Jonah Eaton, «An emerging Norm – Determining the Meaning and Legal Status of the Responsibility to Protect», *University of Michigan Law School*, vol. 32(4), 2011, p. 790.

221 Peters, «Humanity as the A and Ω of sovereignty», *op. cit.*, 2009, p. 524.

222 Jean-Marc Thouvenin, «The legal effects of the Responsibility to Protect commitments», in Chaumette and Thouvenin (dir.), *La responsabilité de protéger, dix ans après*, *op. cit.*, 2013, pp. 10-12.

223 Alex J. Bellamy, *Responsibility to Protect: the Global Effect to End Mass Atrocities*, 2009, p. 95. Quoted in Anne Orford, «Moral responsibility and the Responsibility to Protect», *op. cit.*, 2013, p. 102.

224 Peters, «Humanity as the A and Ω of sovereignty», *op. cit.*, 2009, p. 526.

According to the UN Secretary General, the legal nature of the R2P originates not only from the concept of sovereignty understood as responsibility but also from pre-existing fundamental principles of international law[225]. In this regard, while the responsibility to protect from war crimes is already established by IHL through Common Article 1, other instruments of IHRL also stipulate *erga omnes* obligations. In the above-mentioned Barcelona Traction Case, the ICJ held the following:

> [a]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In the view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.
>
> Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law... others are conferred by international instruments of a universal or quasi-universal character[226].

In the same line, the ILC gave as examples of *jus cogens* norms the prohibition of, *inter alia*, genocide and racial discrimination in its Commentary to the 'Draft Articles on State Responsibility' in 2001[227]. Likewise, it referred to crimes against humanity as one of the «most frequently cited candidates for the status of *jus cogens*» in its Report on 'Fragmentation of international law'[228]. As a result, it seems reasonable to agree with Laurence Boisson de Chazournes and Luigi Condorelli when they talk about a new ornament for a well-estab-

225 Report of the Secretary General on Responsibility to Protect: timely and decisive response, A/66/874-S/2012/578, 25.07.2012, p. 3.

226 ICJ, Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Second Phase), ICJ Reports 1970, p. 32.

227 Draft Articles on State Responsibility, Commentary on article 4, paras. 4-6 in Official Records of the General Assembly, Fifth-sixth Session (A/56/10), pp. 283-284.

228 Report of the Study Group of the International Law Commission on Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law, A/CN.4/L.682, 13.04.2006, p. 189. Available at: http://legal.un.org/docs/?symbol=A/CN.4/L.682 (Accessed: 22.05.2017).

lished concept («une nouvelle parure pour une notion déjà bien établie»)[229]. The R2P actually brings different existing elements of international law into a single unified framework.

Conclusions
Chapter 1

Common Article 1 and the R2P establish a system of collective responsibility in case of violations of IHL and mass atrocities respectively. While the former focuses on the violations of IHL, the latter aims to tackle violations of both IHL and IHRL. Both systems participate in the creation of a multilevel governance system, whereby the international community takes action in case of failure at State level. As a result, they constitute one aspect of the implementation of IHL.

While Common Article 1 benefits from an undisputable legal authority and is considered an obligation of quasi-constitutional[230] nature in the international legal order, the same cannot be said about the R2P, whose legal status has not been unanimously decided yet. In any case, the emergence of the R2P as a norm of international law reinforces the authority of Common Article 1, as it is a structurally similar concept. It contributes to the development of an international legal framework that establishes a system of collective responsibility whenever international crimes were to be committed. What happens within the borders of a State has become a matter of international concern whenever serious or repeated violations of IHL and human rights occur, and States can no longer protect themselves behind the principle of sovereignty. In this respect, while the normativity of pillar three of the R2P is not definite, there seems to be an international consensus concerning pillar one as a legal norm, that is, on sovereignty as responsibility.

Pursuant to the system established by Common Article 1, States are placed under a duty to ensure respect for IHL internally and externally. Com-

229 Boisson de Chazournes and Condorelli, «De la Responsabilité de Protéger ou d'une nouvelle», *op. cit.*, 2006, pp. 11-18.

230 Boisson de Chazournes and Condorelli, «Common Article 1 revisited: Protecting collective interest», *op. cit.*, 2000, pp. 68, 85-86.

mon Article 1 sets up a decentralized system of compliance whereby States are made guardians of the respect for IHL. Common Article 1 indeed stipulates an obligation to ensure respect for IHL by other States, a «multi-faceted responsibility»[231] falling upon all States, which requires them to act before, during and after warfare.

It first entails measures in time of peace, to *prevent* IHL violations from occurring, such as the adoption of domestic legislation transposing IHL or the dissemination of IHL among the civilian population. The underpinning is the following: if States take all the necessary measures in times of peace, then they will be ready to conduct hostilities in accordance with IHL. In pragmatic terms, it would indeed appear more difficult for the armed forces, just to name those, to learn how to conduct hostilities lawfully during warfare. As a result, one important challenge is to reach the future members of non-State armed groups, as they are responsible for a significant number of IHL violations. Disseminating and promoting IHL not only within the armed forces but also among civilians is indeed essential. Furthermore, the use of conditionality clauses, especially in arms trade, is an effective means to implement the preventive aspect of Common Article 1. The objective at the stage of prevention is arguably to avoid that the irreparable is committed, and in practical terms, this is probably an essential aspect of Common Article 1.

The obligation to ensure respect for IHL also requires States to react during an armed conflict, in order to *end* IHL violations. In this respect, third States may conduct different individual actions, from political dialogue to economic action, to exert pressure on the belligerent party infringing upon IHL. Nonetheless, countermeasures and military intervention can only be agreed upon within the framework of the UN and remain subject to international law, in particular to the prohibition of the use of force.

Nevertheless, as already mentioned, this obligation is conceived as a best effort obligation, or a due diligence obligation. It would indeed be unrealistic to obtain the effective cessation of any IHL violation from third States. A concomitant issue therefore arises: even though third States cannot be required to successfully stop IHL violations, one could wonder what would be the consequences in the absence of reaction from third States in the case of serious or repeated vio-

231 Stutz, Blazeby and Goussac, «Strengthening compliance with International Humanitarian Law», *op. cit.*, 2015, p. 54.

lations of IHL. In accordance with the fundamental principles of international law, if a State breaches upon its international obligations, it entails its international responsibility[232]. As a result, it is possible to wonder whether an omission can entail the international responsibility of third States to the armed conflict. While this line of reasoning might seem appealing in order to ensure that third States effectively take all the possible measures to implement Common Article 1, it seems unrealistic and extremely difficult to enforce as it would be practically unfeasible to entail the responsibility of all the States that have not taken action in response to an armed conflict taking place in a third country. Furthermore, it shifts the focus from the most pressing issue: that the State actually infringing upon IHL is brought back to an attitude of compliance.

That being said, all States arguably do not have the same capacities and political bonds with one another, so that differing responsibilities should probably be established. In this regard, one could claim that the States' actual capacity to influence the infringing State is the determining element. As mentioned above, Knut Dörmann and José Serralvo argue that if a State is closely tied to one of the warring parties, its duty to ensure respect for IHL is stronger[233]. This position is in line with the case-law of the ICJ on the obligation to prevent genocide[234].

It could also be argued that the permanent members of the UNSC have a more important role to play, an approach already proposed by the ICISS Report with regard to the R2P. Being the institution in charge of establishing and maintaining international peace and security pursuant to the UN Charter, it arguably holds an important role in this regard and the same reasoning could be made with regard to Common Article 1. This perspective is actually sustained by practice, as the UNSC has already described IHL violations as threats to international peace and security.

In this regard, the UN Secretary General proposed to require the five permanent members to abstain and not veto resolutions authorizing interna-

232 ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Official Records of the General Assembly, Fifty-sixth session, Supplement nº 10 (A/56/10), chp.IV.E.1) (hereafter, 'ARSIWA'), articles 1-2. Available at: http://legal.un.org/docs/?path=../ilc/texts/instruments/english/draft_articles/9_6_2001.pdf&lang=EF (Accessed: 22.05.2017).

233 ARSIWA.

234 ICJ, Application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, ICJ Reports 2007, p. 43, para. 430.

tional reaction in situations where people are at risk of mass atrocities, but the UN General Assembly did not endorse this proposal in 2009[235]. Nonetheless, there have been some changes since 2009. In this sense, Jonah Eaton actually considers that there are legal expectations towards the UNSC from the international community to take action in situations of international crimes:

> There is now a heavy accumulated weight of *opinio juris*, both from opponents and advocates of responsibility to protect, that the Security Council should act in cases of mass atrocity crimes, despite the considerable degree of mistrust revealed[236].

It is important noticing that one of the permanent members of the Security Council, France, has undertaken a campaign in this sense. In response to Russia's constant use of its right to veto in relation with the Syrian conflict, a French-Mexican initiative was proposed before the General Assembly inviting the permanent members of the UNSC to refrain from using their right to veto in the event of mass atrocities[237]. In particular, the political statement describes «crimes of genocide, crimes against humanity and war crimes on a large scale» as threats to international peace and security requiring action by the international community. It also calls for international action and specifically refers to the R2P principle. The political statement refers to the right to veto as a 'responsibility' rather than a privilege. In parallel to this, the Accountability, Coherence and Transparency Group[238] drafted a 'Code of conduct regarding Security Council action against genocide, crimes against humanity and war crimes'[239]. At the time

235 According to Jonah Eaton, only over thirty-five states echoed the Secretary-General's Report's call that Security Council members refrain from using the veto in situations where people are at risk of mass atrocities. See Eaton, «An emerging Norm – Determining the Meaning and Legal Status of the Responsibility to Protect», *op. cit.*, 2011, p. 797.

236 *Ibid.*, p. 801.

237 70th General Assembly of the United Nations, Political statement on the suspension of the veto in case of mass atrocities presented by France and Mexico, Open to signature to the members of the United Nations. Available at: http://centerforunreform.org/sites/default/files/French%20Mexican%20Proposal%20English.pdf (Accessed: 06.10.2015).

238 The Accountability, Coherence, Transparency Group was created in 2013 under the auspices of the Swiss government. It is a regional group uniting 27 small and medium States whose objective is to improve the coherence and transparency of the Security Council.

239 Explanatory Note on a Code of Conduct regarding Security Council action against genocide, crimes against humanity or war crimes. Available at: http://www.unelections.org/files/Code%20of%20Conduct_EN.pdf (Accessed: 06.10.2015).

of writing, the French-Mexican initiative has gathered the support of more than 75 States, while the Code of conduct has been supported by 53 States[240]. The initiative is gaining visibility. On the occasion of the 70th session of the General Assembly in 2015, the then French President of the Republic publicly renounced to using its right of veto in case of mass atrocities, thus adding pressure:

> La France veut que les membres permanents du Conseil de sécurité ne puissent plus recourir au droit de veto en cas d'atrocités de masse. Comment admettre que l'ONU, encore aujourd'hui, puisse rester paralysée, lorsque le pire se produit ? Là aussi, montrons l'exemple. Je m'engage ici à ce que la France n'utilise jamais son droit de veto lorsqu'il y a des atrocités de masse.
>
> Le droit de veto, tel qu'il avait été introduit lors de la fondation des Nations unies n'était pas le droit de bloquer. C'était le devoir d'agir. Nous devons agir. Nous pouvons agir. Nous l'avons montré depuis 70 ans. Là, aujourd'hui, nous pouvons agir pour régler les drames d'aujourd'hui et sauver la planète demain. Agissons[241].

While the effects of such initiative remain to be seen, they arguably highlight a certain change regarding the prerogatives of the UNSC and certainly tilt the balance in favor of a duty for the UNSC to act. Without going that far, some have argued that Common Article 1 entails «an obligation to explain and justify inactivity, or even potentially obstructing voting behavior in a multilateral forum»[242].

These developments are interesting insofar as they aim to provide the UNSC's permanent Member States with a higher duty, which stems from its particular role in maintaining international peace and security. Since this institution has already taken action to ensure respect for IHL, it might be argued that its permanent Member States are more responsible for ensuring respect

240 Rita Emch, «Appels pour renoncer au droit de veto en cas d'atrocités», *Swissinfo*, 04.10.2015. Available at: http://www.swissinfo.ch/fre/politique/conseil-de-s%C3%A9curit%C3%A9-de-l-onu_appels-pour-renoncer-au-droit-de-veto-en-cas-d-atrocit%C3%A9s/41696184 (Accessed: 06.10.2015).

241 Débat général de la 70ème Assemblée générale des Nations unies – Discours de M. François Hollande, président de la République française – Assemblée générale – 28.09.2015. Available at: http://www.franceonu.org/70eme-Assemblee-generale-des-Nations-unies-le-discours-de-Francois-Hollande (Accessed: 06.10.2015).

242 Geiβ, «The Obligation to Respect and to Ensure Respect for the Conventions», *op. cit.*, 2015, pp. 129-130.

for IHL than the other States. Nonetheless, given the current state of international law, it probably is possible to talk about a soft duty only and assigning responsibility in the technical legal sense to the UNSC permanent members in case of omission has not yet occurred.

This discussion also highlights one of the main issues regarding IHL: «the need to enhance the effectiveness of mechanisms of compliance». Indeed, the Protecting Powers mechanism has been underused; the IHFFC has never been activated, so that, *in fine*, the institution in charge of monitoring compliance with IHL during armed conflicts is the ICRC. However, some of these activities, such as public denunciations, cannot be undertaken by the ICRC.

The system established by Common Article 1, completed by the R2P and IHRL, is therefore undeniably perfectible, insofar as the action of the international community to ensure respect for IHL, especially regarding intervention, can remain conditioned by political interests. This consideration also adds weight to the necessity of prevention, to take all the possible measures in peacetime to prevent that war crimes and other mass atrocities occur, so as not to be in an irreparable situation and need to resort to international criminal law.

Chapter 2
IMPLEMENTATION AT EU AND DOMESTIC LEVELS

The previous chapter is dedicated to the meaning, content, and scope of the obligation to ensure respect for IHL. It is acknowledged that Common Article 1 has become an essential element of IHL and is at the heart of the international legal order itself. In this regard, while the legal authority of Common Article 1 as a system of collective responsibility has been progressively accepted in the international legal system, it is equally important to ensure that State parties effectively endorse this acceptation of Common Article 1 as they are its primary enforcers.

Therefore, the objective pursued in this chapter is to assess whether and to what extent the EU[1], France, and Spain are bound by Common Article 1. In particular, it seeks to analyze if and how the three actors have transposed Common Article 1 into their respective legal orders, and if they have effectively implemented it.

In the first section, the issue of transposition is analyzed. The question of the integration of Common Article 1 does not raise much doubt with regard to France and Spain, as both are State parties to the Geneva Conventions and have enacted legislation to integrate them in their respective legal orders. Conversely, this question is especially relevant with respect to the EU, since it cannot be a party to the Geneva Conventions but has nonetheless adopted a document, the Guidelines on promoting compliance with IHL[2], which appears to 'transpose' the content of Common Article 1 at EU level.

1 Some paragraphs in this chapter were published in: Bettina Steible, «Externalizing EU values: the case of International Humanitarian Law», in Baigorri and Elvert (eds.), *Paz y valores europeos como possible modelo de integración y progreso en un mundo global = Peace and and European values as a potential model for integration and progress in a global words,* Cuadernos de Yuste, 11, Brussels, P.I.E. Peter Lang, 2019, pp. 77-97.

2 IHL Guidelines.

In the second section, the practice of the EU, France, and Spain on this issue is analyzed. Common Article 1 establishes an obligation mostly towards States, so that State practice is a key element of the effective implementation of the obligation to ensure respect for IHL. Analyzing practice serves different purposes in this regard. From a strictly legal perspective, it assists in interpreting the norms themselves, in accordance with article 31(1)(b) VCLT[3], and may contribute to the crystallization of customary norms, as it is one of the two constitutive elements. Lastly, it allows assessing to what extent the principles are translated into action, thus raising questions about the norms' effectiveness.

3 VCLT, article 31.3.b): «Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation» shall be taken into account, together with the context when interpreting treaties.

Section 1
TRANSPOSITION OF THE OBLIGATION TO ENSURE RESPECT

> *Pour remplir sa tâche, le droit international est continuellement obligé de recourir au droit interne. Sans lui, il est, sous de nombreux rapports, tout à fait impuissant*[4].

The purpose of IHL is to guarantee the protection of people *hors de combat*, who do not participate or do not participate anymore in the conduct of hostilities. This entails an obligation on the part of State parties to integrate the norms contained in IHL treaties into their own legal orders.

This obligation of transposition is based on international law, as it is reflected in the principle *pacta sunt servanda*: «Every treaty in force is binding upon the parties to it and must be performed by them in good faith»[5]. In this sense, article 27 VCLT adds that «[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty»[6]. As Claudia Sciotti-Lam has shown, treaty-based obligations reflect even more clearly the voluntarist nature than customary international law. When it ratifies a treaty, a State first consents to it and cannot find justifications to refuse the enforcement of such treaty. Otherwise, it would act in bad faith, and therefore, in violation of the most elementary principles of general international law. Consequently, the binding nature of a treaty for its State parties is based on the expression of consent made at the time of ratification. In this context, performance in good faith of treaty-based obligations imposes their integration in the legal orders of their State parties[7].

In the case of IHL, many of the norms contained in the Geneva Conventions are very detailed. On this basis, it has been sustained that regarding the «internal operation of treaties» in IHL, «there is no doubt that most of

4 Heinrich Triepel, «Les rapports entre le droit interne et le droit international», RCADI, 1923, p. 106. Quoted in Claudia Sciotti-Lam, *L'applicabilité des traités internationaux relatifs aux droits de l'homme en droit interne*, Brussels, Bruylant, 2004, p. 47.

5 VCLT, article 26.

6 VCLT, article 27.

7 Sciotti-Lam, *L'applicabilité des traités internationaux relatifs aux droits de l'homme en droit interne*, *op. cit.*, 2004, pp. 36-46.

their provisions are of a self-executing character»[8] as they do not require special implementing measures for their direct application. Conversely, a limited number of provisions are not self-executing, those «specifying, explicitly or implicitly, that States must provide for special means for implementation»[9].

In this context, the objective of this section is to analyze how the EU, France, and Spain have integrated Common Article 1 into their respective legal orders. It is argued in that regard that national legislation plays an important role in ensuring respect for IHL. Quite intuitively, it constitutes a reaffirmation of State parties' commitment, already expressed at the moment of ratification, and therefore contributes to the formation of *opinio juris* in that sense. This obligation of transposition is even more relevant in the case of Common Article 1, as there is no universal or regional mechanism of enforcement of the law and the correct implementation and application of IHL remains in the hands of the State parties. Finally, it constitutes a measure for implementation of IHL[10] and thus contributes to the enforcement of Common Article 1.

Despite a limited legal framework and a lack of attributed competence, the EU has ambitiously 'transposed' Common Article 1 by means of its Guidelines on ensuring compliance with IHL, thus reflecting its founding values. As for France and Spain, the issue of transposition is not very problematic, as both have adopted a monist approach to international law. In this respect, they have ratified the Geneva Conventions and adopted the measures necessary for their integration in their respective legal orders. Therefore, attention has been paid to policy documents with a view to analyze their approach to Common Article 1.

1. THE EUROPEAN UNION: AN OBLIGATION TO «PROMOTE COMPLIANCE WITH IHL»

In a ground-breaking article published in 2002 in the International Review of the Red Cross, Tristan Ferraro explained how International Humanitarian

8 Krzysztof Drewicki, «National legislation as a measure for implementation of international humanitarian law», in Frits Kalshovenand and Yves Sandoz, *Implementation of International Humanitarian Law/Mise en œuvre du droit international humanitaire*, Dordrecht, Martinus Nijhoff Publishers, 1989, p. 111.

9 *Ibid*.

10 *Ibid*., pp. 109-131.

Law had entered into the EU's sphere[11] by way of its Common Foreign and Security Policy (hereafter, 'CFSP') to the point that the EU can be considered a 'driving force' of the implementation and creation of IHL («moteur de la mise en oeuvre et de la création du droit international humanitaire»)[12]. Nonetheless, a few decades before, this question was not even imaginable as the European Community, and later the EU, did not have a claim to be an IHL actor. The prior objective of the European Communities was economical[13]. In that respect, they used to be considered the «economic Europe» as opposed to the «Europe of human rights», embodied by the Council of Europe. Furthermore, as the project of European Defense was rejected in 1952[14], there was no reason for the European Community to interfere in the area of IHL.

However, as the European economic integration had advanced, European leaders felt the need to democratize and politicize the European Community, and later on, the European Union. The idea of a political union has made its way so that a CFSP has been envisaged as well and created eventually in 1992. Today, despite the fact that the EU is one of the first economic powers in the world, it is still seeking its political power, especially at the international level. In this regard, the EU is often regarded as an economic giant, but a political dwarf. It is clear that the EU has not achieved such a political integration that it is able to speak with one voice at the international level.

Nevertheless, the EU has brought IHL into its area of concern. It should be noted that this appropriation of IHL by the EU is not without problems insofar it increases the complexity of the relationship between International, European and domestic law. The EU's intervention in the IHL sphere is thus at the crossroads of various contemporary mutations: the transformation of the EU from an economic to a political entity, as well as the slowing down of the image of the State on the international scene. It likewise highlights the complexity of the relationship between the different corpuses of law, which are not subject to a clear-cut division but actually evolve with regard to each other.

11 Ferraro, «Le droit international humanitaire dans la politique étrangère», *op. cit.*, 2002, pp. 435-461.

12 *Ibid.*, pp. 444-450.

13 José Carlos Remotti Carbonell, «La estrategia común europea contra el terrorismo», in Teresa Freixes et. al., *La gouvernance multi-level. Penser l'enchevêtrement*, Brussels, E. M. E, 2012, p. 153.

14 Treaty of Paris, 1952.

This is particularly relevant for the EU, some sort of unidentified legal object torn between international law and domestic law.

The obligation to ensure respect for IHL is enshrined in Common Article 1, a provision contained in a multilateral treaty. However, it is possible to wonder whether the EU is bound by such obligation. While it is commonly accepted among scholars and international practitioners that Common Article 1 applies not only to the parties of an armed conflict, but also to third States to the armed conflict at stake, the legal nexus with the EU is not self-explaining insofar as the EU is not a State. Indeed, EU practice in the field of IHL, and in particular in its promotion, is possible to identify[15]; however, it remains uncertain whether this practice is due to an *opinio juris* or to a choice of public policy.

It is argued that the EU is indeed placed under a duty to ensure respect for IHL. Actually, the EU already started to act as if it were bound by Common Article 1 within the frame of the Common Foreign and Security Policy even before adopting its Guidelines on promoting compliance with IHL in 2005.

It should be noted that there are external and internal legal factors that compel the EU to enforce Common Article 1. The EU is indeed subject to a legal duty to ensure respect for IHL, albeit it has interpreted this duty on a softer tone and have referred to 'promoting compliance' with IHL. In this regard, the European Union Guidelines on Promoting Compliance with IHL are especially important, as they represent to some extent the EU 'transposition' of Common Article 1 into the EU legal order, even though they constitute an instrument of soft law.

It is argued that Common Article 1 establishes a legal duty upon the EU. There are indeed different elements that tilt the balance in favor of some link with IHL. Firstly, despite the willingness of the EU to build an autonomous legal order[16] distinct from international law, the EU is an international actor, dotted with legal personality. As a consequence, it must comply with international law, and *a fortiori* with customary international law, as is the case with

15 Ferraro, «Le droit international humanitaire dans la politique étrangère», *op. cit.*, 2002; Josiane Auvret-Finck, «L'utilisation du DIH dans les instruments de la PESC», in Millet-Devalle, *L'UE et le droit international humanitaire*, *op. cit.,* 2010.

16 ECJ, Case C-6/64, Judgment of the Court of 15 July 1964, Flaminio Costa v. E.N.E.L. [1964] ECR 585.

Common Article 1. Secondly, the EU legal order itself compels the EU to comply with Common Article 1, as a result of its 'transposition' through the adoption of the 'Guidelines on promoting compliance with IHL' in 2005[17] and more importantly of the entry into force of the Lisbon Treaty.

1.1. An obligation derived from customary international law

If one were to follow the traditional course of international law, the European Union could not be a party to the Geneva Conventions, and consequently, would not be bound by Common Article 1. Nonetheless, the special nature of Common Article 1 in the international legal order establishes a legal obligation for the EU. Indeed, its customary nature as well as the fact that it is an *erga omnes* obligation turns it into a compulsory duty for the EU.

1.1.1. The absence of obligation derived from Treaty Law

The EU is an international organization dotted with international legal personality and as such, it is an international actor that must act pursuant to international law, a situation confirmed by the Treaty of Lisbon[18].

The EU did not have international legal personality and was unable to conclude international treaties until the entry into force of the Treaty of Lisbon[19]. It is clear that the EU as such did not wait until the entry into force of the Treaty of Lisbon to be an active international player, but it helped clarify the status of the EU and put an end to the academic debate on this aspect.

Consequently, the question regarding the integration of international law into the EU legal order arises. In this respect, scholars used to agree on the idea that the EU legal order was monist in its relations with international law. However, the 2008 Kadi judgment[20] seems to have changed this view, as the

17 IHL Guidelines.

18 TEU, articles 3 and 21.

19 TEU, article 47: «The Union shall have legal personality».

20 Joines Cases C-402/05 P and C-415/05, Judgment of the Court (Grand Chamber) of 3 September 2008, P. Kadi and Al Barakaat International Foundation v. Council and Commission [2008] ECR I-6351.

Court of Justice adopted the «Solange»[21] reasoning and appeared to follow a dualist approach. An individual challenged the implementation at EU level of a United Nations Security Council resolution which mandated that his assets be frozen as a result of its involvement with terrorism. Therefore, as evidenced by Gráinne de Búrca, the case was particularly sensitive:

> The case presented a direct confrontation between the U.N. system of international security and peace, with its aspirations to general applicability and universal normative force, and the EU system, situated somewhere between an international organization and a constitutional polity[22].

Actually, the ECJ revolutionized the relationship between international law and the European legal order. Acting as a constitutional court, it refused to recognize the primacy of the UNSC resolution over EU law, and annulled Council Regulation 881/2002 by arguing that it was not compatible with fundamental rights, one of the very foundations of the EU legal order:

> Those provisions cannot, however, be understood to authorize any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union[23].

21 In reference to the famous judgments of the German Constitutional Court on the relationship between EU law and German constitutional law, in particular with regard to fundamental rights: «As long as the integration process has not progressed so far that Community law receives a catalogue of fundamental rights decided on by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the Basic Law, a reference by a court of the Federal Republic of Germany to the Federal Constitutional Court in judicial review proceedings, following the obtaining of a ruling of the European Court under Article 177 of the Treaty, is admissible and necessary if the German court regards the rule of Community law which is relevant to its decision as inapplicable in the interpretation given by the European Court, because and in so far as it conflicts with one of the fundamental rights of the Basic Law».
See BVerfGE 37, 271 2 BvL 52/71 Solange I-Beschluß, 19/05/1974; BVerfGE 73, 339 2 BvR 197/83 Solange II-decision, 22 October 1986.

22 Gráinne De Búrca, «The International Legal Order after Kadi», *Harvard International Law Journal*, vol. 51(1), 2010, p. 5.

23 Joined Cases C-402/05 P and C-415/05, Judgment of the Court (Grand Chamber) of 3 September 2008, P. Kadi and Al Barakaat International Foundation v. Council and Commission [2008] ECR I-6351, para. 303.

In spite of this judgment, the EU legal order is actually more open to the influence of international law than some other systems[24]. In this regard, Article 216(2) of the TFEU recalls that the international agreements concluded by the EU are binding upon its institutions and Member States. As observed by Christina Eckes, the Court has consistently held that «the primacy of international agreements concluded by the Community [Union] over secondary [...] legislation requires that the latter be interpreted, in so far as is possible, in conformity with those agreements»[25]. She also demonstrates that despite the fact that the EU has adopted a dualist approach in recent times, «this should not lead to the immediate conclusion that the Court has become less international law friendly»[26] as its case-law also includes judgments very open to international law and usually attempts to interpret EU law in light of international law.

Regarding IHL specifically, it should be noted first that there are no direct references to it in the founding treaties of the EU. As Valentina Falco highlights[27], the attempt of the ICRC to persuade EU Member States to include IHL in the section dealing with foreign and security policy during the negotiations of the Amsterdam Treaty proved to be unsuccessful. This gap has not been filled in the Lisbon Treaty. Moreover, even though the EU has international legal personality, IHL treaties can be ratified by States only, not by international organizations. This situation might change in the future insofar as international relations are evolving and do not rely on the sole State actor anymore. A symptomatic example of this change is the foreseen accession of the EU to the Council of Europe's Convention for the Protection of human

24 Enzo Cannizzaro, P. Palchetti and R. A. Wessel, «Introduction: International Law as Law of the European Union», in Enzo Cannizzaro, P. Palchetti and R. A. Wessel, *International Law as Law of the European Union*, Martinus Nijhoff Publishers, 2011, p. 2.

25 Case C-335/05, Judgment of the Court (First Chamber) of 7 June 2007, Řízení Letového Provozu ČR, s.p. v. Bundesamt für Finanzen, [2007] ECR I-4307, para. 16 with reference to Case C-61/94, Judgment of the Court of 10 September 1996, Commission v. Germany [1996] ECR I-3989, para. 52; Case C-286/02, Judgment of the Court (Third Chamber) of 1 April 2004, Bellio F.lli [2004] ECR I-3465, para. 33; Case C-311/04, Judgment of the Court (Third Chamber) of 12 January 2006, Algemenes Scheeps Agentuur Dordrecht [2006] ECR I-609, para. 25; Joined Cases C-447/05 and C-448/05, Judgment of the Court (Fourth Chamber) of 8 March 2007, Thomson and Vestel France [2007] ECR I-2049, para. 30. Quoted in Christina Eckes, «International Law as Law of the EU: The role of the Court of Justice», *CLEER Working Papers* 6, 2010, p. 11.

26 Eckes, «International Law as Law of the EU: The role of the Court of Justice», *op. cit.*, 2010, p. 16.

27 Falco, «Symposium on complementing international humanitarian law», *op. cit.*, 2009, p. 188.

Rights and Fundamental Freedoms (hereafter, the 'ECHR') as provided by article 6 of the Treaty on the European Union. In the same way, the Council of Europe modified the Statute of the aforementioned Convention so as to allow the EU to adhere to it[28]. While the EU cannot become a party to IHL treaties for the time being, one may wonder whether there are other means to connect the EU with IHL, especially as a passive actor of IHL.

In this regard, it is worth mentioning that all the EU Member States are parties to the Geneva Conventions. Therefore, their actions are subject to the respect for IHL, which also includes their actions within the frame of the EU. It would be quite contradictory – or convenient – for EU Member States not to comply with IHL by protecting themselves behind some sort of EU 'shield'. In this line of argument, the applicability of IHL to international organizations – including the EU – ever-increasingly involved in peace operations has been debated in the international scholarship[29]. Recent advances in the field of common defense and security augur further developments in this sense[30].

In this context, one may wonder whether the doctrine of functional succession is applicable. Article 351 TFEU holds that the international agreements binding upon the Member States that were concluded before 1958 enjoy a special status and shall not be derogated by EU Law[31]. However, this is not satisfactory insofar as for the doctrine of functional succession to be applicable, the EU must explicitly hold competence in this matter. Nonetheless, this is not the case in IHL matters and EU competences do not cover all the areas governed by the Geneva Conventions. Consequently, a «full transfer of powers» from the Member States to the EU cannot take place[32].

28 Protocol nº 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, article 17.

29 See, for instance, Ferraro, «The applicability and application of international humanitarian law to multinational forces», *op. cit.,* 2013, pp. 561-612; Naert, *International Law Aspects of the EU's Security and Defence Policy*, *op. cit., 2010*; Beruto, *International Humanitarian Law, Human Rights and Peace Operations*, *op. cit.*, 2008.

30 See: https://eeas.europa.eu/headquarters/headquarters-homepage/14820/mogherini-%20presentsimplementation-plan-on-security-and-defence-to-eu-ministers_en (Accessed: 16.11.2016).

31 TFEU, article 351: «The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties».

32 ECJ, Case C-301/08, Judgment of the Court (Fourth Chamber) of 22 October 2009, Irène Bogiatzi v. Deutscher Luftpool, Société Luxair, European Communities, Luxembourg, Foyer Assurances Sam [2009] ECR I-10185.

Thus, it appears that the EU cannot be bound by Common Article 1 by means of a treaty obligation, as it cannot become a party to the Geneva Conventions and does not hold competence in this regard. However, an obligation can be established on the basis of the customary nature of Common Article 1.

1.1.2. An obligation derived from the customary nature of Common Article 1

It is argued that the EU is bound by the obligation to ensure respect for IHL because of the special position of the Geneva Conventions in general, and of Common Article 1 in particular, in the international legal order. In the words of Tristan Ferraro, the EU is at least a «passive subject»[33] of Common article 1.

As explained in Chapter 1, the Geneva Conventions reached universal ratification and have customary status. In particular, Common Article 1 is an *erga omnes* obligation which ensures the respect for, *inter alia*, peremptory norms. Against this background, it is commonly accepted that international organizations are bound by customary international law in their external relations. As observed by Frederik Naert, this link is subject to the principle of specialty. It exists if the norms at stake are relevant for the activities of the international organization in question, and the latter has the capacity to apply such norms[34]. This interpretation seems to be confirmed by article 38 of the 'Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations' (not yet into force):

> Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State or a third organization as a customary rule of international law, recognized as such[35].

33 Ferraro, «Le droit international humanitaire dans la politique étrangère», *op. cit.*, 2002, p. 459.

34 Naert, *International Law Aspects of the EU's Security and Defence Policy, op. cit.,* 2010, p. 391. See, in particular, footnote 1740.

35 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 20 March 1986, not yet entered into force) (1986), 25 ILM 543.

Nonetheless, as Frederik Naert emphasizes, the objective of this provision is not to confirm the subjection of international organizations to customary international law, but rather to refute their systematic exclusion[36].

In this context, the EU case-law has considered on several occasions that the EU must comply with customary law. In the A. Racke GmbH & Co. v. Hauptzollamt Mainz, the Court of Justice recognized customary international law as a source of EU law in the context of the law of treaties:

> The rules of customary international law concerning the termination and suspension of treaty relations by reason of a fundamental change in circumstances are binding on the European Community institutions and form part of the Community legal order[37].

As Valentina Falco has shown, the Intertanko case of 2008 further confirmed such approach by considering that treaty law applies to the EU to the extent that it expresses customary international law:

> The powers of the Community must be exercised in observance of international law, including provisions of international agreements in so far as they codify customary rules of general international law[38].

In the same way, as observed by Christina Eckes, the ECJ held that even though the Vienna Convention regulates international agreements concluded between States only, it also applies to an agreement concluded by the EU and therefore binds upon the EU, insofar as it expresses general customary international law[39].

36 Naert, *International Law Aspects of the EU's Security and Defence Policy*, *op. cit.,* 2010, p. 391. See, in particular, footnote 1740.

37 ECJ, Judgment of the Court of 25 January 1979, Case C-162/96, A. Racke GmbH & Co. v. Hauptzollamt Mainz, [1998], ECR I-3655, para. 46. Quoted in De Búrca, «The International Legal Order after Kadi», *op. cit.*, 2010, p. 6.

38 ECJ, Case C-308/06, Judgment of the Court (Grand Chamber) of 3 June 2008, The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v. Secretary of State for Transport [2008] ECR I-04057, para. 51. Quoted in Falco, «Symposium on complementing international humanitarian law», *op. cit.*, 2009, p. 184.

39 ECJ, Case C-386/08, Judgment of the Court (Fourth Chamber) of 25 February 2010, Brita GmbH v. Hauptzollamt Hamburg-Hafenm [2010], paras. 40-42. Quoted in Eckes «International Law as Law of the EU: The role of the Court of Justice», *op. cit.,* 2010, p. 16.

Thus, if one applies this case-law to IHL, one may infer that the EU is indeed bound by Common Article 1. This interpretation is actually ratified by the 2016 Commentary to the First Geneva Convention, which states that international organizations are bound by customary IHL, especially Commo Article 1:

> International organizations are – in the current state of international law – not directly or formally bound by the Conventions because only States may become 'High Contracting Parties'. However, it is now widely agreed that, as subjects of international law, they are bound by customary international humanitarian law, and thus also by the obligations to respect and to ensure respect for that body of law[40].

The conclusions of Rapporteur Paolo Mengozzi in relation with the 2015 *Diakité* Case are worth mentioning in this regard. In this case, the Court of Justice of the EU had to pronounce itself on the meaning of the concept of 'internal armed conflict' as provided by article 15(c) of Council Directive 2004/83/EC of 29 April 2004- in order to decide whether Mr. Diakité could be eligible to subsidiary protection. Rapporteur Paolo Mengozzi confirmed that the EU is bound by IHL even though it is not a party to the Geneva Conventions and used the case-law of the ICJ to do so:

> D'une part, l'obligation d'interprétation conforme n'a été posée, en principe, que par rapport aux engagements internationaux qui lient l'Union. En l'espèce, s'il est constant que l'Union n'est pas partie aux conventions de Genève du 12 août 1949 et à leurs protocoles additionnels, la Cour internationale de justice (CIJ) a affirmé que ces actes expriment des «principes intransgressibles du droit international coutumier». En tant que tels, ils lient les institutions, y compris la Cour qui doit assurer une lecture du droit de l'Union conforme à ces principes[41].

Even though this paragraph was not reproduced in the Court's judgment, it is an indicator that demonstrates that not only the EU must act in

40 See «Article 1: Respect and Ensure Respect», in Henckaerts (dir.), *Updated Commentary on the First Geneva Convention*, *op. cit*., 2016, para. 139.

41 Case C-285/12, of 18 July 2013, Aboubacar Diakité v. Commissaire général aux réfugiés et aux apatrides (18 July 2013), Conclusions of Advocate General Paolo Mengozzi, para. 26.

accordance with established principles of customary international law, but that its legal order must comply with the customary principles expressed in the Geneva Conventions and their Additional Protocols. In this sense, EU officials have made several statements reaffirming the customary character of the Geneva Conventions. By way of example, Anna Sotaniemi, in her quality of legal adviser before the Permanent Mission of Finland to the UN affirmed that «most of the provisions of the [Geneva] Conventions and their 1977 additional protocols are generally recognized as customary law»[42].

It therefore appears that the EU is bound by Common Article 1 at least in its internal dimension, i.e. the EU must take all the appropriate measures to ensure that IHL is respected internally. However, it is possible to wonder whether the same reasoning applies to the external dimension of Common Article 1. The 2016 Commentary to the first Geneva Convention provides some elements of clarification in the following terms:

> At the same time, and even absent any such exercise of command and control, international organizations, whether or not they are themselves party to the conflict, are also obliged under customary international law to ensure respect by others. This is particularly the case where the organization has mandated the use of armed force in the first place, or engages in operations in support of other Parties to the conflict[43].

The obligation to ensure respect for IHL by others is therefore clearly established for international organizations, including the EU. In this regard, the EU has increasingly deployed military operations and civilian missions all over the globe within the frame of its Common Security and Defence Policy[44], so that it may fulfill command and control tasks or support other parties to an armed conflict. It should be noted nonetheless that the wording to the official Commentary does not require the use of armed force or support for other parties to the armed conflict for an international organization to be expected

42 Statement by Ms. Anna Sotaniemi, Legal adviser, Permanent Mission of Finland to the UN on behalf of the EU, UNGA, 61st session, 6th committee, Agenda Item 75: Status of the Protocols Additionals to the Geneva Conventions of 1949 and relating to the protection of victims in armed conflicts, New York. Quoted in Naert, *International Law Aspects of the EU's Security and Defence Policy*, *op. cit.*, 2010, p. 533.

43 *Ibid.*, para. 25.

44 It has 17 operations and missions deployed all over the world at the time of writing.

to comply with Common Article 1 and take action to ensure respect for IHL. This is consistent with the fact that Common Article 1 establishes an obligation of due diligence, which binds third actors to the armed conflict gradually, depending on their capacity to influence the behavior of the warring parties. As a matter of fact, the 2016 Commentary clarifies that international organizations remain subject to the obligation to ensure respect due to – first and foremost – the customary nature of this obligation. As a result, the EU cannot elude its responsibility and has the obligation to take all the necessary and reasonable measures to ensure respect for IHL in all situations, including those where it has not sent a military operation or a civilian mission.

Thus, even without being a formal party to the Geneva Conventions, the EU is subject to a customary obligation to ensure respect for IHL by others, i.e. in its external dimension. Furthermore, this obligation has been received in the EU legal order by way of the adoption of the Guidelines on promoting compliance with IHL. There are also internal factors that make the EU a potential subject of Common Article 1.

1.2. An obligation derived from the EU legal order

The EU's duty to ensure respect for IHL does not only stem from its customary obligations, but also from the EU legal order. As a matter of fact, even before the entry into force of the Treaty of Lisbon, the EU already acted as if it were bound by Common Article 1. It was notably one of the priorities of the EU for the 63rd General Assembly of the UN:

> The EU will continue to promote and improve compliance with international humanitarian law in a visible and consistent manner. In addition the EU attaches great importance to the implementation of the Responsibility to protect, a concept that was endorsed at the 2005 World Summit, and emphasizes the need for further consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity in the General Assembly and the Security Council[45].

45 European Union Priorities for the 63rd General Assembly of the United Nations, 16 June 2008, Brussels.

Indeed, the EU intends as much as possible to fulfill the obligation «to ensure respect» for IHL by others. It means that the EU takes «all possible steps to ensure that the rules are respected by all, and in particular by parties to conflict»[46]. Here, the choice of the vocabulary is significant, as the wording of Common Article 1 is used. It demonstrates that the EU recognizes that the obligation to ensure respect for IHL establishes an obligation of due diligence for third parties to an armed conflict, in concordance with the current dominant approach in this sense.

In this respect, even though the EU is not formally bound by IHL treaties, it can adopt a declaration whereby it commits to act in accordance with such treaties, and for the purposes of this thesis, with the obligation to ensure respect for IHL. This is precisely what the EU did when it adopted the Guidelines on promoting compliance with IHL in 2005 which were further updated in 2009 during the Swedish Presidency[47]. In this regard, one could say that the EU has integrated Common Article 1 into the EU legal order through the adoption of these Guidelines, a fundamental piece whose language 'transposes' the content of Common Article 1 and adapts it to the EU. Furthermore, the Lisbon Treaty now offers sizeable opportunities for the EU to develop this area further as it implicitly refers to IHL. Indeed, a Peace Nobel Prize winner, it is not surprising that the EU has interest in complying with Common Article 1 and in promoting compliance with IHL. Abiding by IHL and ensuring respect for IHL is actually in the interest of the EU, an international organization willing to assert its normative power and to promote multilateralism on the international scene.

1.2.1. An explicit but soft 'transposition': The Guidelines on promoting compliance with IHL

In December 2005, the Council adopted the Guidelines on Promoting Compliance with IHL, a text initiated by Sweden and adopted during the British Presidency of the EU. The Guidelines were further updated in 2009 during the Swedish Presidency[48], on the year of the 60th anniversary of the Geneva

46 *Ibid*.
47 IHL Guidelines.
48 *Ibid*.

Conventions. These Guidelines represent to some extent the 'transposition' of Common Article 1 into the EU legal order and reflect the EU commitment regarding the importance of IHL, even though they are not legally binding.

As Pål Wrange explains, a report including various proposals relating to the procedures under the Geneva Conventions and their additional protocols, the Conventional Weapons Convention, and the UN Commission for Human Rights and fundamental standards of humanity was drafted by a committee under the auspices of the Swedish Delegation on Public International Law in 2003; however, the «EU track» was preferred. A set of proposals was therefore submitted to COJUR, the Council Working Group on Public International Law, without much success. The following year, the Swedish Delegation submitted a new proposal that triggered the process of elaboration and adoption of the current Guidelines. The process benefited from the insight of different actors, ranging from ICRC representatives to EU institutions officials and COJUR experts. It is worth noticing that although the Swedish Delegation expected the proposals to be adopted progressively, the idea of adopting comprehensive guidelines on the model of the existing human rights guidelines was endorsed. The Swedish Delegation then wrote a first draft, which was taken over by the UK, as it was about to ensure the rotating presidency. COJUR finalized the Guidelines, which were endorsed by the Political and Security Committee, the Coreper and eventually the Council.[49] According to Javier Solana, former High Representative for the CFSP, the IHL Guidelines were created:

> Because of the explosive growth of operations and missions conducted under the European Security and Defence Policy and as a result of our conviction that counterterrorism be conducted within the framework of international law, the Guideline on IHL is growing in importance[50].

Therefore, these Guidelines intervened, on the one hand, to adapt the institutional means to the already existing operational means in the field of IHL. On the other hand, it also seems that they were adopted in order to foster the EU's dialogue with the United States on counterterrorism and the need

49 Wrange, «The EU Guidelines on Promoting Compliance with International Humanitarian Law», *op. cit.*, 2009, pp. 543-544.

50 Council of the European Union, EU Guidelines Human rights and International Humanitarian law, March 2009, QC-83-08-123-EN-C.

to respect international law. Despite this context, they apply to all situations where IHL is at stake.

Thus, the Guidelines give the EU some sort of 'legal basis' to act in this field and detail the actions that may be undertaken to fulfill this purpose. The updated Guidelines in 2009 reflected the need for better integration of IHL in every external aspect of the EU's action and better implementation of it[51]. They are also explicitly complementary to other Guidelines and Common Positions already adopted within the EU in relation to matters such as human rights, torture and the protection of civilians.

Despite their non-legally binding character, these Guidelines represent an important step forward concerning the recognition of Common Article 1 in EU law, especially within a framework where unanimity has to be reached. Their legal significance is not defined either in the former treaties or in the Lisbon Treaty, but they acquire a *solo consensu* character since they represent the will of the Member States in the Council[52] and represent a «strong political signal that they are priorities for the Union»[53]. They indeed reflect the existence of a consensus within the EU on how CFSP's instruments can be used in the field of IHL[54]. Besides, they are indicative of their authors as the Court of Justice held it in the Dansk Rørindustri and Others v. Commission of the European Communities case of 28 June 2005:

> Although those measures may not be regarded as rules of law which the administration is always bound to observe, they nevertheless form rules of practice from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment. Such measures therefore constitute a general act and the officials and other staff concerned may invoke their illegality in support of an action against the individual measures taken on the basis of the measures[55].

51 EEAS, «Human Rights and Democracy in the world», Report on EU action July 2008 to December 2009, European Commission, 2010. Available at: www.eeas.europa.eu/_human_rights/docs/2010_hr_report_fr.pdf (Accessed: 31.10.2014).

52 David, «Rapport introductif», *op. cit.*, 2010, p. 7.

53 Official Website of the EEAS, Human Rights Guidelines, Available at: http://eeas.europa.eu/delegations/council_europe/more_info/eu_human_rights_guidelines/index_en.htm (Accessed 13.04.2011).

54 David, «Rapport introductif», *op. cit.*, 2010, p. 7.

55 ECJ, Case C-189/02, Judgment of the Court (Grand Chamber), 28 June 2005, Dansk Rørindustri and Others v. Commission of the European Communities [2005] ECR I-05425.

The Guidelines thus reflect the EU's commitment with Common Article 1 and define the contours of its action in this field.

These Guidelines are of utmost importance with regard to the obligation to ensure respect for IHL, as they constitute Common Article 1's *de facto* transposition into the EU legal order. This idea is confirmed by the fact that even though a reference is made to the obligation to respect[56], the latter is expressly excluded from the scope of the Guidelines, which focus solely on the EU action «to address compliance with IHL by third States, and, as appropriate, non-State actors operating in third States». It is therefore a clear adhesion to the extensive interpretation of Common Article 1, according to which the obligation to ensure respect for IHL entails an external dimension. It should nonetheless be noted that given the importance of Common Article 1 in the international legal framework, it would be desirable to see the commitment of the EU enshrined in a legally binding document, such as a Council Decision[57].

It is worth noticing that the wording slightly differs from that of the Geneva Conventions as the Guidelines refer to «promoting compliance with International Humanitarian Law» instead of 'ensuring respect'. This change in the wording is most likely a choice. They convey the idea of a less constraining duty falling upon the EU than the one established by Common Article 1. This idea is further reinforced by the acknowledgment that the EU and its Member States are under duty «to ensure compliance with IHL in their own conduct, including by their own forces» (para. 2). There is therefore a clear willingness to diminish the scope of the obligation to ensure respect for IHL, 'promoting' being less constraining than 'ensuring'. The French version of the Guidelines goes even further, as it refers to the «promotion du droit international humanitaire» in the title[58], thus removing the concept of compliance from the title.

This choice might be explained by the limitations of the EU: as explained *infra*, the Common Foreign and Security Policy, which is the privileged framework of the EU action in promoting compliance with IHL, is a sensitive policy and remains quite limited. EU Member States have diverging interests

56 IHL Guidelines, para. 2: «the same commitment extends to measures taken by the EU and its Member States to ensure compliance with IHL in their conduct, including their own forces».

57 Such formalization of the EU's commitment exists with regard to the International Criminal Court and constitutes a good practice.

58 Conseil de l'Union européenne, Lignes Directrices de l'UE concernant la promotion du droit international humanitaire (DIH) (2009/C 303/06).

in foreign matters, and most notably in the field of IHL, so that the CFSP is characterized by a derogatory regime. As a consequence, the wording of the Guidelines conveys the idea that States remain the prior actors in charge of enforcing Common Article 1 on the international scene. Nevertheless, it could be argued that this choice of vocabulary contradicts international law for two reasons. First, Common Article 1 establishes a customary obligation that is directly applicable to the EU, in its quality of international subject. Second, since Common Article 1 expresses an obligation of due diligence, it is not necessary to refer to a different formulation from the one contained in the Geneva Conventions, insofar as the flexibility deriving from EU's capacities is already reflected in the notion of obligation of due diligence itself. The EU has the obligation to ensure respect for IHL, but always insofar as it has the means to do so. Nothing more but also nothing less is expected.

On the one hand, these Guidelines are indicative of the EU approach on IHL as they define it, its sources, scope of application and consequences in terms of individual responsibility. Firstly, it is explicitly stated that the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law include promoting compliance with IHL. Common Article 1 in particular and IHL in general are therefore included within the values of the EU, thus providing legitimacy for the EU to act on this matter. The Guidelines define IHL in the following terms:

> International Humanitarian Law (IHL) – also known as the Law of Armed Conflict or the Law of War – is intended to alleviate the effects of armed conflict by protecting those not, or no longer taking part in conflict and by regulating the means and methods of warfare[59].

As observed by Pål Wrange, the Guidelines remain silent as to whether Common Article 1 establishes a system of collective responsibility binding upon all states for any conflict[60]. However, it could be argued that they indirectly mention the *erga omnes* character of Common Article 1 when they stipulate that compliance with IHL «is a matter of international concern» (para. 5), thus reflecting the wording used by the ICJ and the ILC.

59 IHL Guidelines, para. 4.

60 Wrange, «The EU Guidelines on Promoting Compliance with International Humanitarian Law», *op. cit.*, 2009, p. 546.

Secondly, the Guidelines generally recall the scope of application of IHL and its sources. In this regard, the annex to the Guidelines includes the «principal legal instruments on international humanitarian law and other relevant legal instruments», which refer to treaties and conventions resorting to The Hague Law, the four Geneva Conventions and their additional protocols, International Criminal Law (most notably the statutes of the different international criminal tribunals), and treaties and conventions on the regulation of arms. Furthermore, the Guidelines integrate some aspects of the international case-law on IHL and Common Article 1. Indeed, they specifically assert that States must conform to customary obligations stemming from IHL, thus referring indirectly to the Corfu Channel and Nicaragua cases of the ICJ. However, all these references are quite vague and elude controversial questions such as the use of the ICRC Study on 'Customary International Humanitarian Law'.

Thirdly, the Guidelines refer to the fundamental principles of military necessity, humanity, distinction, and proportionality (para. 6). They likewise envisage the distinction between international and non-international armed conflicts (paras. 9, 10, and 11) as well as the relationship of IHL with Human Rights Law (para. 12), which is interpreted in line with the ICJ Advisory Opinion on the Wall[61].

Fourthly, the IHL Guidelines reinstate some consequences resulting from the violation of IHL, notably concerning individual responsibility within the framework of International Criminal Law (paragraphs 13 and 14). Although these are elementary principles, they clearly emphasize the EU's adhesion to this corpus, and its participation in terms of its codification.

On the other hand, these Guidelines establish the operational tools to be used by the EU, its institutions and bodies in order to promote compliance with IHL, firstly between the EU itself and its Member States, but they also tie the EU together with its relationships with third states. These include the following: political dialogue, general public statements, demarches and/or public statements about specific conflicts, restrictive measures and sanctions, cooperation with other international bodies, crisis-management operations, fight against impunity for war crimes, training, and adopting rules ensuring

61 ICJ, Wall Advisory Opinion, *op. cit.*

that arms trade is subjected to compliance with IHL. Again, the choice of the different means reflects to a great extent the measures available to States for fulfilling their obligation to ensure respect for IHL[62].

Thus, the adoption of the IHL Guidelines is a positive step regarding the correct enforcement and application of IHL. Indeed, as observed by Pål Wrange, this is particularly relevant for IHL, a field where oversight mechanisms are lacking in contrast with human rights law[63]. Furthermore, the IHL Guidelines somehow give a 'legal basis' for the EU's action in this matter, «even in cases where the public pressure or geopolitical exigencies are absent, or when the IHL aspect is not obvious»[64]. The idea is therefore to provide the EU with a foundational text with a great potential for systematic and coherent action on this matter. Indeed, action on this matter can be traced back to the 1990's[65], but it had been quite chaotic. In this respect, it should be noted that since 2005, the EU has indeed implemented the Guidelines in its CFSP and has mainstreamed IHL as a result. By way of example, the ICRC conducted a mapping study of the references to IHL in EU public documents adopted between 2005 and 2009, according to which at least 300 EU public documents made reference to IHL[66]. Therefore, the Guidelines have not become a dead letter and constitute, *de facto*, the 'transposition' of Common Article 1 into the EU legal order. The EU consciously adheres to Common Article 1 and reflects it in its own legal order thanks to these Guidelines. The reception of Common Article 1 into the EU legal order is therefore explicit, although the instrument to do so belongs to soft law. In this regard, it should be noted that the acts further adopted in order to implement this instrument of soft law can belong to hard law. Consequently, the potential of the Guidelines should not be under-estimated. Furthermore, the Lisbon Treaty augurs interesting developments in that regard, in particular with the 'constitutionalization' of EU's objectives and values in EU primary law.

62 Palwankar, «Measures available to States for fulfilling their obligation to ensure respect for IHL», *op. cit.*, 1994. See, *supra*, Chapter 1.

63 Wrange, «The EU Guidelines on Promoting Compliance with International Humanitarian Law», *op. cit.*, 2009, p. 542.

64 *Ibid.*, p. 552.

65 Ferraro, «Le droit international humanitaire dans la politique étrangère», *op. cit.*, 2002, p. 439.

66 Document available upon request.

1.2.2. An implicit 'constitutionalization': The Treaty of Lisbon and the values of the EU

As mentioned above, the founding treaties do not refer explicitly to IHL. However, it is reasonable to consider that the Treaty of Lisbon contains indirect references to IHL, in particular in light of the meaning provided to the concepts of 'human rights', 'democracy' and the 'rule of law' in the founding values and objectives enshrined in EU primary law.

First, it could be argued that the references to the more encompassing concepts of «peace», «security», and «international law» actually include IHL. Indeed, the objectives of «peace» and «security» codified in article 3 implicitly refer to the need to respect IHL, insofar as the latter contributes to the former. In addition, «the strict observance and the development of International Law, including respect for the principles of the United Nations Charter»[67] is strictly related to IHL. In this respect, the EU assigns itself the mission of respecting and developing IHL and considers itself both as a passive and an active subject of international law. If all these elements are read together, an indirect reference to IHL may be found, especially in light of the movement of convergence of the Law of international peace and security with IHL, as explained in Chapter 1. Thus, these references to the Law of international peace and security make it possible to establish a connection between the EU and Common Article 1.

Second, and more importantly, the integration of IHL into EU Law emphasizes the symmetry between the EU's internal and external values. In this respect, the codification of EU's values within the body of the Treaty of Lisbon turns them into legal requirements, not mere moral and political aspirations. In this context, the EU's approach to the concepts of democracy, rule of law, and respect for human rights is particularly important regarding IHL. Indeed, pursuant to their European acceptation, the concepts of democracy, rule of law, and overall, respect for human rights include the respect for and promotion of IHL at international level.

Well before the entry into force of the Lisbon Treaty, the EU has been considered a «community based on the rule of law» («*communauté de droit*»)[68]

67 TEU article 3.5.

68 ECJ, Case C-294/83, Judgment of the Court of 23 April 1986, Parti écologiste «Les Verts» v. European Parliament [1986] ECR 1339, para. 23.

in the words of the European Court of Justice, in which fundamental rights ought to be respected and protected[69]. The European identity has been progressively shaped so that the Union is nowadays founded on «the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities»[70] which have become «axiological»[71] to the EU with the adoption of the Treaty of Lisbon. They now are the *raison d'être* of the EU[72], they legitimize it, and command its action since EU policies rely upon it. In this sense, the entry into force of the Charter of Fundamental Rights of the EU confirms the EU's aspiration to be a leader in human rights matters on the international stage[73]. Furthermore, several operational advances have been made in this sense since 2009. In particular, the EU adopted the Strategic Framework for Human Rights and Democracy in 2012[74], which constitutes the cornerstone of the EU's action on human rights matters and includes aspects relating to IHL. Furthermore, it appointed its first EU Special Representative for Human Rights[75], thus enhancing the EU's visibility on this matter.

The EU has become a multilevel democracy which has encouraged Member States to respect these values, to the point that article 7 TEU foresees a mechanism of sanction in the event of «a serious and persistent breach

69 ECJ, Case C-29/69, Judgment of 12 November 1969, Stauder v. City of Ulm [1969] ECR 419; C-11/70, Judgment of 17 December 1970, Internationale Handelsgesellschaft mbH v. Einfhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125, para. 4; C-44/79, J. Nold, Kohlen-und BaustoffgroBhandlung v. Commission [1974] ECR 491, para. 31; C-6/64, Flaminio Costa v. Enel [1964] ECR 585.

70 TEU, article 2.

71 Denys Simon, «Les fondations: L'Europe modeste?, Le traité de Lisbonne: oui, non, mais à quoi?», *Europe*, n° 7, July 2008, pp. 24-138.

72 Teresa Freixes, «Quelles valeurs à protéger dans le dialogue interculturel euro méditerrannéen?», in Teresa Freixes et al., *La gouvernance multi-level. Penser l'enchevêtrement*, Brussels, E.M.E, 2012, pp. 110-112.

73 While the EU self-assigns an extremely ambitious mission, its practice on this matter compels to relativize this statement, to the extent that the EU's – controversial – action in response to the massive arrival of refugees on European soil has importantly damaged its aspiration to be a leader in human rights in the public's eye just to mention one example.

74 Council of the European Union, EU Strategic Framework and Action Plan on Human Rights and Democracy, 25 June 2012, Luxembourg, 11855/12.

75 Council Decision 2012/440/CFSP of 25 July 2012 appointing the European Union Special Representative for Human Rights.

by a Member State of the values referred to in Article 2»[76]. A precedent may be found on the occasion of the Austrian crisis in 2000, when Jorg Haïder, an extremist leader acceded the Austrian government. Sanctions were taken against Austria which was unable to vote in the Council. Thus, proclaiming the respect for human rights was not merely formal but had concrete implications too. Said sanctions were eventually lifted as it was held that the policies conducted by the Austrian government would not pose a threat to the EU's founding values. A more recent example can be found with the launching of a structured dialogue between Poland and the European Commission under the Rule of Law Framework[77], albeit it is too early to assess the results of this dialogue at the time of writing.

The result of this process is that the EU's action must be consistent with this commitment to its values, both internally and externally. It should be

76 TEU, article 7: «1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.
The Council shall regularly verify that the grounds on which such a determination was made continue to apply.
2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.
3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.
The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.
4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.
5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union».

77 See European Commission, Fact Sheet: College Orientation Debate on recent developments in Poland and the Rule of Law Framework: Questions & Answers, Brussels, 13 January 2016. Available at: http://europa.eu/rapid/press-release_MEMO-16-62_en.htm (Accessed: 28.01.2016).

noted in this regard that this commitment is not a mere political mandate, but a legal obligation enshrined in EU primary law. The self-proclamation in the 'constitutional' text of a space where human rights are respected generates international expectations on this matter. The EU cannot pretend to incarnate a democratic space internally without promoting its values on the international scene too without running the risk of establishing double standards, and vice versa. As a matter of fact, the externalization of the EU's values is confirmed by the Lisbon Treaty provisions governing the Common Foreign and Security Policy in the following terms:

> Union's action on the international scene shall be guided by [...] democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law[78].

In the same way, the Union's foreign policy shall pursue the objectives of safeguarding «its values, fundamental interests, security, independence and integrity» and of consolidating and supporting «democracy, the rule of law, human rights and the principles of international law»[79].

Thus, the EU self-assigns an extremely ambitious mission, a quasi-evangelical mission, of projection and promotion of its values on the international stage, which includes the promotion of IHL. The inscription of this aspiration in the EU constitutional marble – the founding treaties – entails legal consequences, not moral ones, and the EU must therefore subject its action to the respect of these values. It must live up to the expectations that it sets itself and that stem from its own primary law, in order to avoid accusations of double standards. In this respect, it seems that the EU is currently challenged by a set of crises: the economic crisis, Brexit and the surge of euro-skepticism in general, as well as the so-called 'refugee crisis'. While there are no easy responses to all these crises, the 'constitutionalization' of the EU's values mean that the EU must always bear them in mind while it confronts such crises. In this line of argument, the importance of such crises should not overshadow its commitment in IHL matters.

78 TEU, article 21.

79 *Ibid*.

As Katharina Häusler and Alexandra Timmer have shown[80], the EU external activism on human rights matters is justified notably because of their universality. The 2012 EU Strategic Framework and Action Plan on Human Rights and Democracy are particularly significant in this regard, as it underlines that «[h]uman rights are universally applicable legal norms»[81]. Therefore, the EU is not only compelled to promote human rights on the international scene because of internal constraints – its founding values – but also because of external constraints: human rights are enshrined in international treaties and conventions and are universally applicable. The EU adopts an approach based on, *inter alia*, the United Nations Universal Declaration of Human Rights and is therefore in a position to refute Eurocentrism-based critics. The promotion of human rights is not only a reflection of European values, but also a legal duty, which is the result of an international consensus on the universal nature of human rights. The same holds true regarding IHL.

This is particularly relevant when talking about Common Article 1, as the EU has integrated IHL as one of the constituting elements of its values, in particular of the rule of law and human rights. This is clearly expressed in the introduction to the IHL Guidelines:

> The European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law. This includes the goal of promoting compliance with IHL[82].

This approach was further confirmed in the Declaration by the Presidency on behalf of the Union on the occasion of the 60th anniversary of the adoption of the Geneva Conventions:

> International law, including international humanitarian law, is one of the strongest tools the international community has to maintain international order and to ensure the protection and dignity of all persons. The European

80 Katarina Häuslerand and Alexandra Timmer, «Human Rights, Democracy and Rule of Law in EU External Action: Conceptualization and Practice», in Wolfgang Benedek et al. (eds.), *European Yearbook on Human Rights 2015*, Intersentia, p. 234.

81 Council of the European Union, EU Strategic Framework and Action Plan on Human Rights and Democracy, 25 June 2012, Luxembourg, 11855/12, p. 1.

82 IHL Guidelines, para. 3.

> Union will continue to do its utmost to promote an international order where no state or individual is above the law and no one is outside the protection of the law[83].

It appears from these declarations that ensuring respect for IHL is a component of the rule of law as it contributes to subjecting all individuals and States to the law, while ensuring legal protection for all.

Furthermore, IHL is integrated into EU law through the vector of human rights, which in turns reflects the movement of convergence of IHL and International Human Rights Law. As noted above, human rights are closely tied to the human principle, which also applies in times of armed conflict. The integration of human rights in IHL is blatant in the case-law of several regional tribunals, such as the ECtHR and the Inter-American Court of Human Rights, as well as in the development of international criminal law. Besides humanizing IHL, this movement of convergence also allows to ensure the efficiency of IHL in response to its difficult litigation. In turn, the EU contributes to this movement of convergence as it has included the promotion of IHL as a sub-category – although autonomous – of its policy of promotion of human rights. The participation of the EU in the development and enforcement of IHL through its external action indeed reinforces its credibility as a human rights promoter and leader.

In fact, only three years after the creation of the CFSP, some acts already referred to IHL mainly thanks to declaratory acts[84] through the vector of the promotion of human rights. It indeed would be surprising to differentiate between IHL and human rights exactions when the EU deals with a particular situation. As Tristan Ferraro highlights, these references used to be scattered and reflected the lack of a consistent strategy regarding this matter[85]. Nevertheless, those references to IHL became more frequent and explicit, including in legally binding acts[86], to the point that the Geneva Conventions and their additional protocols can now be considered recurrent instruments of the

83 Declaration of the Presidency on behalf of the EU on the occasion of the 60th anniversary of the adoption of the 4 Geneva Conventions of 1949, 12535/1/09 REV 1 (Press 241), Brussels, 12 August 2009.

84 Ferraro, «Le droit international humanitaire dans la politique étrangère», *op. cit.*, 2002, p. 437.

85 *Ibid.*, p. 435.

86 Auvret-Finck, «L'utilisation du DIH dans les instruments de la PESC», *op. cit.*, 2010.

CSFP[87]. The EU has therefore used its policy of promotion of human rights at international level to enter into the IHL field, and in particular to promote compliance with IHL. While it could have been understood that the EU was associating both corpuses of law through their systematic combination, the EU's approach is clearer on that aspect now. The promotion of IHL in the EU external action has become autonomous and is reported as a policy by itself. By way of example, Point 21 of the EU Action Plan on Human Rights and Democracy included in the 2012 Strategic Framework for Human Rights and Democracy is specifically dedicated to IHL[88]. The latter is integrated within the policy on human rights but appears in a specific section. The same holds true regarding the EU annual reports on human rights. It therefore clearly appears that, in the EU's view, promoting compliance with IHL is seen as an extension of the necessity to guarantee its values.

As a subsidiary comment, the integration of the obligation to ensure respect for IHL in EU Law is consistent with the EU's claim to be a super soft power. Besides the legal duty, there are other reasons why the EU should enter into IHL concerns which evolve around the ideas of legitimacy and democratization from a constitutional perspective. In particular, the EU's ambition to establish a European constitutional legal order based on values – democracy, the rule of law, and the respect for human rights – calls for the externalization of these values in the EU action on the international scene.

In this regard, the meaning the EU wishes to place on its international action defines its own identity. The EU is sometimes termed a soft[89], civil, normative or even a calm power. According to Joseph Nye, a soft power is characterized by its capacity to influence, the promotion of its values, and an attractive power not exclusively based on military means[90]. Although the EU is a *sui generis* entity, it is a union composed of free states, who decided to tie their relationships in such a way that they make war very unlikely to happen among them. The very purpose of the creation of the EU was to establish a permanent peace throughout Europe by creating interdependency among its

87 Ferraro, «Le droit international humanitaire dans la politique étrangère», *op. cit.*, 2002, p. 436.

88 Council of the European Union, EU Strategic Framework and Action Plan on Human Rights and Democracy, 25 June 2012, Luxembourg, 11855/12.

89 Joseph Nye, *Soft power: The means to success in politics*, New York, Public Affairs, 2004. Quoted in Jérôme Koechlin, *La politique étrangère de l'Europe, entre puissance et conscience*, Paris, Infolio Ed., 2009.

90 *Ibid*.

members that would not allow for war to be waged among them. European integration has allowed for the union of historic enemies such as Germany and France, but it has also permitted the reunification of Western and Eastern Europe. The EU's role as a pacific force in international relations is therefore legitimatized by and founded on this primary mission.

Consequently, the EU prefers to communicate and use diplomacy rather than be guided by military power. The EU projects itself in a post-modern world grounded by its rejection of the use of force and is refusal of any imperial temptation[91]. In this respect, the integration of IHL as one of the sources of EU Law is not surprising as the promotion of International Law has become a 'leitmotiv'[92] in the CFSP, to the point that some authors talk about the «Europeanisation of International Law»[93]. For example, the 2003 European Security Strategy[94], the 2015 Security Agenda, the European Commission Communication on multilateralism[95], as well as the 2012 EU Strategic Framework and Action Plan on Human Rights and Democracy[96] reassert these concerns: fostering multilateralism as well as the EU's dialogue with third parties, setting respect for International Law as a priority. This approach was clearly expressed by Federica Mogherini, the High Representative for the Common Foreign and Security Policy, in a 2015 speech at the UN Security Council:

> Europe's commitment to multilateralism – with the UN at its core – stems from our values and beliefs. But it is also an act of realism. The threats we face have never been so complex. They require complex, articulated

91 Koechlin, *La politique étrangère de l'Europe, entre puissance et conscience*, *op. cit.*, 2009.

92 Knudsen, «Les lignes directrices de l'UE concernant la promotion du respect du DIH et leur mise en œuvre», in Millet-Devalle, *L'UE et le droit international humanitaire*, *op. cit.*, 2010, p. 176.

93 See Jan Wouters, André Nollkaemper and Erika De Wet, *The Europeanisation of International Law: The Status of International Law in the EU and its Member States*, TMC Asser Press, 2008.

94 Council of the European Union, A Secure Europe in a Better World, European Security Strategy, Brussels, 12 December 2003. (The objective of the EU is «the development of a stronger international society, well-functioning international institutions and a rule-based international order»).

95 Communication from the Commission to the Council and the European Parliament of 10 September 2003, European Union and United Nations: the choice of multilateralism (COM[2003] 526 final).

96 Council of the European Union, EU Strategic Framework and Action Plan on Human Rights and Democracy, Luxembourg, 25 June 2012 11855/12, p. 1: «The European Union is founded on a shared determination to promote peace and stability and to build a world founded on respect for human rights, democracy and the rule of law. These principles underpin all aspects of the internal and external policies of the European Union».

> responses. The time when super-powers thought they could split the world into spheres of influence is long gone – we should all realise that. The number of regional and global actors has multiplied. And none of them can realistically aspire at facing challenges, or truly benefiting from opportunities, alone. We need cooperation, more than ever. The new global order will be multilateral, or it will not be[97].

On the other hand, some may argue that the EU does not have the choice of being a soft power since it still does not benefit from an actual military power[98], although the increasing involvement of the EU in defense matters[99] should nuance this multilateralist aspiration. However, it is still possible to assert that it is in the EU's interest that multilateralism works. It would confirm its role as an international actor and increase the legitimacy of its foreign policy since it would be considered the first soft superpower in history[100]. Whatever the EU's motivation is, the EU's image as a soft power conditions its interest in humanitarian matters and in IHL. The CFSP constitutes an important element in the definition of the EU's identity and the integration of IHL into EU law shapes it. Humanitarian norms allow the EU to define its identity towards the other IHL actors, notably national, which are more likely to act according to their sole interests. It is pursuant to these norms that the EU defines its behavior, perceives others' behaviors, asserts its identity and determines its interests. In Delphine Loupsans' opinion, it denies realistic determinism and seeks to promote governance based on norms of centrality[101].

The EU is actually an organization full of potential in relation with IHL. Despite the limitative framework of the CFSP[102], it has assets that differentiate it from other IHL actors and give it an added value. The EU model is often taken into account and can be inspirational for other regions such as South

97 Speech by High Representative/Vice-President Federica Mogherini at the UN Security Council: Cooperation between the UN and regional and sub-regional organisations, New York, 09.03.2015 (150309_01_en).

98 Moreover, this idea is counter-balanced by the increasing importance of the EU in security and defense areas.

99 See: http://eeas.europa.eu/headquarters/headquarters-homepage/10669/28-eu-defence-ministers-agree-to-move-forward-on-european-defence_en (Accessed: 15.10.2016).

100 IRRI-KIIB, *Un concept de sécurité pour le 21ème siècle*, Brussels, 2003.

101 Delphine Loupsans, «La place des intérêts et des normes dans l'action humanitaire de l'Union européenne», PhD thesis, SPIRIT, Bordeaux, 2009.

102 See *infra*.

America, or Africa. They both started as economic actors on the international scene but are evolving towards human rights spaces as the establishment of regional courts of protection of human rights like the African Court of Human Rights and the Inter-American Court of Human Rights have shown. In this line of argument, the future of international relations could potentially evolve towards multilateralism based on the interaction between continental unions acting in a complementary manner to States, and always under the auspices of the principles developed at UN level. In this framework, the EU could be in a good position to become a dynamic regional entity able to exercise leadership[103] in IHL matters. This ambition was clearly expressed in 2008 by Louis Michel, former commissioner in charge of the Humanitarian Aid and Civil Protection Office (hereafter, 'ECHO'):

> Il est clair que l'Union européenne peut et doit exercer un rôle de premier plan pour mieux respecter le droit humanitaire à la mesure de son autorité politique et morale reconnue. Il en va du respect par l'Union européenne de ses propres valeurs éthiques fondamentales. La communauté internationale a un nom, c'est l'humanité. Forger pour cette humanité des valeurs communes fortes et justes, partagées par tous, en faire les repères intangibles d'une éthique universelle, c'est mon ambition, c'est l'ambition européenne, cela doit être notre engagement[104].

Thus, this implicit codification of IHL in primary law is significant as it guides the EU's action both internally and externally. The Lisbon Treaty recognizes implicitly the humanitarian policy as a key-policy and the EU as a global humanitarian actor for the first time.

To conclude, the European Union has become a global actor, active in many fields at international level. While its economic weight is undisputable, the same does not hold true regarding its political power on the international scene. In spite of that, the EU has integrated IHL in to its CFSP and has progressively allowed it to enter its sphere of competency even before the entry into force of the Lisbon Treaty. As Tristan Ferraro demonstrates, the EU has been an active – and chaotic – promoter of IHL through its CFSP since the 1990's, thus acting as if it were bound by Common Article 1. It has used

103 Koechlin, *La politique étrangère de l'Europe, entre puissance et conscience*, *op. cit.*, 2009.

104 Respect du Droit International Humanitaire: un défi majeur, une responsabilité globale, Brussels, 16.08.2009 (SPEECH/08/434).

its status and resources to reinforce the implementation and respect for IHL through the use of the Geneva Conventions as a recurrent element of the Common Foreign and Security Policy[105]. In this regard, it is worth mentioning that the international community has acknowledged the EU's action in the maintenance of international peace and security through the Statement by the President of the Security Council of 14 February 2014[106]. In this statement, the partnership of the EU with the UN in resolving global challenges is applauded, notably with regard to the promotion of human rights and the protection of civilians in armed conflicts. It therefore constitutes a powerful signal regarding the perception and credibility of the EU on the international scene as well as the expectations that arise with respect to Common Article 1.

What is more, the entry into force of the Lisbon Treaty has opened up new possibilities in this regard. In this respect, there are external and internal factors that compel the EU to comply with Common Article 1. The EU is a fully-fledged international actor which must act in accordance with international law, and, *a fortiori*, with IHL, a legal corpus with customary character at the very heart of the international legal order. At internal level, the EU is a union of values – the rule of law, democracy and the respect for human rights – which include IHL in the Union's perspective. Therefore, these values are not only axiological to the EU, but they must also be externalized in order to foster the EU's external identity in symmetry with its internal identity. In this respect, promoting compliance with IHL is arguably in the interest of the EU, an international actor willing to assert its credibility and power through multilateralism. The process of recognizing IHL as an EU concern thus contributes to the process of politicization of the EU. As a result of this integration of IHL into European law, the EU defines its identity but also contributes to the development of this area of international law.

Nonetheless, despite the unequivocal legal authority of Common Article 1 in the international legal order and the fact that the EU did not wait until the Lisbon Treaty to act as if it were bound by Common Article 1, its action in the IHL field is limited. The CFSP remains an intergovernmental policy, where EU Member States wish to retain their sovereignty, *a fortiori* in the field of IHL, as it may entail the use of lethal force. Furthermore, there are no express refer-

105 Ferraro, «Le droit international humanitaire dans la politique étrangère», *op. cit.*, 2002, p. 443.
106 S/PRST/2014/4.

ences to IHL in the EU treaties. Hence, EU Member States preferred to refer to an obligation to 'promote compliance with IHL' in the IHL Guidelines, instead of an obligation to 'ensure respect for IHL by others'. Nonetheless, this approach contradicts the current state of international law, as Common Article 1 establishes an obligation of due diligence.

This duty to ensure respect for IHL therefore implies that implementing Common Article 1 remains primarily in the hands of EU Member States. It also implies that much effort is put during at preventive levels, rather than reactive levels although the IHL Guidelines also detail reactive measures that the EU may undertake in case of IHL violations. This aspect is particularly interesting as there is an increasing concern on prevention of IHL violations, as manifested with the publication of the ICRC in 2015 on 'Generating respect for the law'[107]. In this regard, the intervention of the EU in the IHL field, and in particular in the promotion of its compliance is of utmost relevance with regard to the contemporary challenges of IHL. It is likely and desirable that the EU is to become a more important and credible player on this matter.

2. FRANCE AND COMMON ARTICLE 1

> *La défense des droits de l'Homme fait partie de l'identité de notre pays, la France, et elle est un principe d'action de la diplomatie française. C'est pour moi, aussi, un engagement ancien et personnel. La France ne se mettra pas du côté de ceux qui voudraient mettre les violations des droits de l'Homme et le droit humanitaire entre parenthèses, sous le tapis. Le choix n'est pas entre incantation et silence complice: entre les deux, il y a un espace pour l'action, et ce que je souhaite, c'est que la France l'occupe pleinement*[108].

It clearly appears from this statement made by the former French Minister of Foreign Affairs that France must be active in order to ensure respect for IHL, and that no violations thereof can be met with silence. Nonetheless, beyond political declarations, it is important to scrutinize the relationship between the French legal order and Common Article 1. This is the objective pursued in this

107 *International Review of the Red Cross* (2014), 96 (895/896), pp. 689-696. Generating respect for the law.

108 Jean-Marc Ayrault, Minister of Foreign Affairs and International Development.

fragment of the thesis, where the relationship between the French legal order and the obligation to ensure respect for IHL, and the extent to which Common Article 1 has been integrated in the French legal order are analyzed. This question is not subject to much debate, insofar as France is a State party to the four Geneva Conventions and their Additional Protocols, so that it is formally bound by Common Article 1.

Firstly, the relationship between International Law and domestic law must be analyzed. On this basis, France has ratified not only the four Geneva Conventions of 12 August 1949 and their Additional Protocols, but also most of the IHL treaties and conventions, thus establishing a strong nexus between France and the obligation to ensure respect for IHL. Secondly, the role of the National Consultative Commission for Human Rights in ensuring respect for IHL is analyzed.

2.1. The articulation of international and domestic law

> *Cependant, comme nul n'a souhaité interrompre le cours des planètes, les confrontations sont restées toutes théoriques et, à travers un dialogue nourri de concepts prétoriens apparemment contradictoires, des solutions concrètes ont pu être dégagées*[109].

The French approach on the relationship between international and national law is equivocal and complex, torn between the willingness to assert the Constitution's supremacy and the realities of a legal order intertwined between international law, European law and national law. For the sake of clarity, it is therefore important to distinguish between the systems of integration of public international law and EU law into the French legal order, as they reflect the specific character of EU law in domestic law.

2.1.1. Public International Law

The relationship between French law and international law is defined in the French Constitution. The latter was adopted on 4 October 1958 and

[109] Jean-Paul Jacqué, «Droit constitutionnel, Droit communautaire, CEDH, Charte des Nations Unies. L'instabilité des rapports de système entre ordres juridiques», *Revue française de droit constitutionnel*, vol. 1(69), 2007, pp. 3-37.

constitutes the founding text of the Fifth Republic. It is the supreme norm of the French legal order and must be understood as including the so-called 'constitutionality bloc'[110], i.e. its preamble, the preamble of the 1946 Constitution, the 2004 'Charter for the Environment', and the 1789 'Declaration of Human Rights and Citizenship' (Déclaration des droits de l'homme et du citoyen). The Constitution regulates to some extent the relationship between International and national law, and establishes distinctions depending on whether legislative or constitutional norms are at stake.

At first sight, it seems that the Constitution recognizes the primacy of international law over national law. According to the 1946 Constitution's preamble, the French Republic shall comply with public international law rules (paragraph 14). As evidenced by Alain Pellet, the traditional French legal principle according to which international law is part of the law of the land is recognized as a constitutional principle, thus enshrining the subjection of the State to the international legal order into the Constitution[111]. Moreover, according to Article 55, once a treaty or agreement is ratified or approved and published, it shall prevail over the acts of Parliament, provided that the principle of reciprocity is respected.

It should be noted in this regard that the principle of reciprocity is not absolute in international law, a fact that is recognized in the French legal order. As regards humanitarian treaties, the French Constitutional Court (Conseil constitutionnel) considered that it does not apply, in line with the current state of international law[112]. The ECHR and corresponding case-law are thus exempt from the application of reciprocity. More importantly for present purposes, the principle of reciprocity does not apply to IHL[113], as the ICRC has confirmed with regard to the 1949 Geneva Conventions[114]. The legal grounds

110 Conseil constitutionnel, Decision n° 71-44 DC, 16 July 1971, Loi complétant les dispositions des articles 5 et 7 de la loi du 1er juillet 1901 relative au contrat d'association.

111 Alain Pellet, «Question n° 11: Le droit international et la constitution de 1958», *La constitution en 20 questions*, Conseil constitutionnel, 2008, pp. 1-28.

112 Conseil constitutionnel, Decision n° 98-408 DC, 22 January 1999, Traité portant statut de la Cour pénale internationale.

113 Vienna Convention on the Law of Treaties, article 60-5: «Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties».

114 Pictet (dir.), *The Geneva Conventions of 12 August 1949: Commentary. Volume I*, *op. cit*, 1952b.

for such distinction between humanitarian treaties and ordinary treaties is, according to Claudia Sciotti-Lam, that the former does not establish mechanisms allowing the balance between States' interests; rather, it aims at creating an international public order whose subjects are not only States, but also human beings[115]. On this basis, the absence of reciprocity is not a condition for the compliance of French national law with international law, so that the legislator may not invoke this argument to justify incompliance with some treaty provisions[116].

Article 55 is generally understood as recognizing the monist character of the French Constitution; this approach is reinforced by the 1946 preamble. Nevertheless, the legal practice is not completely clear in that regard as the case-law is tinged with dualist overtones.

On the one hand, it appears from the case-law that the legislation must comply with international law. However, the Conseil constitutionnel refuses to scrutinize the compliance of national laws with international law[117]. Indeed, according to the Constitutional Court, international rules do not belong to the constitutionality block. Therefore, a piece of legislation that violates a treaty does not necessarily violate the Constitution, and the Constitutional Court is not competent to scrutinize the conformity of national laws to the provisions of international treaties and conventions.

This situation led the judicial (Cour de cassation) and administrative (Conseil d'État) highest courts to take over this role[118]. As a result, if the Conseil constitutionnel is in charge of monitoring the compliance of French laws with the Constitution, the Cour de cassation and Conseil d'État are in charge of monitoring the compliance of French laws with International law, the so-called '*contrôle de conventionnalité*'. This situation potentially leads to conflictive decisions as constitutional standards are not always equivalent to international standards, in particular in the field of fundamental rights, as they are formulated in very similar terms at international, European and national

115 Sciotti-Lam, *L'applicabilité des traités internationaux relatifs aux droits de l'homme en droit interne*, *op. cit.*, 2004, p. 303.

116 Conseil constitutionnel, Decision nº 80-126 DC, 30 December 1980, Loi de finances pour 1981.

117 Conseil constitutionnel, Decision nº 74-54 DC, 15 January 1975, Loi relative á l'interruption volontaire de grossesse.

118 Cour de cassation, chambre mixte, Judgment nº 73-13556, 24 May 1975, Société Jacques Vabre; Conseil d'État, Judgment nº 108243, 20 October 1989, Nicolo.

levels[119]. The Constitution as the supreme norm of the French legal system thus appears to be a legal fiction difficult to maintain with the development of International Law.

This situation is particularly problematic in relation to ECHR law. In this regard, should a legal norm comply with the Constitution but not with the ECHR, the Cour de cassation and Conseil d'État must set aside the former, otherwise France would run the risk of being condemned by the European Court. Actually, this situation occurred in 1999, when the ECHR condemned France because the Cour de cassation applied a piece of legislation that was declared constitutional by the Constitutional Court[120].

On the other hand, the relationship between International Law and constitutional norms is even more sensitive. Even though the principle of primacy of international law is enshrined in the Constitution, all the French highest courts – Conseil constitutionnel, Cour de cassation, and Conseil d'État – have refused to apply it to the Constitution[121], invoking that the Constitution remains the supreme norm of the French legal order. This position is the result of a settled case-law. In this regard, the Conseil d'État already considered in 1996 that a bilateral treaty of extradition remains subject to constitutional principles in the Koné judgment[122]. In this particular case, the supreme administrative court had to adjudicate on the validity of a decree of extradition. First, it recognized that there is a principle of constitutional nature in the French legal order according to which an extradition may be refused if it is requested

119 See, *inter alia*: Christine Maugüe, «Le conseil constitutionnel et le droit supranational», *Pouvoir*, nº 105, 2003, pp. 67-68.

120 ECtHR, Zielinski et Pradal et al. vs France, Judgment of 28.10.1999.

121 Conseil constitutionnel, 19.11.2004, Decision Traité établissant une constitution pour l'Europe; Conseil d'État, Judgment nº 200286-200287, 30 October 1998, Sarran; Cour de Cassation, Assemblée plénière, Judgment nº 99-60274, 02 June 2000, Pauline Fraisse.

122 Conseil d'État, Judgment nº 169219, 03 July 1996, Koné: «Considérant qu'aux termes de l'article 44 de l'accord de coopération franco-malien susvisé: "L'extradition ne sera pas exécutée si l'infraction pour laquelle *elle est demandée est considérée par la partie requise comme une infraction politique ou comme une infraction connexe à une telle infraction*"; que ces stipulations doivent être interprétées conformément au principe fondamental reconnu par les lois de la République, selon lequel l'État doit refuser l'extradition d'un étranger lorsqu'elle est demandée dans un but politique; qu'elles ne sauraient dès lors limiter le pouvoir de l'État français de refuser l'extradition au seul cas des infractions de nature politique et des infractions qui leur sont connexes*; que par suite, M. KONE est, contrairement à ce que soutient le garde des sceaux, fondé à se prévaloir de ce principe; qu'il ne ressort toutefois pas des pièces du dossier que l'extradition du requérant ait été demandée dans un but politique* [emphasis added]».

on political grounds instead of criminal grounds. Second, it considered that the provisions of the bilateral treaty between France and Mali had to comply with this constitutional principle, thus recognizing the primacy of constitutional norms over treaty norms. Then, the Conseil d'État confirmed such position in the Sarran case of 1998 in the following terms:

> Considérant que l'article 55 de la Constitution dispose que «les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois sous réserve, pour chaque accord ou traité, de son application par l'autre partie», la suprématie ainsi conférée aux engagements internationaux ne s'applique pas, dans l'ordre interne, aux dispositions de nature constitutionnelle; qu'ainsi, le moyen tiré de ce que le décret attaqué, en ce qu'il méconnaîtrait les stipulations d'engagements internationaux régulièrement introduits dans l'ordre interne, serait par là même contraire à l'article 55 de la Constitution, ne peut lui aussi qu'être écarté[123].

In this case, the highest administrative court scrutinized the validity of a decree and was asked to annul it because it did not comply with several norms of international law, including the ECHR and the UN Covenant on Political and Civil Rights. Nonetheless, the Conseil d'État explicitly enshrined the primacy of constitutional norms over international norms. The position of the highest administrative court was later ratified by the Cour de cassation in the Fraisse case of 2000 in the exact same terms as those chosen by the Conseil d'État[124].

This interpretation of international law may be explained by different elements. As Christine Maugüé has observed[125], article 55 of the Constitution refers to the primacy of international law but with regard to *legislative* acts only. No mention is made to the superiority of international norms over *constitutional* norms. Furthermore, the ratification procedure reinforces this argumentation. Indeed, article 54 of the Constitution reads as follows:

123 Conseil d'État, Case nº 200286 200287, 30 October 1998, Sarran.

124 Cour de Cassation, Assemblée plénière, Judgment nº 99-60274, 02 June 2000, Pauline Fraisse: «que la suprématie conférée aux engagements internationaux ne s'appliquant pas dans l'ordre interne aux dispositions de valeur constitutitionnelle».

125 Christine Maugüe, «L'arrêt Sarran, entre apparence et réalité», *Cahiers du conseil constitutionnel,* nº 7, 1999.

> if the Constitutional Council [...] has held that an international undertaking contains a clause contrary to the Constitution, authorization to ratify or approve the international undertaking involved may be given only after amending the Constitution[126].

As a consequence, a treaty that would not comply with the Constitution cannot be ratified by the French authorities, except if they amend the Constitution first. This provision therefore leaves the final word to the constituent power. If the latter refuses to modify the Constitution, then the international treaty will remain a dead letter regarding the French legal order[127]. The Constitutional Court eventually confirmed the position of the Cour de cassation and Conseil d'État [128].

While the situation of international norms in the French hierarchy of norms is clarified, some issues remain. In particular, the question surrounding their effective integration into the domestic legal order needs to be addressed. As evidenced by the monist understanding of article 55 of the Constitution, the international treaties and conventions that are ratified or approved are applicable into the national legal order once they enter into force. Nonetheless, their enforceability regarding individuals is subject to their publication in the Official Journal. Furthermore, if the international treaties and conventions do not entail legislative modifications, then their clauses must be self-executing for them to be directly applicable. The role played by the national jurisdictions in defining whether international norms are self-executing or not is therefore essential.

On another note, it should be highlighted that the Constitution does not refer to the acts adopted by the international organizations to which France is a Member State. However, as evidenced by Alain Pellet[129], they follow the same rules as those of treaties. International organizations' decisions are obligatory and directly applicable as long as they are self-executing.

In addition, the Constitution does not refer to customary international law. In this respect, if the Conseil constitutionnel refuses to monitor the compliance of national norms with treaty law, it accepts to do so in relation with

126 French Constitution of 1958, article 54.
127 Maugüe, «L'arrêt Sarran, entre apparence et réalité», *op. cit.*, 1999.
128 Conseil constitutionnel, 19.11.2004, Decision Traité établissant une constitution pour l'Europe.
129 Pellet, «Question n° 11: Le droit international et la constitution de 1958», *op. cit.*, 2008.

unwritten principles of international law[130]. The Conseil d'État, on the other hand, makes national law prevail in case of conflict with customary international law[131].

Thus, domestic courts have established a sophisticated system of hierarchy according to which international law prevails over legislative acts but remains subject to constitutional norms in the French hierarchy of norms. In this respect, reflecting only in terms of division between monism and dualism has proven to be quite superficial, as national courts have had to adapt the hierarchy of norms to the phenomenon of globalization.

2.1.2. The special case of EU law

Special mention needs to be made to EU law, as it does not exactly obey to the same rules as those that govern public international law. In particular, one of the main issues surrounding the relationship between EU and national law deals with the principle of primacy of EU law.

Indeed, the Court of Justice has consistently affirmed the primacy of EU law over national law[132], a principle which cannot be limited either by constitutional norms[133] or fundamental rights[134]. It is therefore an absolute principle, which accepts no limitations. While the principle of primacy is not alien to international law, the manner in which it is actually implemented in the EU framework is more sophisticated and efficient. In this regard, the European Court of Justice has developed several principles which are corollaries to the principle of primacy. First, the Court considered that the EU legal order can-

130 Conseil constitutionnel, Decision nº 75-59 DC, 30 December 1975, Loi relative aux conséquences de l'autodétermination des îles des Comores; Decision nº 81-132 DC, 16 January 1982, Loi de nationalisation; Conseil constitutionnel, Decision nº 85-197 DC, 23 August 1985, Loi sur l'évolution de la Nouvelle Calédonie; Decision nº 92-308 DC, 09 April 1992, Traité sur l'Union européenne. Quoted in Pellet, «Question nº 11: Le droit international et la constitution de 1958», *op. cit.*, 2008.

131 Conseil d'État, Judgment nº 148683, 06 June 1977, Aquarone. Quoted in Pellet, «Question nº 11: Le droit international et la constitution de 1958», *op. cit.*, 2008.

132 ECJ, Case C-6/64, Judgment of the Court of 15 July 1964, Flaminio Costa v. E.N.E.L. [1964] ECR 585.

133 ECJ, Cases C-29/69, Stauder v. City of Ulm [1969] ECR 419.

134 ECJ, C-11/70, Internationale Handelsgesellschaft mbH v. Einfhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125.

not be assimilated to traditional international rules. In the case Costa vs. Enel of 1964, it held the following:

> By contrast with ordinary international treaties, the EEC treaty has created its own legal system which, on the entry into force of the treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply[135].

It then went further in the case Les Verts of 1986:

> It must first be emphasized in this regard that the European Economic Community is a community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the treaty[136].

Consequently, the EU legal order is held to be different from the international legal order; it becomes an integral part of domestic law and cannot obey to the same rules of integration at national level. What is more, the founding treaties constitute the «basic constitutional charter» of that order.

The appearance of the constitutional terminology and mechanisms at EU level is particularly significant. It demonstrates the willingness to establish a legal order similar to that of a State. This is further strengthened by other principles of interpretation of EU law, most notably the principle of direct effect, recognized in the Van Gend en Loos case[137]. The EU legal order does not only establish obligations between States, but it also creates individual rights, so that individuals are allowed to invoke EU law before their national courts. As a result, the traditional mechanisms stemming from international law cannot apply to EU law, as the principle of reciprocity would infringe upon the rights of individuals and the single market[138]. This principle was indeed rejected by

135 ECJ, Case C-6/64, Judgment of the Court of 15 July 1964, Flaminio Costa v. E.N.E.L. [1964] ECR 585.

136 ECJ, Case C-294/83, Parti écologiste «Les Verts» v. European Parliament. Judgment of the Court of 23 April 1986. European Court Reports 1986-01339.

137 ECJ, Judgment of the Court of 5 February 1963, Van Gend en Loos.

138 Jacqué, «Droit constitutionnel, Droit communautaire, CEDH, Charte des Nations Unies», *op. cit.*, 2007, pp. 3-37.

the Court of Justice as it considered it to be incompatible with the structure of the EU[139]. The idea of legal order integrated into national law is made possible by the fact that national judges are the ordinary courts in charge of applying EU law[140]. All these principles set out by the Court of Justice not only reinforce the hierarchy of norms between EU and national law, but they also entail consequences regarding the mechanism of reception of EU law in national law and the manner in which the principle of primacy is actually implemented[141]. Most notably, they allow an effective application of EU law on a daily basis by national judges.

Consequently, the affirmation of the primacy of EU law is not without problems in the French legal order, as constitutional norms are normally considered to be at the summit of the hierarchy of norms. Indeed, the relationship between EU law and national legislative acts was fairly rapidly resolved as the Cour de cassation recognized the primacy of EU law over national legislative acts, including subsequent acts[142]. Even though the recognition arrived later, the Conseil d'État eventually followed the Cour de cassation's approach in 1989[143].

However, the relationship between constitutional and EU norms has been more conflictive or at least, more complex. In this regard, on the occasion of the adoption of the Treaty of Maastricht, the constituent power decided to enshrine the participation of France in the EU into Title XV of the Constitution[144] in order to solve this conflict. Yet, it was not until the Constitutional Court scrutinized the Treaty establishing a Constitution for Europe that it adopted a clear approach on this matter.

In this regard, the Constitutional Court now considers that it is incompetent to scrutinize the constitutionality of the legislative acts that exactly trans-

139 ECJ, Case C-106/77, Judgment of the Court of 9 March 1978, Amministrazione delle Finanze dello Stato v. Simmenthal SpA [1978] ECR 629.

140 *Ibid*.

141 Jacqué «Droit constitutionnel, Droit communautaire, CEDH, Charte des Nations Unies», *op. cit.*, 2007, p. 9.

142 Cour de Cassation, chambre mixte, Judgment nº 73-13556, 24 May 1975, Société Jacques Vabre.

143 Conseil d'État, Judgment nº 108243, 20 October 1989, Nicolo.

144 Constitution of 1958, article 88-1: «The Republic shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common by virtue of the Treaty on European Union and of the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on 13 December, 2007».

pose EU directives (decision 2004-496 DC). As article 88-1 of the Constitution explicitly refers to the participation of France in the EU, it appears that when the legislature transposes EU directives, it responds to an EU obligation that actually derives from a constitutional norm. Therefore, the Constitution obliges the French legislature to comply with its EU commitments. One consequence is that if the Constitutional Court scrutinizes a legislative act which is the exact transposition of a Directive, it indirectly analyses the validity of the directive, a competence that belongs to the sole Court of Justice. Consequently, the Constitutional Court has declared itself incompetent to scrutinize the constitutionality of transposing acts of EU directives.

In this context, the constitutional judge recognizes to some extent the primacy of EU norms and the competence of the Court of Justice of the EU. This approach constitutes a recognition of the trust towards the Court of Justice to ensure, together with the ordinary courts, the respect for the principles that are common to the Constitution and the EU legal order[145], especially fundamental rights. If an act of transposition challenges one of these common principles, the Court of Justice is entrusted to ensure its respect and the Constitutional Court is not competent[146].

However, the constitutional judge does foresee an exception to the primacy of EU norms: that they respect the rules and principles inherent in the French constitutional identity («règle ou principe inhérents à l'identité constitutionnelle de la France»)[147]. In this respect, if the constitutionality of a

145 Bertrand Mathieu, «Les rapports normatifs entre le droit communautaire et le droit national. Bilan et incertitudes relatifs aux évolutions récentes de la jurisprudence des juges constitutionnel et administratif français», *Revue française de droit constitutionnel,* 4(72), 2007, pp. 675-693.

146 See, e.g.: Conseil constitutionnel, Decision 2004-498 DC, 29 July 2004, Loi relative à la bioéthique.

147 Conseil constitutionnel, Decision 2006-540 DC, 27 July 2006 Loi relative au droit d'auteur et aux droits voisins dans la société de l'information («Considérant qu'aux termes du premier alinéa de l'article 88-1 de la Constitution: "La République participe aux Communautés européennes et à l'Union européenne, constituées d'États qui ont choisi librement, en vertu des traités qui les ont instituées, d'exercer en commun certaines de leurs compétences"; qu'ainsi, la transposition en droit interne d'une directive communautaire résulte d'une exigence constitutionnelle; Considérant qu'il appartient par suite au Conseil constitutionnel, saisi dans les conditions prévues par l'article 61 de la Constitution d'une loi ayant pour objet de transposer en droit interne une directive communautaire, de veiller au respect de cette exigence; que, toutefois, le contrôle qu'il exerce à cet effet est soumis à une double limite; Considérant, en premier lieu, que la transposition d'une directive ne saurait aller à l'encontre d'une règle ou d'un principe inhérent à l'identité constitutionnelle de la France, sauf à ce que le constituant y ait consenti; Considérant, en second

transposing act contradicts a principle specific to the domestic legal order, then the Court of Justice cannot ensure its respect, so that the Constitutional Court recovers its competence to scrutinize its validity with regard to that principle.

The primacy of the Constitution is therefore reaffirmed. As Bertrand Mathieu observes, on the one hand, the prevalence of EU law is actually based on the primacy of the Constitution (article 88-1); on the other hand, the existence of rules and principles inherent in the French constitutional identity poses a limit to such prevalence[148]. Scholars have described this case-law as the 'French Solange'[149], even though the limitation does not depend on the level of protection of fundamental rights at EU level, but rather on the nature of the norm at stake[150].

To sum up, it appears from an analysis of French case-law that international treaties are not superior to the Constitution but shall prevail over national legislative acts, with the exception of some EU law provisions, which are supreme provided that they respect the French constitutional identity.

2.2. Common Article 1 in national law

France has ratified most IHL treaties and conventions, albeit some issues remain in particular with regard to the IHFFC and the reservations made to Additional Protocol I. It seems that these elements are linked to the specificities of France, notably with regard to nuclear weapons, but also its history in Algeria. Despite these issues, France is an active actor of IHL on the overall. In

lieu, que, devant statuer avant la promulgation de la loi dans le délai prévu par l'article 61 de la Constitution, le Conseil constitutionnel ne peut saisir la Cour de justice des Communautés européennes de la question préjudicielle prévue par l'article 234 du traité instituant la Communauté européenne; qu'il ne saurait en conséquence déclarer non conforme à l'article 88-1 de la Constitution qu'une disposition législative manifestement incompatible avec la directive qu'elle a pour objet de transposer; qu'en tout état de cause, il revient aux autorités juridictionnelles nationales, le cas échéant, de saisir la Cour de justice des Communautés européennes à titre préjudiciel»).

148 Mathieu, «Les rapports normatifs entre le droit communautaire et le droit national», *op. cit.*, 2007, pp. 675-693.

149 Anne Levade, «Constitution et Europe ou le juge constitutionnel au coeur des rapports de système», *Cahiers du Conseil constitutionnel,* nº 18, July 2005.

150 Mathieu, «Les rapports normatifs entre le droit communautaire et le droit national», *op. cit.*, 2007, pp. 675-693.

this respect, the analysis of its policy documents demonstrates that the respect for IHL is one of its priorities and Common Article 1 is explicitly recognized as an institutional mechanism of compliance.

2.2.1. An overall satisfactory ratification of IHL treaties

As Isabelle Fouchard observes in her report on the 'Application et promotion du droit international humanitaire et du droit international des droits de l'homme en temps de conflit armé'[151], France is a party to the vast majority of existing IHL treaties. As she highlights, it is therefore more accurate to examine which treaties have not been ratified by France in order to have an idea of France's participation in IHL treaties[152].

In matter of protection of victims of armed conflicts, France is not a party to the Declaration provided for under article 90 of Additional Protocol I on the acceptance of the competence of the IHFFC[153]. The French Ministry of Foreign Affairs used to argue that France would change its position towards the IHFFC once the International Criminal Court would be competent to prosecute the war crimes committed by French nationals[154]. Indeed, upon the ratification of the Rome Statute on the International Criminal Court, France opposed a declaration on the basis of article 124 in order to exclude the ICC's jurisdiction over the war crimes committed by French nationals for a period of seven years upon the entry into force of the Statute[155]. Even though this declaration was withdrawn on 13 August 2008[156], the position on the IHFFC has not changed.

This omission can be problematic. Even though the State parties have not resorted to the IHFFC, it constitutes a promising tool to ensure respect for IHL

151 Isabelle Fouchard, *Application et promotion du droit international humanitaire et du droit international des droits de l'homme en temps de conflit armé*, ATLAS, 2009.

152 *Ibid*., pp. 3-4.

153 States accepting the competence of the International Humanitarian Fact-Finding Commission based on Article 90 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of the Victims of International Armed Conflicts of 8 June 1977. Available at: http://www.ihffc.org/Files/en/pdf/country_list_05.05.2014.pdf (Accessed: 14.03.2016).

154 Notification dépositaire C.N.404.2000.TREATIES-12 (France: Ratification), 21 June 2000.

155 See, *infra*, Chapter 4, Section 2.

156 Notification dépositaire C.N.592.2008.TREATIES-5 (France: Retrait de déclaration), 20 August 2008.

whose potential should be exploited, as mentioned above[157]. As the IHFFC's website notes, the IHFFC benefits from an important role at international level as it is supported by the UN, the ICRC, and other intergovernmental and non-governmental organizations[158]. In this, regard, the IHFFC is explicitly referred to in the EU 'Guidelines on promoting compliance with IHL'. There is therefore a discrepancy between what France agreed to commit to at EU level and what it commits to in its own capacity. It also questions whether any EU action in this sense would be supported by French authorities.

In relation with the protection of cultural property, France is not a party to the 1999 Hague Protocol[159]. It is not a party either to the Convention on the prohibition of military or any other hostile use of environmental modification techniques of 10 December 1976[160]. Apart from these exceptions, this overwhelming ratification demonstrates an overall engagement of France in favor of IHL.

As far as customary IHL is concerned, France considers that the most universally recognized humanitarian principles which are often formalized in treaty law are indeed of customary nature and shall therefore bind all States. However, the official position of the State is that the precise content and scope of customary principles remains subject to debate. In particular, it values the 'doctrinal value' of the ICRC Study on 'Customary International Humanitarian Law', but it refuses to consider it as proper law, which may be invoked against States[161].

Turning now to the relationship between the 1949 Geneva Conventions and their Additional Protocols – in particular Common Article 1 – and French law specifically, France signed the four Geneva Conventions on the date of their adoption and ratified them two years later, on 28 June 1951. It

157 See, *supra*, Chapter 1.

158 Website of the IHFFC, «Welcome to the Website of the IHFFC». Available at: www.ihffc.org/index.asp?page=home (Accessed: 22.04.2016).

159 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999. Available at: http://www.icrc.org/ihl (Accessed: 14.03.2016).

160 Convention on the prohibition of military or any hostile use of environmental modification techniques, 10 December 1976. Available at: http://www.icrc.org/ihl (Accessed: 14.03.2016).

161 Mission permanente de la France auprès des Nations Unies, Rapport de la France sur l'«Etat des protocoles additionnels aux conventions de Genève de 1949 relatifs à la protection des victimes des conflits armés», New York, 2012, p. 2.

also signed Additional Protocol II on the protection of victims of non-international armed conflicts on 12 December 1977 and ratified it on 7 August 1980.

As for Additional Protocol I on the protection of victims of international armed conflicts, it took longer to get it ratified. Despite an active participation in the elaboration of the Protocol, France signed it and indicated that it was not bound by the instrument[162]. As Marie-Hélène Aubert has shown, France's reluctance to ratify the Protocol was based on the refusal to merge the law on the conduct of hostilities with humanitarian law on the one hand, and on the compatibility of Additional Protocol I with its doctrine of nuclear deterrence[163]. Nonetheless, this position had become untenable, especially with regard to France's willingness to present itself a leader in human rights issues on the international stage[164]. Therefore, the then Prime Minister announced that France was willing to ratify the Protocol on the occasion of the 50th anniversary of the Universal Declaration of Human Rights, in March 1998[165]. Against this background, France eventually ratified Additional Protocol I in April 2001, but it also made 18 reservations and declarations to it[166]. Concretely, they deal with the right to self-defense, nuclear weapons, the definition of an armed conflict, or the notions of military advantage and military objective.

Finally, regarding Additional Protocol III, France signed it on 8 December 2005 and ratified it four years later, on 17 July 2009. Nonetheless, ratification is not sufficient, insofar as the enforceability of the 1949 Geneva Conventions and their Additional Protocols depends on their publication in the French official journal. In this regard, it is worth mentioning that the 1949 Geneva Conventions were ratified by the President of the Republic on June 1951 following an act of Parliament[167] and were published in French by decree

162 Marie-Hélène Aubert, *Rapport n° 2833 fait au nom de la Commission des Affaires étrangères sur le projet de loi adopté par le Sénat, autorisant l'adhésion au protocole additionnel aux conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux (protocole I) (ensemble deux annexes)*, Paris, Assemblée Nationale, 20 December 2000, p. 15.

163 *Ibid*., pp. 15-16.

164 Aubert, *Rapport n° 2833 fait au nom de la Commission des Affaires étrangères sur le projet de loi adopté par le Sénat, op. cit*., 2000, p. 17.

165 *Ibid*.

166 Available at: https://www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=D8041036B40EBC44C1256A34004897B2 (Accessed: 14.03.2016).

167 Act n° 51-161 of 16 February 1951 (Loi n° 51-161 du 16 février 1951 autorisant le Président de la République à ratifier les quatre conventions de Genève du 12 août 1949 pour la protection des victimes de la guerre), JORF 17 February 1951, p. 1644.

n° 52-253 of 28 February 1952[168], thus enshrining the four Geneva Conventions in domestic law. In the same way, an act of Parliament of 23 December 1983 authorized the ratification of Additional Protocol II[169], which was published in the Official Journal through the adoption of decree no. 84-727 of 17 July 1984[170]. Lastly, France formalized the ratification of Additional Protocol I through the adoption of an act of Parliament on 30 January 2001[171]. Therefore, the criteria necessary for the correct ratification of the Geneva Conventions are fulfilled in the French legal order.

Generally speaking, as Isabelle Fouchard underlines, these ratifications highlight an active engagement in the promotion and respect for IHL, as only the reservations made to Additional Protocol I are likely to give rise to problems of application by the Government[172]. With regard to Common Article 1, this means that France is unequivocally bound by the obligation to ensure respect for IHL, both in its internal and external dimensions.

Nevertheless, for the Geneva Conventions to be directly applicable, national jurisdictions must assess whether their clauses are self-executing or not. To do so, they follow a set of criteria well established in the case-law. The provisions contained in the international treaties and conventions must be clear and unconditional; in particular, they must be sufficiently precise to create rights for individuals. The Conseil d'État conducts an assessment following

168 Decree n° 52-253 of 28 February 1952 (Décret n° 52-253 du 28 février 1952 portant publication de la Convention relative au traitement des prisonniers de guerre, de la Convention relative à la protection des personnes civiles en temps de guerre, de la Convention pour l'amélioration du sort des blessés, des malades et des naufragés des forces armées sur mer, de la Convention pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne, signées à Genève le 12 août 1949), JORF 6 March 1952, p. 2617.

169 Act n° 83-1130 of 23 december 1983 (Loi n° 83-1130 du 23 décembre 1983 autorisant l'adhésion de la République française au protocole additionnel aux conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés non internationaux [protocole II] adopté à Genève le 8 juin 1977, Journal Officiel de la République française), JORF 27 December 1983, p. 3731.

170 Decree n° 84-727 of 17 July 1984 (Décret n° 84-727 du 17 juillet 1984 portant publication de ce protocole).

171 Act n° 2001-79 of 30 January 2001 (Loi n° 2001-79 du 30 janvier 2001 autorisant l'adhésion au protocole additionnel aux conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux [protocole I]), JORF, 31 January 2001, p. 1650. Published in the official journal through Decree n° 2001-565 of 25 June 2001 (Décret n° 2001-565 du 25 juin 2001 portant publication de ce protocole), JORF, 30 June 2001, p. 10409.

172 Fouchard, *Application et promotion du droit international humanitaire et du droit international*, *op. cit.*, 2009.

two cumulative criteria: first, the provision at stake is not exclusively intended to govern inter-State relations, and second, it does not require a transposing act to create effects towards individuals:

> Une stipulation doit être reconnue d'effet direct par le juge administratif lorsque, eu égard à l'intention exprimée des parties et à l'économie générale du traité invoqué, ainsi qu'à son contenu et à ses termes, elle n'a pas pour objet exclusif de régir les relations entre Etats et ne requiert l'intervention d'aucun acte complémentaire pour produire des effets à l'égard des particuliers; l'absence de tels effets ne saurait être déduite de la seule circonstance que la stipulation désigne les Etats parties comme sujets de l'obligation qu'elle définit[173].

However, the perspective adopted by the French jurisdictions has been quite conservative concerning the Geneva Conventions. Indeed, they have considered that their provisions are too general, and cannot be directly applicable in the French legal order[174]. National jurisdictions have not interpreted Common Article 1 specifically, but it is most likely that they would adopt the same line of reasoning. In particular, it is very plausible to consider that this provision aims to govern inter-States relations only and cannot create rights for individuals as a result. While this interpretation is logical, it might prove to be problematic regarding the criminalization of violations of IHL at domestic level[175].

2.2.2. An express recognition of Common Article 1 in policy documents

In any case, the particular status of the Geneva Conventions in IHL and the international legal order in general seems to be recognized. By way of example, the Textbook on the Law of Armed Conflicts (*Manuel de droit des conflits armés*) considers that the Geneva Conventions constitute, even today, the basis of IHL. This Textbook was written as a working tool aimed at supporting the military in the legal aspects of their conduct. It is not legally binding, but it offers a useful tool to approach the interpretation of French authorities with

173 Conseil d'État, Ass., GISTI et FAPIL, n° 322326, 11 April 2012, conclusions of G. Dumortier.
174 Cour de cassation, chambre criminelle, case n° 95-81527, 26 March 1996, E. Javor and al. vs. X.
175 This aspect is extensively addressed in Chapter 4.

respect to IHL. In this Textbook, the obligation to ensure respect is referred to, as it is the condition of IHL's efficiency:

> Pour être efficace, le droit des conflits armés doit être respecté par le plus grand nombre d'États. Il doit tendre vers l'universalité, afin d'être accepté par tous. Il doit aussi être encadré par des mesures de confiance, de surveillance, de contrôle et de sanction[176].

The Textbook likewise recognizes that the exemplary behavior of the French military is an element that contributes to ensuring respect for IHL:

> L'exemplarité du comportement de nos forces armées en la matière permet aussi que ces règles, parfois ignorées ou transgressées, soient mieux appliquées partout dans le monde[177].

It thus appears that the French authorities are well aware that they must ensure respect for IHL internally in order to be credible when conducting action to ensure respect for IHL externally.

In the same line, France's Humanitarian Strategy for the period 2012-2017 (Stratégie Humanitaire de la République Française, hereafter, 'Strategy') explicitly refers to Common Article 1 as one of the guiding principles of its humanitarian action in the following terms:

> La France respecte et s'efforce de faire respecter le droit international humanitaire lors de tous les conflits armés, internationaux ou non-internationaux, conformément à l'article 1 commun aux quatre conventions de Genève du 12 août 1949[178].

In this respect, it is worth noticing that France recognizes the application of Common Article 1 both in international and non-international armed conflicts. There also seems to be a sense of permanence in the wording chosen («tous les conflits armés»). Furthermore, the Strategy refers to the necessity to

176 Direction des Affaires Juridiques, Manuel de droit des conflits armés, Paris, Ministère de la Défense, 2012, p. 11.

177 *Ibid.*, p. 11.

178 Ministère des affaires étrangères, Stratégie humanitaire de la République française, Paris, 06.07.2012, p. 12.

reach both State and non-State actors in order to effectively ensure respect for IHL. The Strategy further confirms the relevance of IHL and the idea that it cannot be called in question, either directly or indirectly. It therefore acknowledges the need to reach a uniform and ambitious interpretation, and to foster its application in good faith by all actors involved. It is also worth mentioning that the Strategy refers to the Responsibility to Protect as another guiding principle of France's humanitarian action on the international stage.[179]

In addition, it is important to note that France frames its action also within the EU context. In this respect, it refers to different provisions of EU law relating to humanitarian action and aid. The fact that the Strategy expressly refers to the EU Guidelines on promoting compliance with IHL and states that France's action ensures that they are implemented is of particular interest for present purposes[180].

The importance given to Common Article 1 is likewise expressed in the paragraph on strengthening national and international partnerships. Indeed, France commits to develop initiatives aiming at ensuring respect for IHL together with the Red Cross Movement, by intervening both in multilateral and bilateral fora, so as to support all the actors involved in armed conflicts in respecting IHL[181].

Furthermore, the ICRC Study on Customary International Humanitarian Law provides examples of statements made by the highest French public authorities whereby they declare their commitment to Common Article 1[182]. One of these speeches is particularly eloquent in this regard, as the Minister of Foreign and European Affairs stated the following:

> [A]ll State parties to the conventions [1949 Geneva Conventions and their protocols] must not only obey them but also ensure that they are obeyed by the parties in an armed conflict.
>
> What that means is that the international community has a special responsibility in ensuring compliance with international humanitarian law[183].

179 *Ibid.*, pp. 12-13.

180 Ministère des affaires étrangères, Stratégie humanitaire de la République française, *op. cit.*, 2012, p. 13: «Elle veille attentivement à la mise en œuvre des 'Lignes directrices concernant la promotion du droit international humanitaire', dont l'Union européenne s'est dotée en 2005».

181 *Ibid.*, p. 25.

182 Practice Relating to Rule 144. Ensuring Respect for International Humanitarian Law Erga Omnes.

183 *Ibid.*

These declarations leave no doubt. Common Article 1 is understood as a legal obligation as the wording indicates, and the external dimension of the obligation to ensure respect for IHL is explicitly stated. It also clearly endorses the idea that Common Article 1 establishes a system of collective responsibility binding upon the international community.

It can therefore be concluded that France is not only bound by the obligation to ensure respect for IHL as any other State party to the Geneva Conventions, but that it also is well aware of that and expressly recognizes so. Even though there is no doubt from an international perspective that France is bound by the Geneva Conventions, the domestic case-law on the Geneva Conventions is not conclusive regarding Common Article 1 specifically. Nonetheless, some elements of soft law clearly indicate that France recognizes that it has a duty to ensure respect for IHL not only internally but also externally. In this respect, while the Strategy is not legally binding, it offers an interesting insight about the French perspective on the obligation to ensure respect for IHL. The importance and relevance of the latter are emphasized, and the tone of the Strategy highlights the necessity and urgency to effectively ensure respect for IHL. Likewise, the Strategy endorses the broad interpretation of Common Article 1, understood as an obligation to ensure respect for IHL not only internally, but also by others.

2.3. The National Consultative Commission for Human Rights

State parties to the Geneva Conventions are expected to establish national committees in charge of advising and assisting governments in implementing and disseminating IHL. They therefore constitute a non-negligible aspect of the obligation to ensure respect for IHL. Against this background, France created the National Consultative Commission for Human Rights (Commission Nationale consultative des droits de l'homme, hereafter, 'CNCDH') in 1947 and granted it IHL competences in 1996. This was later confirmed in 2007[184]. As its name suggests, the CNCHD's mandate is much broader and includes human rights matters in general. Nevertheless, its mandate also explicitly refers

[184] Act nº 2007-292 relating to the French National Consultative Commission for Human Rights (Loi relative à la Commission nationale consultative des droits de l'homme).

to IHL and it is recognized as the official national committee for the implementation of IHL, as provided by the ICRC.

In particular, pursuant to the Statutes of the CNCDH, the latter is responsible for advising and proposing recommendations to the Government on IHL and humanitarian action matters. Furthermore, Decree nº 2007-1137 on the composition and functioning of the CNCDH stipulates that the CNCDH shall cooperate with the international organizations in charge of IHL and may call the attention of public authorities regarding the ratification of IHL treaties and conventions or the compliance of domestic law therewith. In addition, the CNCDH may assess which are the measures necessary to ensure the application of IHL[185].

In this respect, the CNCDH's activities include, *inter alia*, the implementation of France's international obligations on this matter, the development of IHL, as well as the creation and implementation of international treaties and conventions relating to weapons. Within this frame, it has adopted a series of advisory opinions on IHL. The first advisory opinion on IHL dates back to 1990[186]. Afterwards, it has adopted advisory opinions on, *inter alia*, the ratification of IHL instruments[187], the need to respect the provisions of the Geneva Convention on prisoners of war[188], the compliance of the French legal order with the Statute of Rome[189] and other IHL instruments[190], the respect for

185 Decree nº 2007-1137 on the composition and functioning of the French National Consultative Commission for Human Rights (Décret nº 2007-1137 relatif à la composition et au fonctionnement de la Commission nationale consultative des droits de l'homme), article 2.

186 CNCDH, Avis Mise en œuvre et développement progressif du droit international humanitaire, 06 April 1990.

187 CNCDH, Avis sur l'adhésion française au protocole additionnel aux conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux (Protocole I), 6 July 2001.

188 CNCDH, Avis concernant la situation des personnes détenues après avoir été arrêtées dans le cadre du conflit armé international en Afghanistan, 7 March 2002.

189 CNCDH, Avis sur la Cour pénale internationale, 23 October 2012; CNCDH, Avis sur la loi portant adaptation du droit pénal à l'institution de la Cour Pénale Internationale, 6 November 2008; CNCDH, Avis sur le projet de loi adaptant la législation française au statut de la Cour Pénale Internationale, 29 June 2006; CNCDH, Avis sur l'avant-projet de loi portant adaptation de la législation française au Statut de la Cour pénale internationale, 15 May 2003; CNCDH, Avis sur la mise en oeuvre du Statut de la Cour pénale internationale, 19 December 2002.

190 CNDCH, Avis sur la protection et l'utilisation des emblèmes de la croix rouge, du croissant rouge et du cristal rouge, 15 April 2010.

humanitarian principles, the need to protect humanitarian workers[191] and medical staff operating in armed conflicts, or on arms trade[192]. In few cases, the CNCDH has called the attention of the French government on violations occurring in armed conflicts, such as in Chechnya[193].

While these opinions are not legally binding, they are helpful in order to assess where France stands on these issues and the efforts that still need to be undertaken. Furthermore, even though this does not hold true for all advisory opinions, some of them have been followed to some extent by the French authorities. By way of example, the CNCDH recommended the adoption of a pluri-annual framework law that would establish the principles of France's humanitarian action on the international scene in 2011[194]. On the following year, the French government adopted the above-mentioned Humanitarian Strategy for the period 2012-2017. Even though this is a non-legally binding instrument, it is reasonable to assume that the recommendation of the CNCDH had something to do with its adoption.

Thus, as any other State party to the Geneva Conventions, France is subject to the obligation to ensure respect for IHL, both internally and externally. In this regard, the overwhelming ratification of IHL treaties denotes an overall commitment of France with respect to IHL in general, and the Geneva Conventions in particular. France has ratified the four Geneva Conventions and their three additional protocols, and it has complied with its internal obligations in order to give full effect to these ratifications. It is therefore unequivocally bound by Common Article 1, a situation not explicit in domestic law but acknowledged by the authorities in different policy documents and public statements. Furthermore, France has long framed itself as the 'country of human rights'. Mirroring the EU, France bases the functioning of democracy and its involvement in international organizations on the respect for human rights, which are considered its founding values[195]. Pursuant to this mandate, France must take all measures to ensure respect for IHL on the international

191 CNDCH, Avis sur le respect et la protection des travailleurs humanitaires, 22 May 2014; CNCDH, Avis sur le respect et la protection du personnel humanitaire, 17 January 2008.

192 CNCDH, Avis sur le projet de Traité sur le commerce des armes, 23 June 2011; CNCDH, Avis portant sur les systèmes d'armes à sous-munitions, 21 September 2006; CNCDH, Avis sur le projet de convention cadre sur les transferts internationaux d'armes, 23 June 2005.

193 CNCDH, Avis sur la situation en Tchétchénie et en Ingouchie, 19 December 2002.

194 CNCDH, Avis sur l'action humanitaire de la France, 31 March 2011.

195 See: http://www.franceonu.org/Protection-of-Human-Rights (Accessed: 08.06.2016).

scene. In addition, it clearly appears that France's action on the matter is multilateral. In this regard, France places its action to ensure respect for IHL within the framework of the EU's action as well as within the UN.

What is more, in terms of capacities, France is an important actor on the international scene and must act accordingly. In particular, it probably has a higher duty to ensure respect for IHL in its quality of permanent member of the UNSC. It is therefore important to scrutinize France's action within the UNSC in order to assess whether it complies with the obligation to ensure respect for IHL. It is worth noting that the protection of civilians was one of the main priorities of the French presidency of the UNSC during June 2016[196]. Furthermore, the above-mentioned French-Mexican initiative on UNSC permanent members refraining from using their right to veto in case of genocide, crimes against humanity, war crimes and ethnic cleansing is encouraging insofar as it highlights the shift from a State-centered approach to a human-centered approach of international relations. When the most serious international crimes are committed, the French government is ready to give up on one of its most important privileges. France's commitment to the R2P is clear, which in turn has an impact on the obligation to ensure respect for IHL.

Yet, two issues remain regarding the integration of Common Article 1 in the French legal order: the refusal to recognize the competence of the IHFFC and the lack of direct effect of the Geneva Conventions' provisions in the French legal order. As mentioned above, the IHFFC is a promising tool that should be used by the State parties to implement their obligation to ensure respect for IHL, and it is regrettable that France does not follow this path. As for the lack of direct effect, while it is understandable regarding Common Article 1, it nonetheless entails problems regarding the criminalization of IHL violations. As evidenced in Chapter 4 of this thesis, the actual criminalization of IHL violations was made possible in France only with the establishment of international criminal jurisdictions despite a clear mandate already established in the Geneva Conventions.

196 See: Conférence de presse de présentation du programme de travail de la présidence française du Conseil de sécurité, Intervention de M. François Delattre, représentant permanent de la France auprès des Nations unies, 01.06.2016. Available at: http://www.franceonu.org/Le-maintien-de-la-paix-colonne-vertebrale-de-la-Presidence-francaise-du-Conseil (Accessed: 08.06.2016).

3. SPAIN AND COMMON ARTICLE 1

A State party to the Geneva Conventions, there is no doubt that Spain is bound by the obligation to ensure respect for IHL, as provided by Common Article 1. Therefore, in this section, the transposition of Common Article 1 into the Spanish legal order is analyzed. In particular, the articulation of international, EU, and domestic law is examined and applied to Common Article 1. It should also be noted that due to the internal structure of Spain, the regional authorities (Comunidades Autónomas) may also conduct their own external action[197]. However, this aspect is excluded from the present analysis, as it would go beyond the scope of this thesis.

In the same way as France, Spain has ratified not only the four Geneva Conventions of 12 August 1949 and their Additional Protocols, but also most of the IHL treaties and conventions, thus establishing a strong nexus with the obligation to ensure respect for IHL. Furthermore, Spain has established a national Commission on International Humanitarian Law. All in all, it seems that the obligation to ensure respect for IHL is well integrated into the Spanish legal order.

3.1. The articulation of international and domestic law

In the same way as in France, the Spanish legal order is intertwined between international law, European law and national law. For the sake of clarity, it is therefore important to distinguish between the systems of integration of public international law and EU law into the Spanish legal order, as they reflect the specific character of EU law in domestic law.

3.1.1. Public International Law

The Spanish Constitution organizes the articulation of the different norms into the Spanish legal order. When it was adopted in 1978, the choice to make it open to international law was made. In this context, the norms deriv-

197 For the Catalan example, see: Xavier Pons Rafols et al., *La acción exterior y europea de la Generalitat de Cataluña. Desarrollo normativo e institucional*, Madrid, Marcial Pons/Centro de Estudios Internacionales, 2012.

ing from international law benefit from a supra-legislative status but remain inferior to the Constitution.

Concretely, a distinction shall be made between customary and treaty norms. Regarding the former, the Constitution does not expressly regulate them even though there are indirect references[198]. In particular, the preamble refers to the cooperation «in the strengthening of peaceful relations and effective cooperation among all the peoples of the earth»[199] and article 10(2) recognizes the Universal Declaration of Human Rights and international treaties and agreements ratified by Spain as criteria for the interpretation of the rights contained in the Constitution[200]. Against this background, the practice of Spanish courts has been to consider these norms of international law as supra-legislative norms.

As for treaty law, its integration in the Spanish legal order is regulated by article 96(1) of the Constitution, article 1(5) of the civil code, and Act nº 25/2014 of 27 November 2014[201]. In particular, article 96(1) seems to enshrine a monist approach to international law as it states that the international treaties validly concluded and officially published in the Spanish official journal (Boletín oficial del Estado) shall be part of the Spanish legal order. This approach is confirmed in Act nº 25/2014[202]. According to Oriol Casanovas and Ángel J. Rodrigo, the publication in the official journal is not the instrument that allows the integration of treaty norms into Spanish law; conversely, the international treaties and conventions ratified by Spain are automatically integrated and produce effects in Spain since their entry into force. They argue that the publication in the official journal is a means of publicity that ensures legal certainty. Thus, the publication authorizes the direct application of the

198 Oriol Casanovas and Ángel J. Rodrigo, *Compendio de derecho internacional público*, 5th ed., Madrid, Tecnos, 2016, p. 140.

199 Spanish Constitution, BOE nº 311, 29 December 1978, pp. 29313-29424, preamble: «[c]olaborar en el fortalecimiento de unas relaciones pacíficas y de eficaz cooperación entre los pueblos de la Tierra».

200 Spanish Constitution, BOE nº 311, 29 December 1978, pp. 29313-29424, article 10(2): «Provisions relating to the fundamental rights and liberties recognised by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain».

201 Casanovas and Rodrigo, *Compendio de derecho internacional público*, *op. cit.*, 2016, p. 141.

202 Act nº 25/2014 of 27 November 2014 (Ley 25/2014, de 27 de noviembre, de Tratados y otros Acuerdos Internacionales), BOE nº 288, of 28 November 2014, pp. 96841-96859, article 23(3).

provisions that are self-executing and – where relevant – the invocation of the rights and obligations contained therein by individuals. As such, the Spanish legal order is described as a soft monist system («sistema monista moderado») insofar as the integration into domestic law is automatic and the full effect of international norms solely requires the official publication[203]. It is also worth noticing that article 30(1) of Act 25/2014 establishes a presumption of direct applicability. In those cases where applicability is conditioned by the adoption of transposing measures, the government shall present the relevant draft bills to the Parliament[204].

As observed by Oriol Casanovas and Ángel J. Rodrigo, the Constitution enshrines the primacy of international law over domestic law[205], to the extent that article 96(1) admits that the provisions of international may be repealed, amended, or suspended in accordance with the norms contained in international law. However, this primacy does not apply to constitutional norms[206]. In the event of conflict, ordinary courts are the ones in charge of ensuring that international norms prevail[207].

3.1.2. EU Law

The integration of EU law in the Spanish legal order obeys to different rules, due to its particular nature. In this regard, it should be noted that the participation of the Kingdom of Spain in the European Union is codified in the Constitution, by means of article 93[208]. Thus, the acts of the EU shall be

203 Casanovas and Rodrigo, *Compendio de derecho internacional público*, *op. cit.*, 2016, p. 141.

204 Act nº 25/2014 of 27 November 2014 (Ley 25/2014, de 27 de noviembre, de Tratados y otros Acuerdos Internacionales), BOE nº 288, of 28 November 2014, pp. 96841-96859, article 30(3).

205 Casanovas and Rodrigo, *Compendio de derecho internacional público*, *op. cit.*, 2016, p. 143.

206 Act nº 25/2014 of 27 November 2014 (Ley 25/2014, de 27 de noviembre, de Tratados y otros Acuerdos Internacionales), BOE nº 288, 28 November 2014, pp. 96841-96859, article 31.

207 Tribunal Constitucional, Case 28/1991, para. 5.

208 Spanish Constitution, BOE nº 311, 29 December 1978, pp. 29313-29424, article 93: «Mediante ley orgánica se podrá autorizar la celebración de tratados por los que se atribuya a una organización o institución internacional el ejercicio de competencias derivadas de la Constitución. Corresponde a las Cortes Generales o al Gobierno, según los casos, la garantía del cumplimiento de estos tratados y de las resoluciones emanadas de los organismos internacionales o supranacionales titulares de la cesión».

integrated into the Spanish legal order in accordance with the rules contained in the EU founding treaties.

In this context, the principles of primacy and direct effect of EU law with regard to domestic legislation have been well integrated into the Spanish legal order. In this respect, the Supreme Court (Tribunal Supremo) had already confirmed in 1990 that the primacy of EU law over domestic law means that ordinary courts shall make EU law prevail[209]. This position was further confirmed by the Constitutional Court (Tribunal Constitucional), who clearly endorsed the case-law of the Court of Justice in 1991[210], regardless of the date of adoption of the legislative act. In this context, the Constitutional Court referred to the infra-constitutionality of EU law in order to exclude it from the parameters of the control of constitutionality of legislative acts[211]. The standard of validity of EU law is not the Constitution, but the founding treaties so that the Constitutional Court shall not control the legality of EU secondary law.

The Constitutional Court recently confirmed and detailed these aspects[212]. Indeed, it reiterated that EU primary and secondary law are not vested with constitutional character in the Spanish legal order[213]; nonetheless, the Consti-

209 Tribunal Supremo, Case of 24 April 1990: «las normas anteriores que se opongan al Derecho comunitario deberán entenderse derogadas y las posteriores contrarias habrán de reputarse inconstitucionales por incompetencia –artículos 93 y 96.1 de la Constitución española– pero no será exigible que el juez ordinario plantee la cuestión de inconstitucionalidad (art. 163 de la CE) para dejar inaplicada la norma estatal, porque está vinculado por la jurisprudencia del Tribunal de Justicia que tiene establecido el principio *pro communitate*».

210 Tribunal Constitucional, Case 28/1991, 14 February 1991, para. 4: «a partir de la fecha de su adhesión, el Reino de España se halla vinculado al Derecho de las Comunidades Europeas, originario y derivado, el cual –por decirlo con palabras del Tribunal de Justicia de las Comunidades Europeas– constituye un ordenamiento jurídico propio, integrado en el sistema jurídico de los Estados miembros y que se impone a sus órganos jurisdiccionales (Sentencia Costa/ENEL, de 15 de julio de 1964)». Balaguer Callejón (coord.), *Manual de Derecho Constitucional*, *op. cit.*, 2012, p. 249.

211 Óscar Alzaga Villamil et al., *Derecho político español según la Constitución de 1978. Vol. I Constitución y fuentes del Derecho,* 6th ed., Madrid, Editorial Universitaria Ramón Areces, 2016, p. 698.

212 Tribunal Constitucional, Case 215/2014, of 18 December 2014. BOE nº 29, 3 February 2015, pp. 107-147; Tribunal Constitucional, Case 232/2015, of 5 November 2015. BOE nº 296, 11 December 2015, pp. 117134-117149.

213 Tribunal Constitucional, Case 232/2015, of 5 November 2015. BOE nº 296, of 11 December 2015, pp. 117134-117149: «En el examen de este motivo principal hemos de comenzar recordando que, según ha reiterado este Tribunal, ni el fenómeno de la integración europea, ni el art. 93 CE a través del que ésta se instrumenta, ni el principio de primacía del Derecho de la Unión que rige las relaciones entre ambos ordenamientos han dotado a las normas del Derecho de la Unión Europea, originario o derivado, «de rango y fuerza constitucionales» [por todas, STC 215/2014, de 18 de diciembre, FJ 3 a), con cita de otras]».

tutional Court is in charge of ensuring respect for the principle of primacy of EU law, especially when the Court of Justice of the EU has already adjudicated on the issue at stake[214].

EU secondary law is therefore integrated into Spanish law as soon as it is published in the EU official journal, without requiring the adoption of specific techniques of implementation[215]. It is worth mentioning that due to the internal structure of Spain, the transposition of EU directives may fall on State and/or regional authorities, in accordance with the internal distribution of competences established in the Constitution and respective Statutes of Autonomy[216].

In case of conflict between constitutional norms and EU law, the situation is a little more complex[217]. EU treaties are understood to prevail over any internal norm regarding the competences that fall under the EU's remit. Indeed, the Constitution remains the supreme norm in those areas that fall under national sovereignty, while the areas for which the EU is competent in accordance with the principle of attribution are regulated by the EU founding treaties[218]. As a result, in case of conflict between a norm contained in the EU treaties and the Constitution, it shall be scrutinized through the prism of article 93 of the Constitution, with a view to assess whether the attribution of competence required by the treaties falls under the remit of article 93 or if, conversely, it goes beyond it and requires an amendment to the Constitution[219]. In case of conflict between EU secondary law and the Constitution, the Constitutional Court recognized that EU norms could not be challenged before Spanish courts[220]; therefore, if

214 *Ibid*.

215 Casanovas and Rodrigo, *Compendio de derecho internacional público*, *op. cit*., 2016, p. 145.

216 Tribunal Constitucional, Case nº 252/1988. Quoted in Casanovas and Rodrigo, *Compendio de derecho internacional público*, *op. cit*., 2016, p. 145.

217 Balaguer Callejón (coord.), *Manual de Derecho Constitucional*, *op. cit*., 2012, p. 251.

218 Araceli Mangas Martín and Diego Liñán Nogueras, *Instituciones y Derecho de la Unión Europea*, 7th ed., Madrid, Tecnos, 2012, p. 476.

219 *Ibid*.

220 Tribunal Constitucional, Case 64/1991, of 22 March 1991, BOE nº 98, 24 April 1991: «Es por ello evidente que no cabe formular recurso de amparo frente a normas o actos de las instituciones de la Comunidad, sino sólo, de acuerdo con lo dispuesto en el art. 41.2 LOTC, contra disposiciones, actos jurídicos o simple vía de hecho de los poderes públicos internos.Y es asimismo patente que los motivos de amparo han de consistir siempre en lesiones de los derechos fundamentales y libertades públicas enunciadas en los arts. 14 a 30 C.E. [arts. 53.2 y 161.1 b), C.E. y Título III LOTC], con exclusión, por tanto, de las eventuales vulneraciones del Derecho comunitario, cuyas normas, además de contar con específicos medios de tutela, únicamente podrían llegar a tener, en su caso, el valor interpretativo que a los Tratados internacionales asigna el art. 10.2 C.E».

there is a risk of violation of fundamental rights, EU Member States should bring legal actions before the Court of Justice[221].

It should be noted in this respect that the Constitutional Court held in 2004, on the occasion of the late Treaty Establishing a Constitution for Europe, that the codification of the principle of *primacy* in the Treaty did not infringe upon the Spanish Constitution's *supremacy*[222]. Pursuant to the reasoning of the Court, primacy and supremacy are two distinct categories operating on different levels: the former deals with the application of valid norms whereas the latter deals with the process of enactment of legislation. Supremacy is founded on the principle of hierarchy and therefore gives validity to the norms that are inferior to it. Consequently, if an inferior norm contradicts it, it is invalid. In contrast, the primacy of EU law, the Court argued, is not necessarily founded on hierarchy but rather on the distinction between the scopes of application of different norms. While all these norms are valid, some of them may displace others because they benefit from preferential application. Supremacy normally entails primacy, except in those cases where the Constitution itself provides for its lack of application. The Constitution's supremacy is therefore compatible with the regimes of application which grant preferential application to the norms of another legal order, as long as it is provided by the Constitution. This is the case with regard to EU law in accordance with article 93 of the Constitution.

Furthermore, the Constitutional Court opposed limitations to the attribution of competences to the EU, in order to oppose constitutional nucleuses of resistence to EU law[223]. On the one hand, it seems to refer to the attribution of the *exercise* of competences[224]. On the other hand, it stipulated limitations deemed to safeguard the fundamental principles of the social and democratic State based on the rule of law. Thus, the Constitution establishes implicit mate-

221 Mangas Martín and Liñán Nogueras, *Instituciones y Derecho de la Unión Europea*, *op. cit.*, 2012, p. 479.

222 Tribunal Constitucional, Declaration 1/2004, of 13 December 2004, BOE nº 3, 4 January 2005, pp. 5-21: «Pues bien, la proclamación de la primacía del Derecho de la Unión por el art. I-6 del Tratado no contradice la supremacía de la Constitución».

223 Balaguer Callejón (coord.), *Manual de Derecho Constitucional*, *op. cit.*, 2012, p. 252.

224 Tribunal Constitucional, Declaration 1/2004, of 13 December 2004, BOE nº 3, 4 January 2005, pp. 5-21: «Por lo demás nuestra jurisprudencia ha venido reconociendo pacíficamente la primacía del Derecho comunitario europeo sobre el interno en el ámbito de las "competencias derivadas de la Constitución", cuyo ejercicio España ha atribuido a las instituciones comunitarias con fundamento, como hemos dicho, en el art. 93 CE».

rial limits such as State sovereignty, its basic constitutional structures, and the fundamental values and principles guaranteed under the Constitution[225]. Consequently, article 93 of the Constitution cannot be interpreted as *carte blanche* in the attribution of competences.

3.2. Common Article 1 in national law

Spain has ratified most treaties and conventions in the field of IHL and has adopted the necessary legislative measures to complement them. While this demonstrates an active commitment towards IHL, it appears from the analysis of the legislation and policy documents that the Spanish authorities have not explicitly recognized Common Article 1 as an institutional mechanism of compliance.

3.2.1. A satisfactory ratification of IHL treaties

Spain has ratified most treaties in the field of IHL. Concretely, Spain ratified the Geneva Conventions already in 1952[226]. It formulated a reservation according to which it understood the expression «under international law in

225 *Ibid*.: «Esa interpretación debe partir del reconocimiento de que la operación de cesión del ejercicio de competencias a la Unión europea y la integración consiguiente del Derecho comunitario en el nuestro propio imponen límites inevitables a las facultades soberanas del Estado, aceptables únicamente en tanto el Derecho europeo sea compatible con los principios fundamentales del Estado social y democrático de Derecho establecido por la Constitución nacional. Por ello la cesión constitucional que el art. 93 CE posibilita tiene a su vez límites materiales que se imponen a la propia cesión. Esos límites materiales, no recogidos expresamente en el precepto constitucional, pero que implícitamente se derivan de la Constitución y del sentido esencial del propio precepto, se traducen en el respeto de la soberanía del Estado, de nuestras estructuras constitucionales básicas y del sistema valores y principios fundamentales consagrados en nuestra Constitución, en el que los derechos fundamentales adquieren sustantividad propia (art. 10.1 CE), límites que, como veremos después, se respetan escrupulosamente en el Tratado objeto de nuestro análisis».

226 Instrumento de Ratificación del Convenio de Ginebra para mejorar la suerte de los heridos y enfermos de las fuerzas armadas en campaña de 4 de Julio de 1952, BOE nº 236, 23.08.1952, pp. 3822-3830; Instrumento de Ratificación del Convenio de Ginebra para mejorar la suerte de los heridos, enfermos y náufragos de las fuerzas armadas en el mar de 4 de Julio de 1952, BOE nº 239, 26.08.1952, pp. 3870-3876; Instrumento de Ratificación del Convenio de Ginebra relativo a la protección de personas civiles en tiempo de guerra de 4 de Julio de 1952, BOE nº 246, 02.09.1952, pp. 3997-4017; Instrumento de Ratificación del Convenio de Ginebra relativo al trato de los prisioneros de Guerra de 4 de Julio de 1952, BOE nº 249, 05.09.1952, pp. 4045-4069.

force» contained in article 99 of GC III as «that which arises from contractual sources or which has been previously elaborated by organizations in which it participates» at the moment of ratification. Nonetheless, it withdrew it upon the establishment of democracy, in 1979[227]. Spain later ratified the Geneva Conventions' Additional Protocols of 1977 in 1989[228], and Additional Protocol III in 2005[229].

In the same way as France, it is therefore more relevant to underline which are the IHL treaties to which Spain is not a party, namely, the UN Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity of 26 November 1968[230] and its equivalent in Europe[231]. It should also be noted that – contrarily to France – Spain has accepted the competence of the IHFFC.

Nonetheless, as mentioned above, the entry into force of an international treaty and its publication in the official bulletin are necessary but not sufficient conditions for them to be self-executing[232], as the provisions at stake must be sufficiently clear and precise and do not need further legislative developments. Fernando Pignatelli y Meca considers that the bulk of IHL is self-executing in the Spanish legal order, with the exception of the provisions dealing with the criminalization of the grave breaches and serious violations[233]. Further-

227 Convenio de Ginebra del 12 de agosto de 1949 para la protección de las víctimas de guerra: Retirada por parte de España de una Reserva al párrafo 1 del artículo 99, BOE nº 182, 31.07.1979, pp. 17951-17951.

228 Instrumentos de Ratificación de los Protocolos I y II adicionales a los Convenios de Ginebra de 12 de agosto de 1949, relativos a la protección de las víctimas de los conflictos armados internacionales y sin carácter internacional, hechos en Ginebra el 8 de junio de 1977, BOE nº 177, 26.07.1989, pp. 23828-23863.

229 Instrumento de Ratificación del Protocolo adicional a los Convenios de Ginebra del 12 de agosto de 1949 relativo a la aprobación de un signo distintivo adicional (Protocolo III), hecho en Ginebra el 8 de diciembre de 2005, BOE nº 42, 18.02.2011, pp. 18278-18285.

230 Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, New York, 26 November 1968, U.N.T.S. vol. 754, p. 73. See: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-6&chapter=4&lang=en (Accessed: 19.04.2017).

231 European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, Strasbourg, 25 January 1974, ETS nº 082. See: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/082/signatures?p_auth=8vg02f3C (Accessed: 19.04.2017).

232 Fernando Pignatelli y Meca, *La sanción de los crímenes de guerra en el Derecho español: Consideraciones sobre el Capítulo III del Título XXIV del Código Penal*, Madrid, Ministerio de Defensa, Secretaría General Técnica, 2003, p. 87.

233 *Ibid*., p. 92.

more, the judicial practice demonstrates that Spanish courts are more likely to apply directly the Geneva Conventions than other States, such as France. Even though it has already been mentioned that Common Article 1 could hardly pretend to self-executing status, the Spanish legal order seems to be more open to IHL than the French one.

In this context, the integration of IHL in the Spanish legal order is completed with specific provisions contained in the Act on National Defense (Ley de Defensa Nacional), the Royal Ordinances on the Armed Forces (Reales Ordenanzas para las Fuerzas Armadas), the criminal code (Código Penal), the military penal code (Código Penal Militar), Organic Act on the disciplinary regime of armed forces (Ley Orgánica de Régimen Disciplinario de las Fuerzas Armadas), Organic Act on the Competence and organization of the Military (Ley Orgánica de Competencia y Organización de la Jurisdicción Militar), as well as Organic Act on the cooperation with the ICC (Ley Orgánica 18/2003, de 10 de diciembre, de cooperación con la Corte Penal Internacional)[234].

3.2.2. The lack of explicit recognition of Common Article 1 as a mechanism of compliance

For present purposes, it is particularly worth mentioning Chapter VI of the Royal Ordinances on the Armed Forces, which deals with ethics during operations. This chapter enshrines some of the most fundamental principles of IHL. In particular, article 106 expressly refers to Common Article 1 in its internal dimension:

> El militar conocerá y difundirá, así como aplicará en el transcurso de cualquier conflicto armado u operación militar, los convenios internacionales ratificados por España relativos al alivio de la suerte de heridos, enfermos o náufragos de las fuerzas armadas, al trato a los prisioneros y a la protección de las personas civiles, así como los relativos a la protección de bienes culturales y a la prohibición o restricciones al empleo de ciertas armas[235].

234 Spanish Ministry of Defense, Orientaciones – El Derecho de los Conflictos Armados, Tomo III, OR7-004 (2ª ed.), 02.11.2007, p. 6-1.

235 Royal Ordinances on the Armed Forces (Real Decreto 96/2009, de 6 de febrero, por el que se aprueban las Reales Ordenanzas para las Fuerzas Armadas), BOE nº 33, 07 February 2009, art. 106.

As for the external dimension of Common Article 1, the situation is not so clear. While it is not expressly established in legally binding documents, indirect references may be found. In this respect, the Ministry of Defense published Guidelines on the Law of Armed Conflicts (*Orientaciones – El Derecho de los Conflictos Armados*) in which a reference is made to the «primary and collective responsibility» of State parties to IHL treaties to safeguard victims' rights[236], thus seemingly alluding to the system of collective responsibility established by the obligation to ensure respect for IHL.

Furthermore, while no strategy has been found on Spain's foreign policy, it is possible to refer to other documents issued by the Ministry for foreign affairs in order to define the contours of its foreign policy and the position occupied by Common Article 1 therein. In this regard, Spain's foreign policy is undoubtedly placed under the umbrella of multilateralism and the UN. Indeed, these elements are the «fundamental cornerstone of Spain's foreign policy»[237]. For the purpose of this thesis, it is worth mentioning Spain's Priorities for the United Nations, which are issued on an annual basis. No explicit reference is made to Common Article 1. Nonetheless, Spain's commitment to the Responsibility to Protect as well as to «furthering the effective protection of civilians and respect for international humanitarian law» is highlighted[238]. Furthermore, several aspects of IHL related to Common Article 1 are stipulated, such as the protection of civilians, the protection of specific groups, medical staff and facilities, and humanitarian person-

236 Spanish Ministry of Defense, Orientaciones – El Derecho de los Conflictos Armados, Tomo I, OR7-004 (2ª ed.), 02.11.2007, pp. 1-7: «La responsabilidad primera y colectiva de los Estados partes en los Convenios de Derecho Internacional Humanitario».

237 Official website of La Moncloa: http://www.lamoncloa.gob.es/lang/en/espana/spaintoday2015/foreignpolicy/Paginas/index.aspx (Accessed: 19/04/2017).

238 Ministerio de Asuntos Exteriores y de Cooperacion. Spain's Priorities for the United Nations 71st Session of the General Assembly, available at: http://www.exteriores.gob.es/Portal/es/PoliticaExteriorCooperacion/NacionesUnidas/Documents/Spanish%20Priorities%20for%20the%2071%20UNGA.pdf (Accessed: 15.05.2017); Ministerio de Asuntos Exteriores y de Cooperacion. Spain's Priorities for the United Nations 70th Session of the General Assembly, available at: http://www.exteriores.gob.es/Portal/es/PoliticaExteriorCooperacion/NacionesUnidas/Documents/Prioridades%20Espa%C3%B1a%20en%20NNUU%2070%20AGNU%20versi%C3%B3n%20en%20ingl%C3%A9s.pdf (Accessed: 15.05.2017); Ministerio de Asuntos Exteriores y de Cooperacion. Spain's Priorities for the United Nations 69th Session of the General Assembly, available at: http://www.exteriores.gob.es/Portal/es/PoliticaExteriorCooperacion/NacionesUnidas/Documents/Prioridades%20Espa%C3%B1a%2069%20AGNU%20ENG.pdf (Accessed: 15.05.2017).

nel, unrestricted humanitarian access as well as accountability and the fight against impunity. These elements are reiterated every year.

In addition, the position of Spain with regard to the obligation to ensure respect for IHL may be inferred from the pledges it makes to the international conferences of the Red Cross and Red Crescent. In this context, the 30th International Conference held in Geneva from 26 to 30 November 2007 is especially worth mentioning, as Spain adhered to the joint pledge on 'National implementation and enforcement' made by the EU[239]. On this basis, it pledged to the following, in line with the EU Guidelines on promoting compliance with IHL:

- to promote ratification of IHL conventions and in particular of the additional protocols to the Geneva Conventions.
- to support states in their efforts to adopt relevant national legislations pertinent to the IHL obligations.
- to support the existing IHL mechanisms such as the International Fact-Finding Commission foreseen in Article 90 of Additional Protocol I.
- to pursue its close cooperation with the International Criminal Court in order to enforce IHL and ensure repression of grave breaches of IHL[240].

Therefore, while there is no exact transcription of the obligation to ensure respect for IHL in these documents, there is a willingness to integrate it as one of the priorities of Spain's foreign policy and to integrate Spain's approach in the EU context.

3.3. The Spanish Commission on International Humanitarian Law

On the occasion of the 28th international conference of the Red Cross and Red Crescent of 2-6 December 2003, Spain undertook the voluntary unilateral pledge of creating and implementing a national coordination and

239 Milena Costas Trascasas, *Implementation of International Humanitarian Law and International Human Rights Law. Spain country report*, ATLAS, 2009, p. 10.

240 See: https://rcrcconference.icrc.org/applic/pledges/p130e.nsf/pbk/PCOE-79CKBW?openDocument&section=PBP (Accessed: 26/04/2017).

consultation mechanism for the application and promotion of IHL[241]. It is on this basis that the Spanish Commission on IHL (Comisión Española de Derecho Internacional Humanitario) was created in 2007[242].

The Spanish Commission on IHL is an advisory body to the government in IHL matters. Article 1 of Royal Decree 1513/2007 specifies that the Commission shall advise the government with regard to the norms contained in the four Geneva Conventions and their 1977 Additional Protocols, the other instruments of IHL ratified by Spain, new ratifications of international treaties on this matter, as well as any other measures that should be adopted to ensure the application and dissemination of IHL in Spain. It is placed under the authority of the Ministry of foreign affairs.

Its objectives are the following: a) to promote the signature, ratification or adhesion of Spain to IHL treaties; b) to prepare and monitor Spain's position and commitments at the International Conferences of the Red Cross and Red Crescent and other international conferences relating to IHL; c) to act as a permanent link with the ICRC and other national commissions; d) to strengthen respect for and application of IHL by advising government authorities on the drafting of new legislation necessary at national or international level; e) to advise authorities on the dissemination of IHL and training programs among the military, security personnel, civil servants, humanitarian organizations, legal and medical professionals, universities and teaching centers, the media, and society in general; f) inform on aid programs that may be established through Spanish international cooperation to promote the application of IHL in third States; g) to stimulate the action of public authorities and other organizations and institutions in the application of IHL by establishing guidelines and general criteria with a view to facilitate the coordination of public authorities in IHL matters; h) to act as a consultant to the government in IHL matters; i) to issue reports and opinions whenever they are required; and j) to evaluate progress on this matter on a periodic basis[243].

In parallel, it should be noted that a Center of Studies on IHL (Centro de Estudios de Derecho Internacional Humanitario [CEDIH]) was created

241 Royal Decree 1513/2007 of 16 November 2007 (Real Decreto 1513/2007, de 16 de noviembre, por el que se crea y regula la Comisión Española de Derecho Internacional Humanitario), BOE nº 283, pp. 48303-48305, Preamble.

242 *Ibid*.

243 *Ibid*., article 2.

within the Spanish Red Cross in 1984. Its objective is to conduct teaching, dissemination, and research activities as well as to contribute to the development of IHL combining both professional and scholar perspectives. As such, it conducts consultancy activities and publishes on matters relating to IHL. It comprises members from the academia, the judiciary, the military, the legal and medical professions, security and armed forces, as well as qualified personnel from the Spanish Red Cross[244].

To conclude, Spain has established the necessary conditions in its legal order to integrate IHL as appropriately as possible. It has ratified the great majority of the relevant treaties and conventions, many of which are self-executing, and has created a Commission on IHL. A consequence of these ratifications is that Common Article 1 undeniably applies to Spain, so that it is subject to the obligation to ensure respect for IHL. However, an express endorsement of the obligation to ensure respect for IHL itself and its current meaning are harder to find. There are no express references found in the legislation or in policy documents. In spite of that, indirect references may be found in policy documents relating to IHL and foreign policy. In this sense, it is uncertain whether Spanish authorities have integrated Common Article 1 as an instrument of enforcement of IHL, as they seem to focus more on the enforcement of specific issues relating to IHL rather the means to enforce them.

244 See: http://www.cruzroja.es/principal/web/cedih/cedih (Accessed: 21/04/2017).

Section 2
PRACTICE OF THE EU, FRANCE, AND SPAIN

> *… [I]f the international community acts early enough, the choice need not be a stark one between doing nothing or using force*[245].

In the first section of this chapter, the issue of transposition of Common Article 1 was analyzed. This question is of utmost relevance with regard to Common Article 1 specifically, to the extent that it relies on States to be effectively enforced. Furthermore, how the EU, France, and Spain have decided to integrate Common Article 1 in their respective legal order likewise constitute an indication of their *opinio juris* on this matter. In this line of argument, the objective of this second section is to analyze the practice of the three actors in ensuring respect for IHL.

Indeed, State practice constitutes a key aspect of the obligation to ensure respect for IHL. Firstly, the analysis of State practice allows assessing the obligation's effectiveness, as it permits to assess whether the objectives of the obligation are indeed met. Secondly, it assists in interpreting the norms themselves[246] and may contribute to the crystallization of customary norms, as it is one of the two constitutive elements together with *opinio juris*.

Therefore, the practice of the EU, France, and Spain to prevent and end violations of IHL is analyzed below. Such practice is protean insofar as they use a wide range of measures, from diplomatic to military action, to ensure respect for IHL. The use of such a wide range of measures reflects their different facets, depending on the magnitude of the violations of IHL at stake. As diplomatic actors, they make use of their declaratory policy to promote IHL but also to denounce its violations. As economic actors, they establish conditionality schemes to prevent breaches and adopt restrictive measures towards third countries and individuals when breaches indeed occur. Finally, if all these measures are not sufficient, they may resort to military intervention or crisis-manage-

245 Report of the Secretary General, 'Implementing the responsibility to protect', A/63/677, 12.01.2009, para. 11.

246 VCLT, article 31.3.b): «Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation» shall be taken into account, together with the context when interpreting treaties».

ment operations. While France and Spain benefit from all the traditional tools of a State's foreign policy, the EU has also developed an arsenal of tools in this sense. These are detailed in the Guidelines on promoting compliance with IHL and include, *inter alia*: political dialogue, general public statements, *démarches* and public statements about specific conflicts, crisis-management operations, training, and regulation on the export of arms[247]. Furthermore, it should be noted that France benefits from additional leverage in its quality of permanent member of the UNSC.

Since the primary focus of this study is on the EU, the temporal scope of this section is limited from the date of adoption of the EU Guidelines on promoting compliance with IHL, with a particular focus on the action of the three actors upon the adoption of the Treaty of Lisbon. In this regard, the cases presented below are solely examples of the practice of the three actors, which confirm the legal rule, and do not intend to be exhaustive.

Prior to the analysis of practice, the institutional framework of the EU's external action to promote compliance with IHL is provided. In this respect, it should be noted that IHL has been treated as a subset of the promotion of human rights in the EU external action. It is therefore mainly within the frame of the Common Foreign and Security Policy that the EU implements this duty.

1. INSTITUTIONAL FRAMEWORK OF THE EU'S ACTION TO PROMOTE COMPLIANCE WITH IHL

It is necessary to present the institutional framework of the EU external action, only insofar as it entails the EU action to promote compliance with IHL. In this regard, the EU has equipped itself with a Common Foreign and Security Policy, which came into existence only in 1992 and which is still very sensitive. It certainly is a domain affecting sovereignty and where Member States are willing to preserve their interests. Although far from being perfect, the EU has progressively but undeniably integrated IHL in the CFSP even before the adoption of the IHL Guidelines, so that the EU's action in IHL matters is now one of the elements that identify the EU external action. While the CFSP is

247 IHL Guidelines.

the main forum where the EU promotes compliance with IHL, the European Commission has also integrated this concern into its action on development aid and humanitarian cooperation.

The CFSP constitutes a specific part of the more general external action of the EU. The Lisbon Treaty dedicates separate sections to the latter, namely, Title V TEU and Part Five TFEU. The writers of the Lisbon Treaty thus intended to make the EU external action more coherent by grouping it together. In particular, Article 21 TEU enumerates the principles and objectives that are common to all the EU external action, including the CFSP. However, the CFSP remains a specific regime that falls under the intergovernmental rules despite its «architectural link with the main body of external action»[248]. Proof of that is that while the CFSP is described in the TEU, the remainder of the EU external action (common commercial policy; cooperation with third countries and humanitarian aid; restrictive measures; international agreements; relations with international organizations and third countries and Union delegations; and the solidarity clause) is described in the TFEU.

The evolution of the CFSP underlines that despite commendable intentions, it has evolved with difficulty. Indeed, Member States are willing to keep this policy under their control as its decision-making, deeply marked by inter-governmentality, has shown.

1.1. The evolution of the Common Foreign and Security Policy

The CFSP was established with the Maastricht Treaty in 1993. It has a somewhat chaotic past and has been shaken by various failures. Many projects regarding European foreign policy have emerged but so far, none has been entirely satisfactory, the most symbolic example being the rejection of the Treaty of Paris of 1952 establishing a Common Defence in Europe[249]. Upon

248 Paul Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform*, Oxford University Press, 2010, p. 381.

249 In 1950, the Pléven Plan proposed to create an integrated European army under joint command. This plan was subject to negotiation among the Member States of the European Coal and Steel Community from 1950 to 1952 and led to the signature of the Treaty establishing the European Defence Community (EDC). The ECD was assorted with a project of European Political Community which was to have important powers and responsibilities. Nevertheless, the project was rejected by the French National Assembly on 30 August 1954.

that failure, it was decided that this matter should be abandoned to the Western European Union and to the North Atlantic Treaty Organization (hereafter, 'NATO').

Cooperation in foreign policy nonetheless became a necessity and emerged from the Member States' practice, starting from the early 70's[250]. EU Member States decided to establish an intergovernmental commission in charge of analyzing political cooperation-related issues in 1961, on the occasion of the Paris Summit, a concern reiterated on the adoption of the Declaration of Bonn. In response to this preoccupation, the 'Fouchet Plans'[251] were drafted. They called for closer political cooperation, a union of States, and common foreign and defense policies. These proposals were eventually rejected.

More importantly, the 'Davignon Report'[252] marked the creation of the 'European Political Cooperation' (hereafter, 'EPC'). The EPC aimed:

> (a) To ensure greater mutual understanding with respect to the major issues of international politics, by exchanging information and consulting regularly;
>
> (b) To increase their solidarity by working for a harmonization of views, concertation of attitudes and joint action when it appears feasible and desirable.[253]

Thus, the Report acknowledged the need to speak with one voice at the international level, to build a political union, and to grant the European Communities with external competences that reflect their internal competences. The Report, in which the Member States committed to consult each other on foreign policy issues, was elaborated and adopted on 27 October 1970. It is on this basis that the Member States started their cooperation in foreign affairs.

See: http://europa.eu/legislation_summaries/institutional_affairs/treaties/amsterdam_treaty/a19000_en.htm (Accessed: 27.01.2016).

250 On the occasion of the Paris Summit of the 19th and 21st of October 1972, the Nine confirmed their will to strengthen political cooperation and to give the EU the means to act as a coherent political entity at the international level.

251 The Fouchet Plans, named after the French Christian Fouchet, proposed the idea of a political union, while preserving the States' autonomy.

252 Davignon Report, Luxembourg, 27/10/1970, Bulletin of the European Communities, November 1970, n° 11.

253 *Ibid*., Part II, Objectives.

In addition, new events in international relations obliged the Member States to move one step forward. Indeed, the Soviet invasion of Afghanistan and the Islamic revolution in Iran emphasized the European Community's growing impotence at international level[254]. Faced with this situation, the Member States approved a series of reports and initiatives that reinforced the EPC. First, the 1981 London Report required prior joint consultation between Member States and the European Commission on all the foreign policy matters that would affect all the Member States[255]. Second, in 1982, the Genscher-Colombo initiative proposed a draft 'European Act' which eventually led to the adoption of the 1983 Stuttgart 'Solemn Declaration on the European Union'[256]. The Declaration explicitly refers to the necessity to «search for common policies in all areas of common interest, both within the Community and in relation to third countries». In particular, one of its objectives is the following:

> to strengthen and develop European Political Cooperation through the elaboration and adoption of joint positions and joint action, on the basis of intensified consultations, in the area of foreign policy, including the coordination of the positions of Member States on the political and economic aspects of security, so as to promote and facilitate the progressive development of such positions and actions in a growing number of foreign policy fields[257].

Therefore, the Declaration set forth different means of cooperation among Member States that would allow them to effectively implement the EPC and emphasized the necessity to consult each other and act in concert.

After different failed attempts of institutionalization, the EPC was finally enshrined in the Single European Act, signed on 17 February 1986. The so-called 'Dooge Committee Report'[258] contained several proposals relating

254 European Union, «Summaries of EU legislation, Common Foreign and Security Policy». Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:a19000 (Accessed: 03.11.2015).

255 *Ibid*.

256 European Council, Solemn Declaration on European Union, Stuttgart, 19/06/1983, Bulletin of the European Communities, Nº 6/1983.

257 *Ibid.,* para. 1.4.2.

258 James Dooge, *Report of the Ad Hoc Committee for Institutional Affairs to the European Council*, Brussels, European Council 29-30 March 1985. Available at: http://aei.pitt.edu/997/1/Dooge_final_report.pdf (Accessed: 03.11.2015).

to foreign policy and called for, *inter alia*, the creation of a permanent secretariat. Although the provisions contained in the Single European Act did not go as far as the Dooge Committee proposals, they established the institutional basis for the EPC[259] and codified it for the first time in EU primary law. They included the amendments applied to the Treaty establishing the European Communities and formalized European cooperation in matters of foreign policy in Title III[260].

The EPC fostered agreement among Member States but remained quite limited. By way of example, it did not cover defense and security issues; no operational aspects were envisaged and the positions common to the Member States were merely declaratory. The wording of the Member States' obligation was quite unclear, insofar as they committed to consult each other for «foreign policy issues of general interest», thus leaving a great margin of maneuver and interpretation in the Member States' hands. This absence of clearly established legally binding obligations led to situations where a Member State, the United Kingdom, lifted the economic sanctions imposed against South-Africa even though they were decided by the Member States in 1986[261].

Against this background, a specific Title on a Common Foreign and Security Policy replaced the EPC and was enshrined in the newly created TEU. The CFSP was created mainly because of two parallel phenomena.

Firstly, the EU – and before that the European Community – had pursued a profound process of economic integration. This process highlighted a discrepancy between the latter and the absence of political integration. This gap highlighted the need for politicization, legitimization, and democratization. However, politicization also refers to foreign policy, a traditional characteristic of nation-States and State sovereignty. In this regard, EU Member States have been reluctant to establish a European foreign policy, not to say a European defense, because of divergent diplomatic traditions. By way of exam-

259 European Union, «Summaries of EU legislation, Common Foreign and Security Policy», *op. cit.*

260 Single European Act, 1987 O.J. L 169/1 (amending Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11).

261 Xavier De Villepin, *Rapport d'information fait au nom de la commission des Affaires étrangères, de la défense et des forces armées sur la politique étrangère commune de l'Union européenne*, Paris, Sénat français, 30 May 1996, p. 11. Available at: http://www.senat.fr/rap/r95-394/r95-3941.pdf (Accessed: 13.05.2013).

ple, some States have the nuclear bomb[262], some are permanently represented in the UNSC, some have a long-standing tradition of neutrality, while others prefer to refer to NATO and to the United States when they have to deal with defense matters. This gap between economic and political integration needed to be addressed and the EU could no longer remain an incontrovertible economic actor but a 'political dwarf'. If the European economic power and the unity of the single market are not questioned at the international level, the idea of the EU as a common political bloc able to assert its political will on the international scene is. Thus, in order to be a relevant and powerful actor at the international level, the EU needed to develop the political aspects of its foreign policy.

Secondly, a dramatic international crisis urged the EU to become an international actor. Following the collapse of communism in Central and Eastern Europe, the Balkans were the scene of many atrocities. The end of these wars was about to determine the fate of the EU for various reasons: wars were taking place on the doorstep of the 15's territory and it seemed likely that these countries would be inclined to enter into the EU afterwards. Despite these crucial challenges, the EU did not manage to play its part in the process as such. It was unable to adopt a common position and to speak with one voice while atrocities were being committed. Eventually, the conflict was resolved thanks to extra-EU systems: the UN and NATO, and behind them the influence of the United States. Although the EU was expected to act and play its part in the conflict's resolution, it just showed inertia and incapacity to do so. Therefore, this dramatic event emphasized the necessity to institutionalize a European foreign policy, in order to effectively speak with one voice and act in concert in case of such a crisis[263].

In this context, the CFSP was established in 1992 and constituted the second pillar of the EU. Pursuant to Title V TEU, its main objective was to assert the EU's identity on the international scene. The CFSP covered all the domains of foreign and security policy, including the framing of a common defense policy[264]. Its aims were the following:

262 Both France and the United Kingdom are parties to the Treaty on the non-proliferation of nuclear weapons. The United Kingdom was one of the submitters and ratified it on the 5th of March 1970. France acceded to it on the 3rd of August 1992.

263 Ministère des Affaires Étrangères, *Guide de la PESC*, Paris, August 2006, p. 2.

264 Treaty of Maastricht on the European Union, article B.

– to safeguard the common values, fundamental interests and independence of the Union;
- to strengthen the security of the Union and of its Member States in all ways;
- to preserve peace and strengthen international security;
- to promote international cooperation;
- to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms[265].

Nevertheless, the Member States' joint actions under Title V were not satisfactory, so that the 1996 intergovernmental conference was mandated to introduce the institutional reforms needed to make the CFSP effective in the new treaty. Hence, the Amsterdam Treaty intended to provide a new dimension to the CFSP: it created the High Representative for the CFSP[266], and equipped the CFSP with operational aspects, through the establishment of the policy planning and early warning unit. The Amsterdam Treaty thus offered better visibility and coherence in terms of the EU's external action.

Finally, the Lisbon Treaty brought new instruments to support the EU in establishing an effective foreign policy. One main priority was to ensure coherence in the EU's external action[267]. Therefore, the pillars' structure disappeared, which implies that the foreign policy is placed on an equal footing with the other policies. It also means that it may eventually constitute an integrated policy in the long-term. Some principles[268] and objectives common to all the aspects of the EU's external action are defined and serve to enhance this coherence. With the Lisbon Treaty, the CFSP's objectives are enlarged:

(to)
- safeguard its values, fundamental interests, security, independence and integrity;

265 *Ibid*., article J.1.
266 *Ibid*., article 26.
267 TEU, article 21(3).
268 *Ibid*., article 21(1): «The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law».

- consolidate and support democracy, the rule of law, human rights and the principles of international law;
- preserve peace, prevent conflicts and strengthen international security (...);
- foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;
- encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;
- help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;
- assist populations, countries and regions confronting natural or man-made disasters; and
- promote an international system based on stronger multilateral cooperation and good global governance.

In addition, the fact that the EU itself now has legal personality[269] is an important feature, insofar as it transforms it into a single subject of international law, at the center of the assertion of its rights and obligations. In this regard, the EU is a full member of some international organizations, in particular where it has an exclusive competence, e.g., in the World Trade Organization. This reality should not overshadow the fact that the EU full membership in international organizations remains the exception[270], and the EU has obtained the enhanced observer status rather than full membership in the UN. Lastly, the Lisbon Treaty created two important novelties: the High Representative and the European External Action Service, described below.

1.2. The Common Security and Defence Policy (CSDP)

As mentioned earlier, the idea of a true common defense was abandoned with the rejection of the Treaty establishing a European Common

269 *Ibid.*, article 47.

270 Wanda Troszczynska-Van Genderen, *In-depth analysis on The Lisbon Treaty's provisions on CFSP/CSDP State of implementation*, Brussels, European Parliament, 2015. Available at: www.europarl.europa.eu/RegData/etudes/IDAN/2015/570446/EXPO_IDA(2015)570446_EN.pdf (Accessed: 27/01/2016).

Defence in 1954. In spite of that, the EU has been pushed to develop an embryonic common defense. Certain policies had already been considered important in 1992: disarmament policies, nuclear non-proliferation and the arms exportation's control. Then the Amsterdam Treaty made the European Security and Defence Policy evolve following the adoption of the 1998 Saint-Malo Declaration[271]. The Lisbon Treaty subsequently formalized the European Security and Defence Policy and renamed it. The CFSP now includes a Common Security and Defence Policy[272](hereafter, 'CSDP'), which may eventually lead to an integrated common defense in the future[273]. As of today, the actors, procedures and instruments of the CSDP differ from the CFSP ones[274].

Firstly, the EU used to rely on the Western European Union capacities in defense matters. The latter was created in 1948 in order to provide the framework for the creation of a European defense policy[275]. It was made of 10 Member States, namely: Belgium, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal, Spain and the United Kingdom. In this regard, the Western European Union approved the 'Petersberg tasks' on the occasion of the Bonn Ministerial Petersberg Declaration[276], whereby Member States declared their readiness to make available to the Western European Union, NATO and the EU, military units from the whole spectrum of their conventional armed forces. A major step regarding the relationship between IHL and the EU is therefore the integration of the Western European Union functions in crisis prevention and management within the EU in the late 2000's. Watching missions were also established together with a rapid-reaction force for the accomplishment of the Petersberg tasks, which were enshrined in the Treaty of Amsterdam[277] and have been from now on under the authority

271 Joint declaration issued at the British-French summit, Saint-Malo, France, 3-4 December 1998.

272 The idea of an ESDP emerged on the occasion of the Cologne European Council of June 1999.

273 TEU, article 42(1 and 2).

274 Directorate-General for external policies, *Study on 'Supporting European security and defence with existing EU measures and procedures'*, Brussels, European Parliament, 2015, p. 11. Available at: www.europarl.europa.eu/RegData/etudes/STUD/2015/534993/EXPO_STU(2015)534993_EN.pdf (Accessed: 28.01.2016).

275 See: http://eeas.europa.eu/csdp/about-csdp/weu/index_en.htm (Accessed: 28.01.2016).

276 Petersberg Declaration, Bonn, 19th June 1992. Available at: www.assembly-weu.org/en/documents/sessions_ordinaires/key/declaration_petersberg.php (Accessed: 28.01.2016).

277 Treaty of Amsterdam, article J.7.

of the EU. In accordance with Article J.7 of the Treaty of Amsterdam[278], the Petersberg tasks can be deployed for three purposes: «humanitarian and rescue tasks, peacekeeping tasks, and tasks of combat forces in crisis management, including peace-making» so that the term 'humanitarian' is enshrined in EU primary law for the first time. This article is now codified in article 43 TEU under the Lisbon Treaty. The Amsterdam Treaty thus permitted the development of the operational force of the EU, although there was a discrepancy between this force and its institutional developments.

Against this background, the EU security policy has developed at institutional level. The Helsinki European Council of 10/11 December 1999 approved the establishment of new permanent political and military bodies. Firstly, the Political and Security Committee (PSC) was established in 2001[279]. It is made up of national representatives at senior/ambassadorial level and it deals with all the aspects of the CFSP. It is responsible for the political control and strategic direction of any military crisis management operation, under the authority of the Council. Secondly, the Military Committee of the EU (EUMC) is composed of the Chiefs of Defense and is represented by their military delegates. The EUMC gives military advice, makes recommendations to the PSC, and gives military direction to the Military Staff of the EU (EUMS). The latter provides military expertise and support to the CSDP, and performs early warnings, situation assessment, as well as strategic planning for the Petersberg tasks[280]. Crisis prevention and management, the fight against terrorism, and arms control are also settled as new priorities. Another element that is worth mentioning is the creation of the European Defence Agency[281],

278 TEU, article 43: «The tasks referred to in Article 42(1), in the course of which the Union may use civilian and military means, shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation. All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories».

279 Council Decision 2001/78/CFSP of 22 January 2001 setting up the Political and Security Committee (PSC).

280 Presidency Conclusions, Helsinki European Council, 10 and 11 December 1999. Available at: www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/ACFA4C.htm (Accessed: 27/01/2016).

281 On the occasion of the Thessaloniki European Council, the Member States tasked «the appropriate bodies of the Council to undertake the necessary actions towards creating, in the course of 2004, an intergovernmental agency in the field of defence capabilities development, research,

an intergovernmental agency of the European Council, following the adoption of the Nice Treaty on 12 July 2004.

Lastly, the Lisbon Treaty has brought important novelties concerning European defense. The CSDP has indeed become part of the TEU and is part of the overall CFSP: it is now regarded as 'common' and as an integral part of the CFSP[282]. In this context, it follows the objectives and principles of the EU's external relations, as set out in article 21 TEU[283], thus reinforcing the coherence of the EU external action.

The CSDP missions have expanded as the EU is now competent in disarmament, military assistance missions, and in conflict prevention and stabilization. In particular, article 43(3) TEU provides that Member States shall make civilian and military capabilities available to the EU for the implementation of the CSDP, to contribute to the objectives defined by the Council, and to make available to the CSDP the multinational forces that they establish. In this line, EU Member States also commit to progressively improve their military capabilities and to draw on the expertise of the European Defence Agency[284].

Furthermore, there is room for further cooperation for the Member States willing to do so. In this respect, article 42(6) TEU provides that the Member States:

> whose military capabilities fulfill higher criteria and which have made more binding commitments to another in this area with a view to the most demanding missions shall establish permanent structured cooperation (PESCO).

The objectives of such system are further explained in the Protocol on PESCO attached to the Lisbon Treaty[285].

acquisition and armaments». Presidency conclusions of the Thessaloniki European Council on 19 and 20 June 2003, Brussels, 1 October 2003, 11638/03.
Following this statement, the Council of the European Union adopted a Joint action 2004/551/CFSP of 12 July 2004 on the establishment of the European Defence Agency.

282 TEU, article 42(1).

283 Directorate-General for external policies, *Study on 'Supporting European security and defence with existing EU measures and procedures'*, *op. cit.*, 2015, p. 12.

284 TEU, article 45.

285 Protocol on Permanent Structured Cooperation established by Article 42 of the Treaty on European Union.

In addition, European solidarity is reinforced by two means: through the solidarity clause enshrined in article 222 TFEU[286] and the mutual defense clause recognized in article 42(7) TEU[287]. Those elements underline the evolution of the EU towards a political union, as the Member States commit to help and to render assistance to one another in case of terrorist attack or a natural or man-made disaster (solidarity clause), and to aid and assist each other by all the means in their power[288] in case of armed aggression (mutual defense clause). France invoked the latter for the first time on the occasion of the terrorist attacks that stroke Paris in November 2015. The fact that France decided to turn to the EU instead of NATO is particularly significant, as it underlines the State's preference to the creation of a European defense policy.

Nonetheless, there still are important limitations to the CSDP. In particular, the CSDP «shall not prejudice the specific character of security and defence policy of certain Member States» and must respect their obligations arising from NATO, which, for those who are members, «remains the foundation of their collective defence»[289]. Furthermore, the EU does not have its own army or civilian officials and relies on its Member States' capabilities. This entails several problems, just to cite a few: only a small number of the EU Member States' soldiers is actually deployable; Member States face difficult choices regarding security framework choices (NATO or EU); and the EU international mission need to be especially attractive for officers on the ground[290].

The evolution of the CFSP thus highlights the will to assert the EU's identity on the international scene and the Lisbon Treaty has provided the EU with important instruments in the form of, in particular, the High Rep-

286 TFEU, article 222: «The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States [...]».

287 TEU, article 42(7): «If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States».

288 In accordance with article 51 of the UN Charter.

289 TEU, article 42.

290 Directorate-General for external policies, *Study on 'Supporting European security and defence with existing EU measures and procedures'*, *op. cit.*, 2015, p. 16.

resentative and the EEAS, which should enable the EU to reach its objectives. Nevertheless, foreign policy and defense matters remain a sensitive area where the States wish to keep their sovereignty as the decision-making demonstrates.

1.3. A decision-making respectful of national interests

The CFSP is not an integrated policy and has been largely given over to the discretion of the Member States. As emphasized by Paul James Cardwell, the choice made during the debates on changes to the EU's constitutional structure was not to bring the CFSP at the supranational level. In this regard, the position of the then UK Foreign Secretary is significant:

> Common foreign and security policy remains intergovernmental and in a separate treaty. Importantly... the European Court of Justice's jurisdiction over substantive CFSP policy is clearly and expressly excluded. As agreed at Maastricht, the ECJ will continue to monitor the boundary between CFSP and other EU external action, such as development assistance. But the Lisbon treaty considerably improves the existing position by making it clear that CFSP cannot be affected by other EU policies. It ring-fences CFSP as a distinct, equal area of action[291].

Due to its sensitive nature, EU Member States want to be able to safeguard their national interests, a situation which has remained unchanged with the entry into force of the Lisbon Treaty. In this respect, the Iraq war underlined the diverging opinions and tendencies of EU Member States. Some states such as France were against the war, while others, such as the United Kingdom, sent troops alongside the United States. Again, others remained neutral. This event served to highlight that the Member States were not ready to speak with one voice in defense matters and are willing instead to maintain the rule of unanimity in this area. The Lisbon Treaty therefore took

291 Secretary of State for Foreign and Commonwealth Affairs (David Miliband), HC Debs 20 February 2008, col 378. Quoted in Paul James Cardwell, «On 'ring-fencing' the Common Foreign and Security Policy in the legal order of the European Union», *The Northern Ireland legal quarterly*, vol. 64(443), 2013, p. 1.

due note of it and kept the principle of unanimity in the CFSP, especially in the area of defense.

A consequence of this risk of divergence is that the CFSP follows a derogatory regime. The central institution is the Council[292], not the Commission; this choice underlines the intergovernmental nature of the CFSP. The European Council defines the general trends of the EU's foreign policy and the Council implements them, acting unanimously, except where the treaties pertain otherwise.

1.3.1. An intergovernmental system

According to the Lisbon Treaty, three institutions are accorded major importance, those being the Council, the European Council, and the High Representative of the Union for Foreign Affairs and Security Policy (High Representative)[293]. Conversely, supranational institutions have a limited role in this area.

The preponderance of national interests in the CFSP is highlighted by the role accorded to the institutions representing States' interests, namely the European Council and the Council. Moreover, Member States are also considered individually. First, the central role of the European Council in the EU external action is set out in Article 22(1):

> On the basis of the principles and objectives set out in Article 21, the European Council shall identify the strategic interests and objectives of the Union.
>
> Decisions of the European Council on the strategic interests and objectives of the Union shall relate to the common foreign and security policy and to other areas of the external action of the Union. [...]
>
> The European Council shall act unanimously on a recommendation from the Council, adopted by the latter under the arrangements laid down for each area. Decisions of the European Council shall be implemented with the procedures provided for in the Treaties[294].

292 TEU, article 24.
293 *Ibid.*, article 24(1).
294 *Ibid.*, article 22(1).

Moreover, the importance of the European Council is reinforced by Article 26, which deals specifically with the CFSP. It is up to the European Council to:

> identify the Union's strategic interests, determine the objectives of and define general guidelines for the common foreign and security policy, including for matters with defence implications[295].

Second, the Council frames the CFSP and adopts the decisions to define and implement it on the basis of the guidelines established by the European Council[296]. Together with the High Representative, it holds responsibility for ensuring the unity, consistency and effectiveness of the EU action[297]. The Council adopts decisions that define the EU's approach to a particular matter of a geographical or thematic nature, the corollary being that Member States must «ensure that their national policies conform to the Union positions»[298]. It adopts decisions that require operational action and commit the Member States to take the agreed action[299].

Third, as an intergovernmental structure, the CFSP requires the Member States' cooperation. They actually are the main actors of the policy. The Lisbon Treaty foresees a duty of cooperation and consultation among Member States. They must consult with one another within the European Council and the Council about any matter of foreign and security policy which would be of general interest in order to determine a common approach, and before undertaking any action on the international scene or entering into any commitment which could affect the Union's interests[300]. Furthermore, in international organizations and at international conferences where not all the Member States participate, those which do take part must uphold the Union's positions[301]. This is a logical consequence of the legally binding character of the CFSP decisions on EU's Member States.

295 *Ibid.*, article 26(1).
296 TEU, article 26(2).
297 *Ibid.*, article 26(2).
298 *Ibid.*, article 29.
299 *Ibid.*, articles 28(1) and 28(2).
300 *Ibid.*, article 32.
301 *Ibid.*, article 34.

However, the Lisbon Treaty is relatively ambiguous to the extent that two of the appended declarations to the Treaties restrain the Member States' obligations *vis-à-vis* the CFSP[302]. In accordance with Declaration 13, the TEU provisions dealing with the CFSP do not affect the responsibilities of the Member States as they currently exist for the formulation and conduct of their foreign policy, nor regarding their national representation in third countries and international organizations. The provisions on the CSDP do not prejudice the specific character of the security and defense policy of the Member States. The declaration stresses that the EU and its Member States remain bound by the UN Charter and, in particular, by the primary responsibility of the UNSC and of its members for the maintenance of international peace and security.

In the same way, Declaration 14 stipulates that in addition to the specific rules and procedures referred to in article 24(1) TEU, the provisions covering the CFSP, including in relation with the High Representative and the EEAS, do not affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of its foreign policy, its national diplomatic service, relations with third countries and participation in international organizations, including a Member State's membership in the UNSC. It further provides that the provisions on the CFSP do not grant new powers to the European Commission to initiate decisions or increase the role of the European Parliament. The final paragraph of the Declaration provides that the provisions governing the CSDP do not prejudice the specific character of the security and defense policy of the Member States.

The absence of the European Commission as a leading institution emphasizes the fact that the CFSP remains largely governed by Member States. As Paul Craig has shown, the changes in the role played by the institutions are most noticeable regarding the European Commission: with the Lisbon Treaty, it is not associated anymore with the CFSP work, and the Council cannot request the Commission to submit proposals relating to the implementation of joint actions. In addition, the Commission loses the ability to assist the Council in its power to make international agreements relating to the CFSP[303].

As for the European Parliament, it remains excluded from the decision-making process. Its involvement is limited to a right to information and

302 Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform*, *op. cit.*, 2010, pp. 44-45.
303 *Ibid.*, p. 412.

consultation by the High Representative on the main aspects and basic choices of the CFSP and CSDP, including the evolution of these policies[304]. Additionally, according to Article 36 TEU, the High Representative «shall ensure that the views of the European Parliament are duly taken into consideration»[305] although it does not detail by which means. As an active actor, it may address questions and make recommendations to the Council and High Representative[306]. It must also hold a debate on the progress in the implementation of the CFSP twice a year[307].

Lastly, the Court of Justice of the European Union (hereafter, 'CJEU') does not have jurisdiction to review the CFSP acts, as provided by Articles 24(1) TEU and 275 TFEU:

> The Court of Justice of the EU shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions[308].

Nonetheless, the Treaties foresee exceptions. Firstly, the CJEU may review the legality of restrictive measures against natural or legal persons adopted under the CFSP provisions[309]. This exception is a codification of the Kadi case, already mentioned[310]. Secondly, the Court has jurisdiction to monitor compliance with Article 40 TEU[311]. Thirdly, it may review whether a proposed agreement is compatible with the treaties[312]. Apart from these

304 TEU, article 36.

305 *Ibid*.

306 *Ibid*.

307 *Ibid*.

308 TFEU, article 275.

309 *Ibid*.

310 Joined cases C-402/05 P and C-415/05, Judgment of the Court (Grand Chamber) of 3 September 2008, P. Kadi and Al Barakaat International Foundation v. Council and Commission [2008] ECR I-6351.

311 TFEU, article 275. Article 40 TEU provides as follow: «The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Article 3 to 6 of the Treaty on the Functioning of the European Union. Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this chapter».

312 Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform*, *op. cit.*, 2010, p. 415.

exceptions, the Court does not have jurisdiction, which is problematic within the frame of a Union based on the rule of law, a foundational principle of the EU.

Against this background, it is worth noting that the IHL Guidelines refer mostly to inter-governmental institutions. Nevertheless, it is also worth mentioning that supranational institutions are important actors of the EU external action in human rights. In particular, the European Commission is omnipresent in the Action Plan on Human Rights and Democracy for the period 2015-2019 as one of the implementing authorities. Furthermore, the «close involvement of the European Parliament» is foreseen (paragraph 5)[313]. It demonstrates the willingness to include the European Parliament, albeit it does not formally hold an important role in CFSP matters. Thus, while most of the EU action to ensure compliance with IHL is governed by intergovernmental institutions, the role of supranational institutions should not be overlooked.

Finally, it is important mentioning the High Representative of the Union for Foreign Affairs and Security Policy, a figure created by the Lisbon Treaty[314] as a result of the fusion of the late High representative for the CFSP and the foreign relations Commissioner. This position is held by Federica Mogherini at the time of writing. Generally speaking, her role is intended to put a 'name and face' on the EU foreign policy and to help the EU to become a consistent, capable and strategic international actor. The incumbent conducts the CFSP, contributes to its formulation and ensures its implementation[315]; chairs the Foreign Affairs Council[316]; represents the EU for matters relating to the CFSP, conducts political dialogue with third countries, and expresses the EU position at international organizations and international conferences[317]; consults and informs the European Parliament[318]. Moreover, as vice-president of the Commission[319], the incumbent must guarantee a better coherence of the EU's external action.

313 Council of the European Union, Conclusions on the Action Plan on Human Rights and Democracy 2015-2019, Brussels, 20 July 2015 (OR. En), 10897/15.

314 TEU, article 18.

315 *Ibid.*, articles 18(2) and 27(1).

316 *Ibid.*, article 27(1).

317 *Ibid.*, article 27(2).

318 *Ibid.*, article 36.

319 *Ibid.*, article 18(4).

The High Representative is assisted by the European External Action Service (EEAS)[320], a sort of EU diplomatic service. It was established by Council Decision of 26 July 2010[321] and officially launched in January 2011. The EEAS is a functionally autonomous body, separate from the General Secretariat of the Council and from the European Commission; it has the legal capacity to perform its tasks and attain its objectives[322] and is placed under the authority of the High Representative. It comprises a central administration based in Brussels and the EU Delegations established in third countries and international organizations[323]. The principal mission of the EEAS is to support the High Representative in their mandate[324]. In addition, the EEAS assists the President of the European Council and the Commission, including its President, in their respective functions relating to external affairs[325]; lastly, it ensures close cooperation with the Member States[326].

Coherence is therefore enhanced thanks to institutional cooperation and the EEAS enables better coordination of national and European policies, which may eventually lead to a fully-fledged European diplomacy in the long run.

1.3.2. A special nomenclature

Another manifestation of the intergovernmental nature of the CFSP is that it establishes a category of acts on its own instead of following the normal nomenclature established under ordinary EU law. Article 25 TEU enumerates the different types of acts the EU may adopt in the frame of the CFSP:

> The Union shall conduct the common foreign and security policy by:
> - defining the general guidelines
> - adopting decisions defining

320 *Ibid*., article 27(3).

321 Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service, OJ L 201/30, 03.08.2010.

322 Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service, OJ L 201/30, 03.08.2010, article 1(2).

323 *Ibid*., article 1(4).

324 *Ibid*., article 2.

325 *Ibid*.

326 EEAS official website, «What we do». Available at: http://eeas.europa.eu/what_we_do/index_en.htm (Accessed: 20.03.2013).

- actions to be undertaken by the Union
- positions to be undertaken by the Union
- arrangements for the implementation of the decisions referred to in points (i) and (ii)

and by

- strengthening systematic cooperation between MS in the conduct of policy[327].

With the Lisbon Treaty, there is a change of denomination since all the CFSP acts are called 'decisions' and thus seem to fit into the ordinary nomenclature of EU acts. However, the exclusion of the European Commission in the decision-making process demonstrates that the CFSP decisions do not have the same legal value as those described in Article 288 TFEU. Actually, the new denomination maintains to some extent the old classification.

Before the Lisbon Treaty, the EU's legal acts in CFSP matters were the common positions, joint actions, and common strategies. Nowadays, the European Council defines the general guidelines by means of decisions[328] and adopts decisions on the strategic interests and objectives of the Union, defining their duration and the means to be made available by the EU and its Member States[329]. In addition, the common positions are replaced by the «positions to be undertaken by the Union» and the joint actions are replaced by the «actions to be undertaken by the Union». The latter are adopted where operational action by the EU is required. The Council must define their objectives, scope, the means to be made available to the EU, their duration if necessary, and the conditions for their implementation[330]. The former common strategies are removed. Their objective was to create a «general policy framework [...] leading to more coherent and unified CFSP actions»[331]. Article 22 TEU gives the European Council the power to adopt decisions on the strategic interests and objectives of the Union, a comparable instrument to a common strategy.

Despite the change of denomination, these acts remain exempt from jurisdictional control under the Lisbon Treaty[332]. That being said, the new

327 TEU, article 25.
328 TEU, articles 25(a) and 26(1).
329 *Ibid*., article 26.
330 *Ibid*., article 26.
331 Piet Eeckhout, *EU external relations law*, Oxford University Press, 2011, p. 470.
332 TEU, article 24(1), and TFEU, article 275.

denomination demonstrates a change: there is a willingness to integrate the CFSP into the ordinary EU legal system. It shows that CFSP decisions might end up following the ordinary regime in the long term.

In addition, even though the Treaty of Lisbon introduced some changes in the CFSP, the voting system still largely preserves national interests. In accordance with article 31(1) TEU, which describes the ordinary voting procedure under the CFSP, the European Council and Council adopt their decisions unanimously and the adoption of legislative acts is excluded[333].

Nevertheless, some mechanisms exist in order to overcome the necessity to reach unanimity, such as the 'constructive abstention'. It enables some Member States to abstain in a vote without impeding the adoption of the act. Any member of the Council may abstain but in such a case, they will accept that the decision commits the Union and will refrain from any action likely to conflict with or impede Union action based on that decision although they will not be obliged to apply the decision[334]. Thus, initiatives having a broad measure of support may be adopted more easily.

Furthermore, the Council may act in exceptional circumstances using a qualified majority when adopting a decision a) defining a Union action or position on the basis of a decision of the European Council, b) defining a Union action or position, on a proposal which the High Representative has presented following a specific request from the European Council, c) implementing a decision defining a Union action or position and d), when appointing a special representative[335].

In case the Member States cannot unanimously agree on CFSP matters, they may use the enhanced cooperation system. It applies to all the CFSP, including defense matters, and allows Member States willing to advance in the EU's foreign policy to do so. Nonetheless, even in relation to these exceptions to unanimity, national interests remain preserved. Firstly, the decision cannot be adopted in case the Council Members using the 'constructive abstention' scheme represent at least one third of the Member States and comprise at least one third of the EU population. Secondly, if a Member State declares that it opposes the adoption of a decision to be taken by a qualified majority for «vital

333 TEU, article 31(1).

334 *Ibid*.

335 *Ibid*., article 31(2).

and stated reasons of national policy», the High Representative will try to find an acceptable solution with the Member State at stake[336]. If (s)he does not succeed, the Council may request that the matter be referred to the European Council for a decision by unanimity[337].

This is within this restrictive framework, the CFSP and the CSDP, that the EU has developed most of its action to ensure respect for IHL. As observed by Tristan Ferraro, the EU has repeatedly referred to IHL in its CFSP instruments, only three years after the establishment of the CFSP most likely due to the increasing level of violence that took place in the former Yugoslavia, notably in Srebrenica[338]. Furthermore, following the path of the EU policy on human rights, the EU uses different tools of its external action to promote compliance with IHL, as explained below.

2. PREVENTING VIOLATIONS OF IHL

As explained in Chapter 1, one constitutive element of the obligation to ensure respect for IHL is prevention. An important number of measures may be adopted in this sense, ranging from disseminating IHL among the civilian and military populations to promoting the ratification of IHL treaties. The action of DG ECHO in this sense is also worth mentioning.

2.1. Promoting and disseminating IHL

State parties are subject to a duty to promote and disseminate IHL, which can be understood as one aspect of the preventive dimension of Common Article 1. In this regard, the EU, France and Spain have undertaken important efforts in training and education. Furthermore, they all have adopted a policy of promotion of IHL treaties and principles on the international stage.

336 *Ibid*.

337 TEU, article 31(2).

338 Declaration by the Presidency on behalf of the European Union on the Situation in Srebrenica, 13/07/1995; Council Conclusions on Former Yugoslavia, 17.07.1995.

2.1.1. Training and education

Training and education are key aspects in ensuring respect for IHL. In this regard, the EU Guidelines on promoting compliance with IHL hold the following:

> Training in IHL is necessary to ensure compliance with IHL in time of armed conflict. Training and education must also be undertaken in peacetime. This applies to the whole population, although special attention should be given to relevant groups such as law enforcement officials. Additional obligations apply to the training of military personnel. The EU should consider providing or funding training and education in IHL in third countries including within the framework of wider programmes to promote the rule of law[339].

This element has proven to be one of the key aspects of the cooperation between the ICRC and the EU. This cooperation is not new but has logically increased over the last 15 years, with the greater involvement of the EU in IHL matters. The relationship evolved in 1999 with the establishment of the ICRC office in Brussels together with the developments of the CFSP and the ESPD. It also corresponds to the Declaration on the occasion of the 50th anniversary of the Geneva Conventions where EU Member States reaffirmed their willingness to respect and promote IHL. The cooperation between the EU and the ICRC could be effective on this basis[340]. On one hand, the recognition of IHL as part of the EU's action supports the fundamental objectives of the ICRC. On the other hand, the ICRC had to respond to the EU's activity in conflict resolution, notably to make sure that IHL was observed and respected by EU forces[341].

In this context, the ICRC offers the EU's institutions training opportunities. By way of example, the year 2009 marked the tenth anniversary of the Bruges Colloquium on IHL, where the ICRC and the College of Europe

339 IHL Guidelines, point (h).

340 Stéphane Kolanowski, «La collaboration de l'union et du comité international de la Croix-Rouge», in Millet-Devalle, *L'Union européenne et le Droit International Humanitaire*, *op. cit.*, 2010, p. 182

341 British Institute of International and Comparative Law, *Implementation of International Humanitarian Law and International Human Rights Law in the European Union*, ATLAS, July 2009.

provide training for students. Subsequently, in order to better promote humanitarian issues and actions at the European level, the ICRC and ECHO implemented a joint communication plan. Finally, the ICRC gave presentations on IHL during training activities aimed at EU forces[342].

On the occasion of the 32nd International Conference of the Red Cross and Red Crescent, the EU and its Member States, including France and Spain, adopted a pledge in which they:

> underline[d] that proper training in, and dissemination of, international humanitarian law is required to ensure better compliance with international humanitarian law in time of armed conflict[343].

In this context, they committed to actions at EU and national levels. At EU level, basing their action on the IHL Guidelines and the 2007 European Consensus on Humanitarian Aid, they committed to promote the dissemination and training of IHL in third countries. This pledge is extensive, as it applies both in wartime and peacetime, and is applicable to State authorities, but also non-State armed actors and humanitarian actors. At national level, the emphasis is put on action «inside the EU, in particular to military and civilian personnel, involved in crisis management operations». In addition, EU Member States commit to pursue their efforts in advocating for the respect of IHL, on a constant and strong basis[344].

In the same line, the Spanish Red Cross pledged to promote training in IHL and international criminal justice among the members of the judiciary and lawyers[345]. Likewise, France vowed to exchange know-how on the protection of cultural goods in situation of armed conflicts, to cooperate with the French Red Cross in the training of the military in IHL and international criminal law, to contribute to the dissemination of IHL in secondary educa-

342 See, *inter alia*: ICRC, *Annual Report 2009*, Geneva, ICRC, May 2010, pp. 299-301, available at: https://www.icrc.org/eng/resources/documents/annual-report/icrc-annual-report-2009.htm (Accessed: 25.05.2017); ICRC, *Annual Report 2010*, Geneva, ICRC, May 2010, pp. 352-355, available at: http://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_2440.pdf (Accessed: 25.05.2017).

343 Pledge by the European Union and its Member States nº OP320039, Promotion and dissemination of international humanitarian law.

344 *Ibid*.

345 Pledge by the Spanish Red Cross nº OP320052, Formación y Difusión del Derecho Internacional Humanitario.

tion, to support foreign National Societies willing to disseminate IHL among the youth[346], as well as to disseminate IHL relating to the protection of journalists in their training[347].

2.1.2. Promotion of IHL treaties and related principles

The EU, together with France and Spain, normally makes use of public declarations to promote the ratification, respect, and implementation of IHL treaties. Furthermore, some aspects related to IHL have been especially important for the three actors, thus leading to the adoption of specific policies. In this respect, the issues of women in armed conflicts and regulation of weapons are briefly analyzed.

2.1.2.1. Multilateral diplomacy

The EU develops its IHL declaratory policy promoting the respect for IHL in general public statements, as the IHL Guidelines so provide: «[i]n public statements on issues related to IHL, the EU should, whenever appropriate, emphasise the need to ensure compliance with IHL». Public statements or declarations may be issued by the High Representative or by the Presidency. According to the EU annual reports on human rights, the EU makes extensive use of public statements to give them the broadest audience possible. They are agreed on unanimously[348]. Moreover, the Council may adopt conclusions, which are not legally binding but can nonetheless be referred to as reflecting the EU's policy on the matter. In addition, in its 2012 Strategic Framework and Action Plan on Human Rights and Democracy, the EU pledged to make more systematic use of political dialogue and *démarche* campaigns to encourage third countries to ratify core IHL instruments and implement IHL obligations[349]. As evidenced by Tristan Ferraro,

346 Pledge by the French Red Cross and France nº SP320015, Promotion et diffusion du Droit international humanitaire.

347 Pledge by the French Red Cross nº SP320044, Promotion et diffusion du Droit international humanitaire auprès des journalists.

348 EEAS, *EU annual report on Human Rights and Democracy in the World in 2011*, Brussels, European Union, 2012, p. 18. Available at: https://eeas.europa.eu/sites/eeas/files/2011_human-rights-annual_report_en.pdf (Accessed: 25.05.2017).

349 Council of the European Union, EU Strategic Framework on Human Rights and Democracy (11855/12), Luxembourg, 25 June 2012, point 21(c).

this declaratory policy promoting compliance with IHL turns into a declaratory law (*droit déclaratoire*), which helps developing an *opinio juris*.

The cornerstone of the EU's declaratory policy can be found in the 'Declaration on the occasion of the 50th anniversary of the adoption of the Geneva Conventions of 1949', which exclusively refers to IHL for the first time[350]. The EU «recalls the primary importance that it attaches to the four Geneva Conventions as the basic treaties of international humanitarian law», makes clear the necessity «to promote the implementation of international humanitarian law in armed conflicts» as the «Member States of the Union seize this opportunity to reaffirm their commitment to respect and promote international humanitarian law» and «calls upon all countries that have not yet done so to become a party to the Geneva Conventions as well as to all major treaties in the humanitarian field»[351].

After this fundamental declaration, the EU has increasingly referred to IHL in its common positions and joint actions. Sometimes, IHL was not formally referred to but the application of some of its rules can be recognized[352]. By way of example, the EU refers to «serious violations of international law involving the targeting of children or women in situations of armed conflict, including killing and maiming, sexual violence, abduction and forced displacement» and to «recruiting or using children in armed conflicts in violation of applicable international law»[353]. References can be made to the general principles of IHL[354], or more generally, to the principles of International Law, which include IHL[355].

These references may be abstract and general, but they can also detail the sources of IHL which are taken into account[356]. By way of example, in the

350 Ferraro, «Le droit international humanitaire dans la politique étrangère», *op. cit.*, 2002, p. 438.

351 Declaration of the Presidency on behalf of the EU on the occasion of the 50th anniversary of the adoption of the Geneva Conventions of 1949, BUE 7/8-1999, 12.08.1999.

352 Ferraro, «Le droit international humanitaire dans la politique étrangère», *op. cit.*, 2002, p. 438.

353 Council Common Position 2009/66/CFSP of 26 January 2009 amending Common Position 2008/369/CFSP concerning restrictive measures against the Democratic Republic of the Congo.

354 Afghanistan EU Common position, 2158th Council meeting, General Affairs, Brussels, 25 January 1999. Available at: http://register.consilium.europa.eu/pdf/en/99/st05/st05455.en99.pdf (Accessed: 25.05.2017).

355 *Ibid*.

356 Ferraro, «Le droit international humanitaire dans la politique étrangère», *op. cit.*, 2002, p. 442. See for example: Declaration of the Presidency on behalf of the EU on the occasion of the 50th anniversary of the adoption of the Geneva Conventions of 1949, BUE 7/8-1999, 12.08.1999.

framework of the mainstreamed policy on the rights of the child[357], the EU has developed a set of Guidelines and an implementation Strategy on the prohibition of child soldiers[358]. The EU also mentions specific rights and obligations stemming from IHL, albeit this is not clearly stated.

Additionally, the EU has been playing an important part in disarmament and has adopted various strategies in this sense: the European Security Strategy[359] in which it recognizes proliferation of weapons of mass destruction as potentially the greatest threat to European security; the Strategy against the proliferation of weapons of mass destruction[360] according to which the EU must act with resolve, using all instruments and policies at its disposal and the need to eliminate them is enhanced; and the Strategy to combat illicit accumulation and trafficking of small arms and light weapons and their accumulation[361] in which the means available to the EU at multilateral and regional levels, within the EU and in the EU's bilateral relations are exploited.

Afterwards, the EU has always confirmed this commitment towards IHL, calling for the ratification of and the respect for IHL instruments by all parties. From among the numerous declarations on the topic, the most important are the 'Declaration of the Presidency on behalf of the EU on the occasion of the 150th anniversary of the Battle of Solferino'[362] and the 'Declaration of the Presidency on the occasion of the 60th anniversaries of the adoption of the four Geneva Conventions of 1949'[363], both issued in 2009.

The International Conferences of the Red Cross and Red Crescent also constitute fora where the EU, together with its Member States, publicly com-

357 Communication from the Commission, Towards an EU Strategy on the Rights of the Child, COM(2006) 367 final, 04.07.2006.

358 Council of the European Union, EU Guidelines on Children and Armed Conflict, General Affairs Council of 16 June 2008.

359 Council of the European Union, A Secure Europe In A Better World, European Security Strategy, Brussels, 12 December 2003.

360 Council of the European Union, Fight against the proliferation of weapons of mass destruction – EU strategy against proliferation of Weapons of Mass Destruction (15708/03), Brussels, 10 December 2003.

361 Council of the European Union, EU Strategy to combat illicit accumulation and trafficking of SALW and their ammunition (5319/06), Brussels, 13 January 2006.

362 Declaration by the Presidency on behalf of the European Union on the Occasion of the 150th Anniversary of the Battle of Solferino, 11280/09 (Press 192), Brussels, 24 June 2009.

363 Declaration of the Presidency on behalf of the EU on the occasion of the 60th anniversary of the adoption of the 4th Geneva Convention of 1949, 12535/1/09 REV 1 (Presse 241), Brussels, 12 August 2009.

mits to take action to ensure respect for IHL. For example, on the occasion of the 31st and 32nd International Conferences of the Red Cross and Red Crescent, the EU and its Member States made the pledge to support States in their efforts to adopt relevant national legislation pertinent to their international humanitarian law obligations and to support the promotion and dissemination of IHL[364].

Besides these 'unilateral' statements aiming to promote IHL, the EU also makes use of its status of special observer at the UN to promote this agenda. In this respect, the IHL Guidelines provide the following:

> Where appropriate, the EU should cooperate with the UN [...] for the promotion of compliance with IHL. EU Member States should also, whenever appropriate, act towards that goal as members in other organisations, including the United Nations. [...] Consultations and exchange of information with knowledgeable actors, including [...] the UN [...], should be considered when appropriate.

According to the Guidelines, it is the duty of both the EU and its Member States to cooperate with the UN on IHL matters. This is particularly relevant for the Security Council Permanent Members, namely France and the United Kingdom. Cooperation is two-fold. Firstly, it has to be apprehended from a legal point of view, as the UN and in particular the Security Council, is an international normative actor. Secondly, cooperation is also envisaged from an operational point of view, i.e. when the EU acts in the framework of IHL. The UN's predominant position in the IHL system was already acknowledged in 2003 in the European Security Strategy, a comprehensive framework for EU security in which the UN Charter is described as «the fundamental framework for international relations»[365].

364 Pledge by European Union and its Member States nº OP320033, Strengthening compliance with International Humanitarian Law: «The EU and its Member States will strongly support the establishment of an effective mechanism on strengthening compliance with international humanitarian law. The EU and its Member States will assess and as necessary enhance the implementation of the EU Guidelines on promoting compliance with international humanitarian law in light of the ongoing discussions on establishing an international humanitarian law compliance mechanism».

365 Council of the European Union, A secure Europe in a better world. European Security Strategy, Brussels, 12 December 2003, p. 9.

IHL mainstreams EU-UN cooperation and relies on numerous documents. By way of example, policy dialogue, greater cooperation in the field, better crisis management and prevention, and strategic partnerships between the Commission and some UN organizations are made possible thanks to the Commission's communications on 'Building an effective partnership with the United Nations in the fields of Development and Humanitarian Affairs'[366] and on 'The European Union and the United Nations: The choice of Multilateralism'[367]. More specifically, the Swedish Presidency of 2001 developed a document entitled 'EU-UN cooperation in conflict prevention and crisis management' which identified three forms of cooperation: conflict prevention, civilian and military aspects of crisis management, and particular regional issues[368]. On this basis, both organizations furthered their cooperation notably thanks to the 2003 Joint Declaration on UN-EU Cooperation in Crisis management where it is stated that cooperation should be explored in the fields of planning, training, communication and best practices[369]. Although this domain is not strictly part of IHL, it participates in it.

In this context, the EU does not hesitate to promote the respect for IHL within the UN[370]. In fact, IHL is presented as one of the EU's priorities to the UN. Indeed, the EU priorities at the UN and the 71st UN General Assembly refer to IHL within the frame of migratory and refugee flows[371] or

366 *Ibid*.

367 Communication from the Commission to the Council and the European Parliament, The European Union and the United Nations: The choice of multilateralism, COM(2003) 526 final, 10 September 2003.

368 Göteborg European Council, EU-UN cooperation in conflict prevention and crisis management, Annex to the Presidency conclusions, June 2001. The conclusions of this joint declaration were based on experiences with recent developments in EU-UN cooperation in crisis management.

369 Council of the European Union, Joint Declaration on UN-EU Cooperation in crisis-management (12730/03), Brussels, 19 September 2003.

370 See, e.g.: Statement on behalf of the European Union and its Member States by Mr. Eduardo Fernandez Zincke, Counsellor, Delegation of the European Union to the United Nations, at the Security Council Open Debate on the Protection of Civilians and Healthcare in Armed Conflict, New York, 25 May 2017; Statement on behalf of the European Union by H.E. Mr. Pedro Serrano, Acting Head of the Delegation of the European Union to the United Nations, at the Security Council Open Debate on 'Protection of civilians in armed conflicts', New York, 10 May 2011.

371 «The EU will draw on the frameworks set out by the United Nations, including the 2030 Agenda and the forthcoming UN Summit on Addressing the Large Movements of Refugees and Migrants, towards the establishment of a global and efficient cooperation framework. It

humanitarian action[372] and especially underlines its role as a global promoter of IHL:

> The EU will continue to support the leading role of the UN in the coordination and delivery of international humanitarian assistance as well as continue to advocate for the respect of the humanitarian principles, International Humanitarian Law, Human Rights Law and Refugee Law[373].

This last expression has become a leitmotiv repeated in the previous EU priorities at the UN[374].

Against this background, the Presidency has called for the accession to the Protocols of the Geneva Conventions[375] as well as accepting the competence of the IHFFC in response to the above-mentioned UN periodic reports and resolutions on the status of the Additional Protocols[376]. In the last statement on the matter, the Presidency recalled the universal acceptance of the Geneva Conventions, their customary character, as well as the customary nature of «many of the provisions contained in the 1977 Additional

should be based on shared responsibilities, capable of addressing migration and displacement challenges worldwide, underscored by a renewed commitment to international humanitarian law».

372 «Humanitarian action has for several years been faced with serious challenges. Recent conflicts have been characterised by longer duration, brutality and blatant disregard for norms including International Humanitarian Law, unprecedented levels of suffering and forced displacement internally or across international borders, as well as increasing deliberate targeting of civilian infrastructure, humanitarian workers and restrictions on humanitarian access».

373 EU priorities at the United Nations and the 71st UN General Assembly, Brussels, 18 June 2016. Available at: http://eu-un.europa.eu/eu-priorities-united-nations-71st-unga/ (Accessed: 29.05.2017).

374 See, e.g.: EU Priorities for the 70th UN General Assembly, Luxembourg, 22 June 2015, available at http://eu-un.europa.eu/eu-priorities-for-the-70th-un-general-assembly-2/ (Accessed: 29.05.2017); EU Priorities for the UN General Assembly 69th General Assembly, available at http://eu-un.europa.eu/eu-priorities-for-the-un-general-assembly-69th-general-assembly/ (Accessed: 29.05.2017); EU Priorities for the UN General Assembly 68th General Assembly, available at http://eu-un.europa.eu/eu-priorities-for-the-68th-un-general-assembly/ (Accessed: 29.05.2017); EU Priorities for the UN General Assembly 67th General Assembly, available at http://eu-un.europa.eu/eu-priorities-for-the-67th-united-nations-general-assembly/ (Accessed: 29.05.2017).

375 Statement by Ms. Anna Sotaniemi, Legal Adviser, Permanent Mission of Finland to the United Nations, on behalf of the European Union, UN 61st Session, VI Committee, Agenda Item 75: Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts, New York, 2005.

376 See, *supra*, Chapter 1, Section 2.

Protocols». Furthermore, it constituted an occasion to renew the EU's commitment to IHL:

> Ensuring improved compliance with international humanitarian law remains a priority for the European Union and its Member States. To this end, at the 31st International Conference of the Red Cross and Red Crescent in November 2011, we pledged to emphasize our commitment to promoting dissemination and training in international humanitarian law. In line with the EU Guidelines on promoting compliance with international humanitarian law, the EU Member States also pledged to work towards further participation in the principal international humanitarian law instruments and to support States in their efforts to adopt relevant national legislation pertinent to their international humanitarian law obligations.

In addition, the statement underlined the work developed by the ICRC, national Red Cross and Red Crescent societies and States «to strengthen and to promote the dissemination» of IHL and its implementation. Further mention is made to accountability, labelled as «crucial to secure compliance», and to the need «to preserve the integrity and to promote the universality of the Rome Statute». Lastly, IHL is termed «one of the strongest tools at the disposal of the international community to ensure the protection and dignity of all persons affected by armed conflict» and support thereto «an issue of common interest and shared responsibility for all UN Member States», thus reflecting the *erga omnes* nature of Common Article 1[377].

It should be noted that in these statements made at the UN, some third States indicate that they align themselves with the EU's position. This is most often the case of candidate or potential candidate countries – especially Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Montenegro, Serbia, and Albania – EFTA countries, as well as Ukraine and the Republic of Moldova.

With regard to France specifically, its position as a permanent member of the UNSC puts it at the forefront of the obligation to ensure respect for IHL

377 EU Statement – United Nations 6th Committee: Status of Protocols Additional to Geneva Conventions, 22 October 2012. Available at: http://eu-un.europa.eu/eu-statement-united-nations-6th-committee-status-of-protocols-additional-to-geneva-conventions/ (Accessed: 29.05.2017).

at the UN. It is worth noting that the protection of civilians was one of the main priorities of the French presidency of the UNSC during June 2016[378]. In this context, the above-mentioned French-Mexican initiative on UNSC permanent members refraining from using their right to veto in case of genocide, crimes against humanity, war crimes and ethnic cleansing is encouraging, insofar as it highlights the shift from an exclusively State-centered approach to a more human-centered approach of international relations.

As for Spain, its external action reflects its commitment to ensure respect for IHL. It took advantage of its membership in the UNSC in the years 2015-2016 to advance on crucial topics such as the protection of civilians, with a special focus on the most vulnerable groups, on women and children[379]. In addition, Spain has supported the initiative proposed by France and Mexico on UNSC permanent members refraining from using their right to veto in case of mass atrocities. In this context, it signed the Code of Conduct and pledged not to vote against a draft resolution proposing action to end to prevent core international crimes[380]. This commitment is also reflected in the different attempts by the French and Spanish authorities to adopt resolutions within the UNSC with regard to the armed conflict in Syria.

2.1.2.2. Specific issues: the example of sexual and gender-based violence in armed conflicts

All three actors have defended some aspects of IHL more than others. In particular, it is possible to mention their special promotion of the protection of women in armed conflicts. The protection due to women in armed conflicts constitutes a good example of multilevel. Indeed, Spain has promoted this agenda on the international stage, which has in turn been endorsed by the UNSC, thus necessitating France's approval, and confirmed at EU level.

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378 See: Conférence de presse de présentation du programme de travail de la présidence française du Conseil de sécurité, Intervention de M. François Delattre, représentant permanent de la France auprès des Nations unies, 01.06.2016. Available at: http://www.franceonu.org/Le-maintien-de-la-paix-colonne-vertebrale-de-la-Presidence-francaise-du-Conseil (Accessed: 08.06.2016).

379 Spain in the United Nations Security Council, Review of 2015 and priorities for 2016. Available at: http://www.exteriores.gob.es/Portal/es/SalaDePrensa/Multimedia/Documents/2016_ENERO_BALANCE%20CSNNUU%20ENG.PDF (Accessed: 02.06.2017).

380 Spain in the United Nations Security Council, Review of 2015 and priorities for 2016. Available at: http://www.exteriores.gob.es/Portal/es/SalaDePrensa/Multimedia/Documents/2016_ENERO_BALANCE%20CSNNUU%20ENG.PDF (Accessed: 02.06.2017).

In particular, the UNSC operated an important step in the recognition of the role of women and girls in armed conflicts through Resolution 1325(2000). This resolution is essential insofar as it offers a gender-based perspective of peace and security. For present purposes, it reaffirms «the need to implement fully international humanitarian and human rights law that protects the rights of women and girls during and after conflicts» and calls on warring parties «to respect the civilian and humanitarian character of refugee camps and settlements, and to take into account the particular needs of women and girls, including in their design». In addition, it highlights the scourge of gender-based and sexual violence:

> 10. Calls on all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict;
>
> 11. Emphasizes the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, war crimes including those relating to sexual violence against women and girls, and in this regard, stresses the need to exclude these crimes, where feasible from amnesty provisions[381].

For the first time, sexual and gender-based violence is recognized as a tactic of warfare, a matter of international peace and security, and a war crime. This resolution has been completed by seven resolutions, until the adoption of UNSC Resolution 2242 (2015), sponsored by Spain. Likewise, France, in its quality of permanent member of the UNSC, has actively supported the resolutions sustaining the 'Women, Peace, and Security' agenda. In particular, it «has been a leading proponent of certain issues therein (fight against impunity and the [ICC], health and sexual and reproductive rights in particular)»[382].

In the preamble of Resolution 2242 (2015), it is acknowledged that sexual violence may be «used or commissioned as a method of war or as part of a widespread or systematic attack against civilian populations». It interestingly notes that the UNSC should:

381 UNSC Resolution S/RES/1325 (2000), 31 October 2000.

382 Ministère des affaires étrangères et du développement international. France's second national action plan. Implementation of United Nations Security Council «Women, peace and security», Resolutions 2015-2018.

> when adopting or renewing targeted sanctions in situations of armed conflict, [...] consider designating, as appropriate, those actors, including those in terrorist groups, engaged in violations engaged in violations of international humanitarian law and violations and abuses of human rights, including sexual and gender-based violence, forced disappearances, and forced displacement, and commits to ensuring that the relevant expert groups for sanctions committees have the necessary gender expertise[383].

The need to ensure the fight against impunity regarding sexual and gender-based violence is further emphasized.

The EU contributes to the implementation of these resolutions, notably through the development of a Comprehensive Approach on this matter[384], a 'Guide to Practical Actions at EU level for Ending Sexual Violence in Conflict' adopted in 2014, and a Joint EU Gender Action Plan for the period 2016-2020. In particular, it mainstreams women' rights in all its policies and particularly addresses the issue of women in armed conflicts, as well as the necessity to criminalize some war crimes, such as mass rape in times of armed conflicts, both in policy[385] and legally binding documents[386].

In this respect, it is worth mentioning the 'Guidelines on Violence against women and girls and combating all forms of discrimination against them' as they make express reference to the UNSC resolutions on this matter and underline the provisions of the Rome Statute on sexual violence, insofar as it amounts to a core international crime[387]. Besides, the 2015 Action Plan on

383 UNSC Resolution S/RES/2242 (2015), 13 October 2015.

384 Council of the European Union, Revised indicators for the Comprehensive approach to the EU implementation of the UN Security Council Resolutions 1325 and 1820 on women, peace and security (12525/16), Brussels, 22 September 2016; Council of the European Union, Comprehensive approach to the EU implementation of the United Nations Security Council Resolutions 1325 and 1820 on women, peace and security, Brussels, 1 December 2008.

385 See, e.g.: Catherine Ashton EU High Representative for Foreign Affairs and Security Policy and Vice President of the European Commission Speech on women, peace and security Conference on the 10th anniversary of the UN Security Council Resolution 1325 on women, peace and security (SPEECH/10/417), Palais d'Egmont, Brussels, 9 September 2010; Council conclusions on promoting compliance with international humanitarian law, 2985th Foreign Affairs, Council meeting Brussels, 8 December 2009.

386 E.g.: Council Common Position 2009/66/CFSP of 26 January 2009 amending Common Position 2008/369/CFSP concerning restrictive measures against the Democratic Republic of the Congo.

387 Council of the European Union, EU guidelines on violence against women and girls and combating all forms of discrimination against them, 08.12.2008.

Human Rights and Democracy contains some measures relating to the support of the UN in this area. By way of example, measure 20(c) foresees the:

> [s]upport the work of UN Special Representative on Sexual Violence in Conflict, the UN team of experts and UN Action to enhance co-ordination of international efforts against sexual violence and the effective investigation and prosecution of sexual violence crimes[388].

It should also be noted that the 2009 French and 2010 Spanish Presidencies have promoted this agenda at EU level[389].

Lastly, the EU and its Member States, including France and Spain, adopted a pledge on this matter at the 31st International Conference of the Red Cross and Red Crescent. At EU level, they committed to prioritize the implementation of its 2014 'Guide to Practical Actions at EU level for Ending Sexual Violence in Conflict' and to undertake actions «in the areas of prevention, support, protection and accountability, in contexts of conflict prevention, crisis response and humanitarian aid» as well as to promote cooperation in multilateral fora[390].

At national level, the emphasis is put on raising awareness on the issues of sexual and gender-based violence, support for the UN Secretary General's Special Representative on Sexual Violence, exchange of practices and know-how, promotion of the International Protocol on the Documentation and investigation of Sexual Violence, and support for prevention and response activities on sexual and gender-based violence[391]. Likewise, France joined two pledges promoted by the United-Kingdom and another one promoted by Canada[392]. On this basis, it committed to implement the Women, Peace, and Security agenda[393] and to prioritize policy and practical support within States

388 Council of the European Union, Council Conclusions on the Action Plan on Human Rights and Democracy 2015-2019 (10897/15), Brussels, 20 July 2015.

389 Giji Gya, *Women, Peace and Security in EU Common Security and Defence Policy*, Brussels, Civil Society Dialogue Network, 2011, p. 18.

390 Pledge by the European Union and its Member States nº OP320037, Sexual and gender-based violence during times of armed conflict or in the aftermath of disasters and other emergencies.

391 *Ibid*.

392 Pledge by Canada nº OP320020, Engagement du groupe francophone sur la violence sexuelle et sexiste dans les conflits armés et autres situations d'urgence.

393 Pledge by the United Kingdom of Great Britain and Northern Ireland nº OP320010, Women, Peace, and Security.

and with partner organizations in the prevention and response to sexual and gender-based violence in conflict and emergency situation, with a special focus on the fight against impunity[394].

2.1.3. The European Commission's Humanitarian Aid and Civil Protection Office

The European Commission's Humanitarian Aid and Civil Protection Office «aims to save and preserve life, prevent and alleviate human suffering and safeguard the integrity and dignity of populations affected by natural disasters and man-made crises»[395]. ECHO «ensures rapid and effective delivery of EU relief assistance through its two main instruments: humanitarian aid and civil protection». These two areas used to be separated and were brought together in 2010, following the entry into force of the Lisbon Treaty.

Within this frame, the European Commission has developed a policy of promotion of IHL. Indeed, even though humanitarian aid is distinct from IHL, both areas are connected. The European Commission bases its action of promotion of compliance with IHL on two elements[396]. First, IHL is one of the legal corpuses that govern humanitarian action. In particular, it is applicable to humanitarian assistance and protection of civilians, and the principles that guide humanitarian action – humanity, impartiality, neutrality and independence – also have their basis in IHL. Second, the EU is bound by IHL insofar as all EU Member States have ratified the Geneva Conventions and their Additional Protocols, and the EU adopted the IHL Guidelines. In this section, only aspects of ECHO's action relating to IHL will be briefly analyzed.

On 18 December 2007, the Presidents of the Council, the European Parliament and the Commission signed the European Consensus on Humani-

394 Pledge by the United Kingdom of Great Britain and Northern Ireland nº OP320007, Preventing and responding to sexual and gender-based violence in conflict and emergency situations.

395 ECHO Website, «About the EU Humanitarian Aid and Civil Protection department (ECHO)», 03/12/2015. Available at: http://ec.europa.eu/echo/who/about-echo_en (Accessed: 15.01.2016).

396 ECHO Factsheet, «International Humanitarian Law», European Commission, 2015. Available at: http://ec.europa.eu/echo/files/aid/countries/factsheets/thematic/ihl_en.pdf (Accessed: 15.01.2016).

tarian Aid[397], a document which provides the EU with a common vision and approach to guide its action in the provision of humanitarian assistance in third countries. In the Consensus, the increasing tendency to ignore or blatantly violate international law, including IHL is mentioned. In this regard, the respect for IHL and the principles of humanitarian intervention – neutrality, impartiality, humanity and independence of humanitarian action – are directly connected to guarantee the 'humanitarian space' and to «ensure access to vulnerable populations and the safety and security of humanitarian workers» (paragraph 2). Furthermore, it includes IHL among the common principles and good practice to be followed (paragraph 16) and refers explicitly to the Guidelines on promoting compliance with IHL. Another interesting element in this regard is the reference to the R2P as forming part of the international legal framework (paragraph 17). Concerning the use of civil protection and military assets and capabilities, the EU commits to «encourage common training in international law and the fundamental humanitarian principles» (paragraph 57).

Then, the Action Plan on Humanitarian Aid for the years 2008-2013 was adopted in 2008[398]. It includes a series of practical measures to implement the consensus. Area 1 of the Action Plan is of particular interest for the purposes of this thesis. It deals with 'Advocacy, promotion of humanitarian principles and international law' and therefore includes promoting compliance with IHL, as it is understood to be necessary to ensure the safety and security of humanitarian workers and to preserve access to affected populations. In particular, one of the priority actions is:

> general and case-specific advocacy for the respect of international law, including IHL, Human Rights Law and Refugee Law through EU policy channels (statements, political dialogue, joint demarches)[399].

The idea is to raise awareness about specific situations of failure to uphold IHL with the responsible parties. This policy action is therefore a clear exam-

397 Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission (2008/C 25/01).

398 European Consensus on Humanitarian Aid – Action Plan, Brussels, 29/05/2008, SEC(2008) 1991.

399 *Ibid*., p. 6.

ple of how the EU fulfills Common Article 1. An element that is particularly interesting is that the European Commission must report on its progress. In this regard, the 2014 Evaluation Report of the Action Plan dedicates a specific evaluation question on the extent to which the implementation of the European Consensus contributed to promoting and upholding the fundamental humanitarian principles, promoting IHL and respecting the distinct nature of humanitarian law[400].

Against this background, the European Commission supports five kinds of activities to disseminate and implement IHL[401], which deal mostly with funding and awareness activities. First, it funds advocacy activities with its partners or does advocacy itself when it funds humanitarian assistance in response to conflicts and emergencies. Second, it funds training programs involving a wide range of stakeholders, including non-State actors. This activity is particularly important as many non-State actors have no knowledge of IHL and the consequences of its violation. Third, it funds activities among humanitarian workers to raise awareness of IHL issues and the humanitarian principles applicable in humanitarian aid. Fourth, it «tries to raise awareness among partners worldwide about some of the unintended consequences of new counter-terrorism legislation and policies», as many States have enacted legislation prohibiting the funding of training in IHL aimed at armed groups labeled as 'terrorist'. Lastly, it plays an important role in funding and implementing information and awareness campaigns of IHL among a wider public.

The action of DG ECHO is therefore particularly important in the implementation of the obligation to ensure respect for IHL at EU level. The EU is the biggest humanitarian donor and as such, it is a more credible actor at international level in the IHL field.

2.2. Resorting to trade agreements

Even though the IHL Guidelines do not make reference to trade agreements as an operational tool at the EU's disposal to ensure respect for IHL,

400 ADE & King's College London, Report on 'Evaluation of the implementation of the European Consensus on Humanitarian Aid', *European Commission*, 2014, pp. 55-57.

401 ECHO Factsheet, «International Humanitarian Law», *op. cit.*, 2015.

their potential should not be underestimated. Indeed, the Common Commercial Policy (hereafter, 'CCP') of the EU has been used to promote human rights and the international criminal law, so that it could be used as well within the frame of the obligation to ensure respect for IHL.

The CCP falls under the exclusive competence of the EU and is regulated by articles 206 and 207 TFEU. Therefore, the European Parliament and Council, acting under the ordinary legislative procedure, adopt the measures that define the framework for implementing the CCP[402]. For present purposes, the conclusion of international agreements is especially relevant. Indeed, article 216(1) TFEU provides that international agreements may be concluded to achieve the EU's objectives:

> The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.

In this respect, article 207(1) TFEU states that the CCP «shall be conducted in the context of the principles and objectives of the Union's external action». As Paul Craig has shown, these principles include the trade liberalization objectives codified in article 206 TFEU but also the objectives enshrined in articles 3(5) and 21 TEU[403]. For present purposes, the respect for the rule of law, human rights, the principles of the UN Charter and international law can therefore guide the CCP. It can thus be inferred that the EU has the possibility to adopt international agreements to «effectuate one of the broad objectives in article 3 TEU or article 21 TEU»[404] within the frame of its CCP. Nonetheless, it should also be noted that when it comes to integrating human rights into trade agreements, the latter must be individually ratified by Member States, as this matter is not an exclusive competence of the EU[405].

402 Craig, *The Lisbon Treaty. Law, Politics and Treaty Reform*, *op. cit.*, 2010, p. 390.

403 *Ibid.*, p. 390.

404 *Ibid.*, p. 399.

405 Laura Beke, David D'hollander, Nicolas Hachez and Beatriz Pérez de las Heras, *Report on the integration of human rights in EU development and trade policies*, FRAME, 2014, p. 25.

2.2.1. The use of conditionality clauses to ensure respect for IHL

The EU has adopted 'conditionality clauses' in international agreements passed with third States. Pursuant to such clauses, human rights «serve as a basis for the implementation of positive measures on a par with other key provisions in an agreement»[406]. The origin of conditionality clauses goes back to the late 70's, after a massacre occurred in Uganda[407]. Ever since, the EU has been willing not to provide funds that could contribute to violations of IHRL and IHL. To this end, it has included conditionality clauses in most of its comprehensive international agreements since 1995. The Cotonou agreement[408] constitutes a landmark in this respect. It is an agreement applicable to 79 African, Caribbean, and Pacific countries on the one part and the EU on the other, revised in 2005 and 2010, which enshrines in article 96(2)(a) the following conditionality clause:

> If, despite the political dialogue conducted regularly between the Parties, a Party considers that the other Party has failed to fulfill an obligation stemming from respect for human rights, democratic principles and the rule of law referred to in paragraph 2 of Article 9, it shall, except in cases of special urgency, supply the other Party and the Council of Ministers with the relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties. To this end, it shall invite the other Party to hold consultations that focus on the measures taken or to be taken by the party concerned to remedy the situation[409].

406 EEAS, *EU annual report on human rights and democracy in 2010*, Brussels, European Union, 2011, pp. 17-18. Available at: https://eeas.europa.eu/sites/eeas/files/2010_human-rights-annual_report_en.pdf (Accessed: 30.05.2017).

407 Lorand Bartels, *The application of human rights conditionality in the EU's bilateral trade agreements and other trade arrangements with third countries*, Brussels, European Parliament, November 2008, p. 2

408 The Cotonou Agreement ensues from the Lomé Conventions. It is the most comprehensive partnership agreement between developing countries and the EU. Since 2000, it has been the framework for the EU's relations with 79 countries from Africa, the Caribbean and the Pacific. See: http://ec.europa.eu/europeaid/where/acp/overview/cotonou-agreement/index_en.htm (Accessed: 13.05.2013).

409 Agreement amending for the second time the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, as first amended in Luxembourg on 25 June 2005, OJ L 287, 4.11.2010, pp. 1-49, article 96(2)(a).

In this context, it may be considered that IHL has been included in conditionality clauses, through the allusion to more encompassing principles of international law, human rights, and the rule of law[410].

Noncompliance with conditionality clauses can result in the adoption of sanctions in proportion to the seriousness of the breaches[411]. In particular, the violation of a conditionality clause will entail the suspension of financial aid or other forms of cooperation. However, these measures may be accompanied by a redirection of payments to civil society bypassing the government. For example, the Temporary International Mechanism for direct assistance to the Palestinian population bypasses the Hamas government. When the EU suspends development aid, it intends not to target the population as a whole and tries to minimize the impact on the civil population. By way of example, it did so in Russia in response to the Chechnya conflict in 1999 and redirected aid to the civil society[412].

Furthermore, explicit mentions to IHL have been found in numerous international agreements of all types. In this regard, the agreements concluded in recent years include the same general references to the respect for international law, the rule of law, and human rights, in addition to explicit references to IHL within the frame of the fight against terrorism[413].

410 See, e.g.: Interim Agreement on trade and trade-related matters between the European Community, of the one part, and Bosnia and Herzegovina, of the other part, OJ L169, 30.06.2008, p. 13, article 1; Interim Agreement on trade and trade-related matters between the European Community, of the one part, and the Republic of Montenegro, of the other part – Protocols – Final Act – Declarations, OJ L345, 28.12.2007, p. 2., article 1; Interim Agreement on trade and trade-related matters between the European Community, of the one part, and the Republic of Serbia, of the other part, OJ L28, 30.01.2010, p. 2., article1; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part, OJ L107, 28.04.2009, p. 166, article 2; Stabilisation and Association Agreement (SAA) between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part, 01.01.2010, article 2.

411 EEAS, *EU annual report on human rights and democracy in 2010*, *op. cit.*, 2011, pp. 17-18.

412 Bartels, *The application of human rights conditionality*, *op. cit.*, 2008, p. 21.

413 See, e.g.: Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other, OJ L 346, 15.12.2012, pp. 3-2621, articles 15 and 16; Decision No 1/2016 of the EU-Lebanon Association Council of 11 November 2016 agreeing on EU-Lebanon Partnership Priorities [2016/2368], OJ L 350, 22.12.2016, pp. 114-125; Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part, OJ L 329, 3.12.2016, pp. 8-42, preamble and article 10; Cooperation Agreement on Partnership and Development between the European Union and its Member States, of the one part, and the Islamic Republic of Afghanistan, of the other part, OJ L 67, 14.03.2017, pp. 3-30, preamble; Partnership Agreement on Relations and Cooperation between the European

While the systematic inclusion of IHL clauses is an important step to ensure respect for IHL, the need to effectively implement them is equally important. In this regard, the European Parliament emphasized the importance and indispensability of human rights clauses but also called for more effective implementation, notably «through the establishment of an enforcement mechanism linked to benchmarks to measure implementation of human rights obligations»[414]. This statement applies with regard to IHL as well.

2.2.2. The use of arm agreements

The EU has approved a policy of regulation of weapons with special relevance for IHL[415]. The EU's policy priorities of relevance for present purposes deal with weapons of mass destruction, conventional weapons, and arms export control. It should be noted in this respect that the position of Principal Adviser and Special Envoy for Non-proliferation and Disarmament was created within the EEAS in 2013, thus demonstrating the special importance of this matter.

In the field of arms exports, the EU adopted in 2008 Common Position 2008/944/CFSP under the French Presidency of the EU, which replaced the former EU Code of conduct on arms exports. Common Position 2008/944/CFSP details the criteria applicable to the exportations of military equip-

Union and its Member States, of the one part, and New Zealand, of the other part, OJ L 321, 29.11.2016, pp. 3-30, article 11; Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part, OJ L 329, 03.12.2016, pp. 45-65, article 5; Political Dialogue and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Cuba, of the other part, OJ L 337I, 13.12.2016, pp. 3-40, article 8; Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part, OJ L 29, 04.02.2016, pp. 3-150, article 13; Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, OJ L 261, 30.08.2014, pp. 4-743, article 12; Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, OJ L 260, 30.08.2014, pp. 4-738, articles 11 and 19; Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJ L 161, 29.05.2014, pp. 3-2137, articles 13 and 29.

414 EEAS, *EU annual report on human rights and democracy in 2010*, *op. cit.*, 2011, pp. 17-18.

415 For a detailed explanation, see: Millet-Devalle, «L'UE et le droit relatif aux moyens de combat», *L'Union européenne et le Droit International Humanitaire*, *op. cit.*, 2010, p. 217.

ment[416], the respect for IHL being a criterion that destination States must respect from a reactive and preventive perspective[417]. In the event of «clear risk» that the military equipment in question might be used «in the commission of serious violations of IHL», EU Member States shall not issue export licenses. With this common position, the «EU is the only regional organization to have established a legally binding arrangement on conventional arms exports»[418].

At external level, the Council adopted Decision 2012/711/CFSP in order to promote the principles and criteria set forth in Common Position 2008/944/CFSP among third countries[419]. Furthermore, the EU played an active role in the elaboration and entry into force of some international treaties and conventions, most notably the UN Arms Trade Treaty in 2014[420]. In this respect, it is worth recalling the pledge made by the EU and some of its Member States, including France and Spain, on the occasion of the 2015 International Conference of the Red Cross and Red Crescent with regard to the Arms Trade Treaty:

> The EU welcomes the entry into force of the Arms Trade Treaty in December 2014. It promotes its effective implementation, which notably applies to the IHL related provisions of the Treaty by states parties.
>
> Against this background, the EU and its Member States pledge:
>
> – to continue its efforts towards effective implementation and universalization of the Arms Trade Treaty;
> – to work for robust and transparent reporting in accordance with the object and spirit of the treaty;

416 Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, OJ L 335/99, 13.12.2008, article 2(2).

417 Auvret-Finck, «L'utilisation du DIH dans les instruments de la PESC», *op. cit.*, 2010, p. 72.

418 Carmen-Cristina Cîrlig, «EU Rules on Control of Arms Exports», *EPthinktank*, 14.12.2015. Available at: https://epthinktank.eu/2015/12/14/eu-rules-on-control-of-arms-exports/ (Accessed: 29.05.2017).

419 Council Decision 2012/711/CFSP of 19 November 2012 on support for Union activities in order to promote, among third countries, the control of arms exports and the principles and criteria of Common Position 2008/944/CFSP, OJ L 321, 20.11.2012, p. 62.

420 Arms Trade Treaty, adopted through UNGA Resolution A/RES/67/234 B, New York, 2 April 2013 (entry into force: 24 December 2014). Implementation at EU level through: Council Decision 2013/768/CFSP of 16 December 2013 on EU activities in support of the implementation of the Arms Trade Treaty, in the framework of the European Security Strategy, OJ L 341, 18.12.2013, pp. 56-67.

– to fully apply – at its domestic level – the IHL related provisions of the Arms Trade Treaty consistently with its own principles regarding respect for IHL in arms transfers as enshrined in EU Common Position 2008/944/CFSP on arms export control.

Spain transposed its obligations arising from the common position by means of Act 53/2007 of 28 December 2007[421], completed with a Regulation on the control of the export of defense equipment approved in 2014[422]. The latter also incorporates elements relating to the Arms Trade Treaty. In this regard, it is especially worth noticing that article 7 of Royal Decree 679/2014 refers explicitly to the serious violations of IHL as a motive for refusal, suspension or revocation of export licenses[423].

Conversely, France applies directly the provisions of Common Position 2008/944/CFSP, without act of transposition[424]. Pursuant to the French mech-

421 Act 53/2007 of 28 December 2007 (Ley 53/2007, de 28 de diciembre, sobre el control del comercio exterior de material de defensa y de doble uso), BOE nº 312, 29.12.2007, pp. 53605-53676.

422 Regulation on the control of the export of defense equipement, as established by Royal Decree 679/2014 of 28 December 2014 (Real Decreto 679/2014, de 1 de agosto, por el que se aprueba el Reglamento de control del comercio exterior de material de defensa, de otro material y de productos y tecnologías de doble uso), BOE nº 207, 26.08.2014, p. 68148.

423 Regulation on the control of the export of defense equipement, article 7: «Las autorizaciones a que se refiere el artículo 2 podrán ser suspendidas, denegadas o revocadas por resolución dictada por el titular de la Secretaría de Estado de Comercio, en los supuestos siguientes: a) Cuando existan indicios racionales de que el material de defensa, el otro material o los productos y tecnologías de doble uso puedan ser empleados en acciones que perturben la paz, la estabilidad o la seguridad en un ámbito mundial o regional, puedan exacerbar tensiones o conflictos latentes, puedan ser utilizados de manera contraria al respeto debido y la dignidad inherente al ser humano, con fines de represión interna o en situaciones de violación grave del derecho internacional de los derechos humanos o del derecho internacional humanitario, tengan como destino países con evidencia de desvíos de materiales transferidos o puedan vulnerar los compromisos internacionales contraídos por España. Para determinar la existencia de estos indicios racionales se tendrán en cuenta los informes sobre transferencias de material de defensa y destino final de estas operaciones que sean emitidos por organismos internacionales en los que participe España, los informes de los órganos de derechos humanos y otros organismos de Naciones Unidas, la información facilitada por organizaciones y centros de investigación de reconocido prestigio en el ámbito del desarrollo, la paz y la seguridad, el desarme, la desmovilización y los derechos humanos, así como las mejores prácticas más actualizadas descritas en la Guía del Usuario de la Posición Común 2008/944/PESC del Consejo, de 8 de diciembre de 2008, por la que se definen las normas comunes que rigen el control de las exportaciones de tecnología y equipos militares».

424 Council fifteenth annual report according to article 8(2) of Council Common Position 2008/944/cfsp defining common rules governing control of exports of military technology and equipment, OJ C 621, 21.01.2014, p. 1, Table C.

anism of control, arm exports are in principle forbidden. Therefore, the State grants licenses, which remain under its control. The decision to grant a license takes into consideration the criteria established in Common Position 2008/944/CFSP, together with concerns over international peace and stability, the safety of French and allied armed forces, as well as the respect for human rights[425].

While Common Position 2008/944/CFSP has been assessed as having a «positive impact on EU national arms export policies», some limitations remain. In particular, its implementation is not subject to the jurisdiction of the CJEU and no sanctions are foreseen in case of non-compliance[426]. Furthermore, diverging interpretation at national level is reported to weaken the effectiveness of the common position[427].

Even though France normally applies strict criteria regarding arms exports, there are some inconsistencies. By way of example, it has exported arms to countries suspected of having committed serious violations of IHL such as Saudi Arabia[428]. The same holds true regarding Spain[429]. This is particularly problematic as Saudi Arabia is suspected of having violated IHL in Yemen, as some attacks directed against the civilian population may amount to war crimes[430].

Lastly, the EU has adopted rules in related fields, even though they do not necessarily relate to arms exports. In the field of conventional weapons, the EU adopted rules on the fight against antipersonnel mines and unexploded munitions[431], which creates assistance programs designed to assist non-EU countries

425 See: Ministère de la Défense, Rapport au Parlement 2016 sur les exportations d'armement de la France, May 2016. Available at: https://armerdesarmer.files.wordpress.com/2016/06/rapport-au-parlement-en-2016.pdf (Accessed: 08.06.2017).

426 Carmen-Cristina Cîrlig, *EU arms exports. Member States' compliance with the common rules. Library Briefing*, European Parliament, 2013.

427 Cîrlig, «EU Rules on Control of Arms Exports», *op. cit.*, 2015.

428 See: Ministère de la Défense, Rapport au Parlement 2016 sur les exportations d'armement de la France, *op. cit.*, 2016.

429 ATT Monitor, *Dealing in double standards: How arms sales to Saudi Arabia are causing human suffering in Yemen. Case study* 2, 2016. Available at: http://controlarms.org/en/wp-content/uploads/sites/2/2016/02/ATT-Monitor-Case-Study-2-Saudi-Arabia-FINAL.pdf (Accessed: 08.06.2017).

430 *Ibid*.

431 Council Decision 2012/700/CFSP of 13 November 2012 in the framework of the European Security Strategy in support of the implementation of the Cartagena Action Plan 2010-2014, adopted by the States Parties to the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, OJ L 314, 14.11.2012, pp. 40-46.

in complying with the Anti-Personnel Mine Ban Convention[432] to eliminate mines and resolve the socio-economic problems that arise. In addition, the EU adopted a Strategy to combat illicit accumulation and trafficking of light weapons[433]. Lastly, the EU has approved policy documents to implement and comply with international agreements dealing with weapons of mass destruction, most notably the Strategy against the proliferation of weapons of mass destruction[434]. In this context, clauses relating to weapons of mass destruction or small arms and light weapons have likewise been enshrined in numerous international agreements concluded with third countries[435].

Thus, the three actors have developed a set of tools to prevent violations of IHL from occurring, in accordance with the mandate established in the

432 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Oslo, 18 September 1997 (entry into force: 1 March 1999), 2056 UNTS 211.

433 Council of the European Union, EU Strategy to combat illicit accumulation and trafficking of SALW and their ammunition (5319/06), Brussels, 13 January 2006.

434 Council of the European Union, Fight against the proliferation of weapons of mass destruction – EU strategy against proliferation of Weapons of Mass Destruction (15708/03), Brussels, 10 December 2003.

435 See, e.g.: Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other, OJ L 346, 15.12.2012, pp. 3-2621, articles 15 and 16; Decision No 1/2016 of the EU-Lebanon Association Council of 11 November 2016 agreeing on EU-Lebanon Partnership Priorities [2016/2368], OJ L 350, 22.12.2016, pp. 114-125; Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part, OJ L 329, 03.12.2016, pp. 8-42, preamble and article 10; Cooperation Agreement on Partnership and Development between the European Union and its Member States, of the one part, and the Islamic Republic of Afghanistan, of the other part, OJ L 67, 14.03.2017, pp. 3-30, preamble; Partnership Agreement on Relations and Cooperation between the European Union and its Member States, of the one part, and New Zealand, of the other part, OJ L 321, 29.11.2016, pp. 3-30, article 11; Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part, OJ L 329, 03.12.2016, pp. 45-65, article 5; Political Dialogue and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Cuba, of the other part, OJ L 337I, 13.12.2016, pp. 3-40, article 8; Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part, OJ L 29, 04.02.2016, pp. 3-150, article 13; Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, OJ L 261, 30.08.2014, pp. 4-743, article 12; Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, OJ L 260, 30.08.2014, pp. 4-738, articles 11 and 19; Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJ L 161, 29.05.2014, pp. 3-2137, articles 13 and 29.

Geneva Conventions. Nonetheless, in some cases, these preventive measures are not sufficient; they therefore need to react to violations of IHL and adopt all the necessary and reasonable measures to bring the offending warring party back to a state of compliance.

3. ENDING VIOLATIONS OF IHL

As noted in Chapter 1, the obligation to ensure respect for IHL entails a certain number of measures that third parties to armed conflicts shall implement in order to put an end to violations of IHL during an armed conflict. It is clear that these measures cannot be interpreted as entailing an obligation of result, as this would be utopian and practically unfeasible. Below, some non-coercive and coercive measures adopted by the three actors are detailed, without claiming to be exhaustive.

3.1. Non-coercive measures

As noted above, the EU regularly uses declarations and public statements to promote compliance with IHL in general terms: ratification of IHL instruments, need to respect IHL instruments, call for end of impunity, etc. In addition, the EU also enacts statements about specific situations calling to stop violations of IHL. Whereas the EU seems to promote IHL as a core element of international law, which must be respected at all times, it becomes more selective when it condemns violations of IHL, and its action is not consistent.

One type of measure that may be adopted in reaction to violations of IHL in a given armed conflict is public denunciations. In this framework, the EU may adopt demarches and/or public statements about specific conflicts:

> When violations of IHL are reported the EU should consider making *démarches* and issuing public statements, as appropriate, condemning such acts and demanding that the parties fulfil their obligations under IHL and undertake effective measures to prevent further violations[436].

436 IHL Guidelines, pt. 16(c)

In this respect, the EU often uses this means to remind the parties to a conflict to respect IHL. When the EU adopts such a position – be it support, condemnation or silence – the parties to the conflict in question may reconsider their own actions. In the same way, the EU's position may affect the behavior of the other members of the international community and exert pressure on the parties to the conflict to abide by IHL. In this context, the EU has issued public statements regarding the conflicts in, *inter alia*, Israel, Darfur, Libya, the Democratic Republic of Congo, the Ivory Coast, Sri Lanka, Colombia, or Syria[437].

Some patterns appear from the analysis of these declarations. Indeed, the Council, or alternatively, the High Representative, have reiterated the need to respect IHL in general terms, but have also emphasized the norms under threat. In particular, they have referred to the EU's «determination to support the prevention of crimes violating human rights and humanitarian law»[438]. Furthermore, they have denounced violence against specifically protected groups such as the civilian population[439] or humanitarian personnel[440]. In the

437 With regard to Syria, the situation has been so dramatic that it is considered as posing risks and threats to EU core interest. Therefore, the EU adopted a Strategy on the matter. See: European Commission, High Representative, Joint Communication to the European Parliament and the Council, Elements for an EU Strategy for Syria, JOIN(2017) 11 final, Strasbourg, 14.03.2017.

438 Declaration by the High Representative for Foreign Affairs and Security Policy Catherine Ashton on behalf of the European Union on the Office of the High Commissioner for Human Rights (OHCHR) Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003, 6 October 2010, Brussels.

439 See, e.g.: Council conclusions on Côte d'Ivoire, 3065th Foreign Affairs Council meeting, Brussels, 31 January 2011.

440 See, e.g.: Council Conclusions On Middle East Peace Process, 2921st External Relations Council Meeting, Brussels, 2627 January 2009; Council conclusions on the Middle East Peace Process, 2985th Foreign Affairs Council meeting, Brussels, 8 December 2009; Council Conclusions On Sri Lanka, 2942nd General Affairs Council Meeting, Brussels, 18 May 2009; Declaration by the Presidency on behalf of the European Union on the situation in Darfur, Brussels, 23 September 2008, 13276/08 (Presse 267), P 120/08 (OR. fr); Council of the EU, Press release 2678th Council Meeting, General Affairs and External Relations, General Affairs, Luxembourg, 3 October 2005, 12514/1/05 REV 1 (Presse 241), available at: http://register.consilium.europa.eu/pdf/en/05/st12/st12514-re01.en05.pdf (Accessed: 25.05.2017); Statement by the spokesperson of HR Catherine Ashton on the liberation of FARC hostages, Brussels, 17 February 2011, A 056/11; Declaration by the High Representative Catherine Ashton on behalf of the European Union on Libya, Brussels, 23 February 2011, 6966/1/11 REV 1 PRESSE 36; Council conclusions on

Libyan context, the EU called on the Libyan government to meet its responsibility to protect its population. The use of sexual violence and gender-based violence in armed conflicts are also recurrent themes of this declaratory policy[441].

In addition, the EU has called for the adoption of a «comprehensive legal framework for the process of disarmament, demobilization and re-integration of the illegal armed groups» in line with international law within the frame of the Colombian armed conflict[442].

In the same way, the EU has condemned the use of chemical attacks in Syria in April 2017[443]. The latter case is a good example of mutual efforts among the different actors analyzed in this thesis, through numerous attempts to adopt UNSC resolutions in that sense. Indeed, France also denounced the attacks and called for the adoption of a resolution within the UNSC to shed light on the events, together with the UK and the US. The project of resolution was nonetheless vetoed by the Russian Federation[444]. Prior to that, the UNSC, which included Spain at the time, adopted unanimously Resolution

Libya, 3082nd Foreign Affairs Council meeting, Luxembourg, 12 April 2011, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/121499.pdf (Accessed: 25.05.2017); Declaration by the High Representative, Catherine Ashton, on behalf of the EU on the reported use of cluster munitions in Libya, Brussels, 29 April 2011 9544/1/11 REV 1 PRESSE 118, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/cfsp/121882.pdf (Accessed: 25.05.2017); Council conclusions on Libya, 3106th Foreign Affairs Council meeting, Brussels, 18 July 2011, available at: http://consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/123915.pdf (Accessed: 25.05.2017); Council conclusions on Libya, 3124th Foreign Affairs Council meeting, Brussels, 14 November 2011, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/126042.pdf (Accessed: 25.05.2017); Council conclusions on Syria, 3149th Foreign Affairs Council meeting, Brussels, 27 February 2012, available at: http://consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/128174.pdf (Accessed: 25.05.2017).

441 See, e.g.: EEAS, *Human Rights and Democracy in the world. Report on EU action July 2008 to December 2009*, Brussels, European Commission, 2010, p. 175, available at: www.eeas.europa.eu/_human_rights/docs/2010_hr_report_fr.pdf (Accessed: 31/10/2014); Déclaration Conjointe de la Haute Représentante Ashton et du Commissaire UE pour le développement Piebalgs sur le Regain de violences au nord Kivu en RDC, 27 August 2010, Brussels.

442 Council of the EU, Press release 2678th Council Meeting, General Affairs and External Relations, General Affairs, Luxembourg, 3 October 2005, 12514/1/05 REV 1 (Presse 241). Available at: http://register.consilium.europa.eu/pdf/en/05/st12/st12514-re01.en05.pdf (Accessed: 25.05.2017).

443 See, e.g.: Declaration by the High Representative on behalf of the EU on the alleged chemical attack in Idlib, Syria. Brussels, 6 April 2017.

444 See: https://www.un.org/press/fr/2017/cs12791.doc.htm (Accessed: 25.05.2017).

2235 (2015), on the establishment of a mechanism to identify perpetrators using chemical weapons in Syria[445].

In some instances, the EU has condemned the existence of behaviors prohibited under IHL and IHRL and noted that these could be classified as core international crimes[446]. Finally, they have repeatedly called for the establishment of accountability mechanisms, be it through the establishment of independent inquiries[447] or of criminal proceedings[448]. Furthermore, it has

445 Spain in the United Nations Security Council, Review of 2015 and priorities for 2016. Available at: http://www.exteriores.gob.es/Portal/es/SalaDePrensa/Multimedia/Documents/2016_ENERO_BALANCE%20CSNNUU%20ENG.PDF (Accessed: 02.06.2017).

446 Declaration by the High Representative on behalf of the EU on the alleged chemical attack in Idlib, Syria. Brussels, 6 April 2017; Council conclusions on Syria, 3117th Foreign Affairs Council meeting, Luxembourg, 10 October 2011, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/125011.pdf (Accessed: 25.05.2017); Council conclusions on Syria, 3124th Foreign Affairs Council meeting, Brussels, 14 November 2011, available at: http://consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/126046.pdf (Accessed: 25.05.2017); Council conclusions on Syria, 3110th Foreign Affairs Council meeting, Brussels, 1 December 2011, available at: http://consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/126498.pdf (Accessed: 25.05.2017).

447 See, e.g.: Council Conclusions on Sri Lanka, 2942nd General Affairs Council Meeting, Brussels, 18 May 2009.

448 See, e.g.: Declaration by the High Representative for Foreign Affairs and Security Policy Catherine Ashton on behalf of the European Union on the Office of the High Commissioner for Human Rights (OHCHR) Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003, 6 October 2010, Brussels; EEAS, *Human Rights and Democracy in the world, Report on EU action July 2008 to December 2009*, European Commission, 2010, p. 175, available at: www.eeas.europa.eu/_human_rights/docs/2010_hr_report_fr.pdf (Accessed: 31.10.2014); Declaration by the Presidency on behalf of the European Union on the report by the International Commission of Enquiry on Darfur, Brussels, 4 February 2005, 6072/05 (Presse 19), P 008/05, available at: http://register.consilium.europa.eu/pdf/en/05/st06/st06072.en05.pdf (Accessed: 25.05.2017); Press release marking the conclusion of the 61st session of the Commission on Human Rights, Geneva, 14 March to 22 April 2005, Brussels, 22 April 2005, 8394/05 (Presse 98), available at: http://register.consilium.europa.eu/pdf/en/05/st08/st08394.en05.pdf (Accessed: 25.05.2017); Council conclusions on Côte d'Ivoire, 3065th Foreign Affairs Council meeting, Brussels, 31 January 2011; Declaration by the High Representative Catherine Ashton on behalf of the European Union on Libya, Brussels, 23 February 2011, 6966/1/11 REV 1 PRESSE 36; Council conclusions on Libya, 3082nd Foreign Affairs Council meeting, Luxembourg, 12 April 2011, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/121499.pdf (Accessed: 25.05.2017); Declaration by the High Representative, Catherine Ashton, on behalf of the EU on the reported use of cluster munitions in Libya, Brussels, 29 April 2011 9544/1/11 REV 1 PRESSE 118, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/cfsp/121882.pdf (Accessed: 25.05.2017); Council conclusions on Libya, 3106th Foreign Af-

repeatedly called on the United Nations to take action in the Syrian context[449]. It is worth mentioning in this respect that the EEAS has sponsored Human Rights Councils resolutions on the situation in Syria[450], thus reflecting the consensus among EU Member States on these issues. In addition, the 'European Foreign Policy Scorecard 2013' highlights that the EU members of the UNSC in 2012 – France, Germany, Portugal, and the UK – «maintained a high degree of unity and often took the initiative over Syria» despite Russian and Chinese opposition[451]. In the same way, it is possible to mention the unanimous adoption of UNSC Resolution 2258 (2015), renewing authorization for passage of humanitarian aid in Syria and sponsored by Spain, together Jordan and New Zealand[452].

When the situation so requires, the EU prefers to use *démarches,* which are performed confidentially with the authorities of third countries, to the extent that «silent diplomacy» might be more appropriate.

In the same line, the EU may use political dialogue to promote compliance with IHL. It is the privileged means of action of the CFSP so that the EU maintains numerous political dialogues with third countries, be it with head of states or by way of experts' meetings[453]. It is a classical means of action, which is also used for the promotion of human rights[454] in over 40 countries.

Thus far, IHL has been mentioned in an important number of meetings, notably within the frame of the fight against terrorism, where the EU

fairs Council meeting, Brussels, 18 July 2011, available at: http://consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/123915.pdf (Accessed: 25.05.2017); Council conclusions on Libya, 3124th Foreign Affairs Council meeting, Brussels, 14 November 2011, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/126042.pdf (Accessed: 25.05.2017).

449 See, e.g.: Declaration by the High Representative on behalf of the EU on the alleged chemical attack in Idlib, Syria, Brussels, 6 April 2017; Extract from the European Council conclusions on Syria, Brussels, 2 March 2012, available at: http://consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/128522.pdf (Accessed: 25.05.2017).

450 See: http://www.ecfr.eu/scorecard/2013/issues/69 (Accessed: 25.05.2017).

451 See: http://www.ecfr.eu/scorecard/2013/issues/75 (Accessed: 25.05.2017).

452 Spain in the United Nations Security Council, Review of 2015 and priorities for 2016. Available at: http://www.exteriores.gob.es/Portal/es/SalaDePrensa/Multimedia/Documents/2016_ENERO_BALANCE%20CSNNUU%20ENG.PDF (Accessed: 02.06.2017).

453 Knudsen, «Les lignes directrices de l'UE concernant la promotion du respect du DIH et leur mise en oeuvre», *op. cit.*, 2010, p. 178.

454 See: Council of the EU. EU Human Rights and International Humanitarian Law Guidelines, March 2009.

has insisted on the necessity to respect international law, human rights, and the rule of law[455]. In some cases, it led to intensive legal dialogues, such as the dialogue on counterterrorism and international law started with the United States in 2006.

Even though no official evidence of the EU's insistence on respecting human rights and IHL in the fight against terrorism can be found in Council conclusions or Declarations, some elements demonstrate that the EU has placed their respect at the forefront of the dialogue with the United States, notably regarding the humanitarian situation in Guantanamo. For instance, a French Guide of the CFSP mentions the fact that the issue of Guantanamo prisoners and the importance to respect human rights in counterterrorism was discussed on the occasion of the EU-US Summit that took place in Vienna in 2006[456]. Moreover, in a speech at the European Parliament, the then European Commissioner for External Relations and European Neighborhood Policy Benita Ferrero-Waldner expressed these concerns quite clearly:

> All anti-terrorist measures must be consistent with both international humanitarian law and international human rights law. It is our firm belief that the Geneva Conventions apply to all persons captured on the field of battle [...]. It is vital that the international community seeks to re-assert full adherence to international law, including human rights and humanitarian standards, in relation to the alleged Taliban and Al-Qaida members in Guantanamo and elsewhere.

Furthermore, in a Joint Statement of the EU and the United States on the Closure of the Guantanamo Bay Detention facility and Future Counterterrorism Cooperation, the EU and the United States committed to pursue the dialogue following these principles:

> Taking into account that the action against international terrorism raises important legal questions, we recognize the importance of deepening our dialogue on international legal principles relevant to combating terrorism.

455 Knudsen, «Les lignes directrices de l'UE concernant la promotion du respect du DIH et leur mise en oeuvre», *op. cit.*, 2010, p. 178.

456 Ministère des Affaires Étrangères, *Guide de la PESC*, *op. cit.*, 2006, p. 52.

> In particular, we will continue working together in semi-annual meetings involving the Legal Advisers to the Foreign Ministries of the European Union Member States (COJUR), representatives of the General Secretariat of the Council of the European Union and the European Commission, and the U.S. Department of State Legal Adviser, with the objective of furthering an improved mutual understanding of our respective legal frameworks, and developing common ground from which we can work more effectively in combating terrorism[457].

To date, the EU-United States dialogue is the longest and most systematic the EU has had with third countries, but it is not the only one. For instance, within the Georgia and African Union human rights dialogues, the EU made reference to some specific aspects of IHL, namely the «rights of internally displaced persons and the human rights situation in Abkhazia, Georgia and South Ossetia, Georgia»[458] or the «full realization of UN Security Council Resolutions on Women, Peace and Security»[459], which contains references to gender-based and sexual violence in armed conflicts.

Although multilateral and bilateral diplomacy do not always take the form of legally binding acts, their actions, initially non-binding, participate in the evolution of IHL and acquire legal effects[460]. First, one should notice that the ICTY used EU Declarations on Liberia and Chechnya in the Tadic Case of 2 October 1995[461]. They were used as interpretative elements so as to determine whether some principles are applicable to NIACs. Second, the practice of the three actors, especially the EU, offers a new way to participate in the normative creation of IHL thanks to its precursory declaratory

457 Council of the European Union, Joint Statement of the European Union and its Member States and the United States of America on the Closure of Guantanamo Bay Detention Facility and future Counterterrorism Cooperation, based on Shared Values, International Law, and Respect for the Rule of Law and Human Rights. Available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/gena/108455.pdf (Accessed: 25.05.2017).

458 Council of the EU, EU-Georgia Human Rights Dialogue, 9 July 2010, Tbilisi, Brussels, 9 July 2010 (OR. En), 12444/10, PRESSE [210].

459 Council of the EU, 6th African Union-European Union Human Rights Dialogue, Brussels, 7/11 May 2010, 9721/10 (Presse 120).

460 Ferraro, «Le droit international humanitaire dans la politique étrangère», *op. cit.*, 2002, p. 144.

461 ICTY, Judgement of 2 October 1995, Prosecutor v. Dusko Tadic, alias «Dule», paras. 13 and 115. Quoted in Michel Veuthey, «L'Union européenne et l'obligation de faire respecter le droit international humanitaire», in Millet-Devalle, *L'UE et le droit international humanitaire, op. cit.*, 2010, p. 209.

law («droit déclaratoire précurseur»)[462]. This practice is therefore of utmost importance when considering the creation and consolidation of customary IHL.

3.2. Coercive measures

Firstly, the three actors may adopt restrictive measures against the States and individuals violating IHL. Furthermore, if these measures are not sufficient, the resort to military intervention is possible, provided that it is authorized under international law and the UN Charter.

3.2.1. Economic sanctions

Restrictive measures (or sanctions) are a classical means of sanction in international law with which the EU, a global economic power, is familiar. As observed by Alain Pellet, the European Community started to adopt sanctions against third States whose behavior posed a threat to international peace and security, even in the absence of express legal basis in the founding treaties[463]. The question of sanctions was decided on the basis of a consultation foreseen by article 297 (now article 347 TFEU), and specific measures could be approved by the Community within the frame of its CCP on the basis of article 133 (now article 207 TFEU)[464]. Nowadays, economic sanctions are regulated by article 215 TFEU. Pursuant to this provision, the Council is competent to adopt restrictive measures, acting on a joint proposal from the High Representative and the Commission. Decisions are adopted at unanimity and the European Parliament must be informed. In contrast with the ordinary acts adopted under the framework of the CFSP, the Court of Justice is competent to review the legality of restrictive measures. From a multilevel perspective, it

462 *Ibid*.

463 Alain Pellet, «L'Union européenne et le maintien de la paix», in Myriam Benlolo-Carabot, Ulas Candaş and Eglantine Cujo (dir.), *Union européenne et droit international*, Paris, Pedone, 2012, p. 431.

464 Pellet, «L'Union européenne et le maintien de la paix», *op. cit.*, 2012, p. 432.

is worth noticing that the implementation of EU sanctions falls primarily on EU Member States.

The European Commission defines restrictive measures as follows:

> [A]n instrument of a diplomatic or economic nature which seek to bring about a change in activities or policies such as violations of international law or human rights, or policies that do not respect the rule of law or democratic principles [...].
>
> They may comprise arms embargoes, other specific or general trade restrictions, financial restrictions, restrictions on admission, or other measures, as appropriate[465].

Furthermore, article 215(2) TFEU expressly recognizes the possibility to adopt these measures against «natural or legal persons and groups or non-State entities»[466]. Restrictive measures may be adopted to fulfill the CFSP's objectives: «peace, democracy and the respect for the rule of law, human rights and international law»[467].

Once again, the adoption of restrictive measures constitutes a good example of multilevel in action. Indeed, by virtue of articles 2, 21, and 42 TEU, read in conjunction with Declaration 13 concerning the common foreign and security policy[468], the EU is bound by the coercive measures adopted by the UN[469]. Therefore, the EU has adopted restrictive measures in compliance with the measures decided at UN level, thus allowing EU Member States to enforce their obligations arising from international law. That being said, the EU has also adopted such measures outside of the UN framework[470]. Therefore, restrictive measures are the result of a two-fold State mediation: the one

465 European Commission, Restrictive measures – Factsheet, 2008. Available at: http://eeas.europa.eu/archives/docs/cfsp/sanctions/docs/index_en.pdf (Accessed: 25.05.2017).

466 Paul James Cardwell (ed.), *EU external relations law and policy in the Post-Lisbon era*, The Hague, TMC Asser Press/Springer, 2012, pp. 109-110.

467 Council of the European Union, *EU restrictive measures – Factsheet*, Brussels, 29 April 2014a. Available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/135804.pdf (Accessed: 25.05.2017).

468 «It stresses that the European Union and its Member States will remain bound by the provisions of the Charter of the United Nations and, in particular, by the primary responsibility of the Security Council and of its Members for the maintenance of international peace and security».

469 Pellet, «L'Union européenne et le maintien de la paix», *op. cit.*, 2012, p. 434.

470 *Ibid.*, p. 434.

resulting from States as enforcers of the decisions of the UNSC, and the one resulting from the EU institutions as enforcers of State obligations[471].

Against this background, EU Member States foresaw its use to ensure respect for IHL in the Guidelines:

> The use of restrictive measures (sanctions) may be an effective means of promoting compliance with IHL. Such measures should therefore be considered against State and non-parties to a conflict, as well as individuals, when they are appropriate and in accordance with international law[472].

The last sentence underlines the fact that, most of the time, the adoption of restrictive measures is taken on the basis of a UNSC resolution. However, they can also come about when the UN fails to act, thus complementing the UN's practice[473]. Within the frame of the promotion of IHL, the EU can act by way of two means. Either, it adopts ordinary restrictive measures because of the infringement or potential infringement of IHL by a third country. Alternatively, it can adopt sanctions on the basis of the infringement of the conditionality clauses.

In this context, the EU has adopted restrictive measures in response to the lack of respect of IHL in several conflicts. Well before the adoption of the IHL Guidelines, the EU adopted an arms embargo[474] implementing UNSC Resolution 1171 (1998) on the situation in Sierra Leone[475]. Then, this instrument has been increasingly used[476].

471 «Par l'intermédiaire de l'Union européenne, les Etats membres déférent à l'obligation qui résulte pour eux de leur appartenance parallèle à l'Organisation des Nations Unies (art. 25 de la Charte). L'adoption d'une décision PESC (UE), c'est-à-dire sur le mode intergouvernemental, préalablement à la phase communautaire (CE), met en évidence le rôle de pivot joué par les Etats dans cette procédure. Si le recours au droit communautaire s'impose aux Etats comme moyen de mise en œuvre des obligations étatiques vis-à-vis des Nations Unies, c'est en raison du transfert à la Communauté européenne des compétences étatiques correspondant matériellement au domaine des mesures adoptées par le Conseil de sécurité». H. Ascensio, «Les fins de la sanction externe», in I. Pingel (dir.), *Les sanctions contre les Etats en droit communautaire*, Paris, Pedone, 2006, p. 76. Quoted in Pellet, «L'Union européenne et le maintien de la paix», *op. cit.*, 2012, p. 436.

472 IHL Guidelines, para. 16(d).

473 Clara Portela, «Where and why does the EU impose sanctions?», *Politique européenne*, vol. 3(17), 2005, p. 85.

474 Common Position of 29 June 1998 defined by the Council on the basis of Article J.2 of the Treaty on European Union concerning Sierra Leone (98/409/CFSP).

475 UNSC Resolution 98/RES/1171 (1998), 05.06.1998.

476 The full list of restrictive measures currently in force is available at: https://eeas.europa.eu/sites/eeas/files/restrictive_measures-2017-04-26-clean.pdf (Accessed: 30.05.2017).

The former Yugoslavia case is emblematic. The EU adopted a significant number of restrictive measures against the persons who helped ICTY indictees to evade justice[477]. Moreover, regarding Serbia and Montenegro specifically, the EU adopted restrictions on the admission of former President Milosevic and natural persons associated with him[478]. In the same way, the restrictive measures taken in 2005 related to the conflict in Sudan are illustrative insofar as they explicitly mention «violations of international humanitarian or human rights law or other atrocities»[479].

Likewise, the EU adopted restrictions with regard to the conflict in the Democratic Republic of Congo in 2008, which have been revised on several occasions[480]. In this case, infringements of IHL are well detailed and include the violation of the embargo on arms and related measures, the impediment of disarmament, voluntary repatriation or resettlements of combatants, participation of combatants in disarmament, demobilization and reintegration processes, the recruitment or use of children in armed conflict, serious violations of international law involving the targeting of children or women in situations of armed conflict, the obstruction of provision of humanitarian assistance to the eastern part of the DR Congo, and the support for illegal armed groups in the eastern part of the DR Congo through illicit trade of natural resources. In

477 Council Decision 2010/145/CFSP renewing measures in support of the effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY), OJ L 58, 09.03.2010, p. 8.

478 Council Decision 2008/733/CFSP of 15 September 2008 implementing Common Position 2004/694/CFSP on further measures in support of the effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY), OJ L 247/63, 16.09.2008; Council Regulation (EC) nº 1763/2004 of 11 October 2004 imposing certain restrictive measures in support of effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY), OJ L 315/14, 14.10.2004. See: *infra*, Chapter 4, Section 2.

479 Council Common Position 2005/411/CFSP of 30 May 2005 concerning restrictive measures against Sudan and repealing Common Position 2004/31/CFSP, OJ L 139/25, 02.06.2005.

480 See, e.g.: Council Common Position 2008/369/CFSP of 14 May 2008 concerning restrictive measures against the Democratic Republic of the Congo, OJ L 127, 15.05.2008, p. 84; Council Decision 2010/788/CFSP of 20 December 2010 concerning restrictive measures against the Democratic Republic of the Congo and repealing Common Position 2008/369/CFSP, OJ L 336, 21.12.2010, pp. 30-42; Council Decision 2014/147/CFSP of 17 March 2014 amending Decision 2010/788/CFSP concerning restrictive measures against the Democratic Republic of the Congo, OJ L 79, 18.03.2014, pp. 42-43; Council Decision (CFSP) 2016/2231 of 12 December 2016 amending Decision 2010/788/CFSP concerning restrictive measures against the Democratic Republic of the Congo, OJ L 336I, 12.12.2016, pp. 7-14.

2010, the EU adopted sanctions against persons and entities in Somalia who acted in violation of the arms embargo against Somalia and obstructed the delivery of humanitarian assistance[481]. Restrictive measures have been adopted on similar grounds, with explicit reference to violations of IHL regarding the situations in Central African Republic[482], South Sudan[483], or Darfur[484].

For more notorious examples, it is possible to refer to the Syrian and Libyan cases. In the latter case, the Council has approved sanctions on the basis of UNSC resolutions 1970 (2011), 2174 (2014), and 2213 (2015)[485]. In this respect, Council Decision 2015/1333/CFSP refers to explicit rules of IHL derived from the principle of distinction or the conduct of hostilities as grounds justifying the adoption of the sanctions[486].

481 Council Decision 2010/231/CFSP of 26 April 2010 concerning restrictive measures against Somalia and repealing Common Position 2009/138/CFSP, OJ L 105/17, 27.04.2010.

482 Council Decision (CFSP) 2017/412 of 7 March 2017 amending Decision 2013/798/CFSP concerning restrictive measures against the Central African Republic, OJ L 63, 09.03.2017, pp. 102-104.

483 Council Implementing Regulation (EU) 2017/402 of 7 March 2017 implementing Article 20(3) of Regulation (EU) 2015/735 concerning restrictive measures in respect of the situation in South Sudan, OJ L 63, 09.03.2017, pp. 7-14.

484 Council Implementing Regulation (EU) 2017/401 of 7 March 2017 implementing Article 15(3) of Regulation (EU) Nº 747/2014 concerning restrictive measures in view of the situation in Sudan, OJ L 63, 09.03.2017, pp. 3-6.

485 Council Decision 2015/1333/CFSP of 31 July 2015 concerning restrictive measures in view of the situation in Libya, and repealing Decision 2011/137/CFSP, OJ L 206, 01.08.2015, p. 34; Council Regulation (EU) 2016/44 of 18 January 2016 concerning restrictive measures in view of the situation in Libya and repealing Regulation (EU) nº 204/2011.

486 *Ibid*., article 8: «2. Member States shall take the necessary measures to prevent the entry into, or transit through, their territories of persons:
   a) involved in or complicit in ordering, controlling, or otherwise directing, the commission of serious human rights abuses against persons in Libya, including by being involved or complicit in planning, commanding, ordering or conducting attacks, in violation of international law, including aerial bombardments, on civilian populations and facilities, or persons acting for or on their behalf or at their direction;
   b) identified as having been involved in the repressive policies of the former regime of Muammar Qadhafi in Libya, or otherwise formerly associated with that regime, and who pose a continued risk to the peace, stability or security of Libya, or the successful completion of its political transition;
   c) engaged in or providing support for acts that threaten the peace, stability or security of Libya, or obstructing or undermining the successful completion of its political transition, including by:
      a. planning, directing, or committing acts that violate applicable international human rights law or international humanitarian law, or acts that constitute human rights abuses, in Libya;

In the Syrian case, the EU started with a suspension of its cooperation with the Syrian government under the European Neighborhood Policy[487]. Then, it has adopted restrictive measures, which have gradually been extended. They range from the export and import of «certain equipment, goods and technology which might be used for internal repression [...] or for the manufacture and maintenance of products which could be used for internal repression» to restrictions on admission or freezing of funds and economic resources[488]. For present purposes, among the reasons for the adoption of these measures appears the involvement in the repression and violence against the civilian population, in violation of IHRL and IHL. In the same way, the EU added four high-level Syrian military officials to the sanctions list for their role in the use of chemical weapons against the civilian population in March 2017[489]. It is worth mentioning that, in line with the EU's approach on restrictive sanctions, the EU also provided for exceptions in order to facilitate humanitarian relief or assistance to the civilian population[490]. All in all, the EU has adopted sanc-

b. providing support for armed groups or criminal networks through the illicit exploitation of crude oil or any other natural resources in Libya;
[...]
c. violating, or assisting in the evasion of, the provisions of the arms embargo in Libya established in UNSCR 1970 (2011) and Article 1 of this Decision;
d. acting for or on behalf of or at the direction of listed persons or entities;

d) that own or control Libyan State funds misappropriated during the former regime of Muammar Qadhafi in Libya which could be used to threaten the peace, stability or security of Libya, or to obstruct or undermine the successful completion of its political transition».

487 Council conclusions on Syria, 23 May 2011, para. 6: «As part of the ongoing review of all aspects of its cooperation with Syria, the EU has decided to suspen all preparations in relation to new bilateral cooperation programs and to suspend the ongoing bilateral programs with the Syrian authorities under ENPI and MEDA instruments. The EU Member States stand ready to review their bilateral cooperation in this regard. The Council invites the EIB to not approve new EIB financing operations in Syria for the time being. The EU will consider the suspension of further Community assistance to Syria in light of developments». Available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/122168.pdf (Accessed: 29.05.2017).

488 See, *inter alia*: Council Decision 2013/255/CFSP of 31 May 2013 concerning restrictive measures against Syria, OJ L 147, 01.06.2013, p. 14; Decision 2014/309/CFSP of 28 May 2014 amending Decision 2013/255/CFSP concerning restrictive measures against Syria, OJ L 160, 29.05.2014, p. 37; Council Decision 2015/837/CFSP of 28 May 2015 amending Decision 2013/255/CFSP concerning restrictive measures against Syria, OJ L 132, 29.05.2015, pp. 82-85.

489 EEAS, *The EU and the crisis in Syria, factsheet*, Brussels, 04.04.2017.

490 Council Regulation (EU) 2016/2137 of 6 December 2016 amending Regulation (EU) Nº 36/2012 concerning restrictive measures in view of the situation in Syria, OJ L 332, 07.12.2016, pp. 3-6.

tions against the Syrian government and supporters, including 235 people and 67 entities «targeted by a travel ban and an asset freeze»[491].

In this context, the Qosmos case in France is worth mentioning. Indeed, two associations – the FIDH and LDH – lodged a complaint against the Qosmos company in 2012, regarding the provision of equipment used for surveillance to the Syrian regime in violation of the restrictive measures adopted at EU level[492]. The case is still being investigated at the time of writing.

Hence, the EU, together with its Member States, is able to adopt restrictive measures to punish the disrespect for IHL and exert pressure on the warring party in question. Whenever this solution is not efficient enough and if the situation is critical, they may send out management-crisis operations to ensure respect for IHL or to prevent further breaches.

3.2.2. Peace operations and military intervention

Peace operations and military intervention is arguably the last type of measures that State parties to the Geneva Conventions may use to ensure respect for IHL. It is likewise the type of measure for which the three actors are not on the same footing. Indeed, the EU is much more limited than its Member States because of legal and political obstacles. Furthermore, this is an area where France has been more proactive than other States, notably in its quality of permanent member of the UNSC. This is also an area where multilevel appears clearly as military interventions must first be authorized by the UNSC, which includes France. On this basis, Member States may fulfill their obligations within the frame of the UN peacekeeping operations, but also under the auspices of the EU. Likewise, the EU may implement autonomous operations providing support, even though they are not authorized to resort to lethal force.

3.2.2.1. UN operations

At the time of writing, 16 peacekeeping operations are led by the UN worldwide. Among those, at least eight missions – in the Central African

491 EEAS, *The EU and the crisis in Syria, factsheet*, *op. cit.*, 2017.

492 «Syrie: la justice française enquête sur la société Qosmos», *Le Monde*, 11.04.2014.

Republic[493], Côte d'Ivoire[494], Darfur[495], the Democratic Republic of Congo[496], Liberia[497], Mali[498], the Abyei area in Sudan[499], and South Sudan[500] – include in their mandate one aspect of the obligation to ensure respect for IHL. Their mandates typically include the obligation to promote and protect IHL, to ensure humanitarian access, to respect the principle of distinction and to protect civilians, to protect women and children, humanitarian and UN personnel, to prevent sexual and gender-based violence, or to protect historical and cultural sites.

Among those missions, both France and Spain participate in the mission in the Central African Republic (MINUSCA); in addition, France participates in the missions in Mali (MINUSMA) and the Democratic Republic of Congo (MONUSCO)[501]. It should likewise be noted that the UNSC authorized the French forces «to use all necessary means» to support MINUSMA «when under imminent and serious threat upon request of the Secretary General»[502].

3.2.2.2. EU operations

In parallel, the EU has developed autonomous peace operations. The possibility for the EU to send out management-crisis operation reflects its own evolution. The EU is no longer a mere politico-normative actor contributing to the promotion and development of IHL; it is becoming a real subject of

493 MINUSCA in the Central African Republic, established by UNSC Resolution S/RES/2301 (2016), 26 July 2016.

494 UNOCI in Côte d'Ivoire, established by UNSC Resolution S/RES/2226 (2015), 25 June 2014.

495 UNAMID in Darfur, established by UNSC Resolution S/RES/1769 (2007), 31 July 2007.

496 MONUSCO in the Democratic Republic of Congo, established by UNSC Resolution S/RES/1925 (2010), 28 May 2010.

497 UNMIL in Liberia, established by UNSC Resolution S/RES/1509 (2003), 19 September 2003.

498 MINUSMA in Mali, established by UNSC Resolution S/RES/2164 (2014), 25 June 2014.

499 UNISFA, established by UNSC Resolution S/RES/1990 (2011) regarding the disputed Abyei Area, in Sudan.

500 UNMISS in South Sudan, established by Resolution S/RES/2155 (2014), 27 May 2014.

501 UN Mission's Summary detailed by Country, 30 April 2017. Available at: http://www.un.org/en/peacekeeping/contributors/2017/apr17_3.pdf (Accessed: 31.05.2017).
Spain withdrew from MONUSCO in 2012. See: http://www.exteriores.gob.es/Portal/es/PoliticaExteriorCooperacion/CSNU2015-2016/Documents/MAPAMANTENIMIENTOPAZ.pdf (Accessed: 31.05.2017).

502 MINUSMA in Mali, established by UNSC Resolution S/RES/2164 (2014), 25 June 2014, para. 26. Indeed, France answered positively to the calls of the Malian State to fight against jihadist terrorists within the frame of the Serval operation, then replaced with Barkhane operation.

IHL[503]. Theoretically, in case where simple diplomacy is not enough to ensure respect of IHL, the EU foresees the possibility to constrain a reluctant State or party to the conflict to abide by IHL by sending out crisis-management operations. In this respect, the IHL Guidelines read as follow:

> The importance of preventing and suppressing violations of IHL by third parties should be considered, where appropriate, in the drafting of mandates of EU crisis-management operations. In appropriate cases, this may include collecting information which may be of use for the ICC or in other investigations of war crimes.

Some missions have been launched in support of humanitarian assistance operations. This possibility is in line with international practice as peacekeeping operations in general now include a humanitarian dimension. Their objective is the application of IHL provisions aiming at the protection of the civilian population and humanitarian agents assisting them. From now on, civilians' protection as well as support and protection of humanitarian aid are at the heart of peacekeeping operations and justify the use of lethal force in accordance with Chapter VII of the UN Charter[504]. As observed in Chapter 1, authorization to intervene on humanitarian grounds is possible only within the frame of the UN Charter[505]. In that regard, EU crisis management operations are usually based on a UN mandate, peace agreement, and/or State consent[506].

At the time of writing, there are six EU military operations/missions and nine EU civilian missions deployed all over the globe. Some of them touch upon the respect for IHL in their mandate. For example, the unarmed civilian monitoring mission EUMM Georgia, created on 15 September 2008, shall contribute to, *inter alia*, stabilization, defined as:

> Monitor[ing], analy[zing] and report[ing] on the pertaining to the stabilisation process, centered on full compliance with the six-point Agreement,

503 Valentina Falco, «L'applicabilité du droit international humanitaire à l'Union européenne: évolutions normatives», in Millet-Devalle, *L'UE et le droit international humanitaire*, *op. cit.*, 2010, p. 88. However, the aspect of the applicability of IHL to EU operations falls outside of the scope of this thesis.

504 Louis Balmond, «Les positions des Etats Membres relatives au DIH», in Millet-Devalle, *L'UE et le droit international humanitaire, op. cit.*, 2010, p. 38

505 Peters, «Humanity as the A and Ω of sovereignty», *op. cit.*, 2009, p. 537.

506 Naert, *International Law Aspects of the EU's Security and Defence Policy*, *op. cit.*, 2010, p. 99.

> including troop withdrawals, and on freedom of movement and actions by spoilers, as well as on violations of human rights and international humanitarian law[507].

The case of Bosnia and Herzegovina is also worth mentioning. The EU established a military operation (EUFOR Althea)[508] on the basis of UNSC Resolution 1575(2004)[509]. This resolution, adopted under Chapter VII of the UN Charter, authorized the EU to establish a multinational stabilization force to succeed SFOR, under NATO command. The mandate of EUFOR Althea was recently renewed by the UNSC[510]. The objective of EUFOR Althea is to ensure continued compliance with the Dayton Agreement, and for present purposes, with Annex 1A thereof. The latter makes some references to IHL, notably with regard to the exchange of prisoners or humanitarian access[511]. The mandate established by the UNSC is broad, as it authorizes Member States «to take *all necessary measures* to effect the implementation of and to ensure compliance with annexes 1-A and 2 of the Peace Agreement[512] [emphasis added]». Both France and Spain are contributors to this military operation.

Moreover, the EU said in 2011 that it was ready to launch a military mission called EUFOR LIBYA providing humanitarian assistance in Libya upon request of the UN Office for the Coordination of Humanitarian Affairs. The

507 Council Joint Action 2008/736/CFSP of 15 September 2008 on the European Union Monitoring Mission in Georgia, EUMM Georgia, OJ L 248, 17.09.2008, pp. 26-31, article 3(1).

508 Council Decision 2004/803/CFSP of 25 November 2004 on the launching of the European Union military operation in Bosnia and Herzegovina, OJ L 353, 27.11.2004, pp. 21-22.

509 UNSC Resolution S/RES/1575 (2004), 22 November 2004.

510 UNSC Resolution S/RES/2315 (2016), 8 November 2016.

511 General Framework Agreement for Peace in Bosnia and Herzegovina, initialed in Dayton on 21 November 1995 and signed in Paris on 14 December 1995, Annex 1A: Agreement on the Military Aspects of the Peace Settlement.

512 UNSC Resolution S/RES/2315 (2016), 8 November 2016, para. 5. There are other references to the use of force in the resolution: «6. Authorizes Member States to take all necessary measures, at the request of either EUFOR ALTHEA or the NATO Headquarters, in defence of the EUFOR ALTHEA or NATO presence respectively, and to assist both organizations in carrying out their missions, and recognizes the right of both EUFOR ALTHEA and the NATO presence to take all necessary measures to defend themselves from attack or threat of attack; 7. Authorizes the Member States acting under paragraphs 3 and 4 above, in accordance with annex 1-A of the Peace Agreement, to take all necessary measures to ensure compliance with the rules and procedures governing command and control of airspace over Bosnia and Herzegovina with respect to all civilian and military air traffic».

mission would have been based on the mandates of the UN Security Council Resolutions 1970 and 1973 and would have contributed «to the safe movement and evacuation of displaced persons and support humanitarian agencies in their activities in the region»[513]. Nonetheless, it was never activated, and States acted outside of the scope of the EU.

Furthermore, the EU has launched operations to provide military and training advice to armed forces. Within this mandate, they shall provide training on IHL, IHRL, and protection of civilians. This is the case of EUTM Mali, a military training mission established in February 2013, whose objective is «to provide military and training advice to the Malian Armed Forces (MaAF) operating under the control of legitimate civilian authorities»[514]. It should be noted in this respect that UNSC Resolution expressly calls on the EU, notably its EUTM Mali, «to coordinate closely with MINUSMA, and other bilateral partners of Mali engaged to assist the Malian authorities in the Security Sector Reform»[515]. Both France and Spain participate in the personnel of EUTM Mali.

For what concerns more specifically the launching of management-crisis operations in order to enhance the criminal justice system, the EU assigned EUPOL COPPS, in the Palestinian Territories, the mission to ensure coherence and coordination of EU activities related to capacity-building, notably in the criminal justice field[516]. Both France and Spain participate in the personnel of EUPOL COPPS[517]. In the same line, on 4 February 2008, the EU entrusted EULEX Kosovo a rule of law mission whose objective was to:

> ensure that cases of war crimes, [...] inter-ethnic crimes, [...] and other serious crimes are properly investigated, prosecuted, adjudicated and enforced, according to the applicable law, including, where appropriate, by international investigators, prosecutors and judges jointly with Kosovo

513 Council Decision 2011/210/CFSP of 1 April 2011 on a European Union military operation in support of humanitarian assistance operations in response to the crisis situation in Libya (EUFOR Libya), OJ L 89/17, 05.04.2011.

514 EUTM Mali website: http://www.eutmmali.eu/about-eutm-mali/mandate-concepts/ (Accessed: 31.05.2017).

515 MINUSMA in Mali, established by UNSC Resolution S/RES/2164 (2014), 25 June 2014.

516 Council Joint Action 2005/797/CFSP of 14 November 2005 on the European Union Police Mission for the Palestinian Territories, Article 2. Confirmed in subsequent decisions.

517 See: http://eupolcopps.eu/en/content/rule-law-section (Accessed: 31.05.2017).

> investigators, prosecutors and judges or independently, and by measures including, as appropriate, the creation of cooperation and coordination structures between police and prosecution authorities[518].

On this basis, the Kosovo Specialist Chambers were established to hear allegations of grave violations of IHL during the conflict in Kosovo[519]. EULEX is supported by all EU Member States, thus including France and Spain.

Therefore, there are cases where the EU has implemented CSDP operations within the frame of Common Article 1. Nonetheless, this operational aspect of the EU's action is importantly limited and remains in the hands of EU Member States. In terms of CSDP missions aiming to put an end to violations of IHL, EU action is quite cautious and when it dares to be bold, like in the Libyan case, EU Member States do not follow. Therefore, it seems that in relation with the obligation to ensure respect for IHL, CSDP operations are more used to promote IHL among the armed forces of foreign countries or to contribute to the fight against impunity.

As observed by ECFR, there are important divergences among EU Member States as to the extent of EU military activity[520]. By way of example, in the year 2015, Italy lobbied for a UN peacekeeping mission in Libya but was not followed by other Member States. Furthermore, France, an active player, complained that other Member States were not sufficiently involved in African missions[521].

3.2.2.3. NATO operations

Lastly, there are some instances where France and Spain have acted outside the frame of the EU. In this respect, the example of the 'humanitarian intervention' conducted by NATO in Kosovo is worth mentioning, as both

518 Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo (EULEX KOSOVO), OJ L 42/92, 16.02.2008, pp. 92-98, article 3 (d). Also observed in Auvret-Finck, «L'utilisation du DIH dans les instruments de la PESC», *op. cit.*, 2010, p. 71.

519 EEAS, *Common Security and Defence Policy of the European Union: Missions and Operations annual report 2016*, pp. 5, 10. Available at: https://eeas.europa.eu/sites/eeas/files/e_csdp_annual_report1.pdf (Accessed: 31.10.2017).

520 European Council on Foreign Relations, *European Foreign Policy Scorecard 2016*, January 2016. Available at: http://www.ecfr.eu/page/-/ECFR157_SCORECARD_2016.pdf (Accessed: 31.10.2017).

521 *Ibid.*, p. 25.

France and Spain belong to NATO. In this regard, NATO deployed KFOR in June 1999 in response to the humanitarian crisis deriving from the armed conflict in Kosovo[522]. KFOR is still operational, even though its mandate has shifted to «maintaining a safe and secure environment in Kosovo and freedom of movement for all»[523]. Both Spain and France have participated in the coalition, even though Spain eventually withdrew from it.

Another example is the Libyan case. In response to an announced massacre of civilians in March 2011 by pro-Gaddafi forces, France, Lebanon, and the UK proposed the adoption of a resolution aiming to prevent attacks on civilians[524]. The UNSC approved Resolution 1973 (2011), which authorized Member States to use all necessary measures to establish and enforce a no-fly zone over Libya, with a view to «prevent attacks on civilians»[525]. On this basis, a NATO coalition led by France and including Spain (Operation Unified Protector) enforced Resolution 1973 (2011). While it was argued at the time that the UNSC Resolution represented a welcomed application of the R2P – and, *in fine*, of Common Article 1 – the results of the intervention are mixed, as it seems that the coalition went beyond its mandate and might have contributed to the destabilization of the country[526].

Conclusions
Chapter 2

In light of these developments, all three actors, the EU, France, and Spain are bound by the obligation to ensure respect for IHL. While this obligation is treaty-based with regard to France and Spain, the EU's obligation is of custo-

522 UNSC Resolution S/RES/1244 (1999), 10 June 1999.

523 See: http://www.nato.int/cps/en/natolive/topics_48818.htm (Accessed: 31.10.2017).

524 House of Commons, Foreign Affairs Committee, *Libya: Examination of intervention and collapse and the UK's future policy options. Third Report of Session 2016-17*, 6 September 2016, p. 10. Available at: https://www.publications.parliament.uk/pa/cm201617/cmselect/cmfaff/119/119.pdf (Accessed: 31.05.2017).

525 UNSC Resolution S/RES/1973 (2011), 17 March 2011.

526 For a critical appraisal of the intervention, see: House of Commons, Foreign Affairs Committee, *Libya: Examination of intervention and collapse and the UK's future policy options*, *op. cit.*, 2016.

mary nature. In this respect, since Common Article 1 stipulates a due diligence obligation, it seemingly binds the three actors in differing ways. The EU is bound by the obligation, but only to the extent of its capabilities, which are, by definition, more limited than those of State parties. France on the other hand is probably held to a higher standard, due to its permanent membership in the UNSC. As for Spain, the level of demand will depend on the circumstances of the case, in analogy with the ICJ's ruling on the Bosnian Genocide case.

This international duty is further reflected in the legal orders of the three different actors. On this matter, the EU has made a bold move when it adopted the Guidelines on promoting compliance with IHL, as it constitutes the 'transposition' of Common Article 1 at EU level despite the absence of express attributed competence in this sense. Hence, the EU's recognition of the obligation to ensure respect for IHL is actually framed by its values, which implicitly refer to IHL. Therefore, if the EU is sometimes criticized for its lack of ambition, this criticism does not apply at this stage. Regarding France and Spain, both States have ratified and adopted the necessary measures to integrate the Geneva Conventions into their respective legal orders. In this regard, since both adopt a monist approach to international law, the Geneva Conventions, including Common Article 1, form part of their legal orders.

Nonetheless, there are differences to the extent that this integration does not necessarily mean direct applicability. On this matter, Spain has proven to be more open to apply directly the Geneva Conventions than France. Conversely, in terms of express recognition of Common Article 1 as a mechanism of implementation of IHL, the position of France is much clearer than that of Spain. France explicitly acknowledges Common Article 1 as establishing a system of collective responsibility regarding IHL and it also formally recognizes the EU's role on this issue. In contrast, Spain seems to support the effective implementation of key concepts of IHL, but not so much the enforcement mechanism itself.

Yet, the adoption of the EU Guidelines on promoting compliance with IHL can also be interpreted as an elevation at EU level of its Member States' interest in ensuring compliance with IHL. In this context, it is worth noticing that both Spain and France have supported the EU's pledges to the ICRC relating to the obligation to ensure respect for IHL. Consequently, the EU level seems to have been endorsed as an efficient forum where EU Member States can voice their views on ensuring respect for IHL. All these elements are essential for the authority of Common Article 1, to the extent that they contribute to the formation of an *opinio juris* in this sense. The case of the

EU is particularly powerful, insofar as it represents 28 Member States which have all agreed on these basic principles. In addition, this strong recognition is strengthened by further reaffirmation at national level.

While the basic principles seem to meet general approval, some specific elements are problematic. In particular, the EU has adapted the language of Common Article 1 to transform it into an obligation to promote compliance. On this topic, the more limited capacities of the EU should not transform the obligation itself, all the more when the obligation at stake is an obligation of due diligence and therefore already allows flexibility in its implementation. As for France, two issues remain: the refusal to recognize the competence of the IHFFC and the lack of direct effect of the Geneva Conventions' provisions in the French legal order. As mentioned above, the IHFFC is a promising tool that should be used by the State parties to implement their obligation to ensure respect for IHL, and it is regrettable that France does not follow this path. As for the lack of direct effect, while it is understandable regarding Common Article 1, it still entails problems regarding the penal repression of war crimes. As evidenced in Part II of this thesis, the actual suppression of IHL violations was made possible only with the establishment of international criminal jurisdictions despite a clear mandate already established in the Geneva Conventions. Regarding Spain, an express recognition in policy documents of the obligation to ensure respect, of its meaning and scope, as well as of the EU's role on this matter would be desirable.

Furthermore, this commitment to Common Article 1 is reflected in practice, as all three actors have made used of the different measures at their disposal to implement the obligation to ensure respect for IHL on the international stage. In this regard, all three actors have resorted to diplomatic, economic, and in limited cases, military resources, to intend to prevent or respond to violations of IHL. This diplomatic machinery induces the parties to an armed conflict to abide by IHL norms. In addition, it should be highlighted that some themes have been especially underlined by the three actors, such as the protection of civilians, the protection of women and children, the fight against sexual and gender-based violence, humanitarian access, as well as the regulation of weapons.

The breakdown of these measures further demonstrates how the different levels of action – international, European, or national – complement each other. In this regard, the EU has developed an important set of tools, similar to those of States, although they are not equally used. Indeed, the

declaratory policy remains the EU's privileged means of action, together with its CCP and the corresponding adoption of sanctions. This approach is consistent with the capacities of the EU, an economic superpower on the international stage.

While the adoption of these measures constitutes a means to implement Common Article 1, their effectiveness should also be assessed. In this respect, some elements demonstrate that they have some impact. By way of example, a trial of rapists during the armed conflict in South Kivu was held in the Democratic Republic of Congo; the EU welcomed this trial and recalled that the fight against rape as a weapon of war is part of the cooperation partnership between the EU and the Democratic Republic of Congo[527]. Another example may be provided by the situation in Sri Lanka, where the Government modified its treatment of the internally displaced persons and initiated a rapid resettlement programme[528]. The EU and other international actors had indeed advocated for the respect of humanitarian principles within this context. With regard to the adoption of restrictive measures however, it has been argued that in the absence of adequate monitoring, «it is extremely hard to tell how effective they are», so that there is «urgent need for better monitoring of the implementation and impact of EU sanctions»[529]. The same may be argued with regard to military interventions, as the Libyan case highlights the deficiencies and possible abuses of this tool and therefore calls for prudence.

In addition, the three actors have – unsurprisingly – been more reactive regarding some situations of violations of IHL than others, thus raising the question of double standards. By way of example, the European Parliament has criticized their action with regard to the Israeli-Palestinian conflict on several occasions. The latter highlights the lack of unity and coordination about the situation and deplores the paralysis of the EU when political action has to be

527 République Démocratique du Congo, «Un pas vers la fin de l'impunité», Brussels, 22 février 2011, MEMO/11/108.

528 Commission Staff Working Document On the mid-term review of the European Consensus on Humanitarian Aid Action Plan: Assessing progress and priorities in the EU's implementation of humanitarian action Accompanying document to the Communication on the mid-term review of the European Consensus on Humanitarian Aid Action Plan – implementing effective, principled EU humanitarian action COM(2010) 722 final, p. 6.

529 Konstanty Gebert, *Shooting in the Dark? EU sanctions policies, Policy Brief*, London, European Council on Foreign Relations, 2013, p. 1.

taken[530]. An example is found regarding situations of occupation. For instance, the European Parliament called for the suspension of the EU-Israel Association Agreement in reaction to Israeli activities in the Occupied Territories, without success[531]. In this regard, the UN report launched on 15 September 2009 that concludes to the existence of war crimes from both sides of the conflict and possibly of crime against humanity has not been duly taken into consideration by the Council. Likewise, sanctions have been adopted against private parties benefitting from the annexation of Crimea, but the same measures have not been adopted in the context of Western Sahara or the Occupied Palestinian Territories. The same holds true with regard to sanctions adopted against States: it has been the case against Russia, but not against Morocco or Israel[532].

Despite these issues, on the overall, it can be argued that the three actors implement Common Article 1 pursuant to its contemporary acceptation. In this respect, they contribute to its crystallization as a norm of customary international law, insofar as there is «evidence of a general practice accepted as law»[533]. This process thus nourishes a virtuous circle whereby 1) Common Article 1 is reinforced as an international treaty obligation; 2) IHL is better respected; 3) the EU projects itself as global leader through the externalization of its values, including IHL; 4) EU Member States fulfill their obligation to ensure respect for IHL as State parties to the Geneva Conventions; and 5) Common Article 1 is reinforced as an international customary obligation.

530 Auvret-Finck, «L'utilisation du DIH dans les instruments de la PESC», *op. cit.*, 2010, p. 60.

531 Bartels, *The application of human rights conditionality*, *op. cit.*, 2008, p. 21.

532 Pål Wrange and and Sarah Helaoui, *Étude sur l'Occupation/annexion d'un territoire: Respect du droit humanitaire international et des droits de l'homme et politique cohérente de l'Union européenne dans ce domaine*, European Parliament, 2015, pp. 10-11.

533 Statute of the ICJ, article 38(1)(b).

Part 2
ENSURING RESPECT: PUNISHING VIOLATIONS OF IHL

INTRODUCTION

Common Article 1 entails three dimensions: preventing violations of IHL from occurring, adopting measures to put an end to them when they effectively occur, and finally, criminalizing the violations of IHL that are tantamount to war crimes. The first two dimensions, foreseen in IHL and public international law, are thoroughly analyzed in Part I of this thesis. As a result, the third dimension of the obligation to ensure respect for IHL is contemplated in this second Part. This division into two separate parts reflects the considerable advances made in the criminalization of certain violations of IHL since the second half of the XXth century.

Indeed, the criminalization of the violations of IHL has been extensively developed within the frame of international criminal law in the last decades, notably with the establishment of the *ad hoc* international criminal tribunals and the International Criminal Court. Furthermore, while it is important to reflect in the domestic legal order the commitment of Common Article 1, most of the preventive and reactive measures undertaken to implement it are measures that resort to the external action of States. In contrast, the penalization of IHL violations calls for specific legislative and judicial developments at internal level.

In Chapter 3, the different systems of international responsibility over violations of IHL are analyzed. Indeed, besides the obligation to prevent and put an end to IHL violations, Common Article 1 also calls to deter individuals and States from committing them. In this regard, Common Article 1 connects different branches of international law, namely those regulating State responsibility – public international law – and individual responsibility – international criminal law. While it is not a punitive mechanism in a strict legal sense, State responsibility should nonetheless be briefly addressed. As for

individual responsibility, the Geneva Conventions themselves already established the grave breaches regime, which is a necessary corollary of Common Article 1. Further developments in international criminal law have completed this system, so that it is now possible to prosecute war criminals at national and international levels.

In Chapter 4, the implementation of the system of criminal responsibility over war crimes at EU, French, and Spanish levels is examined. In particular, it assesses whether the EU, France, and Spain have adopted the necessary measures in their respective legal orders to allow the prosecution of alleged perpetrators of war crimes, including on the basis of universal jurisdiction if necessary. Besides, the implementation of the obligation of cooperation with international criminal jurisdictions is analyzed, with a special emphasis on cooperation with the International Criminal Court.

Chapter 3
MECHANISMS OF INTERNATIONAL RESPONSIBILITY FOR VIOLATIONS OF IHL

This chapter intends to answer whether the State parties to the Geneva Conventions may resort to legal tools to punish IHL violations in order to comply with their obligation to ensure respect for IHL.

The answer to this question is in the affirmative. When all the efforts to influence State parties to an armed conflict have not prevented IHL violations from occurring, the State parties to the Geneva Conventions are still bound by Common Article 1 and must adopt measures in order to ensure that perpetrators are brought to justice. Indeed, the concept of international responsibility is a corollary of the obligation to ensure respect for IHL by others. The system of international responsibility has traditionally rested upon States, as primary subjects of international law. In this sense, even human rights treaties impose obligations falling upon States while conferring rights upon individuals[1]. If States remain the prior subjects of international responsibility, they are no longer its sole subjects. In particular, international organizations have become fully-fledged subjects of international law[2], albeit with some nuances due to their special nature. Further, individuals have increasingly gained importance

1 James Crawford, «The system of international responsibility», in James Crawford, Alain Pellet and Simon Olleson (eds.), *Law of International Responsibility*, Oxford University Press, 2010b, p. 17.

2 ICJ, Reparations for injuries suffered in the service of the UN, ICJ reports 1949, pp. 174, 179. (The United Nations «is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims [...] from the moment that organizations exercise legal competencies of the same type as those of States, it seemed logical that the same consequences should attach to the actions of both one and the other»).
Nonetheless, as Alain Pellet notes, if the UN can invoke the responsibility of States and incur its own international responsibility, it is slightly different to the extent that it is limited by the principle of specialty and the limited concrete resources they have. See: Alain Pellet, «The definition of responsibility in international law», in Crawford, Pellet and Olleson (eds.), *The Law of International Responsibility*, *op. cit.*, 2010, pp. 3-16.

at the international level. While they do not benefit from the same status of subjects of international law as States, international criminal responsibility in relation to individuals has noticeably developed since World War II.

Thus, third States may resort to two mechanisms in case of violations of IHL. On the one hand, they may refer the case to the ICJ and invoke the responsibility of the State for a violation of a norm of international law owed to the international community as a whole. On the other hand, international criminal law has developed considerably since World War II, so that alleged perpetrators of IHL violations may incur criminal responsibility both at international and national levels.

It is submitted that if States adequately and systematically made use of these tools, not only they would fulfill a crucial aspect of the obligation to ensure respect for IHL, but this would likewise importantly participate in deterring individuals and public authorities from committing IHL violations.

Section 1

STATE RESPONSIBILITY: A NON-PUNITIVE MECHANISM OF INTERNATIONAL RESPONSIBILITY

> *If only every State in the world would systematically and regardless of all other considerations invoke the responsibility of the responsible State as soon as it deems a violation of IHL to have occurred, and would claim and reparation in the interest of the victims, as it may under Draft Articles 48(2) and must under Common Article 1, then much would be gained*[3].

IHL belongs to public international law, and as such, it obeys to its rules, including those regulating the consequences of its violations. The violation of an obligation contained in IHL treaties entails the responsibility of the wrongdoing State, in accordance with the rules established under public international law. While IHL recognizes specific rules in case of breach, international public law already establishes the rules of responsibility for internationally wrongful acts whose regime applies to IHL too. Indeed, in accordance with the international case-law, an injured State by a breach of a treaty obligation can refer both to the rules of treaty law and to the regime of State responsibility[4]. Yet, as James Crawford notes, these systems fulfill different objectives: while treaty law determines how a specific treaty obligation shall be interpreted, the rules deriving from the regime of State responsibility deal with the breach's legal consequences, notably with regard to reparation[5]. As a result, there is «some overlap between the two but they are legally and logically distinct»[6].

Firstly, the general regime of State responsibility is briefly explained and applied to IHL. In this respect, the most important international text with regard to State responsibility is the ILC's 'Articles on the Responsibility of

3 Sassòli, «State responsibility for violations of international humanitarian law», *op. cit.*, 2002, p. 433.

4 Tribunal in the Rainbow Warrior arbitration; ICJ in the Gabcikovo-Nagymaros Project Case. Quoted in Crawford, «The system of international responsibility», *op. cit.,* 2010b, p. 21.

5 *Ibid.*, p. 21.

6 *Ibid.*

States for Internationally Wrongful Acts' (hereafter, 'ARSIWA') of 2001[7] and approved by the UN General Assembly in 2002[8]. It took about four decades for the ILC to adopt ARSIWA in 2001, which probably represent the ILC's most important work after the VCLT. Even though ARSIWA has not been translated into an international treaty, it has been widely cited by the international scholarship and case-law, thus making it a fundamental element of the regime of State responsibility[9]. Pursuant to this regime, States may incur responsibility whenever an internationally wrongful act is constituted.

Secondly, the invocation of State responsibility by third States to an armed conflict is analyzed. Indeed, ARSIWA foresees a special regime which, applied to IHL, completes the obligation to ensure respect for IHL.

1. DEFINITION OF STATE RESPONSIBILITY FOR VIOLATIONS OF IHL

Article 1 ARSIWA stipulates the following maxim: «[e]very internationally wrongful act of a State entails the international responsibility of that State». This apparent simple definition represents an important turn in the law of State responsibility, insofar as it leaves aside the necessity of injury. As Alain Pellet has shown, the traditional acceptance of responsibility used to rely on the model established by Grotius, who considered that from an injury caused «there arises an Obligation by the Law of Nature to make Reparation for the Damage, if any be done»[10]. Consequently, this model could be assimilated to a 'civil' law-model, based on bilateral relations[11]. This model indeed fitted well with traditional international relations, as it excluded any form of criminal or similar punishment. Nonetheless, some form of responsibility had to exist to

7 ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Official Records of the General Assembly, Fifty-sixth session, Supplement nº 10 (A/56/10), chp.IV.E.1) (hereafter, 'ARSIWA'). Available at: http://legal.un.org/docs/?path=../ilc/texts/instruments/english/draft_articles/9_6_2001.pdf&lang=EF (Accessed: 22.05.2017).

8 UNGA, Resolution A/RES/56/83, 12 December 2001. Responsibility of States for internationally wrongful acts: «Takes note of the articles on responsibility of States for internationally wrongful acts, presented by the International Law Commission, the text of which is annexed to the present resolution, and commends them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action».

9 Crawford, «The system of international responsibility», *op. cit.,* 2010, p. 21.

10 Pellet, «The definition of responsibility in international law», *op. cit.*, 2010, p. 5.

11 *Ibid*.

the extent that if the damage was the result of a violation of international law, then reparation had to be made for it[12]. However, the notion of State responsibility has undergone important changes. In this sense, article 1 ARSIWA does not refer to the idea of damage, thus making the internationally wrongful act objectively established. The disappearance of the notion of damage contributes to the development of international law: a breach thereof can engage the responsibility of a State simply on this ground; there is no need to prove the existence of a damage and the sole fact that the conduct violated international law is sufficient. Thus, ARSIWA enshrines a shift towards the 'objectivization' of international law[13].

Actually, a defining characteristic of State responsibility is the absence of any notion of criminal responsibility, in contrast with national legislation. In this regard, an important change was made between the first and the second reading of the ILC's Draft Articles. Indeed, in 1996, the idea of penal consequences of breaches of international law was envisaged through the concept of 'international crimes of States'. However, this sparked controversy among the members of the ILC so that the concept was eventually left aside in 1998[14]. This choice therefore emphasizes the special nature of State responsibility in comparison with the classical notions of responsibility in national law.

For State responsibility to be engaged at international level, several requirements must be fulfilled. In particular, article 2 ARSIWA provides the following:

> There is an internationally wrongful act of a State when conduct consisting of an action or omission:
> a) Is attributable to the State under international law; and
> b)Constitutes a breach of an international obligation of the State.

It appears from this wording that two conditions must be met. On the one hand, there must a breach of an international obligation of the State. On the other hand, that breach must be attributable to the State under international law. In any event, for the internationally wrongful act to exist, none of the circumstances precluding wrongfulness detailed in ARSIWA can be met.

12 *Ibid.*, p. 6.

13 *Ibid.*

14 Crawford, «The system of international responsibility», *op. cit.*, 2010, p. 22.

Luigi Condorelli and Claus Kreβ define attribution in the following terms:

> 'Attribution' (or 'imputation') is the term used to denote the legal operation having as its function to establish whether given conduct of a physical person, whether consisting of a positive action or an omission, is to be characterized, from the point of view of international law, as an 'act of the State' (or the act of any other entity possessing international legal personality). In other words, by the term 'attribution', reference is made to the body of criteria of connection and the conditions which have to be fulfilled, according to the relevant principles of international law, in order to conclude that it is a State (or other subject of international law) which has acted in the particular case. In that case (and only for that purpose), the actual author of the act, i.e. the individual, is, as it were, forgotten, and is perceived as being the means by which the entity acts, a tool of the State (or other subject of international law) in question[15].

As far as IHL is concerned, the issue that arises is therefore to what extent the conduct of the armed forces can be attributable to the State[16]. In this respect, articles 3 to 11 provide details on the different circumstances under which a conduct may be attributable to a State. Luigi Condorelli and Claus Kreβ classify these articles into four categories.

The first one regards the situations provided by articles 4, 5, 6, and 7 on the conduct of *de jure* organs, the conduct of persons or entities exercising elements of governmental authority and the conduct of organs placed at the disposal of a State by another State[17]. Here, the process of attribution seems straightforward as it relies on a legally established situation, not subject to much debate. Nevertheless, it is important to note that the ICJ considered in its judgment on the merits in 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide' that the status as an organ of State may be recognized even if the domestic law of the State provides otherwise, «provided that in fact the persons, groups or enti-

15 Luigi Condorelli and Claus Kreβ, «The rules of attribution. General considerations», in Crawford, Pellet and Olleson (eds.), *The Law of International Responsibility*, *op. cit.*, 2010, p. 221.

16 Sassòli, «State responsibility for violations of international humanitarian law», *op. cit.,* 2002, p. 405.

17 Condorelli and Kreβ, «The rules of attribution. General considerations», *op. cit.*, 2010, p. 229.

ties act in complete dependence on the State, of which they are ultimately merely the instrument»[18]. In the view of the Court, it is indeed necessary to go beyond the formal legal status in order to impede States from escaping international responsibility through subterfuge or a fiction[19]. Furthermore, Article 7 is interesting from IHL's point of view. Indeed, it refers to the «conduct of an organ of a State» acting in that capacity, and «even if it exceeds its authority or contravenes instructions». The fact that the organ of the State must act in that capacity is a limitation that was probably foreseen in order to exclude acts committed as a private person, «such as theft or sexual assaults by a soldier during leave in an occupied territory»[20]. Marco Sassòli criticizes such approach as he considers that it contradicts article 3 of The Hague Convention No. IV, «pertinent scholarly writings and a judicial opinion», so that States should assume responsibility for their armed forces' conduct, even if committed in their capacity as private individuals. To support such claim, he explains that the IHL provision should be an exception to the general rule, as *lex specialis*. He also argues that even though one does not recognize article 3 of the Hague Convention No. IV as *lex specialis* in relation to article 7 on State responsibility, it could be claimed that members of the armed forces are always on duty «in wartime and with regard to the acts governed by» IHL, insofar as «they would have never entered into contact with enemy nationals or acted on enemy territory» in their private capacity[21].

The second category covers the conduct of persons «acting on the instructions of, or under the direction or control of» the State[22], or *de facto* agents, and the conduct of persons or entities acting «in the absence or default of the official authorities»[23], or agents of necessity. In this category, international law – not national law – directs the process of attribution[24], in contrast with the first category. Therefore, the process of attribution is to be made on

18 ICJ, Application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, ICJ Reports 2007, p. 205, para. 492. Quoted in Condorelli and Kreβ, «The rules of attribution. General considerations», *op. cit.*, 2010, p. 230.

19 *Ibid*.

20 *Ibid*.

21 *Ibid*.

22 ARSIWA, article 8.

23 *Ibid.*, article 9.

24 Condorelli and Kreβ, «The rules of attribution. General considerations», *op. cit.*, 2010, p. 230.

a case-by-case analysis[25]. This approach is in line with the reasoning adopted by the ICTY in the Tadić case, where it used the criterion of 'overall control' exercised by a foreign State over a particular organization[26].

The third category refers to the attribution of «conduct of insurrectional or other movement» under article 10[27]. Regarding IHL, the (il)legitimacy of the insurrection is irrelevant in contrast with the (il)legitimacy of the conduct at stake «under the applicable rules of international law»[28]. This rule of attribution is in line with IHL, insofar as non-State armed groups can be held responsible for violations of IHL if they succeed in supplanting the government or become the government of a new State. However, it is possible to wonder what happens if non-State armed groups violate IHL and do not succeed in becoming the new government. In this regard, Marco Sassòli refers to a «lack of due diligence», to the extent that it may be suggested that States have an obligation of due diligence «in order to prevent conduct contrary to international law and to prosecute and punish if it occurs»[29].

Finally, the fourth category refers to the attribution of «conduct acknowledged and adopted by a State as its own»[30], however, the same reasoning as the one applied to the first category applies.

It should be noted that in accordance with the ICRC Study on 'Customary International Humanitarian Law' the principle of State responsibility for violations of IHL has reached customary status. In particular, Rule 149 refers to the different categories of conduct that may be attributable to a State:

> A State is responsible for violations of international humanitarian law attributable to it, including:
>
> (a) violations committed by its organs, including its armed forces;

25 ILC, Report on the work of its fifty-third session (23 April-1June and 2 July-10 August 2001), General Assembly, Official Records, Fifty-fifth Session, Supplement nº 10 (A/56/10) (hereafter, 'Commentary to ARSIWA'), p. 48. Available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (Accessed: 22.05.2017).

26 Sassòli, «State responsibility for violations of international humanitarian law», *op. cit.*, 2002, p. 408.

27 Condorelli and Kreβ, «The rules of attribution. General considerations», *op. cit.*, 2010, p. 229.

28 Sassòli, «State responsibility for violations of international humanitarian law», *op. cit.*, 2002, p. 410.

29 *Ibid.*, p. 411.

30 Condorelli and Kreβ, «The rules of attribution. General considerations», *op. cit.*, 2010, p. 229.

(b) violations committed by persons or entities it empowered to exercise elements of governmental authority;

(c) violations committed by persons or groups acting in fact on its instructions, or under its direction or control; and

(d) violations committed by private persons or groups which it acknowledges and adopts as its own conduct.

Then, the second requirement for an internationally wrongful act to occur is the existence of a violation of international law. In this respect, ARSIWA establishes a classification of norms of international law albeit it does not provide details about their content. It distinguishes between the general regime of State responsibility, where the breach of any norm of international law entails bilateral consequences, and the special regime of State responsibility, where norms of *jus cogens* («serious breaches of obligations under peremptory norms of general international law»[31]) are breached. The content of each category was voluntarily left out of the process, so as to allow the application of the regime of State responsibility to norms that have acquired *jus cogens* status after the adoption of ARSIWA.

Nonetheless, where those two requirements are fulfilled – breach and attribution – it is also necessary to scrutinize whether there are conditions precluding the wrongfulness of a violation of a norm of international law, as provided by Chapter V ARSIWA. These include consent, self-defense, countermeasures, *force majeure*, necessity, and distress. Some of those deserve particular developments when analyzed in conjunction with IHL.

Firstly, it should be noted that the Geneva Conventions themselves stipulate that no State may absolve itself or another State of any responsibility incurred in respect of grave breaches in accordance with articles 51/52/131/148 of the four Geneva Conventions[32]. Therefore, this common article is a confirmation of the principle of non-reciprocity, which also applies to the regime of State responsibility. Furthermore, regarding those norms of IHL that have *jus cogens* status, no motive can be invoked to preclude their wrongfulness. Concerning self-defense, the ILC Commentary clearly expresses that it is unacceptable regarding IHL norms[33]:

31 ASRIWA, articles 40-41.

32 Sassòli, «State responsibility for violations of international humanitarian law», *op. cit.*, 2002, p. 413.

33 *Ibid.*, p. 414.

> This is not to say that self-defence precludes the wrongfulness of conduct in all cases or with respect to all obligations. Examples relate to international humanitarian law and human rights obligations. The Geneva Conventions for the protection of war victims of 12 August 1949 and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) apply equally to all the parties in an international armed conflict, and the same is true of customary international humanitarian law. Human rights treaties contain derogation provisions for times of public emergency, including actions taken in self-defence. As to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct[34].

As for necessity, the ILC Commentary already provides that it is acceptable regarding IHL only «where explicitly stated in some of its rules»[35]:

> [c]ertain humanitarian conventions applicable to armed conflict expressly exclude reliance on military necessity. Others while not explicitly excluding necessity are intended to apply in abnormal situation of peril for the responsible State and plainly engage its essential interest. In such a case, the non-availability of the plea of necessity emerges clearly from the object and purpose of the rule[36].

Finally, the same reasoning as the one that applies to necessity can be applied to distress, but at the individual level[37].

2. LEGAL CONSEQUENCES

Firstly, the traditional regime, regarding legal consequences towards States, is analyzed and applied to IHL. Secondly, the application of this regime to war victims is discussed.

34 Commentary to ARSIWA, article 21, para. 3.

35 Sassòli, «State responsibility for violations of international humanitarian law», *op. cit.*, 2002, p. 415.

36 Commentary to ARSIWA, p. 84.

37 Sassòli, «State responsibility for violations of international humanitarian law», *op. cit.*, 2002, p. 415.

2.1. Legal consequences towards States

If the conduct of a State breaches a norm of international law and can be attributed to that State, it incurs its responsibility, which in turn entails several legal consequences[38]. In particular, the State is subject to an obligation «to cease that act» and «to offer appropriate assurances and guarantees of non-repetition»[39], as well as «to make full reparation for the injury caused by the internationally wrongful act»[40]. The ILC clarifies that these legal consequences «do not affect the continued duty of the responsible State to perform the obligation breached»[41]. In addition, in the case of breach of *jus cogens* norms, additional consequences are foreseen, namely the prohibition to recognize the unlawful situation and the prohibition to render aid or assistance in maintaining that situation[42]. These legal consequences therefore overlap to some extent with those deriving from the application of Common Article 1, as demonstrated in Chapter 1.

The issue of reparation is especially important regarding IHL. In the words of Emanuela-Chiara Gillard, reparation aims at «eliminating, as far as possible, the consequences of the illegal act and restoring the situation that would have existed if the act had not been committed»[43]. Further, ARSIWA defines reparation as consisting of restitution, compensation, and satisfaction. With regard to IHL, Additional Protocol 1 also formally expresses the principle of reparation and explicitly refers to the obligation of compensation:

> A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces[44].

A few examples involving reparation for violations of IHL at international level can be found, such as the cases in Congo, Eritrea-Ethiopia, and the ones

38 ARSIWA, article 28.
39 *Ibid*., article 30.
40 *Ibid*., article 31.
41 *Ibid*., article 29.
42 *Ibid*., article 41.
43 Emanuela-Chiara Gillard, «Reparation for violations of international humanitarian law», *International Review of the Red Cross*, vol. 85(851), 2003, p. 531.
44 Additional Protocol 1, article 91.

involving NATO in the former Yugoslavia. According to Michael J. Matheson, these cases have broader consequences than simply the case in point:

> [s]uch assessment can contribute in important ways to dealing with such violations – by providing a means of further interpreting and developing the law, by establishing historical responsibility for such crimes, by helping to deter future crimes with the prospect that entities committing violations would suffer adverse political and financial consequences, and by helping to restore the victims of such crimes by providing compensation and a sense of justice[45].

The case about Eritrea and Ethiopia is especially interesting, insofar as a Claims Commission was established to arbitrate all claims for loss, damage or injury resulting «from violations of [IHL], including the 1949 Geneva Conventions», thus eluding questions of jurisdiction of the ICJ[46]. Additionally, the establishment of the Eritrea-Ethiopia Claims Commission entails other advantages: the standards of evidence and proof are not as strict as those used by the ICJ[47]. Indeed, it required «clear and convincing evidence» of violations but did not

> accept any suggestion that, because some claims may involve allegations of potentially criminal conduct, it should apply an even higher standard of proof corresponding to that in individual criminal proceedings [...] it must instead decide whether there have been breaches of international law based on normal principles of State responsibility[48].

Besides, the Claims Commission has been less reluctant to resolve factual issues than the ICJ, thus being more likely to establish the truth regarding the alleged violations of IHL[49]. Therefore, the establishment of the Eritrea-Ethiopia Claims Commission constitutes an encouraging precedent in light of State responsibility over violations of IHL. However, one crucial problem is the lack of true standing for war victims before international courts.

45 Matheson, «The New International Humanitarian Law and its enforcement», *op. cit.*, 2010, p. 164.
46 *Ibid.*, p. 165.
47 *Ibid.*
48 Quoted in Matheson, «The New International Humanitarian Law and its enforcement», *op. cit.*, 2010, p. 167.
49 *Ibid.*, p. 168.

2.2. Legal consequences towards individuals

In this context, the distinction between primary, secondary and tertiary rights is worth recalling. Primary rights refer to the substantive norm that has been breached, and which triggers the secondary right: the right to reparation. Nevertheless, those two rights are incomplete, as it is necessary to assess whether individuals have *locus standi* in this respect (tertiary right)[50]. As demonstrated by Veronika Bilkova, for individuals to claim reparation for IHL violations, they must therefore prove that they enjoy primary rights under IHL, are entitled to claim reparation whenever these rights are infringed upon and have the right to initiate legal proceedings on these grounds[51]. The main issue in this sense is indeed that IHL has been edified as an inter-State body of law, thus establishing obligations between States for the most part. Hence, this obligation to pay compensation has been understood as an obligation of compensation towards the injured State, not victims[52].

While the existing legislation, case-law, and doctrine is not conclusive insofar as «various scenarios result from the possible combinations of answers given to these three questions»[53], it can be argued that there has been a shift towards a greater recognition of individuals as «active subjects of rights»[54]. As Veronika Bilkova underlines:

> As such, they are considered to have full range of both substantive and procedural rights. This shift has been taking place mainly under the influence of human rights law, which pushes IHL towards the adoption of an individual-oriented perspective, putting the victim first; and at the same time promotes the justiciability of any recognized rights for individuals[55].

In this regard, as Marco Sassòli observes, many IHL rules «are formulated in a human rights-like manner, as entitlement of war victims»[56]. In particular,

50 Veronika Bilkova, «Victims of War and their Right to Reparation for Violations of IHL», *Miskolc Journal of International Law*, vol. 4(2), 2007, pp. 2-3.

51 *Ibid.*, p. 1.

52 Sassòli, «State responsibility for violations of international humanitarian law», *op. cit.*, 2002, p. 418.

53 Bilkova, «Victims of War and their Right to Reparation for Violations of IHL», *op. cit.*, 2007, p. 1.

54 *Ibid.*, p. 9.

55 *Ibid.*

56 Sassòli, «State responsibility for violations of international humanitarian law», *op. cit.*, 2002, p. 418.

common article 6/6/6/7 of the four Geneva Conventions refers to the «rights» that are «conferred» upon individuals[57]. Therefore, it is reasonable to consider that war victims are beneficiaries of IHL obligations and should have access to reparation. In this sense, the ILC Commentaries to ARSIWA explain the following:

> [w]hen an obligation of reparation exists towards a State, reparation does not necessarily accrue to that State's benefit. For instance, a State's responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights. Individual rights under international law may also arise outside the framework of human rights[58].

This reasoning can be applied to IHL. The ICJ confirmed this interpretation in the Advisory Opinion on the Wall when it held that Israel was subject to a duty to provide restitution and compensate individuals as well as «all natural and legal persons having suffered any form of material damage as a result of the wall's construction»[59]. It is therefore acknowledged that individuals enjoy not only a primary – substantive – right but also a secondary right, that to claim reparation for the violation of their primary right under IHL. Nonetheless, doubts remain regarding the tertiary right. Consequently, there is a conflict between the entitlement war victims enjoy under IHL and the lack of standing in dispute settlement procedures[60].

57 Common Article 6/6/6/7 reads as follows: «In addition to the agreements expressly provided for in Articles 10, 15, 23, 28, 31, 36, 37 and 52, the High Contracting Parties may conclude other special agreements for all matters concerning which they may deem it suitable to make separate provision. No special agreement shall adversely affect the situation of the wounded and sick, of members of the medical personnel or of chaplains, as defined by the present Convention, nor restrict the rights which it confers upon them.
Wounded and sick, as well as medical personnel and chaplains, shall continue to have the benefit of such agreements as long as the Convention is applicable to them, except where express provisions to the contrary are contained in the aforesaid or in subsequent agreements, or where more favourable measures have been taken with regard to them by one or other of the Parties to the conflict».

58 Commentaries to ASRIWA, article 33, para. 3.

59 ICJ, *Advisory Opinion on the Wall*, paras. 145, 152-3.

60 Sassòli, «State responsibility for violations of international humanitarian law», *op. cit.*, 2002, p. 418.

However, there are elements pushing forward that «shift»[61] towards the justiciability of individuals' rights. Most notably, the UN General Assembly adopted a soft law instrument in 2005 entitled the 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (hereafter, 'Basic Principles and Guidelines')[62]. At first, the drafts of the Basic Principles and Guidelines dealt only with human rights law, and some governments even advocated for the adoption of two different instruments[63]. However, it was finally agreed that the Basic Principles and Guidelines should include both human rights law and IHL insofar as both bodies of law are victim-oriented and the protection awarded to victims tends to overlap in some respects[64]. It is worth mentioning that the Basic Principles and Guidelines were understood as a codification of the existing law, not a development of international law, an approach reflected in the preamble[65]:

> Emphasizing that the Basic Principles and Guidelines contained herein do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms.

The most important part of the Basic Principles and Guidelines deals with the status and rights of victims of gross violations of human rights law and serious violations of IHL (principles 11-23). These principles therefore elaborate on the provisions of ARSIWA and apply them to individuals. Hence, restitution refers to measures that «restore the victim to the original situation before the gross violations of international human rights law and serious vio-

61 Bilkova, «Victims of War and their Right to Reparation for Violations of IHL», *op. cit.*, 2007, p. 9.

62 UNGA, Resolution 60/147. Basic principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of IHRL and Serious Violations of IHL.

63 Theo Van Boven, «The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for victims of Gross Violations of International Human Rights Law and International Humanitarian Law», *United Nations Audiovisual Library of International Law*, 2010, p. 2.

64 Van Boven, «The United Nations Basic Principles and Guidelines on the Right to a Remedy», *op. cit.*, 2010, p. 2.

65 *Ibid.*, p. 4.

lations of international humanitarian law occurred» (principle 19). However, in the case of violation of IHL, restitution is difficult to obtain in most cases. Further, pursuant to principle 20, compensation «should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case». Rehabilitation includes medical and psychological care, as well as legal and social services (principle 21). As for satisfaction, it includes a wide range of measures, from those aiming at the cessation of violations to truth-seeking, to judicial and administrative sanctions (principle 22). Finally, guarantees of non-repetition include «structural measures of a policy nature»[66] (principle 23).

As Veronika Bilkova underlines, this shift is welcomed, as reparation constitutes a crucial element in enforcement, and arguably participates in deterrence. Likewise, it is a matter of justice, as war victims are entitled to redress, which in turns participates in the greater movement of reconciliation, particularly necessary for the maintenance of peace in the post-conflict situation[67].

Thus, if an affected State – and to a lesser extent, individuals – is allowed to invoke the responsibility of the infringing State for violations of IHL, one may wonder whether the same holds true regarding third States by virtue of their obligation to ensure respect for IHL.

66 *Ibid*.
Principle 23 reads as follows: «Guarantees of non-repetition should include, where applicable, any or all of the following measures, which will also contribute to prevention:
(a) Ensuring effective civilian control of military and security forces;
(b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
(c) Strengthening the independence of the judiciary;
(d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders
(e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;
(f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;
(g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;
(h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law».

67 Bilkova, «Victims of War and their Right to Reparation for Violations of IHL», *op. cit.*, 2007, p. 9.

3. INVOCATION OF STATE RESPONSIBILITY BY THIRD STATES FOR VIOLATIONS OF IHL

Pursuant to the general regime of State responsibility, only an injured State is allowed to invoke the responsibility of another State; however, article 48 ARSIWA provides an exception in the case of an obligation owed to the international community as a whole:

> 1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:
>
> (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
>
> (b) the obligation breached is owed to the international community as a whole.
>
> 2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:
>
> (a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and
>
> (b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.
>
> 3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

Scholars interpret the expression «obligation owed to the international community as a whole» as *erga omnes* obligations. James Crawford, the Special Rapporteur in charge of drafting ARSIWA, holds that the wording chosen in article 48 reflects the rejection of «the artificial idea that breach of such an obligation made all other States into individually 'injured states'»[68]. He further adds that

> instead it permits the invocation of the responsibility of the wrongdoing State by any of the States identified – indeed, in the case of obligations owed to the international community as a whole, by any State[69].

68 James Crawford, «Overview of Part Three of the Articles on State Responsibility», in Crawford, Pellet and Olleson (eds.), *The Law of International Responsibility*, *op. cit.*, 2010a, p. 934.

69 *Ibid*.

Consequently, the underpinning is to act in the collective public interest, rather than conferring a subjective right upon all States.

It should be noted that article 48 ARSIWA deals with the invocation of State responsibility and should therefore be distinguished from article 40 on *jus cogens* norms. Indeed, the latter deals with the seriousness of the offense, not the right for States to invoke State responsibility. Yet, as many scholars argue, *erga omnes* obligations and *jus cogens* norms are inextricably linked[70]. Antonio Cassese considers in this regard that:

> The two categories inextricably coincide: every peremptory norm imposes obligation *erga omnes* and, vice versa, every obligation *erga omnes* proper is laid down in a peremptory norm [...]
>
> To contend that an obligation *erga omnes* may be derogated from would amount to denying its very nature as an obligation designed to protect fundamental values, the respect of which is an interest of the whole international community[71].

The shift enshrined in article 48 thus constitutes an important development in the regime of State responsibility, insofar as it reflects the change from a bilateral to a multilateral perspective. It demonstrates that, in some cases, such as human rights or specific IHL violations, no State is injured[72], only individuals are. Moreover, this shift allows an interpretation according to which a third State would be allowed to invoke the responsibility of the wrongdoing State on behalf of an affected State or in the interest of the international community[73]. For the purposes of this thesis, it is interesting to note the parallelism between the regime of State responsibility and the system established by IHL, which aims to protect fundamental norms, including *jus cogens* norms, through Common Article 1.

70 See, e.g.: Giorgio Gaja, «States having an interest in compliance with the obligation breached», in Crawford, Pellet and Olleson (eds.), *The Law of International Responsibility*, *op. cit.*, 2010, p. 958; Antonio Cassese, «The Character of the violated obligation», in Crawford, Pellet and Olleson (eds.), *The Law of International Responsibility*, *op. cit.*, 2010, pp. 415-426; Pellet, «The ILC's Articles on State Responsibility for Internationally Wrongful Acts and Related Texts», in Crawford, Pellet and Olleson (eds.), *The Law of International Responsibility*, *op. cit.*, 2010, p. 85.

71 Cassese, «The character of the violated obligation», *op. cit.*, 2010, pp. 417-418.

72 Gaja, «States having an interest in compliance with the obligation breached», *op. cit.*, 2010, p. 958.

73 *Ibid.*, p. 961.

Therefore, any State may claim cessation and reparation from the wrongdoing State[74]. To do so, third States may refer the case to the ICJ in order to claim reparation on behalf of an injured State[75]. As long as the violation of an *erga omnes* obligation can be established, third States are indeed allowed to do so, provided that the Court holds jurisdiction. In this regard, the Court expressly held that the existence of *jus cogens* or *erga omnes* obligations does not amount to jurisdiction. Indeed, the jurisdiction of the Court must be established in all cases:

> [...] the court deems it necessary to recall that the mere fact that rights and obligations erga omnes or peremptory norms of general international law (jus cogens) are at issue in a dispute cannot in itself constitute an exception to the principle that its jurisdiction always depends on the consent of the parties...[76]

While the practice of third States invoking the responsibility of wrongdoing States before the ICJ for violations of IHL does not exist at the moment, it remains a possibility in accordance with the current state of international law.

Thus, it is possible to argue that third States may refer to the regime of State responsibility on behalf of injured States or war victims in case of serious violations of IHL. This possibility stems from IHL itself, through Common Article 1, but also from ARSIWA. Moreover, in the event that the IHL violations cannot be attributable to a State, the 'second layer' of public international law comes into play as the criminal responsibility of the perpetrator may be engaged[77].

74 Sassòli, «State responsibility for violations of international humanitarian law», *op. cit.*, 2002, p. 430.

75 Moulier, «L'obligation de 'faire respecter' le droit international humanitaire», *op. cit.*, 2010b, pp. 757-759.

76 ICJ, Armed Activities on the Territory of Congo, Jurisdiction and admissibility, ICJ reports 2006, pp. 6, 50 (para. 125). Quoted in Gaja, «States having an interest in compliance with the obligation breached», *op. cit.*, 2010, p. 960.

77 Sassòli, «State responsibility for violations of international humanitarian law», *op. cit.*, 2002, pp. 401-434.

Section 2
INDIVIDUAL CRIMINAL RESPONSIBILITY

> *Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced*[78].

One aspect of the obligation to ensure respect for IHL is the prosecution of war criminals. The idea of a penal response to violations of the law of war is not novel[79]. However, it is during the XXth century that the criminalization of IHL violations has effectively taken place. As it is the case regarding many developments of public international law, World War II constitutes the starting point of an important movement of international repression of war crimes. Indeed, a movement of recognition of international criminal law has developed all over the XXth century in order to recognize the individual criminal responsibility of perpetrators of war crimes.

In contrast to State responsibility, the responsibility of individuals at international level has developed in criminal matters[80]. In the aftermath of World War II, it was deemed necessary to punish the main perpetrators of atrocities. The creation of the Nuremberg and Tokyo war crimes tribunals established the landmark in the development of individual criminal responsibility at international level. This movement was consolidated with the enshrinement of individual criminal responsibility in several international treaties and conventions right after the war, including the Geneva Conventions or the Genocide Convention.

It should be noted that criminal responsibility at international level is reserved for individuals, insofar as corporations are not yet recognized criminal responsibility despite progress on this matter. In particular, the statutes of the ICTY, ICTR and the ICC restrict jurisdiction *ratione personae* to individual

78 Trial of the Major War Criminals before the International Military Tribunal, Nürnberg, 14 November 1945-1 October 1946 (1947) 223.

79 See: Yves Sandoz, «The History of the Grave Breaches Regime», *Journal of International Criminal Justice,* vol. 7, 2009, pp. 657-682.

80 There is an exception in the United States of America, where civil universal jurisdiction is established by the Alien Tort Statute and regularly used.

persons[81]. Nevertheless, under IHL, rebel groups may be held responsible for the breaches they commit if they successfully become the new government of the State or the government of a new State.

Thus, the development of individual criminal responsibility has led to the development of a new branch of international law: international criminal law. The latter covers a set of laws stemming from international public law whose aim is the protection of the international public order by prohibiting the behaviors that threaten it and organizing the repression of such behaviors. The concept of public order contains rights and values of the international community that are considered fundamental. An international public order offense can harm either fundamental features of the State or fundamental aspects of the universal human society, i.e. that affect the integrity of the human being or the principle of equality between all human beings. In this regard, Common Article 1 establishes an *erga omnes* obligation, binding upon the international community as a whole, as demonstrated in Chapter 1 and as such, it belongs to the fundamental rights and values of the international community. As a result, the violation of some IHL provisions constitutes an infringement upon the international public order and requires penal repression.

It should be noted that although IHL is distinct from international criminal law, it participates in its development, thus leading to a mutual development. On the one hand, international criminal law is developed by IHL as its 'grave breaches' and 'serious violations' amount to war crimes. The infringement of IHL may indeed trigger the application of international criminal law. On the other hand, international criminal law contributes to the development of IHL as its case-law defines with more clarity some concepts of IHL. As a result, there is a clear relationship between IHL and international criminal law, even though they constitute two distinct legal sets of norms[82].

Against this background, it is submitted in this section that Common Article 1 has been reinforced by further developments in the field of international criminal law. Common Article 1 is not a free electron in international law, and there are penal mechanisms inside and outside of IHL that complement and reinforce it. Firstly, the 1949 Geneva Conventions themselves estab-

81 Crawford, «The system of international responsibility», *op. cit.,* 2010, p. 17.

82 Olivier De Frouville, *Droit international pénal, Sources, Incriminations, Responsabilité*, Paris, Pedone, 2012.

lish obligations that complement Common Article 1 and allow State parties to adequately enforce IHL. They codify the obligation to prosecute or extradite (*aut dedere, aut judicare*) in relation to the grave breaches of the Geneva Conventions, thus calling State Parties to criminalize these conducts and to prosecute alleged war criminals, including on the basis of universality. Secondly, the tremendous development of international criminal law and the creation of international criminal tribunals since World War II have significantly helped State Parties to implement this obligation. These mechanisms are different in their actors and procedures, but both consolidate the corpus of criminal sanctions in reaction to IHL violations.

1. ENFORCING THE GRAVE BREACHES REGIME

The concluding chapter of the four Geneva Conventions tackles the 'repression of abuses and infractions'. According to these provisions, the State parties to the 1949 Geneva Conventions have the obligation to search out, prosecute or extradite the war criminals that are present on their own territory and to punish the grave breaches of IHL in their domestic legal orders. These provisions therefore enshrine the *aut dedere, aut judicare* principle in the Geneva Conventions, which can be interpreted as the «first treaty codifying war crimes»[83].

It is argued that the grave breaches regime completes the obligation to ensure respect for IHL and that a proper enforcement of the *aut dedere, aut judicare* obligation with respect to grave breaches also constitute one means to enforce Common Article 1. As a delegate to the 1949 Diplomatic Conference observed:

> [The object of these articles] is to *increase respect* for the Conventions, and to strengthen them and the protection they provide by supplying a means of deterring people from violating their provisions and, if necessary, by enforcing obedience to the Conventions[84] [emphasis added].

83 James Stewart, «The future of grave breaches», *Journal of International Criminal Law*, vol. 7, 2009b, p. 856.

84 Quoted in Eve La Haye, «Article 49: Penal sanctions», in Jean-Marie Henckaerts (dir.), *Updated Commentary on the First Geneva Convention*, Geneva, International Committee of the Red Cross, 2016, para. 2809.

In this regard, there is a clear correspondence between Common Article 1, which is triggered whenever serious or repeated violations of IHL occur, and the obligation to extradite or prosecute, which punishes grave breaches, i.e. the violation of a specific category of behaviors defined under IHL deemed so serious that they cannot go unpunished. Not only there is an obligation falling upon State parties to ensure respect for IHL, but they must also ensure that war criminals do not remain unpunished and are denied safe havens. In the same way that Common Article 1 establishes a decentralized system of collective responsibility binding upon the international community as a whole in case of violations of IHL, the 1949 Geneva Conventions require all the State Parties to take responsibility and prosecute war criminals, regardless of their nationality. The system established by the Geneva Conventions therefore represents a landmark in the evolution of universal criminal jurisdiction, as they enshrine universal jurisdiction applicable to IHL violations in an international treaty for the first time.

The grave breaches regime as established by the Geneva Conventions stipulates an obligation to prosecute or extradite alleged perpetrators of grave breaches, a category of infractions exhaustively listed in the Geneva Conventions. While this mechanism has great potential in contributing to the respect for IHL, it has had mixed results in light of State practice.

1.1. The obligation to prosecute or extradite alleged perpetrators of grave breaches

In this subsection, the definition of the obligation to prosecute or extradite and the consequences it entails at the national level are discussed.

1.1.1. Definition

The obligation to extradite or prosecute is not exclusive to the 1949 Geneva Conventions but is present in different international treaties and conventions. The origins of the obligation are traced back to Grotius, who conceived it in its embryonic form through the formula *aut dedere, aut punire*. As emphasized by the ILC, the modern form of the obligation to extradite or prosecute refers to the State's alternative obligation concerning the treatment

of an alleged offender: it must extradite if it does not prosecute and prosecute if it does not extradite[85].

Nowadays, the obligation to extradite or prosecute is to be found in four categories of international treaties and conventions: extradition treaties, the counterfeiting convention formula, the 1949 Geneva Conventions, and The Hague convention formula[86]. The first category aims to avoid that some crimes remain unpunished by providing for local prosecution whenever extradition fails because many States refuse to extradite their own nationals. In accordance with this formula, if a State does not extradite, it must «submit the case to its competent authorities for the purpose of prosecution»[87]. The following category deals with some specific international offenses and is enshrined in article 6(1)(d) of the 1929 Convention for the Suppression of Counterfeiting. As for The Hague Convention formula, it intends to «deny safe haven to offenders»[88], so that the forum State is placed under a duty to prosecute without even the necessity of a request for extradition by the territorial State. More importantly, the formula of interest for present purposes is the one contained in common article 49, 50, 129 and 146 of the four Geneva Conventions:

> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case. Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in [Article 50 of the 1949 Geneva Convention I, Article 51 of the 1949 Geneva Convention II, Article 130 of the 1949 Geneva Convention III and Article 147 of the 1949 Geneva Convention IV][89].

85 ILC, «The obligation to extradite or prosecute (aut dedere aut judicare), Final report of the International Law Commission», *op. cit.*, 2014,

86 André Da Rocha Ferreira et al., «The obligation to extradite or prosecute (*aut dedere aut judicare*)», *UFRGS Model United Nations Journal*, vol. 1, 2013, p. 207.

87 Article 7 of the 1970 Hague Convention for the suppression of unlawful seizure of aircraft.

88 Da Rocha Ferreira et al., «The obligation to extradite or prosecute (*aut dedere aut judicare*)», *op. cit.*, 2013, p. 207.

89 Article 49 of the 1949 Geneva Convention I, Article 50 of the 1949 Geneva Convention II, Article 129 of the 1949 Geneva Convention III and Article 146 of the 1949 Geneva Conven-

Thus, the 1949 Geneva Conventions provide a model where prosecution is an obligation, while extradition is only an option; it becomes an obligation only if the forum State fails to submit war criminals to prosecution. If a State does not wish to prosecute an alleged war criminal, then it must extradite them so that another State can proceed to prosecution. The forum State therefore has a «free choice»[90] between prosecution and extradition, so that the duty to prosecute may not be subsidiary to extradition. In any event, if the forum State refuses to extradite its own nationals, then it should proceed to prosecute them itself.

This mechanism has led some scholars to talk about a '*primo prosequi, secundo dedere* obligation' instead of an '*aut dedere aut judicare* obligation', as it appears that the grave breaches system establishes an unconditional obligation to prosecute[91]. This interpretation was later confirmed by the ILC, in its final report on 'The obligation to extradite or prosecute (*aut dedere aut judicare*)' of 2014[92]. Basing its conclusions on the findings of the Committee against Torture in the Guengueng et al. v. Senegal case[93], and of the ICJ in the Belgium v. Senegal case [94], the ILC concludes that «the choice between extradition and submission for prosecution under the Convention did not mean that the two alternatives enjoyed the same weight»[95]. Conversely, prosecution is understood as an obligation, and extradition as an option. Nevertheless, State practice tends to say otherwise, as it seems that there is a tendency to exercise universal jurisdiction on a subsidiary basis to extradition to States with a direct link to the

tion IV; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, articles 11 and 85.

90 Claus Kreβ, «Reflections on the Iudicare Limb of the Grave Breaches Regime», *Journal of International Criminal Justice,* vol. 7, p. 796.

91 Moulier, «L'obligation de 'faire respecter' le droit international humanitaire», *op. cit.*, 2010b, p. 767.

92 ILC, Final Report on 'The obligation to extradite or prosecute (aut dedere aut judicare)', 2014, Official Records of the General Assembly, sixty-sixth session, p. 15. Available at: http://legal.un.org/ilc/texts/instruments/english/reports/7_6_2014.pdf (Accessed: 22.05.2017).

93 Doc. CAT/C/36/D/181/2001, 19 May 2006, para. 9.7.

94 ICJ, Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment of 20 July 2012, ICJ Reports 2012, p. 422, paras. 94-95.

95 ILC, Final Report on 'The obligation to extradite or prosecute (aut dedere aut judicare)', 2014, Official Records of the General Assembly, sixty-sixth session, p. 15. Available at: http://legal.un.org/ilc/texts/instruments/english/reports/7_6_2014.pdf (Accessed: 22.05.2017).

crime[96]. The Institut de Droit International emphasized such policy in its 2005 resolution on universal jurisdiction:

> Any State having custody over an alleged offender, to the extent that it relies solely on universal jurisdiction, should carefully consider and, as appropriate, grant any extradition request addressed to it by a State having a significant link, such as primarily territoriality or nationality, with the crime, the offender, or the victim, provided that such State is clearly able and willing to prosecute the alleged offender[97].

However, it should be noted that this tendency does not amount to a legal obligation, but only to a judicial policy, and it should not overshadow the fact that the Geneva Conventions clearly establish a legal obligation to prosecute alleged criminals of grave breaches, while extradition is solely an option.

1.1.2. Consequences at national level

Pursuant to common article 49, 50, 129 and 146 of the four Geneva Conventions, the obligation to extradite or prosecute the grave breaches of the Geneva Conventions therefore entails several requirements at domestic level to be effective, namely: to provide for effective penal sanctions with respect to the grave breaches of national law, to search out and investigate alleged war criminals, to prosecute them, including on the basis of universal jurisdiction where necessary, and to provide for extradition mechanisms in national law.

1.1.2.1. The obligation to provide for effective penal sanctions

Firstly, the obligation calls for a legislative response, as the grave breaches must be criminalized in national law. In accordance with the first paragraph of articles 49, 50, 129 and 146 of the four Geneva Conventions:

> The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following article.

96 Kreβ, «Reflections on the Iudicare Limb of the Grave Breaches Regime», *op. cit.*, 2009, p. 798.

97 Institut de droit international, 2005 Resolution on Universal Jurisdiction, article 3(c) and (d). Quoted in Kreβ, «Reflections on the Iudicare Limb of the Grave Breaches Regime», *op. cit.*, 2009, p. 798.

The obligation therefore applies in peacetime. As emphasized by Marco Sassòli et al., it is necessary to enshrine penalties in national legislation, so that the principle *nulla poena sine lege* is guaranteed. National legislation is also essential in order to define the corresponding mechanisms, procedures, and jurisdictions applicable to the grave breaches regime[98]. As the 1952 official Commentary to the Conventions mentions, the obligation to enact penal legislation entails a duty to

> specify the nature and extent of the penalty for each infraction, taking into account the principle of due proportion between the severity of the punishment and the gravity of the offense[99].

The 2016 official Commentary further emphasizes the deterrent dimension of penal sanctions and holds that «they should stop ongoing violations of humanitarian law and prevent their repetition or the occurrence of new violations»[100]. Consequently, and following general trends in the theory of criminal law, the celerity of penal sanctions is highlighted as a decisive element of deterrence, together with their appropriate visibility and dissemination[101]. Another element, which is specific to IHL, is the necessity to equally apply penal sanctions to all perpetrators, so as to avoid the so-called 'victor's justice'[102].

The criminalization of the grave breaches at national level entails several consequences. In particular, it should be noted that there is no unique way of integrating the grave breaches into the national criminal legislation, and the weight will fall upon the legislature or the judiciary depending on the option chosen by the State parties to do so. As the 2016 official Commentary notes, there are four options. The first consists in simply «applying the existing military or ordinary criminal law»[103]. Pursuant to this approach, the national criminal law already enshrines the relevant crimes and does not need to be amended. As Knut Dörmann and Robin Geiβ note, this option can be effective in some cases:

98 ICRC, *How does the law protect in war*, Part I, Chapter 3, pp. 8-10.
99 Pictet (dir.), *The Geneva Conventions of 12 August 1949: Commentary. Volume I*, *op. cit*, 1952b, p. 364.
100 La Haye, «Article 49: Penal sanctions», *op. cit.*, 2016, para. 2842.
101 *Ibid*.
102 *Ibid*.
103 *Ibid*., paras. 2847-2851.

> After all, life-time imprisonment for the act of murder as an ordinary crime would appear to be as effective a penal sanction as a life-time imprisonment for a willful killing in the sense of Article 50 of the First Geneva Convention...[104]

Nonetheless, this approach remains problematic insofar as it presupposes that the existing legislation exactly corresponds to the conduct prohibited under IHL. It is quite unlikely that the existing national legislation appropriately takes into account the specificities of the law of armed conflicts and provides for sanctions proportionate to the seriousness of the offences committed. The nexus with the armed conflict and specific concepts linked to IHL such as 'protected persons' can hardly be adequately grasped by non-specific legislation. Consequently, some grave breaches could «neither be prosecuted nor effectively sanctioned»[105]. Furthermore, if that first option were sufficient, one could wonder what purpose would be served by the obligation to provide for effective penal sanctions. In this sense, Knut Dörmann and Robin Geiβ correctly observe that:

> [a]n overly strict reading of the obligation would thus contradict the principle, anchored in article 31(1) of the Vienna Convention on the Law of Treaties, that treaty provisions are to be interpreted in good faith and that unreasonable or absurd results are to be avoided. An interpretation based on good faith militates against any interpretation that renders a treaty obligation meaningless[106].

In this line of reasoning, if the High Contracting Parties felt the need to enshrine an obligation to provide for effective penal sanctions in the four Geneva Conventions, then it would make sense to expect more than simply referring to existing legislation. To support this interpretation, Knut Dörmann and Robin Geiβ emphasize that the statutes of the ICTY and ICTR allow for the prosecution of a suspect already tried before a national court for acts constituting serious violations of IHL if the behaviors at stake were catego-

104 Knut Dörmann and Robin Geiβ, «The implementation of Grave Breaches into Domestic Legal Orders», *Journal of International Criminal Justice*, vol. 7, 2009, p. 708.

105 *Ibid.*, p. 709.

106 *Ibid.*

rized ordinary crimes[107]. Therefore, prosecuting these acts again before the *ad hoc* international criminal tribunals does not infringe upon the *non bis in idem* principle, to the extent that they were tried as ordinary crimes under national law. Nevertheless, if a State were to choose this model, it would be advisable to at least include aggravating/mitigating circumstances in order to reflect the special nature of the grave breaches and to ensure that the existing legislation is interpreted in light of international law[108].

As for the second option, it requires State parties to criminalize all serious violations of IHL by means of a general reference to the relevant provisions of IHL and international criminal law[109]. This option presents several advantages: it is clear, economical as it prevents the legislature from translating each grave breach into a crime in national legislation, and it avoids distortions between the international and national provisions[110]. This option can take the form of two models: the 'dynamic' and 'static' reference models[111]. The former implies a reference to the specific relevant provisions of IHL and international criminal law. While this model overall responds to legality concerns, it also «automatically incorporates deficiencies of the legal provision it refers to»[112], as there is no adaptation whatsoever at the national level. The latter entails a reference to the «laws and customs of war» and would consequently integrate further customary developments[113]. The advantage of this model is that it does not need further legislative modifications at the national level as the relevant provisions of international law evolve.

However, this model does present problems regarding the application of the principle of legality in criminal law, insofar as it may lead to the direct application of norms of customary international law[114]. In addition, both models present difficulties, as they leave considerable room for interpretation in the hands of judges, who are the ones responsible for the clarification and

107 Statute ICTR, article 9(2)(a); Statute ICTY, article 10(2)(a). Quoted in Dörmann and Geiβ, «The implementation of Grave Breaches into Domestic Legal Orders», *op. cit.*, 2009, p. 709.

108 *Ibid.*, p. 715.

109 La Haye, «Article 49: Penal sanctions», *op. cit.*, 2016, paras. 2847-2851.

110 Dörmann and Geiβ, «The implementation of Grave Breaches into Domestic Legal Orders», *op. cit.*, 2009, p. 711.

111 *Ibid.*

112 *Ibid.*, p. 712.

113 *Ibid.*

114 *Ibid.*

interpretation of the law in light of international law. In this respect, the obstacles avoided by the legislature, such as the translation and accommodation of international law into national criminal law, eventually fall upon the judiciary[115]. Therefore, the difficulties are not avoided but merely transferred from an authority to another.

A third option is the possibility to amend the existing national law in order to specifically criminalize the grave breaches in national law[116], what Knut Dörmann and Robin Geiβ call an «autonomous national legal basis for the prosecution of grave breaches»[117]. They further divide this model into two sub-categories, as the national legal basis allowing prosecution of grave breaches can be integrated into criminal law or in a stand-alone national law. This model may present issues relating to the principle of legality only to the extent that the national legislation uses concepts typical of IHL, such as 'protected person' or 'international/non-international armed conflict'[118]. More importantly, the adoption of national legislation entails the risk of deviating from the standards established by international law. Therefore, the differing definition of the grave breaches at the national level might alter their scope *ratione materiae*[119]. Besides, this option also implies a greater task for the legislature and involves an extensive and thorough study of the existing legal framework both at the national and international levels, as already observed in the 1952 official Commentary.

Finally, the last option is arguably the most desirable one, since it consists «in a mixed approach combining criminalization by a general provision with the explicit and specific criminalization of certain serious crimes»[120].

Nevertheless, the integration of the grave breaches into national law is not necessarily straightforward, as other elements that relate to principles of international criminal law must also be taken into account. In this respect, the State parties must enshrine in their legal orders the prohibition of statutory limits in case of commission of grave breaches of the Geneva Conventions.

115 *Ibid*.

116 La Haye, «Article 49: Penal sanctions», *op. cit*., 2016, paras. 2847-2851.

117 Dörmann and Geiβ, «The implementation of Grave Breaches into Domestic Legal Orders», *op. cit*., 2009, p. 713.

118 *Ibid*.

119 *Ibid*., p. 716.

120 La Haye, «Article 49: Penal sanctions», *op. cit*., 2016, paras. 2847-2851.

Even though the Geneva Conventions remain silent on this aspect, the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity stipulates that no statutory limitations shall apply to them[121]. The Rome Statute of the International Criminal Court (hereafter, 'Rome Statute') includes a similar provision. Indeed, article 29 provides that «[t]he crimes within the jurisdiction of the Court shall not be subject to any statute of limitations»[122]. While the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity has been ratified by 55 States only, 124 States are parties to the Rome Statute[123], thus reflecting some consensus on this aspect among the international community. Therefore, the State parties should pay attention to this element and not provide for statutory limitations for the grave breaches in their national criminal legislation.

The criminalization of the grave breaches also means that individual criminal responsibility must be clearly recognized. While the preparatory works of the Geneva Conventions denote the lack of consensus on other forms of individual criminal responsibility, practice has evolved. In this regard, assisting in, facilitating or aiding and abetting to commit these crimes, as well as planning or instigating their commission, are now recognized as conducts that give rise to the individual criminal responsibility of their perpetrators. As for commanders, they may be held responsible for the conduct of their subordinates. Command responsibility must be foreseen in the event that they fail to ensure that all measures are taken in order to prevent their subordinates from committing grave breaches, or if they do not punish them. Command responsibility is therefore based on the commander's failure to act. On the other hand, subordinates can be held responsible for following orders that they know are unlawful or manifestly unlawful. As a result, subordinates cannot be relieved from their individual responsibility on the grounds that they

121 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 26 November 1968, article 1: «[w]ar crimes as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, particularly the "grave breaches" enumerated in the Geneva Convention of 12 August 1949 for the protection of war victims».

122 Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 90, article 29.

123 See: https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (Accessed: 22.06.2016).

simply followed orders, even though it may be taken into account as a mitigating factor[124].

A parallel aspect that national legislators must take into account is the need to prohibit or at least alter the principle of immunity, a principle derived from State sovereignty. There are two forms of immunity: personal and functional. The former refers to the protection of the acts of specific State officials during their mandate and also extends to the acts adopted in their private capacity (immunity *ratione personae*). The latter refers to the acts adopted by State officials in their official capacity, which remain protected upon the end of their mandate (immunity *ratione materiae*). There is little doubt that the principle of immunity is necessary and still valid today in order to ensure smooth international relations and avoid unnecessary interferences in other States' internal affairs. Nonetheless, if understood as an absolute principle, immunity may also constitute a procedural obstacle to the fight against impunity, as it may protect State officials accused of grave breaches of the Geneva Conventions from being prosecuted. Hence, unconditional immunity clauses have been condemned by different bodies, including the Inter-American Court of Human Rights[125], and have been prohibited by the statutes of the different international criminal tribunals. In this respect, articles 7(2) of the ICTY Statute and 6(2) of the ICTR Statute explicitly exclude functional immunity in the case of international crimes in the exact same terms:

> The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

The Rome Statute on the ICC goes even further and excludes all types of immunity, qualifying official capacity as irrelevant:

> 1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person

124 La Haye, «Article 49: Penal sanctions», *op. cit.*, 2016, paras. 2853-2856.

125 See, e.g.: Inter-American Court on Human Rights, Case Barrios Altos v. Peru, 14 March 2001, paras. 41-44.

> from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
>
> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person[126].

In this respect, it is worth mentioning that the ICJ established a distinction between incumbent and former ministers in the 2002 'Case concerning the Arrest Warrant' in considering that immunity does not apply to *incumbent* ministers for foreign affairs[127]. This case opposed Belgium against the Democratic Republic of Congo, as a Belgian judge had issued an arrest warrant against the then incumbent Minister for Foreign Affairs, Mr. Yerodia, on the grounds of inciting genocide, crimes against humanity, and grave breaches of the Geneva Conventions. Even though this case deals with the Convention against Torture, it provides guidance on the meaning and implications of the system established by the Geneva Conventions, to the extent that the obligation to prosecute or extradite is spelled out in similar terms. The Court held that incumbent ministers benefit from full immunity, while former ministers «no longer enjoy all of the immunities accorded by international law in other States»[128]. As a result, the arrest warrant failed to respect the immunity of Mr. Yerodia and Belgium had violated its obligations under international law. While this solution seems to contradict the wording of the Rome Statute at first sight, the Court went on to consider that international criminal tribunals, including the ICC, may prosecute an incumbent or former Minister for Foreign Affairs[129]. Consequently, it can be inferred that *national* jurisdictions cannot prosecute incumbent State officials and must wait until immunity is waived or a person ceases to hold a State office in order to enforce the system of grave breaches.

This approach is not entirely clear and remains controversial, especially in light of the ICC's subsidiary competence and the objective pursued by international criminal law. On the one hand, there seems to be room for contradictions or at least uncertainties, insofar as the application of the case-law of the

126 Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 90, article 27.

127 ICJ, Case concerning the arrest warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment of 14 February 2002, ICJ Reports 2002, p. 3, para. 54.

128 *Ibid*., para. 61.

129 *Ibid*.

ICJ would lead national courts not to prosecute incumbent State officials and oblige the ICC to act as a priority. On the other hand, allowing national courts to prosecute alleged war criminals only if their immunity has been waived or if they no longer hold a State office will likely lead the national authorities of the alleged war criminal precisely not to do so, in order to preserve the full effects of immunity. In this respect, the distinction established by the Court between immunity and impunity[130] seems undermined. It is also interesting to note that following this judgment before the ICJ, the Congolese military criminal code was modified so as to exclude immunity attached to official capacity in case of war crime or crime against humanity[131].

1.1.2.2. The obligation to search out and investigate alleged perpetrators

Criminalization at the national level is not sufficient. Indeed, State parties are also under a duty to search for alleged war criminals. This element differentiates the grave breaches regime from the other models of *aut dedere, aut judicare*. As already observed by Jean Pictet in the 1952 official Commentary to the Geneva Conventions, this aspect of the obligation implies activity on States' part as soon as the alleged offender is present on their territory[132]. The forum State shall initiate an investigation whenever it finds out that a person on its territory is suspected to have committed, or to have ordered to be committed, a grave breach of the Conventions. This is confirmed by the ILC, according to which the obligation to search for and submit to prosecution an alleged offender as provided by the 1949 Geneva Conventions «is not conditional on any jurisdictional consideration»[133]. States are not supposed to remain passive

130 «The Court emphasizes, however, that the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offenses; it cannot exonerate the person to whom it applies from all criminal responsibility» (para. 60).

131 Congolese military criminal code, ar ticle 163: «L'immunité attachée à la qualité officielle d'une personne ne l'exonère pas de poursuites pour crimes de guerre ou crimes contre l'humanité». Quoted in Momtaz, «Les défis des conflits armés asymétriques et identitaires au droit international humanitaire», *op. cit.*, 2010, p. 116.

132 Pictet (dir.), *The Geneva Conventions of 12 August 1949: Commentary. Volume I, op. cit*, 1952b, p. 366.

133 ILC, «The obligation to extradite or prosecute (aut dedere aut judicare), Final report of the International Law Commission», *op. cit.*, 2014, p. 5.

in the event of a grave breach but should actively search out for their responsible. This means that the forum State shall not wait until it receives a request for extradition to initiate an investigation. As Claus Kreβ puts it, limiting the exercise of the obligation to the receipt of an extradition request:

> would also run counter to the basic principle underlying the whole scheme – the exercise of universal jurisdiction in the interest of the international community, rather than the exercise of jurisdiction by representation[134].

The 2012 case concerning 'Questions relating to the Obligation to Prosecute or Extradite'[135] opposing Senegal to Belgium provides guidance on the content of the obligation to investigate. In particular, the ICJ held that the obligation to investigate «must be interpreted in the light of the object and purpose» of the treaty at stake (para. 86). In this particular case, the object and purpose of the provisions on the obligation to prosecute or extradite are to fight against impunity and ensure that alleged war criminals do not benefit from safe havens.

It is worth noticing that establishing the legislation required for the implementation of the obligation is not sufficient, as the authorities must actually exercise their jurisdiction «starting by establishing the facts» (para. 85). Thus, «the authorities concerned must be just as demanding in terms of evidence as when they have jurisdiction by virtue of a link with the case in question» (para. 84) and the preliminary enquiry must start immediately as soon as the authorities have reason to suspect that a person present on their territory may be responsible for grave breaches of the Geneva Conventions. This point is reached, at the latest, when the first complaint is filed against the person (para. 88). Furthermore, according to the Court, the obligation entails the establishment of the relevant facts «in order to corroborate or not the suspicions regarding the person in question» (para. 83). In this respect, superficial questioning that solely aims to establish the alleged criminal's identity and

134 Kreβ, «Reflections on the Iudicare Limb of the Grave Breaches Regime», *op. cit.*, 2009, p. 796 (in this article, the author traces the origins of the *aut dedere aut judicare* principle to the exercise of jurisdiction by representation [*principe de la eompétence déléguée, stellvertretende Strafrechtspflege*]). See p. 791.

135 ICJ, Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment of 20 July 2012, ICJ Reports 2012, p. 422.

inform them of the charges is not sufficient. Finally, the forum State should seek the cooperation of the authorities of the State where grave breaches took place or where complaints have been filed in this sense[136]. In light of these elements, the ICJ found that Senegal had violated article 6 of the Convention against Torture, as it did not immediately initiate a preliminary inquiry as soon as it had reasons to suspect that the accused had committed acts of torture.

1.1.2.3. The obligation to prosecute, including on the basis of universal jurisdiction

Thirdly, State parties are subject to an obligation to prosecute, including on the basis of universal jurisdiction where necessary. It is interesting to note that the ICJ considered that the forum State is required to submit the case to its competent authorities for prosecution, regardless of any extradition request[137]. What is more, prosecution is understood as an international obligation, «the violation of which is a wrongful act engaging the responsibility of the State»[138]. In particular, in the event that complaints «include a number of serious offenses», then the relevant State «is under an obligation to submit the allegations concerning those acts to its competent authorities for the purpose of prosecution»[139]. The ICJ also held that proceedings should take place without delay and that the forum State cannot invoke financial difficulties or provisions of national law to justify its breach of the obligation to prosecute[140]. In sum, the obligation to prosecute requires the forum State to «take all measures necessary for its implementation as soon as possible, in particular, once the first complaint had been filed against» the suspect[141]. Therefore, the timeliness of the prosecution is important in order to allow the fulfillment of the Geneva Conventions' object and purpose, i.e. to avoid safe havens for alleged war criminals.

Nevertheless, the fulfillment of the obligation to prosecute does not necessarily mean that it will actually result in the institution of proceedings, as

136 ILC, «The obligation to extradite or prosecute (aut dedere aut judicare), Final report of the International Law Commission», *op. cit.*, 2014, p. 9.

137 ICJ, Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment of 20 July 2012, ICJ Reports 2012, p. 422, para. 94.

138 *Ibid.*, para. 95.

139 *Ibid.*, para. 102.

140 *Ibid.*, paras. 112-115.

141 *Ibid.*, paras. 112-117.

what is required from national authorities is to follow the same standards as the ones applied for any alleged offense under national law[142]. It must also be noted that there cannot be an actual duty to punish, as it would infringe upon the presumption of innocence, a pillar of modern criminal justice systems. In this regard, the authorities of the forum State must always comply with the right to a fair trial when conducting such proceedings.

An element related to the obligation to prosecute is the obligation to vest national courts with universal jurisdiction over grave breaches. When the *aut dedere aut judicare* rule applies, the forum State must ensure that its courts can exercise all possible forms of jurisdiction, including universal jurisdiction, in those cases in which it will not be possible to extradite the suspect to another State or surrender them to an international tribunal. Common Article 49 indeed clearly establishes a system of universal jurisdiction in the repression of the grave breaches:

> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, *regardless of their nationality*, before its own courts[143] [emphasis added].

Normally, tribunals' jurisdiction is limited on the basis of the principles of personality, nationality, territoriality and security. In this regard, national criminal law usually accepts some extra-territorial application of jurisdiction if the acts at stake are committed by their nationals (principle of nationality or active personality jurisdiction), against their nationals (passive personality jurisdiction), or affect State's security (protective principle jurisdiction)[144]. Consequently, these acts must entail some sort of nexus with the forum State for its tribunals to be competent. These rules are considered an extension of the principle of State sovereignty.

Conversely, universal jurisdiction, in its pure formulation, does not require any nexus with the prosecuting State. Pursuant to the universal jurisdiction doc-

142 *Ibid*., paras. 90-94.

143 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 Aug. 1949, 75 U.N.T.S. 31, article 49; Geneva Convention (II), article 50; Geneva Convention (III), article 129; Geneva Convention (IV), article 146.

144 ICRC, Factsheet https://www.icrc.org/eng/assets/files/2014/universal-jurisdiction-icrc-eng.pdf (Accessed: 01/04/2017).

trine, some crimes are so heinous that their perpetrators cannot remain unpunished and hide behind the shield of sovereign immunity doctrines. Universal jurisdiction mechanisms first emerged in relation to piracy, for States to be able to exercise jurisdiction over areas where they had no territorial power, the *terrae nullis*[145]. The underpinning was that all States had an interest in combating maritime piracy so that they enshrined universal jurisdiction in their national legal orders. Nowadays, universal jurisdiction may be defined as follows:

> [T]he ability of the court of any State to try persons for crimes committed outside their territory that are not linked to the State by the nationality of the suspect or the victims or by harm to the State's own national interests[146].

Universal jurisdiction also applies to other core international crimes, such as genocide, crimes against humanity, and torture. The establishment of universal jurisdiction mechanisms is justified by the nature of the crimes committed, which are so serious that they undermine the international legal order and cannot go unpunished. They constitute a blatant violation of the principle of humanity and undermine international peace and security, so that it is necessary to organize their penal repression regardless of the nationality of their authors. Universal jurisdiction therefore reflects the duality of public international law to the extent that it aims to protect human beings on the one hand, and to preserve certain fundamental values that belong to the international public order on the other. The prohibition of these crimes is non-derogable and constitutes the nucleus of public international law. All States have therefore an interest in ensuring that perpetrators are held accountable, as observed by Roger O' Keefe:

> [The basis for such jurisdiction] had to be universality, a universality justified that what had been breached was a rule of international law, the manifestation not of the sovereign will of a single State but of the combined sovereign wills of the High Contracting Parties and thus transcending, *inter se*, the usual international limits on assertions of national criminal jurisdiction[147].

145 Da Rocha Ferreira, «The obligation to extradite or prosecute (*aut dedere aut judicare*)», *op. cit.*, 2013, p. 5.

146 *Ibid*.

147 Roger O' Keefe, «The Grave Breaches Regime and Universal Jurisdiction», *Journal of International Criminal Justice*, vol. 7, 2009, p. 823.

In this sense, universal jurisdiction constitutes the nexus between State sovereignty and the norms of international law dealing with international responsibility for violations of supranational interests; it is not an extension of national authorities' jurisdiction to protect State interests, but rather the exercise of State sovereignty to safeguard the interests of the international community[148].

In the case of the Geneva Conventions, the object and purpose of the provisions on the obligation to prosecute or extradite are to deny safe havens to alleged war criminals. As a result, the nationality of the suspect becomes irrelevant and national tribunals are required to initiate proceedings anyway. No mention is made either to the place where the grave breaches took place or to the nationality of the victims. It is interesting to note that the universal jurisdiction clause enshrined in the Geneva Conventions is not optional. On the contrary, State parties are under a clear mandate to enact national legislation that allows national judges to prosecute alleged war criminals regardless of their nationality. It is likewise important to note that the obligation to enshrine universal jurisdiction in national law applies to all State parties and not only to the parties to the armed conflict where the grave breaches have taken place[149].

This interpretation is sustained by State practice. As observed by the ICRC, the provisions on universal jurisdiction over grave breaches have not become a dead letter, as more than 100 States have established «some form of universal jurisdiction over serious violations IHL in their national legal order»[150]. What is more, national provisions have also had an impact, as «investigation and prosecution on the basis of universal jurisdiction has increased», and «recent national court decisions and State initiatives have demonstrated that the exercise of the principle of universal jurisdiction is gaining more acceptance»[151].

According to the ICRC[152], national legislation must clearly indicate the conditions that may trigger the proceedings on the basis of universal jurisdic-

148 Abraham Martínez Alcañiz, *El principio de justicia universal y los crímenes de guerra*, Madrid, Instituto Universitario General Gutiérrez Mellado de investigación sobre la Paz, la Seguridad y la Defensa, 2015, p. 148.

149 Martínez Alcañiz, *El principio de justicia universal y los crímenes de guerra*, *op. cit.*, 2015, p. 814.

150 UNGA, «The scope and application of the principle of universal jurisdiction», Report of the Secretary General, 23.07.2014, A/69/174, p. 14.

151 *Ibid.*, p. 14.

152 ICRC, *Universal jurisdiction over war crimes – Factsheet*, March 2014. Available at: https://www.icrc.org/eng/assets/files/2014/universal-jurisdiction-icrc-eng.pdf (Accessed: 05.07.2016).

tion or justify their rejection. In any case, these conditions should not have the effect of impeding the effective prosecution of alleged war criminals. In this respect, common article 49 is quite vague and does not provide much detail as to how universal jurisdiction should be exercised. While the Geneva Conventions seem to provide for absolute universal jurisdiction, State practice demonstrates that some conditions have been associated with its exercise in many national legal orders. In particular, the presence of the suspect on the territory of the forum State is considered by many States as a precondition for the exercise of universal jurisdiction. According to the ICRC's National Implementation Database, more than 40 States require the presence of the suspect on their territory before initiating proceedings[153], even though in some cases, this condition is interpreted with some degree of flexibility: *in absentia* prosecution may take place if presence can be demonstrated at least once during the investigation or trial[154]. While this condition seems to contradict the letter of common article 49, it is reasonable from a practical standpoint. As rightly observed in the 2016 official Commentary to the First Geneva Convention:

> [i]n practice, State parties cannot effectively prosecute alleged perpetrators unless they were present in their territory or in places under their jurisdiction at some point in time[155].

In the same line of reasoning, some States require the consent of a governmental or legal authority for prosecution to take place on the basis of UJ[156]. The ICRC likewise emphasizes that universal jurisdiction is normally understood as a «subsidiary jurisdictional basis»[157]. In this regard, States normally understand universal jurisdiction as a way to avoid impunity in those cases where the national courts competent to «prosecute on the basis of territoriality or nationality, refuse or are not able to do so»[158].

153 National Implementation Database, ICRC Advisory Service on International Humanitarian Law. Available at: http://www.icrc.org/ihl-nat (Accessed: 05.07.2016). Quoted in UNGA, «The scope and application of the principle of universal jurisdiction», *op. cit.*, 2014, p. 15.

154 UNGA, «The scope and application of the principle of universal jurisdiction», *op. cit.*, 2014, p. 15.

155 La Haye, «Article 49: Penal sanctions», *op. cit.*, 2016, para. 2866.

156 UNGA, «The scope and application of the principle of universal jurisdiction», *op. cit.*, 2014, p. 15.

157 *Ibid*.

158 *Ibid*.

It should be noted that there is wide agreement among scholars that the obligation to vest national courts with universal jurisdiction over grave breaches has reached customary status, notably as a result of the universal ratification of the Geneva Conventions[159]. The ICRC Study on 'Customary International Humanitarian Law' also enshrines this norm in Rule 157 on 'jurisdiction over war crimes'[160], and this interpretation is shared among different learned societies such as the International Law Association and the Institut de Droit International[161]. This position is likewise endorsed by the ICTY[162]. Nonetheless, it is important to distinguish between the *obligation* to provide for universal jurisdiction over *grave breaches* and the *right* to provide for universal jurisdiction over *war crimes*, which therefore applies to serious violations of IHL too, including Common Article 3. Universal jurisdiction over *grave breaches* is a duty that falls upon all States as a treaty obligation deriving from the Geneva Conventions and which has acquired customary status. Conversely, international custom solely authorizes States to establish universal jurisdiction over *war crimes*. Pursuant to the current state of international law, there is no treaty or customary obligation, only a right to create a universal jurisdiction system over war crimes. Nevertheless, «[t]his right in no way diminishes the obligation existing under the Geneva Conventions to vest universal jurisdiction over grave breaches. This is not optional, but obligatory» as Jean-Marie Henckaerts notes[163].

159 See, *e.g.*: Jean-Marie Henckaerts, «The Grave Breaches Regime as Customary International Law», *Journal of International Criminal Justice*, vol. 7, 2009, pp. 603-701; Moulier, «L'obligation de 'faire respecter' le droit international humanitaire», *op. cit.*, 2010b, p. 767; Momtaz, «Les défis des conflits armés asymétriques et identitaires au droit international humanitaire», *op. cit.*, 2010, p. 115.

160 Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *op. cit.*, 2005, Rule 157: «States have the right to vest universal jurisdiction in their national courts over war crimes».

161 Momtaz, «Les défis des conflits armés asymétriques et identitaires au droit international humanitaire», *op. cit.*, 2010, p. 115.

162 ICTY, Prosecutor v. Tihomir Blaskic, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case IT-95-14-AR, 29 October 1997, para. 29: «The International Tribunal does not have the mission of replacing the jurisdiction of any State. By virtue of Article 9 of the statute, the International Tribunal and the national jurisdictions are concurrently competent. The national jurisdictions of the States of ex-Yugoslavia, as those of all States, are required by customary law to judge or to extradite those persons Isponsable for grave violations of international humanitarian law. The primacy of the Tribunal foreseen in Article 9(2) is applicable to all national jurisdictions or, if these jurisdictions lack this customary obligation, it can intervene and judge».

163 Henckaerts, «The Grave Breaches Regime as Customary International Law», *op. cit.*, 2009, p. 698.

1.1.2.4. The obligation to provide for extradition mechanisms

Finally, the fourth element of the obligation to prosecute or extradite is the obligation to make the grave breaches extraditable. In the event that the forum State decides to proceed to extradition, some conditions must always be fulfilled. On the one hand, the State requesting the extradition must provide evidence that the charges brought against the alleged offender are «sufficient», i.e. that a *prima facie* case is made against the accused[164]. The 2016 official Commentary underlines that this requirement aims:

> not only to protect individuals against excessive or unjustified requests, but also to ensure that the penal proceedings envisaged will not be frustrated or reduced in scope as a result of transfer to another State Party[165].

Since the objective of the grave breaches regime is to deny safe havens for alleged perpetrators, then a request for extradition intending to «protect its own nationals, and conduct a sham trial» should be refused[166]. In any case, whenever the alleged perpetrator is a national and the internal legislation does not authorize extradition, this should lead to prosecution before their own tribunals. As observed in the above-mentioned case concerning 'Questions relating to the Obligation to Prosecute or Extradite', extradition may only be to a State that has jurisdiction in some capacity to prosecute and try the alleged offender pursuant to an international legal obligation binding on the State in whose territory the person is present[167]. On the other hand, it must demonstrate that the accused will benefit from a fair trial and that their rights of defense will be safeguarded:

> In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949[168].

164 Pictet (dir.), *The Geneva Conventions of 12 August 1949: Commentary. Volume I*, *op. cit*, 1952b, p. 365.

165 La Haye, «Article 49: Penal sanctions», *op. cit.*, 2016, para. 2882.

166 *Ibid*.

167 ICJ, Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment of 20 July 2012, ICJ Reports 2012, p. 422, para. 120.

168 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 Aug. 1949, 75 U.N.T.S. 31, article 49 (4).

These safeguards comprise the principles of *non bis in idem*, *nullen crimen sine lege*, specialty, non-extradition of the suspect to stand trial on the grounds of ethnic origin, religion, nationality or political views, as well as the respect for the principle of *nonrefoulement*. As emphasized by the ILC, extradition cannot be substituted by «deportation, extraordinary rendition or other informal forms of dispatching the suspect to another State»[169].

Furthermore, it is worth mentioning that the obligation to extradite may be fulfilled through the surrender of the suspect to a competent international criminal jurisdiction. The relatively recent developments in international law have underlined a third alternative obligation, that to surrender the alleged offender to international criminal courts rather than prosecute itself or extradite to another State. As observed by Jean Pictet in the 1952 official Commentary, nothing in the paragraph excludes such possibility[170]. In this respect, the creation of the *ad hoc* international criminal tribunals by the UNSC and, to a greater extent, the establishment of the ICC underline the consensus at international level on the validity of this alternative. As Claus Kreβ holds, «the grave breaches regime has thus undergone an evolution through subsequent practice»[171].

1.2. From 'grave breaches' to 'war crimes'

The obligation to extradite or prosecute contained in the 1949 Geneva Conventions refers to the grave breaches[172], an exhaustive list of behaviors which must be repressed in national legislation. However, the scope of individual criminal responsibility has broadened throughout the years and now includes 'serious violations' of IHL. Nowadays, both categories – grave breaches and serious violations – constitute war crimes, so that the violations of IHL occurring both in IACs and NIACs may be repressed under international or

169 ILC, «The obligation to extradite or prosecute (aut dedere aut judicare), Final report of the International Law Commission», *op. cit.*, 2014, p. 10.

170 Pictet (dir.), *The Geneva Conventions of 12 August 1949: Commentary. Volume I*, *op. cit*, 1952b, p. 366.

171 Kreβ, «Reflections on the Iudicare Limb of the Grave Breaches Regime», *op. cit.*, 2009, p. 799.

172 Article 50 of the 1949 Geneva Convention I; Article 51 of the 1949 Geneva Convention II; Article 130 of the 1949 Geneva Convention III, and Article 147 of the 1949 Geneva Convention IV.

national criminal law. This evolution of international law is desirable. Indeed, prosecution over grave breaches may take place *vis-à-vis* behaviors occurring in IACs only, so that the same behavior could go unpunished simply because it was framed in an NIAC.

It should be noted in this regard that instead of providing for an international criminal liability for grave breaches in general, the Geneva Conventions create a list of offences deemed so serious that State parties «agreed to enact domestic penal legislation, search for suspects, and judge them or hand them over to another State for trial»[173].

Since some violations of the Geneva Conventions are described as 'grave breaches', there are other violations of IHL that do not enter into this category. This raises a question: one may indeed wonder what happens with regard to these other violations of the Geneva Conventions. Article 29 of the 1929 Geneva Convention already referred to the punishment of 'all' acts contrary to the Convention. As observed in the 1952 official Commentary, the intention of the members of the 1949 Diplomatic Conference was at least to maintain the threshold already established in 1929, so that all breaches to the Conventions should be punished by national law[174], with a large discretion left to the State parties on how to organize such punishment. Therefore, State parties are under an obligation to ensure that these other violations cease, but not necessarily to provide for *penal* sanctions for all these violations.

This distinction between grave breaches and the other violations of IHL is justified on the grounds that not all violations of IHL are of concern for the international community due to the level of details of such rules. As underlined by Yves Sandoz, accusing a person in charge of a canteen of a war crime because tobacco is sold at a higher price than local market prices (article 87 GC IV) is manifestly unjustified[175]. Consequently, the system established by the 1949 Geneva Conventions distinguishes between the penal repression of the «grave breaches», which is organized at the international level notably through the enforcement of the *aut dedere, aut judicare* principle, and the penal repression of the other breaches, which falls under national legislation. The inclusion of the definition of the grave breaches in the Conventions' text responded to the

173 Marko Divac Öberg, «The absorption of grave breaches into war crimes law», *International Review of the Red Cross*, vol. 91(873), 2009, p. 165.

174 Pictet (dir.), *The Geneva Conventions of 12 August 1949: Commentary. Volume I*, *op. cit*, 1952b, p. 367.

175 Sandoz, «The History of the Grave Breaches Regime», *op. cit.*, 2009, p. 674.

necessity to ensure universality in the treatment in their repression. As a result, the agreement among the State parties to the Geneva Conventions on the necessity to adopt legislation to enforce this provision highlights the consensus among the international community regarding the universal opprobrium of the grave breaches[176]. Establishing a list of offences for which individual criminal responsibility is incurred at international level arguably responds to considerations of legal certainty with respect to offenders too.

The grave breaches are therefore exhaustively listed in articles 50, 51, 130 and 147 of the four Geneva Conventions. Concretely, if committed against persons or property protected by the 1949 Geneva Conventions, the grave breaches include willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, compelling a prisoner of war to serve in the forces of the hostile Power, willfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, or taking of hostages[177]. The 1949 Geneva Conventions have therefore codified a certain number of violations of IHL and imposed an obligation upon all States to punish them.

The scope of the obligation to extradite or prosecute has evolved ever since. Additional Protocol I, adopted in 1977, defines the grave breaches in articles 11 and 85, in the following terms:

> Seriously endangering, by any willful and unjustified act or omission, physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of an armed conflict, in particular physical mutilations, medical or scientific experiments, removal of tissue or organs for transplantation which is not indicated by the state of health of the person concerned or not consistent with generally accepted medical standards which

176 Colleen Enache-Brown and Ari Fried, «Universal Crime, Jurisdiction and Duty: The Obligation of Aut Dedere Aut Judicare in International Law», *McGill Law Journal*, vol. 43, 1998, p. 622.

177 Article 50 GC I; article 51 GC II; article 130 GC III; article 147 GC IV.

would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and in no way deprived of liberty[178];

When committed willfully and if they cause death or serious injury to body and health:

- making the civilian population or individual civilians the object of attack;
- launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;
- launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage civilian objects;
- making non-defended localities and demilitarized zones the object of attack;
- making a person the object of an attack in the knowledge that he is hors de combat,
- the perfidious use of the distinctive emblem of the red cross and red crescent or other protective signs[179];

When committed willfully and in violation of the Conventions and the Protocol:

- the transfer by the occupying power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- unjustifiable delay in the repatriation of prisoners of war or civilians;
- practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;
- attacking clearly recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given, causing as a result extensive destruction thereof when such objects are not located in the immediate proximity of military objectives or used by the adverse party in support of its military effort;
- depriving a person protected by the Conventions or by Protocol l of the rights of fair and regular trial[180].

178 Additional Protocol I, article 11(4).
179 Additional Protocol I, article 85(3).
180 *Ibid.*, article 85(4).

As a result, Additional Protocol I clarifies some aspects. It adds new grave breaches to the list of the Geneva Conventions and criminalizes some violations of The Hague Law. In light of these elements, a few comments should be made relating to the content of the grave breaches and their corresponding scope.

Firstly, the grave breaches regime applies to IACs only. At the time when the Geneva Conventions were adopted, the State parties agreed to repress violations of IHL taking place in IACs only. Even though Common Article 3 establishes some behaviors which are prohibited at all times[181], the State parties decided not to include these offences into the list of 'grave breaches' in 1949, thus seemingly establishing a distinction of treatment between the breaches occurring in IACs and NIACs. The former called for a national penal response in line with international standards, while the penal repression of the latter was left to the discretion of the State parties. As highlighted by Yves Sandoz:

> The provision, in common Articles 50, 51, 130 and 147, that graves breaches have to be committed 'against persons or property protected by

181 Common Article 3 reads as follows: «In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
(1) 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) Iing 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.
(2) The wounded and sick shall be collected and cared for.
An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
The application of the preceding provisions shall not affect the legal status of the Parties to the conflict».

> the Convention' has to be taken in the narrow sense of the notion of 'protected persons or property', which are those precisely defined by the Conventions as applicable to international armed conflicts[182].

Despite advances, NIACs were not included within the scope of the grave breaches as defined by the Additional Protocols. The violations of Additional Protocol II were not considered 'grave breaches' and therefore fell outside of the scope of the obligation to extradite or prosecute. Nonetheless, while the existence of an exhaustive list of war crimes is essential for the credibility of international criminal law, and in particular with regard to legality and certainty concerns, this does not mean that the list should be immutable[183]. International law, including international criminal law, must adapt and take note of subsequent evolution.

A solution to fill in this gap could be to refer to customary international law. Nonetheless, the applicability of the grave breaches regime to NIACs on the basis of customary international law remains subject to debate, as the case-law of the ICTY has shown. Indeed, the ICTY was called on answering this question in the Tadić case. The United States Government submitted an *amicus curiae* brief supporting the application of the grave breaches regime to NIACs on the basis of customary international law[184], and Judge Abi-Saab endorsed this interpretation in his separate opinion[185]. However, this view was not shared by the majority, and the Appeals Chamber therefore excluded Common Article 3 from the scope of the grave breaches (para. 83) and held that a different

182 Sandoz, «The History of the Grave Breaches Regime», *op. cit.*, 2009, p. 675.

183 *Ibid.*, p. 676.

184 ICTY, Prosecutor v. Dusko Tadić a/k/a «Dule», Case (IT-94-1), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.
According to the amicus curiae, «the 'grave breaches' provisions of article 2 of the International Tribunal Statute apply to armed conflicts of a non-international character as well as those of an international character» (paras. 35-36). Quoted in Dieter Fleck, «Shortcomings of the Grave Breaches Regime», *Journal of International Criminal Justice*, vol. 7, 2009, p. 838.

185 «As a matter of treaty interpretation... it can be said that this normative substance has led to a new interpretation of the Geneva Conventions as a result of the 'subsequent practice' and *opinio juris* of the State parties: a teleological interpretation of the Conventions in the light of their object and purpose to the effect of including internal armed conflicts within the regime of grave breaches. The other possible rendering of the significance of the new normative substance is to consider it as establishing a new customary rule ancillary to the conventions, whereby the regime of grave breaches is extended to internal conflicts. But the first seems to me as the better approach». Quoted in Fleck, «Shortcomings of the Grave Breaches Regime», *op. cit.*, 2009, p. 838.

solution would constitute a violation of the principle of sovereignty[186]. Thus, as Dieter Fleck highlights, at least as regards the jurisdiction of the ICTY, the IAC criterion is necessary to trigger the grave breaches regime because article 2 of the Statute sticks to the wording of the Geneva Conventions[187].

In the same way, the debate over the customary nature of universal jurisdiction over grave breaches occurring both in IACs and NIACs has not been solved. The ICRC Study on 'Customary International Humanitarian Law' states in Rule 157 the right to vest universal jurisdiction over war crimes, regardless of the nature of the armed conflict. As noted above, this is not an obligation, but a permissive rule. Nonetheless, this constituted one of the points of discrepancy between the United States and the ICRC, as the former objected to this rule[188]. As Dieter Fleck observes, the ICRC answered that no objection against the exercise of universal jurisdiction for war crimes taking place in IACs and NIACs were formulated by the affected States, most notably by the suspect's State of nationality[189]. Hence the ICRC concluded that the principle of universal jurisdiction over all serious violations of IHL, including those occurring in NIACs, had been asserted as a permissive rule pursuant to customary international law. While universal jurisdiction over grave breaches is only one component of the grave breaches regime, this debate underlines the uncertainty surrounding its application to NIACs on the basis of customary law.

Secondly, even though at the time when the Geneva Conventions were drafted the intent of the State parties was not to establish international criminal responsibility over the grave breaches, this is no longer the case. Indeed, the provisions of the Geneva Conventions do not entail criminal consequences in

186 ICTY, Prosecutor v. Dusko Tadić a/k/a «Dule», Case (IT-94-1), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 80: «The international armed conflict element generally attributed to the grave breaches provisions of the Geneva Conventions is merely a function of the system of universal mandatory jurisdiction that those provisions create. The international armed conflict requirement was a necessary limitation on the grave breaches system in light of the intrusion on State sovereignty that such mandatory universal jurisdiction represents. State parties to the 1949 Geneva Conventions did not want to give other States jurisdiction over serious violations of international humanitarian law committed in their internal armed conflict – at least not the mandatory universal jurisdiction involved in the grave breaches system».

187 Fleck, «Shortcomings of the Grave Breaches Regime», *op. cit.*, 2009, p. 840.

188 *Ibid.*, p. 851.

189 *Ibid.*, p. 852.

international law, but in domestic law[190]. Therefore, whenever grave breaches are committed, a rule of international law is violated, but the criminal consequences must be established by the national law in accordance with the spirit of the Geneva Conventions. In this regard, the provisions of the Geneva Conventions serve as some sort of guidelines for national authorities. This element must be connected with the fact that at the time the Geneva Conventions were drafted, the expression 'war crime' was explicitly refused on the grounds that such expression should be reserved for the violations of The Hague Conventions[191]. A simple definition of war crime could be the following: «acts and omissions that violate international humanitarian law and are criminalized in international criminal law»[192]. Therefore, war crimes, contrarily to grave breaches, entail criminal responsibility at international level. This element is important insofar as the grave breaches provisions lack some indispensable elements of a proper criminal law, such as *mens rea*, modes of liability, defenses, penalties, rules of procedure[193], etc.

However, this changed with the adoption of Additional Protocol I, which describes grave breaches as 'war crimes', as a matter of codification of customary international law. The connection between the grave breaches and international criminal law is therefore established, and the grave breaches are officially recognized as a category of war crimes. Additional Protocol I thus acknowledges that the provisions of the Geneva Conventions on the grave breaches entail criminal consequences not only at domestic level but also at international level. This movement has been further developed with the adoption of the statutes of the different international criminal tribunals. In particular, article 2 of the Statute of the ICTY replicates the formula of the Geneva Conventions provisions on the grave breaches, thus confirming that the latter had become international crimes[194]. Likewise, the Statute of the ICC enshrines the grave breaches in article 8(2)(a), albeit the grave breaches contained in Additional Protocol I are codified separately, in article 8(2)(b)[195]. It is therefore on

190 Öberg, «The absorption of grave breaches into war crimes law», *op. cit.*, 2009, p. 166.

191 Sandoz, «The History of the Grave Breaches Regime», *op. cit.*, 2009, p. 675.

192 Öberg, «The absorption of grave breaches into war crimes law», *op. cit.*, 2009, p. 164.

193 *Ibid.*, p. 166.

194 *Ibid.*, p. 168.

195 This separation can be explained by the fact that the Geneva Conventions have been universally ratified, while Additional Protocol I has not. See: Öberg, «The absorption of grave breaches into war crimes law», *op. cit.*, 2009, p. 168.

this basis that charges based on the grave breaches provisions have been filed before different international tribunals[196].

However, the convergence or 'absorption'[197] of the grave breaches in war crime law is problematic regarding the lack of clear *mens rea* contained in the Geneva Conventions provisions. In this respect, the ICRC has held that the term 'willful', which is established in some grave breaches, include «international and reckless conduct, but excludes negligence»[198], a position confirmed by the ICTY[199]. It should also be noted that the Rome Statute has solved several issues, insofar as it provides for the same modes of liability regarding the grave breaches and the other war crimes[200].

As a consequence, grave breaches are no longer 'guidelines' for national authorities; they constitute war crimes themselves and may therefore be prosecuted both at national and international levels.

1.3. A mechanism with mixed results

The system established by the Geneva Conventions in order to repress IHL violations could have been groundbreaking. In some respects, it is; nonetheless, it also suffers from important deficiencies.

The grave breaches regime was groundbreaking at the time it was codified into the Geneva Conventions. As the first international treaty that enshrines universal jurisdiction over some violations of IHL, it was considered a promising mechanism to fight against impunity. Just like Common Article 1, it establishes a decentralized system whereby all States are vested with a legal interest in prosecuting alleged perpetrators of grave breaches. It therefore very much

196 See, e.g.: ICC, The prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case nº ICC-01/04-01/07, amended document containing the charges pursuant to Article 61(3)(a) of the Statute, 26 June 2008, Annex 1A; Extraordinary Chambers in the Courts of Cambodia, Kaing Guek Eav, OCIJ, Closing order indicting Kaing Guek Eav alias Duch, 8 August 2008, p. 44. Quoted in Öberg, «The absorption of grave breaches into war crimes law», *op. cit.*, 2009, p. 182. (In the Dutch case, the author notes that this choice was probably due to the greater acceptance of Cambodia of grave breaches).

197 Öberg, «The absorption of grave breaches into war crimes law», *op. cit.*, 2009.

198 *Ibid.*, p. 173.

199 ICTY, Celebici Case, IT-96-21-A, Appeals Judgment, 20 February 2001, para. 422. Quoted in Öberg, «The absorption of grave breaches into war crimes law», *op. cit.*, 2009, p. 173.

200 Öberg, «The absorption of grave breaches into war crimes law», *op. cit.*, 2009, p. 177.

reflects the idea that IHL stipulates *erga omnes* obligations, even in some cases, *jus cogens* obligations, so that the legal interest to prosecute alleged perpetrators of grave breaches becomes objective and universal. Following this line of reasoning, because of the special nature of the norms that are violated, the right to take legal action extends to all States, including non-specially affected States. It was therefore understood as a promising mechanism, effective in fighting against impunity.

In this respect, it seems that the obligation to prosecute or extradite in relation to the grave breaches has acquired customary status under the 1949 Geneva Conventions. As Jean-Marie Henckaerts demonstrates, while it is normally understood that only the 'substantive' rules of a treaty can reach customary status, the obligation to enact effective penal sanctions, the obligation to search and prosecute or extradite, and the obligation to establish universal jurisdictions over grave breaches should not be considered purely technical rules and can therefore aim to customary status[201]. Indeed, the purpose of these provisions is «to prevent and punish the commission of grave breaches», and to «avoid safe havens for persons suspected of grave breaches», and therefore «to combat impunity for grave breaches». These rules are consequently «fundamental to the respect of the human person» and cannot be categorized as technical rules, «purely related to the operation» of the Geneva Conventions and «self-contained within the treaty regime» of the Geneva Conventions. For all these reasons, it can be assumed that these rules may be considered customary rules of international law[202].

On the one hand, some have criticized the lack of actual State practice to support such claim. And it is true that national authorities have not been very active in this regard, especially during the cold war, to the point that Antonio Cassese described the provisions on national prosecution over grave breaches as «a dead letter»[203] in 1998. In 1965, the ICRC deplored that «it is to be admitted that in many countries the regulations for the repression of violations of the Geneva Conventions are not adequate»[204]. The same con-

201 Henckaerts, «The Grave Breaches Regime as Customary International Law», *op. cit.*, 2009, pp. 693-701.

202 *Ibid.*, pp. 693-694/699.

203 Antonio Cassese, «On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law», *European Journal of International Law*, vol. 9, 1998, p. 5.

204 ICRC, Respect of the Geneva Conventions. Measures taken to repress violations (vol. 1, 1965) ICRC doc. Conf. D 4a/1. Quoted in Dörmann and Geiβ, «The implementation of Grave Breaches into Domestic Legal Orders», *op. cit.*, 2009, p. 704.

cerns were expressed in 1998, on the occasion of the adoption of the Rome Statute, where the ICRC stated that «the obligation to prosecute war criminals already exists, but frequently remains a dead letter»[205]. It is worth recalling that the ILC was quite cautious about the recognition of the customary status of the obligation to extradite or prosecute in the 'Draft Code of crimes against the peace and security of mankind'. Indeed, the then Special Rapporteur Galicki proposed a draft article in this sense which was eventually rejected:

> 1. Each State is obliged either to extradite or to prosecute an alleged offender if such an obligation is deriving from the customary norm of international law.
> 2. Such an obligation may derive, in particular, from customary norms of international law concerning [serious violations of international humanitarian, genocide, crimes against humanity and war crimes].
> 3. The obligation to extradite or prosecute shall derive from the peremptory norms of general international law accepted and recognized by the international community of States (*jus cogens*), either in the form of international treaty or international custom, criminalizing any one of acts listed in paragraph 2[206].

In particular, there seemed to be general disagreement on the fact that the customary status of *aut dedere aut judicare* could derive from the existence of customary rules proscribing specific international crimes[207]. Therefore, the customary status of the prohibition of these crimes cannot solely constitute the basis of the customary nature of the obligation to prosecute or extradite. Nevertheless, the ILC underlines in its Final Report on the obligation to prosecute or extradite that «there may have been further developments in international law that reflect State practice and *opinio juris* in this respect» so that no hasty conclusions should not be made on the basis of this rejection. Furthermore, the ICJ did not adjudicate on the customary international law status of the

205 Dörmann and Geiβ, «The implementation of Grave Breaches into Domestic Legal Orders», *op. cit.*, 2009, p. 705.

206 Special Rapporteur Galicki, Fourth Report, A/CN.4/648, para. 95. Quoted in ILC, «The obligation to extradite or prosecute (aut dedere aut judicare), Final report of the International Law Commission», *op. cit.*, 2014, p. 16.

207 ILC, «The obligation to extradite or prosecute (aut dedere aut judicare), Final report of the International Law Commission», *op. cit.*, 2014, p. 17.

obligation to extradite or prosecute in the case concerning 'Questions relating to the Obligation to Prosecute or Extradite', as the dispute between Belgium and Senegal did not relate to breaches of obligations under customary international law when Belgium filed the application[208]. All these elements point to the uncertain customary status of the obligation to prosecute or extradite.

On the other hand, some scholars argue that the obligation to prosecute or extradite over grave breaches is supported by both State practice and *opinio juris*. In particular, the ICRC Study on 'Customary International Humanitarian Law' endorses such approach as Rule 158 on 'prosecution of war crimes' states the following:

> States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects[209].

To support such claim, the ICRC Study on 'Customary International Humanitarian Law' relies on the integration of the obligation to investigate and prosecute in several international treaties, numerous military manuals, national legislation and practice of national investigations and prosecutions of suspected war criminals. It also relies on the practice of different UN bodies, namely the UNSC, the UN General Assembly and the UN Commission on Human Rights. At judicial level, Claus Kreβ notes that the conflict in the former Yugoslavia triggered the reaction of national courts, so that:

> la base factuelle nécessaire pour pouvoir assumer l'existence d'une règle coutumière, est venue compléter l'opinio juris qui avait trouvé son reflet dans les textes conventionnels[210].

Moreover, with the further creation of the *ad hoc* international criminal tribunals and the establishment of the ICC, several States have adopted differ-

208 ICJ, Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment of 20 July 2012, ICJ Reports 2012, p. 422, paras. 53-55, 122.

209 Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *op. cit.*, 2005, p. 607.

210 Christian Tomuschat, «La cristallisation coutumière», in H. Ascensio, H., Emmanuel Decaux and Alain Pellet (eds.), *Droit International Pénal*, Pedone, Paris, 2000, p. 28. Quoted in Kreβ, «Reflections on the Iudicare Limb of the Grave Breaches Regime», *op. cit.*, 2009, p. 793.

ent laws of cooperation, which have had the effect of enhancing this practice of national prosecution. Thus, the *opinio juris* already reflected in treaty law has been completed by State practice, which can lead to the crystallization of customary international law.

In spite of this, the effective implementation of the grave breaches regime remains subject to important obstacles. These obstacles are both legal and political. First, there are limitations inherent in the grave breaches system. Arguably, the most important limitation is the exclusion of NIACs from the scope of the grave breaches regime as neither the Geneva Conventions nor the Additional Protocols provide for jurisdiction in the case of NIAC. As Dieter Fleck has shown, this exclusion entails two difficulties: on the one hand, it is too burdensome for international and national jurisdictions to assess whether an armed conflict is international or not in practice. In the same way, this means that national and international courts must prove that the victims are protected persons or protected property under the Geneva Conventions, i.e. an additional burdensome task. On the other hand, it is hardly understandable not to prosecute the atrocities that are committed in NIACs, albeit the same behaviors as the ones described in the grave breaches provisions are perpetrated[211].

Nonetheless, this exclusion from the grave breaches regime does not equate to an absolute exclusion of criminal responsibility in case of NIAC. Indeed, the international legal framework has evolved: it is now admitted that some 'serious violations' of IHL taking place in NIACs constitute war crimes over which national and international criminal courts may exercise jurisdiction. The difference therefore lies in the fact that this prosecution does not take place on the basis of the grave breaches. Pursuant to the statutes of the different international criminal tribunals, certain violations of IHL occurring in times of NIACs constitute war crimes, punishable under international criminal law. In this respect, the ICTY recognized that some violations to the law governing NIACs indeed constituted war crimes in the Tadić case[212]. Although this was a particular case, it set an important precedent. In the same way, the Statute of the ICTR, which was established one year after the ICTY, included

211 Fleck, «Shortcomings of the Grave Breaches Regime», *op. cit.*, 2009, p. 837.

212 ICTY, Prosecutor v. Dusko Tadić a/k/a «Dule», Case IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

NIACs' violations for the first time in article 4[213]. Nowadays, the most important effort of codification of war crimes is to be found in the Rome Statute, which defines four international crimes, including war crimes. The latter contains the grave breaches of the Geneva Conventions, «other serious violations of the laws and customs applicable in international armed conflicts», serious violations of Common Article 3, as well as «other serious violations of the laws and customs applicable in armed conflicts not of an international character»[214]. International legal developments and practice have therefore filled in the gap codified in the Geneva Conventions, through the recurrent use of Common Article 3 and some alignment of the regime of NIACs on that of IACs.

One consequence is that the grave breaches regime has been supplanted on different occasions by Common Article 3, which has been used «as a minimum yardstick in all armed conflicts» notably by the ICTY[215]. This solution is not surprising insofar as it avoids the arduous determination of the nature of the armed conflict before actually scrutinizing the violations of IHL at stake. Therefore, the only advantage of the grave breaches over the other categories of war crimes is the fact that the list of grave breaches is clear, benefits from universal endorsement and is clearly binding upon all States, in comparison with «the nebulous customary law origins of war crimes»[216]. Nonetheless, as Marko Divac Öberg emphasizes, the crystallization of war crimes in accepted international law will undermine this advantage[217].

Secondly, while universal jurisdiction over grave breaches has been codified in many domestic legal orders in practice, it remains unclear whether

213 UN Doc. S/RES/955, Statute of the International Tribunal for Rwanda, 08/11/1994, article 4: «The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to: a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; b) Collective punishments; c) Taking of hostages; d) Acts of terrorism; e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; f) Pillage; g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples; h) Threats to commit any of the foregoing acts».

214 Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 90, article 8.

215 Fleck, «Shortcomings of the Grave Breaches Regime», *op. cit.*, 2009, p. 839.

216 Öberg, «The absorption of grave breaches into war crimes law», *op. cit.*, 2009, p. 182.

217 *Ibid*.

the same holds true *vis-à-vis* the obligation to prosecute or extradite, and as to whether the relevant national authorities are aware of the fact that they have the duty to prosecute or extradite alleged perpetrators of grave breaches as soon as they are on their territory[218]. This obstacle to the effective enforcement of the grave breaches regime stems from the confusion that often exists between the obligation to prosecute or extradite and universal jurisdiction. While these two concepts complement each other and are consequently spelled out in the same provision in the Geneva Conventions, they are not strictly equivalent and should not be confused. As noted by Roger O'Keefe:

> The obligation aut dedere aut judicare is as much applicable when the underlying jurisdiction is based on territoriality, nationality, passive personality, the protective principle or any other basis of criminal jurisdiction provided for in the treaty in question[219].

Indeed, the exercise of universal jurisdiction by national courts is not a precondition for the enforcement of the obligation to prosecute or extradite. On the contrary, universal jurisdiction merely bestows national courts with the power to prosecute suspects if national courts cannot do so on the basis of territoriality, nationality, passive personality or the protective principle. Hence the distinction between jurisdiction and prosecution is essential. Along the same line, the fact that the obligation to prosecute or extradite presupposes the presence of the suspect on the territory of the forum State at the time of the trial does not mean that the exercise *in absentia* of universal jurisdiction over grave breaches is formally prohibited[220]. There cannot be an obligation to extradite if the suspect is not present on the territory of the forum State. However, if there is no obligation to provide for *in absentia* universal jurisdiction, there are no rules that prohibit it either[221].

Thirdly, State parties have made little use of this mechanism. According to the 2016 official Commentary to the First Geneva Convention, the first national case where a suspect was prosecuted for grave breaches on the basis of universal jurisdiction dates back to 1994, and only 17 cases have

218 La Haye, «Article 49: Penal sanctions», *op. cit.*, 2016, paras. 2890-2891.

219 O' Keefe, «The Grave Breaches Regime and Universal Jurisdiction», *op. cit.*, 2009, p. 828.

220 *Ibid.*

221 *Ibid.*

been reported whereby national courts have exercised universal jurisdiction over alleged perpetrators of war crimes or grave breaches[222]. Political considerations often come to the fore at that point. Indeed, some politicians[223] consider that mandatory universal jurisdiction is a «dangerous and illegitimate»[224] tool, which has been used selectively and most notably by former empires towards State officials of their former colonies. Furthermore, the well-known debate between the need to fight against impunity and the necessity to restore social peace after an armed conflict has led several States to give preference to amnesties over justice. Another – practical – argument is the simple fact that it is extremely difficult for courts to gather evidence, interrogate witnesses, arrest suspects and conduct a proper investigation for acts committed in a foreign country.

All in all, despite the evident limitations of the grave breaches regime, its importance lies in the fact that it acted as a «blueprint for other treaties, ranging from the Torture to the Enforced Disappearances Conventions»[225], thus establishing an important precedent in international law. As regards IHL, the grave breaches regime constitutes the embryo of the penal system of repression of IHL violations, which has considerably evolved since the adoption of the Geneva Conventions in 1949. As Knut Dörmann and Robin Geiβ put it:

> Prosecuting grave breaches and other serious international crimes is no longer regarded as an historic anomaly specific to the post-war period, but as a primary concern of the international community[226].

In addition, the adoption of the Rome Statute has had a domino effect, as it compels national legislators to effectively criminalize the grave breaches together with the other serious violations of IHL which amount to war crimes. While in 1969 only 49 out of 122 State parties to the Geneva Conventions had criminalized the grave breaches of their national legal orders, this figure rises to 125 out of 196 State parties in 2016[227].

222 La Haye, «Article 49: Penal sanctions», *op. cit.*, 2016, para. 2889.

223 See, e.g.: Henry Kissinger, «The Pitfalls of Universal Jurisdiction», *Foreign Affairs*, July/August 2001.

224 Fleck, «Shortcomings of the Grave Breaches Regime», *op. cit.*, 2009, p. 848.

225 James Stewart, «Introduction», *Journal of International Criminal Justice*, vol. 7, 2009a, p. 654.

226 Dörmann and Geiβ, «The implementation of Grave Breaches into Domestic Legal Orders», *op. cit.*, 2009, p. 705.

227 La Haye, «Article 49: Penal sanctions», *op. cit.*, 2016, paras. 2857-2858.

Therefore, the development of international criminal justice in recent decades has arguably led to a renewed interest in the grave breaches regime, and more broadly, in national prosecution of serious violations of IHL.

2. COOPERATING WITH INTERNATIONAL CRIMINAL JURISDICTIONS

Another means to enforce States' obligation to ensure respect for IHL is cooperation with international criminal courts. A detailed account of the evolution of international criminal justice would go beyond the scope of this thesis. Nonetheless, it is important to briefly describe it, as States can enforce their obligation to ensure respect for IHL through cooperation with the international criminal tribunals in charge of punishing perpetrators of IHL violations that amount to war crimes.

2.1. The development of international criminal justice

Firstly, the establishment and legacy of the Nuremberg and Tokyo trials are analyzed, as they set a revolutionary precedent in the history of international criminal justice. Then, the creation, development, and duty of cooperation with the *ad hoc* international criminal tribunals and the International Criminal Court are studied.

2.1.1. Cornerstone: the Nuremberg and Tokyo trials

The landmark of international jurisdictional developments providing for the repression of IHL violations can be situated around World War II, with the establishment of the Nuremberg and Tokyo trials. In reaction to the atrocities committed during the Second World War, the Allies created the Nuremberg and Tokyo tribunals in charge of prosecuting war criminals.

Planning for the establishment of such tribunals was the result of a coordinated effort by the Allies[228]. In particular, the United Nations War Crime

[228] Douglas Guilfoyle, *International Criminal Law*, Oxford University Press, 2016, p. 61.

Commission was established in 1943 in order to identify German individuals who should be prosecuted for war crimes, and President Roosevelt, Prime Minister Churchill, and Premier Stalin signed a declaration at the Moscow Conference on atrocities, where they called for the trial of officers and soldiers who participated in «atrocities, massacres, and executions» and more importantly for the punishment of «German criminals whose offenses have no particular geographical localization» by «joint decision of the government of the Allies»[229]. After much debate regarding the fate of the perpetrators, the United States, the United Kingdom and the Union of Soviet Socialist Republics agreed on the organization of trials[230]. It led to the adoption of the Charter of the International Military Tribunal at Nuremberg (hereafter, 'IMT Charter') annexed to the London Agreement concluded among the four victorious States (France, the Soviet Union, the United Kingdom, and the United States)[231].

Pursuant to article 1 IMT Charter, the objective of the Tribunal was «the just and prompt trial and punishment of the major war criminals of the European Axis». In particular, article 6 states that the Tribunal had jurisdiction to:

> try and punish persons who, acting in the interest of the European Axis countries, whether as individuals or as members of organizations, committed [crimes against peace, war crimes, and crimes against humanity].

The principles of the IMT Charter were reproduced at the war crimes trial in Tokyo[232], where a similar tribunal was established by a special proclamation issued by the Supreme Allied Commander of the Far East, General Douglas MacArthur. 24 people were indicted in Nuremberg, but only 21 of them could actually be prosecuted. The Nuremberg trials concluded with death penalty sentences for 12 accused, several prison sentences and three acquittals.

229 9 US Department of State bulletin 310 (Nº 228, 6 November 1943). Quoted in Guilfoyle, *International Criminal Law*, *op. cit.*, 2016, p. 61.

230 Guilfoyle, *International Criminal Law*, *op. cit.*, 2016, p. 62.

231 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8 August 1945. Available at: https://ihl-databases.icrc.org/ihl/INTRO/350?OpenDocument (Accessed: 02.08.2016).

232 Gerhard Werle and Florian Jessberger, *Principles of international criminal law*, 3th ed., Oxford University Press, 2014, p. 6.

As for the Tokyo trials, they resulted in the death penalty for seven accused, 16 life imprisonments, and two other prison sentences.

One of the most revolutionary aspects of the IMT Charter was the fact that individuals were prosecuted, instead of States[233]. It was therefore the first time that the penal repression was organized on the basis of the nature of the acts committed, and not on the belligerent situation. It was likewise the first time that the individual criminal responsibility for international crimes was recognized regardless of the status of the suspects[234]. Furthermore, the Nuremberg and Tokyo trials indisputably asserted the primacy of international law over domestic law, as their statutes stipulated that crimes against humanity were punishable «whether or not in violation of the domestic law of the country where perpetrated»[235]. Thus, these statutes constituted an important precedent regarding the tension between State sovereignty and respect for essential international norms. As Antonio Cassese observed:

> [W]ith the establishment of international criminal tribunals, for the first time international bodies penetrated that powerful and historically impervious fortress – State sovereignty – to reach out to all those who live within the fortress[236].

Those tribunals set an important precedent in the development of international criminal law, but they were not exempt from criticism – both on political and legal grounds[237]. In particular, the trials were not deemed impartial insofar as only the losing side of the war was prosecuted. The atrocities committed by the Allies, the winning side, have never been prosecuted. Another important criticism put forward by the defense was that charges were brought without legal basis and therefore infringed upon the principle of non-retroactivity.

233 Guilfoyle, *International Criminal Law*, *op. cit.*, 2016, p. 58.

234 Article 7 of the IMT Charter reads as follows: «The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment».

235 Beth Van Schaack and Ron Slye, «A concise history of international criminal law: Chapter 1 of Understanding International Criminal Law», *Santa Clara University Legal Studies Research Paper,* nº 07/42, 2007, pp. 7-46.

236 Antonio Cassese, «Reflections on International Criminal Justice», *Journal of International Criminal Justice*, vol. 9, 2011, p. 273.

237 Gerhard Werle and Florian Jessberger, *Principles of international criminal law*, Oxford University Press, 2014, p. 8.

However, as Gerhard Werle and Florian Jessberger underline, «it is undisputable that punishment of war crimes rested on a secure foundation in the law as it existed at the time they were committed»[238]. In this regard, the Nuremberg Tribunal held that defenses based on the principle of non-retroactivity were invalid in light of the obvious wrongfulness of the defendants' conduct. To do so, they relied on customary international law where treaty law would not criminalize such conduct[239]. Furthermore, from a retrospective point of view, there is no doubt that the principles applied at Nuremberg have been «repeatedly conformed to be part of international law», and that they have crystallized as customary international law[240]. In particular, the UN General Assembly endorsed them in Resolution 95 of 11 December 1946[241], and charged the ILC with formulating such principles and «prepare a draft code of offenses against the peace and security of mankind»[242], which eventually led to the ILC's Draft Code of Crimes Against the Peace and Security of Mankind[243].

While these trials and the subsequent adoption of fundamental international treaties and conventions – the UN Charter, the Genocide Convention in 1948, and the Geneva Conventions in 1949 – marked a turning point in the development of international criminal law, it seemed that this branch of international law was condemned to oblivion with the Cold War. Indeed, the development of international criminal law froze as a result of the lack of consensus within the international community in order to establish new legal instruments on that matter. Nonetheless, the end of the Cold War allowed new developments, especially from the UNSC. In reaction to the exactions committed in the former Yugoslavia and in Rwanda, the UNSC adopted two resolutions establishing the International Criminal Tribunal for the former Yugoslavia[244] in 1993 and the International Criminal Tribunal for Rwanda[245] in 1999 respectively.

238 Werle and Jessberger, *Principles of international criminal law*, *op. cit.*, 2014, p. 9.

239 Van Schaack and Slye, «A concise history of international criminal law», *op. cit.*, 2007, p. 36.

240 Werle and Jessberger, *Principles of international criminal law*, *op. cit.*, 2014, p. 10.

241 UNGA Resolution 95(I) of 11 December 1946, UN Doc. A/RES/1/95: «Affirms the principles of international law recognized by the Charter of the Nurnberg Tribunal and the judgment of the Tribunal».

242 UNGA Resolution 177(II) of 21 November 1947, UN Doc. A/RES/2/177.

243 Werle and Jessberger, *Principles of international criminal law*, *op. cit.*, 2014, p. 13.

244 UNSC Resolution 827 (1993), 25 May 1993. UN Doc. S/RES/827 (1993).

245 UNSC Resolution 955 (1994), 8 November 1994. UN Doc. S/RES/955 (1994).

2.1.2. Further developments: the «ad hoc» tribunals

The end of the Cold War signed a new era in the development of international criminal law, as the UNSC started to activate its peace enforcement mechanisms[246]. In particular, the situation in the Federal Republic of Yugoslavia drew the attention of the UNSC, as tensions between ethnic groups escalated and led to one of the most horrendous conflicts of the XXth century in Europe. In response to the commission of mass atrocities, the UNSC described the situation as a threat to international peace and security in Resolution 808 (1993) and called on the Secretary-General to establish a Commission of Experts to document the violations of international law that were taking place. The Commission of experts recommended the creation of an international tribunal to prosecute the individuals responsible for the abuses reported. In response, the Security Council decided in Resolution 808 (1993):

> [t]hat an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.

The Secretary General then prepared a draft statute for the future tribunal. Finally, acting under Chapter VII of the UN Charter, the Security Council approved the draft statute and established the ICTY in Resolution 827 (1993). In this same resolution, the UNSC considered that the prosecution of perpetrators before an international tribunal would «contribute to ensuring that such violations are halted and effectively redressed». Pursuant to its statute, the ICTY has jurisdiction over individuals accused of committing serious violations of international humanitarian law[247], grave breaches of the Geneva Conventions[248], violations of the laws or customs of war[249], genocide[250], and crimes against humanity[251] that have occurred in the former Yugoslavia since 1 January 1991.

In the same manner, the UNSC used its powers under Chapter VII of the UN Charter to create another *ad hoc* tribunal, responsible for prosecuting

246 Werle and Jessberger, *Principles of international criminal law*, *op. cit.*, 2014, p. 14.
247 Statute of the ICTY, article 1.
248 *Ibid.*, article 2.
249 *Ibid.*, article 3.
250 *Ibid.*, article 4.
251 *Ibid.*, articles 5.

the individuals allegedly accused of genocide, crimes against humanity, and war crimes committed between 1 January and 31 December 1994 in Rwanda. While the international community had mostly remained silent as mass killings and exactions were happening, a response was expected from the Security Council. In Resolution 955 (1994), it established the ICTR as it considered that the widespread violations of international law amounted to a threat to international peace and security, even though they had taken place within the frame of an internal conflict for the most part[252]. Although both *ad hoc* tribunals were originally thought to share the same Appeals Chambers and Chief Prosecutor, the Office of the Prosecutor was eventually split into two positions on 15 September 2003[253].

These *ad hoc* tribunals have allowed noticeable progress in the field of international criminal law, and, *in fine*, IHL. In this respect, concerns over the rudimentary nature of some procedural and evidentiary rules of the Nuremberg and Tokyo Tribunals are solved as the statutes of the *ad hoc* tribunals extensively address these issues[254]. In addition, their statutes and case-law have provided further details regarding the precise meaning and scope of international crimes. In particular, as mentioned above, the ICTY has elaborated on the elements of war crimes and importantly contributed to the development of the law governing NIACs. Most notably, it has extended individual criminal responsibility to conducts prohibited under IHL taking place in NIACs[255]. It has therefore significantly filled in the gap of the grave breaches, which criminalize IHL violations occurring in IACs only. In the same way, the ICTR has done pioneering work, most notably regarding the definition of genocide[256], and the recognition of sexual violence as a material element of genocide or crime against humanity.

The ICTY and ICTR's functions have been taken upon by the Mechanism for International Criminal Tribunals ('MICT'), whose exact nature and mandate are provided by UNSC Resolution 1966 (2010)[257].

252 Van Schaack and Slye, «A concise history of international criminal law», *op. cit.*, 2007, p. 44.

253 *Ibid*.

254 Werleand Jessberger, *Principles of international criminal law*, *op. cit.*, 2014, p. 16.

255 ICTY, Prosecutor v. Dusko Tadić a/k/a «Dule», Case IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

256 Werle and Jessberger, *Principles of international criminal law*, *op. cit.*, 2014, p. 17.

257 UNSC Resolution S/RES/1966 (2010), 22.12.2010. For a brief ovierview of the MICT, see: Giorgia Tortora, «The Mechanism for International Criminal Tribunals: A Unique Model and

2.1.3. Consolidation: The International Criminal Court

The development of the *ad hoc* tribunals served as an inspiration for the drafting of a permanent international criminal court, described as «the final milestone in the development of international criminal law»[258]. As Antonio Cassese notes, while the creation of international criminal jurisdictions had thus far responded to the «failure of States and international organizations to take decisive political, military or diplomatic action» and to the «lack of a robust response at the domestic level», this was not the case of the ICC. Instead:

> [t]he international criminal court was born out of a genuine desire to dispense justice at the international level regardless of any policy considerations and without taking into account any geo-political context[259].

The idea of a permanent international criminal court was not novel; it is the product of a history marked by various attempts. Indeed, a Convention for the creation of an international criminal court (*Convention pour la création d'une cour pénale internationale*) was signed in 1937 under the auspices of the League of Nations; nonetheless, it never came into effect[260]. Then, the Nuremberg and Tokyo trials gave birth to a renewed interest in the establishment of an international criminal court. This is manifest in the Genocide Convention of 1948 which provides for such a jurisdiction in addition to national prosecution.

Against this background, the UN General Assembly called on the ILC to study «the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide»[261]. This led to the submission of a Draft Statute for an International Criminal Court to the General Assembly in 1954, but the international context defined by the cold war made it impossible to reach an agreement. Therefore, the General Assembly decided to postpone discussions on this matter in 1957. In 1989, it finally authorized the ILC to resume work on this issue, as Latin American and Caribbean States

Some of Its Distinctive Challenges», *ASIL Insights*, vol. 21(5), 06.05.2017. Available at: https://www.asil.org/insights/volume/21/issue/5/mechanism-international-criminal-tribunals (Accessed: 25.05.2017).

258 Werle and Jessberger, *Principles of international criminal law*, *op. cit.*, 2014, p. 17.

259 Cassese, «Reflections on International Criminal Justice», *op. cit.*, 2011, p. 274.

260 *Ibid*.

261 UNGA Resolution 260(III) of 9 December 1948, UN Doc. A/RES/3/260 (1948).

were willing to establish an international criminal court competent to prosecute drug traffickers[262]. In response, the ILC presented a draft statute in 1994 to the General Assembly, which further appointed an *ad hoc* Committee. The latter rejected the distinction between a Statute and a Code where the rules of procedure of the Court and substantial rules on the definition of crimes would be exposed respectively[263], thus resulting in one statute including both.

The negotiations took place at the Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court in Rome in 1998. During the course of these negotiations, mainly two camps opposed: some States were willing to establish a fully-fledged international criminal court acting also in accordance with the principle of universal jurisdiction, while other States were more reticent and preferred a more symbolic court that the Security Council would trigger in crisis situations[264]. The negotiations eventually led to the adoption of the Rome State of the International Criminal Court (hereafter, 'Rome Statute'), broadly accepted by the international community as only seven States voted against it, namely China, Iraq, Israel, Libya, Qatar, the United States, and Yemen. The Rome Statute entered into effect only four years later, with the 60th ratification thereof. As of 4 August 2016, 124 States are parties to the Rome Statute, including all the EU Member StatesEU.

Articles 12 and 13 of the Rome Statute stipulate the conditions for the ICC's jurisdiction. One element that is particularly important is the automatic acceptance of the ICC's jurisdiction by its State parties. Therefore, the exercise of jurisdiction is governed by the principles of territoriality and nationality[265]. Further, the procedure may be triggered in three scenarios: referral by a State party, an investigation ordered by the Prosecutor *propio motu*, or referral by the Security Council acting under Chapter VII of the UN Charter[266]. In the latter case, the investigation may take place even though the national and territorial States are not parties to the Rome Statute.

The establishment of the ICC thus represents a major improvement in international criminal justice. In particular, the Rome Statute constitutes the

262 Van Schaack and Slye, «A concise history of international criminal law», *op. cit.*, 2007, p. 39.
263 Werle and Jessberger, *Principles of international criminal law*, *op. cit.*, 2014, p. 19.
264 *Ibid*.
265 Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 90, article 12.2.
266 *Ibid.*, article 13.

greatest effort of codification of international criminal law, most notably with regard to the definition of the core crimes – genocide, crimes against humanity, war crimes, and aggression. It therefore has become the most authoritative international treaty on this matter.

Nonetheless, for the ICC to become a «universally accepted and authoritative world court»[267], it would need to be ratified by major players such as the United States, Russia, China or Israel. It should be noted that while the United States used to adopt an aggressive approach towards the ICC[268], there has been a gradual shift under the Obama administration. Even though the United States have not ratified the Rome Statute, they have cooperated with the ICC and acted accordingly within the Security Council. By way of example, the United States voted in favor of Resolution 1970 (2011)[269] – which referred the situation in Libya to the ICC – and abstained on Resolution 1593 (2005) on the situation in Darfur, thus allowing the Security Council to refer the situation to the ICC[270]. Further, the United States have facilitated the transfer of Bosco Ntaganda to the ICC in 2013[271]. While this constructive attitude does not constitute an endorsement as strong as a ratification, it arguably provides greater credibility to the ICC.

Besides, the ICC has been accused of being partial and targeting African countries only. These accusations have notably been spread by the African Union upon the issuance of an arrest warrant against Omar Al-Bashir in 2009. While this criticism must be taken into consideration, it is not entirely objective. It is true that much of the ICC's work has targeted African countries, but it also has extended to other geographical areas. In particular, the ICC is currently conducting preliminary examinations in Colombia, Iraq as regards the conduct of UK nationals during the Iraq war, Afghanistan, and Ukraine; the 2008 armed conflict in Georgia[272] is likewise under formal investigation. It should also be noted that many of the situations under scrutiny at the ICC were referred to the Court by African States themselves or by the Security

267 Werle and Jessberger, *Principles of international criminal law*, *op. cit.*, 2014, p. 22.

268 See: William A. Schabas, «United States Hostility to the International Criminal Court: It's all about the Security Council», *European Journal of International Law*, vol. 15(4), 2004, pp. 701-720.

269 UNSC Resolution 1970 (2011) of 26 February 2011. UN Doc. S/RES/1970 (2011).

270 See: http://www.amicc.org/usicc/approachtoicccases.php (Accessed: 05.08.2016).

271 See: http://www.amicc.org/usicc/approachtocooperation.php (Accessed: 05.08.2016).

272 See: https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-27-01-2016-georgia (Accessed: 04.08.2016).

Council, thus leaving not much margin of discretion to the ICC. For example, the situation in Sudan was referred to the ICC by the Security Council. Further, as Gerhard Werle and Florian Jessberger underline, African countries have played an important role in the establishment of the ICC and the African civil society largely supports them[273]. In the words of the current Prosecutor of the ICC, Fatou Bensouda:

> If you look at protecting the perpetrators of these crimes, if that is the only thing you are looking at, obviously you will make the criticism that we are targeting only Africans. But if you look at the millions of victims of these crimes – millions, in all the situations across Africa that we are dealing with, there is millions of rape, of pillaging, of all sorts of atrocities – then you will know that someone, some institution, has to be there to protect them[274].

In addition, it should be noted that the establishment of the ICC does not constitute by itself a complete system; therefore, the claim according to which the ICC represents «the final milestone in the development of international criminal law»[275] must be nuanced.

In this respect, a movement has emerged with the creation of hybrid courts, in particular, the Special Court for Sierra Leone, the Special Panels in East Timor, the Extraordinary Chambers in Cambodia, the War Crimes Chamber in Bosnia and Herzegovina, the Special Tribunal for Lebanon or the Extraordinary African Chambers in the Courts of Senegal[276]. These jurisdictions are hybrid to the extent that they use elements of both domestic and international law. Consequently, the establishment of the ICC did not constitute the final achievement of international criminal justice. More importantly, the ICC institutes a system of complementarity between international and national jurisdictions, which is essential for the effective success of the fight against impunity.

273 Werle and Jessberger, *Principles of international criminal law*, *op. cit.*, 2014, p. 25.

274 Theodor Meron and Fatou Bensouda, «Twenty Years of International Criminal Law: From the ICTY to the ICC and Beyond», *Proceedings of the Annual Meeting of the American Society of International Law*, vol. 107, 2013, p. 410.

275 Werle and Jessberger, *Principles of international criminal law*, *op. cit.*, 2014, p. 17.

276 The Extraordinary African Chambers confirmed Hissène Habré's penalty of life imprisonment in appeals on 27 April 2017. See: Extraordinary African Chambers, court of appeals, Le procureur général c. Hissein Habré, judgment of 27 April 2017. Available at: http://www.chambresafricaines.org/pdf/Arr%C3%AAt_int%C3%A9gral.pdf (Accessed: 25.05.2017).

2.2. A duty of cooperation

In accordance with their duty to ensure respect for IHL, third States to an armed conflict are called on cooperating with these international criminal jurisdictions. This duty of cooperation is further spelled out in the statutes of the different tribunals. In particular, article 28 ICTR Statute and 29 ICTY Statute stipulate this obligation of cooperation in similar terms:

> 1. States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
>
> 2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
>
> (a) the identification and location of persons;
>
> (b) the taking of testimony and the production of evidence;
>
> (c) the service of documents;
>
> (d) the arrest or detention of persons;
>
> (e) the surrender or the transfer of the accused to the International Tribunal.

As far as the ICC is concerned, the Rome Statute dedicates a whole part to the issue of international cooperation and judicial assistance[277]. It should also be noted that the Security Council has reiterated this duty of cooperation in numerous resolutions on the international criminal tribunals[278], in particular with regard to the affected countries. Cooperation is crucial for the success of international criminal justice. Indeed, international jurisdictions do not have the same capacities as States and therefore rely heavily on them regarding arrest, surrender, detention, etc. The case of Omar al-Bashir is significant in this regard, as two arrest warrants were issued against him in 2009 and 2010 respectively. However, this suspect has traveled throughout the world without being arrested, including in State parties to the Rome Statute[279].

277 Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 90, articles 86-102.

278 UNSC Resolution 1166 (1998) of 13 May 1998, UN Doc. S/RES/1166 (1998); UNSC Resolution 1329 (2000) of 30 November 2000, UN Doc. S/RES/1329 (2000); UNSC Resolution 1503 (2003) of 28 August 2003, UN Doc. S/RES/1503 (2003); UNSC Resolution 1534 (2004) of 26 March 2004, UN Doc. S/RES/1534 (2004).

279 South African judges intended to prosecute him in 2015 on the occasion of an African Union summit in Johannesburg, however the South African government alleged he had immunity as a head of State and allowed him to leave the country.

Furthermore, it could be argued that prosecuting at national level suspects who are involved in one of the cases being prosecuted before those international courts also constitute a fulfillment of the obligation to ensure respect for IHL. In this respect, the *ad hoc* tribunals and the ICC provide two different models. While both admit concurrent jurisdiction, the *ad hoc* tribunals rely on the principle of precedence[280]. That is, international criminal tribunals have primacy over national courts, so that they may «formally request national courts to defer to the competence of the International Tribunal»[281]. However, they have rarely exercised this right[282].

Conversely, the ICC relies on a different model, that of complementarity[283]. Therefore, national prosecution takes precedence over international prosecution. In this regard, the preamble clearly refers to «the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes» and underlines that effective prosecution can only take place «by taking measures at the national level and by enhancing international cooperation». As Gerhard Werle and Florian Jessberger note, this choice derives from «the realistic assessment that direct enforcement of international criminal law through international courts will continue to be the exception rather than the rule»[284]. In practical terms, if domestic courts indeed enforced their obligation to prosecute alleged perpetrators of international crimes, it would result in faster, cheaper and more effective proceedings[285]. Therefore, for the ICC to act, the State must either be «unwilling or unable genuinely to carry out the investigation of prosecution»[286]. Consequently, this model seems to better adapt to concerns over State sovereignty[287] insofar as it avoids the intervention of the ICC whenever

280 ICTY Statute, article 9(2); ICTR Statute, article 8(2).

281 *Ibid*.

282 Werle and Jessberger, *Principles of international criminal law*, *op. cit*., 2014, p. 93.

283 The preamble clearly expresses this idea: «Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions». This idea is further expressed in article 1: «An International Court [...] is hereby established. It shall be a permanent institutio and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions».

284 Werle and Jessberger, *Principles of international criminal law*, *op. cit*., 2014, p. 93.

285 *Ibid*.

286 Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 90, article 17.

287 See: Óscar Solera, «Complementary jurisdiction and international criminal justice», *International Review of the Red Cross*, vol. 84(845), 2002, pp. 149-154.

States already proceed to prosecution themselves. Furthermore, as noted above, this model of complementarity has prompted numerous States to actually legislate in order to be able to prosecute themselves. A virtuous circle has therefore taken place of mutual influence and cooperation, whereby the ICC has been bestowed competence to try alleged perpetrators of international crimes, except if they are already prosecuted at the national level. Therefore, national legislators have bestowed their national courts competence over these crimes as well, so as to make intervention by the ICC unnecessary. Yet, if a State were unwilling to prosecute, the ICC could still intervene. In the words of Gerhard Werle and Florian Jessberger, «[t]he Rome Statute thus regulates the relationship between international and domestic criminal jurisdictions through a carrot-and-stick mechanism»[288].

Conclusions
Chapter 3

One aspect of the obligation to ensure respect for IHL as provided by Common Article 1 to the four Geneva Conventions deals with the consequences of a breach in terms of responsibility. In this respect, there are two mechanisms of international responsibility: State responsibility and individual responsibility. While the former does not entail criminal consequences as a result of the rejection of the notion of State crime in international law, the opposite is true with regard to individual responsibility.

Pursuant to the system established by the ILC' Articles on State Responsibility for Internationally Wrongful Acts, third States to an armed conflict may refer a case of serious violation to IHL to the ICJ, insofar as the norms at stake are owed to the international community. The regime of State responsibility follows the same logic as Common Article 1 since it creates a decentralized mechanism whereby all States are guardians of the respect for such obligations. This is arguably the case of many rules of IHL, some of which constitute *jus cogens* as already established in Chapter 1. Even though the application of State

288 Werle and Jessberger, *Principles of international criminal law*, *op. cit.*, 2014, p. 95.

responsibility to Common Article 1 is theoretical at the moment, the regime of State responsibility retains some importance with respect to Common Article 1. Indeed, the recurrent and systematic resort to the ICJ, together with the obligation to make reparation whenever the violations are established by the ICJ, should have some deterrent effect and help prevent future violations from occurring. Further, there is some overlap between the legal consequences arising from an internationally wrongful act pursuant to ARSIWA and the measures that third States may undertake in accordance with Common Article 1. Consequently, it can be submitted that ARSIWA reinforces the system established by Common Article 1 and should be effectively implemented by the State parties to the Geneva Conventions in order to enforce their obligation to ensure respect for IHL.

As for the system of individual responsibility, it is probably the one that has been further developed in relation to IHL and for which the most important legal developments have taken place. To implement their obligation to ensure respect for IHL, third States to an armed conflict can prosecute or extradite alleged perpetrators of serious violations and grave breaches of the Geneva Conventions on the one hand and cooperate with international criminal tribunals on the other. The Geneva Conventions established, already in 1949, a decentralized model of penal repression of grave breaches whereby all State parties committed to providing penal sanctions for the grave breaches and to either prosecute or extradite alleged perpetrators, including on the basis of universal jurisdiction if needed. This model contains many flaws and its practical application remains limited; however, its most important virtue actually lies in the fact that it established a precedent in the establishment of individual criminal responsibility for IHL violations in treaty law and enshrined the principle of universal jurisdiction over those cases. Further developments in international law have intended to fill in the gaps of the grave breaches regime and have tremendously extended the scope of individual criminal responsibility at international level. The current system that is being designed rests on national/international cooperation which, despite the limitations of each system, is quite complete if effectively implemented. In particular, with regard to the ICC, national courts have precedence but if they do not prosecute, then the ICC can take the lead.

Therefore, it appears that States have the means to enforce their obligation to ensure respect for IHL in legal terms, but extra-legal considerations often impede their effective development. Concerning the use of universal

jurisdiction or the establishment of international criminal tribunals, practical issues arise as the courts responsible for the case are often too remote from the place where exactions took place for victims and civil society in general to play a role, and therefore require the effective cooperation of the affected countries in collecting evidence, etc. Another issue that arises is selectivity, as in many cases justice is rendered during or after the armed conflict took place with regard to the crimes committed by the losing party only[289].

289 Cassese, «Reflections on International Criminal Justice», *op. cit.*, 2011, p. 273.

Chapter 4
IMPLEMENTATION AT EU AND DOMESTIC LEVELS

The previous chapter dealt with the mechanisms of international responsibility over violations of IHL. While State responsibility may be invoked in accordance with the rules established under public international law, this system neither calls for a purely punitive response, nor requires transposition at national level. Therefore, this chapter aims to analyze whether the three actors – the EU, France, and Spain – have correctly transposed and enforced their obligations regarding the penal repression of violations of IHL committed by individuals.

In particular, this chapter seeks to assess whether they have appropriately transposed the grave breaches system into their legal order and if they have extended it to include serious violations of IHL occurring in NIACs. Besides this action designed to provide a response at national level, this chapter further aims to determine whether the EU, France and Spain have established the means for their cooperation with international criminal tribunals.

As a preliminary comment, it should be noted that despite lacking criminal jurisdiction of its own, the potential of the EU on this matter should not be overlooked. Indeed, the IHL Guidelines specifically refer to the fight against impunity, so that the different operational means at the disposal at the EU to implement them are also available on this matter. Furthermore, the EU acknowledges that national prosecution is a priority, but also a consequence of the creation of the ICC, as EU Member States must cooperate with the ICC pursuant to the principle of complementarity.

The EU's involvement in the fight against impunity is thus reflected both at internal and external levels. At internal level, the EU has adopted a series of legal instruments allowing an improved cooperation among EU Member States in the prosecution of alleged perpetrators of core international crimes. At external level, it is reflected in the EU's commitment to the establishment and consolidation of international criminal jurisdictions in charge of prosecuting, *inter alia*, war crimes.

Section 1
PROSECUTING ALLEGED PERPETRATORS

> *[N]ational courts are often the last opportunity for the State to comply with its international obligations before reaching an international tribunal.*[1]

In this section, the measures adopted at EU and domestic levels to prosecute alleged perpetrators are analyzed. It is sustained that the resort to national courts, together with the support of the EU, contributes to the process of ensuring respect of IHL. As observed by Sharon Weill, this process is two-fold: it generates respect for IHL at the national level but also strengthens the «international rule of law on a global level»[2].

As explained in Chapter 3, the Geneva Conventions already established a mechanism of penal sanction with regard to the grave breaches. Nonetheless, since this system has proven to be limited, the elements scrutinized in this Chapter slightly differ from the strict wording of the Geneva Conventions. As such, the notion of grave breaches, typical of IHL, is replaced with that of war crimes, proper to international criminal law.

It should be noted in this regard that the adoption of the Rome Statute and its corresponding entry into force have arguably accelerated the process of prosecuting alleged perpetrators of violations of IHL. This is – unsurprisingly – the case for the EU, but also for France. Indeed, the latter had not transposed into its legal order the obligation to extradite or prosecute in relation with violations of IHL, nor provided for a definition of war crimes before the entry into force of the Rome Statute. As for Spain, while it had transposed – for the most part – its obligations arising from the Geneva Conventions into its domestic legislation, the adoption of the Rome Statute constituted an opportunity to improve the existing system and to further enlarge it.

First, the process of criminalization of the violations of IHL is analyzed. It covers the process of providing for penal sanctions for a certain number of behaviors prohibited under IHL, the provisions relating to the status of the alleged perpetrator, as well as the operational developments, such as the

1 Weill, *The role of national courts in applying International Humanitarian Law*, *op. cit.*, 2014, p. 8.
2 *Ibid.*, p. 9.

creation of specialized jurisdictions on this matter. Second, the establishment of universal jurisdiction mechanisms over war crimes allowing prosecution, regardless of nationality, is examined as this mechanism is mandatory with regard to the grave breaches under the Geneva Conventions.

1. CRIMINALIZING THE VIOLATIONS OF IHL

The action of the three different actors is analyzed with regard to the provision of penal sanctions in response to violations of IHL in their legal orders. In this framework, the EU has promoted the development of individual criminal responsibility for war crimes and the necessity to prosecute alleged perpetrators despite lacking criminal jurisdiction. As for France, it has enshrined the relevant provisions in its criminal legislation quite lately, in response to the entry into force of the Rome Statute; nonetheless, this recent interest seems to be accompanied by political will, as operational means have been implemented subsequently to ensure the effectiveness of prosecutions. Finally, Spain has been a model insofar as it integrated the relevant provisions in its criminal legislation already in 1995 and has completed it with the entry into force of the Rome Statute.

1.1. The EU: Support national prosecutions[3]

The EU has become an advocate of international criminal justice, including with regard to the obligation to implement the *aut dedere aut judicare* principle, which must be adapted to the EU's specific nature. The potential of the EU on this matter should not be disregarded. Indeed, the IHL Guidelines specifically refer to the fight against impunity, so that the different operational means at the disposal at the EU to implement them are also available on this matter. Furthermore, the EU acknowledges that national prosecution is a priority, but also a consequence of the creation of the ICC, as EU Member States

[3] Some paragraphs in this section were published in: Bettina Steible, «EU support to domestic prosecution of violations of International Humanitarian Law», *UNIO – EU Law Journal*, vol. 4(1), 2018, pp. 51-66.

must cooperate with the ICC pursuant to the principle of complementarity. As a result, the EU has adopted a range of tools to foster judicial cooperation among EU Member States on this matter in order to ensure that the EU does not become a safe haven for perpetrators[4].

1.1.1. Supporting the fight against impunity regarding war crimes

The EU has been an important promoter of international criminal law, including the fight against impunity regarding war crimes. It proclaims that it is committed to ending impunity for the most serious crimes and therefore strongly supports the dissemination of international criminal law. Following the example of the UN, the EU projects the idea that peace may be achieved only if justice is made and alleged perpetrators of the most serious international crimes are prosecuted[5]. EU Member States formalized this commitment to the fight against impunity, including in several legally binding instruments.

1.1.1.1. An EU objective

In Council Common Position 2001/443/CFSP of 11 June 2001 on the International Criminal Court, EU Member States expressed that international core crimes are «of concern for all Member States» so that they should «cooperate for the prevention of those crimes and for putting an end to the impunity of the perpetrators thereof»[6]. The fight against impunity was then enshrined as an objective in the Stockholm Program[7], in which the

4 Strategy of the EU Genocide Network to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States, 2014, 15581/1/14 Rev 1 (hereafter, 'EU Genocide Network Strategy'), p. 3; The Stockholm Programme, OJ C 115/1 of 4 May 2010, p. 8.

5 ICC, 7th session of the Assembly of State parties, General debate, Declaration of Mr. Jean-François Blarel, Ambassador of France in the Netherlands, Head of Delegation, on behalf of the European Union, The Hague, 14 November 2008: «[...] une paix durable ne peut être réalisée si les exigences de la justice et la recherche des responsabilités individuelles pour les crimes internationaux les plus graves ne reçoivent pas une réponse appropriée».

6 Council Common Position 2001/443/CFSP of 11 June 2001 on the International Criminal Court, OJ L 150, 18.06.2003, pp. 67-69, Recital, para. 4.

7 The Stockholm Programme was adopted on 4 May 2010. It established the priorities of the EU in the area of freedom and security for the period 2010-2014 and replaced the Hague Programme. See: The Stockholm Programme – An open and secure Europe serving and protecting citizens, OJ C 115/1, 04.05.2010, pp. 1-38.

EU institutions are invited to «continue support and promote Union and Member States' activity against impunity and to fight against crimes of genocide, crimes against humanity and war crimes»[8]. Finally, Council Decision 2011/168/CFSP of 21 March 2011 endorsed these statements, as its recital also states that:

> [t]he Union and its Member States are determined to put an end to the impunity of the perpetrators of those crimes by taking measures at national level and by enhancing international cooperation to ensure their effective prosecution[9].

It is also worth mentioning in this regard that the EU established an annual 'EU Day against impunity', which aims to raise awareness on international core crimes, to promote prosecution, as well as to «appropriately recognize the common efforts of the EU Member States and the European Union in enforcing international criminal law»[10].

In the same manner as IHL, the fight against impunity is understood as one component of the EU's prior objectives, in particular regarding the EU's founding values and its commitment towards the universal principles of liberty, democracy, the rule of law, human rights, and fundamental freedoms[11]. EU Member States made this commitment clear on several occasions, using the provisions on the EU's founding values and on their externalization as the legal basis for the EU's action on this matter. By way of example, the recital of Council Common Position 2001/443/CFSP refers to «the consolidation of the rule of law and respect for human rights, as well as the preservation of peace and the strengthening of international security» as the EU legal basis to act on this matter. It then explicitly integrates the principles of the Rome Statute into the EU's objectives:

8 The Stockholm Programme – An open and secure Europe serving and protecting citizens, OJ C 115/1, 04.05.2010, p. 8.

9 Council Decision 2011/168/CFSP of 21 March 2011, OJ L 76, 22.03.2011, p. 56, preamble, para. 6.

10 Presidency report of the EU Day against impunity of genocide, crimes against humanity and war crimes, 23 May 2016, Eurojust, The Hague (10233/16).

11 Jan Wouters and Sudeshna Basu, «The creation of a global justice system: The European Union and the International Criminal Court», in Cédric Ryngaert (ed.), *The effectiveness of International Criminal Tribunals*, Antwerp, Intersentia, 2009, p. 5.

> [...] the principles of the Rome Statute of the International Criminal Court, as well as those regulating its functioning, are fully in line with the principles and objectives of the EU[12].

In Council Decision 2011/168/CFSP of 21 March 2011, the EU Member States confirmed and further detailed those elements, as they based their Decision on article 21 of the Treaty on the European Union:

> In its action on the international scene the Union seeks to advance the principles of democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, equality and solidarity, and respect for the principles of the United Nations Charter and international law, as provided for in article 21 of the Treaty[13].

EU Member States explicitly reiterated this commitment in 2016 in their 'Conclusions on the fight against impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States'. The recital states that the EU «is founded on the values of liberty, democracy, the rule of law and respect for human rights»[14]. Consequently, the codification of the EU's founding values as well as their externalization has not become a dead letter. On the contrary, they serve as the legal basis for the EU's action in the fight against impunity on the international scene. The EU therefore explicitly legitimizes its action on this matter on the basis of article 2 TEU.

This commitment extends to violations of both IHL and IHRL, in particular with regard to the so-called 'core international crimes'. It is manifest both externally and internally. In this respect, the EU has used its CFSP to promote the fight against impunity on the international stage, notably through the adoption of guidelines. The IHL Guidelines are of utmost importance in this regard, but it is also possible to refer to the 'Guidelines to the EU policy toward third countries, on torture and other cruel, inhuman or degrading treatment

12 Council Common Position 2001/443/CFSP of 11 June 2001 on the International Criminal Court, OJ L 150, 18.06.2003, pp. 67-69, recital, para. 3.

13 Council Decision 2011/168/CFSP of 21 March 2011 (OJ L 76, 22.03.2011, p. 56), recital, para. 1.

14 Council Conclusions on fight against impunity for the crimes of genocide, crimes against humanity and war crimes within the European Union and its Member States (15584/2/14), 15-16 June 2015.

or punishment'[15], the 'EU Guidelines on Children and Armed Conflict'[16], or the 'EU Guidelines on violence against women and girls and combating all forms of discrimination against them'[17].

1.1.1.2. Developing the legal framework on war crimes

In relation with the obligation to ensure respect for IHL specifically, the IHL Guidelines refer to the concept of war crimes and the necessity to prosecute them. In this regard, even though the wording of the Guidelines is quite vague, it refers to several key concepts. In particular, it recognizes that certain «serious violations of IHL are defined as war crimes», thereby acknowledging the link existing between IHL and international criminal law, two branches of international law which meet at the notion of war crimes[18]. By giving its opinion on numerous declarations where it has called for the suppression of serious violations of IHL and the need to prosecute their perpetrators[19], the Union has, in the words of Tristan Ferraro, initiated a movement followed progressively by international organizations and States, which culminated with the creation of international *ad hoc* tribunals and the adoption of the Statute of Rome[20].

15 Council of the European Union, Guidelines to EU Policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment – An up-date of the Guidelines (6129/1/12), Brussels, 20.03.2012. Available at: http://data.consilium.europa.eu/doc/document/ST-6129-2012-REV-1/en/pdf (Accessed: 15.05.2017).

16 Council of the European Union, Update of the EU guidelines on children and armed conflict, 16.06.2008. Available at: http://www.consilium.europa.eu/uedocs/cmsUpload/10019.en08.pdf (Accessed: 15.05.2017).

17 Council of the European Union, EU Guidelines on violence against women and girls and combating all forms of discrimination against them, 08.12.2008. Available at: http://www.consilium.europa.eu/uedocs/cmsUpload/16173cor.en08.pdf (Accessed: 15.05.2017).

18 But also genocides and crimes against humanity when they occur in times of war.

19 See, e.g.: Declaration by the High Representative Catherine Ashton on behalf of the European Union on Libya, Brussels, 23 February 2011, 6966/1/11 REV 1 PRESSE 36; Council conclusions on Côte d'Ivoire, 3065th Foreign Affairs Council meeting, Brussels, 31 January 2011; Declaration by the High Representative for Foreign Affairs and Security Policy Catherine Ashton on behalf of the European Union on the Office of the High Commissioner for Human Rights (OHCHR) Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003, 6 October 2010, Brussels; Council Conclusions on Sri Lanka, 2942nd General Affairs Council Meeting, Brussels, 18 May 2009; EU annual report on human rights 2008, p. 175.

20 Ferraro, «Le droit international humanitaire dans la politique étrangère», *op. cit.*, 2002, p. 448.

The EU goes even further as it recognizes international criminal law as forming part of IHL. Indeed, the list of «principal legal instruments of IHL» contained in the annex of the IHL Guidelines refers to the statutes of the ICTY, ICTR, and ICC[21]. In the same line, in the document on the 'Use of Force Concept for EU-led Military Crisis Management Operations', the EU confirms that the Statute of the ICC is an integral part of IHL:

> References to the Law of Armed Conflict (LOAC) or International Humanitarian Law (IHL) are deemed to include, where applicable, inter alia, the Geneva Conventions of 12 August 1949, the Protocols additional to these Conventions of 8 June 1977 and the Statute of the International Criminal Court, Rome, 17 July 1998[22].

The latter example is significant in the sense that the Rome Statute is the only legal text referred to other than IHL, and no mention is made to the 1907 Hague Regulations in the text of the IHL Guidelines[23], even though they are considered the most important IHL treaty norms alongside the Geneva Conventions. It is further worth mentioning that the 2009 'Council Conclusions on promoting compliance with IHL' highlight the importance of criminalizing the serious violations of IHL:

> The Council affirms its strong opposition to impunity for serious violations of international humanitarian law and human rights law. [...] The Council emphasizes the importance of dealing effectively with the legacy of serious violations of international humanitarian and human rights law by supporting appropriate accountability mechanisms[24].

As a result, the EU seems to consider international criminal law as an integral part of IHL as well as an essential component of its respect. By doing so, it participates in the general movement of criminalization of the most seri-

21 IHL Guidelines, Annex.

22 Use of Force Concept for EU-led Military Crisis Management Operations – 1st revision, Brussels, 28 February 2006, 6877/06, EXT 1 (31.03.2010).

23 IHL Guidelines, para. 8.

24 Council conclusions on promoting compliance with international humanitarian law, 2985th Foreign Affairs Council meeting, Brussels, 8 December 2009.

ous violations of IHL on a conceptual level. In this context, the IHL Guidelines refer to the notion of war crimes as follows:

> Certain serious violations of IHL are defined as war crimes. War crimes may occur in the same circumstances as genocide and crimes against humanity but the latter, unlike war crimes, are not linked to the existence of an armed conflict[25].

With this wording, the EU emphasizes the close relationship between war crimes, genocides and crimes against humanity. They all are considered the most serious violations of international law and are punishable, not only at national level, but also at the international level. However, the Guidelines do not provide for a definition of all these crimes. Instead of defining what war crimes, genocide and crime against humanity are, the Guidelines underline their differences in terms of *ratione temporis* only.

Furthermore, the EU's practice seems to have focused on the notion of 'war crimes' in the context of the fight against impunity, instead of those of 'grave breaches' and 'serious violations', typical of IHL. The wording of the Guidelines does not seem to establish any kind of differentiated procedural regime, depending on the nature of the violation, as it is the case in IHL. As explained in Chapter 3, the obligation to prosecute or extradite was designed with regard to the grave breaches only. However, the Guidelines refer to war crimes and do not even mention the grave breaches in relation with the obligation. Therefore, even though the wording is quite imprecise, it seems to endorse the alignment of the procedural regime of war crimes occurring in IAC and in NIAC. In practice, the EU has called to hold the criminal responsibility of persons responsible for IHL violations regardless of the nature of the armed conflict[26]. It should also be observed that the EU recognizes the authority of the Rome Statute of the ICC[27], so that it endorses the criminalization of violations of IHL occurring both in IACs and NIACs, as enshrined in Article 8. Thus, through its practice and pursuant to the Guidelines, the EU participates in the movement of alignment of the regime of IACs and NIACs and focuses on the notion of 'war crimes'.

25 IHL Guidelines, paras. 13/14.

26 Ferraro, «Le droit international humanitaire dans la politique étrangère», *op. cit.*, 2002, p. 447.

27 See *infra*, Section 2.

In addition, the EU, together with some active Member States, has proven to advocate successfully for the extension of the list of behaviors that amount to 'war crimes'. On the occasion of the Review Conference of the Rome Statute of the International Criminal Court held in Kampala, Uganda, from 31 May to 11 June 2010, the delegation of Belgium lobbied to include some new war crimes applicable to NIAC. Negotiations came out in favor of the delegation of Belgium so that three war crimes were added to the already long list of war crimes contained in the Rome Statute. These crimes are the following: employing poison or poisoned weapons[28]; employing asphyxiating, poisonous or other gases, and all analogous liquids, materials and devices[29]; and employing bullets which expand or flatten easily in the human body such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions[30]. The argument raised was that these crimes constitute «serious violation of the laws and customs applicable in armed conflicts not of an international character, as reflected in customary international law»[31]. The results of this Conference were acknowledged by the Council[32], which adopted a new Decision on the International Criminal Court notably in order to integrate them in its policy action.

In the same line, the EU has focused on the criminalization of sexual violence occurring in armed conflict. By way of example, it reaffirms the commitment to eliminate

> all forms of discrimination and violence towards women and girls, notably by putting an end to impunity and ensuring the protection of civilians, especially women and girls, during and after armed conflicts, as IHL and IHRL impose the obligation to the States[33].

It is recalled that, pursuant to the Rome Statute, rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization and any other form of sexual violence are constitutive of war crimes when they are committed in

28 Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 90, article 8(2)(b)(xvii).

29 *Ibid*., article 8(2)(b)(xviii).

30 *Ibid*., article 8(2)(b)(xix).

31 Rome Statute amendment proposals, Report of the Working Group on other amendments, RC/11, annex IV. Available at: https://asp.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-11-Annex.IV-ENG.pdf (Accessed: 22.05.2017).

32 Council Conclusions on the Review Conference of the Rome Statute of the International Criminal Court, Kampala, Uganda, from 31 May to 11 June 2010, 25 May 2010.

33 6072/1/05 REV (Presse 19).

situations of armed conflict and also, in some very specific circumstances, of crimes against humanity[34].

1.1.1.3. Recognizing international criminal responsibility

Lastly, the EU has touched upon the regulation of the status of the alleged perpetrator in the sense that it has consistently supported the recognition of international criminal responsibility. This commitment is formalized in the Guidelines on promoting compliance with IHL:

> Individuals bear personal responsibility for war crimes. States must, in accordance with their national law, ensure that alleged perpetrators are brought before their own domestic courts or handed over for trial by the courts of another State or by an international criminal tribunal, such as the International Criminal Court[35].

Even though the wording is quite vague, it recalls an essential element of international law that has been reiterated in numerous declarations.

As for immunity, some recommendations are addressed to EU Member States in the EU 'Genocide Network Strategy to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States'. The underpinning is that immunity should not be understood as allowing safe havens on EU territory, thus encouraging EU Member States to develop «national guidelines in line with international standards and clarify this area of law applicable to relevant ministries and criminal justice authorities»[36]. Within the frame of the EU's external action, it is held in the 2013 'Toolkit for bridging the gap between international and national justice' that the official capacity as a Head of State or government or a member of Government or Parliament shall in no case exempt a person from criminal responsibility in national law «as there should be no exceptions in the fight against impunity», while recognizing that this may involve constitutional issues, which «may need to be resolved, either by interpretation or amendment»[37].

34 Auvret-Finck, «L'utilisation du DIH dans les instruments de la PESC», *op. cit.*, 2010, p. 54.

35 IHL Guidelines, paras. 13/14.

36 EU Genocide Network Strategy, Measure 4.

37 European Commission, High Representative of the Europeann Union for Foreign Affairs and Security Policy, Joint Staff Working Document on advancing the principle of complementarity, Toolkit for bridging the gap between international and national justice, SWD(2013) 26 final, Brussels, 31.01.2013, p. 19.

Thus, the EU has been a staunch supporter of the fight against impunity, considered one of its prior objectives. This political support has extended to, *inter alia*, war crimes, which are understood in accordance with the current state of international law, since they include not only 'grave breaches' but also 'serious violations' of IHL and entail new behaviors, such as sexual violence. Nonetheless, all these elements are quite vague due to the lack of competence of the EU to enact penal legislation on this matter. In spite of these limitations, the EU has adopted legally binding instruments where it could: judicial cooperation in criminal matters.

1.1.2. Fostering judicial cooperation among EU Member States

The EU has adopted a range of instruments to foster judicial cooperation among EU Member States, in order to ensure that the EU does not become a safe haven for perpetrators[38]. In this regard, article 8 of Council Decision 2011/168/CFSP clarifies that the EU's commitment in the fight against impunity exists within the frame of its external action, but also extends to its internal policy:

> The Union shall ensure consistency and coherence between its instruments and policies in all areas of its external and internal action in relation to the most serious international crimes as referred to in the Rome Statute[39].

Developing tools at internal level is indeed necessary in order to avoid, to the largest extent possible, accusations of double standards. If the EU were to succeed in compelling EU Member States to develop legislation on this matter, its efforts in the fight against impunity would be more credible, legitimate, and comprehensive[40].

Even though the IHL Guidelines refer to the EU's external action, they are indicative of the EU's approach to the concepts that they implement. In

38 EU Genocide Network Strategy, p. 3; The Stockholm Programme, OJ C 115/1 of 4 May 2010, p. 8.

39 Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court and repealing Common Position 2003/44/CFSP, OJ L 76 of 22 March 2011, p. 58.

40 EU Genocide Network Strategy, p. 24.

particular, they specifically refers to the obligation to extradite or prosecute in the following terms:

> Individuals bear personal responsibility for war crimes. States must, in accordance with their national law, ensure that the alleged perpetrators are brought before their own domestic courts or handed over for trial by the courts of another State or by an international criminal tribunal, such as the International Criminal Court.

While the content of this clause is not exactly the same as the one contained in the Geneva Conventions, there is no doubt that it recalls the obligation to extradite or prosecute. First, it refers to the obligation to prosecute: «States must [...] ensure that the alleged perpetrators are brought before their own domestic courts», and presents extradition as an alternative, including before international jurisdictions.

In parallel to the IHL Guidelines, the EU has adopted a series of legally binding instruments in relation to domestic prosecution of war crimes within the frame of the area of Freedom, Security and Justice. In particular, it is worth mentioning Council Decision 2002/494/JHA, which established a 'European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes' (hereafter, 'EU genocide network'), Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes, and the EU Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant. The adoption of such tools may be interpreted as a response to the commitment formalized by EU Members States in 2001 to work together to combat certain forms of crime[41].

The purpose of Council Decision 2003/335/JHA is:

> to increase cooperation between national units in order to maximize the ability of law enforcement authorities in different Member States to cooperate effectively in the field of investigation and prosecution of persons who have committed or participated in the commission of

41 Council Common Position of 11 June 2001 on the International Criminal Court (2001/443/CFSP), recital 4.

> genocide, crimes against humanity or war crimes as defined in Articles 6, 7 and 8 of the Rome Statute of the International Criminal Court of 17 July 1998[42].

Therefore, an international commitment of the EU – cooperating with the ICC – is in turn used at internal level in order to encourage EU Member States to take action on this issue. The Decision does not provide for precise obligations but solely establishes an obligation of cooperation regarding the exchange of information[43], investigation, and prosecution[44] of people seeking residence in an EU Member State and allegedly accused of having committed an international core crime.

In the same line, the objective of Council Decision 2002/494/JHA is to make cooperation more efficient through the establishment of an EU Genocide Network within Member States' police and justice systems[45]. Concretely, EU Member States must designate a contact point for the exchange of information concerning the investigation of international core crimes, including war crimes, as defined by the Rome Statute[46]. These contact points must then provide information upon request or on their initiative that may be relevant in this context. Therefore, this Decision aims to establish the means of cooperation on this matter, as the actual investigation and prosecution fall under the remit of national authorities[47].

In this context, a Secretariat was established in July 2011 within the staff of Eurojust, although it works as a separate unit[48]. Furthermore, it is worth noticing that the EU Genocide Network cooperates with institutions not from

42 Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes, OJ L 118, 14.05.2003, pp. 12-14.

43 *Ibid*., article 2.

44 *Ibid*., article 3.

45 Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crimes, OJ L 138, 04.06.2009, p. 12.

46 *Ibid*., article 1.

47 See: «EU a key player in ICC system» interview, *Global Justice*, 03.02.2015. Available at: https://ciccglobaljustice.wordpress.com/2015/02/03/eu-a-key-player-in-icc-system/ (Accessed: 09.02.2017).

48 Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crimes, OJ L 138, 04.06.2009, p. 14, article 25a.

the EU. As such, it includes observers from Canada, Norway, Switzerland, and the USA and works with representatives from the ICC, *ad hoc* international criminal tribunals, the ICRC, Interpol, and civil society organizations. The EU Genocide Network further liaises with representatives from the European Commission and Eurojust[49]. In addition, a Task Force composed of five contact points was established within this framework with a view to propose improvements in the fight against impunity's efficiency[50].

The Task Force drafted a Strategy in this sense, published in 2014[51] and endorsed by the Council in its Conclusions of 15-16 June 2015[52]. Some elements of the Strategy are worth mentioning here. It is stated that the EU Genocide Network holds «a pivotal role in ensuring the EU's commitment to fighting impunity in the internal area»[53] and serves as a «best practice model for the development of similar networks in other regions» as it is already the case in the African Union framework[54]. In addition, it provides a set of measures addressed to EU institutions and Member States «to support national investigations and prosecutions of core international crimes»[55].

Concretely, the Strategy proposes several recommendations relating to procedures and the operational functioning of the fight against impunity at national level, such as implementing measures to improve the identification of cases and case-relevant information (measure 2), facilitating cooperation among the «immigration, law enforcement, prosecution, mutual legal assistance, financial and intelligence authorities» as well as with civil society (measure 3).

For present purposes, the «desirability» of the creation of specialized units dealing exclusively with cases of core international crimes should be highlighted (measure 1). This recommendation should therefore be read in conjunction with Council Decision 2003/335/JHA on the investigation and prosecution of genocide, crimes against humanity and war crimes, which recommended – already in 2003:

49 EU Genocide Network Strategy, p. 24.

50 *Ibid*., p. 4.

51 *Ibid*.

52 Council conclusions on fight against impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States.

53 EU Genocide Network Strategy, p. 24.

54 *Ibid*., p. 25.

55 *Ibid*., pp. 32-45.

> to set up or designate specialist units within the competent law enforcement authorities with particular responsibility for investigating and, as appropriate, prosecuting the crimes in question[56].

At least Belgium, Croatia, Denmark, France, Germany, the Netherlands, Poland, Sweden, the UK and have created such units, which include officers specially trained to work in the identification, investigation or prosecution of, *inter alia*, war crimes, following a multidisciplinary approach[57]. The creation of these units has proven to meaningfully improve the prosecution of alleged war criminals in the countries where they have been established. In this respect, the data presented in the Strategy on the number of completed and ongoing cases in EU Member States unsurprisingly reflect this reality, with the bulk of prosecutions taking place in the countries dotted with such specialized units[58].

In the same way, Measure 4 explicitly refers to the need to improve domestic legislation relating to investigation, prosecution and mutual legal assistance so as to ensure that it appropriately reflects the current state of customary and treaty international law, in particular with regard to the obligation to extradite or prosecute. It likewise refers to the necessity to codify in domestic law the definition of «core international crimes in accordance with international standards», to provide for «an exercise of extraterritorial, including universal, jurisdiction over those crimes», to ensure that the legislation adequately transposes the notions of command or superior responsibility and «includes the relevant rules on the irrelevance of superior order defenses and statutes of limitation»[59]. Special mention is also made to the necessity not to use immunity as an undue protection of alleged perpetrators. The Strategy also refers to the necessity to include the different types of individual criminal responsibility for these crimes, namely command or superior responsibility, as well as the «relevant rules on the irrelevance of superior order defenses and statutes of limitation»[60].

Furthermore, other recommendations are addressed to the EU institutions, some of which have already been implemented. *Inter alia*, the EU

56 Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes, OJ L 118, 14.05.2003, pp. 12-14, article 4.

57 EU Genocide Network Strategy, pp. 27-29 and 33.

58 *Ibid.*, pp. 30-32.

59 *Ibid.*, p. 40.

60 *Ibid.*, Measure 4.

Genocide Network recommends evaluating the implementation of Council Decision 2002/494/JHA and Council Decision 2003/335/JHA, to elaborate an Action Plan on the Fight against Impunity within the EU, or to assess additional funding possibilities in that framework[61]. In that same line, it is interesting to note that the proposal to create a European day against impunity for core international crimes[62] has been implemented.

Another instrument designed to enhance cooperation among EU Member States in relation with the fight against impunity is 'Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States'[63]. Even though framework decisions do not have direct effect[64], they oblige EU Member States «to reach the requested result and set a standard level by which to interpret different national criminal legislation»[65]. As such, they «generate a harmonizing effect on national criminal legislation within the Union»[66]. The Framework Decision on the European Arrest Warrant replaces formal extradition procedures among EU Member States with a system of mutual recognition of criminal decisions, referred to as the cornerstone of judicial cooperation[67]. In particular, the purpose of the Framework Decision is to introduce «a new simplified system of

61 *Ibid*., p. 43.

62 *Ibid*., p. 44.

63 Luisa Vierucci, «The European Arrest Warrant: An additional tool for prosecuting ICC crimes», *Journal of International Criminal Justice*, vol. 2, 2004, pp. 275-285.

64 Article 34(2) of the Treaty of the European Union as amended by the Treaty of Nice reads as follows: «The Council shall take measures and promote cooperation, using the appropriate form and procedures as set out in this title, contributing to the pursuit of the objectives of the Union. To that end, acting unanimously on the initiative of any Member State or of the Commission, the Council may: [...]
(b) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect». Even though framework decisions no longer exist under the Lisbon Treaty architecture, their legal effects are preserved until they are repealed, annulled or amended. See: Protocol (nº 36) on Transitional Provisions, OJ 115, 09.05.2008, pp. 0322-0326, article 9.

65 ECJ, Case 103/05, judgment of 16 June 2005, Criminal proceedings against Maria Pupino, ECR I-5825. Quoted in Wouters and Basu, «The creation of a global justice system: the European Union and the International Criminal Court», *op. cit*., 2009, p. 25.

66 Wouters and Basu, «The creation of a global justice system: the European Union and the International Criminal Court», *op. cit*., 2009, p. 25.

67 EU Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant, OJ L 190/1, 18.07.2002, Preamble.

surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences» allowing to «remove the complexity and potential for delay inherent in the present extradition procedures»[68]. The new system shall therefore aim to facilitate the «free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice»[69]. To do so, the Framework Decision contains a list of offences, which:

> if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State, shall, under the terms of this Framework Decision and without verification of the double criminality of the act, give rise to surrender pursuant to a European arrest warrant[70].

Said list includes «crimes within the jurisdiction of the International Criminal Court». Therefore, this Framework Decision does not subject national authorities to the double jeopardy rule, nationality, and specialty requirements[71] to hand over a suspect to another Member State. As observed by Luisa Verucci, the Framework Decision on the European Arrest Warrant presents several advantages in the fight against impunity. It establishes a harmonized system of arrest and surrender throughout the EU, «which is unprecedented in any other region of the world»[72]. More importantly, it allows national authorities to comply with their obligation to cooperate with the ICC without delay. Consequently, the Framework Decision has the potential to considerably facilitate proceedings whenever national authorities are willing to prosecute an alleged war criminal that has moved to another EU Member State.

Thus, even though the EU retains limited competence on this matter, it has established a series of tools which allow EU Member States to cooperate

68 *Ibid.*, recital 5.

69 *Ibid.*

70 *Ibid.*, article 2.

71 The last two requirements do meet exceptions, detailed in article 4(6), 5(3), and 27. See: Vierucci, «The European Arrest Warrant: An additional tool for prosecuting ICC crimes», *op. cit.*, 2004, p. 276.

72 Vierucci, «The European Arrest Warrant: An additional tool for prosecuting ICC crimes», *op. cit.*, 2004, p. 277.

efficiently in the apprehension and prosecution of persons suspected of having committed war crimes. Through these legal instruments, the EU likewise implements part of its obligation to ensure respect for IHL insofar as it facilitates the work of national authorities to enforce Common Article 1.

1.2. France: a late criminalization

French law codifies the penal repression of international crimes in its criminal code. War crimes have been punished in French law only since 2010, with the adoption of Act n° 2010-930 on the adaptation of criminal law to the establishment of the International Criminal Court (Loi n° 2010-930 du 9 août 2010 portant adaptation du droit pénal à l'institution de la Cour pénale internationale). The reasons for such a late transposition are probably tied to the Algerian War of Independence, which took place from 1954 until 1962, and for which the French authorities had adopted a number of acts organizing the amnesty in order to avoid the prosecution of its nationals[73]. Within this frame, French courts refused to apply the specificities of core international crimes to the atrocities committed during the Algerian War, so that amnesty was applicable[74].

Despite the ratification and integration of the Geneva Conventions in the French legal order (see *supra,* Chapter 2), French authorities had not incorpo-

73 Ordonnance n° 62-427 du 14 avril 1962 «rendant applicable sur l'ensemble du territoire de la République le décret n° 62-327 du 22 mars 1962 portant amnistie des infractions commises au titre de l'insurrection algérienne»; Ordonnance n° 62-428 du 14 avril 1962 «rendant applicable sur l'ensemble du territoire de la République le décret n° 62-328 du 22 mars 1962 portant amnistie de faits commis dans le cadre des opérations de maintien de l'ordre dirigées contre l'insurrection algérienne»; Ordonnance n° 62-429 du 14 avril 1962 «relative à la procédure concernant les crimes et délits en relation avec les événements d'Algérie»; Ordonnance n° 62-430 du 14 avril 1962 «modifiant la décision du président de la République en date du 3 mai 1961 instituant un tribunal militaire»; Ordonnance n° 62-431 du 14 avril 1962 «relative à la délégation au tribunal militaire des magistrats de l'ordre judiciaire», Journal officiel, «Lois et décrets», pp. 3892-3894; Loi n° 64-1269 du 23 décembre 1964 «portant amnistie et autorisant la dispense de certaines incapacités et déchéances», Journal officiel, «Lois et décrets», 24 décembre 1964, p. 11499; Loi n° 66-396 du 17 juin 1966 «portant amnistie d'infractions contre la sûreté de l'État ou commises en relation avec les événements d'Algérie», Journal officiel, Lois et décrets, 18 juin 1966, p. 4915; Loi n° 68-697 du 31 juillet 1968 «portant amnistie», Journal officiel, «Lois et décrets», 2 août 1968, p. 7521. On this aspect, see: Gilles Manceron, «Mémoire et guerre d'Algérie», *La Revue des droits de l'homme* [on line], n° 2, 2012. Available at: https://revdh.revues.org/252 (Accessed: 22.05.2017).

74 Cour de cassation, criminal section, 20 May 2000. Quoted in Fouchard, *Application et promotion du droit international humanitaire et du droit international*, *op. cit.*, 2009, p. 38.

rated the notion of grave breaches and corresponding procedures of prosecution in its criminal legislation. This codification is considered unnecessary in some countries to the extent that international treaties are automatically integrated into national law, as it is the case in France. Furthermore, the Cour de cassation held in the Ould Dah Ely case of 23 October 2002 that the principle of legality authorized that an offence be defined in an international treaty[75].

Nonetheless, such integration does not automatically give rise to the invocability of the international provisions at stake. In the French case, this legislative inertia proved to be problematic insofar as national jurisdictions refused to rely on the provisions of the Geneva Conventions in order to prosecute alleged perpetrators on the grounds that the provisions of the Geneva Conventions were not precise enough, thus rejecting the internal applicability of the Geneva Conventions[76]. Even though the Geneva Conventions effectively defined the grave breaches, they were not deemed a sufficiently precise legal basis allowing for criminal prosecution. Consequently, up until the adoption of Act nº 2010-930, French jurisdictions could only prosecute alleged perpetrators of grave breaches and serious violations on the basis of ordinary criminal law, thus getting past the specificities of IHL, or on the basis of the code of military justice, thus limiting importantly its scope of application *ratione personae*. The adaptation of French criminal law was therefore a necessary requirement for the effective jurisdiction of national courts over grave breaches[77].

The ratification of the Rome Statute by France constituted an important step in that regard. The rule of complementarity obliged national authorities to modify the legislation for them to be able to effectively prosecute alleged perpetrators of the crimes contained in the Rome Statute. Act nº 2010-930 on the adaptation of criminal law to the establishment of the International Criminal Court modified the French criminal code, so as to integrate the crimes included in the Rome Statute. The result of such process is that they are regulated by the new Chapter 1 of Book IV bis of the criminal code.

75 Cour de cassation, case nº 02-85379, 23 October 2002, Ould Dah Ely: «aux motifs, que le príncipe de légalité ne s'oppose nullement à ce qu'une infraction soit définie dans un traité ou un accord international, celui-ci ayant une force supérieure à la loi».

76 Cour de cassation, chambre criminelle, case nº 95-81527, 26 March 1996, E. Javor et al. vs. X.

77 CNCDH, *Les Droits de l'Homme en France, Rapport 2009-2011*, Paris, La Documentation française, 2011, p. 29.

First, the transposition of the notion of war crimes in national legislation is provided. Then, the status of the alleged perpetrator has been defined by national legislation and case-law, on matters dealing with the rules on responsibility, immunity, and statutory limits.

1.2.1. The notion of war crimes («crimes et délits de guerre»)

Following a general definition of war crimes, the criminal code then provides for a certain number of offenses that are common to NIACs and IACs[78], and for those that apply exclusively to IACs[79] and NIACs[80] respectively.

1.2.1.1. General definition

Pursuant to article 461-1, for a war crime to exist, three conditions shall be met: a) a violation shall be committed within the frame of an armed conflict; b) this behavior shall violate the laws and customs of war or treaty law; and c) they shall aim the persons or property referred to by articles 461-2 to 461-31 of the criminal code. It should be noted that the ICRC proposed to add that these offences may constitute actions or omissions, so as to reflect article 86 of Additional Protocol I[81], but this proposal was rejected.

A few comments may be made regarding the definition of war crimes as provided by the French legal order. On the one hand, the criminal code established a distinction between more serious (*crimes*) and less serious crimes (*délits*). This distinction is surprising insofar as it does not reflect the current state of international criminal law. Furthermore, this distinction is questionable. The notion of '*délits*' seems to infer that these crimes are not so serious. Proof of that is that it is often translated into 'misdemeanor' in English. Nonetheless, this section of the criminal code enshrines the prohibition of behaviors deemed so serious that their penal repression is organized at international level.

78 French criminal code, articles 461-2 to 461-18.

79 French criminal code, articles 461-19 to 461-29.

80 French criminal code, articles 461-30 to 461-31.

81 Nicole Ameline, *Avis n° 1828 fait au nom de la commission des affaires étrangères sur le projet de loi, adopté par le Sénat, portant adaptation du droit pénal à l'institution de la Cour pénale internationale*, Paris, Sénat, 8 July 2009, p. 30.

In addition, the French category of '*délits de guerre*' does not address the less serious violations of the Geneva Conventions that do not belong to the categories of grave breaches and serious violations. On the contrary, it transposes the content of well-established war crimes, which are either grave breaches or serious violations in IHL. Another issue is that it establishes a lower threshold regarding statutory limits than for war crimes.

On the other hand, the definition refers to the violations of the laws and customs of war («violation des lois et coutumes de la guerre») as well as to the violations of international conventions governing armed conflicts («violation des conventions internationales applicables aux conflits armés»). Those provisions are welcomed, to the extent that they allow for a flexible interpretation of the notion of war crimes, in accordance with the evolution of international law, including further customary developments. Consequently, the choice of the legislature was to opt for a mixed approach, whereby the violations of the laws and customs of war and of international conventions governing armed conflicts are criminalized by a general provision, and certain serious crimes are explicitly and specifically codified in the criminal law.

It is also worth noticing that the criminal code contributes to the movement of alignment of the regime of NIACs on that of IACs, even though this contribution is strictly framed. Indeed, one of the requirements for a war crime or delict to be constituted in the French legal order is the existence of an armed conflict, international or not[82]. In this sense, the criminal code does not bind the notion of war crimes to that of IAC. Furthermore, it refers to the notion of «persons mentioned in the chapter» and may therefore apply to a broader category of persons than that of 'protected persons' in the sense of the Geneva Conventions. These elements demonstrate that the French legislature has endorsed the evolution of war crimes at international level. That being said, the provisions of the criminal code do not go beyond what is stated in the Rome Statute and operate a strict categorization among the offences which are made punishable both in IACs and NIACs, those which are made punishable exclusively in IACs, and those which constitute war crimes in NIACs. Consequently, the French legislation reflects a positive endorsement of the current state of international treaty law but does not seem to develop this area or to break new grounds.

82 French criminal code, article 461-1.

Besides, the French legislature protected some of its specificities in the field of defense and security. Indeed, article 462-11 of the criminal code explicitly excludes from the scope of war crimes the use of nuclear weapons or any other weapon whose use is not prohibited pursuant to France's international treaty obligations in the exercise of its right to self-defense. This provision is in line with France's interpretative declarations made to the Rome Statute[83]. However, it was criticized by the CNCDH, as it authorizes behaviors which are actually defined as war crimes by the Rome Statute. The CNCDH thus called for the abrogation of this provision[84]. On the other hand, it should be noted that the ICJ was quite cautious on this issue, as it held in the Advisory Opinion on Nuclear Weapons that it could not:

> reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defense, in which its very survival would be at stake[85].

Following this general definition of war crimes, the criminal code then provides for a certain number of offenses that are common to NIACs and IACs[86], and for those that apply exclusively to IACs[87] and NIACs[88] respectively.

1.2.1.2. A catalog of offences based on the Rome Statute

The first category of offences, which applies to both IACs and NIACs, is divided into three sub-categories: violations resulting from violence against persons, the conduct of hostilities, and from violence against property. Attempt-

83 «The provisions of article 8 of the Statute, in particular paragraph 2 (b) thereof, relate solely to conventional weapons and can neither regulate nor prohibit the possible use of nuclear weapons nor impair the other rules of international law applicable to other weapons necessary to the exercise by France of its inherent right of self-defence, unless nuclear weapons or the other weapons referred to herein become subject in the future to a comprehensive ban and are specified in an annex to the Statute by means of an amendment adopted in accordance with the provisions of articles 121 and 123».

84 CNCDH, Avis sur la loi portant adaptation du droit pénale à l'institution de la Cour Pénale Internationale, 6 November 2008, p. 2.

85 IJC, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1. ICJ Reports 1996, p. 226, para. 97.

86 French criminal code, articles 461-2 to 461-18.

87 *Ibid.*, articles 461-19 to 461-29.

88 *Ibid.*, articles 461-30 to 461-31.

ing[89], and aiding or abetting[90] are also considered offences under the French criminal code.

In this regard, article 461-2 stipulates a general formula as it punishes willful killing («atteintes volontaires à la vie»), or willfully endangering the physical or mental integrity of protected persons in accordance with the laws and customs of war and IHL, as well as their kidnapping and unlawful confinement. It thus reflects to some extent articles 50/51/130/147 of the Geneva Conventions – which regulate the grave breaches, Common Article 3, and articles 8(2)(a)(i), (iii), (iv), and 8(2)(c)(i) of the Rome Statute, although the reference to customary law seems to broaden its scope of application. Then, article 461-3 literally transposes the content of article 8 (2)(b)(x) of the Rome Statute and punishes the subjection of persons who are in the power of an adverse party to medical or scientific experiments or physical mutilation not justified on medical grounds nor made in the interest of these persons, and which cause death to or seriously endanger the health, physical or mental integrity of such person. Sexual violence is also repressed, namely enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, which are punished by life imprisonment in accordance with article 461-4[91]. Article 461-5 also refers to the prohibition of humiliating and degrading treatments on persons from the adverse party which seriously endanger their physic or mental integrity. The criminal code punishes the behaviors which endanger the individual freedom of protected persons, even in the absence of protection offered by international treaty law (articles 461-6). Finally, conscripting or enlisting children in the national armed forces or in armed groups, or using them to participate actively in hostilities is also criminalized (articles 461-7), in accordance with the current state of international treaty and customary law[92], albeit the threshold is elevated from 15 to 18 years.

89 *Ibid*., article 461-17.

90 *Ibid*., article 461-18.

91 Reflecting articles 8(2)(b)(xxii) and (vi) of the Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90), articles 4(2)(e) and (f) of Additional Protocol II, articles 75(2)(b) and 76(1) of Additional Protocol I, as well as article 27(2) of GC IV.

92 Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90), articles 8(2)(b)(xxvi) and 8(2)(e)(vii), Additional Protocol II, article 4(3)(c), Additional Protocol I, article 77(2), Convention on the Rights of the Child, articles 38(2) and (3), ICRC Study on Customary IHL, rules 136 and 137.

Regarding the offences relating to the conduct of hostilities occurring both in IACs and NIACs, the criminal code punishes with life imprisonment to declare that there shall be no survivors or to threaten an adversary therewith[93] and to willfully attack the civilian population or civilians not directly participating in hostilities[94]. Furthermore, killing or wounding a combatant who, having laid down his arms or having no longer means of defense, has surrendered at discretion[95] is included, even though international treaty law does not seem to apply this rule to NIACs. Killing or wounding treacherously a combatant adversary is likewise penalized[96].

Finally, willfully attacking the staff and property making use of the distinctive emblems of the Geneva Conventions and Additional Protocols or employed within the frame of a humanitarian mission or a peace-keeping mission in accordance with the UN Charter[97]; willfully attacking buildings dedicated to religion, education, art, science or caritative purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided that they are not military objectives[98]; willfully attacking civilian objects[99]; pillaging a town or place, even when taken by assault[100]; as well as

93 French criminal code, article 461-8.

94 French criminal code, article 461-9, reflecting articles 85(3)(a) and 51(2) of Additional Protocol I, article 13(2) of Additional Protocol II, articles 8(2)(b)(i) and 8(2)(e)(i) of the Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90).

95 French criminal code, article 461-10, reflecting article 85(3)(e) of Additional Protocol I and article 8(2)(b)(vi) of the Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90).

96 French criminal code, article 461-11, reflecting articles 8(2)(b)(xi) and 8(2)(e)(ix) of the Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90), article 37(1) of Additional Protocol I, and rule 65 of the ICRC Study on Customary IHL.

97 French criminal code, article 461-12, reflecting articles 8(2)(b)(xxiv) and 8(2)(e)(ii) of the Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90), articles 19(1), 20, 35(1), 24, 35(1) and 36(1) of GC I, articles 22(1), 23, 24(1), 27(1) and 36 of GC II, articles 18(1) and (3), 20(1) and (2), 21, and 22(1) and (2) of GC IV, articles 12(1) and (2), 15(1) and (5), 21, 23(1), and 24 of Additional Protocol I, articles 9(1) and 11(1) of Additional Protocol II, Rules 25, 28, 29, and 30 of the ICRC Study on Customary IHL.

98 French criminal code, article 461-13, reflecting articles 8(2)(b)(ix) and 8(2)(e)(iv) of the Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90), articles 53(a) and c, 85(4)(d) of Additional Protocol I, article 16 of Additional Protocol II, articles 27(1) and 56 of HR IV, and rules 38 and 40 of the ICRC Study on Customary IHL.

99 French criminal code, article 461-14, reflecting article 52(1) of Additional Protocol I.

100 French criminal code, article 461-15, reflecting articles 8(2)(b)(xvi) and 8(2)(e)(v) of the Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90), article 28 of HR IV, article 4(2)(g) of Additional Protocol II; and rule 52 of the ICRC Study on Customary IHL.

stealing, extorting, destructing, degrading or deteriorating the property of persons protected by IHL, not justified by military necessity[101], constitute war crimes or *délits*.

The second category, which applies solely to international armed conflicts, is divided between the violations of IHL directed against persons and the conduct of hostilities. In this respect, utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations, compelling a protected person to serve in the forces of a hostile power[102], putting obstacles to the right for a protected person to be regularly and impartially judged[103], are punished by 20 years of imprisonment[104]. Furthermore, declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party is punished with 15 years of imprisonment[105].

In addition, employing poison or poisoned weapons, asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, employing bullets which expand or flatten easily in the human body, as well as employing weapons, projectiles, and material and methods of warfare which are prohibited and annexed to the Rome Statute are punished by life imprisonment[106]. Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are defended and which are not military objectives[107], inten-

101 French criminal code, article 461-16, reflecting articles 50/51/147 of GC I, II, and IV, although the wording of the criminal code does not seem to require an 'extensive' destruction of appropriation of property.

102 French criminal code, article 461-20, reflecting article 8(2)(a)(v) of the Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90), article 130 of GC III, and article 147 of GC IV.

103 French criminal code, article 461-21, reflecting article 8(2)(a)(v) of the Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90), article 130 of GC III, and article 147 of GC IV.

104 French criminal code, article 461-19, reflecting article 8(2)(b)(xxiii) of the Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90), article 23(1) of GC III, article 28 of GC IV, articles 51(7) and 58(a) of Additional Protocol I, rule 97 of the ICRC Study on Customary IHL.

105 French criminal code, article 461-22, reflecting article 8(2)(b)(xiv) of the Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90), and article 23(2) of HR IV.

106 French criminal code, article 461-23, reflecting articles 8(2)(b)(xvii), (xviii), (xix), and (xx) of the Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90).

107 French criminal code, article 461-24, reflecting article 8(2)(b)(v) of the Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90), article 85(3)(d) of Additional Protocol I, article 25 of HR IV, and rules 35, 36, and 37 of the ICRC Study of Customary IHL.

tionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions and their Additional Protocols[108], the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory[109], intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians, which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated[110], are punished with life imprisonment. Moreover, intentionally launching an attack in the knowledge that such attack will cause damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated is punished by 20 years of imprisonment[111]. Finally, making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in personal injury is punished by 20 years of imprisonment[112]. If this causes mutilation or permanent injuries, the sentence increases to 30 years, while if it causes death, life imprisonment applies.

As for the third category, relating to crimes applicable to non-international armed conflicts only, it is less extensive. They extend to the displacement of the civilian population for reasons related to the conflict, unless the security

108 French criminal code, article 461-25, reflecting article 8(2)(b)(xxv) of the Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90), article 23(1) of GC IV, article 55(1) of GC IV, article 59(1) of GC IV, articles 54(1) and (2) of Addtional Protocol I, rules 55 and 56 of the ICRC Study on Customary IHL.

109 French criminal code, article 461-26, reflecting article 8 (2) (b) (viii) of the Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90), article 85 (4) (a) of Additional protocol I, rules 129A and 130 of the ICRC Study on Customary IHL.

110 French criminal code, article 461-27, reflecting article 8(2)(b)(iv) of the Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90).

111 French criminal code, article 461-28, reflecting article 8(2)(b)(iv) of the Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90).

112 French criminal code, article 461-29, reflecting article 8(2)(b)(vii) of the Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90), article 85(3)(f) of Additional Protocol I; article 23f) of HR IV, and rules 58, 59, 60, 61, 62, and 63 of the ICRC Study on Customary IHL.

of the civilians involved or imperative military reasons so demand[113], as well as the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court as provided by the Geneva Conventions and their Additional Protocols[114]. It should also be noted that if the person is executed, then the punishment shifts from 20 years of imprisonment to life imprisonment.

Thus, while the definitions enshrined in the criminal code extensively use the wording of the Rome Statute, they are nonetheless less detailed[115]. Furthermore, some offences contained in the Rome Statute are not included in the criminal code. In this respect, sexual slavery is not expressly repressed although it is enshrined in article 8(2)(a) of the Rome Statute[116]. In the same way, taking hostages does not appear as a war crime in the criminal code, despite its codification in article 8(2)(a) of the Rome Statute[117]. Indiscriminate attacks and the unjustifiable delay in the repatriation of prisoners of war or civilians are not punished by the French criminal code either[118]. These gaps, associated with the hierarchy between war crimes and *délits*, were criticized by the CNDCH. The latter considers that the adaptation of the French legal order to the Rome Statute is incomplete and actually harms the coherence, harmonization, and consolidation of international criminal law[119]. It is possible to apply this statement to IHL as well.

1.2.2. The status of the alleged perpetrator

First, the French Criminal Code appropriately integrates the different types of criminal responsibility over war crimes. In this regard, it recognizes the responsibility of both natural and legal persons[120].

113 French criminal code, article 461-30, reflecting article 8(2)(e)(viii) of the Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90), article 17(1) of Additional Protocol II, and rule 129B of the ICRC Study on Customary IHL.

114 French criminal code, article 461-31.

115 Ameline, *Avis n° 1828 fait au nom de la commission des affaires étrangères*, *op. cit.*, 8 July 2009, p. 30.

116 CNCDH, Avis sur la loi portant adaptation du droit pénale à l'institution de la Cour Pénale Internationale, 6 November 2008, p. 2.

117 *Ibid*.

118 CNCDH, Avis sur la Cour pénale internationale, 23 October 2012, Recommendation 2.

119 CNCDH, Avis sur la loi portant adaptation du droit pénale à l'institution de la Cour Pénale Internationale, 6 November 2008, p. 2.

120 French criminal code, articles 462-5 and 462-6.

Moreover, both military and civilian superior responsibility over war crimes are provided for. In this respect, article 462-7 stipulates the conditions that trigger command or superior responsibility. In accordance with these provisions, a military or civilian superior can be held responsible if (s)he knew – or should have known in the case of military superiors – that their subordinates committed or were about to commit a war crime and (s)he did not take all the necessary and reasonable measures to impede or repress such behavior, or to refer the situation to the competent authorities to investigate the facts or prosecute the alleged perpetrators. For the superior to be held responsible, the subordinates must be under their effective authority and control.

In the case of civilian superiors, the behavior at stake must be related to the activities that fall under their effective responsibility or control. Omissions are also foreseen insofar as the civilian superior may be held responsible if (s)he deliberately decided not to take into consideration the information provided on the subordinates' behaviors. Consequently, the wording used in the criminal code reflects to a large extent the wording used in the Rome Statute.

On the other hand, the criminal code explicitly refutes the possibility to exonerate one's criminal responsibility on the grounds that the behavior at stake is prohibited or authorized by the law or ordered by a legitimate authority[121]. Nonetheless, it may be used as a mitigating factor. In addition, if the suspect did not know that the act ordered by the legitimate authority was unlawful and if this order was not manifestly unlawful, then the criminal responsibility of the alleged perpetrator may not be incurred. *A contrario*, they may be held criminally responsible if the order is manifestly unlawful at all times. Ignorance is therefore not an acceptable excuse under French law.

Conversely, self-defense is recognized as an excuse under some conditions. In particular, the person must have behaved reasonably to safeguard goods which are essential to their survival or someone else's survival, or to the accomplishment of a military mission against an imminent and illicit use of force, except if the means of defense are disproportionate to the seriousness of the danger[122].

121 *Ibid.*, article 462-8.
122 *Ibid.*, article 462-9.

Second, the provisions on statutory limits do not appropriately reflect the current state of international law. The legislation transposing the Rome Statute establishes statutory limits over war crimes, a situation criticized by the CNCDH. Indeed, it considered that it goes against the coherence of the regime applicable to the crimes contained in the Rome Statute and that it undermines the penal repression of war crimes, thus posing a threat to the harmonization of their repression at international level[123]. It also called on the French authorities to ratify the UN 'Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity'[124] as well as the 'European Convention on the non-applicability of statutory limitation to crimes against humanity and war crimes'[125].

It should be noted in this respect that there are no statutory limits with regard to the other international core crimes, namely genocides and crimes against humanity[126]. The Constitutional Court acknowledged in 1999 that the absence of statutory limits regarding the most serious crimes which affect the international community as a whole («crimes les plus graves qui touchent l'ensemble de la communauté internationale») was constitutional[127]. Therefore, this difference of treatment between war crimes and the other international core crimes seems to reflect the legislature's willingness to establish a hierarchy among them and to emphasize the seriousness of genocides and crimes against humanity over any other type of offence in the French legal order[128].

123 CNCDH, Avis sur la loi portant adaptation du droit pénale à l'institution de la Cour Pénale Internationale, 6 November 2008, p. 2.

124 See: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-6&chapter=4&lang=en (Accessed: 30.01.2016).

125 CNCDH, Avis sur la Cour pénale internationale, 23 October 2012, Recommendation 3. See also: CNCDH, Avis sur l'adhésion française au Protocole Additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victims des conflits armés internationaux (Protocole I), 6 July 2001; CNCDH, Avis sur l'adaptation du droit interne au Statut de la Cour pénale internationale, 23 November 2001.

126 French criminal code, article 213-5.

127 Conseil constitutionnel, case nº 98-408 DC of 22 January 1999, Loi autorisant la ratification de la convention portant statut de la Cour pénale internationale, JO of 24 January 1999, p. 1317, para. 20.

128 Patrice Gélard, *Rapport n° 326 (2007-2008) fait au nom de la commission des lois constitutionnelles, de législation, du suffrage universel, du Règlement et d'administration générale sur le projet de loi portant adaptation du droit pénal à l'institution de la Cour pénale internationale*, Paris, Sénat français, 14 May 2008, p. 47.

Actually, several members of Parliament challenged this difference of treatment before the Constitutional Court in 2010[129]. They considered that article 462-10 violated the Rome Treaty as well as the principle of equality. It is interesting to note that the appellants alleged that the codification of the ICC's jurisdiction in article 53-2 of the Constitution entailed the integration of the Rome Statute in the bloc of constitutionality as a norm of reference of constitutionality review. Nonetheless, the Court rejected this argument and held that the conditions foreseen in the Rome Treaty did not transform it into such norm of reference. Consequently, it was not competent to ensure the control of conventionality of French laws, in accordance with its well-established case-law[130]. As for the second argument, the Court concluded that war crimes and crimes against humanity are of different nature, so that the difference of regime regarding statutory limits is constitutional[131].

Thus, pursuant to article 462-10 of the criminal code, war crimes lapse upon 30 years, while 'war *délits*' lapse upon 20 years. The penalty imposed in case of conviction follows the same statutory limitations. Therefore, if the war crimes and delicts occurred more than 30 and 20 years respectively, French courts lose their competence to prosecute alleged perpetrators. In turn, this means that the ICC would automatically have a claim on situations involving French nationals or foreigners present on French territory in accordance with the principle of complementarity[132].

Finally, the existing case-law is not entirely clear on the extent of State immunity. Several cases are worth mentioning even though they do not necessarily deal with war crimes.

Firstly, the personal immunity of incumbent State officials is understood as general and absolute[133]. In accordance with this approach, State

129 Conseil constitutionnel, Case n° 2010-612 DC, Loi n° 2010-930 du 9 août 2010 portant adaptation du droit pénal à l'institution de la Cour pénale internationale, JO of 10 August 2010, p. 14682.

130 *Ibid*., p. 14682, para. 5.

131 *Ibid*., para. 7.

132 Gélard, *Rapport n° 326 (2007-2008) fait au nom de la commission des lois constitutionnelles*, *op. cit*., 14 May 2008, p. 48.

133 UN Committee against torture, «Liste de points concernant le septième rapport périodique de la France. Additif. Réponses de la France à la liste de points», CAT/C/FRA/Q/7/Add.1, 18 February 2016, p. 12.

officials benefit from an absolute immunity during the time of their office on the French territory, provided that such immunity does not contradict other international provisions that apply to them[134]. In this respect, a complaint was filed in 2001 against Muammar Gaddafi for his involvement in the attack against an airliner in September 1989. However, the Cour de cassation endorsed the application of the principle of immunity of incumbent heads of State and based its decision on international custom to do so[135]. The Court nonetheless accepted that some exceptions may apply in accordance with international law, although it did not provide further details regarding such exceptions[136]. Pursuant to a report of 2016 on France's application of the Convention against Torture, these exceptions would include situations in which an arrest warrant has been issued by the ICC against a national of a State party to the Rome Statute or of a State whose situation has been referred to the ICC by the UN Security Council[137].

Nevertheless, it remains unclear who the beneficiaries of such personal immunity are besides heads of State, heads of government and ministers of foreign affairs[138]. By way of example, the Cour de cassation rejected the application of personal immunity to an incumbent vice president on 15 December 2015[139]. Furthermore, the Cour de cassation considered that the obligation of a State official to inform within the frame of a preliminary inquiry does not infringe upon the principle of personal immunity[140]. In this respect, the above-mentioned report on the application of the Convention against Torture specifies that the other acts of a preliminary inquiry such as an arrest

134 *Ibid*.

135 Cour de cassation, chambre criminelle, case nº 00-87215, 13 March 2001, Muammar Gaddafi case: «La coutume internationale s'oppose à ce que les chefs d'État en exercice puissent, en l'absence de dispositions internationales contraires s'imposant aux parties concernées, faire l'objet de poursuites devant les juridictions pénales d'un État étranger [...]. Qu'en l'état du droit international, le crime dénoncé, quelle qu'en soit la gravité, ne relève pas des exceptions au principe de l'immunité de jurisdiction des chefs d'État étrangers en exercice».

136 *Ibid*.

137 UN Committee against torture, «Liste de points concernant le septième rapport périodique de la France. Additif. Réponses de la France à la liste de points», CAT/C/FRA/Q/7/Add.1, 18 February 2016, p. 12.

138 *Ibid*.

139 Cour de cassation, chambre criminelle, case nº 15-83156, 15 December 2015.

140 Cour de cassation, chambre criminelle, case nº 12-81676, 19 March 2013. Confirmed in: Cour de cassation, chambre criminelle, case nº 1380158, 17 June 2014.

warrant might violate such immunity[141]. However, the interpretation provided by the Cour de cassation seems to nuance this approach insofar as it held that the acts of torture and cruelty committed by State officials do not belong to the exercise of State sovereignty and that since the prohibition of torture is a norm of *jus cogens*, it constitutes a legitimate restriction upon jurisdictional immunity[142].

As for functional immunity of the other State officials, it is limited to the acts conducted within the frame of their duties[143]. However, the application of immunity is not entirely clear. Indeed, on 25 October 2007, the International Federation of Human Rights filed a complaint against the former American Secretary for Defense, Donald H. Rumsfeld, on grounds of torture. On 16 November, the public prosecutor dismissed the proceedings, alleging that he enjoyed immunity. The arguments raised were that the acts for which he was challenged fell under the remit of his official functions, and that functional immunity continues even after leaving office[144]. The public prosecutor did not provide further details justifying how acts of torture could possibly enter within the scope of Donald H. Rumsfeld's functions. This interpretation was nonetheless upheld by the Court of appeals[145]. Yet, this interpretation is in contradiction with the one adopted in other cases. By way of example, the public prosecutor issued an extradition request against former President Augusto Pinochet and alleged that the crimes of which he was accused were not intrinsically connected («actes détachables») with the

141 UN Committee against torture, «Liste de points concernant le septième rapport périodique de la France. Additif. Réponses de la France à la liste de points», CAT/C/FRA/Q/7/Add.1, 18 February 2016, p. 12.

142 Cour de cassation, chambre criminelle, case nº 12-81676, 19 March 2013: «3) alors que les actes de torture et de barbarie commis par les agents d'un Etat ne participent pas à l'exercice de la souveraineté de l'Etat; [...] 4) alors que l'interdiction de la torture a valeur de norme impérative ou jus cogens en droit international, laquelle prime les autres règles du droit international et constitue une restriction légitime à l'immunité de juridiction».

143 Cour de cassation, chambre criminelle, 23 November 2004, Malta Maritime Authority case: «qu'en effet, la coutume internationale qui s'oppose à la poursuite des États devant les juridictions pénales d'un État étranger s'étend aux organes et entités qui constituent l'émanation de l'État ainsi qu'à leurs agents en raison d'actes qui, [...] relèvent de la souveraineté de l'État concerné».

144 Court of appeals of Paris, Letter from the prosecutor Jean Claude Marin to Patrick Baudouin, Paris, 16.11.2007. Available at: https://competenceuniverselle.files.wordpress.com/2011/07/lettre_du_procureur_dans_l.pdf (Accessed: 10.03.2017).

145 Court of appeals of Paris, 27 February 2008, dismissal by the prosecutor.

exercise of his mandate. Consequently, even though the principle seems to be clearly stipulated, its application is more hazardous and seems to respond to extra-legal considerations.

1.2.3. Institutional developments

A specialized unit was created within the Paris Tribunal of first instance in order to prosecute crimes against humanity, genocides and war crimes (Pôle judiciaire spécialisé pour les crimes contre l'humanité et les crimes et délits de guerre) in 2012[146]. Created with a view to try the cases relating to the genocide in Rwanda already opened in France, it exercises its jurisdiction in accordance with the principles of complementarity and concurrent jurisdiction with regard to international courts and local courts respectively. As such, local courts may decline their jurisdiction in favor of the specialized unit. This specialized unit is therefore composed of judges specialized in international criminal law. It collaborates with foreign jurisdictions and police forces, notably when it applies universal jurisdiction or when cases are prosecuted in foreign countries. The creation of this specialized unit is understood as France's active contribution to a European and international system dedicated to the fight against impunity[147].

As noted by Human Rights Watch, the establishment of the Pôle judiciaire supposed a significant improvement in the prosecution of Rwandan genocide suspects living in France, insofar as the lack of experience, resources, and time of the prosecutors and investigative judges in charge had importantly delayed the proceedings[148]. In this context, the first completed trial was that of Pascal Simbikanga in 2014.

The Pôle judiciaire is assisted by a specialized police unit in charge of searching alleged perpetrators of crimes against humanity, genocides, and war

146 Act nº 2011-1862 of 13 December 2011, article 22 (Loi nº 2011-1862 du 13 décembre 2011 relative à la répartition des contentieux et l'allègement de certaines procédures juridictionnelles), JORF n°0289 of 14 December 2011, p. 21105.

147 Damien Arnaud, «Crimes contre l'humanité: la France mobilisée», French Ministry of Justice, 5 March 2013, Podcast.

148 Leslie Haskell, *The Long Arm of Justice: Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands*, Human Rights Watch, 2014, p. 72. Available at: https://www.hrw.org/sites/default/files/reports/IJ0914_ForUpload.pdf (Accessed: 05.05.2017).

crimes (Office central de lutte contre les crimes contre l'humanité, les génocides et les crimes de guerre)[149]. It is particularly worth noticing that this specialized police unit is competent to search for the alleged perpetrators of, *inter alia*, war crimes, who are suspected to be in France. Consequently, the creation of the Office central responds to the obligation established by the Geneva Conventions to actively search for alleged war criminals under the grave breaches regime. It also means that investigators no longer need to rely «solely on victims and NGOs to bring [suspects] to their attention» as they have the «capacity to proactively look for them»[150].

It should be noted that both units collaborate with their European counterparts and cooperate actively with Europol, Eurojust, in particular the EU Genocide Network[151]. Furthermore, they maintain relationships with scholars, NGOs, members of the military, and public authorities in order to benefit from their expertise on the matter[152]. As of April 2017, 57 cases were under investigation[153], thus making France one of the most active fora on the issue.

1.3. Spain: a progressive transposition

The Spanish legislature has progressively organized the penal repression of the grave breaches and serious violations of IHL at internal level. Indeed, the 1985 Spanish military criminal code[154] enshrined the penal repression of the violations of IHL. Nonetheless, this implementation was incomplete and unsatisfactory because it presented gaps in matters of competence *ratione personae* and *ratione materiae*[155]. Indeed, the military criminal code applied to mem-

149 Decree nº 2013-987 of 5 November 2013 (Décret nº 2013-987 du 5 novembre 2013 portant création d'un office central de lutte contre les crimes contre l'humanité, les génocides et les crimes de guerre).

150 Haskell, *The Long Arm of Justice: Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands*, *op. cit.*, 2014, p. 72.

151 Anaïs Colgnac, *Report on 'L'Office central de lutte contre les crimes contre l'humanite, pour que «la justice reste»*, Dalloz, 07.04.2017. Available at: http://www.dalloz-actualite.fr/dossier/l-office-central-de-lutte-contre-crimes-contre-l-humanite-pour-que-justice-reste#.WO3txBLyhQM (Accessed: 10.04.2017).

152 *Ibid*.

153 *Ibid*.

154 Organic Act 13/1985 of 9 December 1985 (Ley Orgánica 13/1985, de 9 de diciembre).

155 Pignatelli y Meca, *La sanción de los crímenes de guerra en el Derecho español*, *op. cit.*, 2003, p. 101.

bers of the military, so that civilians could not be prosecuted on war crimes grounds and not all the existing grave breaches and serious violations of IHL at the time were included in the code[156].

It was in 1995, upon a proposal made by the CEDIH (Centro de Estudios del Derecho Internacional Humanitario de la Cruz Roja), that war crimes were included in the ordinary criminal legislation, with the introduction of Chapter III, on crimes against protected persons and property in case of armed conflicts («De los delitos contra las personas y bienes protegidos en caso de conflicto armado») in Title XXIV on 'crimes against the international community' («Delitos contra la comunidad internacional»). In contrast with the military criminal code, any person can be prosecuted on war crimes grounds, members of the military and civilians alike. Therefore, Spain complied with its obligation to provide for the penal repression of the grave breaches and established the conditions allowing for the effective prosecution of alleged perpetrators – in accordance with the principle of legality – already in 1995[157]. The early transposition of the grave breaches and other serious violations of IHL into the national criminal legislation has permitted the effective implementation and application of IHL and constituted a benchmark for other nations on this matter. As such, the Spanish transposition has been called a 'model' for legislative initiatives undertaken in foreign countries[158].

Nevertheless, the ratification of the Rome Statute on the ICC[159] made it necessary to amend the provisions on war crimes to the extent that some behaviors criminalized under the Rome Statute were not considered as such in the 1995 wording. In the same way, Spain had ratified several international conventions and treaties relating to armed conflicts after 1995 – the Convention on the Safety of the United Nations and Associated Personnel of 9 December 1994[160], the Protocol on the participation of children in armed

156 *Ibid*., pp. 101-103.

157 Fernando Pignatelli y Meca, «Los crímenes de guerra en la Ley orgánica 5/2010, de 22 de junio, de modificación del código penal», in José Luis Rodríguez-Villasante, José Luis Prieto and Joaquín López Sánchez (coords.), *La protección de la dignidad de la persona y el principio de humanidad en el siglo XXI*, Valencia, Tirant lo Blanch, 2012, p. 190.

158 *Ibid*., p. 195.

159 Instrumento de ratificación del Estatuto de Roma de la Corte Penal Internacional, hecho en Roma el 17 de julio de 1998, BOE nº 126, 27.05.2002, pp. 18824-18860.

160 Instrumento de ratificación de la Convención sobre la Seguridad del Personal de las Naciones Unidas y el Personal Asociado, hecha en Nueva York el 9 de diciembre de 1994, BOE nº 124, 25.05.1999, pp. 19556-19560.

conflicts to the Convention on the Rights of the Child[161], Protocol II to the Hague Convention of 1954 on the protection of cultural property in case of armed conflict of 1999[162], as well as other treaties relating to weapons[163] – so that Spain's new international commitments had to be reflected in the legislation as well[164].

Against this background, the Spanish legislature amended the criminal code in 2003[165], so as to include, *inter alia*, the protection of UN and associate personnel, additional provisions on specifically protected persons and objects, and the prohibition of some specific methods of warfare. Nonetheless, the proposal to include the prohibition of certain forms of sexual violence, in line with article 7(1) of the Rome Statute, was rejected[166]. A new reform was therefore adopted in 2010 to fill in the remaining gaps in the legislation[167]. Finally, a general reform was made to the criminal code in 2015[168], which provided for the prohibition of nuclear and radiological weapons as well as the prohibition of the denial of genocide, crimes against humanity, and war crimes.

In accordance with the current state of the legislation, articles 609 to 615 include an extensive catalogue of violations of IHL that are punishable under Spanish law. Furthermore, the status of the alleged perpetrator has been defined by national legislation and case-law, on matters dealing with the rules on responsibility, immunity, and statutory limits.

161 Instrumento de ratificación del Protocolo facultativo de la Convención sobre los Derechos del Niño, sobre la participación de niños en conflictos armados, hecho en Nueva York el 25 de mayo de 2000, BOE nº 92, 17.04.2002, pp. 14494-14497.

162 Instrumento de ratificación del Segundo Protocolo de la Convención de La Haya de 1954 para la Protección de los Bienes Culturales en caso de Conflicto Armado, hecho en La Haya el 26 de marzo de 1999, BOE nº 77, 30.03.2004, pp. 13410-13417.

163 See: Pignatelli y Meca, «Los crímenes de guerra en la Ley orgánica 5/2010», *op. cit.*, 2012, footnote 14.

164 *Ibid.*, p. 195.

165 Organic Act 15/2003, of 25 November 2003 (Ley Orgánica 15/2003, de 25 de noviembre, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal), article 162, BOE nº 283, 26.11.2003, pp. 41842-41875.

166 Pignatelli y Meca, «Los crímenes de guerra en la Ley orgánica 5/2010», *op. cit.*, 2012, pp. 200-201.

167 Organic Act 5/2010, of 22 June 2010 (Ley Orgánica 5/2010, de 22 de junio, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal), BOE nº 152, 23.06.2010, pp. 54811-54883.

168 Organic Act 1/2015, of 30 March 2015 (Ley Orgánica 1/2015, de 30 de marzo, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal), BOE nº 77, 31.03.2015, pp. 27061-27176.

1.3.1. The notion of war crime

Since – contrarily to France – Spain had incorporated into its national legislation the penal repression of the violations of IHL before it ratified the Rome Statute on the ICC, most of the provisions on this matter reflect the language used in IHL rather than in international criminal law. Nonetheless, the offences described in the Spanish criminal code do not necessarily follow the order presented in IHL.

1.3.1.1. General definition

Article 608 of the criminal code defines what a protected person is in accordance with the four Geneva Conventions, Additional Protocol I, and the second Hague Convention of 1899[169]. It likewise expressly enlarges it to the UN and associated personnel, in accordance with the Convention on the Safety of the United Nations and Associated Personnel of 9 December 1994[170], as well as to any person who benefits from this condition pursuant to Additional Protocol II or any other international treaty to which Spain is a party[171]. Consequently, it uses the terminology employed in the Geneva Conventions, enlarges it to the other categories of protected persons in accordance with the current state of international law, and allows for its adaptation to future international legal developments. Consistent with these provisions, the Spanish criminal code covers both grave breaches and serious violations of IHL.

In this context, violations of IHL occurring both in IACs and NIACs are criminalized in Spanish law already under the 1995 criminal code[172]. Actually, all the offences described in articles 609 to 615 are deemed to apply to IACs and NIACs without distinction. As a result, the Spanish criminal code undoubtedly participates in the movement of alignment of the regime of NIACs on that of IACs. Nonetheless, the territorial scope of application of these offences varies. Indeed, violations of IHL occurring in IACs may be repressed under the Spanish criminal code, regardless of the place where they were committed. Conversely, for a violation of IHL occurring in a NIAC to

169 Spanish criminal code, article 608 (1)(2)(3)(4)(5).
170 *Ibid.*, article 608(6).
171 *Ibid.*, article 608(7).
172 Pignatelli y Meca, *La sanción de los crímenes de guerra en el Derecho español*, *op. cit.*, 2003, p. 129.

be prosecuted under Spanish law, it must either have occurred in Spain or be subject to universal jurisdiction[173].

It should be noted that, besides the catalog of offences detailed in Chapter III, the 2003 reform introduced a new article 614 bis, which enshrined an aggravating factor when the behaviors defined in this chapter belong to a plan or a policy, or are committed on a large scale, thus reflecting the chapeau of article 8(1) of the Rome Statute[174]. Moreover, article 615 punishes the provocation, conspiracy, and solicitation to commit these crimes with penalties of one or two degrees below the one which applies to the behaviors at stake.

1.3.1.2. An extended catalog of offences based primarily on the Geneva Conventions

For the sake of clarity, it is possible to divide the offences contained in articles 609 to 613 in the following categories: principle of distinction, specifically protected persons and objects, special methods of warfare, the use of certain weapons, and the treatment of civilians and persons *hors de combat*.

Firstly, the Spanish criminal code enshrines the cardinal principle of distinction by means of several articles. Article 611 punishes with penalties from 10 to 15 years of imprisonment the following behaviors: launching or ordering an indiscriminate or excessive attack against the civilian population[175]; attacking or making the civilian population the object of reprisals[176]; destroying or damaging, in violation of the Law of Armed Conflicts, the civilian ship or aircraft of an adverse or neutral Party unnecessarily and without advance warning, or without adopting the measures necessary to ensure people's safety and to safeguard the documentation onboard[177].

Secondly, the offences against specifically protected persons and objects are contained in the catalog of Spanish war crimes. In particular, article 612

173 *Ibid*.; Pignatelli y Meca, «Los crímenes de guerra en la Ley orgánica 5/2010», *op. cit*., 2012, pp. 193.

174 Pignatelli y Meca, «Los crímenes de guerra en la Ley orgánica 5/2010», *op. cit*., 2012, p. 198.

175 Spanish criminal code, article 611(1), reflecting article 8(2)(b)(i) of the Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90), articles 85(3)(a), 52(1), and 51(2) of Additional Protocol I.

176 Spanish criminal code, article 611(1), reflecting article 8(2)(b)(ii) of the Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90), article 52(1) of Additional Protocol I.

177 Spanish criminal code, article 611(2).

punishes with penalties from three to seven years of imprisonment violations of the protection of non-military property and objects[178], and using violence against medical or religious personnel, or personnel belonging to the medical mission, or humanitarian relief personnel or against the personnel allowed to use the distinctive emblems of the Geneva Conventions[179].

The same article punishes intentionally directing attacks against any member of the UN and associated personnel, personnel involved in a humanitarian mission or peacekeeping mission, in accordance with the UN Charter, as long as they are entitled to the protection given to civilians or civilian objects under the international Law of Armed Conflicts, or threatening to direct such attacks to compel a legal or natural person to do or refrain from doing any act[180]. As for article 613(1)(i), it punishes with penalties from four to six years of imprisonment attacking or conducting acts of hostilities against the installations, material, units, private homes or vehicles of the UN and associated personnel, personnel involved in a humanitarian mission or peacekeeping mission in accordance with the UN Charter, or threatening to commit any such attack with the objective of compelling a physical or legal person to do or to refrain from doing any act[181].

Furthermore, cultural and religious buildings are especially protected. In this regard, article 613(1) punishes with penalties from four to six years of imprisonment attacking, or making the object of reprisals or hostilities the cultural or religious buildings which constitute the cultural or spiritual heritage of peoples, when such objects and places are not located in the immediate

178 Spanish criminal code, article 612(1): «willfully violating the protection due to hospitals, installations, material, medical units and vehicles, prisoner camps, medical and safety areas and localities, neutralized zones, non-defended localities and demilitarized zones» (freely translated by the author).
Reflecting article 8(2)(b)(v) of the Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90), article 85(3)(d) of Additional Protocol I, article 25 of the Hague Regulation IV, rules 35, 36, and 37 of the ICRC Study on Customary International Humanitarian Law.

179 Spanish criminal code, article 612(2).

180 Spanish criminal code, article 612(10), reflecting articles 8(2)(b)(iii) and (xxiv) of the Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90), articles 7(1) and 9 of the 1994 UN Convention, article 71(2) of Additional Protocol I.

181 Spanish criminal code, article 613(1)(i), reflecting articles 8(2)(b)(iii) and 8(2)(b)(xxiv) of the Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90), articles 7(1) and 9 of the 1994 UN Convention, article 71(2) of Additional Protocol I.

proximity of military objectives and they are duly signaled[182]; misappropriation of the cultural or religious buildings referred to in the previous paragraph in support of military action[183]; and the extensive appropriation, theft, pillage or acts of vandalism directed against these cultural or religious buildings[184].

Moreover, directing attacks, reprisals, acts of hostilities or improper use against cultural or religious objects to which special protection has been given or to which protection has been given by special arrangement, cultural or religious property under enhanced protection, or their immediate surroundings constitute aggravating factors[185]. The same holds true regarding the other actions which cause extensive and important destructions of the objects, works, and installations or which are extremely serious[186].

Civilian objects and population likewise benefit from special protection. In particular, attacking or making the object of reprisals or hostilities civilian objects of the adverse party, causing their destruction, as long as they do not offer a concrete military advantage or those objects do not contribute efficiently to the military action of the adverse party[187]; and attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population, except if the adverse party uses such objects in direct support

182 Spanish criminal code, article 613(1)(a), reflecting article 8(2)(b)(ix) of the Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90), articles 85(4)(d) and 53(a) and (C) of Additional Protocol I.

183 Spanish criminal code, article 613(1)(b), reflecting article 8(2)(b)(ix) of the Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90), article 15(1)(e) of the Optional Protocol to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, 25.03.1999.

184 Spanish criminal code, article 613(1)(c), reflecting article 8(2)(b)(ix) of the Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90), article 15(1)(c) and (e) of the Optional Protocol to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, 25.03.1999.

185 Spanish criminal code, article 613(2), reflecting article 8(2)(b)(ix) of the Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90), article 4(1) of Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14.05.1954, article 15 of the Optional Protocol to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, 25.03.1999.

186 Spanish criminal code, article 613(2), reflecting article 8(2)(b)(ix) of the Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90), article 4(1) of Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14.05.1954, article 15 of the Optional Protocol to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, 25.03.1999.

187 Spanish criminal code, article 613(1)(d).

of military action or exclusively as a means of subsistence for the members of their armed forces[188] are punished with penalties from four to six years of imprisonment.

In addition, articles 612(4), (5), and (6) aim to enforce the protection of the symbols recognized in IHL. Concretely, using unduly the protecting or distinctive signs, symbols or signals established and recognized in the international treaties to which Spain is a party, especially the Red Cross, Red Croissant and Red Crystal[189]; making improper or perfidious use of the distinctive flag, uniform, signs or symbols of neutral States, of the UN and other States not party to the armed conflict or adverse parties, during the attack or to cover, favor, protect or put obstacles to military operations, excepts in these cases expressly foreseen in the international treaties to which Spain is a party[190]; and making improper or perfidious use of the white flag of truce for negotiations and surrender[191], breaching the inviolability of or improperly detaining *parlementaires* or any person who accompany them[192], the personnel of the Protecting Power or substitute, or a member of the International Fact Finding Commission[193] are punished with penalties from three to seven years of imprisonment.

Finally, destroying, harming or seizing, without military necessity, the property of others, or obliging others to deliver them or to conduct any other act of pillage[194]; seizing, unduly or unnecessarily, movable and immovable property in occupied territory; or destroying non-military ships and aircrafts of the adverse or a neutral party, in violation of the international norms applicable to armed conflicts at sea[195] are also punished with penalties from four to six years of imprisonment.

Thirdly, the provisions of the Spanish criminal code likewise deal with specific methods of warfare. In particular, article 610 punishes with penalties

188 *Ibid*., article 613(1)(e).

189 *Ibid*., article 612(4).

190 *Ibid*., article 612(5).

191 *Ibid*., article 612(6), reflecting article 8(2)(b)(vii) of the Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90), article 85(3)(f) of Additional Protocol I, article 23(f) of Hague Regulation IV, rule 58 of the ICRC Study on Customary International Humanitarian Law.

192 Spanish criminal code, article 612(6), reflecting article 32 of the Hague Regulations, rule 67 of the ICRC Study on Customary International Humanitarian Law.

193 Spanish criminal code, article 612(6).

194 *Ibid*., article 613(1)(g).

195 *Ibid*., article 613(1)(h).

from 10 to 15 years of imprisonment the following behaviors: using or ordering to use means and methods of warfare which are conceived to or are likely to cause widespread, long-term, and severe damage to the natural environment[196], putting at risk the health or survival of the population, or declaring that there shall be no survivors[197].

In the same way, article 612 punishes with penalties from three to seven years of imprisonment intentionally starving the civilian population as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions[198]; violating the moratorium on weapons, armistice, surrender, or any other agreement made with the adverse party[199]; and conscripting or enlisting children in the national armed forces or in armed groups, or using them to participate actively in hostilities[200].

Fourthly, several provisions punish the use of certain weapons. In particular, using or ordering to use means and methods of warfare prohibited or destined to cause unnecessary suffering is punished with penalties from 10 to 15 years of imprisonment[201]. Furthermore, articles 566 and 567, as amended by Organic Act 1/2015, prohibit the illegal production, trade, stockpiling as well as the development, use, traffic, of certain weapons by adding nuclear and radiological weapons to the list which already included antipersonnel mines and cluster munitions as well as biological and chemical weapons[202].

Fifthly, the provisions on the treatment of civilians and persons *hors de combat* are extensively addressed as well. In this regard, article 609 provides for the penal repression of some of the grave breaches of the Geneva Conventions.

196 Reflecting article 8(2)(b)(iv) of the Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90).

197 Spanish criminal code, article 610, reflecting article 8(2)(b)(xii) of the Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90), article 40 of Additional Protocol I, rule 46 of the ICRC Study on Customary International Humanitarian Law.

198 Spanish criminal code, article 612(8), reflecting verbatim article 8(2)(b)(xxv) of the Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90). Also reflecting articles 23(1), 55(1), 59(1) of GC IV, articles 54(1) and (2) of API, as well as rules 55 and 56 of the ICRC Study on customary international humanitarian law.

199 Spanish criminal code, article 612(9).

200 *Ibid*., article 612(3)

201 *Ibid*., article 610, reflecting articles 8(2)(b)(xx) of the Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90), article 35(2) of Additional Protocol I.

202 Spanish criminal code, articles 566 and 567.

As such, it punishes with penalties between four and eight years of imprisonment the following violations of physical integrity: mistreating or seriously endangering the life, health, or integrity of any protected person[203]; torture or inhumane treatments, including biological experiments, causing great suffering or subjecting to any medical act not justified on health status nor the medical norms that the warring party would normally apply to their nationals[204]. Furthermore, article 611 punishes with penalties from 10 to 15 years of imprisonment the following grave breaches of the Geneva Conventions: compelling a prisoner of war or a civilian to serve in the forces of a hostile power and depriving them of their rights to a fair and regular trial[205]; deporting, forcibly transferring, detaining or unlawfully confining any protected person[206]; taking of hostages[207]; utilizing the presence of a civilian or other protected person to render certain points, zones or military forces immune from enemy attacks[208]; transferring and settling, directly or indirectly, part of the occupying power's own population for them to permanently reside in occupied territory[209]; practicing, commanding or maintaining racial segregation or inhuman and degrading practices involving outrages upon personal dignity with regard to any protected persons are both punished with penalties from 10 to 15 years of imprisonment[210]; and declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the adverse party[211].

Some of the behaviors punished in this article seem to overlap, in particular, article 611(3) on prisoners of war and civilians' right to a fair and regular trial and article 611(8) on the abolition, suspension or inadmissibility of the

203 Reflecting articles 50/51/130/147 of the Geneva Conventions.

204 Reflecting article 8 (2)(b)(x) of the Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90).

205 Reflecting articles 130 and 147 of GC III and GC IV respectively.

206 Reflecting article 147 of GC IV.

207 Reflecting article 147 of GC IV.

208 Spanish criminal code, article 611(4), reflecting article 8(2)(b)(xxiii) of the Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90), article 23(1) of GC III, article 28 of GC IV, article 51(7) of Additional Protocol I, rule 97 of the ICRC Study on Customary International Humanitarian Law.

209 Spanish criminal code, article 611(5), reflecting article 85(4) of API, rules 129A and 130 of the ICRC Study on Customary International Humanitarian Law.

210 Spanish criminal code, article 611.

211 *Ibid*., article 611(8), reflecting article 8(2)(b)(xiv) of the Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90), article 23(1)(h) of the Hague Regulation IV.

rights and actions of the nationals of the adverse party. Nonetheless, the former has a more restricted scope of application. It applies to prisoners of war and civilians only and the judicial guarantees it refers to are the ones expressly provided for by articles 84 and 104 to 106 of GC III, articles 64, 65, 67, 71, and 74 to 117 of GC IV, article 7 of Additional Protocol I, as well as article 6 of Additional Protocol II. Conversely, the latter is not restricted to these two categories of protected persons and includes, as a general rule, all the procedural and substantive guarantees, of criminal nature or not, that normally apply to the nationals of the adverse party[212]. Thus, article 611(8) constitutes the *lex generalis*, while article 611(3) is the *lex specialis*[213].

Besides, the reform of 2010 enshrined the prohibition of certain forms of sexual violence in article 611(9), namely the actions against the sexual freedom of protected persons by committing rape, sexual slavery, forced or induced prostitution, forced pregnancy, enforced sterilization or any other form of sexual aggression[214]. Consequently, the gap that existed in the 2003 reform was filled in.

Finally, article 612 punishes with penalties from three to seven years of imprisonment[215] seriously damaging or depriving essential foodstuffs and medical supplies necessary to any protected person or subject them to humiliating or degrading treatment; not to inform protected persons without justifiable delay and in a comprehensible manner about their situation[216]; imposing collective punishments in response to individual behaviors[217]; and violating the provisions on women and families' accommodation or on the special protection granted to women and children by the international treaties to which Spain is a party.

It should be noted that some of the behaviors which are made punishable in the Spanish legal order are contemplated as grave breaches in IHL, but not codified in the Rome Statute. By way of example, unjustifiably impeding or delaying the liberation or repatriation of prisoners of war or civilians is

212 Pignatelli y Meca, «Los crímenes de guerra en la Ley orgánica 5/2010», *op. cit.*, 2012, p. 27.

213 *Ibid*.

214 Spanish criminal code, article 611(9), reflecting articles 8(2)(b)(xxii) and 8(2)(e)(vi) of the Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 90), article 27(2) of GC IV, articles 75(2)(b) and 76(1) of Additional Protocol I, article 4(2) of Additional Protocol II.

215 Spanish criminal code, article 612(3).

216 *Ibid*.

217 *Ibid*.

punished with penalties from 10 to 15 years of imprisonment[218]. In addition, despoiling the dead, the wounded and sick, shipwrecked, prisoners of war and detained civilians is punished with penalties ranging from three to seven years of imprisonment[219]. Finally, article 613(1)(f) punishes with penalties ranging from four to six years of imprisonment attacking or making the object of reprisals the works and installations containing dangerous forces, when such attacks may result in the release of dangerous forces and cause severe losses among the civilian population[220]. Some exceptions to this rule are foreseen, in line with international State practice[221]: if such works and installations are used in regular, important, and direct support of military action and such attacks are the only feasible means to put an end to this support[222].

Furthermore, although some of the behaviors criminalized in the Spanish legal order are codified in IHL, their repression is not organized at international level. In particular, article 611(1) punishes with penalties from 10 to 15 years of imprisonment the acts or threats of violence whose primary purpose is to spread terror among the civilian population[223]. These rules are well established in IHL insofar as they are enshrined in article 33 of the 1949 Geneva Convention IV, article 51(2) of Additional Protocol I, as well as articles 4(2)(d) and 13(2) of Additional Protocol II; nevertheless, they do not amount to grave breaches and are not expressly recognized in the Rome Statute as war crimes.

Conversely, some of the violations of IHL whose repression is indeed organized at international level are missing. Among them, it is possible to mention articles 8(2)(b)(vi)[224], (xi)[225], and 8(2)(e)(ix) of the Rome Statute, as well as

218 *Ibid*., article 611.

219 *Ibid*., article 612(7), reflecting article 15(1) of GC I, article 18(1) of GC II, article 16(2) of GC IV, Additional Protocol I, article 34(1).

220 Spanish criminal code, article 613(1)(f), reflecting article 56 of API; article 15 APII, rule 42 of the ICRC Study on Customary International Humanitarian Law.

221 See: ICRC Study on Customary International Humanitarian Law, rule 42.

222 Spanish criminal code, article 613(1)(f).

223 *Ibid*., article 611(1): «actos o amenazas de violencia cuya finalidad principal sea aterrorizarla».

224 «Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion». Reflecting article 85(3)(e) of Additional Protocol I and article 23(c) of the Hague Regulation IV.

225 Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 90, article 8(2)(b)(xi): «Killing or wounding treacherously individuals belonging to the hostile nation or army».

the prohibition of apartheid in accordance with article 85(4)(c) of Additional Protocol I. Furthermore, the provisions contained in the criminal code are often not as detailed as the definitions provided in IHL.

To conclude, it is worth mentioning that the Spanish criminal code punishes the violations of IHL which do not amount to grave breaches or serious violations and for which national authorities enjoy freedom regarding their penal repression. In this respect, article 614 punishes with penalties of six months to two years of imprisonment those who violate or order to violate the other behaviors prohibited by the international treaties to which Spain is a party and which govern the conduct of hostilities, the regulation of the means and methods of warfare, the protection of the wounded, sick, and shipwrecked, the treatment of prisoners of war, the protection granted to civilians and cultural property in case of armed conflict.

1.3.2. The status of the alleged perpetrator

First, the different types of criminal responsibility over war crimes are integrated into the national legislation. In this respect, article 55 of the Royal Ordinances on the Armed Forces refers to command responsibility and article 56 to 'serious criminal responsibilities in relation with IHL crimes' («Responsabilidades penales graves en relación con los delitos contra el Derecho Internacional Humanitario»)[226]. Commanders are subject to a duty to demand obedience from their subordinates and enjoy the right to see their authority respected. They shall be conscious of the important responsibility that falls on them; as such, they must avoid the commission of core international crimes by the forces under their command or effective control and may not order illegal acts that amount to crimes.

Furthermore, the criminal code provides for additional details on command responsibility. In particular, article 615 bis of the criminal code explicitly

226 Royal Ordinances on the Armed Forces (Real Decreto 96/2009, de 6 de febrero, por el que se aprueban las Reales Ordenanzas para las Fuerzas Armadas), BOE nº 33, 07/02/2008, pp. 13008-13028, article 56: «Será consciente de la grave responsabilidad que le corresponde y asume para evitar la comisión, por las fuerzas sometidas a su mando o control efectivo, de los delitos de genocidio, lesa humanidad y contra las personas y bienes protegidos en caso de conflicto armado».

provides for both military and civilian superior responsibility. It should be noted that *de facto* leaders are also included in that category[227].

For certain conducts, article 615 foresees the same penalties as the ones falling on perpetrators. This is the case if a military or civilian superior does not adopt the measures under their remit to avoid the commission of a war crime[228] by the forces under their command or effective control. The same holds true regarding the leader who does not fall into the other categories[229].

Regarding some other conducts, the penalty foreseen is of one or two grades lower to the one normally foreseen for perpetrators. This is the case if the acts at stake are the result of a serious negligence[230], or if the superior has not adopted the measures necessary to prosecute the crimes at stake committed by their subordinates[231].

Furthermore, civil servants and other public authorities who do not promote the prosecution of the war crimes[232] described in the criminal code, in violation of the obligations arising from their duty, may be punished with a penalty of two to six years of special disqualification from public office[233]. Generally speaking, penalties of 10 to 20 years of absolute disqualification from

227 Spanish criminal code, article 615 bis (1).

228 *Ibid*.: «La autoridad o jefe militar o quien actúe efectivamente como tal que no adoptara las medidas a su alcance para evitar la comisión, por las fuerzas sometidas a su mando o control efectivo, de alguno de los delitos comprendidos en los capítulos II, II bis y III de este título, será castigado con la misma pena que los autores».

229 Spanish criminal code, article 615 bis (4): «El superior no comprendido en los apartados anteriores que, en el ámbito de su competencia, no adoptara las medidas a su alcance para evitar la comisión por sus subordinados de alguno de los delitos comprendidos en los capítulos II, II bis y III de este título será castigado con la misma pena que los autores».

230 *Ibid*., article 615 bis (2).

231 *Ibid*., article 615 bis (3): «La autoridad o jefe militar o quien actúe efectivamente como tal que no adoptara las medidas a su alcance para que sean perseguidos los delitos comprendidos en los capítulos II, II bis y III de este título cometidos por las personas sometidas a su mando o control efectivo será castigada con la pena inferior en dos grados a la de los autores». And article 615 bis (5): «El superior que no adoptara las medidas a su alcance para que sean perseguidos los delitos comprendidos en los capítulos II, II bis y III de este título cometidos por sus subordinados será castigado con la pena inferior en dos grados a la de los autores».

232 And other international crimes, as provided by the criminal code.

233 Spanish criminal code, article 615 bis (5): «El funcionario o autoridad que, sin incurrir en las conductas previstas en los apartados anteriores, y faltando a la obligación de su cargo, dejará de promover la persecución de alguno de los delitos de los comprendidos en los capítulos II, II bis y III de este título de que tenga noticia será castigado con la pena de inhabilitación especial para empleo o cargo público por tiempo de dos a seis años».

public office are foreseen for the offences detailed in articles 609 to 613, article 615, and article 615 bis (1), (3), (4), and (5) in addition to the penalties already foreseen in these articles. In the case where perpetrators are ordinary citizens, Spanish tribunals can impose penalties of one to 10 years of special disqualification from public office[234].

Nonetheless, there seems to be some gaps in the legislation on this matter. In particular, command and superior responsibility in case of failure to take action when they have information on the possible commission of a war crime by their subordinates is not foreseen. Moreover, the wording of articles 615 and 616 might be too vague, insofar as it does not expressly provide for command responsibility when the military superior should have known that their subordinates were about to commit a war crime and yet, did not take all the necessary and reasonable measures to avoid or repress such behavior.

Secondly, an important amendment to the criminal code made by the 2003 reform was the codification of the absence of statutory limits to prosecute war crimes[235] despite the fact that Spain has not ratified the UN and Council of Europe conventions on the matter. Indeed, article 131(4) was modified so as to state that the crimes against protected persons and objects in armed conflicts do not lapse. Article 133(2) holds the same with regard to the penalties imposed for such crimes. It should yet be noted that Organic Act 5/2010 modified article 131(4) so as to provide for an exception to the absence of statutory limits with regard to the crimes described in article 614. As noted by Fernando Pignatelli y Meca, this exception is justified on the grounds that article 614 provides for the punishment of less serious offences, which do not amount to war crimes or grave breaches and whose penal repression is not organized at international level. Therefore, the absence of statutory limits established in the Rome Statute is not intended to apply to such conducts[236].

234 *Ibid.,* article 616: «En el caso de cometerse cualquiera de los delitos comprendidos en los Capítulos anteriores de este Título, excepto los previstos en el artículo 614 y en los apartados 2 y 6 del 615 bis, y en el Título anterior por una autoridad o funcionario público, se le impondrá, además de las penas señaladas en ellos, la de inhabilitación absoluta por tiempo de diez a veinte años; si fuese un particular, los jueces y tribunales podrán imponerle la de inhabilitación especial para empleo o cargo público por tiempo de uno a diez años».

235 Pignatelli y Meca, «Los crímenes de guerra en la Ley orgánica 5/2010», *op. cit.*, 2012, p. 12.

236 *Ibid.*, 2012, p. 21.

Thirdly, the Spanish approach to immunity has been described as maintaining the *status quo*[237]. Following the current state of international law on the matter, Spain recognizes the immunity of incumbent foreign heads of State[238]. In this respect, the Audiencia Nacional proposed an interpretation of the principle of immunity very much in line with the Yerodia case, already in 1998:

> Es indiscutible que los Jefes de Estado en funciones gozan de esta inmunidad por la misma razón que el Estado extranjero goza de inmunidad soberana para actos de gobierno de naturaleza no privada[239].

As emphasized by Abraham Martínez Alcañiz, recognizing the immunity of incumbent heads of State or government is the result of a constant practice by Spanish courts[240]. Nonetheless, the Audiencia Nacional also noted that former heads of State or government may not enjoy such immunity:

> La situación es muy distinta, sin embargo, con respecto a ex jefes de Estado. El derecho internacional no obliga a su protección, y por los mismos principios aplicables a la doctrina del acto del Estado, que no se extiende a los crímenes bajo el derecho internacional. En este sentido, todo el derecho penal internacional moderno rechaza, expresa o implícitamente, las defensas basadas en doctrinas de actos oficiales y en inmunidades de Jefes de Estado o similares[241].

The Spanish approach is therefore based on the current state of international criminal law.

237 Ángel Sánchez Legido, «El fin del modelo español de jurisdicción universal», *Revista electrónica de estudios internacionales,* nº 27, 2014, p. 31. Available at: http://www.reei.org/index.php/revista/num27/articulos/fin-modelo-espanol-jurisdiccion-universal (Accessed: 05.05.2017).

238 Julio Jorge Urbina, «Las inmunidades de jurisdicción penal de los órganos del Estado en el contexto de la represión de las violaciones del derecho internacional humanitario», *Revista Española de Derecho Militar*, vol. 86, 2005, pp. 344-345. Quoted in Martínez Alcañiz, *El principio de justicia universal y los crímenes de guerra*, *op. cit.*, 2015, p. 346.

239 Audiencia Nacional, Juzgado Central de Instrucción nº 5, Judgment of 3 November 1998 requesting the extradition of Augusto Pinochet, Pinochet case, para. 4.

240 Confirmed, *inter alia*, in: Audiencia Nacional, Sala de lo Penal, judgment of 4 March 1999, Fidel Castro Ruz case; Juzgado central de instrucción nº 4, auto de 4 de noviembre de 2005; Juzgado Central de Instrucción nº 4, auto de 13 de diciembre de 2007. Quoted in Martínez Alcañiz, *El principio de justicia universal y los crímenes de guerra*, *op. cit.*, 2015, p. 346.

241 Audiencia Nacional, Juzgado Central de Instrucción nº 5, Judgment of 3 November 1998 requesting the extradition of Augusto Pinochet, Pinochet case, para. 4.

Thus, it can be sustained that all three actors have undertaken important efforts to allow national authorities to prosecute alleged perpetrators of war crimes. The EU has constantly recognized the importance of the fight against impunity, notably with regard to war crimes, and has established operational means at the service of judicial cooperation on this matter. As for France and Spain, both have extensively transposed the content of war crimes in their legal orders, although in differing ways. The Spanish approach better follows the course of international law, insofar as it first implemented the language of IHL in national law, and then adapted it to further evolutions. Conversely, the French approach is much more in line with international criminal law than with IHL. Furthermore, while France mostly limits itself to codify the current state of international law in relation with non-international armed conflicts, Spain makes no distinction based on the nature of the armed conflict. Finally, the provisions dealing with the status of the alleged perpetrator are not entirely satisfactory, especially with regard to the rules on immunity which would benefit from further clarification. That being said, on the overall, these provisions allow national authorities to effectively prosecute alleged perpetrators. In addition, State parties are also under an obligation to provide for universal jurisdiction mechanisms, at least with respect to grave breaches.

2. ESTABLISHING UNIVERSAL JURISDICTION MECHANISMS

As explained in Chapter 3, the grave breaches regime provides for the obligation to extradite or prosecute alleged perpetrators, regardless of their nationality. The Geneva Conventions therefore establish an obligation to create universal jurisdiction mechanisms over such breaches. The approaches of the EU, France, and Spain on this matter are analyzed below.

2.1. The EU's uneven support for universal jurisdiction[242]

The position of the EU towards universal jurisdiction is ambiguous. Indeed, the EU institutions' political support for the establishment of universal

242 This part is based on: Bettina Steible, «EU support to domestic prosecution of violations of International Humanitarian Law», *op. cit.*, pp. 51-66.

jurisdiction mechanisms at domestic level is uneven. Furthermore, the EU recognizes the importance of universal jurisdiction, but only with regard to non-EU nationals seeking to enter and reside in the EU and in non-legally binding provisions. In spite of that, the EU has supported financially several non-governmental organizations promoting universal jurisdiction.

Firstly, the EU's institutions political support to universal jurisdiction, inside and outside Europe, has been uneven. This is the case of the European Parliament, which has expressly done so on numerous occasions, by means of its resolutions. In this respect, it first stated such support unambiguously in a 2000 Resolution on the situation in East Timor[243]. In this resolution, the European Parliament endorsed the principle of universal jurisdiction and called on the EU to support it, but further enjoined EU Member States to enshrine it into their domestic legislation. In subsequent resolutions, the European Parliament has called on third States – most importantly the USA[244] and the African Union Member States[245], the EU[246], and EU Member States[247] to codify and enforce universal jurisdiction. Furthermore, it has wel-

243 European Parliament Resolution on the situation in East Timor, OJ C 54, 25/02/2000, pp. 97-98: «23. Considers that the Union should be committed to the principle of universal jurisdiction and no safe havens for the perpetrators of genocide, war crimes and crimes against humanity and torture; 24. Calls on the Member States to enact the necessary legislation to permit domestic prosecution of genocide, war crimes, crimes against humanity and torture, regardless of where these crimes were committed».

244 European Parliament Resolution on Human Rights in the world in 2001 and European Union human rights policy (2001/2011(INI)), para. 44: «Calls on the Member States to appeal to all UN Member States, in particular the United States, to ratify or accede to the Rome Statute setting up the International Criminal Court and to enact effective universal jurisdiction legislation».

245 European Parliament resolution on the Special Court for Sierra Leone: the case of Charles Taylor (P6_TA(2005)0059), OJ C 304 E, 01/12/2005, p. 408; European Parliament Resolution on impunity in Africa and in particular the case of Hissène Habré (P6_TA(2006)0101).

246 European Parliament resolution of 26 April 2007 on the Annual Report on Human Rights in the World 2006 and the EU's policy on the matter (2007/2020(INI)), OJ C 74E, 20.03.2008, pp. 753-775, para. 137: «in pursuit of greater coherence of internal and external policies, encourages the Council, the Commission and the Member States to incorporate the fight against impunity for serious international crimes in the development of a common EU area of freedom, security and justice»; European Parliament resolution of 8 May 2008 on the Annual Report on Human Rights in the World 2007 and the European Union's policy on the matter (2007/2274(INI)), OJ C 271E, 12.11.2009, pp. 7-31, para. 144.

247 European Parliament resolution of 26 April 2007 on the Annual Report on Human Rights in the World 2006 and the EU's policy on the matter (2007/2020(INI)), OJ C 74E, 20.03.2008, pp. 753-775, para. 137: «Reiterates the importance of EU internal policy promoting adherence

comed on several occasions «the progress made in the application of universal jurisdiction in some Member States»[248] with regard to proceedings taking place in Spain and the UK. Yet, it should be noted, as Luc Reydams does, that the European Parliament remained silent regarding proceedings taking place in Belgium, Germany, or Spain against US, Chinese, Iranian, and Israeli officials[249].

Furthermore, the EU's support to universal jurisdiction in its external action is mixed. As emphasized above, the EU conducts an important policy on the fight against impunity in its external relations; nonetheless, it has had to nuance its position with regard to universal jurisdiction in response to the African Union (hereafter, 'AU') criticism of EU Member States' practice on the matter described as «abusive»[250]. In particular, African States held that «the exercise of universal jurisdiction by European states is politically selective against them», thus raising concerns over double standards[251]. In this context, the EU and AU established an advisory Technical *Ad Hoc* Expert Group on

to international human rights law and the need for Member States to legislate in a way consistent with, inter alia, the obligations arising out of the Geneva Conventions, the Convention against Torture, the Genocide Convention and the Rome Statute of the ICC»; European Parliament resolution of 8 May 2008 on the Annual Report on Human Rights in the World 2007 and the European Union's policy on the matter (2007/2274(INI)), OJ C 271E, 12.11.2009, pp. 7-31, para. 144; European Parliament resolution of 17 November 2011 on EU support for the ICC: facing challenges and overcoming difficulties (2011/2109(INI)), OJ 2013/C 153 E/13, paras. 16 and 20: «Takes note of the Cooperation and Assistance Agreement between the EU and the ICC; calls on the EU Member States to apply the principle of universal jurisdiction in tackling impunity and crimes against humanity, and highlights its importance for the effectiveness and success of the international criminal justice system».

248 European Parliament Resolution on the arrest of General Pinochet in London, OJ C 341, 09.11.1998, p. 0147; European Parliament Resolution on the proceedings against Ríos Montt, OJ 313 E, 20.12.2006, pp. 0465-0466; European Parliament resolution of 26 April 2007 on the Annual Report on Human Rights in the World 2006 and the EU's policy on the matter (2007/2020(INI)), OJ C 74E, 20.03.2008, pp. 753-775, para. 137; European Parliament resolution of 8 May 2008 on the Annual Report on Human Rights in the World 2007 and the European Union's policy on the matter (2007/2274(INI)), OJ C 271E, 12.11.2009, pp. 7-31, para. 144; European Parliament resolution of 17 November 2011 on EU support for the ICC: facing challenges and overcoming difficulties (2011/2109(INI)), OJ 2013/C 153 E/13, para. 16: «Welcomes the contribution of some EU Member States to the fight against impunity for the worst crimes known to humanity through the application of universal jurisdiction».

249 Luc Reydams, *Study on «The application of universal jurisdiction in the fight against impunity»*, Brussels, European Parliament, 2016, p. 10.

250 Council of the European Union, AU-EU Technical Ad Hoc Expert Report on the Principle of Universal Jurisdiction, 8672/1/19, Brussels, 16 April 2009, p. 4.

251 *Ibid*., p. 35.

the Principle of Universal Jurisdiction, which issued a report on the matter in 2009[252]. The following definition of universal jurisdiction was provided:

> Universal criminal jurisdiction is the assertion by one state of its jurisdiction over crimes allegedly committed in the territory of another state by nationals of another state against nationals of another state where the crime alleged poses no direct threat to the vital interests of the state asserting jurisdiction. In other words, universal jurisdiction amounts to the claim by a state to prosecute crimes in circumstances where none of the traditional links of territoriality, nationality, passive personality or the protective principle exist at the time of the commission of the alleged offence[253].

Moreover, it recognizes that this is a principle which finds its legal basis both in international treaty – with special mention to the Geneva Conventions and Additional Protocol I – and customary law and that it applies, *inter alia*, to war crimes[254]. On the overall, the report endorsed important but vague[255] principles. Political and diplomatic consequences of the use of universal jurisdiction are also addressed, as the experts recommend the States to «bear in mind the need to avoid impairing friendly international relations»[256].

This mixed endorsement is visible in other EU documents dealing with its external action. By way of example, in the 2009 annual report on the main aspects and basic choices of the CFSP, universal jurisdiction is explicitly mentioned as a «national instrument in the fight against impunity»[257]. However, the report also emphasizes that this issue has «negative consequences for the relationships between EU and AU»[258]. In the 2013 'Toolkit for Bridging the

252 *Ibid*., p. 4.

253 Council of the European Union, AU-EU Technical Ad Hoc Expert Report on the Principle of Universal Jurisdiction, *op. cit*., 2009, p. 6.

254 *Ibid*., pp. 6-9.

255 Sassòli and Carron, «EU Law and International Humanitarian Law», in Patterson and Södersten, *A Companion to European Union Law and International Law*, *op. cit*., 2016, p. 419.

256 Council of the European Union, AU-EU Technical Ad Hoc Expert Report on the Principle of Universal Jurisdiction, *op.cit*., 2009, p. 42.

257 Council of the European Union, *Annual report from the High Representative of the European Union for Foreign Affairs and Security Policy to the European Parliament on the main aspects and basic choices of the CFSP*, 10659/10, Brussels, 8 June 2010, p. 49.

258 *Ibid*.

gap between international and national justice', universal jurisdiction is seen as a means to «reduce the risk of impunity», in accordance with the national authorities' duty to prosecute alleged perpetrators of international core crimes by virtue of the principle of complementarity[259]. Nonetheless, no further details are provided on that matter.

In 2012, the European Commission expressed its view on universal jurisdiction on behalf of the EU in an *amicus* brief presented before the US Supreme Court, in relation with the case 'Kiobel vs. Royal Dutch Petroleum Co'[260]. Even though this case concerned a civil suit for damages under the Alien Tort Statute, the Commission elaborated on universal criminal jurisdiction. In this brief, it provides for a quite general definition of universal jurisdiction:

> Universal criminal jurisdiction permits a State to prosecute universally condemned international crimes even when committed by aliens against aliens in the territory of another sovereign[261].

A pure form of universal jurisdiction is therefore acknowledged. In addition, the Commission refers to the concept of *erga omnes* obligation to the extent that it grounds universal jurisdiction on the rationale according to which:

> [t]he universally condemned crimes to which it extends are so repugnant that all States have a legitimate interest and therefore have the authority to suppress and punish them[262].

259 European Commission; High Representative of the European Union for Foreign Affairs and Security Policy, Joint Staff Working Document on advancing the principle of complementarity. Toolkit for Bridging the gap between international and national justice, Brussels, 31.01.2013, SWD(2013) 26 final, p. 19: «It is equally important to introduce in national law all the provisions which are necessary for the national criminal courts to establish and exercise their jurisdiction. The adoption of legal provisions establishing extensive extra-territorial jurisdiction, or even universal jurisdiction, will reduce the risk of impunity. No State Party to the Rome Statute should accept to host on its territory someone who is suspected of having committed a crime falling within the jurisdiction of the ICC, wherever this crime has been committed».

260 Reydams, *Study on «The application of universal jurisdiction in the fight against impunity»*, *op. cit.*, 2016, p. 10.

261 Supplemental Brief of the European Commission on behalf of the European Union at Amicus Curiae in Support of Neither Party, Supreme Court of the United States, Esther Kiobel et al. v. Royal Dutch Petroleum, 13 June 2012, p. 14.

262 *Ibid.*, p. 16.

It is likewise important to note that it considers that «universal criminal jurisdiction is well established under international law»[263]. To illustrate such general acceptance, the Commission relies on treaty law, and for present purposes, on the Geneva Conventions and Additional Protocols. In particular, it acknowledges that such «treaties require States to extend universal jurisdiction over defined crimes where the alleged perpetrator is present within their territory»[264]. Consequently, it endorses the view, seemingly based on State practice, that the alleged perpetrator's presence on a State's territory is a requirement for the activation of universal jurisdiction mechanisms.

As regards State practice, the Commission recognizes that it is «not widely exercised»[265] but that the fact that it does not «upset comity between nations» is another argument in favor general acceptance[266]. Nonetheless, it – surprisingly – uses the scarce number of prosecutions as an additional argument in this sense[267].

Moreover, it is worth mentioning the EU Genocide Network Strategy, which, as noted above, has been endorsed by the Council. It expressly recognizes that the Geneva Conventions and Additional Protocols constitute the legal basis for:

> national authorities to seek out, investigate and prosecute or extradite those responsible for the commission of core international crimes, regardless of where they are committed, and irrespective of the nationality of the perpetrator or the victim[268].

Secondly, in strict legal terms, the EU's competence is quite limited, to the extent that the exercise of universal jurisdiction remains a national competence. Nonetheless, there are references to universal jurisdiction at EU level in 'Council Decision 2003/335/JHA of 8 May 2003 on the investigation and

263 *Ibid*., p. 14.

264 *Ibid*., p. 15.

265 Supplemental Brief of the European Commission on behalf of the European Union at Amicus Curiae in Support of Neither Party, Supreme Court of the United States, Esther Kiobel et al. v. Royal Dutch Petroleum, 13 June 2012, p. 14.

266 *Ibid*., p. 16.

267 *Ibid*. Also observed in: Reydams, *Study on «The application of universal jurisdiction in the fight against impunity»*, *op. cit*., 2016, p. 10.

268 EU Genocide Network Strategy, p. 12.

prosecution of genocide, crimes against humanity, and war crimes', adopted within the frame of judicial cooperation in criminal matters. In particular, recitals (6) and (7) express such support as they refer to the obligation of EU Member States to extradite or prosecute alleged perpetrators from non-EU Member States accused of, *inter alia*, war crimes[269]. Therefore, there is recognition at EU level of the obligation to establish universal jurisdiction mechanisms at domestic level with regard to non-EU citizens seeking to enter and reside in the EU.

Luc Reydams goes even further and considers that under current EU law, «Member States are obliged to establish jurisdiction over international crimes by non-EU citizens who are seeking to enter and reside in the EU»[270]. Nonetheless, it seems more appropriate to consider that there is no legal obligation to do so under current EU law, insofar as recitals are not legally binding and Council Decision 2003/335/JHA establishes a more limited obligation of cooperation among EU Member States on these matters. Consequently, it seems reasonable to assert that the support expressed in recitals (6) and (7) is of political – not legal – nature. In any event, these provisions would most likely apply to low-profile perpetrators, namely refugees and migrants who cannot and often do not want to be extradited, rather than former heads of State or government and other high-level officials[271].

Finally, this uneven support in legal terms should not overshadow the important financial effort made by the EU on this matter, as observed by Luc Reydams[272]. Indeed, the European Commission has financed several NGOs whose objective is the fight against impunity, including on the basis of universal jurisdiction: e.g., the Coalition for the International Criminal Court, No Peace without Justice, Parliamentarians for Global Action, Redress, Avocats

269 Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity, and war crimes: «(6) Member States are being confronted on a regular basis with persons who were involved in such crimes and who are trying to enter and reside in the European Union.
(7) The competent authorities of the Member States are to ensure that, where they receive information that a person who has applied for a residence permit is suspected of having committed or participated in the commission of genocide, crimes against humanity or war crimes, the relevant acts may be investigated, and, where justified, prosecuted in accordance with national law».

270 Reydams, *Study on «The application of universal jurisdiction in the fight against impunity»*, *op. cit*, 2016, p. 10.

271 *Ibid*., p. 20.

272 *Ibid*.

Sans Frontières and the Fédération Internationale des Ligues des Droits de l'Homme[273]. In conclusion, according to Luc Reydams, «grassroots support for universal jurisdiction (and the ICC) within and outside Europe has been partially underwritten by the EU»[274].

2.2. France: a progressive recognition of universal jurisdiction over war crimes

Universal jurisdiction is regulated by the current code of criminal procedure and the criminal code. It should be noted that article 113-6 and 113-7 recognize the competence of French courts over crimes committed outside of the French territory on the grounds of active and passive personality respectively. These possibilities are justified either because France does not accept extraditing its own nationals, or to protect its interests abroad. Besides these traditional mechanisms of extra-territorial application of the law, the French legal order now enshrines, under some conditions, a mechanism of universal jurisdiction over war crimes.

2.2.1. The original exclusion of war crimes from the scope of application of universal jurisdiction

Before the adoption of Act nº 2010-930 of 9 August 2010, the French legislature had not implemented the obligation to establish universal jurisdiction over the grave breaches in application of the Geneva Conventions. Nonetheless, pursuant to articles 689 and 689-1 of the code of criminal procedure, French courts could prosecute any person guilty of having committed certain international and transnational crimes. Article 689-1 of the code of criminal procedure grants universal jurisdictions over the offences contained in the international treaties and conventions exhaustively detailed in the same code[275]. According to this article, the requirement regarding the alleged perpe-

273 *Ibid*.

274 *Ibid*.

275 French code of criminal procedure, article 689-1: «En application des conventions internationales visées aux articles suivants, peut être poursuivie et jugée par les juridictions françaises, si elle se trouve en France, toute personne qui s'est rendue coupable hors du territoire

trator is the presence on the French territory. However, the Geneva Conventions and their Additional Protocols are excluded from this list so that universal jurisdiction does not apply on these grounds.

As for article 689, it allows French courts to prosecute the alleged perpetrators of offences committed outside of the French territory when an international treaty gives them competence to do so. One could therefore wonder whether the Geneva Conventions could have been invoked as an «international treaty that gives French courts the competence to prosecute the offence». Nonetheless, when confronted to this question, French courts rejected the direct effect of the provisions of the Geneva Conventions. In particular, the Cour de cassation considered in the Javor case that the obligations to adopt criminal legislation providing for the repression of the grave breaches, to look for perpetrators, and prosecute or extradite them regardless of their nationality exist towards States and are not directly applicable in the French legal order. It argued that the relevant provisions of the Geneva Conventions were not detailed enough to constitute the legal basis for extra-territorial jurisdiction in criminal matters[276]. The Cour de cassation therefore rejected its competence over the grave breaches when they are committed abroad, by foreigners, or against foreign victims, on the basis of article 689-11 of the code of criminal procedure. Consequently, a legislative reform was needed in order to align the French legislation with the Geneva Conventions on that matter.

de la République de l'une des infractions énumérées par ces articles. Les dispositions du présent article sont applicables à la tentative de ces infractions, chaque fois que celle-ci est punissable».

276 See: Cour de cassation, chambre criminelle, case nº 95-81527, 26 March 1996, E. Javor et al. vs. X: «Aux motifs qu'aux termes des quatre Conventions de Genève entrées en vigueur pour la France le 28 décembre 1951, les Etats parties s'engagent à prendre les mesures législatives nécessaires pour réprimer, par des sanctions adéquates, les infractions graves; que ces conventions imposent également aux parties contractantes de rechercher les auteurs de ces infractions graves, de les déférer à leurs propres tribunaux quelle que soit leur nationalité ou de les remettre à une autre partie contractante intéressée à la poursuite; que la rédaction de ces textes permet de déduire que les obligations précitées ne pèsent que sur les Etats parties et qu'elles ne sont pas directement applicables en droit interne; que ces dispositions revêtent un caractère trop général pour créer directement des règles de compétence extraterritoriales en matière pénale, lesquelles doivent nécessairement être rédigées de manière détaillée et précise; qu'en l'absence d'effet direct les dispositions des quatre Conventions de Genève relatives à la recherche et à la poursuite des auteurs d'infractions graves, l'article 689 du Code de procédure pénale ne saurait recevoir application».

In this context, the French legislature started with the recognition of universal jurisdiction over the graves breaches of the Geneva Conventions and the violations of the laws and customs of war that fall under the competence of the ICTY[277] and ICTR[278]. The application of universal jurisdiction to such cases is subject to the presence of the alleged perpetrator on the French territory. Even though it constituted a first recognition of universal jurisdiction over war crimes, it remained a mechanism with a limited scope of application in terms of territory, crimes, and time[279]. Consequently, it was the adaptation of the French legal order to the Rome Statute which permitted the recognition of the principle of universal jurisdiction over war crimes as a general rule.

2.2.2. The change initiated with the transposition of the Rome Statute

Indeed, Act nº 2010-930 of 9 August 2010 inserted a new article 689-11 which grants universal jurisdiction to French courts over the crimes falling under the competence of the ICC in accordance with the Rome Statute. However, the exercise of universal jurisdiction is importantly restricted, as several conditions must be met. In particular, while foreigners may be prosecuted by French courts, they must regularly reside in France. In this regard, the Cour de cassation held in 2005 that the regular residence («résidence habituelle») is defined as the place where the concerned party established the permanent or common centre of their interests, with a view to confer a stable character to it[280]. Therefore, two conditions – material and intentional – are required[281].

277 Act nº 95-1 of 2 January 1995 (Loi nº 95-1 du 2 janvier 1995 portant adaptation de la législation française aux dispositions de la résolution 827 du Conseil de sécurité des Nations unies instituant un tribunal international en vue de juger les personnes présumées responsables de violations graves du droit international humanitaire commises sur le territoire de l'ex-Yougoslavie depuis 1991), JORF n°2 of 03.01.1995, p. 71.

278 Act nº 96-432 of 22 May 1996 (Loi nº 96-432 du 22 mai 1996 portant adaptation de la législation française aux dispositions de la résolution 955 du Conseil de sécurité des Nations unies instituant un tribunal international en vue de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis en 1994 sur le territoire du Rwanda et, s'agissant des citoyens rwandais, sur le territoire d'Etats voisins), JORF n°119 of 23.05.1996, p. 7695.

279 Ameline, *Avis nº 1828 fait au nom de la commission des affaires étrangères*, *op. cit.*, 8 July 2009, p. 52.

280 Cour de cassation, first civil chamber, 14 December 2005, case nº 1880.

281 Ameline, *Avis nº 1828 fait au nom de la commission des affaires étrangères*, *op. cit.*, 8 July 2009, p. 58.

This requirement has been criticized both by politicians[282] and scholars[283] on the grounds that it is unnecessarily strict and reduces considerably the exercise of universal jurisdiction by French courts. Another criticism is that it establishes an – unjustified – difference of treatment between the crimes defined in the Rome Statute on the one hand, and those regulated by article 689-1 of the Code of criminal procedure or those falling under the competence of the ICTR and the ICTY on the other, as those require the mere presence of the alleged perpetrator on the French territory[284]. In this respect, the Cour de cassation held, in a case relating to the competence of French courts over torture, that the requirement of the presence on the territory was met whenever sufficient elements are found on the presence of at least one of the alleged perpetrators when the proceedings are initiated[285]. As emphasized by the CNCDH, the legislation makes it more difficult to punish the worst crimes affecting the international community as a whole than crimes of a lesser magnitude on the scale of international offences[286].

The second element required by article 689-11 is the double jeopardy rule. Pursuant to this criterion, for an alleged perpetrator to be prosecuted in France on the grounds of universal jurisdiction, the relevant crime must be punishable in the State where it was committed. If not, the territorial State or the State of nationality of the alleged perpetrator must be a party to the Rome Statute.

This requirement is problematic in several respects[287]. First, it subjects the possibility of proceedings in France to the existence of provisions providing

282 *Ibid*.; Alain Anziani, *Rapport n° 353 fait au nom de la commission des lois constitutionnelles, de législation, du suffrage universel, du Règlement et d'administration générale sur la proposition de loi de M. Jean-Pierre Sueur et plusieurs de ses collègues tendant à modifier l'article 689-11 du code de procédure pénale relatif à la compétence territoriale du juge français concernant les infractions visées par le statut de la Cour pénale internationale*, Paris, Sénat français, 13 February 2013.

283 Xavier Philippe and Anne Desmaret, «Remarques critiques relatives au projet de loi portant adaptation du droit pénal français à l'institution de la Cour pénale internationale: la réalité française de la lutte contre l'impunité», *Revue française de droit constitutionnel*, vol. 1(81), 2010, pp. 41-65.

284 *Ibid*.

285 Cour de cassation, chambre criminelle, case n° 7513 of 10 January 2007, «Disappeared of the Beach».

286 CNCDH, Avis sur la loi portant adaptation du droit pénale à l'institution de la Cour Pénale Internationale, 6 November 2008.

287 Ameline, *Avis n° 1828 fait au nom de la commission des affaires étrangères*, *op. cit*., 8 July 2009, p. 58.

for the repression of war crimes in the other State. Thus, French courts will not be competent with regard to the crimes perpetrated in countries where the legislation is more lenient and where the authorities are reluctant to initiate proceedings, even though this is precisely the scenario where universal jurisdiction is especially relevant and necessary. In this regard, Mireille Delmas-Marty notes that France's recognition of the criminal responsibility of legal persons is not shared with many other domestic legal systems, so that the withdrawal of the double jeopardy rule could allow the prosecution of foreign multinational groups operating in war zones[288]. *A contrario*, the action of French Courts will not be as relevant if the territorial State or the State of nationality of the alleged perpetrator is a party to the Rome Statute, as the ICC is competent to prosecute such crime. Besides, this requirement contradicts the provisions on the European Arrest Warrant, insofar as war crimes belong to the category of crimes that can be executed without complying with the double jeopardy rule. Finally, this requirement does not exist with regard to the other mechanisms of extra-territorial jurisdiction of French courts[289] and actually seems to contradict the idea of universality at the basis of international criminal justice[290].

Third, proceedings may be initiated by the sole public prosecutor[291]. As observed by the CNCDH, this condition deprives victims of their right to an effective remedy, although France actively committed to the recognition of their rights during the negotiations that led to the establishment of the ICC[292].

Finally, the public prosecutor must ensure that the ICC expressly declines jurisdiction and that no other competent international or national court has formulated an extradition request to initiate the proceedings[293]. Therefore, it seems that the wording of article 689-11 reverses the order of the obligation to extradite or prosecute, which should be understood as a *primo prosequi,*

288 Anziani, *Rapport n° 353 fait au nom de la commission des lois constitutionnelles, de législation*, *op. cit.*, 13 February 2013, p. 27.

289 CNCDH, Avis sur la loi portant adaptation du droit pénale à l'institution de la Cour Pénale Internationale, 6 November 2008.

290 Anziani, *Rapport n° 353 fait au nom de la commission des lois constitutionnelles, de législation*, *op. cit.*, 13 February 2013, p. 27.

291 French code of criminal procedure, article 689-11.

292 CNCDH, Avis sur la loi portant adaptation du droit pénale à l'institution de la Cour Pénale Internationale, 6 November 2008.

293 French code of criminal procedure, article 689-11.

secundo dedere mechanism, as the obligation to extradite seems to prevail over the obligation to prosecute. In the same way, requiring that the ICC declines jurisdiction goes against the letter and spirit of the principle of complementarity, insofar as it seems to shift States' primary responsibility in the fight against impunity towards the ICC. This approach has been called an erroneous interpretation of the principle of complementarity, which substitutes it with the principle of primacy of the ICC[294].

Thus, article 689-11 contains four conditions which importantly restrict the scope of application of universal jurisdiction over war crimes in the French legal order. These conditions have been criticized on several occasions, notably because they establish a differentiated and restrictive procedural regime for core international crimes, something hardly justifiable both in terms of analogy and hierarchy. In this regard, the same crimes are subject to a less restrictive regime if they fall under the jurisdiction of the ICTY and ICTR. In the same manner, less serious crimes can be prosecuted in France in accordance with a less restrictive procedural regime. Therefore, alleged perpetrators of war crimes could freely move on French territory as long as they do not ordinarily reside in France, while suspects of crimes of torture and other cruel, inhuman or degrading treatment could not. This difference in the procedural regime of universal jurisdiction would result in treating more leniently the person responsible for the wave of acts of torture and murders which constitute war crimes, than their subordinates[295]. In its last opinion on the matter – in 2012, the CNCDH thus reaffirmed its concerns already expressed in 2008[296] and 2010[297] and called for the withdrawal of these conditions so as to align article 689-11 with the Rome Statute[298].

The Senate adopted an amendment on 26 February 2013 in this sense. The so-called Sueur proposal aims to modify article 689-11 of the code of criminal procedure, so as to align its procedural regime with the one established in article 689-1, requiring the mere presence of the suspect on the

294 Anziani, *Rapport n° 353 fait au nom de la commission des lois constitutionnelles, de législation*, *op. cit.*, 13 February 2013, p. 28.

295 *Ibid.*, p. 26.

296 CNCDH, Avis sur la loi portant adaptation du droit pénale à l'institution de la Cour Pénale Internationale, 6 November 2008.

297 CNCDH, Avis sur l'adaptation de la legislation pénale française au Statut de Rome relatif à la Cour pénale internationale, 4 February 2010.

298 CNCDH, Avis sur la Cour pénale internationale, 23 October 2012, Recommendation 1.

French territory, with regard to crimes against humanity, genocide, and war crimes as defined in the French criminal code[299]. Even though this amendment was transferred to the National Assembly on the same day, it has not been placed on its agenda to this date[300].

2.3. Spain: a progressive restriction of universal jurisdiction over war crimes

The Spanish legal framework in relation to the prosecution of perpetrators of international crimes, including war crimes, has profoundly evolved. Originally considered a pioneer in universal jurisdiction, several amendments have been made in order to minimize its scope of application. Even though the Spanish legislation extends the principle of universal jurisdiction to several crimes, including crimes which are excluded from the scope of the international public order[301], the following developments will focus on universal jurisdiction over grave breaches and serious violations of IHL.

2.3.1. Universal jurisdiction over war crimes as provided by Organic Act 6/1985

In its original version, article 23 of Organic Act 6/1985 on the Judicial Power provided for the possibility to prosecute «Spaniards or foreigners outside of the national territory» accused of having committed a certain number of international and transnational crimes as defined in Spanish law. A 'pure form' of universal jurisdiction was therefore enshrined in national legislation, insofar as no special connection was required between the perpetrator and Spain. Thus, the accent was put on the seriousness of the crime at stake and on the necessity to deny safe havens for their perpetrators.

The first cases resorting to universal jurisdiction were based on genocide, terrorism, and torture against the Argentinian military junta as well as against

299 Proposition de loi tendant à modifier l'article 689-11 du code de procédure pénale relatif à la compétence territoriale du juge français concernant les infractions visées par le statut de la Cour pénale internationale.

300 See: http://www.senat.fr/dossier-legislatif/ppl11-753.html (Accessed: 14.03.2017).

301 Martínez Alcañiz, *El principio de justicia universal y los crímenes de guerra*, *op. cit.*, 2015, p. 492.

Augusto Pinochet and the military leadership, in 1996[302] and therefore fall outside of the scope of this thesis. Nevertheless, they gave international visibility to universal jurisdiction, notably thanks to the absolute interpretation made thereof by Spanish judges[303]. Even though Augusto Pinochet was not extradited but returned to his home country on health grounds in 2000[304], these cases remain important insofar as they triggered the application of universal jurisdiction mechanisms in Spain, and other cases were presented before Spanish judges on this basis thereafter. As observed by Antoni Pigrau Solé, the Guatemala case constitutes the cornerstone of Spanish judicial practice on universal jurisdiction[305]. It is therefore important to mention it, albeit it does not deal with war crimes.

This case was presented by Peace Nobel Prize winner Rigoberta Menchú on the situation that occurred in Guatemala between 1978 and 1986. Concretely, a complaint was filed against eight former politicians and military leaders from Guatemala before Spanish courts on 2 December 1999[306]. In a judgment of 13 December 2000, the Audiencia Nacional rejected the competence of Spanish courts over the alleged crimes as a result of the application of the principle of subsidiarity[307]. As noted by Abraham Martínez Alcañiz, the Court interpreted the latter principle quite liberally, insofar as the absence of legal obstacles in the legislation of the territorial State was deemed a sufficient requirement for the application of subsidiarity[308].

302 Audiencia Nacional, Juzgado Central de Instrucción nº 5, Auto de 10 de diciembre de 1998.

303 José Elías Esteve Moltó, «La persecución universal de los crímenes de guerra en España: más retrocesos, que avances», in Consuelo Ramón Chornet (dir.), *Conflictos armados: de la vulneración de los Derechos Humanos a las sanciones del Derecho Internacional*, Valencia, Tirant lo Blanch, 2014, p. 130.

It should also be noted that, contrarily to what is sustained by part of the scholarship on the matter, the extradition request made by Spanish judges was not based on passive personnality but on universal jurisdiction. See, in this sense: Antoni Pigrau Solé, *La Jurisdicción universal y su aplicación en España: la persecución del genocidio, los crímenes de guerra y los crímenes contra la humanidad por los tribunales nacionales*, Colección Recerca por Drets Humans 03, Barcelona, Generalitat de Catalunya, 2009, footnote 271.

304 Pigrau Solé, *La Jurisdicción universal y su aplicación en España*, *op. cit.*, 2009, p. 94.

305 *Ibid.*, pp. 98-100.

306 *Ibid.*

307 Audiencia Nacional, Sala de lo Penal, Judgment of 13 December 2000, diligencias previas 331/99, Guatemala genocide case, para.2.

308 Martínez Alcañiz, *El principio de justicia universal y los crímenes de guerra*, *op. cit.*, 2015, p. 494.

Such decision was challenged before the Supreme Court (Tribunal Supremo). In its judgment of 25 February 2003, the Court upheld the decision of the Audiencia Nacional pursuant to which the Spanish courts lacked jurisdiction to prosecute the crimes of genocide and terrorism on the basis of universal jurisdiction. Conversely, it accepted Spanish courts' jurisdiction over the crime of torture on the basis of passive personality[309]. It should also be noted that it rejected the interpretation of the principle of subsidiarity put forward by the Audiencia Nacional[310].

Indeed, the Supreme Court established a system respectful of some principles of international law – such as the principle of non-intervention – in the cases where universal jurisdiction finds its legal basis in on domestic law only[311]. In particular, the extra-territorial application of criminal law is allowed when the interests of the prosecuting State are at stake, such as the principles of active and passive personality. Conversely, if the extra-territorial application of the law is based on the nature of the offence, the compatibility of the universal jurisdiction with other principles of international law arises. Where universal jurisdiction is expressly based on norms established by treaty law, no objections can be made; on the contrary, if there are no explicit international provisions law and universal jurisdiction is provided at domestic level only, then it must be accommodated with the limits existing under international law[312]. Thus,

309 Tribunal Supremo, Judgment nº 327/2003 of 25 February 2003, Guatemala case.

310 *Ibid.*, point 6: «En cualquier caso, el criterio de la subsidiariedad, además de no estar consagrado expresa o implícitamente en el Convenio para la prevención y la sanción del delito de genocidio, no resulta satisfactorio en la forma en que ha sido aplicado por el Tribunal de instancia. Determinar cuando procede intervenir de modo subsidiario para el enjuiciamiento de unos concretos hechos basándose en la inactividad, real o aparente, de la jurisdicción del lugar, implica un juicio de los órganos jurisdiccionales de un Estado acerca de la capacidad de administrar justicia que tienen los correspondientes órganos del mismo carácter de otro Estado soberano».

311 Tribunal Supremo, Judgment nº 327/2003 of 25 February 2003, Guatemala case, point 8: «Como principio, y con carácter general, la previsión de la ley española ha de hacerse compatible con las exigencias derivadas del orden internacional, tal como es entendido por los Estados».

312 *Ibid.*: «La extensión territorial de la ley penal, en consecuencia, se justifica por la existencia de intereses particulares de cada Estado, lo que explica que actualmente resulte indiscutible el reconocimiento internacional de la facultad de perseguir a los autores de delitos cometidos fuera del territorio nacional, sobre la base del principio real o de defensa o de protección de intereses y del de personalidad activa o pasiva. En estos casos el establecimiento unilateral de la jurisdicción tiene su sentido y apoyo fundamental, aunque no exclusivo, en la necesidad de proveer a la protección de esos intereses por el Estado nacional.

in accordance with this doctrine, confirmed in subsequent cases[313], universal jurisdiction may be exercised only if some type of nexus with Spain is found.

Nonetheless, the case went to the Constitutional Court, which put forward a different approach[314]. In the Case 237/2005 of 26 September 2005, the Court annulled the judgments passed before the Audiencia Nacional and Supreme Court and provided a broad interpretation of the principle of universal jurisdiction:

> En otras palabras, desde una interpretación apegada al sentido literal del precepto, así como también desde la voluntas legislatoris, es obligado concluir que la Ley Orgánica del Poder Judicial instaura un principio de jurisdicción universal absoluto, es decir, sin sometimiento a criterios restrictivos de corrección o procedibilidad, y sin ordenación jerárquica alguna con respecto al resto de las reglas de atribución competencial, puesto que, a diferencia del resto de criterios, el de justicia universal se configura a partir de la particular naturaleza de los delitos objeto de persecución[315].

The Constitutional Court therefore endorsed the principle of pure universal jurisdiction and further considered that the presence of the alleged perpetrator was not a necessary requirement to initiate proceedings, even though the presence of the accused will be necessary at a later stage given the prohibition of trials *in absentia* in the legislation. In this respect, the existence of mechanisms such as extradition or arrest warrants excludes the requirement of the presence of the accused to trigger the proceedings[316]. In addition, the

Cuando la extensión extraterritorial de la ley penal tenga su base en la naturaleza del delito, en tant que afecte a bienes jurídicos de los que es titular la Comunidad Internacional, se plantea la cuestión de la compatibilidad entre el principio de justicia universal y otros principios de derecho internacional público».

313 Tribunal Supremo, Judgment nº 712/2003 of 20 May 2003, Peru case; Tribunal Supremo, Judgment nº 319/2004 of 8 March 2004, Chile case. Quoted in Martínez Alcañiz, *El principio de justicia universal y los crímenes de guerra*, op. cit., 2015, p. 497.

314 Martínez Alcañiz, *El principio de justicia universal y los crímenes de guerra*, *op. cit.*, 2015, p. 501.

315 Tribunal Constitucional, Case nº 237/2007 of 26 September 2007, BOE nº 258, 28.10.2005, pp. 45-57, para. 3.

316 *Ibid.*, para. 7: «Sin lugar a dudas la presencia del presunto autor en el territorio español es un requisito insoslayable para el enjuiciamiento y eventual condena, dada la inexistencia de los juicios *in absentia* en nuestra legislación (exceptuando supuestos no relevantes en el caso). Debido a ello institutos jurídicos como la extradición constituyen piezas fundamentales para una efectiva consecución de la finalidad de la jurisdicción universal: la persecución y sanción

Court held that the necessity to establish some kind of nexus with Spain was *contra legem*[317] and insisted that universal jurisdiction is a mechanism based on the nature of the offence.

Besides, it should be noted that the original wording of article 23(4) referred to genocide, but not crimes against humanity or war crimes. As observed by Gimeno Sandra, the original version of article 23(4) established two groups of crimes: the first category included crimes which, by their very nature, fell directly and immediately under extraterritorial jurisdiction. As for the second category, it included the crimes that could be prosecuted universally on the basis of the international treaties and conventions ratified by Spain[318]. Indeed, a clause allowed the prosecution of any crime that shall be prosecuted in Spain in accordance with international treaty law («según los tratados o convenios internacionales»)[319]. This clause was interpreted liberally and paved the way for several prosecutions against alleged war criminals. The Couso case is worth mentioning in this regard.

In this case, members of the American military were prosecuted regarding the death of a Spanish journalist in Baghdad[320]. In 2006, the Supreme Court accepted the jurisdiction of Spanish courts most notably on the basis of the Constitutional Court's interpretation of universal jurisdiction[321]. It was therefore the first time that the Court expressly considered that the provisions

de crímenes que, por sus características, afectan a toda la comunidad internacional. Pero tal conclusión no puede llevar a erigir esa circunstancia en requisito *sine qua non* para el ejercicio de la competencia judicial y la apertura del proceso, máxime cuando de así proceder se sometería el acceso a la jurisdicción universal a una restricción de hondo calado no contemplada en la ley; restricción que, por lo demás, resultaría contradictoria con el fundamento y los fines inherentes a la institución».

317 Ibid., para. 8: «supone una reducción *contra legem* a partir de criterios correctores que ni siquiera implícitamente pueden considerarse presentes en la ley y que, además, se muestran palmariamente contrarios a la finalidad que inspira la institución, que resulta alterada hasta hacer irreconocible el principio de jurisdicción universal según es concebido en el Derecho internacional, y que tiene el efecto de reducir el ámbito de aplicación del precepto hasta casi suponer una derogación de facto del art. 23.4 LOPJ».

318 José Vicente Gimeno Sandra, *Derecho penal procesal*, Madrid, Colex, 2004, pp. 118-119. Quoted in Martínez Alcañiz, *El principio de justicia universal y los crímenes de guerra*, *op. cit.*, 2015, p. 492.

319 Organic Act on the Judicial Power, article 23.4.g.

320 Audiencia Nacional, Juzgado Central de Instrucción nº 1, Judgment nº 27/2007 of 27.04.2007.

321 Tribunal Supremo, Sala de lo Penal, Sección 1, Judgment nº 1240/2006 of 11.12.2006. It should also be noted that the existence of a legitimate nexus with Spain was likewise recognized, as the victim was a Spaniard.

relating to the grave breaches contained in the Geneva Conventions were applicable to article 23(4)[322].

322 *Ibid*., para. 7: «Establece el art. 23.4 de la LOPJ que "igualmente será competente la jurisdicción española para conocer de los hechos cometidos por españoles o extranjeros fuera del territorio nacional susceptibles de tipificarse, según la ley penal española, como alguno de los siguientes delitos: [...]. h) Y cualquier otro que, según los tratados o convenios internacionales, deba ser perseguido en España". Esta última referencia genérica completa la relación de delitos sobre los que la comunidad internacional ha suscrito determinados Tratados o Convenios (genocidio, terrorismo, piratería, falsificación de moneda, prostitución y corrupción de menores y tráfico de drogas).
En la materia que aquí nos ocupa, existen los cuatro Convenios de Ginebra sobre el Derecho de la Guerra, de 12 de agosto de 1949, con sus correspondientes Protocolos Adicionales, relativo uno de dichos Convenios (el IV) a la protección de personas civiles en tiempo de guerra, cuyo art. 146 establece que "las Altas Partes contratantes se comprometen a tomar todas las medidas legislativas necesarias para fijar las sanciones penales adecuadas que hayan de aplicarse a las personas que cometieren o diesen orden de cometer cualquiera de las infracciones graves al presente Convenio que quedan definidas en el artículo siguiente. Cada una de las Partes contratantes tendrá la obligación de buscar a las personas acusadas de haber cometido u ordenado cometer, una cualquiera de dichas infracciones graves, debiendo hacerlas comparecer ante los propios tribunales de ella, fuere cual fuere su nacionalidad. Podrá también, si lo prefiriese, y según las condiciones previstas en su propia legislación, entregarlas para enjuiciamiento a otra Parte contratante interesada en el proceso, en la medida que esta otra Parte contratante haya formulado contra ella suficientes cargos. [...]".
Por su parte, el art. 147 del citado Convenio dispone que "las infracciones graves a que alude el artículo anterior son las que implican cualquiera de los actos siguientes, si se cometieren contra personas o bienes protegidos por el Convenio: homicidio adrede, tortura o tratos inhumanos, incluso experiencias biológicas, causar intencionadamente grandes sufrimientos, o atentar gravemente a la integridad física o a la salud, las deportaciones y traslados ilegales, la detención ilegítima, coaccionar a una persona protegida a servir en las fuerzas armadas de la Potencia enemiga, o privarla de su derecho a ser juzgada normal e imparcialmente según las estipulaciones del presente Convenio, la toma de rehenes, la destrucción y apropiación de bienes no justificadas por necesidades militares y ejecutadas en gran escala de modo ilícito y arbitrario". En este mismo ámbito, el art. 79 del Protocolo I Adicional de 8 de junio de 1977, relativo a "medidas de protección de periodistas", dice que "1. Los periodistas que realicen misiones profesionales peligrosas en las zonas de conflicto armado serán considerados personas civiles en el sentido del párrafo 1 del artículo 50.2. Serán protegidos como tales de conformidad con los Convenios y el presente Protocolo, a condición de que se abstengan de todo acto que afecte a su estatuto de persona civil y sin perjuicio del derecho que asiste a los corresponsales de guerra acreditados ante las fuerzas armadas a gozar del estatuto que les reconoce el artículo 4, A 4) del III Convenio [...]".
Consecuencia de los anteriores Convenios ha sido la inclusión en el Código Penal de 1995, como novedad absoluta en nuestro ordenamiento jurídico, del Capítulo III del Título XXIV ("Delitos contra la Comunidad Internacional"), en cuyo art. 611.1º se castiga al que, "con ocasión de un conflicto armado: 1º. Realice u ordene realizar ataques indiscriminados o excesivos o haga objeto a la población civil de ataques, represalias o actos o amenazas de violencia cuya finalidad principal sea aterrorizarla"; precisándose en el art. 608 del Código Penal que "a los efectos de este capítulo, se entenderá por personas protegidas: [...] 3º. La población civil y las personas civiles protegidas por el IV Convenio de Ginebra de 12 de agosto de 1949 o por el Protocolo I Adicional de 8 de junio de 1977"».

Against this background, several cases were brought before Spanish jurisdictions to prosecute alleged perpetrators of war crimes, such as the Gaza case[323], the Rwanda case[324], the Guantanamo case[325], or the 'Asesores de Bush' case[326]. It is worth mentioning in this regard that the Spanish legal order authorized *actio popularis*, thus allowing several associations to initiate proceedings before Spanish courts[327]. On the other hand, on different occasions, other cases were not adjudicated on war crimes grounds even though they could have been considered as such. For example, in the Guatemala case, the plaintiff was successful albeit the facts were not described as war crimes, but as genocide[328].

2.3.2. Organic Act 1/2009: clarification of the exercise of universal jurisdiction over war crimes

Article 23(4) was further amended in 2009 by means of Organic Act 1/2009[329]. The objectives of the reform, in accordance with the preamble, were two-fold. On the one hand, it added new crimes for which universal jurisdiction could be exercised, in particular war crimes and crimes against humanity. For present purposes, it is worth noticing that article 23(4)(h) refers to any crime which shall be prosecuted in Spain in accordance with treaty law, in particular with regard to IHL and IHRL conventions. While the former terminology allowed for the prosecution of war crimes, this clarification was desirable as it provided a clearer legal basis for prosecution, an element particularly important with regard to the principle of legality.

323 Audiencia Nacional, Juzgado Central de Instrucción nº 4, Judgment nº 157/2008 of 29.01.2009.

324 Audiencia Nacional, Juzgado Central de Instrucción nº 4, Judgment nº 03/2008 of 06.02.2008.

325 Audiencia Nacional, Juzgado Central de Instrucción nº 5, Judgment nº 150/2009 of 27.04.2009.

326 Audiencia Nacional, Sala de lo Penal, Judgment nº 134/2009 of 23.03.2012.

327 Martínez Alcañiz, *El principio de justicia universal y los crímenes de guerra*, *op. cit.*, 2015, p. 494.

328 Audiencia Nacional, Juzgado Central de Instrucción nº 1, Interlocutory decisión nº 331/99.10 of Justice Ruiz Polanco of 27.03.2000. Quoted in Esteve Moltó, «La persecución universal de los crímenes de guerra en España: más retrocesos, que avances», *op. cit.*, 2014, p. 131.

329 Organic Act 1/2009 of 3 November 2009 (Ley Orgánica 1/2009, de 3 de noviembre, complementaria de la Ley de reforma de la legislación procesal para la implantación de la nueva Oficina judicial, por la que se modifica la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial).

On the other hand, the reform aimed to require some connection between the crime and Spain. Thus, article 23(4) as amended by Organic Act 1/2009 requires the presence of the suspect in Spain, the existence of Spanish victims, or the existence of some relevant nexus with Spain («algún vínculo de conexión relevante con España»). Universal jurisdiction in its pure form was therefore abolished. Furthermore, the reform codified the principle of subsidiarity as interpreted by the Constitutional Court and the Supreme Court[330]. On this basis, Spanish tribunals are deemed incompetent where another competent State or international tribunal has initiated proceedings that entail an effective investigation and prosecution. Thus, Spanish courts are required to dismiss provisionally the criminal proceedings as soon as they are aware of another trial on the same situation which has started in another country or international tribunal.

Even though the objective of this reform was, *inter alia*, to restrict the application of universal jurisdiction, several cases were brought before Spanish judges on this basis. Because some of them brought political and diplomatic difficulties, the legislation on universal jurisdiction was once again modified.

2.3.3. Organic Act 1/2014: further restrictions to the exercise of universal jurisdiction over war crimes

Organic Act 1/2014[331] was adopted on 13 March 2014 in order to restrict use universal jurisdiction, but also to clarify it. It should be noted that these restrictions applied to the pending cases at the moment of the adoption of the Organic Act.

Organic Act 1/2014 enlarges the list of crimes that may be prosecuted on the basis of universal jurisdiction. For the purpose of this thesis, it is worth mentioning that article 23(4)(a) now specifically refers to the crimes

330 Esteve Moltó, «La persecución universal de los crímenes de guerra en España: más retrocesos, que avances», *op. cit.*, 2014, p. 131.

331 Organic Act 1/2014 of 13 March 2014 on universal jurisdiction (Ley Orgánica 1/2014, de 13 de marzo, de modificación de la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, relativa a la justicia universal).

committed against protected persons and property within the frame of an armed conflict:

> 4. Igualmente, será competente la jurisdicción española para conocer de los hechos cometidos por españoles o extranjeros fuera del territorio nacional susceptibles de tipificarse, según la ley española, como alguno de los siguientes delitos cuando se cumplan las condiciones expresadas:
>
> a) Genocidio, lesa humanidad o *contra las personas y bienes protegidos en caso de conflicto armado*, siempre que el procedimiento se dirija contra un español o contra un ciudadano extranjero que resida habitualmente en España, o contra un extranjero que se encontrara en España y cuya extradición hubiera sido denegada por las autoridades españolas [emphasis added].

This clarification is more than welcomed in a matter, criminal law, where provisions must be as clear and detailed as possible in accordance with the principle of legality. As a result of this codification, all the behaviors which constitute war crimes in accordance with the Spanish criminal code may be prosecuted on the basis of universal jurisdiction. As mentioned above, articles 609 to 614 establish no distinction between IACs and NIACs; consequently, universal jurisdiction is applicable to all types of war crimes, i.e., violations of IHL occurring both in IACs and NIACs. This amendment thus tremendously enlarged the material scope of application of universal jurisdiction with regard to IHL, insofar as the previous wording could apply to grave breaches only[332].

Nevertheless, this extension of the material scope of application of universal jurisdiction is counter-balanced by the addition of restrictive conditions of exercise. It is quite surprising in this regard that the preamble states that these additional restrictions are based on Spain's international legal commitments, so that the extension of Spanish jurisdiction to other territories must be legitimized and justified on the basis of an international treaty. In this respect, Organic Act 1/2014 specifies that proceedings on the basis of universal jurisdiction may be triggered only by the prosecutor or the victim[333]. As a result, *actio popularis* is now prohibited.

332 Martínez Alcañiz, *El principio de justicia universal y los crímenes de guerra*, *op. cit.*, 2015, pp. 515-516.

333 «6. Los delitos a los que se refieren los apartados 3 y 4 solamente serán perseguibles en España previa interposición de querella por el agraviado o por el Ministerio Fiscal».

In addition, the reform clarified the principle of subsidiarity, which is defined in more details. In accordance with this clarification, the Spanish courts' jurisdiction is excluded whenever other proceedings are taking place before an international tribunal, in the territorial State, or in the alleged perpetrator's country. The latter two cases, subsidiarity applies if the suspect is not in Spain, or a request for extradition has been issued against them by an international court or the national court of a foreign country.

That being said, Spanish courts still have the possibility to exercise universal jurisdiction if the prosecuting State is unable or unwilling to effectively conduct the investigation. The assessment of these conditions is undertaken by the Supreme Court (Sala 2.ª del Tribunal Supremo) in accordance with the criteria set forth in article 17 of the Statute on the International Criminal Court. Thus, Spanish courts may decide to proceed if a) the proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility; b) there has been an unjustified delay in the proceedings which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice; c) the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice[334]. Furthermore, Spanish courts must assess whether, due to a total or substantial collapse or unavailability of its national judicial system, the forum State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings[335].

334 «A fin de determinar si hay o no disposición a actuar en un asunto determinado, se examinará, teniendo en cuenta los principios de un proceso con las debidas garantías reconocidos por el Derecho Internacional, si se da una o varias de las siguientes circunstancias, según el caso:
a) Que el juicio ya haya estado o esté en marcha o que la decisión nacional haya sido adoptada con el propósito de sustraer a la persona de que se trate de su responsabilidad penal.
b) Que haya habido una demora injustificada en el juicio que, dadas las circunstancias, sea incompatible con la intención de hacer comparecer a la persona de que se trate ante la justicia.
c) Que el proceso no haya sido o no esté siendo sustanciado de manera independiente o imparcial y haya sido o esté siendo sustanciado de forma en que, dadas las circunstancias, sea incompatible con la intención de hacer comparecer a la persona de que se trate ante la justicia».

335 «A fin de determinar la incapacidad para investigar o enjuiciar en un asunto determinado, se examinará si el Estado, debido al colapso total o sustancial de su administración nacional de justicia o al hecho de que carece de ella, no puede hacer comparecer al acusado, no dispone de las pruebas y los testimonios necesarios o no está por otras razones en condiciones de llevar a cabo el juicio».

Judicial practice on this matter is mixed. Some authors have criticized the application of the principle of subsidiarity in cases involving American or Israeli officials, as they consider that the criteria were used in favor of the accused[336]. On the other hand, in the judgment of 17 March 2014 held within the frame of the Couso case, the hearing judge interpreted the principle of subsidiarity quite restrictively. He declined the jurisdiction of US courts on the grounds that the United States are not a State party to the GC IV[337] – even though this is false[338] – and that no proceedings had taken place in the US on these grounds. On this basis, the Court thus wrongly concluded to the lack of application of the principle of subsidiarity to these facts.

Secondly, some aspects are controversial regarding the prosecution of war crimes specifically. In particular, the wording of article 23(4)(a) seems to contradict to some extent the obligation to extradite or prosecute as provided by the Geneva Conventions with respect to foreigners suspected of having committed a crime against a protected person or property who are present on Spanish territory. Indeed, it subjects the possibility to exercise universal jurisdiction to the refusal of a request for extradition. Consequently, it seems to reverse the order of the obligation to extradite or prosecute, which should be understood as a *primo prosequi, secundo dedere* mechanism, as explained in Chapter 3. Pursuant to the Geneva Conventions, Spanish authorities should not be subject to an obligation to wait for an extradition request to initiate proceedings if an alleged perpetrator is on their territory. Therefore, it seems that this new formulation contradicts – if not the letter – the spirit of the Geneva Conventions. Nonetheless, this condition has a narrow scope of application to the extent that it applies only to foreigners present on Spanish territory and who do not permanently reside there.

While the legislature aimed to restrict the scope of application of universal jurisdiction with the last reform, it remains unclear whether such limitations will actually be enforced. Abraham Martínez Alcañiz notes in this sense

336 See, e.g.: Esteve Moltó, «La persecución universal de los crímenes de guerra en España: más retrocesos, que avances», *op. cit.*, 2014.

337 Audiencia Nacional, judgment nº 27/2007 of 15/04/2014, Couso case, para. 4: «La razón es simple: EE.UU. no ha suscrito esa IV Convención, con lo que lo no es "Parte Contratante". No cabe pues declinar la jurisdicción a EE.UU.». Available at: http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=7026645&links=&optim (Accessed: 05.05.2017).

338 See: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=380 (Accessed: 05.05.2017).

that judges may be tempted to apply article 23(4)(p) instead of article 23(4)(a)[339], insofar as the former does not require a special relationship with Spain for the case to proceed:

> Igualmente, será competente la jurisdicción española para conocer de los hechos cometidos por españoles o extranjeros fuera del territorio nacional susceptibles de tipificarse, según la ley española, como alguno de los siguientes delitos cuando se cumplan las condiciones expresadas [...]. Cualquier otro delito cuya persecución se imponga con carácter obligatorio por un Tratado vigente para España o por otros actos normativos de una Organización Internacional de la que España sea miembro, en los supuestos y condiciones que se determine en los mismos[340].

This interpretation has already been used, and overturned. In this regard, the Audiencia Nacional had to assess on 17 March 2014[341] whether investigations and prosecutions within the frame of the above-mentioned Couso case could be pursued, although the accused were US military personnel who did not reside in Spain, did not happen to be in Spain, or whom the Spanish authorities had not refused to extradite. The Court held that the current wording of article 23(4)(a) contradicts article 146 of GC IV and articles 26 and 27 VCLT[342].

339 Martínez Alcañiz, *El principio de justicia universal y los crímenes de guerra*, *op. cit*., 2015, pp. 525-526.

340 Organic Act on the Judiciary, article 23(4)(p).

341 Audiencia Nacional, judgment nº 27/2007 of 15/04/2014, Couso case. Available at: http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=AN&reference=7026645&links=%2227%2F2007%20%22&optimize=20140423&publicinterface=true (Accessed: 08.05.2017).

342 *Ibid*., para. 2: «Sin embargo, teniendo en cuenta que el citado artículo 146 de la IV Convención de Ginebra se contradice abiertamente con el nuevo apartado 4 a) del artículo 23, no procede el archivo de la causa: De otro modo estaríamos admitiendo la posibilidad de que una norma interna modifique o derogue una disposición de un tratado o convenio internacional vigente para España, lo cual está proscrito por dos razones:
En primer lugar, porque con ello se vulneraría la Convención de Viena sobre el Derecho de los Tratados, también suscrita por España, que preceptúa: Artículo 26: *«Pacta sunt servanda»*. Todo tratado en vigor obliga a las partes y debe ser cumplido por ellas de buena fe. Artículo 27. El derecho interno y la observancia de los tratados. Una parte no podrá invocar las disposiciones de su derecho interno como justificación del incumplimiento de un tratado. De hecho, el propio legislador en la Exposición de Motivos de la reforma, viene a reconocerlo implícitamente: Con esta finalidad, se precisan los límites positivos y negativos de la posible extensión de la jurisdicción española: es necesario que el legislador determine, de un modo ajustado al tenor de los tratados internacionales, qué delitos cometidos en el extranjero pueden ser perseguidos por la justicia española y en qué casos y condiciones. En segundo lugar, porque para modificar o derogar una

Consequently, since international law, most notably IHL[343], prevails over legislative provisions in the Spanish legal order, the Court held that article 23(4)(a) was inapplicable to this case. The Court further considered that the transitory provisions of Organic Act 1/2014, which shall apply to all cases pending at the time of its entry into force, were inapplicable as well[344]. As a result, the Court held that the proceedings should continue on the basis of article 23(4)(p). While this decision aims to pursue efforts in the fight against impunity, there are no specific indications found in the judgment as to why article 23(4) contradicts 146 of GC IV, thus raising concerns over legal certainty. However, a few months later, the same hearing judge closed the proceedings. To do so, he based his reasoning on the Tibet case[345], adjudicated in May 2015 by the Supreme Court, the latter being a higher court. On this basis, the hearing judge considered that article 23(4)(a) was applicable, so that the accused should have been present on the Spanish territory in order to be prosecuted[346].

Indeed, in the Tibet case, the Supreme Court held that article 23(4)(p) could not apply to the cases already foreseen in the previous paragraphs:

> En consecuencia, debe establecerse con claridad y firmeza, para éste y para otros supuestos similares, que el apartado p) del art. 23.4º de la LOPJ,

disposición de un tratado, la propia Constitución Española prevé un específico trámite (art. 96.1 CE): las disposiciones de un tratado sólo podrán ser derogadas, modificadas o suspendidas en la forma prevista en los propios tratados o de acuerdo con las normas generales del Derecho internacional; lo que obviamente no acontece en el caso. Así, solo es posible modificar o derogar el artículo 146 siguiendo ese trámite».

343 *Ibid*.: «De otro lado, no cabe duda de la primacía del Derecho Internacional sobre el Derecho interno, máxime en materia de Derecho Internacional Humanitario. Así el Tribunal Constitucional ha indicado –STC 78/82– que los tratados sobre estas materias (Derechos Humanos) deben ser considerados canon de interpretación de las normas relativas a los derechos fundamentales y libertades públicas, en los términos del artículo 10.2 CE. Y precisamente, los cuatro Convenios de Ginebra se consideran el núcleo de Derecho Internacional Humanitario».

344 Audiencia Nacional, judgment nº 27/2007 of 15/04/2014, Couso case, para. 5. Available at: http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=AN&reference=7026645&links=%2227%2F2007%20%22&optimize=20140423&publicinterface=true (Accessed: 08.05.2017).

345 Tribunal Supremo, judgment nº 296/2015 of 06.05.2015. Available at: http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=7389459&links=%22corte%20penal%20internacional%22&optimize=20150526&publicinterface=true (Accessed: 08.05.2017).

346 Audiencia Nacional, Juzgado Central de Instrucción nº 1, Sumario 27/2007, Auto of 9 June 2015. Confirmed by the Tribunal Supremo on 27 October 2016. Available at: http://estaticos.elmundo.es/documentos/2015/06/09/conclusion_caso_couso.pdf (Accessed: 08.05.2017).

> no es aplicable a los supuestos que ya aparecen específicamente regulados en los apartados anteriores del precepto, y concretamente a los delitos contra las personas y bienes protegidos en caso de conflicto armado[347].

In that same case, the Supreme Court clarified that article 23(4)(a) does not violate article 146 GC IV. It affirmed that while the latter indeed imposes an obligation to establish universal jurisdiction mechanisms over grave breaches, it does not entail an obligation to become global enforcers of any grave breach occurring in any armed conflict in the world; conversely, it imposes an obligation to look for, detain, and prosecute before their own courts the suspects who have sought asylum or have hidden in their countries[348]. Consequently, the Court argued that universal jurisdiction over war crimes could not be conducted *in absentia*[349].

347 Tribunal Supremo, judgment nº 296/2015 of 06.05.2015, para. 25. Available at: http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=7389459&links=%22corte%20penal%20internacional%22&optimize=20150526&publicinterface=true (Accessed: 08.05.2017).

348 *Ibid*., para. 27: «El artículo 146 del IV Convenio de Ginebra de 12 de agosto de 1949 relativo a la protección debida a las personas civiles en tiempo de guerra, establece el principio de Justicia Universal obligatoria para los Estados firmantes en el sentido de imponer la obligación de juzgar o extraditar a los responsables de las Infracciones Graves del Convenio, cualquiera que sea el lugar del mundo donde se cometió la infracción y cualquiera que sea la nacionalidad del responsable. Pero esta obligación está referida a los supuestos en que estos responsables se encuentren en el territorio del Estado firmante, pues su contenido y finalidad es evitar que ninguno de estos responsables pueda encontrar refugio en un país firmante de la Convención.
Así se entiende por la doctrina mayoritaria, que si bien concuerda con la posición mantenida por los recurrentes en el sentido de que la Jurisdicción Universal para los crímenes de guerra es imperativa, y no facultativa, mantiene sin embargo que esta obligación no se extiende al hecho de que todos y cada uno de los países firmantes deban investigar todas y cada una de las Infracciones Graves de la Convención de Ginebra, en todos y cada uno de los conflictos armados que se produzcan en cualquier lugar del mundo, y deban competir para reclamar y extraditar a los responsables, sino que esta obligación se concreta para cada país firmante en buscar, detener y enjuiciar ante sus propios Tribunales a los responsables que se hayan refugiado u ocultado en sus respectivos países».

349 *Ibid*., para. 30: «En consecuencia, y para que quede claro en éste y en otros procedimientos con similar fundamento, conforme a la vigente Ley Orgánica 1/2014, los Tribunales españoles carecen de jurisdicción para investigar y enjuiciar delitos contra las personas y bienes protegidos en caso de conflicto armado cometidos en el extranjero, salvo en los supuestos en que el procedimiento se dirija contra un español o contra un ciudadano extranjero que resida habitualmente en España, o contra un extranjero que se encontrara en España y cuya extradición hubiera sido denegada por las autoridades españolas. Sin que pueda extenderse dicha jurisdicción *in absentia* en función de la nacionalidad de la víctima o de cualquier otra circunstancia».

Thus, the presence of the alleged perpetrator has been recognized as a requirement for the activation of universal jurisdiction whenever the other conditions are not fulfilled (active personality or residence in Spain).

In light of these developments, the position of the three actors on universal jurisdiction seems to converge on some aspects. The EU, France, and Spain all agree on the principle of universal jurisdiction over some core international crimes. In this respect, it is acknowledged that in the case of IHL, the creation of universal jurisdiction mechanisms is not optional but mandatory at least with regard to the grave breaches. However, its practical implementation has been restricted, probably in response to the political complications that its exercise might entail. Actually, the current legal framework in Spain and in France present similarities even in the elements which are questionable, such as the reversal of the order of the principle of complementarity. All in all, it seems that universal jurisdiction as it is regulated at EU, French, and Spanish levels aims to deny safe havens to people willing to establish themselves in those territories rather than to become global enforcers proactively prosecuting high-level officials.

Section 2
COOPERATING WITH INTERNATIONAL CRIMINAL JURISDICTIONS

Besides the enactment of criminal provisions allowing for the prosecution of alleged perpetrators at domestic level, another means to enforce the obligation to ensure respect for IHL in its repressive dimension lies in external action, through the cooperation with international criminal jurisdictions. In this context, the purpose of this section is to analyze the efforts made at EU, French, and Spanish levels to cooperate with international criminal jurisdictions, with a special focus on the ICC.

1. COOPERATION WITH THE «AD HOC» TRIBUNALS

All the three actors have established the means necessary for the cooperation with the ad hoc tribunals. In this case, the multilevel approach is particularly visible. Indeed, the EU has made use of its sanctions and conditionality policies to induce third States to cooperate with the ICTY. France, as a permanent member of the UNSC has not only implemented its obligation to cooperate with the *ad hoc* tribunals, but it also participated in its establishment. As for Spain, it has duly transposed its obligations derived from the Statutes. It should likewise be observed that the three actors have concentrated their efforts on different situations. This is particularly clear with regard to the EU, which has conducted an aggressive policy of cooperation with the ICTY, and with respect to France in relation with the ICTR. This situation is most likely due to historical and cultural ties concerning France. As for the EU, the Balkan region is of utmost importance with regard to geopolitical interests, security, and with a view to the EU's enlargement.

1.1. The EU

The EU has cooperated to a larger extent with the ICTY than with the ICTR. Regarding the latter, despite the EU's support to the ICTR since its establishment in 1994, no formal bilateral agreement has been contracted

between both institutions. Even so, the EU has stated in various political statements the importance of the ICTR for the international criminal justice. In particular, in the Statement on the ICT Report on Genocide in Rwanda, the Presidency affirms its «strong support for the ICTR» and considers that the work of the ICTR and ICTY «has paved the way for the ICC» and «serves as an example of the determination of the international community to combat impunity»[350]. More importantly, the 2002 Common Position on Rwanda[351], which follows Common Positions 2000/558/CFSP[352] and 2001/799/CFSP[353], defines its objectives and priorities with regard to the situation in Rwanda. As stated in article 1:

> The objectives and priorities of the European Union in its relations with Rwanda are to encourage, stimulate and support the process of:
>
> (a) recovery from genocide and the promotion of national reconciliation,
>
> (b) reconstruction, poverty reduction and development,
>
> (c) protection and promotion of human rights and fundamental freedoms,
>
> (d) transition to democracy.

For present purposes, article 4(i-ii) is dedicated to supporting the work of the ICTR and to «renew its efforts to ensure that all States surrender to the ICTR all those indicted by it for genocide and other serious violations of IHL». Furthermore, the EU has called on the Government of Rwanda to comply fully with its obligations to cooperate with the Tribunal, notably through the provision of information asked by the ICTR[354]. Generally speaking, the EU's support to the ICTR is mainly financial[355].

350 EU Presidency Statement, ICT Report on Genocide in Rwanda, 28 October 2002. Available at: http://eu-un.europa.eu/eu-presidency-statement-ict-report-on-genocide-in-rwanda/ (Accessed: 05.05.2017). Quoted in British Institute of International and Comparative Law, *Implementation of International Humanitarian Law*, *op. cit.*, 2009, p. 152.

351 Council Common Position of 21 October 2002 on Rwanda and repealing Common Position 2001/799/CFSP, OJ L 285, 23.10.2002, pp. 3-6.

352 Common Position 2000/558/CFSP, OJ L 20.09.2000, p. 1.

353 Common Position 2001/799/CFSP, OJ L 303, 20.11.2001, p. 1.

354 Wouters and Sudeshna Basu, «The creation of a global justice system: the European Union and the International Criminal Court», *op. cit.*, 2009, p. 7.

355 British Institute of International and Comparative Law, *Implementation of International Humanitarian Law*, *op. cit.*, 2009, p. 153.

In contrast, the EU's position towards the ICTY has been more important. The EU's support dates back to 1993, although cooperation was rather minimal and consisted mainly in series of statements supporting States and individuals dedicated to further the mandate of the ICTY. However, the EU's involvement has been more important starting from 2003, after Slobodan Milošević was voted out of office and replaced by Vojislav Koštunica as President of Yugoslavia in 2000[356]. In this context, the EU has resorted to conditionality clauses and the adoption of restrictive measures to fulfill its obligation of cooperation with the ICTY.

1.1.1. The use of conditionality clauses

The EU adopted a conditionality approach towards the successor States of the former Yugoslavia. As observed by Jan Wouters and Sudeshna Basu, by making EU membership dependent on cooperation with the ICTY, the EU has managed to contribute actively to the effective functioning of the ICTY[357]. Florence Hartmann further argues that:

> EU conditionality and international pressure have proved to be the only effective means of overcoming [Western Balkans politicians] reluctance and eliciting the cooperation without which the tribunal would not have been able to fulfill its mandate[358].

In this context, the EU is called a 'surrogate enforcer'[359] of the Tribunal. This role is reflected both in the approach requiring States to handover sus-

By way of example, the EU has allocated 290 million Euros for the period 2008-2013 within the frame of its 10th European Development Fund. See: Wouters and Basu, «The creation of a global justice system: the European Union and the International Criminal Court», *op. cit.*, 2009, p. 7.

356 British Institute of International and Comparative Law, *Implementation of International Humanitarian Law*, *op. cit.*, 2009, p. 153.

357 Wouters and Basu, «The creation of a global justice system: the European Union and the International Criminal Court», *op. cit.*, 2009, p. 8.

358 Florence Hartmann, «The ICTY and EU conditionality», in Judy Batt and Jelena Obradovic-Wochnik (eds.), *War crimes, conditionality and UE integration in the Western Balkans*, Chaillot Paper nº 116, Paris, EU Institute for Security Studies, 2009, p. 67.

359 Beke, D'hollander, Hachez and Pérez de las Heras, *Report on the integration of human rights in EU development and trade policies*, *op. cit.*, 2014, p. 25.

pects to the ICTY and in the clauses[360] enshrined in Stabilization and Association Agreements.

As Dejan Jovic has shown, this policy was successful with regard to Croatia thanks to a partnership between the EU and the ICTY. Indeed, EU membership was conditioned upon full cooperation with the ICTY and the EU approved to move forwards in the talks only when the ICTY recognized that Croatia had undertaken «real efforts to identify, arrest and extradite alleged war criminals»[361]. As the inclusion of Croatia in the next wave of enlargement together with Bulgaria and Romania was discussed, the EU decided in 2003 to halt the process notably because of the failure to hand over ICTY accused[362]. In 2004, the EU made accession negotiations conditioned to the arrest and handover of the last Croatian ICTY suspect, General Gotovina[363], who was eventually arrested in December 2005 and transferred to the ICTY with the cooperation of Croatian authorities. This 'strict conditionality' was effective not only with regard to the functioning of the ICTY, but also to strengthen pro-European forces internally[364].

Despite inconsistencies, the same holds true with regard to Serbia. By way of example, the EU suspended the negotiations of a Stabilization and Association Agreement in May 2006, following a negative assessment of State cooperation and failure to locate, arrest, and transfer of former Chief of Staff of the Bosnian Serb Army Ratko Mladić. It should nonetheless be noted that in the Serbian case, full cooperation with the ICTY was understood under lower thresholds than in the Croatian case, as the EU also intended to provide incentives to pro-Western forces in the country[365].

The EU efforts in the Western Balkans were endorsed by the ICTY, as former Chief Prosecutor Carla del Ponte claimed that «EU conditionality is

360 «Cooperation with the ICTY, with a view to bringing war criminals to justice, is a basic condition for any progress in the development of bilateral relations in the areas of commercial exchanges, financial assistance and economic cooperation as well as contractual relations between the EU and the countries of the region».

361 Dejan Jovic, «Croatia after Tudjman: the ICTY and issues of transitional justice», in Batt and Obradovic-Wochnik (eds.), *War crimes, conditionality and UE integration in the Western Balkans*, *op. cit.*, 2009, p. 23.

362 Hartmann, «The ICTY and EU conditionality», *op. cit.*, 2009, p. 69.

363 *Ibid*.

364 *Ibid*., p. 68.

365 *Ibid*., pp. 67-82.

a crucial tool for encouraging cooperation with the ICTY. 90 % of those in custody now are there as a direct result of EU conditionality»[366].

1.1.2. The use of restrictive measures

EU Member States adopted a certain number of measures against ICTY suspects under the CFSP, which were further implemented within the frame of EU integrated policies. Without providing full account of the EU's policy on the matter, it is worth mentioning that the Council approved 'Common Position 2003/280/CFSP in support of the effective implementation of the mandate of the ICTY'[367] on 16 April 2003, in which the EU committed to cooperate with the ICTY[368]. As such, EU Member States are required to:

> take the necessary measures to prevent the entry into, or transit through, their territories of the persons listed in the Annex, who are engaged in activities which help persons at large continue to evade justice for crimes for which the ICTY has indicted them or are otherwise acting in a manner which could obstruct the ICTY's effective implementation of its mandate[369].

The objective was therefore to deny safe havens on EU soil to persons indicted by the ICTY and evading justice by restricting their admission in EU Member States. These measures are likewise applicable to those individuals obstructing the ICTY's effective functioning[370]. This Common Position was implemented by Council Decision 2003/280/CFSP which included a list of the relevant persons[371]. These measures have been renewed on several occa-

366 European Parliament, «Serbia must deliver war criminals before signing stabilisation agreement with the EU» says Carla Del Ponte, Press release, 26.06.2007.

367 Council Common Position 2003/280/CFSP of 16 April 2003 in support of the effective implementation of the mandate of the ICTY, OJ L 101, 23.04.2003, pp. 0022-0023.

368 *Ibid.*, recital 6: «The European Union should do all it can to prevent obstructions being placed in the way of the ICTY's effective implementation of its mandate».

369 Council Common Position 2003/280/CFSP of 16 April 2003 in support of the effective implementation of the mandate of the ICTY, OJ L 101, 23.04.2003, pp. 0022-0023, article 1.

370 Wouters and Basu, «The creation of a global justice system: the European Union and the International Criminal Court», *op. cit.*, 2009, p. 8.

371 Council Decision 2003/484/CFSP of 27 June 2003 implementing Common Position 2003/280/CFSP in support of the effective implementation of the mandate of the International Criminal Tribunal of the former Yugoslavia (ICTY), OJ L 162, 01.07.2003, pp. 77-79.

sions[372] and the list of persons concerned updated as suspects were transferred into the custody of the ICTY[373].

In addition, the Council agreed on the imposition of restrictive measures in 2004. On this basis, the EU adopted a certain number of legislative acts to implement this common position. In this context, 'Council Regulation nº 1763/2004 imposing certain restrictive measures in support of effective implementation of the mandate of the ICTY' imposed the freezing of funds and economic resources own by «persons indicted by the ICTY who are still at large and to ban any support they might receive from within the Community»[374]. It was extended and amended on several occasions in order to update the list of persons covered by the freezing of funds and economic resources[375].

372 Council Common Position 2004/694/CFSP of 11 October 2004 on further measures in support of the effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY), OJ L 315, 14.10.2004, p. 52; Common Position 2009/164/CFSP of 26 February 2009 renewing measures in support of the effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY), OJ L 55, 27.02.2009, p. 44; Decision 2010/145/CFSP renewing measures in support of the effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY), OJ L 58, 09.03.2010, p. 8; Council Decision 2011/146/CFSP of 7 March 2011 amending Decision 2010/145/CFSP renewing measures in support of the effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY), OJ L 61, 08.03.2011, p. 21.

373 See, e.g.: Council Implementing Decision 2011/422/CFSP of 18 July 2011 implementing Decision 2010/603/CFSP on further measures in support of the effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY), OJ L 188, 19.07.2011, p. 19.

374 Council Regulation (EC) No 1763/2004 of 11 October 2004 imposing certain restrictive measures in support of effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY), OJ L 315, 14.10.2004, pp. 14-23.

375 See, e.g.: Commission Regulation (EC) Nº 607/2005 of 18 April 2005 amending, for the fourth time, Council Regulation (EC) No 1763/2004 imposing certain restrictive measures in support of effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY); Commission Regulation (EC) Nº 830/2005 of 30 May 2005 amending, for the fifth time, Council Regulation (EC) No 1763/2004 imposing certain restrictive measures in support of effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY); Commission Regulation (EC) No 1053/2006 of 11 July 2006 amending, for the 10th time, Council Regulation (EC) No 1763/2004 imposing certain restrictive measures in support of effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY), OJ L 189, 12.07.2006, pp. 5-6; Commission Implementing Regulation (EU) Nº 715/2011 of 19 July 2011 amending, for the 15th time, Council Regulation (EC) No 1763/2004 imposing certain restrictive measures in support of effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY), OJ L 191, 22.07.2011, pp. 19-20; Council Decision 2010/603/CFSP of 7

As Goran Hadzic – the last ICTY indictee evading justice – was transferred into the custody of the ICTY in 2011, the Council finally adopted Decision 2011/705/CFSP[376], which repealed the last Decision in force relating to restrictions on admission. The same holds true regarding the imposition of restrictive measures, as the Council approved Regulation nº 1048/2011[377] which eventually repealed Decision 2010/145/CFSP.

1.2. France's cooperation with the «ad hoc» tribunals

France has traditionally been an active supporter of international criminal justice. As observed in Chapter 1, it was one of the States participating in the London Agreement, which gave birth to the Charter of the International Military Tribunal at Nuremberg[378].

Thereafter, as a permanent member of the UNSC, it has had to adopt eminently important decisions with regard to the fight against impunity at international level. In particular, France defended the adoption of UNSC resolutions 827 of 25 May 1993 and 955 of 8 November 1994 at UNSC, which established the ICTY and ICTR respectively[379]. Since its creation, French authorities have supported both tribunals in multilateral fora[380].

October 2010 on further measures in support of the effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY), OJ L 265, 08.10.2010, p. 15.

376 Council Decision 2011/705/CFSP of 27 October 2011 repealing Decision 2010/145/CFSP renewing measures in support of the effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY), OJ L 281, 28.10.2011, pp. 27-27.

377 Council Regulation (EU) nº 1048/2011 of 20 October 2011, OJ L 276, 21.10.2011, p. 1.

378 Decree nº 45-2267 of 06 October 1945 (Décret nº 45-2267 du 06.10.1945 portant promulgation de l'accord entre le gouvernement provisoire de la république française et les gouvernements des USA, du RU, et de l'URSS concernant la poursuite et le châtiment des grands criminels de guerre des puissances européennes de l'axe, signé à Londres le 08.08.1945, ensemble le statut du tribunal militaire international).

379 Ministry of foreign affairs, «Tribunal pénal international pour l'ex-Yougoslavie (TPIY)», available at: http://www.diplomatie.gouv.fr/fr/politique-etrangere-de-la-france/la-france-a-l-onu/domaines-d-action-de-l-onu/la-justice-internationale/article/tribunal-penal-international-pour-108944 (Accessed: 05.06.2017); Ministry of foreign affairs, «Tribunal pénal international pour le Rwanda (TPIR)», available at: http://www.diplomatie.gouv.fr/fr/politique-etrangere-de-la-france/la-france-a-l-onu/domaines-d-action-de-l-onu/la-justice-internationale/article/tribunal-penal-international-pour-le-rwanda-tpir (Accessed: 05.06.2017).

380 *Ibid*.

In accordance with the resolutions of the UNSC adopted on the basis of Chapter VII of the UN Charter, French authorities have approved laws of cooperation with both *ad hoc* tribunals[381]. These laws have been amended so as to reflect the evolution of international law on the matter and the establishment of the MICT[382]. Pursuant to these laws, French courts benefit from a residual jurisdiction with regard to the crimes referred to in the Statutes of the *ad hoc* tribunals. In this context, they may prosecute alleged perpetrators on the basis of universal jurisdiction, provided that they are found in France[383]. Nonetheless, if the *ad hoc* tribunals or MICT address a request in this sense, French courts may decline its jurisdiction in their favor[384]. Furthermore, the legislation regulates legal assistance[385], arrest and surrender[386], and the execution of prison sentences[387].

On this basis, French courts have cooperated in the prosecution of a certain number of suspects within the frame of these conflicts, especially in Rwanda. The Munyeshyaka and Bucyibaruta cases are also worth mentioning, as France is the only country, together with Rwanda, to which the ICTR has referred cases. After some tergiversation[388], the ICTR referred the cases to

381 Act n° 95-1 of 2 January 1995 (Loi n° 95-1 du 2 janvier 1995 portant adaptation de la législation française aux dispositions de la résolution 827 du Conseil de sécurité des Nations unies instituant un tribunal international en vue de juger les personnes présumées responsables de violations graves du droit international humanitaire commises sur le territoire de l'ex-Yougoslavie depuis 1991), JORF n° 2 of 03.01.1995, p. 71; Act n° 96-432 of 22 May 1996 (Loi n° 96-432 du 22 mai 1996 portant adaptation de la législation française aux dispositions de la résolution 955 du Conseil de sécurité des Nations unies instituant un tribunal international en vue de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis en 1994 sur le territoire du Rwanda et, s'agissant de citoyens rwandais, sur le territoire d'Etats voisins), JORF n° 119 of 23.05.1996, p. 7695.

382 Act n° 2013-711 of 5 August 2013 (Loi n° 2013-711 du 5 août 2013 portant diverses dispositions d'adaptation dans le domaine de la justice en application du droit de l'Union européenne et des engagements internationaux de la France), JORF n° 9181 of 06.08.2013, p. 13338, Chapter IX.

383 Act n° 95-1 of 2 January 1995, article 2; Act n° 96-432 of 22 May 1996, article 2.

384 Act n° 95-1 of 2 January 1995, articles 3 to 6; Act n° 96-432 of 22 May 1996, article 2.

385 Act n° 95-1 of 2 January 1995, articles 7 and 8; Act n° 96-432 of 22 May 1996, article 2.

386 Act n° 95-1 of 2 January 1995, articles 9 to 16; Act n° 96-432 of 22 May 1996, article 2.

387 Act n° 95-1 of 2 January 1995, articles 16-1 and 17; Act n° 96-432 of 22 May 1996, article 2.

388 In 1995, French courts declined their competence, alleging the non-self executing nature of the Geneva Conventions, in accordance with the above-mentioned Javor case. Nonetheless, the Cour de cassation decided to reopen the proceedings in 1998, on the basis of the newly enacted law of cooperation with the ICTR (Cour de cassation, criminal section, judgment n° 96-82491 of 6 January 1998). The ECtHR condemned France in June 2004 because of the tardiness of the investigation, which had violated the right of the plaintiff to be heard promptly and the right to compensation (ECtHR, Mutimura v. France, Judgment n° 46621/99 of 8 June 2004). Then, the

French courts in 2007[389]. The proceedings were closed in 2015, as the cases were dismissed because of a lack of evidence. Lastly, France has welcomed several persons acquitted by the ICTR and ICTY[390] and imprisoned one perpetrator convicted by the ICTY[391].

On the other hand, there are some examples of non-cooperation or at least, lack of transparency with the *ad hoc* tribunals. For instance, French authorities were criticized within the frame of the Gotovina case, as they granted a passport to the General only a few days before his arrest warrant was issued[392], despite the fact that the EU made Croatia's membership talks conditioned to his arrest and surrender to the ICTY.

1.3. Spain's cooperation with the «ad hoc» tribunals

On the basis of the UNSC resolutions establishing the *ad hoc* international criminal tribunals, Spain adopted laws organizing its cooperation with the ICTY[393] and ICTR[394] in 1994 and 1998 respectively.

ICTR issued an arrest warrant against Wenceslas Munyeshyaka and Laurent Bucyibaruta in 2007 but it decided a few months later to refer the cases to French authorities.

389 ICTR, Trial Chamber, The Prosecutor v. Laurent Bucyubaruta, Decision on Prosecutor's request for referral of Laurent Bucyibaruta's indictment to France, Case nº ICTR-2005-85-I, 20 November 2007; ICTR, Trial Chamber, The Prosecutor v. Wenceslas Munyeshyaka, Decision on Prosecutor's request for referral of Wenceslas Munyeshyaka's indictment to France, Case nº ICTR-2005-87-I, 20 November 2007.

390 Ministry of foreign affairs, «Tribunal pénal international pour le Rwanda (TPIR)». Available at: http://www.diplomatie.gouv.fr/fr/politique-etrangere-de-la-france/la-france-a-l-onu/domaines-d-action-de-l-onu/la-justice-internationale/article/tribunal-penal-international-pour-le-rwanda-tpir (Accessed: 05.06.2017).

391 Ministry of foreign affairs, «Tribunal pénal international pour l'ex-Yougoslavie (TPIY)». Available at: http://www.diplomatie.gouv.fr/fr/politique-etrangere-de-la-france/la-france-a-l-onu/domaines-d-action-de-l-onu/la-justice-internationale/article/tribunal-penal-international-pour-108944 (Accessed: 05.06.2017).

392 Elise Bernard, «La coopération avec le TPIY, une justice internationale négociable?», *Nouvelle Europe* [on line], 25 June 2013. Available at: http://www.nouvelle-europe.eu/node/1713 (Accessed: 07.06.2017).

393 Organic Act 15/1994 of 1 June 1994 (Ley Orgánica 15/1994, de 1 de junio, para la cooperación con el Tribunal Internacional para el enjuiciamiento de los presuntos responsables de violaciones graves del Derecho internacional humanitario cometidas en el territorio de la ex-Yugoslavia), BOE nº 131, 02.06.1994, p. 17399.

394 Organic Act 4/1998 of 1 July 1998 (Ley Orgánica 4/1998, de 1 de julio, para la Cooperación con el Tribunal internacional para Ruanda), BOE nº 157, 02.07.1998, p. 21880.

Both organic acts establish the obligation of cooperation of the Kingdom of Spain with the respective *ad hoc* tribunals with regard to the prosecution of the alleged perpetrators of serious violations of IHL committed in the former Yugoslavia and of genocide and other serious violations of IHL committed in Rwanda and in the territory of neighboring States under the conditions provided by the relevant UNSC resolutions[395]. It is worth mentioning that the preamble refers to the self-executing nature of the most part of the Statutes, so that the organic laws were adopted solely to allow the implementation of the matters falling under the remit of organic laws pursuant to the Spanish Constitution.

They stipulate that the Ministry of Justice shall be the central authority competent to transfer and receive cooperation requests and that the Audiencia Nacional shall be the court in charge of cooperating with the *ad hoc* tribunals[396]. Furthermore, they address questions linked to concurrent jurisdiction[397], the *non bis in idem* principle[398], the detention and transfer of suspects[399], appearance before the *ad hoc* tribunals[400] and the enforcement of sentences[401]. In this respect, it is expressly stated that extradition proceedings are excluded in favor of direct transfer to the tribunals.

The Gotovina case is worth mentioning in this regard. Indeed, he was arrested and detained by the Spanish authorities while he was in the Canary Islands[402]. Nonetheless, contrarily to France, the *ad hoc* tribunals have not referred situations to Spanish authorities.

In addition, Spain has called for the cooperation of the relevant States with the *ad hoc* tribunals. This is the case for example of Serbia in 2009, as Spain called on the authorities to pursue cooperation to arrest Ratko Mladic

395 Organic Act 15/1994 of 1 June 1994, article 1; Organic Act 4/1998 of 1 July 1998, article 1.

396 Organic Act 15/1994 of 1 June 1994, article 3; Organic Act 4/1998 of 1 July 1998, article 3.

397 Organic Act 15/1994 of 1 June 1994, article 4; Organic Act 4/1998 of 1 July 1998, article 4.

398 Organic Act 15/1994 of 1 June 1994, article 5; Organic Act 4/1998 of 1 July 1998, article 5.

399 Organic Act 15/1994 of 1 June 1994, article 6; Organic Act 4/1998 of 1 July 1998, article 6.

400 Organic Act 15/1994 of 1 June 1994, article 7; Organic Act 4/1998 of 1 July 1998, article 7.

401 Organic Act 15/1994 of 1 June 1994, article 8; Organic Act 4/1998 of 1 July 1998, article 8.

402 «El ex general Ante Gotovina, el criminal de guerra croata más buscado, detenido en Tenerife», *La Vanguardia*, 08.12.2005. Available at: http://www.lavanguardia.com/internacional/20051208/51262818153/el-ex-general-ante-gotovina-el-criminal-de-guerra-croata-mas-buscado-detenido-en-tenerife.html (Accessed: 05.06.2017).

and Goran Hadzic[403]. In addition, while Spain was a non-permanent member of the UNSC in 2015-2016, it issued a declaration in which it expressed the country's official position with regard to the *ad hoc* tribunals and the MICT. In this context, it acknowledged the important efforts conducted to fight against impunity and welcomed the advances made in that regard. More specifically, it called the creation of the *ad hoc* tribunals a milestone for international criminal law, but also recalled that national courts must complete this task. Lastly, it welcomed the overall satisfactory cooperation of the successor countries of the former-Yugoslavia with the ICTY[404].

2. COOPERATION WITH THE ICC

State parties to the Rome Statute are subject to a duty to cooperate with the Court. This obligation of cooperation has been duly implemented by both French and Spanish authorities, even though the understanding of the principle of complementarity is not in line with the Rome Statute. Furthermore, this is probably the area where the action of the EU has been most visible, as the EU has undertaken a «pivotal and crucial»[405] policy of support for the ICC.

2.1. The EU's unconditional support for the ICC

The ICC's creation, «regarded as the greatest development in international law over the past decade»[406] was made possible notably thanks to the

403 «España pide a Serbia que siga cooperando con el TPIY para la captura de Mladic», Lainformacion.com, 09.03.2009. Available at: http://www.lainformacion.com/policia-y-justicia/derecho-internacional/espana-pide-a-serbia-que-siga-cooperando-con-el-tpiy-para-la-captura-de-mladic_5fZ7RSUMyd9XhUYDPqgG21/ (Accessed: 05.06.2017).

404 UNSC 7574th meeting, S/PV.7574, Intervención del representante de España en debate TPIY / TPIR, 9 December 2015. Available at: http://www.exteriores.gob.es/Portal/es/PoliticaExteriorCooperacion/CSNU2015-2016/Actualidad/Documents/2015-12-09_INTERVENCION.PDF (Accessed: 05.06.2017).

405 British Institute of International and Comparative Law, *Implementation of International Humanitarian Law*, *op. cit.*, 2009, p. 141.

406 Anttonis Antoniadis and Olympia Bekou, «The EU and the ICC: an awkward symbiosis in interesting times», *International Criminal Law Review*, vol. 7(4), 2008, pp. 621-655.

EU. All EU Member States are parties to the Rome Statute of the International Criminal Court[407]. Therefore, the EU is a regional area where the authority of the ICC is unanimously recognized. Furthermore, EU Member States have pushed forward the acceptance of international criminal law by way of the EU. Indeed, it probably was the international organization that pushed the most forwards the establishment of the Rome Statute, together with the UN. As emphasized by Jan Wouters and Sudeshna Basu, the very fact that EU Member States adopted legally binding acts on the ICC is «significant at both the EU and international levels»[408]. On the one hand, it creates a legally binding framework for both the EU and its Member States with regard to the ICC, insofar as EU Member States must ensure that national legislation comply with the Common Position. On the other hand, it constitutes the expression of all EU Member States on the international stage on matters relating to the fight against impunity[409]. As observed by Martjin Groenleer and David Rijks:

> Itself a hybrid of an emerging polity and an international organization, the development of the ICC as an issue of foreign policy has enhanced its role as an international actor in its own right[410].

EU Member States adopted Common Position 2001/443/CFSP[411] to establish the framework of the EU's cooperation with the ICC in anticipation of the Rome Statute's entry into force[412]. Such Common Position was further

407 International Criminal Court's website, The State Parties to the Rome Statute. Available at: https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (Accessed: 08.05.2017).

408 Wouters and Basu, «The creation of a global justice system: the European Union and the International Criminal Court», *op. cit.*, 2009, p. 5.

409 Wouters and Basu, «The creation of a global justice system: the European Union and the International Criminal Court», *op. cit.*, 2009, p. 5.

410 Rijks Groenleer Martjin, «The European Union and the International Criminal Court: the politics of international criminal justice», in Knud Erik Jørgensen, *The European and International Organizations*, London, Taylor and Francis, 2009, p. 168. Quoted in European Parliament, *Mainstreaming Support for the ICC in the EU's Policies*, Directorate General for external policies of the Union, Policy Department, March 2014, p. 16. Available at: http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433844/EXPO-DROI_ET(2014)433844_EN.pdf (Accessed: 11.07.2017).

411 Council Common Position 2001/443/CFSP of 11 June 2001 on the International Criminal Court, OJ L 150, 18.06.2003, pp. 67-69.

412 European Parliament, *Mainstreaming Support for the ICC in the EU's Policies*, *op. cit.*, 2014, p. 16.

amended in 2002 and 2003[413]. On this basis, promoting the universality and integrity of the Rome Statute constituted the principal basis for the EU's engagement with the ICC until 2011[414]. However, as the Court became operational, a new priority emerged, that of making the Court effective[415]. This new concern was echoed at the Review Conference of the Rome Statute of the ICC held in Kampala in 2010. On this occasion, the EU and its Member States issued a pledge to:

> – Promoting the universality and preserving the integrity of the Rome Statute;
> – The fight against impunity as a core value to share with our partners when entering into agreements with third states;
> – Financial support to the ICC, civil society and third country partners;
> – And the update and review of the EU instruments in support of the ICC after the meeting in Kampala, where appropriate[416].

Those pledges were reflected in Council Decision 2011/168/CFSP[417], which repealed the former Common Position. To supplement these legal instruments, the EU has adopted action plans in 2002 and 2004[418], the one in force being Action Plan to follow-up on the Decision on the International Criminal Court of 2011[419]. According to those and regarding the EU's external

413 Council Common Position 2002/474/CFSP on the International Criminal Court, OJ L164, 22.06.2002, pp. 1-2; Council Common Position 2003/444/CFSP on the International Criminal Court, OJ L150, 18.06.2003, pp. 67-69.

414 European Parliament, «Mainstreaming Support for the ICC in the EU's Policies», *op. cit*., 2014, p. 17.

415 *Ibid*.

416 Declaración realizada en nombre de la Unión Europea por la Excma. Sra. Dña. María Jesús Figa López-Palop Subsecretaria de Asuntos Exteriores y de Cooperación del Reino de España en el debate general de la Conferencia de Revisión del Estatuto de Roma de la Corte Penal Internacional, 31.05.2010, Kampala (Uganda), para. 14.

417 Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court repealing Council Common Position 2003/444/CFSP, OJ L 76, 22.03.2011, p. 56.

418 Council of the European Union, Action Plan to follow-up on the Common Position on the International Criminal Court (9019/02), available at: http://register.consilium.europa.eu/pdf/en/02/st09/09019en2.pdf (Accessed: 10.05.2013); Council of the European Union, Action Plan to follow-up on the Common Position on the International Criminal Court (5742/04), available at: http://register.consilium.europa.eu/pdf/en/04/st05/st05742.en04.pdf (Accessed: 10.05.2013).

419 Council of the European Union, Action Plan to follow-up on the Decision on the International Criminal Court (12080/11), 12.07.2011.

action, the EU is required to review its support for the ICC periodically and is called to support third states in the ratification and implementation of the Rome Statute.

It should be noted that third countries – candidate countries, potential candidate countries, Countries of the Stabilization and Association Process, ETFA countries, and others – are associated with the EU's legislation on the matter. This movement arguably contributes to the authority of the Rome Statute. Indeed, pursuant to the preamble of Council Common Position of 16 June 2003:

> the application of this Common Position by the acceding countries and the alignment with it by the associated countries Romania, Bulgaria and Turkey and by the EFTA countries important in order to maximize its impact[420].

This commitment is still on going as the objectives of the 2011 Council Decision on the ICC are shared with

> the Candidate Countries the former Yugoslav Republic of Macedonia, Montenegro and Iceland, the Countries of the Stabilization and Association Process and potential candidates Albania, Bosnia and Herzegovina, Serbia, and the EFTA country Norway, member of the European Economic Area, as well as Ukraine, the Republic of Moldova and Georgia[421].

Council Decision 2011/168/CFSP identifies five objectives, some of which were already contained in former common positions:

> The objective of this Decision is to advance universal support for the Rome Statute of the International Criminal Court (hereinafter the 'Rome Statute') by promoting the widest possible participation in it, to preserve the integrity of the Rome Statute, to support the independence of the ICC and its effective and efficient functioning, to support cooperation with the ICC, and to support the implementation of the principle of complementarity[422].

420 Council Common Position 2003/444/CFSP of 16 June 2003 on the International Criminal Court, L 150/67 18.06.2003, Preamble, pt. 14

421 Declaration by the High Representative on behalf of the European Union on the alignment of certain third countries with the Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court and repealing Common Position 2003/444/CFSP, Brussels, 6 April 2011, 8756/11, PRESSE 98.

422 Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court repealing Council Common Position 2003/444/CFSP, OJ L 76, 22.03.2011, p. 56, article 1(2).

In this context, the EU has developed a policy encouraging ratification, acceptance and approval of the Rome Statute. It has unconditionally supported the universality and integrity of the Rome Statute and has undertaken important efforts to ensure the effective functioning of the ICC once it was established.

2.1.1. Regarding to the universality and integrity of the Rome Statute

The EU's action and support to the ICC is particularly remarkable when one knows the position the United States had at the time of the establishment of the ICC. Indeed, although President Bill Clinton signed the Rome Statute, he did not ratify it. However, when George W. Bush became president, he launched a rather hostile policy towards the ICC[423]. The reason invoked was that the ICC could be misused for political ends. Although the United States put an end to this aggressive policy, it left the Court with difficulties at the moment of its establishment. In this regard, one could infer that it is in reaction to this policy that the EU has stepped over and undertaken important efforts to support the Rome Statute.

First, the United States adopted the American Service Members Protection Act on 2 August 2002, which limited the United States' cooperation with the ICC, restricted the United States' participation in UN peacekeeping operations, prohibited military assistance to most countries that ratify the Rome Statute, and authorized the President to use «all means necessary and appropriate» to free any American or allied personnel held by or on behalf of the ICC[424]. Second, the United States intended to neutralize the impact of the ICC within the Security Council on the occasion of the adoption of Resolution 1422 (2002)[425] in which it requested the ICC to refrain from initiating investigations or proceedings related to peacekeepers or State who are not parties to the Rome Statute. Moreover, it was assorted with the possibility to renew this request each year. Third, the United States adopted bilateral agreements of immunity according to which the other State parties committed

423 For a more detailed approach, see: Schabas, «United States Hostility to the International Criminal Court», *op. cit.*, 2004, pp. 701-720.

424 American Service Members Protection Act of 2 August 2002.

425 Security Council Resolution 1422 (2002) of 12 July 2002, UN. Doc. S/RES/1422 (2002).

themselves not to deliver American citizens to the ICC and to hand them over to the American jurisdictions when necessary[426].

This set of legal instruments was undoubtedly in breach of the Rome Statute, the principle *pacta sunt servanta,* and was undermining the authority of the Rome Statute. Although reactions in the EU were mixed at the beginning[427], the EU eventually adopted a critical approach. The 2002 Council Conclusions on the ICC noticeably reply to the United States' concerns by contesting their arguments:

> The International Criminal Court will be an effective tool of the international community to buttress the rule of law and combat impunity for the gravest crimes. The Rome Statute provides all necessary safeguards against the use of the Court for politically motivated purposes. It should be recalled that the jurisdiction of the Court is complementary to national criminal jurisdictions and is limited to the most serious crimes of concern to the international community as a whole[428].

The EU's ambition to preserve the integrity of the Rome Statute has become clearer in the 2003 Common Position: «[i]t is eminently important that the integrity of the Rome Statute be preserved»[429]. In the same line, the EU congratulated Croatia for not having signed a bilateral agreement with the United States on the ICC[430]. In its annual report on human rights of 2008, the EU reminds it «continued to carry out démarches in third countries [...] to discourage states where possible from signing bilateral non-surrender agreements»[431].

Nonetheless, it is worth noticing that the Preamble of the 2011 Decision does not mention anymore the «eminently» importance of the preservation of

426 Moulier, «L'Union européenne et les juridictions pénales internationales», in Millet-Devalle, *L'Union Européenne et le Droit International Humanitaire*, *op. cit.*, 2010a, p. 278.

427 *Ibid*.

428 Council Conclusions on the International Criminal Court, 2450th Council session, Brussels, 30 September 2002. Available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/gena/72321.pdf (Accessed: 11.07.2017).

429 Council Common Position 2003/444/CFSP on the International Criminal Court, OJ L150/67, 18.06.2003, Preamble, pt. 10.

430 Stabilisation and Association Council between the European Union and Croatia, Brussels, 06.03.2007.

431 Council of the EU, *EU annual report on human rights 2008*, Brussels, 27 November 2008, p. 76.

the Rome Statute's integrity as the 2003 Common Position did. The preamble rather states «[i]t is most important that the integrity of the Rome Statute and the independence of the ICC be preserved»[432]. This change of formulation is likely due to the change of tone of the American administration, which does not press on its aggressive policy towards the ICC anymore. However, the recent developments regarding the withdrawal and eventual return of some African countries – to this date, South Africa, Gambia, and Burundi – together with the new administration in the United States seem to augur challenging times ahead on this aspect.

In parallel, the EU has encouraged ratification, acceptance and approval of the Rome Statute ever since its adoption. This position was included in the 2001 Common Position, where the EU and its Member States were urged:

> to raise the issue of the ratification, acceptance and approval in negotiations or political dialogues with third countries, to adopt initiatives to promote the dissemination of the values, principles and provisions of the Statute and to support the early creation of an appropriate planning mechanism in order to prepare the effective establishment of the Court[433].

This statement was later on confirmed in the 2003 Common Position, which raised the objective to the «widest possible ratification, acceptance, approval or accession»[434]. With the adoption of the 2011 Decision, the EU has enlarged the means at its disposal to reach the objective of the widest possible ratification. The list provided is indeed non-exhaustive as the use of the word «including» shows it:

> the Union and its Member States shall make every effort to further this process by raising the issue of the widest possible ratification, [...] in negotiations, including negotiations of agreements, or political dialogues...[435].

432 Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court repealing Council Common Position 2003/444/CFSP, 22.03.2011, Preamble, pt. 10.

433 Council Common Position 2001/443/CFSP of 11 June 2001 on the International Criminal Court.

434 Council Common Position 2003/444/CFSP of 16 June 2003 on the International Criminal Court, OJ L150, 18.06.2003, article 2, para. 1.

435 Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court repealing Council Common Position 2003/444/CFSP, OJ L 76, 22.03.2011, article 2.

In addition, the 2011 Decision no longer refers to signature but rather to «accession or ratification», thus sending out a strong message to the international community: signature is not enough.

Against this background, the EU has developed partnerships with third countries sharing the same objective of promotion of universality of the Rome Statute. As emphasized in the EU annual reports on human rights, the EU has undertaken important efforts to include the ICC agenda in human rights dialogues and encouraged further countries to ratify the Rome Statute[436]. Furthermore, EU presidencies have carried out over 275 *démarches* between 2002 and 2008 to encourage the ratification of the Rome Statute and the Agreement on Privileges and Immunities[437]. In the same way, the EU concluded agreements with South Africa, Australia, Brazil, Japan and Canada to promote the universality of the Rome Statute. To better fulfill their mission, these countries agreed on a common language to be used when promoting the universality of the Rome Statute. In this context, they exchange information and adopt joint *démarches*[438]. Additionally, the EU adopted a 'Toolkit for bridging the gap between international and national justice'[439] in 2013 in order to assist third countries in implementing the principle of complementarity as provided by the Rome Statute.

In this context, the EU has sought to include a clause supporting the ICC in mandates and agreements concluded with third countries. The EU main-

436 Council of the European Union, *EU annual report on Human Rights and Democracy in the World in 2012 (Thematic reports)* (9431/13), Brussels, 2013b, p. 110, available at: https://eeas.europa.eu/sites/eeas/files/2012_human-rights-annual_report_thematic_en_0.pdf (Accessed: 11.05.2017); Council of the European Union, *EU annual report on Human Rights and Democracy in the World in 2013* (11107/14), Brussels, 2014b, p. 34, available at: https://eeas.europa.eu/sites/eeas/files/2013_human-rights-annual_report_en.pdf (Accessed: 11.05.2017); Council of the European Union, *EU annual report on Human Rights and Democracy in the World in 2014*, 2015, p. 19, available at: https://eeas.europa.eu/sites/eeas/files/2014-human-rights-annual_report_en.pdf (Accessed: 11.05.2017); Council of the European Union, *EU annual report on Human Rights and Democracy in the World in 2015*, Luxembourg, 2016, pp. 17-18, available at: https://eeas.europa.eu/sites/eeas/files/qc0216616enn_002_0.pdf (Accessed: 11.05.2017).

437 Council of the European Union, *The European Union and the International Criminal Court*, 2008b, p. 10. Available at: https://www.consilium.europa.eu/uedocs/cmsUpload/ICC_internet08.pdf (Accessed: 11.07.2017).

438 Council of the European Union, *The European Union and the International Criminal Court*, *op. cit.*, 2008b, p. 15.

439 European Commission, High Representative of the Europeann Union for Foreign Affairs and Security Policy, Joint Staff Working Document on advancing the principle of complementarity, Toolkit for bridging the gap between international and national justice, SWD(2013) 26 final, Brussels, 31.01.2013, p. 19.

streams the ICC in its relations with third countries by bringing up the aim of the universality of the Rome Statute as a human rights issue in the negotiations of agreements[440], negotiated by the European Commission in accordance with Article 218 of the TFEU[441]. On this basis, all recent negotiating mandates include an ICC clause[442].

In this regard, the above-mentioned Cotonou Agreement[443] constitutes a landmark, as it is the first legally binding instrument containing an ICC-related clause[444]. In particular, article 11(7) reads as follow:

> In promoting the strengthening of peace and international justice, the Parties reaffirm their determination to:
> – share experience in the adoption of legal adjustments required to allow for the ratification and implementation of the Rome Statute of the International Criminal Court; and
> – fight against international crime in accordance with international law, giving due regard to the Rome Statute.
>
> The Parties shall seek to take steps towards ratifying and implementing the Rome statute and related instruments[445].

The inclusion of the ICC clause in the Cotonou Agreement has produced some effects. As emphasized in the European Parliament's Study on 'Mainstreaming Support for the ICC in the EU's Policies'[446], 11 State parties

440 Antoniadis and Bekou, «The EU and the ICC: an awkward symbiosis in interesting times», *op. cit.*, 2008, p. 23.

441 Formerly: Treaty establishing a European Community, article 300.

442 Antoniadisand Bekou, «The EU and the ICC: an awkward symbiosis in interesting times», *op. cit.*, 2008, p. 22.

443 The Cotonou Agreement ensues from the Lomé Conventions. It is the most comprehensive partnership agreement between developing countries and the EU. Since 2000, it has been the framework for the EU's relations with 79 countries from Africa, the Caribbean and the Pacific. See: http://ec.europa.eu/europeaid/where/acp/overview/cotonou-agreement/index_en.htm (Accessed: 13.05.2013)

444 Council of the European Union, *The European Union and the International Criminal Court*, *op. cit.*, 2008b, p. 13.

445 Agreement amending for the second time the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, as first amended in Luxembourg on 25 June 2005, OJ L 287, 04.11.2010, pp. 1-49, article 11(7).

446 European Parliament, *Mainstreaming Support for the ICC in the EU's Policies*, *op. cit.*, 2014, pp. 17,34.

to the agreement have signed but not ratified the Rome Statute[447] and ten have yet to sign or ratify it[448]. It should also be noted that Sudan did not sign the revised version of the Cotonou agreement in 2005 due to the referral of the situation in Darfur to the ICC[449].

This clause has become a model of ICC-related clause to be followed when the EU negotiates agreements with third States[450]. It was included – with their corresponding adaptations – in Partnership and Cooperation Agreements, Trade Cooperation and Development Agreements and Association Agreements, such as the ones concluded with Canada[451], Indonesia[452], Iraq[453], New Zea-

447 Angola, the Bahamas, Cameroon, Eritra, Guinea Bissau, Jamaica, Mozambique, Sao Tome and Principe, Solomon Islands and Zimbabwe.

448 Ethiopia, Kiribati, Micronesia, Niue, Palau, Papua New Guinea, Rwanda, Swaziland, Togo and Tonga.

449 European Parliament, *Mainstreaming Support for the ICC in the EU's Policies*, *op. cit.*, 2014, pp. 17, 34.

450 Council of the European Union, *The European Union and the International Criminal Court*, *op. cit.*, 2008b, p. 13.

451 Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part, OJ L 329, 03.12.2016, pp. 45-65, article 5.

452 Framework Agreement between the European Community and its Member States, on the one part, and the Republic of Indonesia, on the other part, OJ L 125, 26.04.2014, p. 17, article 4: «1. The Parties shall cooperate on issues pertaining to the development of their legal systems, laws and legal institutions, including on their effectiveness, in particular by exchanging views and expertise as well as by capacity building. Within their powers and competences, the Parties shall endeavour to develop mutual legal assistance in criminal matters and extradition.
2. The Parties reaffirm that the most serious crimes of concern to the international community as a whole must not go unpunished and that those who are accused of them should be brought to justice and if found guilty should be duly punished.
3. The Parties agree to cooperate on the implementation of the Presidential Decree on the National Plan of Action of Human Rights 2004-2009, including preparations for the ratification and implementation of international human rights instruments, such as the Convention on the Prevention and Punishment of the Crime of Genocide, and the Rome Statute on the International Criminal Court.
4. The Parties agree that a dialogue between them on this matter would be beneficial».

453 Partnership and cooperation agreement establishing a partnership between the European Union and their Member States, of the one part, and the Republic of Iraq, of the other part, OJ L 204, 31.07.2012, p. 18. Article 7 reads as follows: «1. The Parties reaffirm that the most serious crimes of concern to the international community as a whole should not go unpunished and that their prosecution should be ensured by measures at either the domestic or international level.
2. The Parties recognise that Iraq is not yet a State Party to the Rome Statute of the International Criminal Court, but that Iraq is considering the possibility of acceding to it in the future. In so doing, Iraq will take steps to accede to, ratify and implement the Rome Statute and related instruments. 3. The Parties reaffirm their determination to cooperate on this issue, including by sharing experience in the adoption of legal adjustments required by the relevant international law».

land[454], South Africa[455] or South Korea[456]. This list is by no means exhaustive and the examples provided are simply meant to reflect the diversity of the States with which the EU concludes such agreements. The EU Strategy for Central Asia adopted in June 2007 also illustrates the mainstreaming of the ICC in the EU's external action[457] since it foresees the exchange of practices «in the adoption of the necessary legal adjustments required to accede to the Rome Statute

454 Partnership Agreement on Relations and Cooperation between the European Union and its Member States, of the one part, and New Zealand, of the other part, OJ L 321, 29.11.2016, pp. 3-30, article 10.

455 Communication from the Commission to the Council and the European Parliament – Towards an EU-South Africa Strategic Partnership, COM/2006/0347 final, endorsed by the Council, para. 3.4: «South Africa occupies a unique position on the international scene. On many occasions, it speaks on behalf of the emerging and the developing world. Its authority in international fora is remarkable and surpasses its economic weight. Although South Africa and the EU do not always take the same positions on international issues, they agree on many. Like Europe, South Africa is committed to countering the proliferation of weapons of mass destruction, to the recognition of the jurisdiction of the International Criminal Court, to the abolition of the death penalty and to combating terrorism. Both share a strong belief in the multilateral system of collective security of the United Nations and in the prime responsibility of the UN Security Council for the maintenance of international peace and security. Both also share a strong commitment to tackling the causes and impacts of climate change and have confirmed their interest in deepening their dialogue on these and other environmental concerns.

These issues are on the agenda of political talks between the EU and South Africa, but must also lead to concrete action. The EU must seek joint positions and effective cooperation with South Africa in all of these areas and defend mutual interests at international level.

Similarly, the EU must seek to launch mutually beneficial cooperation on the environment, energy security and sustainable use of energy resources, migration, the fight against the international drugs trade, money laundering, tax fraud and avoidance, corruption, maritime and aviation security, trafficking in human beings, in particular children, small arms and organised crime.

Finally, both partners favour a stronger representation of developing and emerging countries in international organisations. To that end, they need to promote stronger political coordination, cooperation in the IFIs and international fora, including UN bodies, and joint action».

456 Framework Agreement between the European Union and its Member States, on the one part, and the Republic of Korea, on the other part, OJ L 20, 23.01.2013, p. 2. Article 6 reads as follows: «1. The Parties reaffirm that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, as appropriate, including the International Criminal Court. The Parties agree to fully support the universality and integrity of the Rome Statute of the International Criminal Court and related instruments.

2. The Parties agree that a dialogue between them on these matters would be beneficial».

457 *Ibid*.

of the International Criminal Court, and in combating international crime in accordance with international law»[458].

In the same way, the European Commission has negotiated ICC-related clauses in its Action Plans created within the frame of the European Neighborhood Policy[459]. It has been noted in this regard, that in the framework of Europe's southern and Eastern neighborhoods, such clauses have been enshrined in all agreements but the ones of Israel, Palestine, and Tunisia[460]. For present purposes, this is particularly problematic with regard to countries where there is a situation of occupation and allegations of widespread violations of IHL. Regarding Israel, the Action Plan limits itself to promoting «cooperation on issues such as fight against impunity of authors of genocide, war crimes and any other crime against humanity»[461].

Besides, the EU has adopted a policy of conditionality towards candidate States, requiring the ratification and implementation of the Rome Statute as a condition for accession[462]. In this regard, four – Albania, the former Yugoslav Republic of Macedonia, Montenegro, and Serbia – out of the five candidate countries are parties to the Rome Statute, the exception being Turkey[463]. It should nonetheless be mentioned that the Czech Republic became an EU Member State even though it had not ratified the Rome Statute, as this element was overlooked in the final monitoring report on the preparedness of EU membership. The absence of mechanism to enforce compliance made it more difficult to require the ratification of the Rome Statute. However, the Czech Republic eventually ratified the Rome Statute in 2009, most likely as it had to assume the rotating presidency of the Council. In spite of that, it seems

458 Council of the EU, The European Union and Central Asia: the new partnership in action, June 2009, pp. 16/17. Available at: https://eeas.europa.eu/sites/eeas/files/the_european_union_and_central_asia_the_new_partnership_in_action.pdf (Accessed: 08.07.2017).

459 Council of the European Union, *The European Union and the International Criminal Court*, *op. cit.*, 2008b, p. 15.

460 European Parliament, *Mainstreaming Support for the ICC in the EU's Policies*, *op. cit.*, 2014, pp. 17 y 33.

461 EU-Israel Action Plan, 01.05.2004, p. 8. Available at: https://eeas.europa.eu/sites/eeas/files/israel_enp_ap_final_en.pdf (Accessed: 11.05.2017).

462 European Parliament, *Mainstreaming Support for the ICC in the EU's Policies*, *op. cit.*, 2014, pp. 17 y 32.

463 International Criminal Court's website, The State Parties to the Rome Statute. Available at: https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (Accessed: 08.05.2017).

that this failure did not have a negative impact on EU *démarches* to third countries to encourage the ratification of the Rome Statute[464].

Finally, the High Representative for Foreign Affairs and Security Policy – formerly the Presidency – makes statements on behalf of the EU in order to encourage, but also to welcome ratifications[465]. On the occasion of these statements, the High Representative always recalls the EU's support to the Court and calls on third states that have not yet ratified the Rome Statute to do so. As observed in the Statement on Moldova's ratification of the Rome Statute, the High Representative trusts this ratification encourages «also other partners in the EU's neighborhood to take similar steps»[466].

An element which negatively affects the EU's policy on encouraging ratifications of the Rome Statute is the «absence of key partners including the USA and Russia [...] from the lists of States with whom the issue of ICC ratification has been recently raised»[467]. Even though it is an issue which has been in present in most dialogues, it inevitably raises the question of double standards[468]. Furthermore, as noticed by the European Parliament, the EU has missed the opportunity to include an ICC clause within the frame of the System of Generalized Preferences Plus (GSP+)[469], which allows developing countries to pay lower duties on their exports to the EU. To qualify to GSP+ status, third States are subject to an obligation to ratify and implement certain international treaties and conventions, including human rights treaties, but not the Rome Statute[470].

464 See, on this matter: Wouters and Basu, «The creation of a global justice system: the European Union and the International Criminal Court», *op. cit.*, 2009, pp. 21-22.

465 See for example: Declaration by the Presidency of the European Union on Chile's ratification of the Rome Statute, 30 June 2009, Brussels; Statement by High Representative Catherine Ashton on the ratification of the Rome Statute of the International Criminal Court by Seychelles, Brussels, 12 August 2010, A 159/10; Statement by EU High Representative Catherine Ashton on the ratification of the Rome Statute of the International Criminal Court by the Republic of Moldova, Brussels, 14 October 2010, A 207/10.

466 Statement by EU High Representative Catherine Ashton on the ratification of the Rome Statute of the International Criminal Court by the Republic of Moldova, Brussels, 14 October 2010, A 207/10.

467 European Parliament, *Mainstreaming Support for the ICC in the EU's Policies*, *op. cit.*, 2014, p. 35.

468 *Ibid*.

469 *Ibid.*, p. 36.

470 Regulation (EU) Nº 978/2012 of the European Parliament and of the Council of 25.10.2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) Nº 732/2008, OJ L 303, 31.10.2012.

2.1.2. Regarding to the independence and effective functioning of and cooperation with the ICC

Article 87(6) of the Rome Statute refers to the cooperation between the ICC and international organizations by enabling the former to request assistance from the latter. The recognition of the role of international organizations is in line with the current treatment of post-conflict situations or situations where serious disorders have occurred where international organizations may be called to intervene. As a result, cooperation of intergovernmental organizations such as the EU is essential for the ICC to properly function[471].

To this end, the EU signed a cooperation and assistance agreement with the ICC on 10 April 2006[472]. It was the first regional organization to do so. Its origin can be found in a request from the Office of the Prosecutor of the ICC regarding EU strategic information[473]. It must be noted that EU/ICC cooperation does not replace the individual relationship EU Member States have with the ICC since it remains under their remit. Pursuant to the agreement, the EU and the ICC are under the obligation of cooperation and assistance:

> [t]he EU and the Court shall, to the fullest extent possible and practicable, ensure the regular exchange of information and documents of mutual interest in accordance with the Statute and the Rules of Procedure and Evidence[474].

The agreement likewise entails the obligation for the EU to provide support in the training and assistance «for judges, prosecutors, officials and counsel in work related to the Court»[475]. Thus, the agreement is limited by itself as it only comprises the «hardcore elements of cooperation and assistance on the provision of information or documents»[476]. Moreover, the EU commits to

471 Antoniadis and Bekou, «The EU and the ICC: an awkward symbiosis in interesting times», *op. cit.*, 2008, p. 80.

472 Agreement between the International Criminal Court and the European Union on cooperation and assistance, OJ L 105/50, 28.04.2006.

473 Antoniadis and Bekou, «The EU and the ICC: an awkward symbiosis in interesting times», *op. cit.*, 2008, p. 11.

474 Agreement between the International Criminal Court and the European Union on cooperation and assistance, OJ L 105/50, 28.04.2006, article 7.

475 *Ibid.*, article 15.

476 *Ibid.*

cooperate with the Prosecutor[477]. On the basis of the 2006 agreement, the ICC and the EU set up a roundtable in 2014 whose objective was to consult and ensure «regular exchanges on matters of mutual interest, including cooperation, complementarity, diplomatic support and mainstreaming, as well as public information and outreach»[478].

In addition, both entities agreed on security arrangements for the protection of classified information that entered into force on 31 March 2008[479]. It is under those agreements that the EUFOR Chad/RCA[480] was allowed to provide support to the Court in Chad on logistical and security issues upon request[481]. In this respect, the commitment of the EU did not go unheeded since it has assisted the ICC's Office of the Prosecutor on several occasions including in the Democratic Republic of Congo and in Darfur[482].

A last element defining the contours of the EU-ICC cooperation is funding as the EU is a major contributor of the ICC[483].

Besides the strict cooperation between the ICC and the EU, the latter has implemented a certain number of measures to ensure the ICC's independence and effective functioning, as they have become a priority for the EU. On this matter, the former common positions were rather vague and aimed at supporting «the effective functioning of the Court and to advance universal support for it by promoting the widest possible participation in the Rome Statute»[484]. Conversely, the 2011 Decision details the objectives as follow:

477 *Ibid.*, article 11.

478 Council of the EU, *EU annual report on Human Rights and Democracy in the World in 2014*, *op. cit.*, 2015, p. 19.

479 *Ibid.*, p. 21.

480 The EUFOR Chad/CAR mission was launched on 28 January 2008 in accordance with the mandate set out in the UN Security Council Resolution 1778. The operation's objectives were to contribute to protecting civilians in danger, particularly refugees and displaced persons, to facilitate the delivery of humanitarian aid and the free movement of humanitarian personnel by helping to improve security in the area of operations and to contribute to protecting UN personnel, facilities installations and equipment and to ensuring the security and freedom of movement of its own staff, UN staff and associated personnel. See: http://www.eeas.europa.eu/archives/csdp/missions-and-operations/eufor-tchad-rca/mission-description/index_en.htm (Accessed: 11.07.2017).

481 Council of the European Union, *The European Union and the International Criminal Court*, *op. cit.*, 2008b, p. 21.

482 *Ibid.*, p. 22.

483 See: European Parliament, *Mainstreaming Support for the ICC in the EU's Policies*, *op. cit.*, 2014.

484 Council Common Position 2003/444/CFSP on the International Criminal Court, OJ L150/67, 18.06.2003, article 1(2).

> advance universal support for the Rome Statute of the International Criminal Court [...] by promoting the widest possible participation in it, to preserve the integrity of the Rome Statute, *to support the independence of the ICC and its effective and efficient functioning*, to support cooperation with the ICC, and to support the implementation of the principle of complementarity[485] [emphasis added].

This inclusion is encouraging to the extent that it underlines the advances made by the ICC, which is now operational and has already ruled important cases. It highlights the general acceptance of the Rome Statute and the need to concentrate on the efficiency and effectiveness of the Court.

The EU's willingness to ensure the independence and efficiency of the Court is essential to the extent that the ICC does not possess an international police force on its own. As a result, it needs States' cooperation to perform its functions and the State parties to the Rome Statute are actually subject to the obligation to execute a cooperation request made by the Court[486]. Against this background, the 2011 Action Plan underlines the issue of cooperation and provides the following:

> [T]he EU and its Member States will undertake consistent action to encourage full cooperation of States with the ICC, including the prompt execution of arrest warrants. The EU and its Member States should avoid non-essential contacts with individuals subject to an arrest warrant issued by the ICC. They will monitor and address developments that may hamper the ICC's work[487].

In this line of reasoning, the Council approved 'The EU's response to non-cooperation with the International Criminal Court by third states' in 2013[488]. The Council described non-cooperation as «one of the most seri-

485 Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court repealing Council Common Position 2003/444/CFSP, OJ L 76, 22.03.2011, p. 56, article 1.2.

486 Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 90, Chapter IX.

487 Council of the European Union, Action Plan to follow-up on the Decision on the International Criminal Court (12080/11), 12.07.2011, p. 14.

488 Council of the European Union, The EU's response to non-cooperation with the International Criminal Court by third states (16993/13), Brussels, 27 November 2013. Available at: http://data.consilium.europa.eu/doc/document/ST-16993-2013-INIT/en/pdf (Accessed: 11.05.2017).

ous challenges to the effective functioning of the ICC» and recalled that it also constitutes a «breach of a legal obligation» concerning State parties to the Rome Statute. It reminds that this also holds true whenever the UN Security Council has approved a resolution based on ChapterVII of the UN Charter which refers a situation to the Court. In light of these elements, it is stated that «[w]henever non-cooperation occurs or is impending, the EU and its Member States will call for cooperation with the ICC and respond to non-cooperation»[489]. To do so, the document provides a list of actions that may be undertaken to «respond to instances of non-cooperation, to persisting or repeated cases of non-cooperation, and when to avoid non-essential contacts with individuals subject to arrest warrants issued by the ICC»[490].

Some examples may be found on this matter. As observed by the European Parliament, the EU has, contrarily to the UN Security Council, provided constant support to the Court in relation to all its proceedings, including in relation with the situations referred to by the Security Council[491]. Hence, the High Representative or spokesperson has issued numerous statements condemning failures to cooperate with the ICC but also welcoming executions of arrest warrants. The following statement made in reaction to the visit of President Al-Bashir to South Africa in 2015 constitutes an example of such practice:

> Committed to preventing crimes against humanity, war crimes and genocide, and to avoiding impunity for the perpetrators of such crimes, the EU confirms its continuing support for the ICC and its work.
>
> Full cooperation with the ICC is a prerequisite for the Court's effective functioning.
>
> In accordance with established approach of the EU and its Member States, *the EU expects South Africa, a founding State Party of the Court, to act in accordance with UN Security Council 1593, in executing the arrest warrant against any ICC indictee present in the country*[492] [emphasis added].

489 *Ibid*., pp. 2-3.

490 *Ibid*., p. 4.

491 European Parliament, *Mainstreaming Support for the ICC in the EU's Policies*, *op. cit*., 2014, p. 64.

492 Statement by spokesperson on South Africa and the ICC, 150614_02_en, Brussels, 14 June 2015. Quoted in Council of the European Union, *EU annual report on Human Rights and Democracy in the World in 2015, op. cit*., 2016, p. 18.

As for non-essential contacts, the 'EU's response to non-cooperation with the International Criminal Court by third states' defines them as follows:

> [T]hose which are strictly required for carrying out core diplomatic, consular and other activities and/or those activities which are UN-mandated or which arise from a legal obligation (e.g., under headquarters agreements) [...]
>
> [T]he specific circumstances of a particular case would be relevant when determining what is an essential contact for these purposes[493].

However, it has been observed that such definition lacks guidance and that the EU guidelines on the implementation of its policy of non-essential contacts should be more transparent, in the interest of both the EU and the ICC State parties[494].

Lastly, when the EU adjudicates on the ICC's situations, it contributes to its effective functioning. It does so by way of European Council conclusions, Council Conclusions and High Representative (formerly Presidency) Declarations on behalf of the EU. The EU's positions on Sudan[495], Uganda, the Democratic Republic of Congo or Kenya are representative of this practice[496]. In recent years, the EU has repeatedly called to the UN Security Council to refer the situation in Syria to the ICC[497]. These positions contribute to the authority of the ICC, a recent court that needs to find its place in the international legal order.

493 Council of the European Union, The EU's response to non-cooperation with the International Criminal Court by third states (16993/13), Brussels, 27 November 2013, p. 4. Available at: http://data.consilium.europa.eu/doc/document/ST-16993-2013-INIT/en/pdf (Accessed: 11.05.2017).

494 European Parliament, *Mainstreaming Support for the ICC in the EU's Policies*, *op. cit.*, 2014, p. 65.

495 The Council of the EU has adopted several sets of conclusions, in 2004, 2006, 2007, 2008 and 2009 calling for the need to establish a Commission of Inquiry about the crimes committed in Darfur, the need to prosecute these serious crimes, to refer them before the ICC and calling Sudan to cooperate with the ICC. See: Council of the European Union, *The European Union and the International Criminal Court*, *op. cit.,* 2008b, p. 22.

496 *Ibid*., pp. 24-25.

497 See, e.g.: European Commission, Joint Communication to the European Parliament and the Council, Elements for an EU regional strategy for Syria and Iraq as well as the Da'esh threat, JOIN(2015) 2 final, Brussels, 06.02.2015, p. 15; Council Conclusions on EU priorities at UN Human Rights Fora in 2016, 15.02.2016; Statement on behalf of the European Union by H.E. Mr. João Vale de Almeida, Head of the Delegation of the European Union to the United Nations, at the Security Council Open Debate on the situation in the Middle East, including the Palestinian question, New York, 12.07.2016.

Thus, the EU has undertaken important measures to implement its obligation to ensure respect for IHL in relation with the criminalization of IHL's violations. Its strong commitment to the ICC and other criminal jurisdictions, as well as its declaratory policy fostering the respect for international criminal law illustrate the EU's activism in the criminalization of serious violation and grave breaches of IHL. This participation is of utmost importance. Firstly, it permits to define IHL as «real law» for those authors who believe that sanction is inherent in the law. Secondly, it defines a behavior that is considered as infringing the international order and has a deterrent effect on those who would be tempted to commit it.

2.2. France's cooperation with the ICC

France has been an active supporter of the ICC as well[498]. It signed the Rome Statute in July 1998 and ratified it on 9 June 2000, thus being the 12th State of the international community and the second EU Member State to do so[499].

2.2.1. Ratification

In accordance with article 54 of the Constitution, the Prime Minister requested the Constitutional Court to assess whether the ratification of the Rome Statute should require an amendment to the Constitution. The Constitutional Court indeed held on 22 January 1999 that some provisions of the Treaty were unconstitutional, thus necessitating a reform prior to ratifica-

498 See: United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June – 17 July 1998, Official Records, Volume II: summary records of the plenary meetings and of the meeintgs of the Committee of the Whole. Available at: http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf (Accessed: 05.06.2017).

499 Xavier Philippe and Anne Desmarest, «Remarques critiques relatives au projet de loi portant adaptation du droit pénal français à l'institution de la Cour pénale internationale: la réalité française de la lutte contre l'impunité», *Revue française de droit constitutionnel*, vol. 1(81), 2010, p. 41.

tion[500]. Against this background, a reform was conducted and led to the constitutionalization of the Rome Statute in the French legal order by means of article 53(2)[501]. This means that the obligation to prosecute or extradite alleged war criminals within the frame of the system established by the ICC is based on international law, but also on a constitutional mandate. Furthermore, as observed by Xavier Philippe and Anne Desmarest, article 53(2) entails the taking into consideration of the Rome Statute in its entirety[502]. Therefore, French authorities accept to draw all the legal consequences resulting from France's participation in the system established by the ICC. France then ratified the Statute in June 2000[503]. Besides, France ratified the Agreement on the privileges and immunities of the ICC in 2004[504]. However, France had not ratified the Amendment to the Rome Statute of the International Criminal Court on War Crimes at the time of writing.

As observed already in Chapter 2, France opposed a declaration on the basis of article 124 of the Rome Statute in order to exclude the ICC's jurisdiction over the war crimes committed by French nationals for a period of seven years upon the entry into force of the Statute. This declaration was made in order to preserve the immunity of French nationals with regard to the Algerian War of Independence. However, this declaration was withdrawn on 13 August 2008[505], thus abolishing an anomaly in a State based on the rule of law.

500 Conseil constitutionnel, Case n° 98-408 DC of 22 January 1999, JO of 24 January 1999, p. 1317.

501 Loi constitutionnelle n°99-568 du 8 juillet 1999 insérant, au titre VI de la Constitution, un article 53-2 et relative à la Cour pénale internationale: «La République peut reconnaître la juridiction de la Cour pénale internationale dans les conditions prévues par le traité signé le 18 juillet 1998».

502 Philippe and Desmarest, «Remarques critiques relatives au projet de loi portant adaptation du droit pénal français à l'institution de la Cour pénale international», *op. cit.*, 2010, p. 45.

503 Loi n° 2000-282 du 31 mars 2000 autorisant la ratification de la convention portant statut de la Cour pénale internationale et décret n° 2002-925 du 6 juin 2002 portant publication de la convention portant statut de la Cour pénale internationale, adoptée à Rome le 17 juillet 1998.

504 Act n° 2003-1367 of 31 December 2003 (Loi n° 2003-1367 du 31 décembre 2003 autorisant l'approbation de l'accord sur les privilèges et immunités de la Cour pénale internationale), JO n° 1 of 1 January 2004.

505 Notification dépositaire C.N.592.2008.TREATIES-5 (France: Retrait de déclaration), 20 August 2008.

2.2.2. Implementation

On this basis, France has adapted its legislation to the Rome Statute by means of Act nº 2002-268 of 26 February 2002 on the cooperation with the ICC[506] and the above-mentioned Act nº 2010-930 on the adaptation of the criminal law to the establishment of the International Criminal Court. It therefore took about 10 years for France to adapt its legislation to the Rome Statute. The aspects relating to the transposition of the Statute into the legal order and the implementation of the principle of complementarity have already been touched upon in the first section of this chapter. While this transposition is on the overall satisfactory, it should nevertheless be recalled that the principle of complementarity was not correctly transposed in the French legal order, since it reverses the order of complementarity by establishing the residual jurisdiction of French courts (article 8). In this regard, the Constitutional Court refused to examine the compatibility of article 8 with the Rome Statute, in accordance with its constant doctrine on international agreements[507].

As regards cooperation, Act nº 2002-268 included some provisions relating to judicial cooperation with the ICC to the Code of criminal procedure. In particular, it defines the modalities of judicial assistance[508], the conditions for the execution of requests for arrest and surrender[509], the modalities of execution of the penalties and measures of reparation[510], and the service of prison sentences[511]. Additionally, the criminal code punishes some offences against the administration of justice in the ICC context. As such, it punishes the threats or acts of intimidation against an ICC official, the solicitation or acceptance of benefits or bribes to influence a decision, as well as false testimonies[512].

506 Act nº 2002-268 of 26 February 2002 on the cooperation with the ICC (Loi n°2002-268 du 26 février 2002 relative à la coopération avec la Cour pénale internationale), JORF 27 February 2002, p. 3684.

507 Conseil constitutionnel, Case nº 2010-612 DC, Loi n° 2010-930 du 9 août 2010 portant adaptation du droit pénal à l'institution de la Cour pénale internationale, JO of 10 August 2010, p. 14682. Available at: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2010612DC2010612dc.pdf (Accessed: 30.05.2017).

508 Code of criminal procedure, articles 627-1 to 627-3.

509 *Ibid*., articles 627-4 to 627-15.

510 *Ibid*., articles 627-16 and 627-17.

511 *Ibid*., articles 627-18 to 627-20.

512 Criminal Code, articles 434-23-1, 435-7, 435-8, 435-9, 435-10.

On this basis, France has cooperated with the ICC regarding different situations. By way of example, Callixte Mbarushimana, a political refugee, was detained in France in October 2010 on the basis of an arrest warrant issued by the ICC on 28 September 2010[513]. He was accused of war crimes and crimes against humanity committed in North and South Kivu, in the Democratic Republic of Congo, in 2009. The Cour de cassation recognized in this context that the detention of Callixte Mbarushimana was legal on the grounds that the ICC holds its rulings in the respect for international human rights, in accordance with article 21 of its Statute[514]. On this basis, the French authorities surrendered Callixte Mbarushimana on 25 January 2011 and the ICC was therefore able to prosecute him. In its decision of 16 December 2011, Pre-Trial Chamber I declined to confirm the charges in the absence of sufficient evidence and decided to release him[515]. On 30 May 2012, the Appeals Chamber rejected the appeal against the Pre-Trial Chamber I[516].

Finally, France has promoted the universality of the Rome Statute and cooperation with the ICC in bilateral and multilateral fora. In this context, France has called on the UN Security Council to refer certain situations. For example, it is at the initiative of France that the Security Council referred the situations in Darfur and in Libya to the ICC[517]. In the same way, France has

513 ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Callixte Mbarushimana, Decision of the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana nº ICC-01/04-01/10, 28 September 2010.

514 Cour de cassation, criminal section, Case nº 10-87759 of 4 January 2011: «Attendu qu'en l'état de ces énonciations, la cour d'appel a justifié sa décision, dès lors que la Cour pénale internationale statue, en application de l'article 21 de son Statut, dans le respect des droits de l'homme internationalement reconnus [...]».

515 ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Callixte Mbarushimana, Decision on the confirmation of charges nº ICC-01/04-01/10, 16 December 2011.

516 ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Callixte Mbarushimana, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled «Decision on the confirmation of charges» nº ICC-01/04-01/10 OA 4, 30 May 2012.

517 Ministry of foreign affairs, «Cour pénale internationale (CPI)». Available at: http://www.diplomatie.gouv.fr/fr/politique-etrangere-de-la-france/la-france-a-l-onu/domaines-d-action-de-l-onu/la-justice-internationale/article/cour-penale-internationale-cpi (Accessed: 05.06.2017).

called on referring the situation in Syria to the ICC on repeated occasions, without success[518]. It should also be mentioned that France is the third contributor to the ICC's budget[519].

2.3. Spain's cooperation with the ICC

Spain has been a constant supporter of the ICC[520]. This is reflected in the state of ratification of the Rome Statute and other associated documents. Furthermore, Spain has transposed the Rome Statute into its legal order, so as to establish the means of its cooperation with the ICC.

518 «France threatens Damascus & Moscow with ICC war crimes probe over Aleppo», *RT*, 10 October 2016, available at: https://www.rt.com/news/362229-france-threatens-icc-aleppo/#.V_uJbAQzFoY.twitter (Accessed: 05.06.2017); UN press release, 'Referral of Syria to the International Criminal Court Fails as Negative Votes prevent Security Council from adopting Draft Resolution', 22 May 2014, available at: http://www.un.org/press/en/2014/sc11407.doc.htm (Accessed: 05.06.2017); Human Rights Watch, Syria and the International Criminal Court, Questions and answers, September 2013, available at: https://www.hrw.org/sites/default/files/related_material/Q%26A_Syria_ICC_Sept2013_en_0.pdf (Accessed: 11.05.2017).

519 Ministry of foreign affairs, «Cour pénale internationale (CPI)». Available at: http://www.diplomatie.gouv.fr/fr/politique-etrangere-de-la-france/la-france-a-l-onu/domaines-d-action-de-l-onu/la-justice-internationale/article/cour-penale-internationale-cpi (Accessed: 05.06.2017).

520 See, e.g.: United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June – 17 July 1998, Official Records, Volume II: summary records of the plenary meetings and of the meeintgs of the Committee of the Whole, available at: http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf (Accessed: 05.06.2017); Spain in UN, «España celebra la primera sentencia de la Corte Penal Internacional», 14.03.2012, available at: http://www.spainun.org/2012/03/espana-celebra-la-primera-sentencia-de-la-corte-penal-internacional/ (Accessed: 05.06.2017): «España reitera su firme y constante apoyo a la Corte Penal Internacional, a cuya creación y desarrollo ha contribuido desde los orígenes de la institución. España reafirma su profundo compromiso con los principios recogidos en el Estatuto de Roma, y con la lucha contra la impunidad de los crímenes más graves para la comunidad internacional»; Spanish Ministry of foreign affairs, «Corte Penal Internacional», available at: http://www.exteriores.gob.es/Portal/es/PoliticaExteriorCooperacion/NacionesUnidas/Paginas/CortePenalInternacional.aspx (Accessed: 05.06.2017): «España tiene un alto grado de compromiso con la CPI y con las funciones que ésta ejerce, como institución universal que lucha contra la impunidad de los crímenes más graves. España ha ratificado los instrumentos internacionales reguladores de los crímenes de los que conoce la CPI y ha apoyado firmemente la labor de la Corte desde la entrada en vigor de su Estatuto»; ICC, Press release: «Reaffirming Spain's support, Minister of Foreign Affairs and Cooperation visits the ICC», 30 January 2017.

2.3.1. Ratification

Spain actively participated in the establishment of the ICC[521]. It signed the Rome Statute in July 1998 and ratified it on 24 October 2000[522]. Prior to the ratification, the Council of State issued an advisory opinion according to which there was no need to amend the Constitution to proceed to ratification. In particular, it held that the powers of the ICC prosecutor, which normally fall under the remit of national jurisdictions, may be transferred to an international organization of institution in accordance with article 93 of the Constitution[523]. However, the Council of State considered that the ratification required the adoption of an organic act in this sense. This was done by means of Organic Act 6/2000 of 4 October 2000[524].

Spain issued two declarations to the Rome Statute[525]. The first one deals with article 87. It clarifies which institutions are competent to «transmit requests for cooperation made by the Court or addressed to the Court», i.e. the

521 See: United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June – 17 July 1998, Official Records, Volume II: summary records of the plenary meetings and of the meeintgs of the Committee of the Whole. Available at: http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf (Accessed: 05.06.2017).

522 Organic Act 6/2000 authorizing Spain's ratification of the Statute on the International Criminal Court (Ley Orgánica 6/2000, de 4 de octubre, por la que se autoriza la ratificación por España del Estatuto de la Corte Penal Internacional), BOE nº 239, 05.10.2000, pp. 34138-34140; Instrumento de Ratificación del Estatuto de Roma de la Corte Penal Internacional, hecho en Roma el 17 de julio de 1998, BOE nº 126, 27.05.2002, pp. 18824-18860.

523 «D) El artículo 99.4 del Estatuto de Roma permite determinadas actuaciones del Fiscal en el territorio de los Estados Partes, para el caso de que una, solicitud pueda ejecutarse sin necesidad de medidas coercitivas, aun cuando sea sin la presencia de las autoridades del Estado Parte requerido. Las funciones en materia de cooperación y asistencia a que se refiere, enunciadas en los artículos 54.2, 93 y 96 del Estatuto, son competencia en su mayor parte del Poder Judicial conforme a la Constitución, en la medida en que podrían coincidir con funciones judiciales de instrucción. De acuerdo con el parecer del Ministerio de Asuntos Exteriores, se estima que las eventuales excepciones que ellas supongan a la exclusividad del ejercicio de la función judicial prevista por el artículo 117.3 de la Constitución, o bien a la misión constitucional (ex artículo 124) del Ministerio Fiscal de promover la acción de la justicia en defensa de la legalidad, pueden reconducirse por el procedimiento del artículo 93 de la Constitución».

524 Organic Act 6/2000 authorizing Spain's ratification of the Statute on the International Criminal Court (Ley Orgánica 6/2000, de 4 de octubre, por la que se autoriza la ratificación por España del Estatuto de la Corte Penal Internacional), BOE nº 239, 05.10.2000, pp. 34138-34140.

525 See: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=47087E3DC4714E0B412566BB003B64EE (Accessed: 11.05.2017).

Ministry of Justice. In addition, such requests and accompanying documents must be in Spanish or provided with a translation into Spanish. As for the second declaration, it refers to article 103 of the Statute, on the role of States in the enforcement of sentences of imprisonment. It clarifies that Spain is willing to enforce prison sentences issued by the ICC «provided that the duration of the sentence does not exceed the maximum stipulated for any crime under Spanish law»[526].

For present purposes, Spain has actively contributed to the codification of war crimes in the Rome Statute. This is reflected in the official records of the Rome Conference[527], but also in the fact that Spain ratified the Amendment to article 8 of the Rome Statute of the International Criminal Court[528], which enlarges the catalog of war crimes.

Finally, Spain ratified the Agreement on the Privileges and Immunities of the ICC in 2009[529].

2.3.2. Implementation

The relationship between Spain and the ICC is regulated mostly by Organic Act 18/2003 of 10 December 2003[530]. The elements regarding the transposition of the Rome Statute in national law were already analyzed in the

526 See: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=47087E3DC4714E0B412566BB003B64EE (Accessed: 11.05.2017).

527 See: United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June – 17 July 1998, Official Records, Volume II: summary records of the plenary meetings and of the meetings of the Committee of the Whole, p. 61. Available at: http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf (Accessed: 05.06.2017).

528 Organic Act 5/2014 (Ley Orgánica 5/2014, de 17 de septiembre, por la que se autoriza la ratificación de las Enmiendas al Estatuto de Roma de la Corte Penal Internacional, relativas a los crímenes de guerra y al crimen de agresión, hechas en Kampala el 10 y 11 de junio de 2010), BOE nº 227, 18.09.2014, pp. 72966-72970; Instrumento de ratificación de la Enmienda al artículo 8 y las Enmiendas relativas al crimen de agresión del Estatuto de Roma de la Corte Penal Internacional, adoptadas en Kampala el 10 y 11 de junio de 2010, BOE nº 310, 24.12.2014, pp. 105054-105058.

529 See:https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-13&chapter=18&lang=en (Accessed: 05.06.2017).

530 Organic Act 18/2003 of 10 December 2003 (Ley Orgánica 18/2003, de 10 de diciembre, de Cooperación con la Corte Penal Internacional), BOE nº 296, 11.12.2003.

first section of this chapter. Therefore, it is simply reminded that Spain already provided for a catalog of war crimes before the ratification of the Rome Statute, in accordance with the Geneva Conventions. However, with the establishment of the ICC, Spanish authorities further enlarged this catalog, and even went beyond what is required by article 8 of the Rome Statute, insofar as the nature of the armed conflict is irrelevant for its recognition as war crime.

Regarding cooperation strictly speaking, article 2 of Organic Act 18/2003 establishes the obligation to cooperate with the ICC in accordance with article 86 of the Rome Statute. Furthermore, Organic Act 18/2003 regulates aspects relating to detention (article 11), conditional release (article 12), the different modalities of surrender to the Court (articles 13, 15, and 18), summons before the ICC (article 14), the issue of competing requests (article 16), as well as the different courses of action upon surrender (article 19). It is also worth mentioning that article 20 establishes an obligation of cooperation with regard to the requests made by the ICC under article 93 of the Statute, and which are not prohibited under Spanish law[531]. Organic Act 18/2003 further specifies which are the legal bodies competent to implement requests for cooperation, namely the Audiencia Nacional in relation with the surrender to other countries and all courts with respect to the other forms of cooperation. Consistent with Spain's declaration to the Rome Statute, the Ministry of Justice is the entity competent regarding the communication and consultation with the ICC on cooperation matters.

Moreover, the Organic Act authorizes the Government to refer a situation to the ICC's prosecutor (article 7.1). This reflects Spain's choice to base the initiative of activities with the ICC on the executive branch, with a view to balance the obligations arising from the Rome Statute with «and the diverse variables of foreign policy that need to be assessed by the body that is constitutionally responsible for foreign policy»[532].

It is interesting to note that articles 8, 9, and 10 of Organic Act 18/2003 connect universal jurisdiction at domestic level with the ICC in order to

531 Cuestionario para los Estados partes sobre la legislación de aplicación, Respuestas del Reino de España, 19.05.2010. Available at: https://asp.icc-cpi.int/iccdocs/asp_docs/ASP9/PoA/ICC-RC-POA2010-SPA-SPA.pdf (Accessed: 05.06.2017).

532 Fourth consultation on the implications for Council of Europe Member States of the ratification of the Rome Statute of the International Criminal Court. Progress Report: Spain. 4th Consult/ICC (2006) 08. Strasbourg, 14.09.2006.

implement the principle of complementarity and to mitigate jurisdictional conflicts. Nonetheless, just like in the French case, the complementarity principle has been reversed with regard to the crimes committed outside of Spain by foreigners[533]. Yet, article 7(3) states that if the ICC does not initiate an investigation on the situation reported, the complaint may be resubmitted to the Spanish courts, who thus recover their jurisdiction.

Lastly, Organic Act 15/2003 of 25 November 2003 added a new chapter IX to Title XX of the criminal code, on the offences against the administration of justice in the ICC context. It punishes false testimonies, the intentional provision of false evidence, the international destruction of evidence, corruptly influencing, obstructing the attendance of or retaliating against a witness, impeding, corrupting, intimidating, or retaliating against a Court official, or soliciting or accepting bribes as a Court official[534]. With this provision,

533 *Ibid*., article 7(2): «Cuando se presentare una denuncia o querella ante un órgano judicial o del Ministerio Fiscal o una solicitud en un departamento ministerial, en relación con hechos sucedidos en otros Estados, cuyos presuntos autores no sean nacionales españoles y para cuyo enjuiciamiento pudiera ser competente la Corte, dichos órganos se abstendrán de todo procedimiento, limitándose a informar al denunciante, querellante o solicitante de la posibilidad de acudir directamente al Fiscal de la Corte, que podrá, en su caso, iniciar una investigación, sin perjuicio de adoptar, si fuera necesario, las primeras diligencias urgentes para las que pudieran tener competencia. En iguales circunstancias, los órganos judiciales y el Ministerio Fiscal se abstendrán de proceder de oficio».

534 Spanish Criminal Code, article 471 bis: «1. El testigo que, intencionadamente, faltare a la verdad en su testimonio ante la Corte Penal Internacional, estando obligado a decir verdad conforme a las normas estatutarias y reglas de procedimiento y prueba de dicha Corte, será castigado con prisión de seis meses a dos años. Si el falso testimonio se diera en contra del acusado, la pena será de prisión de dos a cuatro años. Si a consecuencia del testimonio se dictara un fallo condenatorio, se impondrá pena de prisión de cuatro a cinco años.

2. El que presentare pruebas ante la Corte Penal Internacional a sabiendas de que son falsas o han sido falsificadas será castigado con las penas señaladas en el apartado anterior de este artículo.

3. El que intencionadamente destruya o altere pruebas, o interfiera en las diligencias de prueba ante la Corte Penal Internacional será castigado con la pena de prisión de seis meses a dos años y multa de siete a 12 meses.

4. El que corrompiera a un testigo, obstruyera su comparecencia o testimonio ante la Corte Penal Internacional o interfiriera en ellos será castigado con la pena de prisión de uno a cuatro años y multa de seis a 24 meses.

5. Será castigado con prisión de uno a cuatro años y multa de seis a 24 meses quien pusiera trabas a un funcionario de la Corte, lo corrompiera o intimidara, para obligarlo o inducirlo a que no cumpla sus funciones o a que lo haga de manera indebida.

6. El que tomara represalias contra un funcionario de la Corte Penal Internacional en razón de funciones que haya desempeñado él u otro funcionario será castigado con la pena de prisión de uno a cuatro años y multa de seis a 24 meses.

Spain fulfills its obligation arising from article 70(4)(a) of the Rome Statute. Lastly, Spain highlights its commitment to the ICC and emphasizes its support for the Trust Fund for Victims[535].

In light of these developments, it can be concluded that Spanish authorities are committed to meet their obligations arising from the Rome Statute. They have appropriately transposed at national level their duty to cooperate with the ICC. For present purposes, the activism of Spanish authorities with regard to the criminalization of serious violations of IHL is especially noteworthy. Conversely, the interpretation of the principle of complementarity with regard to crimes committed outside of Spain by foreigners remains controversial.

Conclusions
Chapter 4

It can be sustained that all three actors have undertaken important efforts to allow national authorities to prosecute the alleged perpetrators of war crimes and to cooperate with international criminal tribunals, especially the ICC. Therefore, they have implemented – with some nuances – their obligation to punish the alleged perpetrators of war crimes, in accordance with the system established by Common Article 1.

In the first place, the EU, France, and Spain have established the means allowing for prosecution at national level. The EU has constantly recognized the importance of the fight against impunity, notably with regard to war crimes, and has established operational means at the service of judicial cooperation on this matter. As for France and Spain, both have extensively transposed

En la misma pena incurrirá quien tome represalias contra un testigo por su declaración ante la Corte.

7. El que solicitara o aceptara un soborno en calidad de funcionario de la Corte y en relación con sus funciones oficiales incurrirá en la pena de prisión de dos a cinco años y multa del tanto al triplo del valor de la dádiva solicitada o aceptada».

535 Spanish Ministry of foreign affairs: «Corte Penal Internacional». Available at: http://www.exteriores.gob.es/Portal/es/PoliticaExteriorCooperacion/NacionesUnidas/Paginas/CortePenalInternacional.aspx (Accessed: 05.06.2017).

the content of war crimes in their legal orders, although in differing ways. The Spanish approach better follows the course of international law, insofar as it first implemented the language of IHL in national law, and then adapted it to further evolutions. Conversely, the French approach relies clearly on international criminal law, rather than on IHL.

Furthermore, while France mostly limits itself to codify the current state of international law in relation with non-international armed conflicts, Spain makes no distinction based on the nature of the armed conflict. Besides, the provisions dealing with the status of the alleged perpetrator are not entirely satisfactory, especially with regard to the rules on immunity which would benefit from further clarification. Lastly, the creation of specialized units dedicated to the investigation and prosecution of alleged perpetrators of core international crimes in France represents undoubted progress in the effectiveness of the fight against impunity at national level. On the overall, these provisions allow national authorities to effectively prosecute alleged perpetrators.

In addition, State parties are also under an obligation to provide for universal jurisdiction mechanisms, at least with respect to the grave breaches. The position of the three actors on this point seems to converge on some aspects. The EU, France, and Spain all agree on the principle of universal jurisdiction over some core international crimes. In this respect, it is acknowledged that in the case of IHL, the creation of universal jurisdiction mechanisms is not optional but mandatory, at least with regard to the grave breaches. Furthermore, there seems to be consensus among the French and Spanish authorities that the presence of the accused is required to initiate proceedings when the crime occurred outside of their territories and was committed by foreigners not residing in their countries. This condition is not required by the Geneva Conventions themselves, although it is not prohibited under IHL either.

While the concept of universal jurisdiction over war crimes is accepted, its practical implementation has been restricted, probably in response to the political complications that its exercise might entail. While the Spanish legal order used to be a pioneer in the use of universal jurisdiction – even if in some cases, concerns over legal certainty could be raised – the Spanish legislature has progressively clarified and, at the same time, narrowed its scope of application. Conversely, France authorized quite late the use of universal jurisdiction over war crimes, but even its codification was accompanied with important limitations. Actually, the current legal frameworks in Spain and in France present similarities also in some questionable elements, such as the reversal of the principle of complementarity.

Furthermore, as evidenced by Langer, the executive branch has intervened in several cases involving high-profile cases; as a result, universal jurisdiction seems to be more successful in cases involving low cost defendants[536]. This is probably a reality in the legal orders scrutinized in this chapter[537].

The result of this process is that, nowadays, France is the European country with the greatest number of procedures for international crimes cases under investigation. By April 2017, 57 cases were under investigation[538], although the number of cases brought on war crimes grounds is not known. Therefore, even though France implemented its obligations under IHL and the Rome Statute quite late, this delay seems to be compensated by the political will that now exists to actually prosecute alleged perpetrators of core international crimes in France. Conversely, Spain has established quite soon a well-established legal framework allowing for the prosecution of people suspected of having committed grave breaches and other serious violations. The Spanish legislation is at the *avant-garde* on some aspects, such as the criminalization of serious violations of IHL occurring in NIACs, and it has been a pioneer in the use of universal jurisdiction on this matter. Nonetheless, in contrast with France, the political will to translate these principles into action appears less clearly, as the low number of open cases before Spanish courts[539] has shown.

These developments therefore impose to conceive universal jurisdiction as a more 'reasonable' instrument in the fight against impunity than what was originally expected. It seems that universal jurisdiction as it is regulated at EU, French, and Spanish levels aims to deny safe havens to people willing to establish themselves in those territories rather than to become global enforcers proactively prosecuting high-level officials worldwide, as observed by Luc Reydams[540]. That being said, it should also be mentioned that both French and

536 Máximo Langer, «The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes», *American Journal of International Law*, vol. 105(1), 2011, pp. 1-49, 3.

537 On the situation in Spain, see *inter alia*: Esteve Moltó, «La persecución universal de los crímenes de guerra en España: más retrocesos, que avances», *op. cit.*, 2014; Sánchez Legido, «El fin del modelo español de jurisdicción universal», *op. cit.*, 2014.

538 Colgnac, *Report on 'L'Office central de lutte contre les crimes contre l'humanite, pour que «la justice reste»*, *op. cit*. Available at: http://www.dalloz-actualite.fr/dossier/l-office-central-de-lutte-contre-crimes-contre-l-humanite-pour-que-justice-reste#.WO3txBLyhQM (Accessed: 10.04.2017).

539 EU Genocide Network Strategy, p. 31.

540 Reydams, *Study on «The application of universal jurisdiction in the fight against impunity»*, *op. cit.*, 2016.

Spanish authorities have opened investigations regarding the Syrian case[541], although these are at a too early stage to draw conclusions.

Lastly, this commitment of the three actors to the obligation to ensure respect for IHL is manifested in their support to and cooperation with the international criminal tribunals. This is particularly clear with regard to the EU. The latter has implemented an extensive policy of support to the ICTY, and more importantly to the ICC, which became one of the priorities of the EU's external action. This aspect is particularly interesting insofar as the developments in the field of international criminal justice impose obligations on State parties. Therefore, through their active support to the ICC, Spain and France participated in the elaboration of new – or renovated – international obligations. Likewise, it triggered the modification of domestic law in relation with the prosecution of alleged perpetrators, thus generating a virtuous circle in the fight against impunity.

541 Reuters, «Spanish court to investigate complaint against Syrian security forces», 27.03.2017. Elise Vincent, «Une plainte contre Damas déposée à Paris pour «crimes contre l'humanité», *Le Monde*, 24.10.2016.

FINAL CONCLUSIONS

The objective of this thesis was to assess whether and to what extent the EU, France, and Spain are bound by the obligation to ensure respect for IHL, as provided by Common Article 1 to the four Geneva Conventions of 1949. This question has been analyzed from two angles of research.

The first part was dedicated to the obligation to ensure respect in its first two dimensions, that is, to adopt measures to prevent violations of IHL from occurring or to stop them. Concretely, the objective of the first part was to define the obligation to ensure respect for IHL, in accordance with the current international legal framework, and its corresponding implementation at European and domestic levels.

In this context, it was found that although Common Article 1 could have been condemned to oblivion, as a symbolic provision without much legal projection, the absence of a centralized monitoring mechanism established by the Geneva Conventions decided otherwise. Indeed, IHL does not provide for such a mechanism and the High Contracting Parties have recently refused to establish one. Nevertheless, the effective implementation of IHL is of utmost importance, and it has become necessary to refer to other instruments in order to enforce IHL. This is where Common Article 1 appears, a provision whose wording is both vague and summary. Common Article 1 has, to some extent, filled in this gap most probably thanks to the vagueness of its wording, as it has allowed an evolving and extensive interpretation thereof. The vagueness of the formula has therefore played in the benefit of IHL.

Different institutions have played an important role in defining the scope and limits of this obligation, namely, the ICRC and the ICJ. Thus, according to its modern acceptation, Common Article 1 not only requires State parties to respect the legal provisions they ratified, but also places a duty upon them to ensure respect for IHL by others. In addition to the (traditional) internal dimension of the obligation, State parties are bound to its external dimension and must

take all the necessary measures to ensure that the warring parties to an armed conflict indeed comply with IHL. This external dimension of the obligation is grounded on the *erga omnes* nature of Common Article 1, a provision destined to protect some of the most fundamental norms of the international legal system. Consequently, Common Article 1 has established a decentralized monitoring system, whereby all States are guardians of IHL. The effectiveness of the system established by the Geneva Conventions relies on the good will of its State parties, and as such, it is important to make use of all the instruments made available under international law. If only the international community consistently and systematically implemented the measures at its disposal to ensure respect for IHL in accordance with international law, then much would be gained.

Nonetheless, it should be noted that Common Article 1 is an obligation of due diligence. As a result, third States to an armed conflict must take all the necessary – and reasonable – measures to prevent IHL violations from occurring, intend to stop IHL violations if they occur, and repress them once they have occurred if they are tantamount to grave breaches or serious violations. In this regard, it is possible to consider that not all State parties are bound in the same manner to this obligation, depending on political and cultural bonds with the State party to the armed conflict. In the same way, it seems reasonable to consider that the permanent members of the UN Security Council are probably subject to a higher duty because of their particular mission in maintaining international peace and security pursuant to the UN Charter.

In this respect, all three actors have indeed implemented the obligation to ensure respect for IHL both in terms of *opinio juris* and practice, with mixed results. In this regard, the position of the EU has been bold, as it adopted the Guidelines on promoting compliance with IHL, a document in which it expressly formalized its commitment to the obligation to ensure respect for IHL. This unique document thus expresses the commitment of – thus far – 28 Member States to Common Article 1, as an obligation that creates a system of collective responsibility. In addition, it serves as the 'legal basis' on which the EU institutions may operate to fulfill the obligation.

Furthermore, the entry into force of the Lisbon Treaty has opened up new possibilities with the recognition of the EU's international legal personality and the consolidation of the CFSP. As demonstrated above, there are external and internal factors that compel the EU to comply with Common Article 1. The EU is a fully-fledged international actor which must act in accordance with international law, and *a fortiori*, with IHL, a legal corpus with customary

character at the very heart of the international legal order. At internal level, the EU is a union of values – the rule of law, democracy and the respect for human rights – which include IHL. These values have become axiological to the EU, and the Lisbon Treaty recognizes the necessity to externalize them in order to ensure coherence. Thus, the implementation of the obligation to ensure respect for IHL at EU level is framed within the externalization of EU values on the international scene and thereby acquire a constitutional dimension.

Ensuring respect for IHL is arguably in the interest of the EU, an international actor willing to assert its credibility and power through multilateralism. As a result of this integration of IHL in European law, the EU defines its identity but also contributes to the development of this area of international law. These two elements, the customary nature of Common Article 1 and the 'constitutionalization' of the EU's founding values, are reflected in the Guidelines on promoting compliance with IHL, which explicitly reflect the EU's commitment on this matter.

As any other State party to the Geneva Conventions, France and Spain are subject to the obligation to ensure respect for IHL, both internally and externally. In this regard, the overwhelming ratification of IHL treaties denotes an overall commitment of both States with respect to IHL in general, and the Geneva Conventions in particular. They have ratified the four Geneva Conventions and their three additional protocols, and have complied with their internal obligations in order to give full effect to these ratifications. They are therefore unequivocally bound by Common Article 1, a situation not explicit in domestic law but acknowledged by the authorities in different policy documents and public statements.

Furthermore, France has long projected itself as the nation of human rights and has been willing to embrace this mandate. Mirroring the EU, France bases the functioning of democracy and its involvement in international organizations on the respect for human rights, which are considered its founding values. The same can be said with regard to Spain's foreign policy. Pursuant to this mandate, they must take all measures to ensure respect for IHL on the international scene. In addition, it clearly appears that their action on the matter is multilateral and placed within the framework of the EU and the UN. In the French case, this is likewise reinforced by its higher responsibility, resulting from its permanent membership in the UN Security Council.

In addition, *opinio juris* is indeed reflected in the protean practice of the three actors, although this practice is not always consistent. They all have under-

taken action to prevent IHL, most notably in terms of training and promotion of IHL. In this context, they all have promoted the ratification of IHL treaties as well as the respect for IHL principles on the international stage, through multilateral diplomacy. Furthermore, they have adapted their responses to violations of IHL depending on their capacities, basing their action on diplomatic, economic, and military instruments.

In terms of capacities, France is an especially important actor on the international scene and must act accordingly. In particular, France probably has a higher duty to ensure respect for IHL in its quality of permanent member of the UNSC. The above-mentioned France's initiative together with Mexico on UNSC permanent members refraining from using their right to veto in case of genocide, crimes against humanity, war crimes and ethnic cleansing is encouraging insofar as it highlights the shift from a State-centered approach to a human-centered approach of international relations. The French government expressed its readiness to give up on one of its most important privileges in case of serious international crimes. France's commitment to the R2P is clear, which in turn has an impact on the obligation to ensure respect for IHL. Spain supports these developments and has proven to reflect its commitment to Common Article 1 as a non-permanent member of the UN Security Council in 2015-2016.

The second part of the thesis was dedicated to the third dimension of IHL, the one that has arguably most developed in the last decades: the criminalization of the behaviors prohibited under IHL that amount to war crimes. The objective of this second part was to analyze the legal instruments to punish the violations of IHL at the disposal of the State parties. Consequently, the objective was to identify the mechanisms of responsibility existing under international law and to analyze whether the EU, France, and Spain have adequately used them.

In this context, the first instrument at their disposal is the invocation of State responsibility for an international wrongful act on behalf of the international community as a whole, pursuant to the regime existing under public international law. However, this system is not 'punitive' strictly speaking, and it has never been activated by third States for violations of IHL. The alternative, on the other hand, is more interesting for present purposes: individual international responsibility. Actually, the Geneva Conventions themselves establish the grave breaches regime, whereby the State parties commit to prosecute or extradite, including on the basis of universal jurisdiction, the alleged perpetrators of the so-called 'grave breaches', a list of behaviors prohibited under

IHL. This system has produced mixed results; nonetheless, it established the blueprint of the international system of penal repression of violations of IHL. Indeed, international criminal law has developed upon the categories established in the Geneva Conventions with regard to the repression of war crimes. The result today is that the obligation to ensure respect for IHL obliges the members of the international community to implement the grave breaches system in their legal orders and to cooperate with international criminal tribunals regarding war crime cases.

Against this backdrop, the EU, France, and Spain have undertaken steps to implement these obligations. Since the EU does not hold competence on the matter, it has intended to facilitate cooperation among EU Member States in the prosecution of alleged perpetrators of core international crimes. As for France, it delayed the transposition of the grave breaches in its legal order and finally did so with the adoption of the Rome Statute. French authorities eventually transposed the definitions of war crimes contained in the Rome Statute, authorized universal jurisdiction – under strict conditions – and created specialized units to investigate and prosecute war crimes. Therefore, despite its delay in implementing its penal obligations under IHL, France is now at the forefront of prosecutions of alleged war criminals. As for Spain, it has proceeded in different steps. It transposed the grave breaches system on the basis of the Geneva Conventions and further adapted it to subsequent changes in international law. Concerning prosecutions, Spain has been considered a pioneer in the fight against impunity thanks to an extensive interpretation of universal jurisdiction by Spanish courts. Nonetheless, the legislature has redefined the scope of universal jurisdiction in order to provide greater legal certainty, but also to restrict its use due to political pressure.

Regarding the obligation to cooperate with international criminal courts, all three actors have adopted the relevant measures to do so with regard to the ICTY, ICTR, and ICC. In this respect, it is worth mentioning that France has importantly worked on Rwandan cases due to historical and cultural ties. More importantly, this is an area where EU Member States, including France and Spain, have levelled their activism at EU level, through the application of conditionality clauses and restrictive measures in support for the ICTY and the unconditional support for the ICC. The EU has probably earned its reputation as human rights leader in this context, as it is commonly acknowledged that its activism on the matter has importantly contributed to the establishment and effective functioning of the ICC.

In light of these findings, it is worth stressing the following *general conclusions*.

First, an introductory and concise article, Common Article 1 establishes a complete yet complex system of monitoring taking place at all times – before, during, and after an armed conflict. The measures to prevent and react to IHL violations include a wide set of measures ranging from dissemination of IHL, to public denunciations, to military intervention in accordance with the UN Charter. However, these measures are not always sufficient, so that it is necessary to criminalize IHL violations. The measures relating to responsibility involve the criminalization and prosecution of alleged perpetrators of serious violations and grave breaches of IHL, as well as litigation before international courts, especially the ICJ in order to invoke the responsibility of the wrongdoing State. In this manner, the obligation to ensure respect borrows from many different branches of international law, including the norms regulating general international law, international human rights law, the law of international peace and security, or international criminal law. Thanks to the vagueness of its wording, Common Article 1 has become a catch-all provision which connects all these branches to fulfill one purpose: ensuring respect for IHL. Common Article 1 is indeed the element that allows connecting all these elements and giving coherence to the system as a whole with regard to IHL.

However, the force of Common Article 1 is also its weakness, insofar as it relies on the developments in other branches of international law and is prone to fragmentation. Furthermore, the spectacular development of international criminal justice in the last decades also highlights that the sophisticated system originally elaborated by the Geneva Conventions in order to tackle IHL violations *during* the conflict is not efficient. In fact, it seems that the efforts of the international community have focused on strengthening repressive mechanisms in the last decades. More recently, prevention seems to have appeared on top of the agenda. It therefore looks like the mechanisms foreseen in the Geneva Conventions to stop violations of IHL are insufficient or ineffective. As a consequence, *ex ante* and *ex post* measures seem to be favored for an increased efficiency.

Second, the EU, France and Spain contribute to the crystallization of Common Article 1 as a norm of customary IHL, as they provide evidence of a general practice accepted as law. The analysis of the transposition of Common Article 1 highlights the existence of an *opinio juris*, with Common Article 1 being interpreted according to its contemporary meaning, that is, as an obli-

gation with external effects. Similarly, the analysis of State and EU practice is consistent with this *opinio juris*.

Third, Common Article 1 should be read in conjunction with an emerging norm of international law, the Responsibility to Protect, which reflects a shift in the understanding of State sovereignty. In this respect, an important issue which applies to the whole system, and in particular with regard to individual criminal responsibility and State responsibility, is the willingness of States to preserve their sovereignty and the unwillingness to intervene by prosecuting alleged perpetrators or resorting to international tribunals as a result. However, in line with the logic of the Responsibility to Protect, if a State does not ensure the respect for the most fundamental norms of international law – including the prohibition of war crimes – then, the international community must take over. That same idea is reflected in the principle of complementarity as established in the Rome Statute: States are primarily responsible for prosecuting alleged perpetrators, but if they do not fulfill this obligation, then the ICC can take the lead and open an investigation.

This evolution of the concept of State sovereignty is essential in order to maintain a balance in international law between two (sometimes) competing interests: States' interests and individuals' interests. This shift is therefore desirable as it allows conciliating these elements. Indeed, it guarantees the respect for the traditional principles of international law, such as the equality between States or non-interference, but also the protection of humanity, a principle enshrined in numerous IHRL and IHL treaties and conventions adopted since World War II. Pursuant to this understanding (non-military) intervention by third States to an armed conflict does not constitute a breach of the principle of sovereignty, but rather its application. State sovereignty cannot be understood as unlimited power anymore, but rather as a responsibility.

Fourth, the European Union is becoming a global actor with regard to the obligation to ensure respect for IHL. While its economic weight is undisputable, the same does not hold true regarding its political power on the international scene. In spite of that, the EU has integrated IHL into its CFSP and has progressively allowed it to enter its sphere of competency well before the entry into force of the Lisbon Treaty. The EU has been a promoter of IHL since the 1990's, thus acting as if it were bound by Common Article 1 even before the adoption of the IHL Guidelines. It has used its status and resources to reinforce the implementation and respect for IHL by mainstreaming the Geneva Conventions in its external action. The result today is that it is a protean actor

of IHL, acting in the same way as State parties to the Geneva Conventions and resorting to an arsenal of tools to ensure respect for IHL: declaratory policy, sanctions policy, or even management-crisis operations. The diversity of means reflects the EU's complexity and illustrates how the EU juggles with the different aspects of its power to ensure respect for IHL.

In this context, the EU is becoming a credible actor of IHL on the international scene. The international community has acknowledged the EU's action in the maintenance of international peace and security through the Statement by the President of the Security Council of 14 February 2014 (S/PRST/2014/4). In this statement, the partnership of the EU with the UN in resolving global challenges is applauded, notably with regard to the promotion of human rights and the protection of civilians in armed conflicts. It therefore constitutes a powerful signal regarding the perception and credibility of the EU on the international scene as well as the expectations that arise with respect to Common Article 1. Consequently, it is possible to expect Brussels to become one of the centers of development of IHL, together with Geneva, The Hague, and New York.

Fifth, despite the unequivocal legal authority of Common Article 1 in the international legal order, the EU's action in the IHL field is limited. The CFSP remains an intergovernmental policy, where EU Member States wish to retain their sovereignty, *a fortiori* in the field of IHL, as it may entail the use of lethal force. Furthermore, there are no express references to IHL in the EU treaties. Hence, Member States chose to alter the language used in Common Article 1 and to talk about an obligation to 'promote compliance with IHL' in the Guidelines. This choice of vocabulary seems to underline that implementing Common Article 1 remains primarily in the hands of EU Member States. Yet, this difference in the terminology does not correspond to the existing legal framework. Indeed, as Common Article 1 is a customary obligation, it directly binds the EU. Furthermore, adopting this language seems to elude that Common Article 1 stipulates an obligation of due diligence; therefore, nothing that the EU cannot do can be expected from it. It is required to act within the frame of its capacities, nothing more but nothing less. If one takes into account this element of the obligation to ensure respect, then it clearly appears that the EU is required to ensure respect for IHL at all times, but it will necessarily do so together with its Member States and in accordance with the corresponding division of competences and capacities.

This statement leads to the sixth point: The obligation to ensure respect applied to the EU highlights the necessity to understand the EU legal order

from a multilevel perspective. The EU is an autonomous subject of international law, but it also expresses the common will of its Member States. Therefore, for the sake of effectively ensuring respect for IHL, both the EU and national levels must work together and take upon the most appropriate tasks at their respective levels. This process reflects how multilevel constitutionalism constitutes an appropriate framework of analysis, as Common Article 1 has become an obligation of quasi-constitutional nature in the international legal framework, whose implementation is made possible at EU and domestic levels thanks to the provisions contained in primary law and in the Constitution respectively. It therefore highlights the existence of a common core at international, EU, and national levels.

In this respect, the common expression of the – so far – 28 Member States feeds into a virtuous circle whereby Common Article 1 is reinforced as an international treaty obligation, and the international consensus on the matter is reaffirmed. The implementation of Common Article 1 leads to the improved respect for IHL at all times, before, during, and after the armed conflict. In turn, the EU projects itself as global leader through the externalization of its values, including IHL and thus reinforces its credibility as a territory where the rule of law and human rights ought to be protected. In this sense, the promotion of IHL on the international stage reflects the EU's values and contributes to its constitutional ambition to be a global actor in human rights. At the same time, EU Member States fulfill their obligation to ensure respect for IHL as State parties to the Geneva Conventions. In light of these developments and in the presence of a general practice accepted as law, Common Article 1 is reinforced as an international customary obligation.

Seventh, the action of the three actors to ensure respect for IHL has repercussions on the development of IHL. In this respect, it appears from State and EU practice that some aspects of IHL are particularly emphasized, such as the protection of civilians, the protection of women and children in armed conflict, or the fight against sexual and gender-based violence, thereby underlining the special importance of these elements in IHL. The areas where the three actors are most active thus gain visibility and their legal authority is reinforced.

Furthermore, the EU, France, and Spain contribute to the convergence of IHL and IHRL. This is reflected in the resort to human rights instruments at UN level to promote compliance with IHL or in the quasi-systematic association of these bodies of law in the declaratory policy of the three actors, especially the EU. At EU level, this approach is all the more relevant, since it is

through the vector of human rights that IHL has first been developed. In addition, both the EU and its Member States must take into account the ECtHR's case-law, which has developed its own doctrine on the application of human rights to situations of armed conflicts. This approach certainly has advantages as well as drawbacks. On the one hand, it avoids having to determine the nature of the armed conflict and may fill in the gaps of IHL. It likewise helps ensuring that victims will not be left without a right to reparation for their damages. On the other hand, its practical application is difficult.

In addition, the EU, France, and Spain participate in the alignment of the legal regime of non-international armed conflicts on that of international armed conflicts. Indeed, the EU calls for the respect for IHL, most notably through its declaratory policy, regardless of the nature of the armed conflict and therefore participates in the creation of an *opinio juris* in this sense. International and domestic criminal law further contribute to this movement. France's penal legislation enshrines the classification of war crimes established by the Rome Statute, thereby acknowledging that certain serious violations of IHL, occurring in non-international armed conflicts, may be tantamount to war crimes. The Spanish legislation goes even further as it provides for penal sanctions regardless of the nature of the armed conflict, thus aligning completely the legal regimes of international and non-international armed conflicts with regard to penal repression. Consequently, it can be sustained that the efforts of the three actors to develop international and domestic criminal law have indirectly impacted the development of IHL itself and contributed to its strengthened authority.

Lastly, IHL seems to be increasingly applied to the fight against terrorism. This is particularly clear within the frame of the Common Commercial Policy, as numerous international trade agreements refer to the respect for IHL in the clauses related to the fight against terrorism. This is an interesting development insofar as political leaders have over-exploited the loopholes regarding the legal framework applicable to counterterrorism, resulting in denying the application of both IHL and IHRL. This will likely call for interesting developments within the EU as well, as European countries have suffered several terrorist attacks.

Eighth, despite these important developments and advances, there are serious limitations. Some of them are inherent in the legal system while some others depend on extra-legal considerations. In particular, it is difficult to assess the impact and effectiveness of the measures undertaken to ensure respect for IHL, especially those adopted to put an end to violations of IHL during an

armed conflict. In the same way, it seems difficult to induce non-State armed groups to respect IHL during the armed conflict.

Additionally, the question of double standards arises. The analysis of State and EU practice has shown that measures to ensure respect for IHL have been more systematic and constraining regarding some third States than others. This position may be justifiable in the cases where it seems that measures conducted in this sense will produce no effect. Nonetheless, it is also probably due to political rather than legal motives. This is deplorable from a legal– and moral – standpoint; but it is unfortunately inevitable. This statement is also applicable to the fight against impunity, insofar as the exercise of universal jurisdiction has been selective and in tension with geopolitical interests.

In the same line of argument, there are inconsistencies regarding what is promoted at external level and remaining issues at internal level, which in turn have an effect on the credibility of the three actors. The adoption of amnesty laws and the early reservations made to the Rome Statute by France with regard to the Algerian War of Independence highlight this duality. Similar inconsistencies are found outside of the scope of IHL, but they also have an impact on the credibility of the different actors in ensuring respect for IHL. This is the case, for example, of the so-called 'refugee crisis', whose management has negatively impacted the image of the EU and its Member States and challenged them as leaders in human rights. Therefore, coherence and consistency are key to establish credibility.

On this basis, it is possible to address the following *recommendations*.

First, Member States and the EU should adapt the wording of the IHL Guidelines, so as to align it to the current state of international law. In particular, the Guidelines should appropriately reflect that the EU is bound by the obligation to ensure respect for IHL on the basis of customary international law, so that it is subject to an obligation to 'ensure respect' for IHL.

Second, the EU could adopt a truly legally binding act, such as a Council Decision in which it commits to ensure respect for IHL. This document would replace the Guidelines and send out a strong message to the international community.

Third, it could extend the conditionality clause to all its partners and include explicitly the respect for IHL into it. In particular, no distinction should be made among third States in doing so.

Fourth, the EU should conduct *ex ante* and *ex post* assessments regarding the different measures implemented in response to violations of IHL, in order

to analyze their effectiveness. In the same line of reasoning, France and Spain should ensure that they effectively enforce the arsenal of tools at their disposal to ensure that they do not export arms to third countries involved in violations of IHL.

Fifth, France and Spain should consider invoking the responsibility of the States involved in armed conflicts and violating IHL before the ICJ on behalf of the international community as a whole, in accordance with the regime of State responsibility as established in ARSIWA.

Sixth, France and Spain should amend their legislation on universal jurisdiction over war crimes so as to align it with the provisions contained in the Geneva Conventions and in the Rome Statute. In this regard, it is particularly important to reconsider the reversal of the principle of complementarity and to enshrine the prior responsibility of State parties to prosecute all alleged perpetrators. Requiring that a request for extradition be made or that the ICC expressly declines its competence to activate the proceedings at national level contradicts the letter of the Geneva Conventions, which establish a *primo prosequi, secundo dedere* obligation.

Lastly, France should abolish the distinction between war crimes and *délits*, as it does not appropriately reflect the current state of international law.

On a final note, it should be stressed that despite the important above-mentioned inconsistencies, loopholes, and limitations, it is important to give visibility to the action of the three actors – and in general, of any international actor – in ensuring respect for IHL. This is an essential element for the proper enforcement of IHL, insofar as the lack of visibility in this field entails a certain attitude of resignation and apathy because there is a perception that nothing is done and, more importantly, nothing can be done. This perception is quite dangerous, as it fuels the feeling of impunity, and therefore feeds into a vicious circle of non-compliance. Consequently, the efforts of the different actors of the international community should be encouraged and advertised, as reporting on compliance and efforts to ensure compliance is probably equally important as reporting on the violations of IHL.

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