



Applicable regulatory frameworks regarding human rights violations in conflicts

Carmen Márquez Carrasco, Joana Abrisketa, Elizabeth Salmón,
María Nagore, Chiara Marinelli, Rita Zafra,
Rocío Alamillos Sánchez, Laura García Martín, Laura Íñigo Álvarez



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Authors	Carmen Márquez Carrasco, Joana Abrisketa, Elizabeth Salmón, María Nagore, Chiara Marinelli, Rita Zafra, Rocío Alamillos Sánchez, Laura García Martín, Laura Íñigo Álvarez

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The findings and conclusions contained within this report remain those of the authors and should not be attributed to any other person or institution.

Executive Summary

Work Package 10 (WP 10) 'Human Rights Violations in Conflicts', part of the FP7 research project 'Fostering Human Rights Among European (External and Internal) Policies' (FRAME) aims at providing a comprehensive assessment of the EU external policies in response to conflicts and crisis situations, exploring ways to prevent and overcome violence through the critical assessment of the instruments available to the EU to integrate human rights, humanitarian law and democracy/rule of law principles in these policies. The ultimate purpose of this Work Package is to contribute to the fostering of human rights in EU conflict-related policies.

Departing from the idea that the legal framework of EU Common Security and Defence Policy (CSDP) integrates EU law and international law, this report will examine the concurrent application of international human rights law and international humanitarian law, and their interaction with other bodies of law that offer a framework for protection in situations of conflict and violent crisis. Hence the main goal of this report is to present and analyse the different international regulatory frameworks applicable to human rights violations with particular attention to vulnerabilities in conflict situations of inter- and intra-State violence.

In FRAME Report D10.1 'Survey study on human rights violations in conflict-settings' a comprehensive survey of the various patterns of human rights violations related to conflict and violent crisis situations was conducted, with a specific focus on the rights of vulnerable groups, as well as on the role of non-state actors as key players in the context of new forms of violence and war. As indicated in that study, human rights violations in conflict-settings represent clear evidence of the erosion of respect for humanitarian and human rights norms, which has aggravated the protection and assistance needs of refugees and other groups in conflict situations, and complicated the task of providing humanitarian assistance and increased the risks faced by humanitarian personnel.

Confronted to this scenario this report studies and examines the relationship between the regulatory frameworks applicable in conflict situations: international human rights law (IHRL), humanitarian law (IHL) and the legal regime for humanitarian assistance, as well as international refugee law (IRL) and international criminal law (ICL). In many contemporary conflict settings key issues arise regarding the relationship between those legal frameworks. They mainly concern: a) the convergence and complementarity between IHRL and IHL; b) the interpretation of key rules for the protection of civilians like the civilian-combatant distinction or civilian and military objectives; c) the concept of protection from a IHL, IHRL and humanitarian assistance perspective. Specific analysis is developed on these questions, with a focus on vulnerable groups in society, which are particularly affected by armed conflict and violent crises (children, women, internally displaced persons, refugees). This report also focuses on the interplay of the international regulatory frameworks with ICL, that arises especially when violence takes a systematic and widespread dimension, amounting possibly to war crimes, crimes against humanity or even genocide. In particular, this study considers the cooperation with and support of the International Criminal Court (ICC) by the EU as part of a broader analysis of the relationship between the protection of human rights and promoting democracy and ICL and the extent to which the application of ICL contributes to the promotion of democracy in post-conflict scenarios. The role of truth, justice and reparation as integral components of any process of transition are also addressed.

In order to achieve the expounded objectives, this report mainly conducts a legal analysis of primary and secondary sources of international and EU law. The different sections of the report review and discuss the scholarly literature in order to situate the research within academic debates on the subject.

The study is structured with an introduction and six sections. The first section of this study offers a basic description of the overlapping legal frameworks applicable to human rights violations in situations of conflict and addresses the basic concepts underlying their application. It describes the applicable legal frameworks as subsets of international law outlining their purposes and key provisions.

Section II aims to provide an overview of the main differences and similarities regarding the application of IHRL and IHL to situations of conflict, to present the theoretical approaches attempting to provide an explanation about the nature of their interplay, and to address the main normative and operational challenges that matter most in the protection of disadvantaged or marginalised groups in armed conflict and other situations of violence.

Section III addresses the notion of protection that stems from the interplay between IHL, IHRL and the law on humanitarian assistance, including an analysis of the EU legal and policy framework on humanitarian assistance.

Section IV addresses the relationship between IHL, IHRL and IRL with the goal to identify the areas where they converge or conflict in providing protection to refugees and displaced populations.

Section V examines the connection between serious violations of human rights and humanitarian law and the doctrine of responsibility to protect (R2P) and assesses the EU's position and available mechanisms to implement R2P.

Section VI includes legal and policy analysis of norms, case law and documents, as well as scholarly doctrine, on the relationship between the protection of human rights and the promotion of democracy and ICL. The main aim of this chapter is to analyse in general terms to what extent transitional justice and the application of ICL contributes to the promotion of democracy in conflict and post-conflict situations, and to examine specifically how the EU and Member States are supporting the goals of ICL and the International Criminal Court (ICC).

Lastly, the report provides preliminary conclusions and recommendations on the relationships between the regulatory frameworks applicable to human rights violations in conflict situations and their implications for the EU and Member States.

This report has led to the conclusion that while IHRL, IHL and other legal frameworks operating at the same time provide a comprehensive legal framework for protection and assistance in situations of armed conflict its effective operationalization constitutes a major challenge as the due to lack of research on the criteria and (legal, policy) mechanisms to set priorities for protection, including those featuring at the EU agenda for protection of civilians.

List of abbreviations

ACP	African, Caribbean and Pacific Group of States
AFET	Committee on Foreign Affairs (European Parliament)
ANSAs	Armed Non-State Actors
AP	Additional Protocol (to the Geneva Conventions)
APIC	Agreement on Privileges and Immunities of the International Criminal Court
AU	African Union
CAR	Central African Republic
CAT	UN Convention against Torture
CEDAW	Convention for the Elimination of All Forms of Discrimination Against Women
CERD	Committee on the Elimination of Racial Discrimination
CFSP	Common Foreign and Security Policy
COJUR-ICC	International Criminal Court Sub-area of the Public International Law Working Group
CRC	Convention on the Rights of the Child
CSDP	Common Security and Defence Policy
CSR	Convention on the Status of Refugees
DRC	Democratic Republic of Congo
DRIPs	UN Declaration on the Rights of Indigenous People
DROI	Subcommittee on Human Rights (European Parliament)
ECHO	European Commission's Humanitarian Aid and Civil Protection department
ECHR	European Convention on Human Rights
ECOSOC	United Nations Economic and Social Council
ECtHR	European Court of Human Rights
EEAS	European External Action Service
ESS	European Security Strategy
EU	European Union
EUCJ	European Union Court of Justice
EUFOR RCA	European Union Force into the Central African Republic
EULEX	European Union Rule of Law Mission in Kosovo
EUSR	European Union Special Representative
EWS	Early Warning System (European Union)
FRY	Former Republic of Yugoslavia
GC	Geneva Convention
HR/VP	High Representative of the Union for Foreign Affairs
I/A	Inter American
IAC	International armed conflict
IACHR	Inter American Commission on Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights

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
IDPs	Internally Displaced Persons
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
ILO	International Labour Organization
IRL	International Refugee Law
LNTC	Libyan National Transitional Council
LRA	Lord Resistance's Army
MEPs	Members of the European Parliament
NATO	North Atlantic Treaty Organisation
NGO	Non-Governmental Organisation
NIAC	Non-international armed conflict
NSAs	Non-State Actors
NSAGs	Non-State Armed groups
OAS	Organisation of American States
OCHA	United Nations Office for the Coordination of Humanitarian Affairs
OHCHR	Office of the UN High Commissioner for Human Rights
OTP	Office of the Prosecutor (ICC)
R2P	Responsibility to Protect
SCSL	Special Court for Sierra Leone
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TRC	Truth and Reconciliation Commissions
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNHRC	United Nation Human Rights Council
UNSC	United Nations Security Council
UNSG	United Nations Secretary-General
UNTS	United Nations Treaty Series
VCLT	Vienna Convention on the Law of Treaties
WFP	World Food Programme

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Introduction

The Treaty on European Union (TEU) explicitly lays down in Article 2 that the foundation of the Union rests 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...’.¹ With regard to the area of foreign and security policy, the TEU provides in Article 21, paragraph 1 that

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, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.²

Thus the TEU directs the Union to respect human rights whenever it conducts activities on the international scene, including EU external policies in response to conflicts and crisis situations. Moreover, as an expression of the EU’s ‘deliberate normative power strategy’,³ the promotion of human rights at the international level is one of the principal objectives of the EU’s external action, as evidenced in the formulation of Article 3, paragraph 5 of the TEU which provides that

in its relations with the wider world, the Union shall uphold and promote its values and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.⁴

This principle is once again applied to the ambit of foreign and security policy by Article 21, paragraph 2, which includes the Union’s commitment to ‘define and pursue common policies and actions, and (to) work for a high degree of cooperation in all fields of international relations, in order to: ... b) consolidate and support democracy, the rule of law, human rights and the principles of international law’.⁵

From these provisions one may infer that they reflect a ‘dual role for human rights in the external activities of the EU’,⁶ which has been expressed under the following terms

¹ Art. 2 TEU.

² Art. 21 (1) TEU.

³ Laura Beke, David D’Hollander, Nicolas Hachez, Beatriz Pérez de las Heras, *Report on the integration of human rights in EU development and trade policies*, FRAME Report 9.1 <<http://www.fp7-frame.eu/wp-content/materiale/reports/07-Deliverable-9.1.pdf>> accessed 2 February 2015, 1.

⁴ Art. 3 (5) TEU.

⁵ Art. 21 (2) b) TEU.

⁶ Aurel Sari and Ramses Wessel, *Human Rights in EU Crisis Management Operations: A duty to respect and protect?*, 2012/6 Cleer Working Papers <<http://www.asser.nl/media/1635/cleer-working-paper.pdf>> accessed 5 April 2015, 7.

a moral and political commitment for the Union to respect human rights in all its activities on the international sphere, including in the field of crisis management, and the Union's own legal obligations to respect human rights and fundamental freedoms in additions to those binding on Member States.⁷

The referred provisions of the TEU highlight the relevant Union's commitments to international law, including the international legal branches applicable in situations of conflict.

The mainstreaming of human rights in the EU external policies has added a new dimension to the promotion and protection of human rights by the Union, which has been evidenced by an expansion of EU instruments and tools where human rights have become a major crosscutting factor. The 2012 'mainstreaming' general documents, the EU *Strategic Framework and Action Plan on Human Rights and Democracy*,⁸ draw on pre-existing policies, seeking to coherently organise their human rights components.⁹ Much of the referred expansion has had to do with security policy, which grew as the EU assumed ever-increasing responsibilities throughout the world during the last twenty years. The EU aligned itself with the international security agenda, formulated at the end of the Cold War, where the security-human rights-nexus featured prominently (later theorised by the doctrine of human security).¹⁰

⁷ *Ibid.* 8. Notwithstanding, other authors such as Lorand Bartels consider that according to the TEU, the EU has the obligation to respect human rights in its external action, but not the obligation to protect and fulfill. See Lorand Bartels, *The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects*, Vol. 25, No. 4, 2014 European Journal of International Law <http://ejil.oxfordjournals.org/content/25/4/1071.full.pdf+html> accessed 10 April 2015, 1075.

⁸ The *Strategic Framework on Human Rights and Democracy* establishes the principles, objectives and priorities that must guide EU's action on its human rights and democracy agenda. Among its general objectives, two of them could be highlighted: the EU's and its Member States' commitment to promote the universality of human rights and the EU's determination to promote human rights and democracy in its external action. In addition, the *Strategic Framework* highlights some areas of action related to CSDP. The first Action Plan for its implementation was adopted for the period 2012-2014. See Council of the European Union, *Strategic Framework and Action Plan on Human Rights and Democracy*, 11855/12 (2012), <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/foraff/131181.pdf> accessed 10 November 2014, at 2, 7, 12, 16.

⁹ In any event it is remarkable that the EU has developed a diversity of instruments (the so-called toolkit) in order to contribute to the specific objective of the promotion of human right and democracy worldwide, in particular, the EIDHR, the human rights clauses, the human rights focal points in EU Delegations, the EUSR for Human Rights, and the human rights dialogues and consultations. Moreover, the EU uses other traditional instruments of its CFSP to promote human rights and democracy in its relations with third countries. These instruments respond to the EU's objective of mainstreaming human rights and democracy in all its policies and actions toward third countries. Among them, it can be highlighted the EU's action in multilateral fora, bilateral political dialogues, demarches and declarations, election support, CFSP decisions, restrictive measures and, finally, thematic and geographic financial programmes. For an extensive analysis of priorities identified by the Strategic Framework/Action Plan, see Cristina Churrua Muguruza, Felipe Gómez Isa, Daniel García San José, Pablo Antonio Fernández Sánchez, Carmen Márquez Carrasco, María Nagore Casas and Alexandra Timmer, *Report mapping legal and policy instruments of the EU for human rights and democracy support*, FRAME Report 12.1 <<http://www.fp7-frame.eu/wp-content/materiale/reports/05-Deliverable-12.1.pdf>> accessed 5 May 2015.

¹⁰ On human security and the EU see Wolfgang Benedek, Matthias C. Kettemann and Markus Möstl (eds), *Mainstreaming human security in peace operations and crisis management. Policies, problems, potential* (Routledge 2010); Markus Möstl, *Mainstreaming human rights in the Common Security and Defence Policy: reality or catchphrase?* (2010) Vol. 2 European Yearbook on Human Rights, 247-262.

This agenda aimed at giving response to the challenges of the ‘new wars’ that characterise twenty first century conflicts.¹¹ In the recently adopted *Action Plan on Human Rights and Democracy* (20 July 2015), the EU Council affirms the determination of the Union to address these and new challenges, by stating

Today's complex crises and widespread violations and abuses of human rights and fundamental freedoms require ever more determined efforts by the EU. This Action Plan should enable the EU to meet these challenges through more focused action, systematic and co-ordinated use of the instruments at its disposal, and enhanced impact of its policies and tools on the ground. The EU will put special emphasis on ownership by, and co-operation with, local institutions and mechanisms, including national human rights institutions, as well as civil society. The EU will promote the principles of non-discrimination, gender equality and women's empowerment. The EU will also ensure a comprehensive human rights approach to preventing and addressing conflicts and crises, and further mainstream human rights in the external aspects of EU policies in order to ensure better policy coherence, in particular in the fields of migration, trade and investment, development cooperation and counter terrorism.¹²

A. Research context

The dramatic reality of contemporary conflicts and related violent crises known as the ‘new wars’ is the heavy toll of armed violence on civilians, a phenomenon known as ‘civilianisation of conflicts’. The changing nature of conflict has brought about strategies and tactics that have made vulnerable groups in society the specific target of attack, as the evidence compiled in databases and reports suggests.¹³ In a context of evolving forms of ‘war’ and other forms of violent conflict, the protection of human rights faces unprecedented challenges and poses essential dilemmas.

Against this backdrop, Work Package 10 (WP 10) ‘Human Rights Violations in Conflicts’, part of the FP7 research project ‘Fostering Human Rights Among European (External and Internal) Policies’ (FRAME) aims at providing a comprehensive assessment of the EU external policies in response to conflicts and crisis situations, exploring ways to prevent and overcome violence through the critical assessment of the instruments available to the EU to integrate human rights, humanitarian law and democracy/rule of law principles in these policies. The final goal of this Work Package is to contribute to the fostering of human rights in EU conflict-related policies (as per Cluster 3’s general goal).

¹¹ On current trends on armed conflict and other forms of violence and their interface with human rights violations, see Carmen Márquez Carrasco (editor and main co-author), Laura Iñigo Álvarez, Nora Loozen and Elizabeth Salmón Gárate, *Report survey study on human rights violations in conflict-settings*, FRAME Report 10.1 <<http://www.fp7-frame.eu/wp-content/materiale/reports/08-Deliverable-10.1.pdf>> accessed 3 February 2015.

¹² Council Conclusions on the Action Plan on Human Rights and Democracy 2015-2019, adopted on 20 July 2015 <[http://data.consilium.europa.eu/doc/document/ST-10897-2015-INIT/en/pdf](http://data.consilium.europa.eu/doc/document/ST-10897-2015-INIT/en/pdfhttp://data.consilium.europa.eu/doc/document/ST-10897-2015-INIT/en/pdf)> accessed 25 July 2015, paragraph 2 at 1.

¹³ For patterns, figures and trends see Carmen Márquez Carrasco (editor and main co-author), Laura Iñigo Álvarez, Nora Loozen and Elizabeth Salmón Gárate, *Report survey study on human rights violations in conflict-settings*, FRAME Report 10.1 <<http://www.fp7-frame.eu/wp-content/materiale/reports/08-Deliverable-10.1.pdf>> accessed 3 February 2015, 93-220.

In a previous FRAME Report ‘Survey study on human rights violations in conflict-settings’ it has been provided a comprehensive survey of the various patterns of human rights violations related to conflict and violent crisis situations, with a specific focus on the rights of vulnerable groups, as well as on the role of non-state actors as key players in the context of new forms of violence and war.¹⁴ As indicated in that study, human rights violations in conflict-setting represent clear evidence of the erosion of respect for humanitarian and human rights norms, which has aggravated the protection and assistance needs of refugees and other groups in conflict situations, and complicated the task of providing humanitarian assistance and increased the risks faced by humanitarian personnel.¹⁵

Confronted to this scenario, there is the need to study and clarify the relationship between the regulatory frameworks applicable in conflict situations: international human rights law (IHRL), humanitarian law (IHL) and the legal regime for humanitarian assistance, as well as international refugee law (IRL) and international criminal law (ICL). In many contemporary conflict settings key issues arise regarding the relationship between those legal frameworks. They mainly concern: a) the convergence and complementarity between IHRL and IHL; b) the interpretation of key rules for the protection of civilians like the civilian-combatant distinction or civilian and military objectives; c) the concept of protection from a IHL, IHRL and humanitarian assistance perspective. Specific analysis will be developed on these questions, with a focus on vulnerable groups in society (children, women, internally displaced persons, refugees). This report will also examine the relationship of the applicable international regulatory frameworks with ICL, that arises especially when violence takes a systematic and widespread dimension, amounting possibly to war crimes, crimes against humanity or even genocide. In particular, this study will consider the cooperation with and support of the International Criminal Court (ICC) by the EU as part of a broader analysis of the relationship between the protection of human rights and promoting democracy and international criminal law and the extent to which the application of international criminal law contributes to the promotion of democracy in post-conflict scenarios. The role of truth, justice and reparation as integral components of any process of transition will also be tackled.

B. Research objectives

Against this background, it should be highlighted that the referred legal frameworks applicable in situations of conflict are particularly relevant for the EU and CSDP policy since the TEU links security with human rights and respect for humanitarian law principles.¹⁶ The EU and its Member States are bound by human rights obligations when they are involved in external action in the field of international security.¹⁷ In that context, the EU is also committed to foster compliance with international humanitarian law. The

¹⁴ Carmen Márquez Carrasco (editor and main co-author), Laura Iñigo Álvarez, Nora Loozen and Elizabeth Salmón Gárate, *Report survey study on human rights violations in conflict-settings*, FRAME Report 10.1 <<http://www.fp7-frame.eu/wp-content/materiale/reports/08-Deliverable-10.1.pdf>> accessed 3 February 2015, 220-221.

¹⁵ *Ibid.*

¹⁶ Hadewych Hazelzet, ‘Common Security and Defence Policy: What nexus between human rights and security?’ in Aurel Sari and Ramses A. Wessel *Human Rights in EU Crisis Management Operations: A Duty to Respect and to Protect?* (CLEER Working paper 2012/6) 12.

¹⁷ Frederik Naert, ‘Legal framework governing the protection and promotion of human rights in EU missions-application of EU law principles and instruments’ in Aurel Sari and Ramses A. Wessel *Human Rights in EU Crisis Management Operations: A Duty to Respect and to Protect?* (CLEER Working paper 2012/6), 42.

TEU lists as one of the objectives of EU foreign policy to ‘preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders’.¹⁸

Departing from the idea that the legal framework of EU Common Security and Defence Policy (CSDP) integrates EU law and international law, this report will examine the concurrent application of IHRL and IHL that offer a framework for protection in situations of conflict and violent crisis. Hence this report has the general aim to present and analyse the different international regulatory frameworks applicable to human rights violations with particular attention to vulnerabilities in conflict situations of inter- and intra-State violence.¹⁹ Those legal frameworks can operate at the same time, combining to create a comprehensive legal framework for protection and assistance. However, the contours and consequences of the interaction between the applicable legal frameworks remain unclear with respect to *whom* to protect and *how* to provide protection and assistance.

As main research question this report aims at identifying the notion and scope of the legal status of protection of disadvantaged groups with specific needs in situations of conflict, in view of the interplay and interaction of the key applicable normative frameworks to human rights violations in conflict-settings.

In order to tackle this research question, it is necessary to underline specific research objectives:

- (i) On the relationship and interactions between IHRL, IHL and the law of humanitarian assistance
 - a. To examine how an effective convergence between IHRL and IHL can be developed to extend human rights protection to the victims of conflict and insecurity in particular with regard to vulnerable groups;
 - b. To examine how an effective convergence between IHRL and IHL can be developed to extend human rights compliance to non-state actors and international organisations;
 - c. To analyse the concept of protection from a IHL, human rights and humanitarian assistance perspective;
 - d. To examine what kind of violations of human rights could constitute a threat to international peace and security.
- (ii) On the relationship between the protection of human rights and promoting democracy and ICL
 - a. To analyse to what extent the application of ICL contributes to the promotion of democracy in post-conflict scenarios
 - b. To examine and assess the role of the EU in the protection of human rights and the promotion of democracy and ICL

¹⁸ Art. 21 (2)(c) TEU.

¹⁹ As noted in Carmen Márquez Carrasco (editor and main co-author), Laura Iñigo Álvarez, Nora Loozen and Elizabeth Salmón Gárate, *Report survey study on human rights violations in conflict-settings*, FRAME Report 10.1 <<http://www.fp7-frame.eu/wp-content/materiale/reports/08-Deliverable-10.1.pdf>> accessed 3 February 2015, 27.

- c. To offer the EU some guidelines for its adequate involvement in processes of transition and recovery of historical memory, both within the EU Members and with third States.

The ultimate aim of this report is to suggest how the interaction between the applicable regulatory frameworks should be approached.

C. Methodology and structure

In line with the objectives of the present report, and in order to examine the relationship between the key applicable normative frameworks to human rights violations in conflicts, and the points of interface among them, the report mainly conducts a legal analysis of primary and secondary sources of international and EU law. The different sections of the report review and discuss the scholarly literature in order to situate the research within academic debates on the subject.

The study is structured with an introduction and six sections. The first section of this study offers a basic description of the overlapping legal frameworks applicable to human rights violations in situations of conflict and addresses the basic concepts underlying their application. It describes the applicable legal frameworks as subsets of international law and outlines their purposes and key provisions.

Section II departs from the assumption that ‘the relationship between international humanitarian law and international human rights law is one of the thorniest issues in the recent literature on these two specialised areas of public international law. It has elicited highly theoretical speculations, but there can be no doubts that it is also fraught with very practical consequences’.²⁰ Considering the characteristics of these legal areas, this section aims to provide an overview of their main differences and similarities regarding their application to situations of conflict, to present the theoretical approaches attempting to provide an explanation about the nature of their interplay, and to address the main normative and operational challenges that matter most in the protection of disadvantaged or marginalised groups in armed conflict and other situations of violence.

Section III of the report addresses the notion of protection that stems from the interplay between IHL, IHRL and the law on humanitarian assistance, including an analysis of the EU legal and policy framework on humanitarian assistance.

Section IV addresses the relationship between IHL, IHRL and IRL with the goal to identify the areas where they converge or conflict in providing protection to refugees and displaced populations.

Section V examines the connection between serious violations of human rights and humanitarian law and the doctrine of responsibility to protect (R2P) and assesses the EU’s position and available mechanisms to implement R2P.

²⁰ See Questions of International Law, *On the relationship between IHL and IHRL where it matters once more assessing the position of the European Court of Human Rights after Hassan and Jaloud* (12 May 2015) <<http://www.qil-qdi.org/on-the-relationship-between-ihl-and-ihrl-where-it-matters-once-more-assessing-the-position-of-the-european-court-of-human-rights-after-hassan-and-jaloud/>> accessed 21 June 2015.

Section VI includes legal and policy analysis of norms, case law and documents, as well as scholarly doctrine, on the relationship between the protection of human rights and the promotion of democracy and international criminal law. The section presents an overview of the literature reviewed and summarises the most important points of interface of the applicable regulatory frameworks in relation to transitional justice, ICL and the promotion of democracy. The main aim of this chapter is to analyse in general terms to what extent transitional justice and the application of ICL contributes to the promotion of democracy in conflict and post-conflict situations, and to examine specifically how the EU and Member States are supporting the goals of ICL and the International Criminal Court (ICC).

Under this section specific reference is made to four different dimensions: the first refers to the relations between human rights and promotion of democracy in transition processes from war to peace; the second deals with the roles of truth, justice and reparation as integral components of any process of transition; the third refers to the EU's contribution to the enhancement of human rights protection through the promotion of democracy and international criminal law; and finally, some recommendations are provided regarding the role of the EU and its Member States in the promotion of the ICC.

Lastly, the report provides preliminary conclusions and recommendations on the relationships between the regulatory frameworks applicable to human rights violations in conflict situations and their implications for the EU and Member States.

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I. The applicable legal frameworks to human rights violations in conflicts

A. Introduction

Conflict-settings, identified as one of the five causes of civilian displacement,²¹ bring about the possibility of simultaneous application of IRL and IHL. In these settings, IHRL and ICL are also linked. In some instances IHRL may create a category of crime such as torture or genocide.²² IHL identifies a list of ‘grave breaches’ of the Geneva Conventions, of Additional Protocol I and of other serious violations of the laws and customs of war. These conducts have been recognised as criminal in ICL and subjected to the jurisdiction of international criminal tribunals, including the International Criminal Court (ICC). As noted, the different legal frameworks applicable to human rights violations in conflict situations ‘can operate at the same time, combining to create a comprehensive legal framework for protection and assistance’.²³ After long scholarly debate and disputed practice, it is now generally accepted that ‘international human rights law applies in situations of armed conflict alongside international humanitarian law, but the contours and consequences of this development remain unclear’.²⁴

This section sets the scene of the report by presenting a basic description of the partially overlapping areas of law applicable to human rights violations in situations of conflict, with particular attention to vulnerable groups. Without a thorough examination of all the possible categories of vulnerable groups, key issues regarding the protection of vulnerable groups in conflict are presented. Vulnerable groups that are structurally discriminated against during armed conflict, children, women, refugees and IDPs and indigenous peoples, are included within each sub-section presented within the particular legal frameworks applicable to human rights violations in conflicts.²⁵

B. Purposes and key provisions of the applicable legal frameworks

Under this sub-section the reference to ‘purposes’ and ‘key provisions’ of the applicable legal frameworks to human rights violations in conflict-settings should be understood as their ‘protective goals’ and ‘essential normative guarantees.’ Building on the survey undertaken in a previous FRAME Report (10.1), specific analysis of the protection afforded to children, women, refugees and IDPs is included in relation to each legal framework.

²¹ Carmen Márquez Carrasco (editor and main co-author), Laura Iñigo Álvarez, Nora Loozen and Elizabeth Salmón Gárate, *Report survey study on human rights violations in conflict-settings*, FRAME Report 10.1 <<http://www.fp7-frame.eu/wp-content/materiale/reports/08-Deliverable-10.1.pdf>> accessed 3 February 2015, 179.

²² Chandra Lekha Sriram, Olga Martín-Ortega, Johanna Herman, *War, Conflict and Human Rights, Theory and Practice* (2nd edn Routledge 2014), 59.

²³ Huma Haider, ‘International Legal Frameworks for Humanitarian Action. Topic Guide’ (2013) UK: GSDRC University of Birmingham, 6. <<http://www.gsdrc.org/docs/open/ILFHA.pdf>> accessed 13 February 2015.

²⁴ Gerd Oberletiner, *Human Rights in Armed Conflict. Law, Practice and Policy* (Cambridge University Press 2015).

²⁵ See for further background information and justification on the selection of those vulnerable groups ‘The impact of human rights violations on most vulnerable groups in conflict-settings: figures and trends’ 123-223, Deliverable 10.1 *Report on the survey study on human rights violations in conflict-settings*, FRAME Project.

Vulnerability factors affect these groups in different ways; conflict and violent crisis result in the greater need for an additional layer of protection for groups that are already disadvantaged.

1. International Human Rights Law

a) Purpose and applicability

IHRL is a branch of international law that is designed to protect and promote the human rights of all persons. These rights are considered to be inherent in all human beings, regardless of their nationality, place of residence, sex, ethnic origin, colour, religion, language, or any other status. They are interrelated, interdependent, and indivisible.

The content of IHRL is the protection of all persons (individuals or groups of individuals) under the State's jurisdiction in all situations, regardless of citizenship, against abuse of power of State authorities or the failure by State authorities to ensure human rights. IHRL operates in peacetime and during armed conflict, crisis and disaster settings, although legal instruments contain provisions allowing States to derogate from certain civil and political in situations of emergency.

Typically, human rights law contain both rights and obligations and set out obligations of States to act in a certain way or to refrain from certain acts.²⁶ In terms of human rights protection, States' obligations are threefold: (i) To respect human rights (to refrain from interfering with or curtailing the enjoyment of human rights; to not take any action that would hinder individuals from exercising a specific right.); (ii) To protect human rights (to protect individuals or groups from human rights abuses – in concrete terms to prevent, investigate, punish and ensure redress for human rights violations committed by third – private – parties); and (iii) To fulfil human rights (States must take positive action to facilitate the enjoyment of human rights, to facilitate by increasing access to resources and means of attaining rights, to provide the realisation of the rights to its whole population if it is unable to do so on its own, and to promote the rights of individuals and groups).

²⁶ Office of the High Commissioner of Human Rights (OHCHR), *International Legal Protection of Human Rights in Armed Conflict*, (United Nations Publications 2011) 18.

b) Key sources and provisions

Human rights are guaranteed by legally binding treaties²⁷ which have been reinforced and complemented by customary international law, general principles of law, and soft law instruments. Despite their non-binding nature, soft law instruments often serve to fill substantial gaps and solve interpretative problems within the different legal frameworks applicable to a conflict situation. For instance, soft law has been relied on to supplement the protection of women and children in armed conflict²⁸ or to address gaps in the protection of IDPs.²⁹

Over time, an international system as well as several regional systems for the protection of human rights have developed, with enforcement mechanisms ranging from relatively weak State reports to legally binding judgments by specialised human rights courts and mechanisms to oversee their implementation.³⁰ Important to note, however, is that the number of States party to each treaty varies significantly.³¹

c) Challenges

In its broadest sense the topic of ‘human rights in armed conflict’ is not only about the nature and scope of the interplay between IHRL and IHL, but, as it has been put, ‘comprises profound questions about the purpose, nature, scope of the whole *ius in bello* as a legal framework which governs the use of force in conflict scenarios of various types, within and across States, as well as in situations of occupation (and spills-over into post-conflict scenarios)’.³²

²⁷ International human rights law has been codified in the Universal Declaration of Human Rights and in a number of international and regional treaties. The core international treaties are the International Covenant on Civil and Political Rights (ICCPR) and its two Optional Protocols, the International Covenant of Economic, Social and Cultural Rights (ICESCR) and its Optional Protocol, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol, the Convention on the Rights of the Child and its three Optional Protocols, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the International Convention for the Protection of All Persons from Enforced Disappearance, and the Convention on the Rights of Persons with Disabilities and its Optional Protocol. Apart from these treaties, further binding documents exist on regional level, prominently among those are the European Convention on Human Rights (ECHR) and the American Convention on Human Rights. On the different instruments for human rights protection adopted at UN and regional levels see ‘Report on the mapping study on relevant actors in human rights protection’ Deliverable 4.1 FRAME Project.

²⁸ UN Security Council Resolutions on Children in Armed Conflict and on Women Peace and Security.

²⁹ UN Economic and Social Council, Guiding Principles on Internal Displacement (1998), E/CN.4/1998/53/Add.2, <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G98/104/93/PDF/G9810493.pdf?OpenElement>>, accessed 15 September 2015.

³⁰ See Deliverable 4.1, FRAME Project, 4.

³¹ The Convention on the Rights of the Child has been ratified by 193 states, whereas the Migrant Workers Convention has 47 members. See <https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-13&chapter=4&lang=en> accessed 2 May 2015.

³² For an presentation and analysis of such debate see Gerd Oberletiner, *Human Rights in Armed Conflict. Law, Practice and Policy* (Cambridge University Press 2015) 2.

In a narrow sense, the topic involves questions mainly related to the application of IHRL to armed conflict, which pose a series of challenges that have been the subject of extensive discussion over the last years. As summarised by one of the experts in the field, the main challenges comprise:

- the scope of applicability of human rights law, and whether it applies to all situations of armed conflict. This question revolves largely around the issue of extraterritorial applicability of human rights obligations.³³
- Whether human rights bodies have the mandate and necessary expertise to evaluate military operations.³⁴
- Conceptual differences between IHRL and IHL: IHRL and IHL as different languages³⁵
- IHRL and IHL during non-international armed conflicts³⁶
- Economic, social and cultural rights during armed conflict³⁷

In addition to these challenges, the question may be added as to the binding character of human rights law on armed non-state actors (ANSAs), particularly to those who exercise government-like functions³⁸, and on the protection of the rights of vulnerable groups in conflict scenarios.

d) Protection of vulnerable groups

The initial human rights documents do not single out any particular group for special human rights treatment, however the notion of ‘vulnerability’ is closely linked to the principle of non-discrimination and equality. Protection of certain categories of persons can be found in specific treaties, but also general treaty bodies contain additional guarantees for persons belonging to these groups.³⁹ There is no universal definition of what constitutes a vulnerable group, however the recognition of the need to protect the rights and interests of the vulnerable has been a recurrent theme in the work of international and regional human rights bodies and international and domestic courts, which have devoted attention to the protection of certain, although not necessarily the same, groups of vulnerable people such as, for instance, children, women and ethnic minorities.⁴⁰

Regarding children, in addition to specific treaties on children’s rights, the Convention on the Rights of the Child and its Optional Protocol⁴¹, a number of UN Security Council Resolutions have contributed to

³³ Noam Lubell, ‘Challenges in applying human rights law to armed conflict’ (2005) Vol. 87 No. 860 *International Review of the Red Cross* 739.

³⁴ *Ibid*, 742.

³⁵ *Ibid*, 745

³⁶ *Ibid*, 746

³⁷ *Ibid*, 751-753.

³⁸ See Deliverable 10.1 FRAME Project, 107.

³⁹ Lourdes Peroni and Alexandra Timmer, ‘Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law’ (2013) 11 (4) *Int J Constitutional Law*, 1061-1062.

⁴⁰ See *inter alia* Audrey R. Chapman and Benjamin Carbonetti, ‘Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Economic, Social and Cultural Rights’ (2011) 33 (3) *Human Rights Quarterly*, 682–732; Lourdes Peroni and Alexandra Timmer, ‘Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law’ (2013) 11 (4) *Int J Constitutional Law*, 1056–1085.

⁴¹ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict adopted in 2000 addresses the issue of recruitment and use of children in armed conflict.

developing the framework for protection of children affected by armed conflict.⁴² The main guiding principles for the protection of children under IHRL are the principle of non-discrimination,⁴³ best interests of the child,⁴⁴ the right to life, survival and development⁴⁵ and the right to participation.⁴⁶ The CRC provides specific protection of children in times of armed conflict,⁴⁷ however it is arguable to what extent all provisions of the CRC apply during armed conflict, as there is no provision that allows derogation in times of armed emergency, as there are with other human rights instruments.⁴⁸ The hierarchy of rights and the interaction between rights and needs of children during and after armed conflicts is the subject of discussion amongst aid actors and the international community.⁴⁹

The EU's commitment to protecting children is underlined in the EU Guidelines on the Rights of the Child,⁵⁰ adopted in 2007 and the more specific EU Guidelines on children affected by armed conflict, adopted in 2003 and revised in 2008.⁵¹

Concerning women, the Convention on the Elimination of Discrimination against Women (CEDAW) is the main specific legal instrument for the protection of women, complemented by a number of Security Council Resolutions on Women, Security and Peace, which provide a conflict-specific framework for protection, prior to, during, and in the aftermath of conflict.⁵² The participation of women in peace-

⁴² Security Council Resolutions on Children in Armed Conflict: UNSC Resolution 1379 (2001) on the protection of children during peacekeeping operations; UNSCR 1460 (2003) endorsed an 'era of application' of international norms and standards for the protection of war-affected children; UNSCR 1539 (2004) condemned the use of child soldiers and asked UNSG to establish a monitoring mechanism; UNSCR 1612 (2005) on the establishment a monitoring and reporting mechanism on use of child soldiers; UNSCR 1882 (2009) including parties responsible for the killing and maiming and/or rape and other sexual violence against children in the list monitoring grave human rights violators ('shame list'); UNSCR 1888 (2009) on acts of sexual violence against civilians in armed conflicts; UNSCR 1998 (2011) calling peacekeeping missions to protect women and children from sexual violence during armed conflict; UNSCR 2068 (2012) on the imposition of sanctions against armed groups persistently violating rights of children; UNSCR 2143 (2014) on preventative training for militaries, police and peacekeepers in child protection and UNSCR 2225 (2015) adding parties abducting children during armed conflict to list monitoring grave human rights violators.

⁴³ Art. 2 CRC.

⁴⁴ Art. 3 CRC.

⁴⁵ Art. 6 CRC.

⁴⁶ Art. 12 CRC.

⁴⁷ Article 38 CRC specifically addresses the issue of protecting children in times of armed conflict and Article 39 related to the post-conflict care of children, namely rehabilitation and reintegration of children who have been victims of armed conflict.

⁴⁸ For instance Art. 4 ICCPR.

⁴⁹ Rachel Harvey, *Children and Armed Conflict. A guide to international and humanitarian law* (2003), <http://www.essex.ac.uk/armedcon/story_id/000911.pdf>, accessed 10 September 2015, 13.

⁵⁰ Council of the European Union, 'EU Guidelines for the Promotion and Protection of the Rights of the Child', (2007), <<http://www.consilium.europa.eu/uedocs/cmsUpload/16031.07.pdf>>, accessed 10 September 2015.

⁵¹ Council of the European Union, 'Update of the Guidelines on Children and Armed Conflict' (2008), <http://eeas.europa.eu/human_rights/child/ac/docs/eu_guidelines_children_armed_conflict_en.pdf>, accessed 10 September 2015.

⁵² Security Council Resolutions on Women, Peace and Security: UNSCR 1325 (2000) on women, peace and security and the incorporation of a gender perspective into peacekeeping missions; UNSCR 1327 (2000) on the role of women in conflict prevention and resolution and peacebuilding; UNSCR 1366 (2001) on DDR in UN peacekeeping and peacebuilding mandates; UNSCR 1408 (2002) on civil society initiatives in the region, particularly gender-focus

building and post-conflict processes, and in political and public life, is receiving increasing attention. The protection of women against trafficking and threats against personal safety are also key issues of concern, in relation to women.

With regard to the protection of refugees and IDPs, IHRL has contributed to the development of policies for IDPs, who are not afforded protection under IRL. The main rights guaranteed under IHRL in relation to forcibly displaced people, are freedom of movement and the freedom to choose one's residence. Indigenous peoples rights to land and to self-determination are amongst the most threatened human rights of IDPs in situations of conflict.

Table I-1: Purposes and key provisions of International Human Rights Law (IHRL)⁵³

Purpose and applicability	<ul style="list-style-type: none"> ▪ Protection of all persons (individuals or groups of individuals) under the State's territory and/or jurisdiction in all situations, regardless of citizenship, against abuse of power of State authorities or failure by State authorities to ensure human rights. ▪ Operates in peace time and during armed conflict, crisis and disaster settings. ▪ Applies to States (obligation to act in a certain way or to refrain from certain acts) and confers rights to individuals. ▪ Wide range of enforcement mechanisms. ▪ Dependent on State ratification .
Key sources of law	<ul style="list-style-type: none"> ▪ Treaties <ul style="list-style-type: none"> - International Covenant on Civil and Political Rights (ICCPR) 1966 - International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966. - Convention on the Prevention and Punishment of Genocide (1948) - Convention on the Elimination of Discrimination against Women (CEDAW), 1979 - Convention on the Elimination of All Forms of Racial Discrimination (CERD) (1965). - Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984). - Convention on the Rights of the Child (1989).

initiative, and their contribution towards regional peace. ; UNSCR 1820 (2008) on sexual violence in conflict and post-conflict situations and asking the Secretary-General for a report with information on the systematic use of sexual violence in conflict areas and proposals to minimize the prevalence of such acts; UNSSCR 1888 (2009) strengthening efforts to end sexual violence against women and children in armed conflict; UNSCR 1889 (2009) to ensure that women's protection and empowerment is taken into account during post-conflict needs assessment and planning; UNSCR 1960 (2010) establishing a monitoring, analysis and reporting mechanism on conflict-related sexual violence; UNSCR 2106 (2013) on accountability for perpetrators of sexual violence in conflict and stressing women's political and economic empowerment; UNSCR 2122 (2013) addressing persistent gaps in the implementation of the women, peace and security agenda.

⁵³ Table I.1. is partly based on Huma Haider, *International legal frameworks for humanitarian action: Topic guide* (Birmingham, UK: GSDRC, University of Birmingham, 2013) <<http://www.gsdr.org/docs/open/ILFHA.pdf>> accessed 20 April 2015.

	<ul style="list-style-type: none"> - International Convention for the Protection of All Persons from Enforced Disappearance (2006). - Convention on the Rights of Persons with Disabilities (2006) ▪ Customary international human rights law. ▪ General principles of law: <i>jus cogens</i> norms. ▪ Judicial decisions and teachings: various decisions by human rights bodies (treaty implementing bodies); the International Court of Justice (ICJ) ▪ Supplementary non-binding soft law: Guidelines and resolutions from the UN Security Council and the General Assembly.
Key provisions	<ul style="list-style-type: none"> ▪ States assume obligations and duties under IHRL to respect, to protect and to fulfil human rights. ▪ Human rights are interrelated, interdependent, and indivisible. ▪ Human rights are classified into civil and political rights; economic, social and cultural rights; and the contested category of collective rights. ▪ There are a number of human rights protected under IHL. ▪ Allows States to derogate from certain civil and political in situations of emergency (Article 4 ICCPR).
Current challenges	<ul style="list-style-type: none"> ▪ Accountability of non-state actors for human rights violations, particularly in exercise government-like functions. ▪ Debate over the collective dimension of human rights ('third generation of rights')
Protection of vulnerable groups	
Children	
Additional sources	<ul style="list-style-type: none"> ▪ Convention on the Rights of the Child ▪ ILO Convention 182 (1999) ▪ Security Council Resolutions on Children in Armed Conflict S/RES/1261(1999); S/RES/1314(2000); S/RES/1379(2001); S/RES/1460(2003); S/RES/1539(2004); S/RES/1612(2005); S/RES/1882(2009); S/RES/1998(2011); S/RES/2068(2012); S/RES/2143(2014); S/RES/2225(2015).
Key issues	<ul style="list-style-type: none"> ▪ The main guiding principles are non-discrimination (Article 2 CRC), the best interests of the child (Article 3 CRC), the right to life, survival and development (Article 6 CRC), and the right to participation (Article 12 CRC).
Women	
Additional sources	<ul style="list-style-type: none"> ▪ Convention on the Elimination of Discrimination against Women (CEDAW) (1979). ▪ CEDAW Committee General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations (2013). ▪ Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2000). ▪ Security Council Resolutions on Women, Peace and Security S/RES/1325(2000); S/RES/1327(2000); S/RES/1366(2001); S/RES/1408(2002); S/RES/1820(2008); S/RES/1888(2009); S/RES/1889(2009); S/RES/1960(2010); S/RES/2106(2013); S/RES/2122(2013)

Key issues	<ul style="list-style-type: none"> ▪ Special protection of women, especially against sexual violence and trafficking and threats against personal safety. ▪ Enhancement of women participation in peace-building and post-conflict, and political and public life.
Refugees and IDPs	
Additional sources	<ul style="list-style-type: none"> ▪ Guiding Principles on Internal Displacement (1998) ▪ Human Rights Committee, General Comment 27, Freedom of movement (Art.12)
Key issues	<ul style="list-style-type: none"> ▪ IHRL has contributed to the development of policies for IDPs, who are not afforded protection under IRL. ▪ Freedom of movement (Article 12 ICCPR) outlaws forced displacement other than on exceptional grounds. ▪ Freedom to choose one's residence, freedom from arbitrary interference in one's home, and the right to housing.
Indigenous peoples	
Additional sources	<ul style="list-style-type: none"> ▪ International Convention on the Elimination of All Forms of Racial Discrimination (1965). ▪ ILO Indigenous and Tribal Peoples Convention No. 169 (1979). ▪ CRC Committee General Comment No. 11 'Indigenous Children and their Rights under the Convention' (2009).
Key issues	<ul style="list-style-type: none"> ▪ Indigenous rights to land and to self-determination are most threatened.

2. International Humanitarian Law

a) Purpose and applicability

IHL is a set of rules which seek to limit the effects of armed conflict by striking a balance between military necessity and humanity. This set of rules is aimed at protecting persons who do not take part in hostilities and restricts the means and methods of warfare. Unlike IHRL which applies at all times, IHL only operates in armed conflict. Despite the prohibition of the threat and the use of force in the United Nations Charter,⁵⁴ IHL applies to all parties in armed conflict – regardless of who has started and for what reason.⁵⁵

From a legal point of view, in order to determine whether IHL applies to situations of violence, it is necessary to determine as a precondition whether the situation amounts to an 'armed conflict'.⁵⁶ The IHL framework can be divided into two sub-categories or typologies, as it has been generally contented by

⁵⁴ United Nations Charter Article 2, paragraph 4.

⁵⁵ IHL is part of *ius in bello* (the law of how force may be used), as opposed to *ius ad bellum* (the law on the legality of the use of force). On this distinction see Carmen Márquez Carrasco, *Problemas actuales sobre la prohibición del recurso a la fuerza en Derecho Internacional* (Tecnos 1998) 14-18.

⁵⁶ On the difficulties around the legal notion of 'armed conflict' see Deliverable 10.1 FRAME.

scholarly doctrine:⁵⁷ international armed conflict (IAC) and non-international armed conflict (NIAC).⁵⁸ The changing character of armed conflicts evidenced since the 1990s in the ‘new wars,’ has altered the simple division into these two types of armed conflicts.⁵⁹ The majority of current armed conflicts are ‘mixed conflicts’/internal, which are not limited to a specific region or territory of a single State, but occur in ‘international space’.⁶⁰

IHL works on the premise of equality of belligerents in an armed conflict, while IHRL has been constructed around the relationship between the State and the individual. It is precisely the rule of equality between belligerents that distinguishes an armed conflict, where IHL applies, from a crime, to which criminal law and human rights rules on law enforcement are applicable.⁶¹

With regards to its scope of protection, States have both positive and negative obligations under IHL and States can be responsible for a violation of its norms through action, omission or inadequate action, similar to human rights law. In IHL, States are specifically obliged *to protect and to ensure respect*.⁶² In certain aspects, a State’s obligation under IHL functions similarly to human rights duties: in particular the prohibitions of for example; physical and moral coercion exercised against protected civilians and prisoners of war; violence directed against persons taking no active part in the hostilities; the requisition of foodstuffs and hospitals in occupied territories; attacks against indispensables for the survival of the civilian population.⁶³

⁵⁷ See Marko Milanovic and Vidan Haadzi-Vidanovic, ‘A Taxonomy of armed conflict’ in Nigel D. White and Christian Henderson (eds.) *Research Handbook on International Conflict and Security Law* (Edward Elgar 2013), 256-314; Dapo Akande, ‘Classification of Armed Conflicts: Relevant Legal Concepts’ in Elizabeth Wilmhurst (ed.) *International Law and the Classification of Conflicts* (Oxford University Press 2012) 32-79; Dietrich Schindler, ‘The Different Types of Armed Conflict According to the Geneva Conventions and Protocols’ (1979) vol. 163 II *Recueil des Cours de l’Academy de Droit International* 147.

⁵⁸ ICRC, ‘Opinion paper: definition of ‘international’ and ‘non-international armed conflict’ in International Humanitarian Law’ (March 2008) <<http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>>, accessed 20 May 2015.

⁵⁹ See Deliverable 10.1 FRAME Project, 23.

⁶⁰ Jed Odermatt, ‘New Wars’ and the International/Non-international Armed Conflict Dichotomy, <<http://www.isisc.org/dms/images/stories/PDF/Paper%20Odermatt.pdf>><http://www.isisc.org/dms/images/stories/PDF/Paper%20Odermatt.pdf><http://www.isisc.org/dms/images/stories/PDF/Paper%20Odermatt.pdf><http://www.isisc.org/dms/images/stories/PDF/Paper%20Odermatt.pdf>> accessed 15 July 2015.

⁶¹ OHCHR, Report on International Legal Protection of Human Rights in armed conflict, 2011, 5. <http://www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf> accessed 2 April 2015.

⁶² OHCHR, Report on International Legal Protection of Human Rights in armed conflict, 2011, 17 <http://www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf> accessed 2 April 2015; Rule 144, List of Customary Rules of International Humanitarian Law, in: Jean-Marie Henckaerts (2007), 210; Art. 1 common to the GCs, Art. 1 AP I, Art. 1 AP III.

⁶³ Rules 53-56 –Jean-Marie Henckaerts, (2007), 203; Rules 88 -105 - idem, 206 ff.

b) Key sources and provisions

Similarly to IHRL, IHL is based on a variety of binding treaties,⁶⁴ as well as customary international humanitarian law and non-binding instruments.⁶⁵ IHL treaties do not contain treaty-specific enforcement mechanisms in the same way as some IHRL treaties.

As opposed to IHRL, IHL is formulated as objective rules of conduct for States and armed groups and generally does not confer rights upon the individual. However, some rules are framed as subjective rights, in particular fundamental guarantees for all persons in the control of a party to the conflict and rules in non-international armed conflicts (NIACs).⁶⁶ Despite its nuances of formulation, IHL may be considered to protect the 'hard core' of human rights during armed conflict. Both treaties and customary IHL stipulate an obligation on States to take precautionary measures, to the maximum extent feasible, to protect civilian population, for instance by endeavoring to keep military objectives and combatants away from densely populated areas.⁶⁷ In order to fulfill its obligations, States must care for the wounded and sick, shelter prisoners, or, as an occupying power, must to the fullest extent of the means available to it, ensure food and medical supplies, public health and hygiene, in the territory it occupies.

c) Challenges

The legal framework of IHL is characterised by the principles of distinction and proportionality. Considered as an expression of customary international law, the principle of distinction, specified in Article 48 of the Additional Protocol (AP) 1 to the Geneva Conventions (GC), related to the victims of international armed conflicts, states that 'the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their

⁶⁴ The main instruments are: The Hague Regulations respecting the Laws and Customs of War on Land, the Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; the Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, the Geneva Convention (III) relative to the Treatment of Prisoners of War, the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, the Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of International Armed Conflict (AP I), and the Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of Non-International Armed Conflicts (AP II). The Hague Regulations are considered customary international law, the four Geneva Conventions are universally ratified. Many of the provisions contained in the Geneva Conventions and their Additional Protocols are considered customary international humanitarian law and applicable in any armed conflict. See overview in Jean-Marie Henckaerts, 'Study on customary international humanitarian law: a contribution to the understanding and respect for the rule of law in armed conflict', *International Review of the Red Cross*, (2007) 87(857) 198 – 212. In addition, certain other treaties exist that deal with the production, use and stockpiling of certain weapons, i.e. the Convention on Cluster Munition.

⁶⁵ ICRC *Study and Database on Customary International Humanitarian Law*, <<https://www.icrc.org/en/war-and-law/treaties-customary-law/customary-law>> accessed 3 February 2015.

⁶⁶ OHCHR 2011, *Report on International Legal Protection of Human Rights in armed conflict* <http://www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf> accessed 2 April 2015, 15; e.g. the right to persons whose liberty has been restricted to receive individual or collective relief or the right of families to know the fate of their relatives.

⁶⁷ OHCHR 2001, *Report on International Legal Protection of Human Rights in armed conflict*, 18 <http://www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf>, accessed 2 April 2015.

operations only against [the latter]’.⁶⁸ This principle of distinction aims at protecting the civilian population not taking part in hostilities, against the implications of hostilities and has to be respected in IAC as well as in NIAC. The violation of this principle of IHL might constitute a war crime, leading to individual criminal responsibility, within the ICL framework, and also under domestic criminal law.⁶⁹

Similar to Article 48 of the AP I to the GCs, Article 51 (5) b is also recognised as customary international law, which has to be respected in both IAC and NIAC. It covers the rule of proportionality directed at the avoidance of incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be considered excessive in relation to the concrete and direct military advantage anticipated. Therefore, even if the rule of distinction is fulfilled, an attack may still be unlawful by causing unacceptable civilian harm. A violation of this rule might also lead to individual criminal responsibility for committing a war crime.⁷⁰ The principle of proportionality complements the prohibition of indiscriminate attacks, even if it is difficult to demonstrate the recklessness of the attacking party. Hence, an assessment of the proportionality has to be made prior to the attack which demands an objective balancing between the expected possible loss of civilian lives and the concrete and direct military advantage.⁷¹ When it comes to the problem of what is *excessive*, no clear answer can be given. According to the Committee Established by the ICTY to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, this question has to be decided on a case by case basis,⁷² whereas the International Committee of the Red Cross (ICRC) declared that where there is doubt about the excessiveness of an attack, the interest of the civilian population should always be given priority.⁷³ In regards to the use of certain weapons, international law attempts to outlaw them by treaty or to restrict their use if they are considered to cause in general, excessive harm to the civilian population.⁷⁴

For instance, concerning the use of explosive weapons or cluster munitions,⁷⁵ if they are applied in, or close to, a densely populated area, it is likely to be a violation of the principle of proportionality, because of the afore mentioned aspect of inaccuracy and the wide-area effects of these particular weapons. The

⁶⁸ Art. 52 (2) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) UNTS vol. 1125, I-17512.

⁶⁹ As an example it can be cited a judgment of the ICTY concerning the use of Cluster Munitions against Zagreb in 1995. The Tribunal asserted in this case that cluster munitions were incapable of hitting a specific target and therefore its unlawful use constituted a violation of the principle of distinction. ⁶⁹ Stuart Casey-Maslen & Sharon Weill, ‘The use of weapons in armed conflict’, in Stuart Casey-Maslen (ed.) *Weapons under International Human Rights Law* (Cambridge University Press 2014) 262-263.

⁷⁰ Art. 85 (3)(b) AP I; Art. 8 (2)(b)(iv) ICC Statute.

⁷¹ Alexander Breitegger, *Cluster Munitions and International Law: Disarmament with a Human Face?* (Routledge 2012) 48.

⁷² ICTY, ‘Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia’ <http://www.icty.org/x/file/Press/nato061300.pdf>, accessed 10 September 2015, para. 50.

⁷³ Yves Sandoz et al. (eds.), ICRC, *Commentary on the Additional Protocols of June 1977 to the Geneva Conventions of 12 August 1949*, para. 1980.

⁷⁴ Stuart Casey-Maslen & Sharon Weill, ‘The use of weapons in armed conflict’, in Stuart Casey-Maslen (ed.) *Weapons under International Human Rights Law* (Cambridge University Press 2014) 264 -268.

⁷⁵ The Convention on cluster munitions even totally prohibits the use, transfer and stockpile of cluster munitions.

issue of long-term implications for civilians and especially for children, caused by the high failure rate of accurate targeting of these weapons in conflict, should be taken into consideration in the proportionality assessment, which is however still subjected to debate.⁷⁶

If an attack triggers aggravated suffering, injury or destruction, it should be forbidden as long as it is not proportionally necessary for military reasons. Hence, an attack has to be essential, whereas military utility might not be sufficient to legitimate human suffering. Disarmament treaties can be considered a result of the intention to balance military necessity and the need to limit the use of weapons for the protection of humanity.⁷⁷

d) Protection of vulnerable groups

IHL grants general protection to civilians and special protection to certain groups. In this regard, specific provisions can be found in the Geneva Conventions and Additional Protocols⁷⁸ and in the UN Security Council Resolutions addressing the special needs of children and women. Particularly relevant is the UNSCR 1612(2005) which identifies the six most serious violations of children's rights in times of armed conflict.⁷⁹ However, a single fixed definition of 'children' does not exist, instead a variable level of protection according to different age thresholds is in existence.⁸⁰ In addition to the protection provided for children as victims or witnesses of armed conflict, the Additional Protocols to the Geneva Conventions prohibits the recruitment and use of children in armed conflict under the age of 15,⁸¹ and awards special treatment to captured child combatants.⁸²

At EU level, the EU guidelines on the protection of children affected by armed conflict together with other EU guidelines on relevant areas of action for the work of CSDP operations and missions, provide a comprehensive framework for the realisation of the EU's human rights priority for protection of children through EU's crisis management actions.⁸³

⁷⁶ Alexander Breitegger, *Cluster Munitions and International Law: Disarmament with a Human Face?* (Routledge 2012) 48-49.

⁷⁷ ICRC *Study and Database on Customary International Humanitarian Law*, <<https://www.icrc.org/en/war-and-law/treaties-customary-law/customary-law>> accessed 3 February 2015.

⁷⁸ Special protection for children is provided under Art. 77 API (IACs) and Art. 4 APII (NIACs).

⁷⁹ UNSCR 1612 (2005) on the establishment a monitoring and reporting mechanism on use of child soldiers.

⁸⁰ The general age for children protection is 15 years, both under IHL and Art. 38 CRC. The age of 18 is established in the Genocide Convention and Art. 18 API on the recruitment of children. New-born babies are assimilated to the wounded or sick for the purposes of Art. 8 API. Children under the age of seven are granted special protection under the scope of protection for mother with dependent children. Art. 24 GC IV requires the identification all children under 12 years. See José Luis Rodríguez-Villasante y Prieto, La protección del niño en los conflictos armados por el Derecho Internacional Humanitario. Los niños soldados (2011) no. 5, *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid*, <<http://www.uam.es/otros/afduam/pdf/15/Jose%20Luis%20Rgez.pdf>>, accessed 15 September 2015, 222.

⁸¹ Art. 77 API and 4(3)(c) APII.

⁸² Art. 77(3) API and Art. 4 (3)(d)APII.

⁸³ Council of the European Union, 'Updated European Union Guidelines on promoting compliance with international humanitarian law', <<http://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:52009XG1215%2801%29&from=EN>>, accessed 10

Women also receive special attention under IHL, however this category raises the question on whether women are more vulnerable than men in situations of armed conflict. Men are generally at greater risk of being detained, wounded or killed due to their potential or actual role as military opponents while women and girls are much more exposed to sexual violence. Therefore, under IHL, only in specific situations or based on specific factors, can women be considered as particularly vulnerable and in need of special protection.⁸⁴ The Geneva Conventions and its Additional Protocols offer special protection particularly against sexual violence, which can amount to a method of warfare under certain circumstances.⁸⁵ Pregnant women and mothers of young children are also entitled to particular care.⁸⁶ As with children, specific provisions on the treatment of women in detention, address their particular needs under these circumstances.⁸⁷

The EU has also set out a common approach to the implementation of UNSC Resolutions 1325 and 1820 to ensure that the EU's external actions are shaped to protect women from violence, particularly in terms of prevention and in response to sexual and gender-based violence.⁸⁸

Conflict-related protection is afforded to forcibly displaced persons, particularly relevant in the case of IDPs as they are not covered by IRL. Parties to an armed conflict may not displace civilians unless for the security of the civilians involved or because imperative military reasons so demand.⁸⁹ In any event displaced persons have a right to voluntary return as soon as the reasons for their displacement cease to exist.⁹⁰

September 2015; Council of the European Union, 'Guidelines to EU policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment (an update of the guidelines)', <http://eeas.europa.eu/human_rights/guidelines/torture/docs/20120626_guidelines_en.pdf>, accessed 10 September 2015; Council of the European Union, 'Guidelines on Protection of Civilians in CSDP Missions and Operations', <<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2013047%202010%20INIT>>, accessed 3 September 2015; Council of the European Union, 'Generic Standards of Behaviour for ESDP Operations', <<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%208373%202005%20REV%203>>, accessed 10 September 2015.

⁸⁴ ICRC, 'Women in war: a particularly vulnerable group?' (2007), <<https://www.icrc.org/eng/resources/documents/feature/2007/women-vulnerability-010307.htm>>, accessed 16 September 2015.

⁸⁵ Art. 27 GC IV and UN Security Council, Security Council resolution 1820 (2008) [on acts of sexual violence against civilians in armed conflicts], 19 June 2008, S/RES/1820 (2008), <<http://www.refworld.org/docid/485bbca72.html>>, accessed 16 September 2015.

⁸⁶ Art. 16, 17, 18, 21, 22, 23, 38, 50, 89, 91 and 127 GC IV; Ar. 70(1) and 76(2) AP I.

⁸⁷ Art. 14 GC III.

⁸⁸ 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' (2008) 15671/1/08, <<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015671%202008%20REV%201>>, accessed 15 September 2015.

⁸⁹ Art. 47 and 49 GC IV.

⁹⁰ Art. 49 GC IV.

Table I-2: Purposes and key provisions of International Humanitarian Law (IHL)⁹¹

Purpose and applicability	<ul style="list-style-type: none"> Seeks to limit the effects of armed conflict by protecting persons who are not or no longer participating in the hostilities and restricts the means and methods of warfare. Operates in situations of armed conflict. Applies to all parties to a conflict (equality between the belligerents).
Key sources of law	<ul style="list-style-type: none"> Treaties. <ul style="list-style-type: none"> Hague Regulations (1907) The four Geneva Conventions (1949) Additional Protocols to the Geneva Conventions I and II (1977) Other international treaties regulate the conduct of armed hostilities and impose limitations on the use of certain weapons. Customary international humanitarian law. General Principles of law, <i>ius cogens</i> norms. Judicial decisions and teachings.
Key provisions	<ul style="list-style-type: none"> Principle of distinction Principle of proportionality (Article 51 (5) b) AP I) Principle of necessity and human treatment (Article 27 GC IV) Obligation of States to respect and protect humanitarian relief personnel. Obligation of occupying powers to provide for the welfare of the population in the occupied territory. Rules on access to affected population and delivery of humanitarian assistance in international armed conflict. Principles of non-discrimination and positive measures concerning vulnerable groups.
Current challenges	<ul style="list-style-type: none"> Respect of IHL norms by peacekeeping and peace enforcement operations. IHL applicability to non-state armed groups. Requirement of consent of State parties to undertake relief actions. Different provisions applied to international (GCs and AP I) and non-international armed conflicts. (Common article 3 and AP II) Difficulties in the practical application of IHL principles of proportionality and distinction. Choice of weapons and new weapon technologies.
Protection of vulnerable groups	
Children	
Additional sources	<ul style="list-style-type: none"> Geneva Conventions of (1949) and its Additional Protocols (1977) <ul style="list-style-type: none"> GC III: Articles 16, 49. GC IV: Articles 14, 16, 17, 18, 21, 22, 23, 24, 25, 25, 26, 27(2), 38, 49, 50, 51, 68, 76, 81, 82, 85, 89, 91, 94, 119, 127, 132, 136 to 140 AP I: 8, 53, 70, 74, 75, 76, 77, 78. AP II: 4, 5, 6. Security Council Resolutions on Children in Armed Conflict:

⁹¹ Table I.2 is partly based on Huma Haider, *International legal frameworks for humanitarian action: Topic guide* (Birmingham, UK: GSDRC, University of Birmingham, 2013) <<http://www.gsdr.org/docs/open/ILFHA.pdf>> accessed 20 April 2015.

	S/RES/1261(1999); S/RES/1314(2000); S/RES/1379(2001), S/RES/1460(2003); S/RES/1539(2004); S/RES/1612(2005); S/RES/1882(2009); S/RES/1998(2011); S/RES/2068(2012); S/RES/2143(2014); S/RES/2225(2015).
Key issues	<ul style="list-style-type: none"> Children affected by armed conflict are entitled to special care and protection (Article 23, 24, 38, 50, 76 and 77 GC IV; Article 70 and 77 AP I; Article 4(3) AP II) Recruitment of children (Article 77(2) API, 4(3) AP II and 38 CRC) Reintegration of children affected by armed conflict (Paris Principles and Article 39 CRC) Killing or maiming of children (Common Article 3 GCs) Rape and other grave sexual abuse of children. (Article 77(1) AP I and 37 CRC) Attacks against school and hospitals (Article 48 AP I) Abduction of children (Article 35 CRC) Denial of humanitarian access for children (Article 23 GC IV)
Women	
Additional sources	<ul style="list-style-type: none"> Geneva Conventions of (1949) and its Additional Protocols (1977) <ul style="list-style-type: none"> GC I: Articles 3, 12 GC II: Articles 3, 12 GC III: Articles 3, 14, 16, 25(4), 29, 49, 88(2), 3, 97(4), 108(2) GC IV: Articles 3, 14(1), 16, 17, 21, 22(1), 23(1), 27(2), 38(5), 50(5), 76(4), 85(4), 89(5), 91(2), 97/4, 98(2), 119(2), 124(3), 127(3), 132(2) AP I: Articles 8(a), 70(1), 75(1), 75(5), 76 AP II: Articles 4(2)e, 5(2)a, 6(4) Security Council Resolutions on Women, Peace and Security S/RES/1325(2000); S/RES/1327(2000); S/RES/1366(2001); S/RES/1408(2002); S/RES/1820(2008); S/RES/1888(2009); S/RES/1889(2009); S/RES/1960(2010); S/RES/2106(2013); S/RES/2122(2013)
Key issues	<ul style="list-style-type: none"> Women affected by armed conflict are entitled to special protection (Article 12(4) GC I; Article 12(4) GC II; Articles 14 and 15 GC IV) including relief aid. (Article 23 GCIV; Art. 70(1) AP I) Particular care for pregnant women and mothers of young children (Articles 16, 17, 18, 21, 22, 23, 38, 50, 89, 91 and 127 GC IV; Article 70(1) and 76(2) AP I) Special protection from sexual violence (Art. 27 GC IV) Special treatment for women deprived of their freedom. Art. 14 GC III Sexual violence has been recognized as a method of warfare under certain circumstances (S/RES/1820(2008) and by judicial decisions of International Criminal Courts
Refugees and IDPs	
Additional sources	<ul style="list-style-type: none"> Geneva Conventions of (1949) and its Additional Protocols (1977) <ul style="list-style-type: none"> GC IV: Articles 44, 45, 49, 70 AP I: Articles 73, 85 AP II: Article 17
	<ul style="list-style-type: none"> Different conflict-related protection afforded to refugees (IHL and International Refugee Law) and IDPs (IHL).

Key issues	<ul style="list-style-type: none"> ▪ Additional protection for displaced persons is provided by the GCs with respect for family unity. (Article 49 GC IV) ▪ Parties to an armed conflict may not displace the civilian unless for the security of the civilians involved or imperative military reasons so demand. (Article 47 and 49 GC IV) ▪ Occupying powers have the duty to protect and provide aid. (Article 49 GC IV) ▪ States may not deport or transfer parts of their own civilian population into a territory it occupies. (Article 49 GC IV) ▪ Displaced persons have a right to voluntary return as soon as the reasons for their displacement cease to exist. (Article 49 GC IV) ▪ Humanitarian assistance shall take into consideration the specific needs of displaced women, children, disabled or elderly. (Article 78 AP I) ▪ 'Safety zones' and 'safe areas' are established to protect and provide humanitarian assistance to vulnerable civilian population while 'neutralised zones' or 'demilitarized zones' require the consent of the belligerent parties are expressly protected by IHL rules.
Indigenous peoples	
Additional sources	<ul style="list-style-type: none"> ▪ No specific reference to indigenous people in the main IHL legal instruments.
Key issues	<ul style="list-style-type: none"> ▪ Indigenous peoples' connection with the land increases the degree of vulnerability in the event of forced displacement and severe damage to the natural environment. ▪ Intersection between gender and ethnicity: sexual violence against indigenous women and girls.

3. International Refugee Law

a) Purpose and applicability

IRL is a set of rules and procedures that aims to protect persons recognised as refugees under the relevant instruments or in a broader sense, persons seeking asylum from persecution. This legal framework provides a distinct set of guarantees for these specific groups of persons (asylum seekers and refugees) and overlaps to a certain extent with IHRL, and with IHL with regard to situations of conflict.

b) Key sources and provisions

The 1951 Convention on the Status of Refugees (CRSR, known as the Refugee Convention) provides the foundation for IRL.⁹² The establishment of the Office of the United Nations High Commissioner for

⁹²Convention relating to the Status of Refugees (1951) UNTS vol. 189, 137 <<https://treaties.un.org/doc/Publication/UNTS/Volume%20189/v189.pdf>> accessed on March 2015.

Refugees (UNHCR) took place in 1950, introducing the international refugee protection system along with the Convention. Some years later the Convention was supplemented by the 1967 Protocol.⁹³

Regional instruments of protection of refugees have also been introduced such as the 1966 Bangkok Principles on Status and Treatment of Refugees,⁹⁴ the 1969 Convention on the Specific Aspects of Refugee Problems in Africa⁹⁵ and the 1984 Cartagena Declaration on Refugees.⁹⁶

The absence of effective national protection for refugees, results in the need for international protection. IRL applies to States that are party to the relevant treaties. Those provisions that have acquired the status of general customary law bind all States. The 1951 Refugee Convention contains the definition of 'refugee' as those persons that 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, are outside the country of his nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country' (Article 1).⁹⁷ Although the Refugee Convention does not include an explicit reference to sex and/or gender, the importance of gender in shaping the experiences of refugees is increasingly recognised.⁹⁸

The 1951 Convention is the main instrument for the protection of refugees, including those fleeing armed conflict and other situations of violence. Nothing in the text, context or the object and purpose of the 1951 Convention, prevents its application in conflict-settings or other situations of armed violence. In fact, the Refugee Convention makes no distinction between refugees fleeing situations in peacetime or war. Drafted after World War II, the drafters understood that people fleeing armed conflicts and other situations of violence may have a well-founded fear of being persecuted on the basis of one or more of the Convention's grounds.

⁹³ The UN Convention and Protocol relating to the Status of Refugees are available at <<http://www.unhcr.org/3b66c2aa10.html>> accessed 14 March 2015.

⁹⁴ Asian-African Legal Consultative Organization (AALCO), *Bangkok Principles on the Status and Treatment of Refugees (Bangkok Principles)*, 31 December 1966 <<http://www.refworld.org/docid/3de5f2d52.html>> accessed 22 July 2015.

⁹⁵ Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention")*, 10 September 1969, 1001 U.N.T.S. 45, <<http://www.refworld.org/docid/3ae6b36018.html>> accessed 22 July 2015

⁹⁶ The UN Convention and Protocol relating to the Status of Refugees <<http://www.unhcr.org/3b66c2aa10.html>> accessed 14 June 2015. The Cartagena Declaration <<http://www.unhcr.org/45dc19084.html>> accessed 14 June 2015. This Declaration is a non-binding agreement adopted by the Colloquium on the International Protection of Refugees in Latin America, Mexico and Panama, held at Cartagena, Colombia, from 19-22 November 1984.

⁹⁷ The UN Convention relating to the Status of Refugees was adopted by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, held at Geneva from 2 to 25 July 1951. The Conference was convened pursuant to resolution 429 (V) 1, adopted by the General Assembly of the United Nations on 14 December 1950. It entered into force on 22 April 1954. United Nations Treaty Series, vol. 189.

⁹⁸ Valerie Oosterveld, 'Gender-Based Crimes Against Humanity', in Leila Nadya Sadat (ed.) *Forging a Convention for Crimes Against Humanity*, (Cambridge University Press 2011) 80.

The regional instruments have extended the definition of ‘refugee’ beyond the definition of the 1951 Refugee Convention, and explicitly invite consideration of IHL and ICL. The reference to armed conflict in the context of subsidiary protection in the European Qualification Directive indicates a similar approach.⁹⁹

IDPs, who remain within the borders of their own country, are subject to national law and applicable international law such as IHL and IHRL. IHL and IHRL are incorporated in binding regional instruments as applicable, and as reflected in the UN Guiding Principles on Internal Displacement (1988).¹⁰⁰ The Principles identify the rights and guarantees relevant to the protection of IDPs in all phases of displacement.

In recent years, there have been significant developments in binding normative frameworks – including, for example, the codification of the African Union’s Convention for the Protection and Assistance of IDPs in Africa (Kampala Convention) of 2009¹⁰¹, and the Great Lakes Protocol on the Protection and Assistance to IDPs.¹⁰²

c) Challenges

Large variations exist in rates of recognition of refugee status for people fleeing from countries in conflict, suggesting divergences in the implementation of the Convention of 1951. Although there are some good State practices in the implementation of the Refugee Convention regarding people fleeing armed conflict and other situations of violence, there are jurisdictions where there are frequent erroneous or excessively restrictive interpretations of the refugee definition contained in the 1951 Convention. In some countries, it is evident that excessive reliance on the use of ‘complementary or subsidiary protection’ may adversely

⁹⁹ Council Directive 2004/83/EC, on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, 29 April 2009. <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:en:HTML>>, accessed 2 April 2015.

¹⁰⁰ UN Commission on Human Rights, *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39. Addendum: Guiding Principles on Internal Displacement* (11 February 1998) E/CN.4/1998/53/Add.2 <<http://www.unhcr.org/43ce1cff2.html>> accessed 30 June 2015.

¹⁰¹ According to data from 2013, 39 of 54 States Members of the African Union had signed the Kampala Convention, while 22 had ratified it. The Convention is described as ‘an innovative agreement in that it provides guarantees against forced displacement and standards for the protection of and assistance for persons during displacement, as well as with regard to durable solutions. It also addresses the causes of displacement, which are not limited to situations of armed conflicts and human rights violations but also encompass situations of natural or human-made disasters. Moreover, the Convention is unique in that, in its article 2(d), it provides for the obligations and responsibilities of States parties, while also specifying the roles and responsibilities of non-State armed groups, private companies, humanitarian agencies and civil society organizations, the international community, internally displaced persons and communities affected by displacement’. UNHRC, *Report of the Special Rapporteur on the human rights of internally displaced persons, Chaloka Beyani* (4 April 2014) A/HRC/26/33 <<http://www.ohchr.org/EN/Issues/IDPersons/Pages/Annual.aspx>> accessed 30 June 2014, para. 28.

¹⁰² Protocol on the Protection and Assistance to Internally Displaced Persons, 30 November 2006 <<http://www.refworld.org/pdfid/52384fe44.pdf>>, accessed 2 April 2015.

result in denial of protection for those who are precisely entitled to protection under a strict interpretation of the Convention.¹⁰³

Regarding IDPs, the UN Guiding Principles on Internal Displacement, despite the fact that they do not have binding force, establish clear standards for the protection of IDPs. It can be challenging, however, to encourage States to comply with non-binding frameworks.

d) Protection of vulnerable groups

Vulnerable groups do not constitute fixed categories but rather interrelated ones, indeed vulnerability is the result of numerous factors, and the concurrence of various elements implies a higher degree of vulnerability. In situations of displacement, the risks faced by each of these interrelated groups can be exacerbated. Based on this assumption, some additional guarantees for protection of these ‘particularly vulnerable groups’ are warranted under IRL. However, this protection is flawed with regard to certain groups and IHRL plays a crucial role.

Both GC IV and AP I within IHL provide limited specific protection for children.¹⁰⁴ The principle of unity of the family is crucial for the protection of forcibly displaced children.¹⁰⁵ For example, it is worth noting that the 1951 Convention requires States to provide the same treatment with respect to elementary education as afforded to nationals and at least as favorable as that given to non-refugee aliens in secondary education.¹⁰⁶ The UNHCR Guidelines on the protection of children provides further clarification concerning the protection of refugee children.¹⁰⁷

The Refugee Convention fails to provide an adequate basis for gender-based persecution, therefore it has to fit within the category of ‘membership of a particular social group’ or political opinion’.¹⁰⁸ The UNHCR has addressed these deficiencies on gender-based protection by developing three Guidelines, on the

¹⁰³ Regarding the existing gaps and differing levels of protection for refugees and asylum seekers among Member States, see Jean-François Durieux, ‘The vanishing refugee: how EU asylum law blurs the specificity of refugee protection’ in Hélène Lambert, Jane McAdam and Maryellen Fullerton (eds.), *The global reach of European refugee law* (Cambridge University Press 2013), 244-257; Jane McAdam, *Complementary Protection in International Refugee Law*, (Oxford University Press 2007).

¹⁰⁴ Art. 38(5) GC IV and Art. 78 AP I.

¹⁰⁵ Art. 22 CRC.

¹⁰⁶ Art. 4, 22(1) and (2) of the Convention Relating to the Status of Refugees (1951).

¹⁰⁷ UNHCR, ‘Guidelines on Determining the Best Interests of the Child’ (2008) <<http://www.unhcr.org/4566b16b2.html>>, accessed 15 September 2015; UNHCR, Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (1997) <<http://www.unhcr.org/3d4f91cf4.pdf>> accessed 15 September 2015.

¹⁰⁸ See UNHCR, Guidelines on International Protection: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/02 (7 May 2002), <<http://www.unhcr.org/3d58de2da.html>>, accessed 14 September 2015.

Protection of Refugee Women,¹⁰⁹ on Gender-Related Persecution¹¹⁰ and on Membership of a Particular Social Group.¹¹¹

While IHL prohibits forced displacement in international¹¹² and non-international armed conflicts,¹¹³ IHL plays a crucial role by filling the gaps in lack of protection of IDPs under IRL. Another non-binding instrument, the United Nations Declaration on the Rights of Indigenous Peoples (DRIPS), also includes prohibition of forced transfer or displacement of indigenous people from their lands or territories.¹¹⁴

The EU adopted the recast Qualification Directive in 2011¹¹⁵ within its Common European Asylum System (CEAS) aimed at harmonisation of the criteria by which Member States define who qualifies as a refugee, and other forms of protection for persons (subsidiary protection).¹¹⁶ The Qualification Directive provides specific provisions for children and vulnerable persons.¹¹⁷ However, the Directive has been highly criticised for not tackling all the shortcomings within the previous Directive 2004/83/EC.¹¹⁸

¹⁰⁹ UNHCR, 'Guidelines on the Protection of Refugee Women' (1991) <<http://www.unhcr.org/3d4f915e4.html>>, accessed 15 September 2015.

¹¹⁰ UNHCR, 'Guidelines on Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees' (2002), HCR/GIP/02/01, <<http://www.unhcr.org/3d58ddef4.pdf>>, accessed 15 September 2015.

¹¹¹ UNHCR, Guidelines on "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees Membership of a Particular Social Group (2002) HCR/GIP/02/02, <<http://www.unhcr.org/3d58de2da.html>>, accessed 15 September 2015.

¹¹² Art. 49 GC IV and 85(4)a AP II.

¹¹³ Art. 17 AP I.

¹¹⁴ Art. 8 and 10 DRIPS.

¹¹⁵ European Parliament, (Recast) Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (2011) OJ L 337/9, <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0095&from=EN>>, accessed 15 September 2015.

¹¹⁶ The recast Directive was adopted in December 2011 and is binding on all EU Member States except for UK, Denmark and Ireland who have opted out of this Directive. However, the UK and Ireland remain bound by the previous 2004 Directive. Council of the European Union, Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (2004) OJ L 304/12 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:en:HTML>> accessed 15 September 2015.

¹¹⁷ Art. 2(j) sets an extended definition of the family with the deletion of the requirement that minor children of the beneficiary of international protection are dependent. Pursuant Art. 10(1)(d) there is an explicit obligation for States to take into consideration gender related aspects for the purposes of defining membership of a particular social group. Art. 19(3) on the content of international protection states that 'Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence'.

¹¹⁸ See Evangelia (Lilian) Tsourdi 'Qualifying for International Protection in the EU: New Understandings of the 1951 Convention and beyond', 240-271 in Jean-Pierre Gauci, Mariagiulia Giuffr  and Evangelia (Lilian) Tsourdi (eds.) *Exploring the Boundaries of Refugee Law. Current Protection Challenges* (Brill 2015).

Table I-3: Purposes and key provisions of International Refugee Law (IRL)¹¹⁹

Purpose and applicability	<ul style="list-style-type: none"> Provides protection and assistance to individuals who have crossed an international border and are at risk or are victims of persecution in their country of origin. Does not apply to IDPs. Operates in peacetime and during armed conflict. Applies to States.
Key sources of law	<ul style="list-style-type: none"> Treaties <ul style="list-style-type: none"> Convention on the Status of Refugees (1951). Protocol relating to the Status of Refugees (1967). International Customary Law. General Principles of Law. Judicial decisions and teachings.
Key provisions	<ul style="list-style-type: none"> 'Refugee' is an externally displaced individual with a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. Allows for the application of other instruments (IHL and IHRL) granting rights and benefits to refugees. (Article 5 of the 1951 Convention). Individuals responsible for serious violations of IHL are not granted refugee protection. Principle of non-refoulement (Article 33 of the 1951 Convention).
Current challenges	<ul style="list-style-type: none"> Forced displacement due to violations of IHL or IHRL pose a risk to refugee protection.
Protection of vulnerable groups	
Children	
Additional sources	<ul style="list-style-type: none"> General Comment No. 6 'Treatment of Unaccompanied and Separated Children Outside their Country of Origin' (2005). UNHCR Guidelines Determining the Best Interests of the Child (2008) UNHCR Guidelines on Policies and Procedures on Unaccompanied Children Seeking Asylum.
Key issues	<ul style="list-style-type: none"> Principle of unity of the family. States' obligation to provide special protection to children seeking refugee status (Article 22 CRC). Children must receive the same treatment as nationals in primary education, and at least as favourable as that given to non-refugee aliens in secondary education (Article 22 Convention 1951).
Women	
Additional sources	<ul style="list-style-type: none"> UNHCR Guidelines on the Protection of Refugee Women. UNHCR Guidelines on Gender-Related Persecution (2001). UNHCR Guidelines on Membership of a Particular Social Group (2001).
Key issues	<ul style="list-style-type: none"> Gender-based persecution has to fit in the category of 'membership of a particular social group' or political opinion'.

¹¹⁹ Table I.3. is partly based on Huma Haider, *International legal frameworks for humanitarian action: Topic guide* (Birmingham, UK: GSDRC, University of Birmingham, 2013) <<http://www.gsdr.org/docs/open/ILFHA.pdf>> accessed 20 April 2015.

Refugees and IDPs	
Additional sources	<ul style="list-style-type: none"> ▪ IHL applies to IDPs thereby filling the gap, in legal terms, in the event of forced displacement within a State. ▪ IHL prohibits forced displacement in international (Article 49 GC IV and 85(4)a AP II) and non-international armed conflicts (Article 17 AP I).
Key issues	<ul style="list-style-type: none"> ▪ Prevention of displacement and protection of refugees under IHL. ▪ Article 9 of the 1951 Convention allows for derogation from treaty provisions in times of war, in this event IHL applies to ensure protection.
Indigenous peoples	
Additional sources	<ul style="list-style-type: none"> ▪ United Nations Declaration on the Rights of Indigenous Peoples (DRIPS).
Key issues	<ul style="list-style-type: none"> ▪ Prohibition of forced transfer or displacement of indigenous people from their lands or territories. (Article 8 and 10 DRIPS).

4. International Criminal Law

a) Purpose and applicability

ICL is recognised as a ‘relatively new branch of international law’¹²⁰ which sets the prohibition of certain categories of conduct considered to be international crimes (primarily genocide, crimes against humanity and war crimes, but also aggression) and seeks to bring individual perpetrators of such conduct to justice, on the basis of the principle of individual criminal responsibility. As noted by a distinguished scholar in this field, two limbs of this legal body exist: substantive and procedural international criminal law.¹²¹

Conducts prohibited and sanctioned by ICL constitute international crimes. There is a broad consensus on certain international core crimes¹²² but there are various interpretations of these categories, given the variety of formulations in customary and treaty law. As one commentator has noted:

‘There is no such thing as an explicit, universally agreed definition of “international law crimes” in treaty law. Therefore, in order to assess its meaning and specific applications, one will need to look at customary international law, to be distilled – as is well-known – from both State practice and States’ acting with the conviction that the said practice amounts to an international legal obligation. However, the fact that the concept of “international law crimes” as such has not been codified in treaty law must be clearly distinguished from the fact that certain examples of international law crimes can indeed be found in international legal definitions. Examples thereof are war crimes, some of which have been laid down as “grave breaches” in the 1949 Geneva Conventions, and the prohibition against torture, enshrined in the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.’¹²³

¹²⁰ Antonio Cassese, Paola Gaeta, Laurel Baig, Mary Fan, Christopher Gosnell and Alex Whiting, *International Criminal Law* (Oxford University Press 2013), 4.

¹²¹ *Ibid.*

¹²² Mainly those crimes within the jurisdiction of the ICC contained in Article 5 of the Rome Statute.

¹²³ Jan Wouters, ‘The Obligation to prosecute International Law Crimes’, (2011) <<https://www.law.kuleuven.be/iir/nl/onderzoek/opinies/obligationtoprosecute.pdf>> accessed 2 April 2015, 2.

ICL is linked to other legal areas, such as IHRL and IHL, and IRL. Indeed, it has been put forward that it simultaneously derives its origin from and continuously draws upon both IHL and IHRL as well as domestic criminal law.¹²⁴ However the existing differences between all these legal branches pose potential difficulties. The major distinction between ICL and these other bodies of law is the fact that ICL gives rise to individual criminal responsibility for violations of international law. Conversely, IHRL primarily focus on the actions and obligations of States, governments or parties to a conflict. IHL was created to protect civilians and persons placed *hors de combat* in the conduct of hostilities. Under ICL, many violations of IHL are now considered war crimes.

The two bodies of law, IHL and ICL, have distinct modes of interpretation and application, and while IHL can be useful in interpreting ICL, the two should not be merged. In essence, IHL is broader than ICL, not all violations of IHL constitute war crimes and not all crimes addressed by ICL are necessarily conflict-related. Thus, the result could be that under ICL certain provisions of war crimes law are interpreted in a narrower fashion than their IHL counterparts. Certain authors have warned that 'if care is not taken, this narrower reading of a war crime will come to replace the broader interpretation of the international humanitarian law rule'.¹²⁵

Not all IHL treaties define violations as crimes, although the violations may be classified as war crimes through customary law. Moreover, IHL is primarily addressed to States and parties to conflicts. ICL, on the other hand, is addressed to individuals, involves only the most serious crimes, and violations can result in criminal liability and penalties such as imprisonment.

To a large degree, ICL has developed as a response to gross and systematic violations of human rights. This has become more evident since the decade of the 90s when the prosecution of genocide and crimes against humanity has been developed based on human rights standards. Human rights law influenced the drafting of the statutes of international criminal tribunals and judges at these courts have used human rights law to interpret substantive international criminal laws and procedures.¹²⁶ Nevertheless 'if international human rights law is to be applied directly in situations of internal armed conflict, this vertical relationship may require re-thinking, with non-state armed groups potentially being held subject to human rights obligations'.¹²⁷

¹²⁴ Antonio Cassese et al., *International Criminal Law* (Oxford University Press 2013) 5.

¹²⁵ Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012) 100.

¹²⁶ For a general overview see <http://wcjp.unicri.it/deliverables/docs/Module_2_What_is_international_criminal_law.pdf> accessed 3 April 2015, 16-17; See for example The Prosecutor v. Ferdinand Nahimana et al., (Judgment and Sentence) ICTR Case ICTR 99-52-T (3 December 2003) <<http://www.unictr.org/sites/unictr.org/files/case-documents/ict9-52/trial-judgements/en/031203.pdf>>, 983-1010; The Prosecutor v. Simon Bikindi, (Trial Judgement) ICTR Case ICTR-01-72-T (2 December 2008), <<http://www.unictr.org/sites/unictr.org/files/case-documents/ict9-01-72/trial-judgements/en/081202.pdf>>, 378-397; Prosecutor v. Mile Mrkšić et al. (Trial Judgement) ICTY Case IT-95-13/1-T, (27 September 2007) <<http://www.icty.org/x/cases/mrksic/tjug/en/070927.pdf>>, 459-460.

¹²⁷ Sandesh Sivakumaran, 'Re-envisioning the International Law of Internal Armed Conflict' (2011), *European Journal of International Law*, Volume 22, Issue 1, 222 <<http://www.ejil.org/issue.php?issue=105>> accessed 20 July 2015.

As indicated previously, IHRL provides for obligations that are primarily imposed upon States and not on individuals. It is up to States themselves to decide how to enforce human rights obligations and deal with human rights violations by State agents. Not all human rights are protected by international criminal law. Bearing these limitations in mind, ICL could be considered a complementary legal framework when States do not abide by their human rights obligations.

Regarding the relation between IRL and ICL, it is generally accepted that persons suspected of having committed war crimes are not entitled to refugee status.¹²⁸ However this provision might also face problems in its enforcement, e.g. children may seek asylum to obtain protection from persecution relating to armed conflict, but they may also face exclusion from refugee status if they have been used as child soldiers and committed international crimes.¹²⁹

International criminal tribunals have been established to prosecute international crimes at the international level. The *ad hoc* tribunals, such as those for the former Republic of Yugoslavia and Rwanda (ICTY and ICTR), mixed tribunals (e.g. the Special Court for Sierra Leone), and the International Criminal Court, have been created to enforce individual criminal responsibility for war crimes, crimes against humanity and genocide.

Individual criminal responsibility is incurred not only by acting, but also by failing to act where there is an obligation to act. This includes military leaders and their superiors who fail to take necessary and reasonable measures to prevent or suppress the commission of unlawful acts by subordinates, over whom they have effective control.¹³⁰ This form of liability, termed 'command responsibility' has been expanded by ICTY and ICTR case law.¹³¹

b) Key sources and provisions

Court decisions are not simply declaratory of the law, but courts themselves are important actors in their development. The ICTY and ICTR interpreted their mandate as extending to non-international armed conflict, while the Geneva Conventions and Additional Protocols only apply to international armed conflict situations. This extended jurisdiction was subsequently incorporated into the Rome Statute of the ICC.¹³²

¹²⁸ Art. 1(F)(a) of the Refugee Convention.

¹²⁹ The problem that arises here is precisely one of the main challenges in the protection of children under ICL as it does not define a minimum age for criminal responsibility, states apply the age of individual criminal responsibility established in their respective national legislations. See Magali Maystre, 'The Interaction between International Refugee Law and International Criminal Law with respect to Child Soldiers' (2014) 12 (5) *Journal of International Criminal Justice*, 975-996.

¹³⁰ Hortensia D.T. Gutierrez Posse, 'The relationship between international humanitarian law and the international criminal tribunals' (2006), *International Review of the Red Cross*, 88(861), 65-86.
< https://www.icrc.org/eng/assets/files/other/irrc_861_gutierrez.pdf > accessed 2 April 2015.

¹³¹ Jaime Allan Williamson, 'Some considerations on command responsibility and criminal liability' Vol. 80 Number 870 2008 *International Review of the Red Cross* <https://www.icrc.org/eng/assets/files/other/irrc-870_williamson.pdf> accessed 30 March 2015.

¹³² Art. 8(2)(d) of the Rome Statute.

The Rome Statute of the ICC also includes two categories of war crimes over which the Court has jurisdiction.¹³³ The first concerns grave breaches of the Geneva Conventions in international armed conflict and serious violations of Article 3 in the case of non-international armed conflict. The second concerns other serious violations of the laws and customs applicable in international and non-international armed conflicts. This includes 'intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance [mission]' as long as they are entitled to civilian protection under international humanitarian law (Rome Statute, Articles 2(b)(iii) and 2(e)(iii)). In addition to war crimes, the ICC and the other international (and mixed) tribunals have jurisdiction over crimes against humanity, genocide and the crime of aggression.¹³⁴

c) Challenges

Regarding the activities of humanitarian organisations operating in conflict zones, these organisations are often witness to violations that can be used as evidence in international criminal proceedings. However, their participation in such proceedings could undermine their access to populations in need. If parties to the conflict that are facilitating the delivery of assistance, are at risk of criminal investigation and prosecution, they may deny humanitarian actors access to affected areas and withdraw from humanitarian dialogue. 'Humanitarian organisations need to develop a strategy to address this dilemma; and international criminal tribunals need to be aware of these risks. Both sides should work together to minimise potential adverse impacts on the provision of humanitarian assistance'.

d) Protection of vulnerable groups

ICL has contributed to reinforce the protection of vulnerable groups particularly affected by armed conflict by filling some protection gaps existing under IHL. The ICC contributes to the fulfilment of many obligations incorporated in human rights treaties by providing an enforcement mechanism. Regarding women, the international criminal courts have addressed that sexual and gender-based violence are often present in genocide, crimes against humanity and war crimes committed during armed conflict, although it is not mentioned in the list of grave breaches under Article 146 GC IV.¹³⁵

The Rome Statute includes laws punishing crimes committed against children; i.e. enlisting children under the age of fifteen or using them to participate actively in hostilities amounts to a war crime.¹³⁶ The ICC Statute also foresees separate procedures to establish the criminal responsibility of children and special measures protecting children as victims and witnesses during judicial proceedings.¹³⁷

¹³³ For in depth analysis see Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (ICRC/Cambridge University Press 2003).

¹³⁴ Only the ICC has jurisdiction over crimes of aggression (Article 5 of the Rome Statute); international crimes under ICTY competence in Articles 2 to 5 of the Statute for the International Tribunal for the Former Yugoslavia; international crimes under ICTC competence in Article 2 to 4 of the Statute of the International Criminal Tribunal for Rwanda.

¹³⁵ Art. 7.1(g) and 8.2(b)(xii) of the ICC Statute

¹³⁶ Art. 8(b)(xxvi) of the ICC Statute.

¹³⁷ Arts. 36(8)(b); 42(9); 43(6); 54(1)(b); 68(1) and (2) of the Rome Statute.

The Rome Statute broadened the ICC's jurisdiction and made gender-based crimes an international concern, namely under Article 7 of the Rome Statute addressing crimes against humanity and Article 8 on war crimes.¹³⁸ The ICC Statute also establishes procedural guarantees to prosecuted women or to those taking part in the judicial proceeding as victim or witness.¹³⁹

Serious forms of arbitrary displacements amount to genocide, war crimes or crimes against humanity as well as those acts aimed at 'ethnic cleansing'.¹⁴⁰ The protection of indigenous people is also strengthened under the ICC Statute, which also criminalises attacks against cultural heritage¹⁴¹ and causing long-term and severe damage to the natural environment.¹⁴²

Table I-4: Purposes and key provisions of International Criminal Law (ICL)¹⁴³

Purpose and applicability	<ul style="list-style-type: none"> ▪ Prohibits and seeks accountability for certain forms of conduct considered as serious violations (war crimes, crimes against humanity and genocide) ▪ Individual criminal responsibility also comprises 'command responsibility' for failure to act. ▪ States have primary responsibility to prosecute crimes. The jurisdiction of international criminal courts operates when a state fails to prosecute the alleged crimes (principle of complementarity of ICC)¹⁴⁴ ▪ ICTY and ICTR have precedence over State jurisdiction ▪ Operates in peacetime and during armed conflict depending on the crime
Key sources of law	<ul style="list-style-type: none"> ▪ Treaties and statutes: <ul style="list-style-type: none"> - Rome Statute of the International Criminal Court - Statutes of ad hoc international criminal courts (ICTY and ICTR) and hybrid criminal courts¹⁴⁵ - Geneva Conventions of (1949) and its Additional Protocols (1977) - Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) - Convention on the Prevention and Punishment of the Crime of Genocide (1948) - International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973 - Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954

¹³⁸ Art. 7(1)(g) and (h); Art. 8(2)(xxi) respectively.

¹³⁹ Art. 42(9), 54(1)(b) and 68(1).

¹⁴⁰ Art. 6, 7.1(d) 8.2(e)(viii) of the ICC Statute.

¹⁴¹ Art. 8.2(b)(ix) of the ICC Statute.

¹⁴² Art. 8.2(b)(iv) of the ICC Statute.

¹⁴³ Table I.4 is partly based on Huma Haider, *International legal frameworks for humanitarian action: Topic guide* (Birmingham, UK: GSDRC, University of Birmingham, 2013) <<http://www.gsdr.org/docs/open/ILFHA.pdf>> accessed 20 April 2015.

¹⁴⁴ The principle of complementarity only applies to the ICC.

¹⁴⁵ 'Hybrid tribunals' are courts established by treaties or legislation which incorporate domestic and international law aspects as the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, Special Tribunal for Lebanon or the Special Panels of the Dili District Court.

	<ul style="list-style-type: none"> International customary law General principles of law Judicial decisions and writings
Key provisions	<ul style="list-style-type: none"> Individuals can be held accountable for serious violations of IHL, particularly common Article 3 applies to non-international armed conflict. Article 8 of the ICC Statute consolidates the broad notion of war crimes including IACs and NIAs. Serious violations of IHL in armed conflict are directing attacks against persons or objects involved in a humanitarian assistance, which are entitled to civilian protection (Articles 2(b)(iii) and 2(e)(iii))
Current challenges	<ul style="list-style-type: none"> Individuals can be held criminally liable for attacks against humanitarian personnel and supplies. The involvement of humanitarian organisations in judicial proceedings may potentially compromise respect of humanitarian principles (Impartiality, neutrality and humanitarianism)
Protection of vulnerable groups	
Children	
Additional sources	<ul style="list-style-type: none"> General Comment No. 10 'Children's Rights in Juvenile Justice' (2007).
Key issues	<ul style="list-style-type: none"> Special treatment of minors in criminal proceedings. Criminal responsibility of children who actively took part in an armed conflict. Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities amounts to war crime (Article 8 ICC Statute)
Women	
Additional sources	<ul style="list-style-type: none"> 1998 Rome Statute (Articles 6, 7, 8) SCSL and ICTY Statutes. ICTY, ICTR and SCSL decisions.
Key issues	<ul style="list-style-type: none"> ICL has contributed towards filling the gap of protection of women under IHL. Sexual and gender-based violence may be present in genocide, crimes against humanity and war crimes committed during armed conflict but it is not included in the list of grave breaches under Article 146 GC IV.
Refugees and IDPs	
Additional sources	<ul style="list-style-type: none"> IHL prohibits forced displacement in international (Article 49 GC IV and 85(4)a AP II) and non-international armed conflicts (Article 17 AP I)
Key issues	<ul style="list-style-type: none"> Serious forms of arbitrary displacements amount to genocide, war crimes or crimes against humanity. (Article 6, 7, 8 ICC Statute) as those aimed at 'ethnic cleansing'.
Indigenous peoples	
Additional sources	<ul style="list-style-type: none"> United Nations Declaration on the Rights of Indigenous Peoples (DRIPS) ILO Indigenous and Tribal Peoples Convention No. 169 (1979)
Key issues	<ul style="list-style-type: none"> Indigenous people may suffer direct or indirect attacks (i.e. damage to the natural environment) which falls within the ICC jurisdiction.

	<ul style="list-style-type: none"> ▪ Indigenous people as a community with well-defined cultural and ethnic identity, with demands for natural resources and land, are more vulnerable to the most serious violations of ICL.
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C. Conclusion

This section has provided a general overview of all the legal frameworks applicable to human rights violations in conflict situations, with particular reference to certain vulnerable groups. The general view reveals that defining the boundaries between the legal branches can be challenging as there are areas that overlap, differ or are tackled from different perspectives. Despite the different interpretations eluded to within this section, in their totality they provide a comprehensive legal framework for protection and assistance.

IHL is the most specific in protecting persons who are not, or are no longer, taking direct part in hostilities. Nonetheless further clarification would be needed in some areas to ensure adequate protection to the most vulnerable in armed conflict situations. However, the problems do not always lie in the legal framework, but rather in a lack of respect for the law.¹⁴⁶

In brief, and without undertaking a detailed examination, this first section attempts to clarify the sources and relevant provisions within each framework, even if many of them combine provisions, such as the Security Council Resolutions on Women, Peace and Security and on Children and Armed Conflict. Similarly, many EU policy documents, despite being more human rights-oriented, are of a mixed nature, including references to IRL, IHL and ICL.

¹⁴⁶ College of Europe and ICRC, Proceedings of the Bruges Colloquium 'Vulnerabilities in Armed Conflicts: Selected Issues', 14th Bruges Colloquium 17-18 October 2013, Collegium No. 44 Autumn 2014, <https://www.coleurope.eu/sites/default/files/uploads/page/collegium_44.pdf> accessed 17 September 2015, 16.

II. The relationship and interactions between IHRL and IHL and their relation with EU law

Considering the characteristics of IHRL and IHL as presented in the previous section, and considering that the relationship between these legal areas has elicited highly theoretical speculations,¹⁴⁷ this section aims to provide an overview of their main differences and similarities in their application to situations of conflict, to present the theoretical approaches in order to provide an explanation about the nature of their interplay, and to address the main normative and operational challenges that matter most in the protection of disadvantaged or marginalised groups in armed conflict and other situations of violence.

A. Overview of differences and similarities in the applicability of IHRL and IHL to situations of conflict

Although civilians¹⁴⁸ have always suffered in times of war, in the last decades armed conflicts and other situations of violence are at the heart of some of the worst human rights violations across the globe, causing civilian population to account for the vast majority of the victims of the world's conflicts, a toll which falls heaviest on women and children¹⁴⁹. 'The changing character of war' has brought about a rise of internal armed conflicts and an increase in non-state armed groups and irregular methods of fighting (asymmetrical warfare),¹⁵⁰ which not only makes it difficult to distinguish fighters from civilians but also increase detrimental effects on the civilian population.¹⁵¹

In 2006, the International Law Commission (ILC)¹⁵² listed both international human rights law as well as international humanitarian law as special regimes.¹⁵³ Both regimes share common characteristics but also differ in various ways. This section will briefly highlight their main differences and similarities before moving to the debate on the nature of the relationship between IHRL and IHL.

¹⁴⁷ See Questions of International Law, *On the relationship between IHL and IHRL where it matters once more assessing the position of the European Court of Human Rights after Hassan and Jaloud* (12 May 2015) <<http://www.qil-qdi.org/on-the-relationship-between-ihl-and-ihrl-where-it-matters-once-more-assessing-the-position-of-the-european-court-of-human-rights-after-hassan-and-jaloud/>> accessed 21 June 2015.

¹⁴⁸ Michael S. Neiberg, *Warfare in World History* (Routledge 2001) 74.

¹⁴⁹ See Deliverable 10.1 'Report on the survey study on human rights violations in conflict-settings', FRAME Project, 99. See also ICRC, 'Civilians protected under International Humanitarian Law' (29 October 2010) <<https://www.icrc.org/eng/war-and-law/protected-persons/civilians/overview-civilians-protected.htm>> accessed 2 May 2015.

¹⁵⁰ See Deliverable 10.1, FRAME Project, 108.

¹⁵¹ *Ibid*, 109.

¹⁵² Karin Oellers-Frahm, 'Multiplication of International Courts and Tribunals and Conflicting Jurisdiction- Problems and Possible Solutions', (2001) Vol. 5 Max Planck Yearbook of the United Nations Law <http://www.mpil.de/files/pdf1/mpunyb_oellers_frahm_5.pdf> accessed 21 July 2015, 67-104.

¹⁵³ The reference is to the study conducted by the Working Group of the ILC on the fragmentation of international law, which was initiated as a specific consequence of 'various concerns related to the proliferation of international courts, tribunals and other institutions and the associated risk of rules and principles developed in particular areas of international law coming into conflict with each other'.

1. Scope of material application

Whereas IHL is applicable in situations of armed conflict only, IHRL is applicable in all situations.¹⁵⁴ Nevertheless States can derogate from their obligations under IHRL in cases of emergencies (situations ‘threatening the life of the nation’), notably during armed conflicts but also in situations of internal disturbances and tension which are outside the scope of application of IHL.¹⁵⁵ In these contexts, police operations remain governed by the specific IHRL standards. They may never be conducted like hostilities against combatants.¹⁵⁶

There are certain rights guaranteed by IHRL which are non-derogable (the so-called ‘hard core’), in particular the right to life, the prohibition of torture or cruel, inhuman or degrading treatment, and slavery.¹⁵⁷ These, together with the prohibition of discrimination, are key human rights norms in situations of armed conflict.¹⁵⁸ Therefore derogations from the ‘hard core’ are not admissible but it is disputed whether, and to what extent, judicial guarantees are applicable to the non-derogable rights.¹⁵⁹

Similarly, on the subject of territorial application, one may note that the extraterritorial application of IHRL by States is disputed, while IHL applies wherever an armed conflict takes place.¹⁶⁰ Hence, it is generally accepted that a State has to comply with IHL when it fights outside its territory. The IHL of military occupation has been specifically developed for such situations.

Some rules of IHL (e.g., on the protection of prisoners of war and protected civilians) protect only those who are in the power of a State, while other rules (such as those on the conduct of hostilities) protect everyone, including, for example, the civilian population of the adverse party, against indiscriminate attacks or enemy soldiers against acts of perfidy or the use of prohibited weapons.

¹⁵⁴ Louise Doswald-Beck and Sylvain Vit , ‘International Humanitarian Law and Human Rights Law’ (1993) No. 293, International Review of the Red Cross <<https://www.icrc.org/eng/resources/documents/misc/57jmrt.htm>> accessed 20 April 2015, 2.

¹⁵⁵ Gloria Gaggioli, ‘The use of force in armed conflicts. Interplay between the conduct of hostilities and law enforcement paradigms’ (ICRC 2013) <<https://www.icrc.org/eng/assets/files/publications/icrc-002-4171.pdf>> accessed 20 April 2015.

¹⁵⁶ Dieter Fleck, ‘Law Enforcement and the Conduct of Hostilities: Two Supplementing or Mutually Excluding Legal Paradigms?’, in *Frieden in Freiheit = Peace in Liberty = Paix en libert  : Festschrift f r Michael Bothe zum 70 Geburtstag*, Baden-Baden (Dike 2008) 391-407.

¹⁵⁷ Louise Doswald-Beck and Sylvain Vit , ‘International Humanitarian Law and Human Rights Law’, (1993) No. 293 International Review of the Red Cross <<https://www.icrc.org/eng/resources/documents/misc/57jmrt.htm>> accessed 20 April 2015, 5.

¹⁵⁸ European Training and Research Centre for Human Rights and Democracy, *Human Rights in Armed Conflict* (2012) 291.

¹⁵⁹ The dispute refers particularly to trends showned by recent practice and actual problems arising in the context of fighting international terrorism. See Marco Sassoli, ‘Internment’ (2013) Max Planck Encyclopedia of Public International Law <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e313?rskey=08KIZx&result=2&prd=OPIL>> accessed 15 Semptember 2015.

¹⁶⁰ Alexander Breitegger, *Cluster Munitions and International Law: Disarmament with a Human Face?* (Routledge 2012) 512-520.

The territorial application of international human rights law is much more problematic.¹⁶¹ Most regional human rights conventions clearly state that the States Parties must secure the rights listed in those conventions for everyone within their jurisdiction. This includes occupied territory. On the universal level, under the International Covenant on Civil and Political Rights, a Party undertakes 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction, the rights recognized...'.¹⁶² This wording and the negotiating history may lead towards understanding territory and jurisdiction as cumulative conditions. On this basis some States deny that the Covenant is applicable extraterritorially.¹⁶³ The ICJ, the United Nations Human Rights Committee¹⁶⁴ and other States are, however, of the opinion that the Covenant applies either in the territory or under the jurisdiction of a State party.

Even if international human rights law applies extraterritorially, the next question that arises is when a person can be considered to be under the jurisdiction of a State. International 'jurisprudence' on this

¹⁶¹ See Orna Ben-Naftali & Yuval Shany, 'Living in Denial: The Application of Human Rights in the Occupied Territories', (2003) Vol. 37, No. 1 Israel Law Review, 17-118; John Cerone, 'Jurisdiction and Power: the Intersection of Human Rights Law & the Law of Non-International Armed Conflict in an Extraterritorial Context' (2007) Vol. 40, No. 2 Israel Law Review, 58; Michael J. Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation' (2005), Vol. 99, no. 1 AJIL, 119-142; Michael J. Dennis & Andre M. Surena Andre, 'Application of the International Covenant on Civil and Political Rights in Times of Armed Conflict and Military Occupation: The Gap Between Legal Theory and State Practice' (2008) Issue 6 European Human Rights Law Review, 714-731.

¹⁶² Stuart Hendin, 'Extraterritorial Application of Human Rights: the Differing Decisions of Canadian and UK Courts', (January 2010) in Windsor Review of Legal and Social Issues, 57-86.

¹⁶³ Such is the well-known position of the United States. The US and Israel, in particular, have raised objections to the application of international human rights law in occupied territories or during armed conflicts See Beth Van Schaak, 'The United States Position's on the Extraterritorial Application of Human Rights Violations. Now it is Time for Change' 2014 90 International Law Studies <<https://www.usnwc.edu/getattachment/a88e97e5-11ec-4dfb-a013-4cfa5f8efe5a/The-United-States-Position-on-the-Extraterritorialia.asp>> accessed 15 September 2015, 22 ff.

¹⁶⁴ See UN Human Rights Committee, General Comment 31 (2004) Nature of the Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13.

1. States Parties are required by article 2, paragraph 1 [of the International Covenant on Civil and Political Rights], to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.
11. As implied in [...] General Comment No. 29 on States of Emergencies, adopted on 24 July 2001, reproduced in Annual Report for 2001, A/56/40, Annex VI, paragraph 3, the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be especially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.

matter has evolved in the face of facts that have come before different human rights treaty bodies and international tribunals in various conflict and non-conflict situations.

Until now the ECtHR's jurisprudence is the one that has received more attention, although it has been enhanced and complemented by pronouncements of the UN Human Rights Committee and other UN human rights treaty bodies, such as the Committee against Torture, and the Inter-American Commission on Human Rights. With regard to the exact meaning of 'effective control' they have clarified a number of situations that may be summarised as follows:¹⁶⁵

-First, some situations have been considered as amounting to effective control on the basis of military presence in a territory. They include 'prolonged' occupations, such as the 30-year Turkish occupation in Northern Cyprus (the *Loizidou* case, ECtHR) or the Israeli occupation of the Palestinian territories (the 2004 Wall Advisory Opinion, ICJ), down to situations which have lasted only a short time, as in the case of *Ilascu v. Moldova*. In this case the ECtHR found Russia to be responsible for human rights violations, although Russia had only a few troops present on the territory of Moldova. It is considered that this situation would not amount to an occupation as provided by Article 42 of the 1907 Hague Convention. The ECtHR decided that Russia exercised effective control for the application of extraterritorial human rights obligations.

-Second, effective control can refer to control exercised over persons, even if this control is only temporary. This includes places of detention or situations in which State agents arrest persons abroad (for instance the *Ocalan* case, ECtHR; and the *Lopez Burgos* case, Human Rights Committee¹⁶⁶).

It should be noted that in the *Bankovic* case, the ECtHR found that NATO's aerial bombing of Belgrade did not amount to effective control. It appears that the Court set a distinction between ground operations (that can exercise effective control) and air power (which the Court found did not amount to effective control in this case).

Similarly, in the *Al-Skeini* case the UK House of Lords distinguished situations of conduct of hostilities during occupation from 'calm occupation'. For this Court, if hostilities break out in occupied territories, it is not implied that these territories are not always under effective control, which is what this Court requires for the extraterritorial applicability of human rights obligations.¹⁶⁷

¹⁶⁵ See Geneva Academy of International Humanitarian and Human Rights Law, 'Rule of Law in Armed conflicts Project' <http://www.genevaacademy.ch/RULAC/interaction_between_humanitarian_law_and_human_rights_in_armed_conflicts.php> accessed 21 April 2015.

¹⁶⁶ See at <<http://www1.umn.edu/humanrts/undocs/session36/12-52.htm>> accessed 15 September 2015.

¹⁶⁷ See Geneva Academy of International Humanitarian and Human Rights Law, 'Rule of Law in Armed conflicts Project' <http://www.genevaacademy.ch/RULAC/interaction_between_humanitarian_law_and_human_rights_in_armed_conflicts.php> accessed 21 April 2015.

2. Scope of provisions on protection

One of the most important differences between IHL and IHRL is the scope of substantive protection. Despite the common objective of both legal areas of preserving the dignity and humanity of all¹⁶⁸, it is an important principle of IHRL that all persons benefit equally from these rights without discrimination, whilst under IHL, the traditional approach of this legal area consistent with its development as inter-State law, is essentially to protect enemies. IHL therefore defines a category of 'protected persons', consisting basically of enemy nationals, who benefit from a general protection.

Another dimension of protection concerns the rights protected. Only some human rights are protected under IHL and only to the extent that they are particularly endangered by armed conflicts, as for example civil and political rights, the right to life of enemies placed *hors de combat* or judicial guarantees.¹⁶⁹ Only certain economic, social and cultural rights are protected or guaranteed, like for instance the right to health and the right to food; as are group rights, like the right to a healthy environment.¹⁷⁰ As opposed to this, the scope of protection under IHRL does not differentiate but covers all human beings, although some instruments establish and protect rights for specific categories of persons, according to their specific needs or disadvantaged situations.¹⁷¹ In IHL some groups (children, women, the elderly, persons with disabilities) are also entitled to special protection.

3. Duty bearers

Traditionally, States and International Organisations have been considered the primary subjects of international law, since they are entitled to enter into treaties and create obligations. It is the practice of States which primarily contributes to international customary law,¹⁷² although certain activities of International Organisations may contribute to the formation or expression of rules of customary law.¹⁷³

As regards human rights, a wide range of rights are explicitly protected and can directly or indirectly be affected by armed conflict. The obligations under human rights treaties apply to the State as a whole, no

¹⁶⁸ Office of the High Commissioner of Human Rights (OHCHR), *International Legal Protection of Human Rights in Armed Conflict* (New York and Geneva: United Nations Publications, 2011) <http://www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf> accessed 24 April 2015, 2.

¹⁶⁹ *Ibid*, 17.

¹⁷⁰ *Ibid*, 17.

¹⁷¹ For instance, the CRC has been ratified by 193 states, whereas the Migrant Workers Convention has 47 members <https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-13&chapter=4&lang=enhttps://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-13&chapter=4&lang=enhttps://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-13&chapter=4&lang=enhttps://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-13&chapter=4&lang=en>, accessed 23 April 2015.

¹⁷² Bing Bing Jia, 'The Relations between Treaties and Custom' (2010) 9 (1) *Chinese Journal of International Law* <<http://chinesejil.oxfordjournals.org/content/9/1/81.full>> accessed 25 April 2015, 81-109, 98.

¹⁷³ Michael Wood, (2015) Vol 48 Issue 3 'International Organizations and Customary Law' *Vanderbilt Journal of Transnational Law* <http://www.vanderbilt.edu/jotl/manage/wp-content/uploads/Wood_International_Organizations_and_Customary_International_Law_A.pdf> accessed 15 September 2015, 609-620.

matter its internal structure and division of responsibilities.¹⁷⁴ IHL is primarily addressed to the States that are parties to an armed conflict, including Common Article 3 (and, where the threshold is met, also AP II).

As to the obligations of international organizations vis-à-vis IHRL, it should be noted that International Organisations are generally not parties to the IHRL and IHL treaties. Nonetheless, they may be bound by IHRL or IHL as part of customary law. Moreover, they may themselves issues binding statements or be bound by specific sources. This is for instance the case of the EU that is not as such a party to human rights treaties, with one exception.

Since the entry into force of the Lisbon Treaty, the EU an international organisation with legal personality (Article 47 TEU) and is thus an international law subject with the capacity to bear rights and obligations under international law¹⁷⁵. In this capacity, the only UN human rights treaty to which the EU has become a party is the United Nations Convention on the Rights of Persons with Disabilities. Notwithstanding the EU has set own commitments under EU law and policy with respect to human rights at the internal and external action. For instance, Title V of the TEU contains references to the principles of international law and in particular to the respect of human rights to guide the EU external action.¹⁷⁶

Besides, it has been recognised by the CJEU that the EU must respect international customary law,¹⁷⁷ and some rules of international humanitarian law would appear to be covered by EU human rights provisions. Moreover, almost all the Member States are party to the most relevant human rights treaties, which might lead to the conclusion that these represent 'regional customary international law'.¹⁷⁸ This works not only for the EU, but with other international organisation such as the UN.¹⁷⁹ Consequently, in addition to any obligations of its Member States, the EU becomes an addressee of the rights and obligations deriving from international human rights norms.¹⁸⁰ This obligation on the EU to respect human rights as part of customary international law also applies abroad. In this regard, there are a number of general principles of international human rights law that are applicable to EU peace missions. Some of them are codified in relevant treaties to which EU Member States are party, and others are a matter of being part of customary international law.¹⁸¹

¹⁷⁴ Art. 27 Vienna Convention on the Law of Treaties.

¹⁷⁵ The EU has signed the UN Convention on the rights of persons with disabilities.

¹⁷⁶ Art. 21 and 22 TEU.

¹⁷⁷ See Cases C-286/90 *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp.*, 24 November 1992, § 9 and C-308/06, *International Association of Independent Tanker Owners (Intertanko) and Others*, 3 June 2008, § 51.

¹⁷⁸ Erika de Wet, 'The emergence of international and regional value systems as a manifestation of the merging international constitutional order', (2006) Vol. 19, *Journal of International Law* <http://law.huji.ac.il/upload/de_wet_reading.pdf> accessed on 10 April 2015 631- 632.

¹⁷⁹ See Jordan Paust, 'The UN is bound by human rights: understanding the full reach of human rights, remedies and non immunity' (2010) Vol. 51, April 12 Harvard ILJ Online.

¹⁸⁰ See for instance, Frederik Naert, *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights* (Intersentia 2010).

¹⁸¹ Frederik Naert, 'Binding International Organisations to Member State Treaties or Responsibility of Member States for Their Own Actions in the Framework of International Organisations', in Jan Wouters et al. (eds), *Accountability for Human Rights Violations by International Organizations* (Intersentia 2010) 129-168. The most important human rights principles applicable to EU crisis management operations are the principle of security and liberty of persons, including the principle of due process, holding that no one shall be subjected to unlimited arrest or detention and

Notwithstanding, the applicability of human rights to the EU *as a matter of law* remains controversial in some respects, including the extraterritorial application of the European Convention on Human Rights¹⁸², the question of derogation in times of emergencies and its applicability to peace operations, the relationship between human rights and international humanitarian law and the impact of UN Security Council mandates on human Rights¹⁸³. However, at least as a matter of *policy and practice*, human rights law provides guidance in EU operations and in practice.¹⁸⁴

Concerning the application of international humanitarian law (IHL) to EU military operations, as regulated in the Geneva Conventions and Additional Protocol, IHL is applicable in situations of armed conflict (and occupation). This legal framework is not directly applicable to a simple deployment of a military operation because it requires the existence of an 'armed conflict', a term of art in IHL which is not conventionally defined. An additional difficulty lies in the characterisation of such an armed conflict and the concrete applicable rules since it is considered that multinational forces operations usually intervene in situations of non-international armed conflict¹⁸⁵. Another important requirement concerning the applicability of IHL is that the organization's troops must also be involved in the conflict as combatants or parties to the conflict.

It is widely accepted that IHL instruments are binding to Member States and applicable during EU military operations as all EU Member States are party to the Geneva Conventions and their Additional Protocols and therefore they are under an obligation to abide by them. Regarding the EU, the Geneva Conventions do not apply directly to it, as international organisations are barred from becoming parties but it has nonetheless been generally recognised that the norms of the Geneva Conventions are part of customary international law and, therefore, the EU must comply with them. This applicability is supported by the TEU and by EU case law. The CJEU has held that the European Communities must respect international law in the exercise of its powers. It is therefore required to comply with the rules of customary

providing the accused the right to be heard before any condemnation, These principles have been identify by Hadewich Hazaleit, 'Common security and defence policy: What nexus between human rights and security?' in Sari and Wessel *op. cit.*, 32.

But there are more important principles in the field of EU missions, such as the prohibition of torture and inhuman treatment; the prevention and repression of (sexual) violence, exploitation, and abuse in the context of peace operations and the principle of non-discrimination.

¹⁸²The extraterritorial application of human rights instruments and customary international law is largely uncontroversial in the case of international organisations as they by definition have no state territory as indicated by Frederik Naert, *International law aspects of the EU's Security and Defence Policy with a particular focus on the law of armed conflicts* (Intersentia 2010) 564-566.

¹⁸³ Frederik Naert, 'The applicability...', 13.

¹⁸⁴ A recent expression of policy commitments in that respect are those formulated in the *Strategic Framework on Human Rights and Democracy* and the first *Action Plan* (25 June 2012) and *Second Action Plan* (20 July 2015) for its Implementation. Additionally, the EU has adopted a number of human rights Guidelines which indicate human rights priorities for the Union. The most relevant guidelines related to CSDP missions are on Children and armed conflict (2008), Violence against women and girls and combating all forms of discrimination against them (2008) and International Humanitarian Law (2009).

¹⁸⁵ Jelena Pejic, 'The protective scope of Common Article 3: more than meets the eye' (2011) vol. 93 no. 881 *International Review of the Red Cross*, 5-7.

international law...'. Recently, the Grand Chamber of the Court has reaffirmed this position by holding that the EU is bound to observe international law in its entirety, including customary international law'.¹⁸⁶

The EU promotes compliance with international humanitarian law, as evidenced in the original and updated EU Guidelines on the matter,¹⁸⁷ under which the EU as well as Member States commit to ensure compliance with IHL by third States or by non-state actors operating in third States. Nevertheless these Guidelines do not cover Member States own conduct or that of their forces.

One of the problems arising from the applicable humanitarian customary law is the question of which rules are applicable to a conflict in which the EU is involved. In terms of treaty law this question is governed by different legal regimes on international and non-international armed conflict, which would entail the applicability of different rules. In terms of customary international law, the preponderant view is that the whole customary body can be applicable to both internal and international armed conflict.¹⁸⁸

Yet, customary law is not the only legal source that could bind the EU in relation to international humanitarian law. The general principles of the EU have also been considered a source of obligation for the EU in humanitarian law. This assertion has been supported in the 'widespread and largely convergent ratification of LOAC treaty obligations by the EU member states and the close link between a number of such obligations and human rights'. Another source of obligation might include unilateral acts. Council decisions (formerly joint actions) might be considered sources of unilateral acts.¹⁸⁹ In relation to EU military operations, in some of the Council joint actions pertaining to operation EUNAVFOR,¹⁹⁰ the EU makes reference to different UN Security Council Resolutions as a basis for its operation. In these resolutions, the Security Council allows States to enter and use the territorial waters of Somalia to fight against piracy in a manner consistent with relevant international law, which in the case of an armed conflict would be international humanitarian law. This limitation has also been included in the 'whereas' sections of one of the Council joint actions.¹⁹¹

This indirect applicability of IHL is confirmed in a subsequent Resolution of the UN Security Council, in which there are specific references to regional organizations to fight against piracy, which foresee that 'any measures undertaken pursuant to the authority of this paragraph shall be undertaken consistent with applicable international humanitarian and human rights law'.¹⁹² Finally the EU, just like all other international subjects, is also bound by the norms of *jus cogens*.¹⁹³

¹⁸⁶Case C-366/10, *Air Transport Association of America and others v. Secretary of State for Energy and Climate Change*

¹⁸⁷ EU Guidelines on promoting compliance with international humanitarian law, OJ 2005 C 327/12, updated in 2009.

¹⁸⁸See McCoubrey and White, *The Blue Helmets. Legal regulation of United Nations military operations*, (Aldershot 1996) 158-160. The authors refer to those rules which may be accepted as customary law.

¹⁸⁹Ramses Wessel, *The European Union's Foreign and Security Policy. A Legal Institutional Perspective*, (Kluwer Law International 1999) 193-195.

¹⁹⁰ Council Joint Action 2008/749/CFSP of 19 September 2008.

¹⁹¹ Council Joint Action 2008/749/CFSP of 19 September 2008 on the European Union military coordination action in support of UN Security Council resolution 1816 (2008) (EU NAVCO), OJ 2008 L 252/93; Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, OJ 2008 L 301/33.

¹⁹²SC Res. 1851 (2008) 16 December 2008.

¹⁹³ Art. 53 of the 1986 Vienna Convention establishes the nullity of a treaty which conflicts with a peremptory norm

In policy terms, EU Member States accept that if EU-led forces become engaged in an armed conflict, IHL will fully apply to them. Some of the relevant general principles of IHL that would be applicable during EU peace missions involving the use of military force, include the principle of distinction between civilian and combatants, the principle of precautions in attack, the principle of proportionality and the overarching principle of humanity. These principles are generally translated into the rules of engagement, which are an important element of the legal framework, guiding the activity of the EU military forces on the ground. It is the duties of each EU Member State to train its armed forces so that they are able to comply with IHL and to respond to complex situations.

As to what concerns applicability of IHL to non-state armed groups (NSAG), this set of law binds all parties to the conflict in all circumstances, and therefore oversees their horizontal relationship. As for the Geneva Conventions, their obligations rest primarily on States and their forces participating in armed conflict, but responsibility is also extended for the direct participants and to their civilian leadership.

4. Accountability

Under IHRL and IHL, States are obliged to investigate alleged violations, to prosecute alleged perpetrators and, if found guilty, to punish them. In recent times, however, convergence between IHRL and IHL has been further developed to also impose certain types of obligations on non-state actors, but in different conditions and to different degrees.¹⁹⁴

Besides, as already indicated, international criminal law, for example, criminalises certain gross violations of human rights and serious violations of IHL amounting to genocide, crimes against humanity and war crimes and provides for individual criminal responsibility.¹⁹⁵ IHRL lays down some clear legal rules regarding the responsibility of States for violations of human rights. Moreover, these rules have been further developed in a large number of cases by the international monitoring bodies. In this context of States' general legal duty to ensure the effective protection of human rights, the most relevant specific legal obligations that this entails are: the duty to prevent human rights violations; the duty to provide domestic remedies; and the duty to investigate alleged human rights violations, to prosecute those suspected of having committed them and to punish those found guilty, and, finally, the duty to provide restitution or compensation to victims of human rights violations.

In 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, the General Assembly stated that the obligation to respect and to ensure respect for and implement international human right and international humanitarian law implies the duty to 'investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those

of general international law; hence, it can be assumed that international organizations are bound by the norms of *jus cogens*.

¹⁹⁴ Office of the High Commissioner of Human Rights (OHCHR), *International Legal Protection of Human Rights in Armed Conflict* (United Nations Publications 2011) 21.

¹⁹⁵ Antonio Cassese, Guido Acquaviva, Mary Fan and Alex Whiting, *International Criminal Law* (Oxford University Press 2003) 20.

allegedly responsible in accordance with domestic and international law'.¹⁹⁶ Further, the preamble stipulates that the Basic Principles and Guidelines 'do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation for existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms'.¹⁹⁷

5. State responsibility

In the International Law Commission's *Draft Articles on International Responsibility of States for Wrongful Acts*, the breach of a State's international obligation constitutes an international wrongful act and entails the international responsibility of that State.¹⁹⁸ If attributable to the State, it is responsible for violations committed by its organs, including the armed forces (Article 4); committed by persons or entities empowered to exercise elements of governmental authority (Article 7); committed by persons or groups acting in fact on its instructions, or under its direction or control (Article 8); committed by private persons or groups which it acknowledges and adopts as its own conduct (Article 11).¹⁹⁹ A State is responsible for a lack of due diligence if it has failed to prevent or punish violations of international human rights and humanitarian law committed by private actors and should adopt measures to repair the damage and to prevent future violations,²⁰⁰ the obligation of a State to provide reparation for a violation of IHL is uncontroversial.

As for human rights abuses, the ECtHR and the Inter-American Court of Human Rights refer to international customary rules of State responsibility to order the payment of compensation to victims of human rights violations.²⁰¹ As regards international criminal law, Article 25, paragraph 4 of the Rome Statute of the International Criminal Court stipulates that the fact that an individual is found guilty of gross abuses of international human rights and humanitarian law does not exonerate the State from international responsibility.²⁰²

¹⁹⁶ 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, UNGA Resolution 69/147, para. 3(b).

¹⁹⁷ *Ibid.*

¹⁹⁸ ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission at its fifty-third session, in 2001 and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10) Articles 1 and 2 <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> accessed 26 April 2015.

¹⁹⁹ OHCHR, *International Legal Protection of Human Rights in Armed Conflict* (New York and Geneva: United Nations Publications, 2011) 72, footnote 104.

²⁰⁰ Measures may include paying reparations to the victims and their families, adoption of legal mechanisms to prevent future abuses, etc.

²⁰¹ OHCHR, *International Legal Protection of Human Rights in Armed Conflict* (New York and Geneva: United Nations Publications, 2011) 73 and *idem*, footnote 106, citing the IACtHR in the Case of the Rochela Massacre v. Colombia, Judgement of 11 May 2007, Series C, No. 163, para. 226: 'it is a principle of international law that any violation of an international obligation which causes damage gives rise to a duty to make adequate reparations. The obligation to provide reparations is regulated in every aspect by international law.'

²⁰² OHCHR, *International Legal Protection of Human Rights in Armed Conflict* (New York and Geneva: United Nations Publications, 2011) <http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf> accessed 23 July 2015, 73.

A State's responsibility can even go so far as to be liable for 'non-state actors' conduct. Despite them being considered bound to observe certain IHRL standards, as mentioned earlier, a State does not cease to be bound according to the rules of State responsibility.²⁰³

6. Individual responsibility

Only in cases of violations of IHRL, do individuals have the possibility to initiate a complaints procedure against States, provided for by several human rights treaties. Unlike IHRL, IHL seeks to hold accountable the perpetrators of serious violations of humanitarian law, instead of allowing for individual complaints.²⁰⁴

As they have been considered of such gravity by the international community, certain gross violations of human rights law, and serious violations of international humanitarian law, give rise to individual criminal responsibility, and have been regulated under international criminal law. As such, the Rome Statute of the International Criminal Court penalises genocide,²⁰⁵ crimes against humanity²⁰⁶ and war crimes.²⁰⁷ Furthermore, under customary international law, crimes against humanity do not require a connection to an armed conflict but can also be committed in peacetime.²⁰⁸ Apart from that, there are only a few international human rights treaties that establish criminal responsibility for human rights violations and contain provisions regarding their prosecution.²⁰⁹

According to the Updated Set of principles for the protection and promotion of human rights through action to combat impunity,²¹⁰ 'serious crimes under international law' are constituted by grave breaches of the Geneva Conventions and other violations of international humanitarian law which are crimes under international law, genocide, crimes against humanity, and other violations of internationally protected human rights that are crimes under international law and /or which international law requires States to penalise, such as torture, enforced disappearances, extrajudicial execution and slavery.²¹¹

²⁰³ OHCHR, *International Legal Protection of Human Rights in Armed Conflict* (United Nations Publications 2011) 27; e.g. a group has been empowered by the law of a State to exercise elements of government authority; is in fact acting on the instruction of, or under the direction or control of the State; has violated international legal obligations and subsequently becomes the new government of the State; has violated legal obligations and subsequently succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration.

²⁰⁴ Alexander Breitegger, *Cluster Munitions and International Law: Disarmament with a Human Face?* (Routledge 2012) 517.

²⁰⁵ Art. 6 ICC Statute.

²⁰⁶ Art. 7 ICC Statute.

²⁰⁷ Art. 8 ICC Statute.

²⁰⁸ *Prosecutor v Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No IT-94-1-AR72 (1996) 35 ILM 32, ICL 36 (ICTY 1995), 2nd October 1995, Appeals Chamber (ICTY) para. 141.

²⁰⁹ Among them are the Convention against Torture (Arts. 4-5), the International Convention for the Protection of All Persons from Enforced Disappearance (Arts. 4 and 9.2), the Optional Protocols to the Convention on the Rights of the Child on the involvement of children in armed conflict (Art. 4.2) and on the sale of children, child prostitution and child pornography (Arts. 3 and 7).

²¹⁰ See ECOSOC, 'Report of the independent expert to update the set of principles to combat impunity, Diane Orentlicher' (8 February 2005) E/CN.4/2005/102/Add.1 <http://ap.ohchr.org/documents/alldocs.aspx?doc_id=10800> accessed 25 July 2015.

²¹¹ OHCHR, *International Legal Protection of Human Rights in Armed Conflict* (United Nations Publications 2011) 82.

Criminal responsibility arises for any person who planned, instigated, ordered, committed or otherwise aided and abetted in their planning, preparation or execution of crimes/violations as listed above.²¹² For genocide and crimes against humanity, the organisational affiliation does not only apply to State actors, but also to non-State actors engaged in an armed conflict. As concerns war crimes, insofar as non-State entities have important obligations in international humanitarian law, their violations fall within the same legal framework applicable to States.²¹³

In IACs all States have the responsibility to respond to grave breaches and other breaches of the Geneva Conventions and of AP I. States undertake the obligation *to respect and to ensure respect* for the Conventions in all circumstances and to enact legislation to provide effective penal sanctions for perpetrators of grave breaches of IHL. In NIACs, neither AP II nor Common Article 3 contains specific provisions for the prosecution of serious violations of their rules and for grave breaches. The possibility to punish war crimes also in the context of non-international armed conflicts was developed through the jurisprudence of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.²¹⁴ Article 8.2 (c) and (e) of the Rome Statute which includes war crimes committed in non-international armed conflict, sets out a State's obligation to investigate and prosecute serious violations of Common Article 3 of the Geneva Conventions and other serious violations of the laws and customs applicable in armed conflicts not of an international character.

An explicit reference to the obligation to seek accountability is entailed in some international IHRL and IHL treaties²¹⁵ which impose a general obligation on all States parties to provide an effective remedy for violations of the rights enshrined in these treaties, including a duty to investigate and punish those responsible.²¹⁶

Legal obligations under IHRL and IHL have been widely recognised as extending beyond the territory of a State and to any place where the State exercises jurisdiction or control over persons. Under the principle of universal jurisdiction, a State may prosecute alleged perpetrators for the core international crimes irrespective of where the crime has taken place and of the nationality of the perpetrator. In cases of grave breaches of the Geneva Conventions, the State is obliged to do so under the principle *aut dedere aut judicare*.²¹⁷

²¹² *Ibid*, 78.

²¹³ Security Council Resolution 1214 (1998) regarding the Afghan internal armed conflict: 'persons who commit or order the commission of breaches of the [Geneva] Conventions are individually responsible in respect of such breaches'.

²¹⁴ *Prosecutor v Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No IT-94-1-AR72, (1996) 35 ILM 32, ICL 36 (ICTY 1995), 2nd October 1995, Appeals Chamber (ICTY) 86-136.

²¹⁵ The International Covenant on Civil and Political Rights (Art. 2.3), the Convention against Torture, the International Convention for the Protection of all Persons from Enforced Disappearance, and the Optional Protocols to the Convention on the Rights of the Child on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography.

²¹⁶ OHCHR, *International Legal Protection of Human Rights in Armed Conflict* (United Nations Publications 2011) 82.

²¹⁷ Miša Zgonc-Rožej and Joanne Foakes, 'International Criminals: Extradite or Prosecute?' (2013) Chatham House Briefing paper.
<http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/0713bp_prosecute.pdf> accessed 25 April 2015, 2.

B. Theoretical approaches to the relationship between IHRL and IHL

Research on the applicability and application of IHRL and IHL in situations of armed conflict, has been the object of a vast array of literature. Scholars chronologically argued that only international humanitarian law was applicable, that both legal regimes were applicable, and eventually that international humanitarian law was the *lex specialis* of human rights law. The subsequent trend was to affirm that international humanitarian law and human rights law are ‘merging’ or ‘fusing’ into a single set of norms along a process of ‘confluence’ of both legal areas under ‘the transformative influence of human rights’.

This section seeks to present this ongoing debate and the various approaches to describing the relationship between human rights and humanitarian law in order to clarify the nature of their interplay. Despite the relevance of the academic discussion, the limited utility of legal theory in solving the problems raised by the relationship between IHRL and IHL has been stressed. Scholars have rightly pointed out that ‘the role of human rights in armed conflict will finally be decided not through abstract application of broad determinative principles, but rather in a pragmatic analysis of individual situations’.²¹⁸

Despite the wide acceptance of the co-applicability of both legal regimes, uncertainty remains as to what the precise interplay of the two sets of norms looks like. While IHL only applies during armed conflict, IHRL do not cease to be applicable in armed conflicts. Human rights treaties, however, allow States to derogate from certain rights during a public emergency that threatens the nation (including a state of war), provided they fulfill certain preconditions and follow specified procedures. Some rights, though, (such as the right to life, freedom from torture, freedom of thought, equality and non-discrimination) can never be suspended. IHL does not allow for derogation.

The concurrent application of IHL and IHRL has been expressly recognised by various international tribunals, including the ICJ, the ECtHR and the Inter-American Commission on Human Rights, as will be analysed under a subsequent sub-heading of this report. It also raises some challenges, however. This is particularly so where there may be a conflict in norms, for example concerning the right to life. What constitutes an ‘unlawful killing’ may be very different under IHL than under IHRL. IHL permits lawful killing of combatants and adopts principles of proportionality, which allows for permissible ‘collateral damage’, whereas IHRL has stricter requirements on the protection of life.²¹⁹ In order to address such challenges, the report will address in the following pages the main theoretical approaches on the relationship between IHRL and IHL and how those approaches have been articulated in the practice of judicial and monitoring human rights bodies.

²¹⁸ Gerd Oberletiner, *Human Rights in Armed Conflict. Law, Practice and Policy* (Cambridge University Press 2015) 15.

²¹⁹ See for instance Iguyovwe Ruona, ‘The inter-play between international humanitarian law and international human rights law’ (2008) 34 Commonwealth Law Bulletin, 749-789.

1. The exclusivist approach

Under this heading, two different schools of thought can be summarised. Adherents of this theoretical branch can be divided between those which support the traditional separatist' school of thought, according to which IHRL and IHL law apply without any potential overlapping, and those which accept that in some cases IHRL and IHL may overlap, but IHL would in any case exclude IHRL by virtue of the *lex specialis* doctrine, which will be further examined below.

a) Separatist theories

For strict proponents of this approach, the fundamental differences in terms of historic development, divergent goals and different nature of the two legal branches are at the core of the debate and are perceived as so significant that in their view they are not only diametrically opposed, neither can be derived from the other.²²⁰ This theory denies any common historical roots or underlying common objectives and values shared by human rights law and humanitarian law, but rather sees them as mutually exclusive. Under this view, a discussion as to their parallel applicability in armed conflicts does not even arise. Theories of separation of human rights and international humanitarian law were supported in particular in the 1970s and prior to then.²²¹ The Teheran Conference 1968 in particular and the developments at the international level in its aftermath, supported and regularly argued for the opinion of the continued applicability of human rights in armed conflicts. However, despite this paradigm shift, even today some – although few – authors still focus on the, in their opinion, irreconcilable nature of human rights and international humanitarian law.²²²

A few States defend the separatist approach, with the United States and Israel being the most vocal ones, despite some changes of attitude under the current administration of the former.²²³ Proponents of this theory further argue that IHL provides a more complete 'set of norms relating to basic standards of human dignity in the particular circumstances of armed conflict. In other words, because IHL has been specifically

²²⁰ *Ibid*, 83.

²²¹ For example by authors like Henri Meyrowitz, Keith D. Suter, G.I.A.D. Draper, or Karl-Josef Partsch; Noam Lubell, 'Parallel Application of International Humanitarian Law and International Human Rights Law: An Examination of the Debate parallel application' (2007) Vol. 40, No. 2, Israel Law Review, 648-660, 649.

²²² See also Michael J. Dennis' very sceptical view as regards the application of human rights obligations extraterritorially, in international armed conflicts and situations of occupation. Overcoming the separation of both regimes, for him would be to 'ignore this distinction in favour of the application of international human rights instruments to situations of international armed conflict and military occupation is, in effect, to ignore what the international community has agreed upon'. Dennis, Michael J., 'Non-Application of Civil and Political Rights Treaties Extraterritorially during Times of International Armed Conflict' (2007) Vol. 40, No. 2, Israel Law Review, 453-502 501; a further critical view on the parallel application of IHL and IHRL was expressed by Naz K., Modirzadeh, 'The Dark Side of Convergence: A Pro-civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict' (2010), Vol. 86 U.S. Naval War College International Law Studies (Blue Book) Series, 349-410. Also Bill Bowring, 'Fragmentation, Lex Specialis and the Tensions in the Jurisprudence of the European Court of Human Rights' (2009), vol. 14, n°. 3 Journal of Conflict & Security Law, 485-498, 485. Aware of his minority position, the author further denies a fragmentation of international law, since in his view no unity exists that could be fragmented.

²²³ Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (Cambridge University Press 2015) 93-95. While still maintaining its view that its international human rights obligations only apply within its territory, whereas individuals elsewhere would be protected by IHL, the US now at least acknowledges that IHL and IHRL are 'complementary, reinforcing, and animated by humanitarian principles designed to protect innocent life', 95.

designed to apply in times of conflict, it is better suited to military operations'.²²⁴ They believe that the fact that the treaties codifying IHL had been negotiated by military lawyers, they entail more practical standards, and are thus more likely to be abided by.

b) Self-contained v. special regimes

Whether a proposed separation of regimes could be viewed under the term 'self-contained regimes', meaning 'sub-categories of international law containing a full, exhaustive and definitive set of (secondary) rules'²²⁵ and therefore being independent from general public international law, has and continues to be criticised.²²⁶ It has been stated by the International Law Commission (ILC) that despite them being highly specific sets of norms with their own groups of practitioners, they are not entirely isolated from general public international law, and instead can be referred to as 'special regimes'²²⁷, which have 'neither clear boundaries nor a strictly determined normative force'.²²⁸ According to this description, they

Are neither mutually exclusive nor isolated from general international law but simply cover an issue of concern (e.g. human rights or humanitarian matters). ... [W]hile special regimes can, in theory, opt out of all rules of international law (with the exception of *jus cogens*) they cannot opt out of the system of international law. ... That they exist as special regimes says a priori nothing about their relationship but merely demonstrates the fragmentation of international law'.²²⁹ These special regimes provide better regulations of the subject matters than general public international law in the sense of a heightened clarity of the law, a more effective enforcement or a more context-sensitive approach.²³⁰

But since 'no regime is self-contained', the ILC came to the conclusion that '[e]ven in the case of well-developed regimes, general law has at least two types of function. First, it provides the normative background that comes in to fulfil aspects of its operation not specifically provided by it. ... Second, the rules of general law also come to operate if the special regime fails to function properly. Such failure might be substantive or procedural, and at least some of the avenues open to regime members in such cases are outlined in the Vienna Convention itself. Also the rules on State responsibility might be relevant in such situations'.²³¹ Since human rights and international humanitarian law do not have boundaries

²²⁴ Roberta Arnold and Nöelle Quenivet, *International Humanitarian Law and Human Rights Law: towards a New Merger in International Law* (Brill 2008) 11.

²²⁵ Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (Cambridge University Press 2015) 84.

²²⁶ See critical voices such as Bruno Simma, and Dirk Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law', (2006) Vol.17, No. 3 *European Journal of International Law* <<http://www.ejil.org/pdfs/17/3/202.pdf>> accessed 25 July 2015, 483-529, 492.

²²⁷ ILC, Report of the Study Group of the International Law Commission, finalised by Martii Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682 (13 April 2006), para. 152 (5).

²²⁸ *Ibid*, para. 173.

²²⁹ Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (Cambridge University Press 2015) 85.

²³⁰ *Ibid*, 86.

²³¹ ILC, Report of the Study Group of the International Law Commission, finalised by Martii Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682 (13 April 2006) para. 192.

sufficiently clear so as to render any discussion about their relationship unnecessary, they cannot be considered self-contained regimes.²³²

As regards the European Convention on Human Rights, the ECtHR regularly refers ‘to rules and principles of general international law concerning not only treaty interpretation but matters such as statehood, jurisdiction and immunity as well as a wide variety of principles of procedural propriety’.²³³ On several occasions it has held that the Convention could ‘not be interpreted in a vacuum’, and that despite the Convention’s special character as a human rights treaty, ‘relevant rules of international law had to be taken into account’.²³⁴ As far as possible - the Court has held - the Convention had to be ‘interpreted in harmony with other rules of international law of which it forms a part’.²³⁵ Due to these recourses to general international law and the Court’s interpretation of the Convention in harmony with it, the European Convention on Human Rights, therefore, is not a self-contained regime.²³⁶

c) *International humanitarian law as lex specialis*

As a result of the increased fragmentation of international law, norm conflicts between different special regimes covering the same area of concern may occur and require coordination.²³⁷ Taking into account that the treaties of neither human rights law nor international humanitarian law contain clauses dealing with the resolution of such conflicts, the principle of *lex specialis derogat generali* has been the main technique proposed by international jurisprudence and academia to solve such conflicts.²³⁸ Derived from domestic law with the underlying reason of fulfilling the legislative will²³⁹, it suggests that in a case of conflicting norms, the more special norm - the *lex specialis* - prevails over the more general rule - the *lex generalis* -, in order to apply the clearer, more detailed and more accurate norm to the case at hand and thereby enhance compliance by the parties.

On the international level, however, the *lex specialis* principle does not come without problems. Unlike in domestic law with its central legislator and a hierarchical normative system which allows for the *lex specialis* to solve norm conflicts, its meaning and reach on an international level has not yet been clarified

²³² Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (Cambridge University Press 2015) 85.

²³³ ILC, Report of the Study Group of the International Law Commission, finalised by Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682 (13 April 2006) para 161.

²³⁴ *Ibid.*

²³⁵ See *McElhinney v. Ireland*, Judgment of 21 November 2001, ECHR 2001-XI, para. 36; *Al-Adsani v. the United Kingdom*, Judgment of 21 November 2001, ECHR 2001-XI, 100, para. 55.; *Bankovic v. Belgium and others*, Decision of 12 December 2001, Admissibility, ECHR 2001-XII, 351, para. 57.

²³⁶ ILC, Report of the Study Group of the International Law Commission, finalised by Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682 (13 April 2006) para 164.

²³⁷ Heike Krieger, ‘A conflict of norms: The relationship between humanitarian law and human rights law in the ICRC Customary Law Study’ (2006), Vol. 11, n° 2 *Journal of Conflict & Security Law*, 265-291 265.

²³⁸ Already authors as early as Hugo Grotius referred to this principle of legal reasoning concerning agreements which were to be regarded as equal. – Connor McCarthy, ‘Legal Conclusion or Interpretative Process? Lex Specialis and the Applicability of International Human Rights Standards’, in Roberta Arnold and Noëlle Quénivet, (eds.), *International Humanitarian Law and Human Rights – Towards a Merger in International Law* (Brill 2008) 101-118, 103.

²³⁹ Heike Krieger, ‘A conflict of norms: The relationship between humanitarian law and human rights law in the ICRC Customary Law Study’, (2006) Vol.11, n°2 *Journal of Conflict and Security Law*, 265-291, 269.

and, given the distinct features of international law as opposed to a domestic legal system, its adequacy has been called into question²⁴⁰, since it is 'much more difficult to establish systematic relations between norms'.²⁴¹ In particular, its de-centralised law-making process supports diverging interpretations of norms and, therefore, enhances the conflict between them.²⁴² It is also important to note, in this context, that not even the Vienna Convention on the Law of Treaties (VCLT) contains the *lex specialis* principle as a tool of treaty interpretation.²⁴³

The *lex specialis* principle was used by the ICJ to solve norm conflicts arising between international humanitarian law and human rights law in 1996.²⁴⁴ In the Advisory Opinion on Nuclear Weapons,²⁴⁵ the ICJ had to assess the question whether the use of nuclear weapons would amount to a violation of the right to life as set out in Article 6 of the ICCPR or whether international humanitarian law would regard their use as lawful. As regards the prohibition of an arbitrary deprivation of the right to life and the rules of international humanitarian law²⁴⁶, the ICJ held that

the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. 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 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.²⁴⁷

Despite the acknowledgment of a continuous application of human rights law in armed conflict on the one hand, and giving prevalence to international humanitarian law on the other, the Court did not explain

²⁴⁰ In particular, there is no central legislator but states themselves conclude treaties, with the result that often different states are parties to different treaties. Also, not all acts by states are binding law but often mere declarations and other acts of soft law, etc.

²⁴¹ Heike Krieger, 'A conflict of norms: The relationship between humanitarian law and human rights law in the ICRC Customary Law Study', (2006) Vol.11, n°2 Journal of Conflict and Security Law, 265-291, 269.

²⁴² *Ibid.*

²⁴³ As opposed to the principle of *lex posterior derogate legi priori* (Article 30 Vienna Convention on Law Treaties).

²⁴⁴ Before that, it cannot be said that it had been a common view to apply this principle in norm conflicts on international level, in particular not with regard to human rights and humanitarian law. See Marko Milanovic, 'The Lost Origins of Lex Specialis: Rethinking the Relationship between Human Rights and International Humanitarian Law', in Jens Davis Ohlin (ed.) *Theoretical Boundaries of Armed Conflict and Human Rights*. Cambridge: (Cambridge University Press) Forthcoming. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2463957> accessed 23 April 2015.

²⁴⁵ *Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice, Advisory Opinion of 8 July 1996 [1996] ICJ Reports 226, para. 25.

²⁴⁶ Request for an Advisory Opinion, UN Doc. GA/Res ES-10/14 (8 December 2003).

²⁴⁷ *Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice, Advisory Opinion of 8 July 1996 [1996] ICJ Reports 226, para 25.

how the principle of *lex specialis* should be applied.²⁴⁸ Not surprisingly, this has led to a new debate about the relationship of the two branches of law and gave way to a wide variety of interpretation, ranging from the total exclusion of human rights and the automatic supremacy of IHL over IHRL in all circumstances via *lex specialis*, (since its aiming for the protection of human beings under special circumstances makes it generally appear more specific²⁴⁹ over the complementary application of both), to a unity of human rights and humanitarian law.²⁵⁰

However, it has been argued against this automatism that ‘human rights law is not necessarily more humane and humanitarian law is not per se better suited to achieving military victories’ and that this view tended to disregard the particular circumstances of a case.²⁵¹ Rather, norms from both branches could either be the special or the general rule, depending on the concrete situation. Human rights law, for instance, would be more specific concerning the rules on judicial guarantees, whereas international humanitarian law would apply in instances regarding targeting.²⁵²

The close link of the two bodies of law has been highlighted and it has been suggested that both branches could be interpreted in the light of the other. This view ‘excludes the rigid use of the *lex specialis derogat generali* rule that gives priority to one discipline in total exclusion of the other and supports a parallel application ... in a way that would complement each other’.²⁵³

In its Study on Fragmentation, the Working Group of the ILC analysed that international humanitarian law, as the law regulating armed conflict, is a set of norms where ‘the rule itself identifies the conditions in which it is to apply’ and therefore ‘appears more “special” than if no such condition had been identified’.²⁵⁴ If this were to be seen as a case of *lex specialis*, the ILC, analysing *Nuclear Weapons*, points to an important operative aspect:

Even as it works so as to justify recourse to an exception, what is being set aside does not vanish altogether. The Court was careful to point out that human rights law *continued to apply* within armed conflict. The exception - humanitarian law - only affected one (albeit

²⁴⁸ Nancie Prud’homme, ‘Lex specialis: oversimplifying a more complex and multifaceted relationship?’ (2007) vol. 40, n° 2 Israel Law Review, 355-395, 372.

²⁴⁹ This view is supported among others by Michael J. Dennis who highlights in particular the will of the parties to a treaty, respectively the lack thereof, to justify an *en bloc* supremacy of IHL in situations of armed conflict and military occupation.

²⁵⁰ Nancie Prud’homme, ‘Lex specialis: oversimplifying a more complex and multifaceted relationship?’ (2007) vol. 40, n° 2 Israel Law Review, 355-395, 373; Hieke Krieger, ‘A conflict of norms: The relationship between humanitarian law and human rights law in the ICRC Customary Law Study’ (2006) Vol.11, n° 2 Journal of Conflict and Security Law, 265-291, 271; Noëlle Quénivet, ‘Introduction. The History of the Relationship Between International Humanitarian Law and Human Rights Law’ in Roberta Arnold and Noëlle Quénivet (eds), *International Humanitarian Law and Human Rights Law* (Brill 2008) 7.

²⁵¹ Heike Krieger, ‘A conflict of norms: The relationship between humanitarian law and human rights law in the ICRC Customary Law Study’ (2006) Vol.11, n°2 Journal of Conflict and Security Law, 265-291, 271.

²⁵² Nancie Prud’homme, ‘Lex specialis: oversimplifying a more complex and multifaceted relationship?’ (2007) Vol. 40, n° 2 in Israel Law Review, 374.

²⁵³ *Ibid*, 375.

²⁵⁴ ILC, Report of the Study Group of the International Law Commission, finalised by Martii Koskeniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682 (13 April 2006) para. 104.

important) aspect of it, namely the relative assessment of ‘arbitrariness’. ... *Lex specialis* did hardly more than indicate that though it might have been desirable to apply only human rights, such a solution would have been too idealistic, bearing in mind the speciality and persistence of armed conflict. So the Court created a systemic view of the law in which the two sets of rules related to each other as today’s reality and tomorrow’s promise, with a view to the overriding need to ensure ‘the survival of a State’.²⁵⁵

In 2004, for its Advisory Opinion on the *Wall*,²⁵⁶ the ICJ was asked to assess the legal consequences ‘arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem’.²⁵⁷ As opposed to Israel, which did not see international humanitarian law applicable to the situation, the ICJ reiterated its previous statement as regards the continuous application of human rights in armed conflict.²⁵⁸ This time, however, not ‘only’ to the right to life but also in a situation of occupation. As opposed to the *Nuclear Weapons* case, the Court made a more pronounced statement as to what the relationship between the two systems could look like, thereby listing three possibilities:

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.²⁵⁹

Despite this being a certain improvement when compared to *Nuclear Weapons*, since the ICJ’s new approach ‘appeared to be promoting the complementarity of international humanitarian law and international human rights law’,²⁶⁰ it did not go into further detail regarding which right would fall under what category. This, in connection with the various different interpretations of the *Nuclear Weapons* case, was considered as a failure of the ICJ ‘to provide a framework capable of clarifying the interplay between international humanitarian law and human rights law’,²⁶¹ since it causes more confusion regarding the relationship between the two branches.

The concurrent application of both legal regimes was repeated once more in the contentious case of the *Democratic Republic of the Congo v. Uganda*²⁶² and now forms part of *res judicata*, being the only binding

²⁵⁵ *Ibid.*

²⁵⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice, Advisory Opinion of 9 July 2004 [2004] ICJ Reports, para. 136.

²⁵⁷ Request of an Advisory Opinion, UN Doc. GA/Res ES-10/14 (8 December 2003).

²⁵⁸ ‘[T]he protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights’ – ICJ, *Wall* Case, para. 106.

²⁵⁹ *Ibid.*

²⁶⁰ Nancie Prud’homme, ‘Lex specialis: oversimplifying a more complex and multifaceted relationship?’ (2007) Vol. 40, n^o. 2 Israel Law Review, 377.

²⁶¹ *Ibid.*, 378.

²⁶² *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, International Court of Justice, Judgment of 19 December 2005 [2006] ICJ Reports, para. 168.

decision so far in this regard.²⁶³ As opposed to the two Advisory Opinions, the ICJ in *DRC v. Uganda* did not however mention the *lex specialis* principle, nor did it make any other reference to the interplay between human rights law and international humanitarian law.²⁶⁴ Whether it is going to follow its previous approach or whether it considers to gradually abandoning the *lex specialis* principle, is hence not clear.²⁶⁵ Some see it as a possible ‘tacit acknowledgement of the bankruptcy of that approach to the matter’.²⁶⁶

The two Advisory Opinions were said to be ‘the most authoritative determination that human rights provisions continue to apply in times of armed conflict, unless a party has lawfully derogated from them’.²⁶⁷ In *Nuclear Weapons*, a possible primacy of IHL was established, whereas the *Wall* case brought relations between the two sets of norms towards more equal terms without, however, providing any sort of guidance as to which right would fall under which category. The ICJ’s silence in *DRC v. Uganda*, finally, might indicate a possible abandonment of the *lex specialis* principle when determining the interplay between human rights and international humanitarian law. Despite this not having been clarified yet, the ICJ would be far from being the only judicial or quasi-judicial body not applying this principle, in cases of parallel applicability of international humanitarian law and international human rights law.

2. The complementarity approach

As opposed to the concepts of exclusivity, for the proponents of complementarity, both international human rights law and international humanitarian law can apply together in situations of armed conflicts, as mutually supportive regimes.²⁶⁸ According to this school of thought, they ‘are not identical bodies of law but complement each other and ultimately remain distinct’.²⁶⁹ Despite all structural and historical differences between the two sets of norms, what counts are their ‘overlaps and similarities in the values, goals, functions and structure’ which ‘necessitate at least some communication and perhaps even cooperation between the two’.²⁷⁰ The concept of complementarity can be said to have been supported

²⁶³ In its decision, the ICJ found violations of both human rights and international humanitarian law by Ugandan forces in occupied parts of Congo and clarified that any occupation (and not necessarily only a prolonged one, like in the *Wall* case) creates obligations of the occupying power under international humanitarian law. – Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (Cambridge University Press 2015) 93.

²⁶⁴ See *Democratic Republic of the Congo v. Uganda*, ICJ, para. 216.

²⁶⁵ Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (Cambridge University Press 2015) 93.

²⁶⁶ Paul Eden and Mathew Happold, ‘Symposium. The relationship between International Humanitarian Law and International Human Rights Law’ (2009) Vol. 14, Issue 3 *Journal of Conflict and Security Law*, Oxford Journals, 442.

²⁶⁷ Theodor Meron, ‘The Humanization of Humanitarian Law’ (2000) Vol. 94, No. 2 *The American Journal of International Law* <<http://users.polisci.wisc.edu/kinsella/meron%20humanization.pdf>> accessed 25 April 2015, 239-278, 266.

²⁶⁸ Noëlle Quénivet, ‘Introduction. The History of the Relationship Between International Humanitarian Law and Human Rights Law’, in Roberta Arnold and Noëlle Quénivet (eds), *International Humanitarian Law and Human Rights Law* (Brill 2008) 9.

²⁶⁹ Hans-Joachim Heintze, ‘On the relationship between human rights law protection and international humanitarian law’ (2004) Vol. 86, n°. 856 *International Review of the Red Cross*, 789-814, 794.

²⁷⁰ Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (Cambridge University Press) 82.

by the ICJ in the *Wall* case,²⁷¹ the UN Human Rights Committee in its General Comment No. 31,²⁷² and by the International Committee of the Red Cross (ICRC).²⁷³

The precise meaning of complementarity is, however, not clear and uniform but is ‘often used more as a catch-word... It describes how two entities come together to connect or interact without losing their respective form or identity’.²⁷⁴ If complementarity is seen as an ‘active interplay, communication and mutual influence of norms’²⁷⁵ with the purpose of ‘securing consistency, filling gaps and achieving broader normative coverage’²⁷⁶, as opposed to a mere parallel application of norms belonging to different legal regimes, it becomes an interpretative principle according to which ‘two norms on a given subject matter are being used in a complementary fashion to identify what the law means’.²⁷⁷ As regards the interpretation of treaties, article 31(3)(c) VCLT seems to echo this principle by permitting to consider ‘any relevant rules of international law applicable in the relations between the parties’,²⁷⁸ thereby ‘enshrin[ing] the idea of international law understood as a coherent system ... in which different sets of rules cohabit in harmony’.²⁷⁹

As opposed to the principle of *lex specialis*, however, the complementarity approach does not aim at finding the ‘special’ norm and thereby leaving aside the general norm, thus establishing the prevalence of one rule over the other, but wants ‘to achieve systematic coherence in light of shared underlying principles’,²⁸⁰ like the protection of the individual in the case of IHRL and IHL.

²⁷¹ By referring to the possibility of both branches of law applying together.

²⁷² ‘[T]he Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, *both spheres of law are complementary, not mutually exclusive*’. UN Human Rights Committee, *General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant* (2004) U.N. Doc. CCPR/C/21/Rev.1/Add.13 (UN HRC, *General Comment No. 31*), para. 11 (emphasis added).

²⁷³ Jacob Kellenberger, ‘Protection through Complementarity of the Law’, in *Current Problems of International Humanitarian Law – International Humanitarian Law and other legal regimes: Interplay in situations of violence*, International Institute of Humanitarian Law, 27th Round Table, San Remo, 4-6 September 2003; Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (Cambridge University Press 2015) 105.

²⁷⁴ *Ibid*, 106.

²⁷⁵ *Ibid*.

²⁷⁶ *Ibid*, 107.

²⁷⁷ *Ibid*. ‘By contrast, the oftentimes interchangeably used terms ‘convergence’ and ‘cumulative application’ ought rather be understood as ‘a process which leads towards complementarity’ (convergence) and ‘a (temporal) coexistence or parallelism of human rights and humanitarian law as two applicable but otherwise isolated sets of norms which are uninterested in the outcome of their co-application and ... not geared towards any cooperative or mutually supportive effort’. See Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (Cambridge University Press 2015) 106.

²⁷⁸ VCLT, Art. 31 (3) (c).

²⁷⁹ Cordula Droege, ‘Elective affinities? Human rights and humanitarian law’, (2008) Vol. 90, No 871 International Review of the Red Cross <<https://www.icrc.org/eng/assets/files/other/irrc-871-droege1.pdf>> accessed 25 April 2015, 521.

²⁸⁰ *Ibid*, 108.

In practical terms as regards the interplay between IHL and IHRL, the principle of complementarity serves three purposes which bring the norms of both branches closer to a harmonisation in accordance with their underlying objectives:

1. Human rights law provisions can step in and fill gaps in international humanitarian law;²⁸¹
2. Both branches can be applied together in order to increase the level of protection;²⁸²
3. 'To interpret norms in light of each other'.²⁸³

The approach is, however, problematic when the norms in question cannot be interpreted in a harmonious way.

Milanovic suggests a distinction between a genuine and an apparent norm conflict.²⁸⁴ Whereas in the case of the latter, interpretation techniques can be used to harmonise different norms, in the former case this is impossible. As a result thereof, extra-legal (political) solutions are required.²⁸⁵ In particular, the legislator is required to pass new legislation, since interpretation is not possible. However, there are only very few cases of such irreconcilable, genuine norm conflict – chief among them are the provisions on the right to life, the use of lethal force, and detention.²⁸⁶

The updated European Union Guidelines on Promoting Compliance with International Humanitarian Law appears to support the complementary approach although in ambiguous terms where it states that IHL and IHRL 'while are distinct, the two set of rules may both be applicable to a particular situation and it is therefore sometimes necessary to consider the relationship among them'.²⁸⁷

²⁸¹ Nöelle Quénivet, 'Introduction. The History of the Relationship Between International Humanitarian Law and Human Rights Law', in Roberta Arnold and Nöelle Quénivet (eds), *International Humanitarian Law and Human Rights Law* (Brill 2008) 9; e.g. right to fair trial as protected under human rights in treaties and by jurisprudence.

²⁸² The level of protection can be increased e.g. through the human rights implementation mechanisms. Since IHL does not have its own implementation system, human rights institutions have taken up the IHL. This, however, has not happened without controversies since it has taken IHL into an even more pro-human-rights orientation. – See for instance Theodor Meron, 'The Humanization of Humanitarian Law' (2000) 94(2) *The American Journal of International Law* <<http://users.polisci.wisc.edu/kinsella/meron%20humanization.pdf>>, accessed 25 July 2015, 239-278, 247. In particular, incorporation of human rights principles of accountability can have a positive impact on the regulation of the use of force during armed conflict – Kenneth Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict' (2004) 98(1) *The American Journal of International Law*, 1-34, 34.

²⁸³ Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (Cambridge University Press 2015) 108.

²⁸⁴ Marko Milanovic, 'Norm Conflict in International Law: Whither human rights?' (2009) Vol. 20, 69 *Duke Journal of Comparative and International Law* <<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1054&context=djCIL>> accessed 25 April 2015, 69-131, 73.

²⁸⁵ Paul Eden and Mathew Happold, 'Symposium. The relationship between International Humanitarian Law and International Human Rights Law' (2009) Vol. 14, Issue 3 *Journal of Conflict and Security Law*, Oxford Journals, 441-447, 442.

²⁸⁶ Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (Cambridge University Press 2015) 109.

²⁸⁷ Updated European Union Guidelines on Promoting Compliance with International Humanitarian Law, , Official Journal of the European Union C303/12, 2009. para. 12. Nöelle Quénivet, 'Introduction. The History of the Relationship Between International Humanitarian Law and Human Rights Law', in Roberta Arnold and Nöelle Quénivet (eds), *International Humanitarian Law and Human Rights Law* (Brill 2008) 10.

3. The integrative approach

As opposed to the two main schools of thought discussed above – both of which share the view that human rights and humanitarian law are two distinct legal regimes and argue for keeping this division – another theory has emerged which claims that both sets of norms do not only coexist or coincide, but support the opinion that human rights and humanitarian law in fact are one ‘integrated legal regime’.²⁸⁸ For the proponents of this approach,²⁸⁹ when human rights merge into international humanitarian law, it is about ‘more than merely delimiting the respective spheres of application, but rather indicates that the law of armed conflict is undergoing a transformation under the influence of human rights’.²⁹⁰ Despite several different sub-theories as to the exact interplay, the most common view is that humanitarian law contributes with specific rights applicable in situations of armed conflict to human rights law ‘so as to expand the protective scope of international human rights law in response to the specific threats and risks of armed conflict’.²⁹¹ As concerns the delimitation to the concept of complementarity, no clear line can be drawn if the latter is also viewed as an active process.²⁹²

Seen from the historical origin and development of both branches of law over time, this view is, however, problematic in as far as IHL cannot be said to be a part of IHRL. It does not take into account the structural differences between the two systems.²⁹³ If one instead looks at the influence of human rights law on humanitarian law after 1945, it all boils down to a debate on the possible transformation of traditional humanitarian law.²⁹⁴ With a focus on their underlying shared concerns, ‘such a transformative process as part or as a result of complementarity suggests that international humanitarian law and international human rights form together [...] a full and complete *jus in bello*, which responds to the underlying goals and values of humanity in armed conflicts which were hitherto expressed by humanitarian law’.²⁹⁵

Despite its apparent rise, this concept does not come without difficulties since its critics fear that a fusion of human rights and humanitarian law might be to the detriment of the latter, possibly even leading to a ‘genetically modified mutation’, the outcome of which might be a lower level of protection.²⁹⁶ Rather, it is claimed, the focus should be on the advantages each of the systems has in particular circumstances.²⁹⁷

²⁸⁸ Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (Cambridge University Press 2015) 122.

²⁸⁹ See for instance Hans-Joachim Heintze, ‘On the relationship between human rights law protection and international humanitarian law’ (2004) Vol. 86, no. 856 *International Review of the Red Cross*, 789-814; *Prosecutor v. Kunarac, Kovač and Vuković*, International Criminal Tribunal for the Former Yugoslavia, IT-96-23-T and IT-96-32/1-T, Judgment of 22 February 2001, para. 467; Office of the High Commissioner for Human Rights, *International Humanitarian Law and Human Rights Law*, Fact Sheet No. 13 (Geneva: United Nations, 1991).

²⁹⁰ Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (Cambridge University Press 2015) 82.

²⁹¹ *Ibid*, 122.

²⁹² *Ibid*.

²⁹³ *Ibid*, 123 ff.

²⁹⁴ *Ibid*, 124.

²⁹⁵ *Ibid*.

²⁹⁶ Noam Lubell, ‘Parallel Application of International Humanitarian Law and International Human Rights Law: An Examination of the Debate’, (2007) Vol. 40, No. 2 *Israel Law Review*, 648-660, 655; Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (Cambridge University Press 2015) 125.

²⁹⁷ For critical authors as regards a complete merger of both branches, see e.g. Cordula Droege, ‘Elective affinities? Human rights and humanitarian law’ (2008) Vol. 90, No 871 *International Review of the Red Cross*, <<https://www.icrc.org/eng/assets/files/other/irrc-871-droege1.pdf>> accessed 25 April 2015, 521; Noëlle Quénivet,

So instead of a complete fusion of the two fields, an ‘integration or incorporation of human rights (as idea, law and policy) in the existing law(s) which govern situations of armed conflict’ is said to take place leading to a ‘human rights based *jus in bello*: a legal framework which governs all questions of armed conflicts in their various forms, which is constituted at its core international humanitarian law, and where human rights law is applied in a complementary or cumulative fashion, while at the same time providing the foundational normative value and operational direction’.²⁹⁸ This approach ‘goes beyond reconciling norms of international human rights and international humanitarian law’, in so far as human rights are the underlying values of the norms regulating armed conflict, thus aiming at ensuring ‘the highest possible level of protection’.²⁹⁹

C. The relationship between IHL and IHRL in the practice of judicial and monitoring bodies

Against the backdrop of this growing consensus on the applicability of both sets of norms in times of armed conflict, the remaining uncertainty leaves room for potential further discussion as regards the nature and implication of the interplay in particular situations. Given the non-existence of an international body to enforce IHL and the growing number of cases brought before human rights bodies that, however, do touch upon the relationship of IHRL and IHL, it is difficult for human rights bodies to engage with IHL.³⁰⁰

1. The UN human rights treaty bodies

All UN human rights committees have an inherent power to issue general comments with which to interpret their respective Convention. Among them, the Human Rights Committee has been the most active in dealing with the relationship between IHRL and IHL. In its General Comment 31, issued in 2004, it stated that IHRL and IHL are not mutually exclusive but *complementary* and that norms of IHL cannot displace human rights norms.³⁰¹ The sometimes more specific rules of IHL can be relevant for interpretative purposes of applicable human rights provisions. Of further note, the Committee on Economic, Social and Cultural Rights in its General Comment on the Right to Water of 2003,³⁰² made creative use of IHL in order to substantiate the right to water, which is not contained in ICESCR, via the right to access to water for prisoners and detainees.

As regards derogations, the Human Rights Committee, in General Comment 29, stated that ‘no measure derogating from the provisions of the Covenant may be inconsistent with the State party’s other

and Roberta Arnold, ‘Conclusions’, 591-592 in Arnold, Roberta and Quéniwet, Noëlle (eds.): *International Humanitarian Law and Human Rights – Towards a Merger in International Law* (Brill 2008).

²⁹⁸ Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (Cambridge University Press 2015) 126.

²⁹⁹ *Ibid.*

³⁰⁰ Françoise J. Hampson, ‘The relationship between International Humanitarian Law and Human Rights Law from the perspective of a human rights treaty body’ (2008) Vol. 90 No. 871 *International Review of the Red Cross*, 549-572.

³⁰¹ UN Human Rights Committee, General Comment 31 (2004) Nature of the Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.1, para. 11.

³⁰² ECOSOC, General Comment No. 15: The right to water (Art. 11 and 12 of the Covenant) 20 January 2003 E/C.12/2002/11.

obligations under international law, particularly the rules of international humanitarian law',³⁰³ giving the Committee the competence to monitor compliance with those other international obligations.

As regards the adjudicative function of some Committees, States explicit acceptance of an individual complaints procedure is required. Even in situations where this is the case, the views of the Committees are of a non-binding nature, and the record of implementation of these views rather poor. A few cases before the Human Rights Committee concerned situations of armed conflict, e.g. *Sarma v. Sri Lanka* concerning the abduction and disappearance of an alleged Tamil Tiger member.³⁰⁴ The HRC found that Sri Lanka had an obligation to offer an effective remedy, including a thorough and effective investigation into the disappearance and adequate compensation. However, it is important to mention that the applicant did not invoke IHL, which led the Committee to solely ground its decision on human rights provisions.

Whereas early human rights treaties do not contain any expressed reference to IHL, more recent ones, like the CRC do contain direct or indirect obligations for States to respect IHL, 'thereby explicitly rendering compliance with IHL a human rights issue'.³⁰⁵ That is the case of the CRC, and therefore the role of the Committee should be underlined. The Third Optional Protocol to the CRC, which entered into force in April 2014, enables children to submit IHL-related complaints.³⁰⁶ How and if this Optional Protocol influences the CRC Committees' approach, towards more actively speak out on IHL matters, remains to be seen.

2. The European Court of Human Rights

Unlike the ICJ, the ECtHR has never been so explicit about the continued application of the European Convention on Human Rights in times of armed conflict. As human rights law on the one hand used to be seen as a matter of states vis-à-vis their citizens, and was just commencing to turn into a consolidated, international field of law, and on the other hand, war traditionally occurred between States, as a result no thought was given to the interplay between the two branches at the time of drafting the ECHR.³⁰⁷ The ECtHR is generally hesitant to refer to international humanitarian law.³⁰⁸ Some see State parties' lack of an open declaration of being involved in an armed conflict as the main reason for this reluctance. Even in

³⁰³ UN Human Rights Committee, General Comment No. 29: Art. 4: Derogations during a State of Emergency (31 August 2001) CCPR/C/21/Rev.1/Add.11.

³⁰⁴ Mr. S. Jegatheeswara Sarma v. Sri Lanka, Communication No. 950/2000. See at <<https://www1.umn.edu/humanrts/undocs/950-2000.html>> accessed 15 September 2015.

³⁰⁵ For instance, Article 38 (1) of the Convention on the Rights of the Child (CRC) obliges the States Parties to undertake to respect and ensure respect for rules of IHL that deal with the protection of children.

³⁰⁶ The Optional Protocol to the UN Convention on the Rights of the Child on a Communications Procedure (Third Optional Protocol) adopted during the Sixty-sixth session of the UN General Assembly on 19 December 2011 A/RES/66/138 available at <https://treaties.un.org/doc/source/docs/A_Res_66_138-E.pdf> accessed 30 June 2015.

³⁰⁷ Andrea Gioia, 'The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict' in Orna Ben-Naftali (ed.) *International Humanitarian Law and International Human Rights Law* (Oxford University Press 2011) 201-249, 202.

³⁰⁸ As opposed to the Inter-American human rights bodies. In particular the Inter-American Human Rights Commission has been very active in both interpreting human rights norms in the light of IHL and even directly applying it in some cases since it was of the opinion that human rights law alone did not give it all necessary tools to decide in cases of armed conflicts (*Abella v. Argentina*, *Coard v. the United States*); the Court, however, showed more reluctance in this regard and held that the American Convention only gives the competence to 'to determine whether the acts or the norms of the state are compatible with the Convention itself, and not with the 1949 Geneva Convention' – *Las Palmas* case, para 33; similarly also in *Bámaca-Velásquez* case.

cases where an armed conflict was obviously going on – for example in Chechnya or Cyprus, the Court ignored the facts on the ground and continued to apply the Convention fully – treating the situation as if in peace times - since no derogation had been made by the States involved.³⁰⁹

Unlike the ICJ, whose legal field of action is much broader, for a court like the ECtHR whose function is to watch over States' compliance with a particular human rights treaty and which has been created just for this purpose, it is much more difficult to accept the *lex specialis* of IHL. Questions arise such as a possible applicability of IHL for the ECtHR and if so, the extent to which it can prevail over human rights law, when the rules in questions cannot be reconciled. Unlike the norms of the ICCPR examined by the ICJ, the provisions under the ECHR with regard to a conflict of norms, do not present an immediate window for IHL to enter (like the term 'arbitrarily' in Article 6 of the ICCPR on the right to life or Article 9 on the right to personal freedom and security). They are framed in more restrictive terms with only concrete exceptions, which make it difficult to interpret them in the light of IHL and instead, lead to conflicts of norms.³¹⁰

The ECtHR has been reluctant to acknowledge explicitly any role for IHL in its interpretation and application of the Convention. In its jurisprudence, it has either refused to acknowledge the existence of a conflict or to consider the impact of IHL on human rights standards, albeit dealing with cases in the context of several armed conflicts concerning, among others, Cyprus, Chechnya, Transdnistria or Iraq.³¹¹ Until recently, the general approach was that where the respondent State had not derogated from its obligations under the Convention, the 'normal legal background' would apply.³¹²

However, the ECtHR has consistently emphasised to render the 'rights practical and effective' and make sure they do not remain 'theoretical and illusory'. In practice, this means that where a State fails to derogate, it is significant how IHL is interpreted in these contexts. In several cases, the ECtHR has closely looked to principles of IHL, such as the use of force against individuals or small groups of persons allegedly engaged in terrorist activities.

Even in cases with a high intensity of use of force, like in *Ergi v. Turkey* and *Özkan v. Turkey* concerning individuals caught in a cross fire, the Court applied an approach typical of law enforcement operations by stating that the right to life required States to 'take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimising, incidental loss of civilian life'.³¹³ The outcome of the interpretation of some principles, particularly in the *Özkan case* – concerning deaths, detention, and the burning of houses during

³⁰⁹ Andrea Gioia, 'The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict' in Orna Ben-Naftali (ed.) *International Humanitarian Law and International Human Rights Law* (Oxford University Press 2011) 201-249, 205.

³¹⁰ *Ibid.*, 215.

³¹¹ See Joana Abrisketa, 'Los problemas del Tribunal Europeo de Derechos Humanos para aplicar el Derecho Internacional Humanitario' (2012) Núm. 43 Revista de Derecho Comunitario Europeo, 875-899.

³¹² *Ibid.*

³¹³ *Ergi v. Turkey*, Application no. 66/1997/850/1057, Judgment, European Court of Human Rights (28 July 1998) <[http://hudoc.echr.coe.int/eng?i=001-58200#{"itemid":\["001-58200"\]}](http://hudoc.echr.coe.int/eng?i=001-58200#{)> accessed 30 June 2015, para 79; *Özkan v. Turkey*, Application no. 21689/93, Judgment, European Court of Human Rights (6 April 2004) <[http://hudoc.echr.coe.int/eng?i=001-61696#{"itemid":\["001-61696"\]}](http://hudoc.echr.coe.int/eng?i=001-61696#{)> accessed 30 June 2015, para. 297.

military occupation in south-east Turkey- could have been different, but instead no reference to IHL was made, despite a possible qualification of the situation as an armed conflict.³¹⁴

The same standard was applied in the case *Isayeva Yusupova and Bazayeva v. Russia* concerning civilian deaths through aerial bombardment, where the Court considered an internal armed conflict exclusively from an IHRL perspective and held that the Russia had failed to assess and prevent a 'possible harm to civilians who might have been present... in the vicinity of what the military could have perceived as legitimate targets'³¹⁵ and that 'the authorities must take appropriate care that any risk of life is minimised'.³¹⁶ The assessment could have been different under IHL and its rules of targeting which allow the application of lethal force as a first recourse if the target is a military one. If this were the case, the principle of proportionality, as further elaborated above, comes into play.

Several cases taken against NATO action in former Yugoslavia were found inadmissible.³¹⁷ In cases concerning World War II, dealing with the legitimacy of prosecuting individuals for war crimes and relating to questions of human rights concerning issues of legality and non-retroactivity, the ECtHR did not directly or indirectly assess the States' responsibility under IHL, but only looked to the way in which national courts had applied international law.

Recently, the ECtHR decided cases, mostly involving the United Kingdom, regarding the occupation of Iraq. The case of *Al Skeini v. UK* concerned allegations that the UK was obliged to investigate allegations of unlawful killings and torture in British occupied Basra, in Southern Iraq. In its judgment, the Court cited IHL in the record of 'applicable law' and in the summary of relevant arguments of the parties and third party interveners who had referred to IHL but made no reference to IHL in its own assessment.³¹⁸ The judgment, however, is important in so far as it acknowledges in principle the potential relevance of IHL to the interpretation of the Convention in conflict situations.

In the case of *Al Jedda v. UK*, concerning the lawfulness of internment in Iraq absent of the normally applicable procedural safeguards, the same approach as in *Al Skeini* was applied: the Court quoted relevant IHL provisions but failed to take them into account when deciding on the lawfulness of the detentions and applicable safeguards in the context of a conflict situation.³¹⁹ The UK Government, on its part, chose not to invoke IHL to justify its actions, but focused on the fact that the UN Security Council had authorised detentions which, as a consequence, were not subject to normal human rights protections, but invoked Article 103 of the UN Charter and the priority of the UN Charter law over other international

³¹⁴ *Özkan v Turkey*, Application no. 21689/93, Judgment, European Court of Human Rights (6 April 2004) <[http://hudoc.echr.coe.int/eng?i=001-61696#{"itemid":\["001-61696"\]}](http://hudoc.echr.coe.int/eng?i=001-61696#{)> accessed 30 April 2015.

³¹⁵ *Isayeva Yusupova and Bazayeva v. Russia*, Applications nos. 57947/00, 57948/00 and 57949/00, Judgment, European Court of Human Rights (24 February 2005) <[http://hudoc.echr.coe.int/eng?i=001-68379#{"itemid":\["001-68379"\]}](http://hudoc.echr.coe.int/eng?i=001-68379#{)> accessed 30 April 2015, para. 175.

³¹⁶ *Ibid*, para. 171.

³¹⁷ See, for instance, *Banković and Others v. Belgium and others*, Application no. 52207/99, Decision as to the admissibility, European Court of Human Rights (12 December 2001) <[http://hudoc.echr.coe.int/eng?i=001-22099#{"itemid":\["001-22099"\]}](http://hudoc.echr.coe.int/eng?i=001-22099#{)> accessed 30 April 2015.

³¹⁸ *Al Skeini v. UK*, Application No. 55721/07, Judgment, European Court of Human Rights (7 July 2011) <<http://hudoc.echr.coe.int/eng?i=001-105606>> accessed 30 June 2015.

³¹⁹ *Al Jedda v. UK*, Application No. 27021/08, Judgment, European Court of Human Rights (7 July 2011) <[http://hudoc.echr.coe.int/eng?i=001-105612#{"itemid":\["001-105612"\]}](http://hudoc.echr.coe.int/eng?i=001-105612#{)> accessed 30 June 2015.

obligations. The ECtHR was not convinced and found that the Security Council only authorised but did not oblige States to detain nor to withhold procedural safeguards. Due to a lack of conflict between the obligations under the respective Security Council Resolution and the Convention, there was no need to prioritise Chapter VII obligations.

As in *Al-Skeini*, the ECtHR did not assess whether any other legal regime co-applied (IHL) and whether there was an alternative legal basis for detention and procedural rules. Like in *Al-Skeini*, none of the parties had requested the Court to do so.

In cases against Russia in context of the Chechen conflict, the ECtHR continued applying its previous approach of not making any reference to IHL. In *Finogenov v. Russian Federation* the Court used IHL language by finding that the use of gas, even dangerous and potentially lethal, did not amount to an indiscriminate attack, as a high chance of survival remained for the hostage, depending on the efficiency of the subsequent rescue operations.³²⁰

In the case of *Hassan v. UK*, however, the UK government took a different position, arguing that the detention of an Iraqi citizen had been lawful, despite a lack of derogation from Article 5 of the ECHR. The ECtHR held that both systems of law, the Convention and IHL, provided safeguards from arbitrary detention in time of armed conflict and that the grounds of permitted deprivation of liberty set out in Article 5 should be accommodated, with taking of prisoners of war and the detention of civilians who pose a risk to security under GC III and GC IV. The capture and detention of the civilian in question had therefore not been arbitrary.³²¹

In general, it can be stated that the ECtHR often holds regard to the realities of armed conflict in interpreting and applying the Convention, but has not been willing to engage in a detailed manner with the ways in which IHL may affect IHRL in conflict situations. However, it has come to acknowledge the importance of interpreting the Convention in the light of other existing fields of international law.

3. The organs of the Inter-American human rights system

As opposed to the ECtHR, the organs of the Inter-American Human Rights System directly and explicitly applied IHL in the context of individual cases.³²² Chief among them is the *Abella case*, addressing a 'combat situation' which 'none of the human rights instruments was designed to regulate'.³²³ The Commission held that in order to consider alleged violations of the right to life it must

³²⁰ *Finogenov and others v. Russia*, Application nos. 18299/03 and 27311/03, Judgment, European Court of Human Rights (4 June 2012) <[http://hudoc.echr.coe.int/eng?i=001-108231#{"itemid":\["001-108231"\]}](http://hudoc.echr.coe.int/eng?i=001-108231#{)> accessed 30 April 2015.

³²¹ *Hassan v. UK*, Application No. 29750/09, Judgment, European Court of Human Rights (16 September 2014) <<http://hudoc.echr.coe.int/eng?i=001-146501>> accessed 30 April 2015.

³²² The above reference to 'organs' is made to the Inter-American Commission and the Inter-American Court of Human Rights.

³²³ *Juan Carlos Abella v. Argentina* (Judgement) Case 11.137, Report N° 55/97, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.95 Doc. 7 rev. at 271 (18 November 1997) <<http://www.cidh.oas.org/annualrep/97span/Argentina11.137c.htm>> [in Spanish] <<http://www1.umn.edu/humanrts/cases/1997/argentina55-97a.html>> accessed 30 June 2015, para. 158.

necessarily look to and apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance in its resolution of this and other kinds of claims alleging violations of the American Convention, which precludes the Convention being applied in a manner that restricts rights protected under other conventions.³²⁴

In *Las Palmeras v. Colombia* the Commission reiterated its approach and declared that Colombia had violated Common Article 3 of the Geneva Conventions. The Court, however, stated that neither the Commission nor the Court had the mandate to make direct pronouncements on the violations of IHL,³²⁵ and called for a more cautious approach to the concurrent application of IHL and IHRL, since it is the purpose of the system to apply and reach findings concerning violation of the relevant human rights instrument and not of IHL per se. IHL, however, was considered important to interpret the obligations under the Inter-American Convention of Human Rights.³²⁶

D. Normative and operational challenges on the interplay between IHRL and IHL

1. Classification of conflicts and regulation of non-international conflicts

As opposed to the – in former times dominant and therefore under IHL regulated in great detail – ‘classical’ types of conflict in which one State was at war with another State, non-international armed conflicts (NIAC) are only regulated in a very rudimentary way. Common Article 3 to the four Geneva Conventions applies to all kind of NIAC and is considered to contain an absolute minimum standard that has to be observed in internal conflicts.³²⁷ Additional Protocol II (AP II) contains some more substantive rules, but depends on the ratification by States and, most importantly, on the threshold an armed conflict must reach for it to apply at all.³²⁸

In recent years, as particular highlighted by the ICRC in its study on customary international law, most rules of international armed conflict have been considered to also apply in NIACs as rules of customary IHL, which has in practice eradicated most of the differences between the two types of conflict.

However, important differences and gaps remain, like the question of how to qualify non-state armed groups and their members. Unlike in IACs, the provisions regulating a non-international armed conflict do not confer the legal status of combatants – meaning persons who may participate in an armed conflict and can lawfully be targeted but also benefit from the prisoner of war (POW) status if captured – upon the fighter of non-state armed groups. However, it is also an established rule of customary international law in both types of conflict, that the targeting of civilians is prohibited.³²⁹ In such conflicts, it is not clear how

³²⁴ *Ibid*, para. 161.

³²⁵ *Las Palmeras v. Colombia* (Preliminary Objections) Inter-American Court of Human Rights (4 February 2000) <http://www.corteidh.or.cr/docs/casos/articulos/seriec_67_ing.pdf> accessed 30 June 2015, paras. 31, 32 and 33.

³²⁶ *Ibid*.

³²⁷ See Jelena Pejic, 'The protective scope of Common Article 3: more than meets the eye', (2011) Vol. 93 no. 881 *International Review of the Red Cross* <<https://www.icrc.org/fre/assets/files/review/2011/irrc-881-pejic.pdf>> accessed 20 April 2015, 1-37.

³²⁸ Art. 1 AP II.

³²⁹ See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume 1: Rules* (ICRC, Cambridge 2005) Rule I, 3-8.

to classify members of an armed group and to determine whether they can be targeted.³³⁰ A similar problem arises around the question of how to legally detain members of an armed group.

Those difficulties are also connected with the difficulties in the practical application and interpretation of the principle of distinction, which, among other, raises the challenge of defining the notion of 'direct participation in hostilities', which determines that civilians taking direct part in the conflict are no longer protected from attacks as provided by Articles 51(3) of the Additional Protocol I and 13(3) of the Additional Protocol II. The difficulty involved in distinguishing between combatants and civilians having increased due to the nature of contemporary conflicts, instigated the ICRC to issue a document providing guidance for interpreting and applying the concept of 'direct participation in hostilities'.³³¹ Conversely, no common ground has been reached on how to apply in practice other concepts also critical to the conduct of hostilities, with blurred lines between 'unfortunate' and 'unlawful' harm to civilians.³³²

2. Enhancing compliance of IHRL by non-state actors

As it has been noted elsewhere, a relevant issue raised by the convergence between IHRL and IHL, concerns the applicability of international human rights law to non-state armed groups.³³³ In this respect, whereas there is consensus on the applicability of IHL to ANSAs, providing that parties to an armed conflict³³⁴ in terms of sufficient organisation and intensity degree of the fight,³³⁵ and despite of the fact that they cannot accede to international treaties, the binding character of IHRL on them both in wartime or peacetime is more controversial.³³⁶ Arguments against ANSAs being bound by IHRL are (a) the traditional tendency for doctrine to consider States as the only subjects to human rights obligations, (b) the scarce expressed references to ANSAs in human rights treaties, and (c) the State reluctance towards giving certain recognition or legitimacy to ANSAs by imposing IHRL obligations on them.³³⁷

On the other hand, those authors who advocate in favour of the IHRL applicability to ANSAs hold that (a) equal obligations must be imposed on both sides of the armed conflict by virtue of the equality of obligation theory,³³⁸ (b) the fact that non-state actors enjoy human rights implies that they must fulfil

³³⁰ *Ibid*, Rules 3, 4 and 5.

³³¹ Nils Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under Humanitarian Law*, (ICRC 2009) <<http://www.icrc.org/eng/resources/documents/publication/p0990.htm>> accessed 25 May 2014.

³³² Charli Carpenter, 'Collateral damage control', *New York Times* (11 August 2010) <<http://www.nytimes.com/2010/08/12/opinion/12iht-edcarpenter.html>> accessed 18 April 2014.

³³³ See Stuart Casey Masley (ed), *The War Report 2012* (Oxford 2013) 404 -410.

³³⁴ *Prosecutor v. Sam Hinga Norman*, Decision on the Preliminary Motion Based on Lack of Jurisdiction, Special Court for Sierra Leone (SCSL) (May 2004) <<http://www.sierrali.org/sl/judgment/special-court/2004/18>> accessed 25 May 2014, para. 22.

³³⁵ *Prosecutor v. Dusko Tadić*, Judgement, International Criminal Tribunal for the Former Yugoslavia (ICTY), 15 July 1999 Case IT-94-1-A <<http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>> accessed 25 May 2014, para. 70.

³³⁶ Sandesh Sivakumaran, 'Re-envisioning the international law of internal armed conflict', (2011) vol. 22 (1) *European Journal of International Law*, 251.

³³⁷ Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006) 46-53.

³³⁸ Christian Tomuschat, 'The applicability of human rights law to insurgent movements', in Horst Fischer, Dieter Fleck et al. (ed), *Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck*, (Berliner Wissenschafts-Verlag 2004) 573-576.

correlative human rights obligations,³³⁹ (c) as far as ANSAs effectively control a territory, they constitute the authority responsible for protecting the human rights of those subject to their jurisdiction,³⁴⁰ (d) customary norms of IHRL which have the status of *jus cogens*, insofar as a persistent and coherent State practice provides them with perceived legal force or *opinio iuris*, are deemed to be generally binding on any entity able to comply with them, even non-state actors.

In this regard, those arguments have been taken into consideration in the practice of the UN human rights bodies putting forward the arguments of the *de facto* control over a territory³⁴¹ in the cases of Afghanistan and Libya, and the status of *jus cogens* of certain norms of IHRL, in the case of Syria, to assert the binding force of at least certain IHRL provisions on ANSAs. Even the Security Council has considered non-state actors bound by IHRL and IHL several times, yet without clear explanation.³⁴² The Security Council has implicitly recognised the applicability of IHRL and of ICL to non-state groups by condemning

the human rights violations and acts of violence committed in northern Mali, in particular by rebels, terrorist groups and other organized transnational crime network, including the violence perpetrated against women and children, the killings, the hostage-taking, pillaging, theft and destruction of religious and cultural sites, as well as the recruitment of child soldiers, and calls for the perpetrators of these acts to be brought to justice³⁴³

With again a slightly different approach, Philip Alston as Special Rapporteur on extrajudicial, summary or arbitrary executions, stated in his report on Sri Lanka: ‘Human rights norms operate on three levels – as the rights of individuals, as obligations assumed by States and as legitimate expectations of the international community’ and considered it incumbent on every organ of society to respect and promote human rights.³⁴⁴ Similar tendencies are at the heart of the discussion around a so-called constitutionalisation of international law.

³³⁹ Dieter Fleck, ‘Humanitarian protection against non-state actors’ in Johan Frowein et al. (eds), *Negotiating for Peace: Liber Amicorum Tono Eitel* (Springer 2003) 69 and 79.

³⁴⁰ Geneva Academy of International Humanitarian Law and Human Rights, *Rules of engagement: protecting civilians through dialogue with non-state actors* (Geneva 2011) <<http://www.geneva-academy.ch/docs/publications/Policy%20studies/Rules%20of%20Engagement.pdf>> accessed 25 May 2014, 25.

³⁴¹ Human Rights Council, *Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya* (1 June 2011) UN Doc. A/HRC/17/44, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.44_AUV.pdf> accessed 25 May 2014, para. 72.

³⁴² See, for example, 1998 in Afghanistan (Resolution 1214, preamble para 12), Guinea-Bissau (Resolution 1216, 1998, para 5), Liberia (Resolution 1509, 2003, para 10).

³⁴³ UN Security Council, Resolution 2056 (2012), UN Doc. S/Res/2056 (2012) <<http://unowa.unmissions.org/Portals/UNOWA/Security%20council/Resolution%202056.pdf>> accessed 26 May 2014, para. 13; UN Security Council, Resolution 2071 (2012), UN Doc. S/Res/2071 (2012) <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2071%282012%29> accessed 25 May 2014, para. 14; UN Security Council, Resolution 2085 (2012), UN Doc. S/Res/2085 (2012) <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2085%282012%29> accessed 25 May 2014, para. 6.

³⁴⁴ Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum - Mission to Sri Lanka* (27 March 2006) UN Doc. E/CN:4/2006/53/Add.5, para. 25.

The referred practice seems to point that an effective convergence between IHL and IHRL in particular with regard to non-international armed conflicts, can provide a legal basis to extend the applicability of IHRL to non-state actors.

At a legal and policy level, responding to abuses by non-state armed groups is increasingly important given the prevalence of internal armed conflicts. This is compounded by the spill-over effects of the movements of armed rebel groups and militias. There is an important need to ensure that key players in contemporary domestic and international security do not remain relatively unregulated and unaddressed by IHRL.³⁴⁵

Notwithstanding the above, the practice of the United Nations, as well as that of other international and regional organisations, shows that efforts are increasingly being made to hold armed groups accountable at the international level for the violation of international norms.³⁴⁶ In particular, the UN Secretary-General in his report on the protection of civilian of 22 November 2013 has highlighted 'the importance of enhancing compliance with international humanitarian law by non-State armed groups and the corresponding need for humanitarian actors to engage with such groups to that end and to gain safe access to people in need of assistance'.³⁴⁷ In this regard, he has urged Member States 'to avoid promulgating policies that inhibit engagement with such groups that control territory or access to the civilian population in areas controlled by non-State armed groups'.³⁴⁸

Besides this, the engagement with such groups is not, however, limited to UN human rights mechanisms. The Geneva Academy of International Humanitarian Law and Human Rights conducted a study on how to enhance compliance with international norms by armed non-state actors, taking into account the views both of the actors themselves and the experiences of those engaged in dialogue with them. The report of the project, 'Rules of Engagement: Protecting Civilians through Dialogue with Armed Non-State Actors', was published in October 2011.³⁴⁹ The report presented a detailed set of conclusions and recommendations. They are addressed to a range of concerned actors, particularly humanitarian and mediation practitioners, members of ANSAs, as well as States, which, under international law, have the primary responsibility to protect people within their jurisdiction. The overarching conclusion of the report is the recognition of an urgent need for increased humanitarian engagement with ANSAs.³⁵⁰

³⁴⁵ *Ibid.*

³⁴⁶ Annyssa Bellal and Stuart Casey-Maslen 'Enhancing Compliance with International Law by Armed Non-State Actors' (2011) 3 (1) Goettingen Journal of International Law available at <<http://ssrn.com/abstract=2163115>> accessed 30 June 2015, 175-197.

³⁴⁷ UN Security Council, *UN Secretary-General Report on the protection of civilian* (22 November 2013) 2013S/2013/689.

³⁴⁸ UN Security Council, *UN Secretary-General Report on the protection of civilian* (22 November 2013) 2013S/2013/689.

³⁴⁹ Geneva Academy of International Humanitarian Law and Human Rights, 'Rules of Engagement: Protecting Civilians through Dialogue with Armed Non-State Actors' (October 2011) <<http://www.geneva-academy.ch/docs/publications/Policy%20studies/Rules-of-Engagement-EN.pdf>> accessed 24 March 2015.

³⁵⁰ *Ibid.*, 41-42. The report has been followed by a more recent policy brief on armed groups and the protection of civilians 'Reactions to Norms: Armed Groups and the Protection of Civilians' (January 2014) <http://www.geneva-academy.ch/docs/publications/Policy%20studies/Geneva%20Academy%20Policy%20Briefing%201_Amed%20Groups%20and%20the%20Protection%20of%20Civilians_April%202014.pdf> accessed 24 March 2015.

To date, there is no comprehensive legal framework addressing these entities, especially regarding their human rights obligations and their accountability. However, new initiatives and practices are trying to hold non-state actors accountable.

3. Applicability of IHRL and IHL to international organisations and peace-keeping and peace-enforcement operations

Usually, States provide military personnel to operations under the authority of the UN. The Secretary General's Bulletin on observance of the United Nations forces of international humanitarian law of 1999 contains many, but not all rules of IHL and instructs UN forces to comply with them when engaged as combatants in armed conflict.³⁵¹ Similarly, the Convention on the Safety of the United Nations and Associated Personnel 1994,³⁵² stipulates in Article 20 that

[N]othing in this Convention shall affect: (a) the applicability of international humanitarian law and universally recognized standards of human rights as contained in international instruments in relation to the protection of United Nations operations and United Nations and associated personnel or the responsibility of such personnel to respect such law and standards.³⁵³

Furthermore, the UN Charter itself recognises the protection and promotion of human rights as one of its fundamental principles.³⁵⁴ Thus, military forces acting under the authority of the UN are expected to apply the highest standard in relation to the protection of civilians and are also expected to investigate and to ensure accountability for violations of IHL and IHRL.³⁵⁵

As for international human rights obligations, the Human Rights Committee stated in General Comment no. 31 (2004):

States parties are required by article 2, paragraph 1, [of the International Covenant on Civil and Political Rights] to respect and to ensure the Covenant rights [...]. This principle also applies to those within the power or effective control of the forces of a State party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State party assigned to an international peacekeeping or peace enforcement operation.³⁵⁶

³⁵¹ UN Secretary-General (UNSG), *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law* (6 August 1999) ST/SGB/1999/13 <<http://www.refworld.org/docid/451bb5724.html>> accessed 10 July 2015.

³⁵² Convention on the Safety of the United Nations and Associated Personnel, New York, 9 December 1994, adopted by UNGA Resolution 49/59 UNTS 2051(363) <<https://treaties.un.org/doc/Publication/UNTS/Volume%202051/v2051.pdf>> accessed 20 April 2015.

³⁵³ *Ibid*, Art. 20.

³⁵⁴ United Nations Charter (1945) 1 UNTS XVI <<https://treaties.un.org/doc/publication/ctc/uncharter.pdf>> accessed 10 April 2015, preamble and Art. 1(3).

³⁵⁵ See Daphna Shrager, 'The interplay between Human Rights and International Humanitarian Law in UN operations' in Erika de Wet and Jan Kleffner, *Convergence and conflicts of Human Rights and International Humanitarian Law in Military Operations* (Pretoria University Law Press 2014) 211-225.

³⁵⁶ Article 10, UN Human Rights Committee, General Comment 31 (2004) Nature of the Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.1.

Usually the forces benefit from immunities in the territory where they are deployed. The UN conducts internal investigations of reported violations. The individuals' home States have jurisdiction and must take steps to prevent violations and to ensure accountability of their own nationals.

As for International Organisations participating in an armed conflict, no clear practice as regards IHRL and IHL obligations exist. Since they themselves are not parties to the relevant treaties, but their Member States and States contributing troops to peace operations are, experts argue that, by rules of customary international law, the respective norms are as equally binding on them as they are on States.³⁵⁷

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 state that the victims' rights under international human rights law and international humanitarian law include an obligation of the State to prevent violations from occurring and, in case where they do occur, to investigate them.³⁵⁸ Further, the Basic Principles and Guidelines affirm the State's duty to

a) take appropriate legislative and administrative and other appropriate measures to prevent violations; b) investigate violations effectively, promptly, thoroughly and impartially, and, where appropriate, take actions against those allegedly responsible on accordance with domestic and international law; c) provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, irrespective of who may ultimately be the bearer of responsibility for the violation; and d) provide effective remedies to victims, including reparation.³⁵⁹

4. Terrorism and the response to it

IHRL and IHL are often confronted with the twofold challenge of terrorism, which also affects other legal regimes such as refugee law. On the one hand 'terrorism negates the most basic principles of humanity that underlie international humanitarian law, human rights law, and refugee law'.³⁶⁰ On the other hand '[w]hile terrorist acts may damage human rights, it is equally true that State counter-terrorism responses may have a degrading effect, though sometimes less visibly'.³⁶¹

³⁵⁷ See <https://www.icrc.org/eng/assets/files/other/sanremo-2008_peace_ops.pdf> accessed 25 July 2015, 90-107.

³⁵⁸ Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>> accessed 25 April 2015.

³⁵⁹ *Ibid.* section II. 3, 4-5.

³⁶⁰ Emanuela-Chiara Gillard, 'The Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law' in *Terrorism and International Law: Challenges and Response*. (Meeting of independent experts on Terrorism and International Law: Challenges and Responses. Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law and Seminar on International Humanitarian Law and Terrorism, San Remo, May, June, September 2002) <<http://www.iihl.org/iihl/Album/terrorism-law.pdf>> accessed 13 September 2015, 50.

³⁶¹ Dinah Pokempner, 'Terrorism and Human Rights: the Legal Framework' in *Terrorism and International Law: Challenges and Response*. (Meeting of independent experts on Terrorism and International Law: Challenges and Responses. Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law and

States have the duty to protect their citizens against terrorism and while achieving this purpose, States must act with due diligence to ensure that counter-terrorism is not used to justify breaches of human rights and recognised humanitarian standards. The applicable legal framework will define the scope of counter-terrorism action and provide the appropriate safeguards. In this sense, the characterisation of the counter-terrorism campaign as either 'war' or 'law enforcement' is essential to determine if IHL applies and if derogation of certain rights is in place.³⁶² The events of September 11, 2001 in the United States have affected perceptions of what constitutes war in the legal sense. The widely used term of 'global war on terror' that emerged in the aftermath of September 11 should be assessed in the light of IHL to ascertain whether violence effectively reaches the threshold of armed conflict. The ICRC is supportive of a case-by-case approach to the legal qualification of the situations of violence in the so-called 'war on terror'.³⁶³

Therefore it is essential to assess whether the 'fight against terrorism' amounts to 'war' under IHL to define the applicable legal framework. It has to be taken into consideration that IHL rules on the use of force and detention for security reasons are less restrictive than the rules applicable to 'law enforcement'. Despite its more lenient character, IHL expressly prohibits terrorist acts without providing an explicit definition of 'terrorism'.³⁶⁴ While terrorism is recognised as a crime however, usually terrorist acts do not amount to a breach of human rights, as they are not committed by a State.

Its less restrictive nature has led many States to justify arbitrary deprivations of liberty under IHL; detentions that otherwise would be in breach of human rights norms. This is precisely the case of the United States as it 'justifies the indeterminate detention of the men held at Guantánamo Bay and the denial of their right to challenge the legality of the deprivation of liberty by classifying them as "enemy combatants"'.³⁶⁵ The 2006 UN Report on Guantánamo Detainees explains the relationship between IHL and IHRL on the detention of individuals in the following terms:

'any person having committed a belligerent act in the context of an international armed conflict and having fallen into the hands of one of the parties to the conflict (in this case, the United States) can be held for the duration of hostilities, as long as the detention serves the purpose of preventing combatants from continuing to take up arms against the United States. Indeed, this principle encapsulates a fundamental difference between the laws of war and

Seminar on International Humanitarian Law and Terrorism, San Remo, May, June, September 2002) <<http://www.ihl.org/ihl/Album/terrorism-law.pdf>> accessed 15 September 2015, 23.

³⁶² *Ibid*, 24-25.

³⁶³ ICRC, 'International humanitarian law and the challenges of contemporary armed conflicts', Document prepared by the International Committee of the Red Cross for the 30th International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 26-30 November 2007' (2007) 89 (867) *International Review of the Red Cross*, <<https://www.icrc.org/eng/assets/files/other/irrc-867-ihl-challenges.pdf>>, accessed 13 September 2015, 726.

³⁶⁴ Article 51(2) of AP I and Article 13(2) of AP II prohibit 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population'. These provisions are further supported by Article 33 of the GC IV stating that '[c]ollective penalties and likewise all measures of intimidation or of terrorism are prohibited.'

³⁶⁵ UN Commission on Human Rights, *Situation of Detainees at Guantánamo Bay* (27 February 2006) E/CN.4/2006/120, <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/112/76/PDF/G0611276.pdf?OpenElement>> 8-9 para. 20.

human rights law with regard to deprivation of liberty. In the context of armed conflicts covered by international humanitarian law, this rule constitutes the *lex specialis* justifying deprivation of liberty which would otherwise, under human rights law as enshrined by Article 9 of ICCPR, constitute a violation of the right to personal liberty.³⁶⁶

Pursuant to the ICRC approach, the Report concluded that the US alleged 'global war against terrorism' did not constitute an armed conflict for the purposes of the applicability of international humanitarian law.³⁶⁷ Resulting from recent States' practice, Gillard remarks that '[p]aradoxically, perhaps a denial of the application and relevance of the law is much more damaging to a body of law than its violation'.³⁶⁸ Gillard further identifies another potential challenge to IHL posed by terrorism: the differences between IHL and terrorism conventions imply a risk that an individual could be held accountable for acts committed in armed conflict that did not violate IHL.³⁶⁹

With regards to refugees, UNHCR has expressed concern for the recent counter-terrorism policies adversely affecting asylum seekers, as they have to comply with more restrictive legislative or administrative measures and refugee standards of protection may be eroded. For instance there is an increasing trend to adopt and enforce legislation which leads to denial of access to refugee status determination, or even rejection at the border of certain groups or individuals, based on their religious and/or ethnic identity, national origin or political affiliation, assuming their involvement in terrorism.³⁷⁰

Lastly, it is worth making reference to the role of EU CSDP Missions in the fight against terrorism and the challenges deriving from the interplay of the legal branches. As already stated, IHL applies to situations of armed conflict and occupation; thus, it also applies to peace-keeping operations when they amount to

³⁶⁶ *Ibid*, 9, para. 19.

³⁶⁷ See ICRC 'The relevance of IHL in the context of terrorism' (1 January 2011) <<https://www.icrc.org/eng/resources/documents/misc/terrorism-ihl-210705.htm>> 'International humanitarian law (the law of armed conflict) recognizes two categories of armed conflict: international and non-international. International armed conflict involves the use of armed force by one State against another. Non-international armed conflict involves hostilities between government armed forces and organised armed groups or between such groups within a state. When and where the "global war on terror" manifests itself in either of these forms of armed conflict, international humanitarian law applies, as do aspects of international human rights and domestic law.'

³⁶⁸ Emanuela-Chiara Gillard, 'The Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law' in *Terrorism and International Law: Challenges and Response*. (Meeting of independent experts on Terrorism and International Law: Challenges and Responses. Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law and Seminar on International Humanitarian Law and Terrorism, San Remo, May, June, September 2002) <<http://www.iihl.org/iihl/Album/terrorism-law.pdf>> accessed 15 September 2015, 50.

³⁶⁹ *Ibid*, 53-54.

³⁷⁰ UNHCR, 'The Events of September 11: Possible Repercussions on Refugee Protection' in *Terrorism and International Law: Challenges and Response*. (Meeting of independent experts on Terrorism and International Law: Challenges and Responses. Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law and Seminar on International Humanitarian Law and Terrorism, San Remo, May, June, September 2002) <<http://www.iihl.org/iihl/Album/terrorism-law.pdf>> accessed 16 September 2015, 15-18.

engagement in an armed conflict. Pursuant to the EU's commitment to respect international law in its external relations, IHL will fully apply to EU-led forces if they engage in an armed conflict.³⁷¹

Article 43 TEU empowers the EU to combat terrorism through the CFSP, and even more so, CSDP. Some CSDP missions have included a reference to the combat against terrorism in their mandates.³⁷² However, it is unlikely that the EU will face the question of whether IHL applies to its counter-terrorism actions within CSDP missions and operations for two reasons. First, the 'CSDP competence to fight terrorism has thus far not materialised in terms of direct handling of terrorism by the EU through the CSDP actions enounced in the first part of Article 43(1) TEU, but has taken the more modest form of support for third parties'.³⁷³ Secondly, as a matter of policy, EU military operations rely on human rights for significant guidance as reflected in EU operational planning and ROE. The basic legal instruments governing each EU mission and operation explicitly require respect for human rights in the implementation of the mandate.³⁷⁴

³⁷¹ See Frederik Naert, 'Observance of international humanitarian law by forces under the command of the European Union' (2013) 95 (891/892) *International Review of the Red Cross* <<https://www.icrc.org/eng/assets/files/review/2013/irrc-891-892-naert.pdf>> accessed 16 September 2015, 637–643.

³⁷² EUCAP Sahel Niger established in 2012 'to support the capacity building of the Nigerien security actors to fight terrorism and organised crime', Council of the European Union, Council Decision 2012/392/CFSP of 16 July 2012 on the European Union CSDP mission in Niger (EUCAP Sahel Niger) (2012) OJ L 187/48 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:187:0048:0051:EN:PDF>> Article 1; EUTM Mali is a military operation established in February 2013 'to provide in the South of Mali, military and training advice to the Malian Armed Forces[...] in order to contribute to the restoration of their military capacity with a view to enabling them to conduct military operations aiming at restoring Malian territorial integrity and reducing the threat posed by terrorist groups'. Council of the European Union, Council Decision 2013/87/CFSP of 18 February 2013 on the launch of a European Union military mission to contribute to the training of the Malian Armed Forces (EUTM Mali) (2013) OJ L 46/27 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:046:0027:0027:EN:PDF>> Art. 1.

³⁷³ Christophe Hillion, 'Fighting Terrorism through the EU's Common Foreign and Security Policy' in Inge Govaere and Sara Poli (eds.), *EU Management of Global Emergencies: Legal Framework for Combating Threats and Crises (Studies in EU External Relations)* (Martinus Nijhoff 2014) 79.

³⁷⁴ Frederik Naert, 'Observance of international humanitarian law by forces under the command of the European Union' (2013) 95 (891/892) *International Review of the Red Cross* (2013) <<https://www.icrc.org/eng/assets/files/review/2013/irrc-891-892-naert.pdf>>, accessed 16 September 2015, 640. Some examples of explicit mention are Council of the European Union, Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (2008) OJ L301/33 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:301:0033:0037:EN:PDF>> Art. 12(2); Council of the European Union, Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO 2014/349/CFSP of 12 June 2014 amending Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO (2008) OJ L 42/92 <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008E0124&qid=1438336454511&from=EN>> Art. 3(i).

5. Meaning and scope of protection status categories and vulnerable groups categories

The meaning of 'protected status' is largely the result of formal definitions and the way that these are interpreted in practice. Under IHL the distinction between civilians and combatants is fundamental. However, this principle is inevitably confronted with the difficulty of applying it on the ground.

In addition to the general protection as 'civilians', IHL also foresees special protection for women and children. As the International Committee of the Red Cross (ICRC) has observed, IHL affords women the same protection as men – as combatants, civilians, or persons *hors de combat*. All the fundamental rules of IHL therefore apply equally to men and women without discrimination. However, recognising that they have specific needs and vulnerabilities, IHL grants women and children a number of additional protections and rights.³⁷⁵ Women should be protected against all forms of sexual violence, and should be separated from men when they are held in detention. Children should also be detained separately from adults (unless the adults are their parents). While the prohibition of sexual violence applies equally to men and women (and to boys and girls), in practice women and girls are far more likely to be victims of sexual violence during armed conflicts. Both IHL and IHRL prohibit the recruitment and other association of children with armed forces or armed groups.

Box II-1: The special protection of women and prohibition of sexual violence: key sources of norms

- The four Geneva Conventions (1949): Common Article 3
- Additional Protocol II to the Geneva Conventions (1977): Article 4(2)(e)
- Statute of the International Criminal Court (1998)
 - Article 7(1)(g), rape as a crime against humanity
 - Article 8(2)(b)(xxii) and (e)(vi), rape is a war crime in international and non-international armed conflict.
- Customary IHL (ICRC Study of Rules)
 - Rule 93. Rape and other forms of sexual violence are prohibited.
 - Rule 134. The specific protection, health and assistance needs of women affected by armed conflict must be respected.
- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: Articles 3 and 4.
- United Nations Security Council Resolution 1325 (2000).
- Deed of Commitment under Geneva Call for the Prohibition of Sexual Violence in Situations of Armed Conflict and towards the Elimination of Gender Discrimination (for non-state actors only).

³⁷⁵ Charlotte Lindsey, *Women facing war. ICRC Study on the impact of armed conflict on women* (ICRC, October 2001) <http://www.icrc.org/eng/assets/files/other/icrc_002_0798_women_facing_war.pdf> accessed 30 April 2015, 5.

Box II-2: The special protection of children in armed conflict: key sources of norms

- The four Geneva Conventions (1949): Common Article 3.
- Additional Protocol I to the Geneva Conventions (1977): Article 77(1) and (2).
- Additional Protocol II to the Geneva Conventions (1977): Article 4(3).
- Convention on the Rights of the Child (CRC) 1989: Articles 37, 38 and 39.
- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2002).
- ILO Convention 182 (1999) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour.
- Customary IHL (ICRC Study).
 - Rule 135. Children affected by armed conflict are entitled to special respect and protection.
- 1990 African Charter on the Rights and Welfare of the Child: Article 27.
- United Nations Security Council Resolution 1612 (2000).
- Deed of Commitment under Geneva Call for the Protection of Children from the Effects of Armed Conflict (for non-state actors only).
- The Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (2007)

Both legal areas, IHL and IHRL include provisions for the protection of women, children and other vulnerable groups in situations of conflict, such as the elderly, disabled and the displaced persons. Armed conflicts heighten the vulnerability of all civilians but IHL enhances protection of vulnerable groups not only in general terms but also under specific circumstances where they are more adversely affected.

In line with the 2011 Four-year Action Plan for the Implementation of International Humanitarian Law (IHL) adopted by the 31st International Conference of the Red Cross and Red Crescent, the colloquium dealing with the issue of vulnerabilities in armed conflicts identified some of the most challenging situations in armed conflicts.³⁷⁶ The conference adopted a transversal approach to address vulnerabilities in the context of some key IHL scenarios rather than focusing the debate on specific vulnerable groups.³⁷⁷ Those situations which pose major challenges to the protection of vulnerable groups are identified as detention, the conduct of hostilities, sexual violence or the unlawful recruitment and use of children in hostilities. These situations are all distinguished for being heavily affected by the interaction between IHL and IHRL. The following section will focus on the protection of vulnerable groups and whether the relationship between both legal bodies affects them somehow, with some reference to certain implications for international operations.

³⁷⁶See ICRC, 'Vulnerabilities in armed conflicts' (4 November 2013) <<https://www.icrc.org/eng/resources/documents/statement/2013/10-18-protected-person-bruges.htm#Vulnerabilities%20in%20detention>> accessed 30 April 2015.

³⁷⁷ *Ibid.*

a) *Vulnerabilities in detention*

‘Regardless of the duration of or reasons for detention, persons deprived of liberty are vulnerable because they depend entirely on the detaining authority for the satisfaction of their material and non-material needs’.³⁷⁸ In addition to the general protection applicable to all persons detained in armed conflicts, further provisions are needed to address the specific needs of some categories of persons. The law applicable to non-international armed conflicts is particularly deficient in this regard and needs to be complemented.³⁷⁹

In comparison to international armed conflicts, the treaty provisions applicable to detention in non-international armed conflicts are rather limited and insufficient. All four Geneva Conventions are applicable to IAC while only common Article 3 and AP II to NIACs. As it will be further discussed IHRL can play an important role in filling the gaps in IHL and strengthening NIAC’s detention law, particularly with regard to providing further protection to vulnerable groups.

Scholarly debate on this matter has identified four key areas in which IHL applicable to detention in NIACs falls short. These areas are the conditions for detention, the protection for especially vulnerable groups of detainees, the grounds and procedures for internment and the transfers of detainees from one authority to another.³⁸⁰

Common Article 3 provides minimum standards for the principle of human treatment of detainees and the general prohibitions of torture and ill-treatment. AP II adds nuances to the applicable legal framework however AP II does not apply to all kind of NIACs. There are no international humanitarian law treaty provisions on procedural safeguards for internment in NIACs. In order to overcome the absence of rules, the ICRC recommends the application of the fourth Geneva Convention by analogy, enabling states to detain those who pose threat to their security. However this solution leaves many questions unanswered, in particular on procedural safeguards.³⁸¹ Another issue of concern is the lack of regulation of the transfer of detainees in NIACs. While the Third and Fourth Geneva Conventions impose obligations to ensure the adequate treatment of detainees after being transferred in IACs, there are no such legal guarantees to NIACs.³⁸²

When looking at the protection of especially vulnerable groups of detainees, it is commonly agreed that women, children, the elderly and the disabled are among the most vulnerable. However the protection of vulnerable groups in NIACs could be reinforced by focusing on the needs of more restricted groups such

³⁷⁸ ICRC, ‘Strengthening legal protection for victims of armed conflicts’, 31st Conference of the Red Cross and Red Crescent, 28 November-1 December 2011 (Geneva, October 2011) 31IC/11/5.1. <<https://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-strengthening-legal-protection-11-5-1-1-en.pdf>> accessed 30 April 2015, 8.

³⁷⁹ *Ibid.*

³⁸⁰ College of Europe, ICRC, ‘Vulnerabilities in Armed Conflicts: Selected Issues’, 14th Bruges colloquium, 17-18 October 2013 (Bruges, October 2013) <https://www.coleurope.eu/sites/default/files/uploads/page/collegium_44.pdf> accessed 30 June 2015, 19.

³⁸¹ *Ibid.*, 21.

³⁸² *Ibid.*, 22-23.

as religious or ethnic minorities, foreign nationals and detainees with contagious diseases or terminal illnesses.³⁸³

in NIACs. It will therefore be necessary to identify which human rights rules have to be interpreted in the light of the law of armed conflicts.³⁹⁰

The existence of differing views on the applicability of IHRL to armed conflicts is particularly evidenced in the context of international military operations. Often States are more inclined to deny or restrict the applicability of IHRL to armed conflicts while international organisations and international courts are more supportive of the joint application of both legal bodies.³⁹¹ This picture, albeit unrefined and somewhat simplistic, outlines the differing views between States and international bodies.

The 'Copenhagen Process on the Handling of Detainees in International Military Operations' applies to international military operations in the context of a NIAC and peace operations,³⁹² which do not necessarily amount to armed conflicts. These Guidelines reinforced the principle of humane treatment of those detained with respect to both IHRL and IHL with the support of most states. The Guidelines grant special consideration to the treatment of women, children, the aged and those with disabilities.³⁹³ This is an important *soft law* instrument where the practice of relevant States is expressed.

The adoption of this document demonstrates that most States recognise that IHRL plays a role in dealing with detainees, but eventually they choose an IHL perspective of the applicable norms.³⁹⁴ In the practice of international military operations, the only way to unify the criteria and to ensure the coexistence of IHL and IHRL is as a matter of policy.³⁹⁵

b) *Vulnerabilities in the conduct of hostilities*

The sick, wounded and shipwrecked are entitled to protection and care both in international armed conflicts (IAC) and in non-international armed conflicts (NIAC). The protection of this category of civilians in armed conflicts is not without its challenges. In view of the current proliferation of NIACs there are an

³⁹⁰ *Ibid.*

³⁹¹ Bruce 'Ossie' Oswald, 'Interplay as regards dealing with detainees in international military operations' in Erika de Wet and Jan Kleffner, *Convergence and conflicts of Human Rights and International Humanitarian Law in Military Operations* (Pretoria University Law Press 2014) 87.

³⁹² The Copenhagen Process was launched by the Danish Government in 2007 to address practical and legal challenges to States and organisations involved in international military operations, in particular related to detention. The Copenhagen Process was conceived as a response to a growing international recognition that there was a need to find a multilateral and durable solution to the legal questions related to the handling of detainees in international military operations. See at <<http://um.dk/en/foreign-policy/copenhagen-process-on-the-handling-of-detainees-in-international-military-operations/>> accessed 15 September 2015.

³⁹³ Danish Government, *The Copenhagen Process on the Handling of Detainees in International Military Operations: Principles and Guidelines*, <<http://um.dk/en/~media/UM/English-site/Documents/Politics-and-diplomacy/Copenhagen%20Process%20Principles%20and%20Guidelines.pdf>> accessed 30 June 2015, 6 and 15, para. 2.4 and 9.6.

³⁹⁴ Bruce 'Ossie' Oswald, 'Interplay as regards dealing with detainees in international military operations' in Erika de Wet and Jan Kleffner, *Convergence and conflicts of Human Rights and International Humanitarian Law in Military Operations* (Pretoria University Law Press 2014) 87.

³⁹⁵ *Ibid.* 97.

increasing number of armed groups which control part of the territory, but they do not have the capacity not the means to provide the necessary and effective relief to the wounded, sick and shipwrecked.³⁹⁶

Medical and religious personnel are also granted special protection.³⁹⁷ Violence against healthcare workers is 'one of the most crucial yet overlooked humanitarian issues today'.³⁹⁸ However it should be noted that this protection is not unlimited. Medical personnel may lose the protection against attack if they take part in hostilities, outside their humanitarian function and excluding acts of self-defence.³⁹⁹

c) Sexual violence

The absolute prohibition of sexual violence has been progressively incorporated in IHL and IHRL. Rape and other forms of sexual violence committed in the context of an armed conflict constitute violations under IHL. Rape and other forms of sexual violence are prohibited under treaty law and customary law applicable in both international and non-international armed conflict.⁴⁰⁰ Under IHRL, some forms of sexual violence, such as rape, forced sterilisation or the trafficking in human beings, have been incorporated in the notion of ill-treatment. Furthermore, human rights monitoring bodies have recognised certain forms of sexual violence as slavery, i.e. sexual slavery.⁴⁰¹ A number of specific human rights instruments that prohibit all forms of sexual violence and demanding State action have been adopted in this regard.⁴⁰² IHL and ICL have recognised that sexual violence when used systematically amount to a method of warfare, aimed at destroying social fabric.⁴⁰³ Certain people may be more vulnerable to sexual violence than others, including internally displaced, women, children detainees, those associated with belligerent parties, or those belonging to a specific ethnic group.

The difficult humanitarian situation faced by women and girl victims of rape has led some to advocate for the recognition of the 'right to abortion' under either IHL or human rights law.⁴⁰⁴ According to this

³⁹⁶ ICRC, 'Vulnerabilities in Armed Conflicts: Selected Issues', 14th Bruges colloquium, 17-18 October 2013 (Bruges, October 2013) available at <https://www.coleurope.eu/sites/default/files/uploads/page/collegium_44.pdf> accessed 30 June 2015, 49.

³⁹⁷ Art. 24 GC I Article 24; Art. 8 (c) and 15 AP I.

³⁹⁸ ICRC, 'Health Care in Danger Campaign' <<http://www.icrc.org/eng/what-we-do/safeguardinghealth-care/index.jsp?cpn=hcid>>

³⁹⁹ Art. 22 GC I; Art. 13 AP I; Art. 11 APII.

⁴⁰⁰ Art. 75(2) AP I; Art. 4(2) APII.

⁴⁰¹ UN Economic and Social Committee, Report of the Special Rapporteur on contemporary forms of slavery: systematic rape, sexual slavery and slavery-like practices during armed conflict, Jay J. McDougall, UN doc. E/CN.4/Sub.2/1998/13, <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G98/128/81/PDF/G9812881.pdf?OpenElement>>

⁴⁰² There are mention to sexual violence in the Convention on the Elimination of All Forms of Discrimination against Women (1979); Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (1994), the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003).

⁴⁰³ ICRC, 'Vulnerabilities in Armed Conflicts: Selected Issues', 14th Bruges colloquium, 17-18 October 2013 (Bruges, October 2013) available at <https://www.coleurope.eu/sites/default/files/uploads/page/collegium_44.pdf> accessed 30 June 2015, 63-54. See Prosecutor v. Jean-Paul Akayesu (Judgment) ICTR Case ICTR-96-4-T (2 September 1998) <<http://www.unict.org/sites/unict.org/files/case-documents/ict-96-4/trial-judgements/en/980902.pdf>>.

⁴⁰⁴ See Gloria Gaggioli, 'Is there a "right to abortion" for women and girls who become pregnant as a result of rape? A humanitarian legal issue' (14th Bruges colloquium, Bruges, October 2013) <<https://www.icrc.org/eng/assets/files/2013/abortion-sexual-violence-bruges-10-2013-2.pdf>> accessed 30 June

assumption in support of the establishment of a 'right to abortion', the denial of abortion in a situation that is life threatening or causing unbearable suffering to a victim of armed conflict may contravene Common Article 3. The recognition of a 'right of abortion' would entail an obligation for the parties to provide health care and the assistance required by their condition, and therefore to provide guarantees for safe abortion.⁴⁰⁵ For instance Article 16 GC IV specifies that 'the wounded and sick [...] and expectant mothers, shall be the object of particular protection and respect'.⁴⁰⁶

IHL treaties do not generally provide for an explicit 'right to abortion' with the exception of the 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa which, in Article 14 explicitly provides for a duty for States to take all appropriate measures to authorise medical abortions in some specific cases, 'where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus'.⁴⁰⁷ There is no consensus on whether denying abortion to a rape victim when there is medical need does also amount to a form of cruel, inhuman or degrading treatment.⁴⁰⁸ There is binding case law and non-binding human rights practice indicating that the denial of access to abortion for women impregnated by rape may amount to inhuman or degrading treatment.⁴⁰⁹

With regards to international missions and operations, the adoption of Security Council Resolution 1325 in 2000 marked a milestone in placing the issue of conflict-related sexual violence on the United Nations peace and security agenda which will be subsequently recalled.⁴¹⁰ The protection from sexual violence has also been an object of concern with regard to peacekeeping operations in particular, as reflected in a

2015. See The NGO Global Justice Centre (GJC) interprets IHL as providing a 'right to abortion' and has initiated a advocacy campaign on this issue. Global Justice Center, 'The Right to an Abortion for Girls and Women Raped in Armed Conflict: States' positive obligations to provide non-discriminatory medical care under the Geneva Conventions' (January 2011) <http://globaljusticecenter.net/index.php?option=com_mtree&task=att_download&link_id=2&cf_id=34>.

⁴⁰⁵ Art. 12 and 15 GC I; Art. 12 and 18 GC II; Art. 16 GC IV.

⁴⁰⁶ Art. 8 AP I defines 'wounded and sick' as 'persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases, [...] persons who may be in need of immediate medical assistance or care, such as [...] expectant mothers'.

⁴⁰⁷ Art. 14 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003)

⁴⁰⁸ See inter alia Norwegian Agency for Development Cooperation, 'Sexual Violence in Conflict and the Role of the Health Sector' (2011) NORAD Scoping Paper n°21 <<https://www.icrc.org/eng/assets/files/2013/abortion-sexual-violence-bruges-10-2013-2.pdf>> 12.

⁴⁰⁹ See *inter alia* *P. and S. v. Poland*, Application no. 57375/08, Judgement, European Court of Human Rights (30 October 2012) <[http://hudoc.echr.coe.int/eng?i=001-114098#{"itemid":\["001-114098"\]}](http://hudoc.echr.coe.int/eng?i=001-114098#{)> accessed 30 June 2015, paras. 157-169; UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, UN doc. A/HRC/22/53 <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf>

⁴¹⁰ United Nations Security Council, Resolution 1325, UN doc. S/RES/1325 (2000) <<http://www.un.org/womenwatch/osagi/pdf/res1325.pdf>>; United Nations Security Council, Resolution 1820, UN doc. S/RES/1820 (2008) <<http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/CAC%20S%20RES%201820.pdf>>.

number of guidelines, strategies and training programmes to increase capacity of peacekeeping personnel to prevent and react to conflict-related sexual violence.⁴¹¹

The Council of the EU has adopted new Guidelines on violence against women and the fight against all forms of discrimination against women,⁴¹² 'which provide a framework for the actions undertaken by the diplomatic network of the EU and the Member States' encouraging efforts to fight against discrimination against women in legislation and in practice, and has committed to contribute to the implementation of UN Security Council Resolution 1325 through the EU Comprehensive Approach on the implementation of UNSC Resolutions 1325 and 1820,⁴¹³ which was adopted on 2008 in response to assessed shortcomings of the previous EU policy.⁴¹⁴ This EU Strategy aims at improving exchange of practices among the various EU members and also with non-EU countries. It also contains a pledge by the EU to adopt a tripartite approach based on: a) policy dialogue: integration of women, peace and security issues; b) gender mainstreaming: above all in crisis management and long-term development strategies; c) specific activities to protect, support and empower women. In addition, on 1 February 2012, the European Commission, the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) and the United Nations Development Program (UNDP) announced the start of a multi-country initiative to enhance women's participation in peace-building and post-conflict planning and economic recovery. In addition the EU has developed a comprehensive approach towards integrating gender aspects into CSDP encompassing foreign policy instruments such as diplomacy and CSDP as well as development and humanitarian assistance. Within some CSDP Missions and operations, the EU has integrated its commitment to fight against impunity and sexual violence.⁴¹⁵ The integration of the gender component into CSDP operations will be the object of a next FRAME report.⁴¹⁶

⁴¹¹ Cordula Steinkogler, 'Conflict-related sexual violence and international peace operations' (Master thesis, European Inter-University Centre for Human Rights and Democratisation, 2013), 64-79, UN WOMEN, 'Addressing Conflict-Related Sexual Violence — An Analytical Inventory of Peacekeeping Practice' (June 2010) <<http://www.unwomen.org/~media/headquarters/media/publications/unifem/analyticalinventoryofpeacekeepingpracticeonli.pdf>>.

⁴¹² See at <<http://www.consilium.europa.eu/uedocs/cmsupload/16173cor.en08.pdf>> accessed 15 September 2015.

⁴¹³ 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 (1 December 2008) 15671/1/08 REV 1 <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/hr/news187.pdf> accessed 20 May 2014.

⁴¹⁴ A study prepared for the Slovenian EU Council Presidency, co-financed by Austria, dealt with the EU strategy on women in armed conflicts: Enhancing the EU Response to Women and Armed Conflict with particular Reference to Development Policy. The findings of this study revealed some shortcomings such as an insufficient appreciation of the complexity of this issue and a lack of clear indicators for the coherent supervision of European strategies. See Andrew Sherriff and Karen Barnes, 'Enhancing the EU Response to Woman and Armed Conflict with particular reference to development policy Study for the Slovenian EU Presidency', Discussion Paper No. 84 (April 2008) <<http://www.europarl.europa.eu/document/activities/cont/200805/20080507ATT28495/20080507ATT28495EN.pdf>> accessed 20 May 2014.

⁴¹⁵ See Louise Olsson and Karin Sundström, 'European Union's Gender Policy for CSDP Missions: Contents and Gaps: An assessment of existing policy on 'Women, peace and security' with examples from EUPOL COPPS, EUMM Georgia, EULEX Kosovo and EUPOL RD Congo' (Folke Bernadotte Academy 2012) <<https://www.fba.se/PageFiles/17331/Policy%20review%20of%20resolution%201325%20in%20CSDP%20final%20%283%29.pdf>>.

⁴¹⁶ It will be examined as part of the content of D 10.3 according to the terms of reference of the report description.

d) Recruitment and other association of children with armed forces or armed groups

The interaction between IHL and IHRL with regards to protection of children in armed conflicts is less contentious, as provisions related to recruitment of children in armed conflict from both bodies of law use a similar wording. The set of norms dealing with this matter has even been considered as being of such a hybrid nature that is difficult to discern whether they fall within the scope of IHL or IHRL.⁴¹⁷ The Fourth Geneva Conventions and the 1977 Additional Protocols set prohibitions for the recruitment of children or any other kind of association with armed forces and obligations for the belligerent parties to protect them from recruitment.⁴¹⁸ IHL protection is further reinforced by provisions under IHRL⁴¹⁹ and ICL. Article 38 of the CRC provides that States parties 'shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities' and 'shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces.' The 1999 ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour also contains some related provisions.⁴²⁰

With regards to international missions and operations, both the UN and EU have increasingly put efforts towards the fight against the use of children in armed conflicts. The Security Council has addressed this issue since 1999 and the protection of children in conflict has been included in the mandates of peacekeeping operations.⁴²¹

The EU, similarly to the UN, is focusing its attention on the issue of children affected by armed conflict. The issue is one of the top human rights priorities of the EU as stated in the 2012 Strategic Framework and Action Plan on Human Rights and Democracy.⁴²² Specific guidelines on children in armed conflict were developed by the EU in 2003 and revised in 2008, which address the needs of children in armed conflict but also highlight the ongoing impunity of the crimes committed against them.⁴²³ The EU has also

⁴¹⁷ ICRC, 'Vulnerabilities in Armed Conflicts: Selected Issues', 14th Bruges colloquium, 17-18 October 2013 (Bruges, October 2013) available at <https://www.coleurope.eu/sites/default/files/uploads/page/collegium_44.pdf> accessed 30 June 2015, 103-104.

⁴¹⁸ Arts. 50 and 51 GC IV; Art. 77(2) API, 4(3) AP II.

⁴¹⁹ Art. 38 CRC.

7 Arts. 1, 2 and 3(a), ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, (1999) Articles 1, 2 and 3, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, (2000);

⁴²⁰ Arts. 1, 2 and 3(a) of the ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour.

⁴²¹ UN Security Council, Resolution 1261, UN Doc. S/RES/1261 (1999) <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1261%281999%29>; see UN Department of Peacekeeping Operations, 2014 Review Child Protection in United Nations Peacekeeping <<http://www.un.org/en/peacekeeping/documents/150209cpnewsletterchanges.pdf>> accessed 30 April 2015.

⁴²² Council of the European Union, EU Strategic Framework and Action Plan on Human Rights and Democracy (2012) <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf> accessed 20 April 2014.

⁴²³ Council of the European Union, EU Guidelines on Children and Armed Conflict (2003), Doc. 15634/03 <<http://www.consilium.europa.eu/uedocs/cmsUpload/GuidelinesChildren.pdf>> accessed 30 May 2014; revised EU Guidelines on Children and Armed Conflict (2008) Doc. 1019/08 at <<http://consilium.europa.eu/uedocs/cmsUpload/10019.en08.pdf>> accessed 30 May 2014.

developed an implementation strategy for those guidelines.⁴²⁴ The member States of the EU and the EU itself, are significant donors towards assistance programmes for children affected by armed conflict. This child-focused policy is also provided through crisis management initiatives of the EU and in the EU Common Security and Defense Policy (CSDP) operations, where a Checklist for the integration of the protection in children affected by armed conflict is incorporated.⁴²⁵ A minimum standards pre-deployment training program on child protection, gender and human rights for CSDP staff has been devised by the EU in collaboration with Save the Children.

It should be stressed the focus on CSDP missions and operations in the EU Guidelines on children and armed conflict⁴²⁶ in order to 'influence third parties and non state actors to implement international and regional human rights norms [...] as international humanitarian law [...] and to take effective measures [...] to end the use of children in armed forces and armed groups'.⁴²⁷

E. Conclusion

An effective convergence between IHRL and IHL can be further developed to extend human rights protection to the victims of conflict and crisis with a special focus on vulnerable groups. This convergence can be materialized through the incorporation of human rights in the existing legal frameworks applicable to situations of armed conflict, and also by developing human rights law itself to incorporate explicit provisions on the interpretation and application of human rights in situations of conflict and violent crisis

The incorporation of human rights concerns the legal framework governing all questions of armed conflicts in their various forms, which is constituted at its core by international humanitarian law, and where human rights law is applied in a complementary or cumulative fashion while providing at the same time a foundational normative value and an operational guidance. This approach goes beyond reconciling norms of IHRL and IHL in so far as human rights are the underlying values of the norms regulating armed conflict, thus aimed at ensuring the highest possible level of protection. This was the viewpoint advocated in the UN Declaration of Minimum Standards in 1990 which formulated a set of principles applicable in all situations, including internal violence, disturbances, tensions and public emergency, and which cannot be derogated under any circumstances. Nevertheless, this Declaration has no legally binding effect.

⁴²⁴ Council of the European Union, Revised Implementation Strategy of EU Guidelines on Children and Armed Conflict, (2010) Doc. 17488/10 at <<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2017488%202010%20INIT>> accessed 30 May 2014.

⁴²⁵ Council of the European Union, Checklist for the Integration of the Protection of Children Affected by Armed Conflict into ESDP Operations (2006) Doc. 9767/03 <<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209767%202006%20INIT>> accessed 20 May 2014; the Checklist has been revised in 2008, see Doc. 9822/08 at <<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209822%202008%20INIT>> accessed 30 May 2014.

⁴²⁶ http://eeas.europa.eu/human_rights/child/ac/docs/eu_guidelines_children_armed_conflict_en.pdf

⁴²⁷ Council of the European Union, EU Guidelines on Children and Armed Conflict (2008) Doc. 1019/08 <http://eeas.europa.eu/human_rights/child/ac/docs/eu_guidelines_children_armed_conflict_en.pdf> 3, para. 7; Council of the European Union, Checklist for the Integration of the Protection of Children affected by Armed Conflict into ESDP Operations (2008) Doc. 9822/08 <<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209822%202008%20INIT>> accessed 30 April 2015.

With regards to favouring human rights taking on a greater meaning in conflict situations, this conception requires the development of human rights law rather than IHL, to incorporate specific provisions on the interpretation and application of human rights in situation of violent instability, whether armed conflict or a state of 'emergency'. Such provisions may refer to IHL or go much further in their requirements to apply the same standards of human rights to those affected by conflict. One example of such a development is the UN Convention in the Rights of the Child (CRC) of 1989 and its Optional Protocol relating to armed conflict. The CRC is one of the only human rights treaties instruments that formally recognises a complementarity between human rights and IHL. It makes explicit reference to IHL, specifically to the provisions contained in Additional Protocol I stating that children are exempt from involvement in combat up to the age of 14 years. Additionally the Optional Protocol to the CRC, ratified in 2000, called on States parties to take up all feasible measures to ensure that member of their armed forces below the age of 18 do not take part in hostilities and similarly they are not subject to compulsory recruitment. It is also worth noting that the CRC cross-references to IHL implies that parties to the Convention agree to be held accountable for certain IHL provisions through the treaty's enforcement mechanism. Thus, the 2000 Optional Protocol recognises that humanitarian law may not in itself remove the need for an explicit articulation on how human rights are to be applied in conflict. The CRC adapts the provisions adapts its human rights provisions to situations of conflict so that both the rights of the child and the duties of the relevant parties in these context are clearly stated. The CRC and it Optional Protocol are to be considered unique instruments in guaranteeing human rights in conflicts.

In the lights of some decisions of the ECtHR, with direct implications for EU Member States, the Court takes account of the particularities of armed conflict when interpreting the Convention. However the Court has not been willing to engage and provide more guidance on how IHL may affect IHRL in conflict situations. At least the Court has acknowledged, in general terms, the need for interpretation of the ECHR in the light of other fields of international law, including IHL.

From the analysis of jurisprudence and decisions of human rights monitoring bodies it follows that an effective convergence between IHL and IHRL, in particular with regards to NIACs, can provide an appropriate legal basis to extend the applicability of IHRL to non-state actors. The prohibition of certain acts such as genocide under IHRL does not requires the perpetrator to be a State official of an individual acting in another official capacity such as the definition of torture. In any event, only the members of non-state groups might be held individually responsible under ICL. Nonetheless, this area of convergence between IHL and IHRL can be further developed to extend human rights compliance to non-state actors.

The UN practice, as well as that of other international and regional organisations, including the EU, shows that efforts are increasingly being made to armed groups accountable for violations of international norms. The UN Secretary General has highlighted the importance of enhancing compliance with IHL by non-state armed groups and the corresponding need for humanitarian actors to engage with such process, and the need for States to avoid promulgating policies that inhibit engagement with those groups that have effective control over part of the territory. A certain degree of engagement between humanitarian actors and armed groups is not only crucial to ensure compliance with IHL but to secure access to people in need of humanitarian assistance.

As for international organisations directly involved in armed conflict, there is no clear practice as regards the applicability of IHL and IHRL. International Organisations are not parties to the relevant treaties as a general rule, but at least their Member States and/or contributing countries are, although argueably, bound to international customary law. The upcoming report in the series FRAME 10.3 will address legal and policy issues of the EU in the ambit of CSDP, including crisis management operations and missions, to identify the sources of IHL obligations of the EU and its Member States.

III. The interplay between IHRL, IHL and the legal regime for humanitarian assistance

A. Introduction

Humanitarian action refers to diverse operations to provide aid to victims of armed conflict and disasters, with the aim of alleviating their suffering, ensuring their livelihood, protecting their fundamental rights and defending their dignity and, sometimes, slowing the whole process of socio-economic disintegration of the community and preparing for natural disasters. Humanitarian aid may be provided by national or international actors. This second case has a subsidiary character regarding the responsibility of the sovereign State's assistance to its own population, and in principle is done with the State's approval and upon request, although from the 1990s onwards, international practice has on exception ignored these requirements.⁴²⁸

It is difficult to provide a precise definition of humanitarian action. There is no clear consensus among the authors and organisations on its meaning and scope, which has to do with the complexity and multiplicity of contexts, activities, actors and objectives involved.⁴²⁹ The frequent colloquial use of different terms with excessively broad and imprecise meaning adds to this lack of clarity. The concepts of humanitarian action and humanitarian aid are often used interchangeable, and at the same time the latter is taken as equivalent to emergency aid or even to humanitarian relief.

The notion of relief is understood as aid to assist those who suffer a disaster or other hazard. However, it is an act that is not necessarily guided by the same ethical principles and operational characteristics as the humanitarian action (humanity, neutrality, etc.). Indeed, relief may involve partisan support, such as assistance provided by an army exclusively to its side.⁴³⁰

Emergency relief aid is provided with a sense of urgency to victims of disasters, triggered by natural disasters or armed conflicts. It is an aid consisting of the free provision of goods and services essential for immediate survival (water, food, shelter, medicines and health care). This type of intervention is usually very time limited, usually up to six or, at most, twelve months time frame.

Humanitarian aid, as defined by various agencies, covers a slightly broader field and: it includes not only the aforementioned emergency aid, but also aid in the form of extended operations to support refugees and IDPs.⁴³¹ These operations, such as those initiated by the World Food Programme (WFP) in 1989, began after emergency assistance ran for over 12 months, in order to provide assistance to groups, who sometimes needed it for an extended timeframe.⁴³² In addition, although not always the case in practice,

⁴²⁸ It was common practice in conflicts such as those in Ethiopia, Sudan, Iraq and the former Yugoslavia to provide aid to be delivered clandestinely to the victims of conflicts by humanitarian organizations. Ruth Abril Stoffels, 'Legal regulation of humanitarian assistance in armed conflict: Achievements and gaps' in (2004) 86(855) *IRRC* <https://www.icrc.org/eng/assets/files/other/irrc_855_stoffels.pdf>, accessed 15 September 2015, 536.

⁴²⁹ Joana Abrisketa and Karlos Pérez de Armiño 'Acción humanitaria: concepto y evolución' (Diccionario de Acción Humanitaria y Cooperación al Desarrollo) <<http://www.dicc.hegoa.ehu.es/listar/mostrar/1>> accessed 20 April 2015.

⁴³⁰ *Ibid.*

⁴³¹ *Ibid.*

⁴³² John Borton, Nigel Nicholds and Sanjay Dhiri, *NGOs and Relief Operations: Trends and Policy Implications* (Overseas Development Institute 1994) 5.

many organisations consider that assistance is not limited to ensuring the immediate survival of those impacted and in need of aid, but to further help to stop the breakdown of the economic and social fabric, and to lay the foundations for rehabilitation and future development. For this purpose, assistance usually includes some activities towards post-disaster rehabilitation in the short term and to prepare for possible future disasters.

In sum, humanitarian action can take many forms and has been conceived in many different ways over time. As enshrined in UNGA Resolution 46/182 (1991), it is associated with a set of core principles:⁴³³ humanity (the provision of humanitarian assistance wherever needed and in a manner that respects the dignity and rights of the individual); impartiality (the provision of assistance without discrimination and according to need); neutrality (the provision of assistance without engaging in hostilities or taking sides in controversies of a political, religious or ideological nature); and independence (the provision of assistance autonomous from the political, economic, military or other objectives of other actors).⁴³⁴ These principles are intended to help establish and maintain access to assistance for crisis-affected people, especially in conflict settings. In practice, however, adherence to them can vary widely.

IHL provides a framework for the protection of civilians as part of humanitarian action and it is a legal area that foresees relief and assistance of other kinds.⁴³⁵ In the broadest sense, humanitarian principles are rooted in international humanitarian law. In a more narrow sense, they are the principles devised to guide the work of humanitarian actors.⁴³⁶ These principles are widely recognised as those stated above: humanity; neutrality; impartiality and independence.⁴³⁷

The right to humane treatment is at the core of IHL. It is a basic obligation codified in various provisions of the Geneva Conventions and its Additional Protocols, in particular Article 27 of the Fourth Geneva Convention protecting civilians and in Common Article 3 governing non-international conflicts. As noted earlier, it is also considered to be a norm under customary international law.⁴³⁸

The law of neutrality, which stems from State practice and The Hague Conventions, is defined in international law as ‘the status of a State which is not participating in an armed conflict between other

⁴³³ UNGA Resolution 46/182 (1991) A/RES/46/182 (19 December 1991) <<http://www.un.org/documents/ga/res/46/a46r182.htm>> accessed 20 April 2015.

⁴³⁴ Joana Abrisketa and Karlos Pérez de Armiño ‘Acción humanitaria: principios’ (Diccionario de Acción Humanitaria y Cooperación al Desarrollo) <<http://www.dicc.hegoa.ehu.es/listar/mostrar/4>> accessed 20 April 2015.

⁴³⁵ See Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949).

⁴³⁶ Kate Mackintosh, *The principles of humanitarian action in international humanitarian law* (London, Overseas Development Institute, 2000) <<http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/305.pdf>> accessed 20 April 2015.

⁴³⁷ See Huma Haider, *International legal frameworks for humanitarian action: Topic guide* (Birmingham, UK: GSDRC, University of Birmingham, 2013) <<http://www.gsdrc.org/docs/open/ILFHA.pdf>> accessed 20 April 2015; Joaquín Alcaide Fernández, Carmen Márquez Carrasco and Juan Antonio Carrillo Salcedo, *La Asistencia Humanitaria en Derecho Internacional Contemporáneo* (Sevilla, Secretariado de Publicaciones de la Universidad de Sevilla, 1997).

⁴³⁸ ICCR, Rule 87. Humane Treatment. Rule 87. Civilians and persons hors de combat must be treated humanely. <https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule87> accessed 15 September 2015.

States'.⁴³⁹ It encompasses the right not to be 'adversely affected' and the duty of non-participation. Under The Hague Convention V, humanitarian assistance for the sick or wounded is not considered to be a violation of neutrality, even if it benefits only the sick and wounded from one party to the conflict (Article 14).

In more recent times, there have been concerns that diversion of humanitarian assistance and misuse of aid by parties to international and non-international conflicts can undermine the neutrality of assistance, in terms of non-participation in hostilities (direct and indirect). Provisions that relate to aspects of neutrality include for instance Article 23 of the Fourth Geneva Convention that obliges a party to allow free passage of goods through its territory intended for the civilians of another party to the conflict. However, this is only enforceable if the obligated party has no reason for fearing that these goods may be diverted or that they may result in a military advantage to the enemy. Proper control by the humanitarian organisation transporting the goods is considered essential to ensure that the goods do not indirectly advance one side of the conflict.⁴⁴⁰

Impartiality results in needs-based provision of assistance, incorporating non-discrimination and the absence of subjective distinctions (e.g. whether an individual is innocent or guilty).⁴⁴¹ As noted in the overview of IHL, the principle of non-discrimination is a core principle in IHL. Various provisions of the Geneva Conventions and Additional Protocols state the importance of *equal treatment of protected persons without distinction and entitlement to fundamental rights* without discrimination. This does not affect the specific protection articulated for people with specific needs (women, children, etc).

B. Duties of States parties and role of humanitarian organisations

The Geneva Conventions and Additional Protocols do not define 'humanitarian assistance' but provide a basic description of the rights and responsibilities of parties to the conflict and the potential role for humanitarian agencies. The provision of relief to civilian populations falls within the scope of the Fourth Geneva Convention, the two Additional Protocols and Common Article 3. This includes the supply of foodstuffs, medical supplies and clothing,⁴⁴² distribution of materials for educational, recreational or religious purposes,⁴⁴³ and measures to protect civilians and assist them to 'recover from the immediate effects, of hostilities or disasters and also to provide the conditions necessary for [their] survival'.⁴⁴⁴

⁴³⁹ Michael Bothe, 'The law of neutrality' in Dieter Fleck (ed.), *The handbook of International Humanitarian Law* (Oxford University Press, 2nd edition, 2008) 571-604, 571.

⁴⁴⁰ Kate Mackintosh, *The principles of humanitarian action in international humanitarian law* (London, Overseas Development Institute, 2000) <<http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/305.pdf>> accessed 20 April 2015.

⁴⁴¹ Jean Pictet, *The fundamental principles of the Red Cross: commentary* (Geneva: Henry Dunant Institute, 1979) <<http://www.icrc.org/eng/resources/documents/misc/fundamental-principles-commentary-010179.htm>> accessed 20 April 2015; Jean Pictet, *The Geneva Conventions of 12 August 1949: commentary* (Geneva: International Committee of the Red Cross, 1952-1960) <<http://www.icrc.org/eng/resources/documents/publication/p0203.htm>> accessed 20 April 2015.

⁴⁴² GC IV, Art. 59.

⁴⁴³ GC IV, Art. 108.

⁴⁴⁴ API, Art. 61.

Since the Geneva Conventions and Protocols are addressed to States, they do not directly confer rights or obligations upon humanitarian agencies or organisations.⁴⁴⁵ Provisions in these instruments describe situations in which States must allow humanitarian assistance to be delivered to civilians in their power, the forms of assistance/protection that they are entitled to, and the conditions which States are allowed to impose on their delivery.⁴⁴⁶ These provisions are relevant and useful to humanitarian agencies as they provide insight and guidance into the conditions that they must meet should they seek to provide assistance. They also provide tools to argue for and to secure humanitarian access and cooperation from States, other parties to the conflict and countries that fall under the transit route for delivery of assistance.

Under IHL, the parties to the conflict have the duty and primary responsibility to provide humanitarian assistance to civilian populations under their control. There are, however, also provisions that allow for the possibility (with certain conditions) for humanitarian organisations to undertake relief actions. The rules on humanitarian access and assistance can be distinguished by type of armed conflict:

-International armed conflict (situations of occupation): Articles 55 and 56 of the Fourth Geneva Convention provide that the occupying power has the duty to ensure food, medical supplies, medical and hospital establishments and services, and public health and hygiene to populations in the occupied territory. This duty was extended in Additional Protocol I to include the duty to ensure bedding, means of shelter and other supplies essential to the survival of the civilian population (Article 69).

Article 59 of the GCIV further states that:

If the whole or part of the population of an occupied territory is inadequately supplied the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them [...] Such schemes, which may be undertaken either by States or by impartial humanitarian organisations such as the International Committee of the Red Cross, shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing.

According to Article 63 of the Fourth Geneva Convention, National Red Cross Societies or other relief societies 'shall be able to pursue their activities following with Red Cross principles' or under 'similar conditions' (respectively), subject to 'temporary and exceptional measures imposed for urgent reasons of security'.⁴⁴⁷ Those principles form an ethical framework for humanitarian action encompassing humanity, impartiality, neutrality, independence, universality, voluntary service and unity.⁴⁴⁸

Thus, in situations of occupation, the obligation of occupying authorities to facilitate and cooperate with relief schemes is unconditional. There is a relatively wide space provided for humanitarian organisations, provided that they are impartial and operate in accordance with humanitarian principles. Article 59 of the Fourth Geneva Convention allows occupying authorities to retain a certain 'right of control', however,

⁴⁴⁵ Huma Haider, *International legal frameworks for humanitarian action: Topic guide* (GSDRC, University of Birmingham, 2013) <<http://www.gsdrc.org/docs/open/ILFHA.pdf>> accessed 20 April 2015, 26.

⁴⁴⁶ Kate Mackintosh, *The principles of humanitarian action in international humanitarian law* (London, Overseas Development Institute, 2000) <<http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/305.pdf>> accessed 20 April 2015.

⁴⁴⁷ Art. 63 IV GC.

⁴⁴⁸ Huma Haider, *International legal frameworks for humanitarian action: Topic guide* (Birmingham, UK: GSDRC, University of Birmingham, 2013) <<http://www.gsdrc.org/docs/open/ILFHA.pdf>> accessed 20 April 2015, 26.

such as the right to search the relief consignments, to regulate their passage and to ensure that they are directed at the population in need.⁴⁴⁹

-International armed conflict (outside of occupation): Article 70(1) of Additional Protocol I states that if the civilian population under the control of a party to the conflict is not adequately provided with relief supplies, 'relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken'. This is, however, subject to the agreement of the parties concerned with such actions.

Additional provisions require that civilians are enabled to receive the necessary assistance. State parties are obligated to allow free and rapid passage of all relief consignments, equipment and personnel, regardless of whether they are being delivered to the civilian population of the enemy.⁴⁵⁰

- Non-international armed conflict: Provisions on humanitarian assistance are the least developed in this context. The relevant provisions are common Article 3 to the Geneva Conventions and Article 18(1) of Additional Protocol II.

Common Article 3 simply provides that 'an impartial humanitarian body, such as the [ICRC], may offer its services to the Parties to the conflict'.

Article 18(1) of Additional Protocol II adds that domestic relief societies, such as National Red Cross/ Red Crescent Societies, may 'offer their services' as may the civilian population itself. International relief is addressed in Article 18(2), which states that

if the civilian population is suffering undue hardship owing to a lack of supplies essential for its survival, such as foodstuffs and medical supplies, relief actions [...] of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken.

Similar to international conflicts outside of occupation, this is subject to the consent of the State party concerned. In this context, it entails the State giving consent for assistance to the insurgent side. Although it is difficult to determine the threshold of 'undue hardship', the ICRC commentary on the Additional Protocols suggests that the 'usual standard of living of the population concerned' should be taken into consideration.⁴⁵¹

⁴⁴⁹ Sylvain Beauchamp, *Defining the humanitarian space through Public International Law* (Canadian Red Cross and Liu Institute for Global Issues 2008).

⁴⁵⁰ Art. 23 of the Fourth Geneva Convention; Art. 70 (2) of Additional Protocol I.

⁴⁵¹ ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC/Martinus Nijhoff Publishers, Dordrecht 1997) 1479.

C. Normative and operational challenges

1. The issue of State consent to humanitarian access

The combination of statements that relief actions ‘shall be undertaken’ but with the agreement or consent of State parties, has resulted in debate over the extent to which parties to both international and non-international armed conflicts are obligated to accept assistance.⁴⁵² The premise of State consent to humanitarian access has been eroded over the years as humanitarian actors have often decide to override the state’s refusal and to take independent action.⁴⁵³

The most authoritative interpretation is that so long as there is humanitarian need and organisations and relief actions meet the requisites of being humanitarian and impartial in character and without adverse distinction, governments cannot arbitrarily refuse assistance.⁴⁵⁴ This is particularly the case in extreme situations, where a lack of supplies would result in starvation. Article 54 of Additional Protocol I prohibits the starvation of civilians as a method of combat.⁴⁵⁵

The position of the ICRC is expressed in the ICRC’s study on Customary International Humanitarian Law. It affirms that it is a norm of customary international law, in international and non-international conflicts, that governments cannot arbitrarily refuse assistance. Even in cases outside of starvation, the study also found that parties to the conflict are obligated to allow and facilitate humanitarian assistance in any kind of conflict where civilians are in need (subject to their right to exercise control over relief actions). This is based on practice in the field, various UN resolutions and other sources.⁴⁵⁶

The interpretation of the ICRC has received support in scholarly doctrine,⁴⁵⁷ but there is still debate on the issue. The work of the International Law Commission on customary law in the context of disasters also aims to establish a norm of State responsibility to not arbitrarily refuse assistance.⁴⁵⁸

⁴⁵² Art. 70(1) AP I; Art. 18(2) AP II.

⁴⁵³ Médecins sans Frontières (MSF), for instance, has been clandestinely providing humanitarian assistance in Syria, whose government denied access to the organisation, see MSF, ‘Syrie - Un hôpital clandestin’ <<http://www.msf.fr/press/videos/syrie-hopital-clandestin>>, accessed 10 September 2015. See Cedric Ryngaert, Humanitarian Assistance and the Conundrum of Consent: A Legal Perspective (2013) 5(2) *Amsterdam Law Forum Conference* <<http://amsterdamlawforum.org/article/view/298>> , accessed 15 September 2015.

⁴⁵⁴ See Joaquín Alcaide Fernández, Carmen Márquez Carrasco and Juan Antonio Carrillo Salcedo, *La Asistencia Humanitaria en Derecho Internacional Contemporáneo* (Sevilla, Secretariado de Publicaciones de la Universidad de Sevilla, 1997).

⁴⁵⁵ Art. 54 AP I.

⁴⁵⁶ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume 1: Rules* (ICRC, Cambridge 2005) 201-202.

⁴⁵⁷ See ICRC’s study on Customary International Humanitarian Law (2005); Kate Mackintosh, *The principles of humanitarian action in international humanitarian law* (London, Overseas Development Institute, 2000); Jelena Pejic, ‘The protective scope of Common Article 3: more than meets the eye’ (2011) Vol. 93 No. 881 *International Review of the Red Cross* <<http://www.icrc.org/eng/assets/files/review/2011/irrc-881-pejic.pdf>> accessed 20 April 2015, 189-225.

⁴⁵⁸ See Cedric Ryngaert, ‘Humanitarian Assistance and the Conundrum of Consent: a Legal Perspective’ (2013) Vol. 5 (2) *Spring Issue Amsterdam Law Forum*, 5-19.

2. IHL and humanitarian assistance involving non-State armed groups

Since the mid-1990s, IHL has expanded its coverage of non-international armed conflicts. Various treaties have been drafted or revised to regulate States and armed groups party to such conflicts.⁴⁵⁹ Customary international law has gone through a similar expansion.⁴⁶⁰

The term ‘armed groups’ is not defined in treaty law, although there exists a definition of certain required elements.⁴⁶¹ As noted earlier and in a previous report,⁴⁶² in order to be classified as a non-international armed conflict, the parties involved must demonstrate a certain level of organisation. Organised armed groups are extremely diverse, however, ranging from those that are highly centralised (with a strong hierarchy and effective chain of command) to those that are decentralised (with semi-autonomous or splinter factions).⁴⁶³ Groups may also differ in their level of territorial control; and their capacity to train members and to carry out disciplinary or punitive measures for IHL violations.⁴⁶⁴

IHL binds all parties to non-international armed conflicts, whether State actors or organised armed groups. Various arguments are invoked in order to justify the binding force of IHL on armed groups. According to Jann K Kleffner, these arguments are the following:

The State – the doctrine of legislative jurisdiction: Considered by some as the majority view, holds that IHL applies to armed groups because the ‘parent’ State has accepted the IHL rule(s). It is based on the capacity and right of a State to legislate for all its nationals and to impose upon them obligations that originate from international law. Organised armed groups may reject such an explanation, however, on the grounds that this is the same State against which they are fighting.⁴⁶⁵

⁴⁵⁹ The parties to non-international conflicts are at minimum required to comply with Article 3 common to the Geneva Conventions and Additional Protocol II, which particularly applies to NIACs. The terms ‘organised armed group’, ‘non-state armed group’ and ‘armed group’ will be used interchangeably in this section.

⁴⁶⁰ Anthea Roberts and Sandesh Sivakumaran, ‘Lawmaking by non-state actors: Engaging armed groups in the creation of international humanitarian law’ (2012) 37 Yale Journal of International Law <<http://www.yjil.org/docs/pub/37-1-roberts-sivakumaran-lawmaking-by-nonstate-actors.pdf>> accessed 20 April 2015, 107-152.

⁴⁶¹ See for instance Art. 1 AP II which defines armed groups as being ‘under responsible command’ and exercising ‘such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol’

⁴⁶² See Carmen Márquez Carrasco (ed.) ‘Report on a survey study on human rights violations in conflict-settings’, FRAME Project D10.1 < > 68-71.

⁴⁶³ Michelle Mack, *Increasing respect for International Humanitarian Law in non-international armed conflicts* (Geneva: ICRC 2008) <<http://www.icrc.org/eng/resources/documents/publication/p0923.htm>> accessed 20 April 2015.

⁴⁶⁴ Sophie Rondeau, ‘Participation of armed groups in the development of the law applicable to armed conflicts’ (2011) Vol. 93 No. 883 International Review of the Red Cross, <<http://www.icrc.org/eng/assets/files/review/2011/irrc-883-rondeau.pdf>> accessed 20 April 2015, 649-672.

⁴⁶⁵ Jann K Kleffner, ‘The applicability of international humanitarian law to organized armed groups’ (2011) Vol. 93 No. 882 International Review of the Red Cross <<https://www.icrc.org/eng/assets/files/review/2011/irrc-882-kleffner.pdf>> accessed 20 April 2015, 443-461, 445.

Individuals: the fact that individuals can be held accountable for war crimes demonstrates that they are subject to obligations that stem directly from IHL. It should be noted, however, that individual responsibility is not sufficient to justify the binding force of IHL on organised armed groups.⁴⁶⁶

The exercise of de facto government forces: Should an organised armed group carry out government functions and exercise effective sovereignty (or *de facto* authority), it may be argued that it is thus bound by IHL.⁴⁶⁷ Similar arguments have been made to justify the application of human rights obligations to non-state actors.⁴⁶⁸ This degree of effectiveness is rarely met by armed groups, however.⁴⁶⁹ In addition, there is no clear legal indication of what level of ‘authority’ is required to trigger human rights obligations.⁴⁷⁰

International customary law – legal personality: Armed groups that have reached a certain level of organisation, stability and effective control of territory can be considered to possess international legal personality. This renders them bound by customary international law.⁴⁷¹ A similar argument is made regarding human rights law and the application of ‘general principles of law recognised by civilised nations’.⁴⁷² The International Law Association argues that armed groups are bound by core human rights norms that are part of *jus cogens* norms.⁴⁷³

These explanations can be beneficial as armed groups are thus bound by the international community of States, rather than by the state against whom they fight. Nonetheless, so long as armed groups are excluded from these processes of law formation, their sense of ownership over the rules may still be weak.⁴⁷⁴

Consent – special agreement or unilateral declaration: IHL can be binding on such groups due to their own consent, rather than being imposed. Common Article 3(2) of the Geneva Conventions encourages parties

⁴⁶⁶ *Ibid*, 449.

⁴⁶⁷ *Ibid*, 451.

⁴⁶⁸ Annyssa Bellal, Gilles Giacca and Stuart Casey-Maslen, ‘International law and armed non-state actors in Afghanistan’ (2011) 93 (881) International Review of the Red Cross <<http://www.icrc.org/eng/assets/files/review/2011/irrc-881-bellal-giacca-casey-maslen.pdf>> accessed 20 April 2015, 47-79, 63.

⁴⁶⁹ Jann K Kleffner, ‘The applicability of international humanitarian law to organised armed groups’ (2011) 93(882) International Review of the Red Cross <<https://www.icrc.org/eng/assets/files/review/2011/irrc-882-kleffner.pdf>> accessed 20 April 2015, 443-461, 453.

⁴⁷⁰ Annyssa Bellal, Gilles Giacca and Stuart Casey-Maslen, ‘International law and armed non-state actors in Afghanistan’ (2011) 93 (881) International Review of the Red Cross <<http://www.icrc.org/eng/assets/files/review/2011/irrc-881-bellal-giacca-casey-maslen.pdf>> accessed 20 April 2015, 47-79, 71.

⁴⁷¹ Jann K Kleffner, ‘The applicability of international humanitarian law to organised armed groups’ (2011) 93 (882) International Review of the Red Cross <<https://www.icrc.org/eng/assets/files/review/2011/irrc-882-kleffner.pdf>> accessed 20 April 2015, 443-461, 454.

⁴⁷² *Ibid*, 457.

⁴⁷³ Annyssa Bellal, Gilles Giacca and Stuart Casey-Maslen, ‘International law and armed non-state actors in Afghanistan’ (2011) 93 (881) International Review of the Red Cross <<http://www.icrc.org/eng/assets/files/review/2011/irrc-881-bellal-giacca-casey-maslen.pdf>> accessed 20 April 2015, 47-79, 72.

⁴⁷⁴ Jann K Kleffner, ‘The applicability of international humanitarian law to organised armed groups’ (2011) 93 (882) International Review of the Red Cross <<https://www.icrc.org/eng/assets/files/review/2011/irrc-882-kleffner.pdf>> accessed 20 April 2015, 443-461, 454.

to a non-international armed conflict to conclude 'special agreements' through which all or parts of the other provisions of the Conventions (applicable to international armed conflict) are brought into force. There are various situations in which armed groups have entered into agreements with international organisations and States in which they accept certain IHL obligations (for instance in Operation Lifeline Sudan). Such agreements are considered to improve compliance by non-state armed groups. States are often unwilling, however, to enter into such agreements due to concerns about granting legitimacy to armed groups party to the conflict.⁴⁷⁵ There are also concerns that it could lead to the argument that armed groups must consent to all rules in order to be considered bound by them.⁴⁷⁶

Armed groups have also engaged in unilateral declarations of their acceptance of IHL rules. For example, various non-state actors have become party to the 'Deeds of Commitment', an instrument launched by Geneva Call to ban anti-personnel mines and to further protect children from the effects of armed conflict.⁴⁷⁷

3. Assistance and protection of civilian populations by field operations

Recent situations of violent conflict and crisis have evidenced the need to reappraise the mechanisms for the protection of human rights to cope with the challenges posed to humanitarian principles in complex emergencies. These shortcomings have a definitive impact on field operations aimed at protecting or assisting civilian populations, including people with specific needs, from violence and persecution.

Field operations actions are often divided into either 'protection' or 'assistance' activities. Protection initiatives are twofold: protection from the violence of armed conflict, which is the field regulated by international humanitarian law, or human rights protection, the field covered by international human rights law. Assistance programs consist of the provision of food, shelter and medical services to conflict-affected populations.⁴⁷⁸ These too are human rights issues.

This sub-section first examines field operations to protect civilians from violence or persecution in situations of violent conflict and crisis and the issues involved. Subsequently it considers humanitarian assistance and its impact on protection.

⁴⁷⁵ Anthea Roberts and Sandesh Sivakumaran, 'Lawmaking by non-state actors: Engaging armed groups in the creation of international humanitarian law' (2012) 37 Yale Journal of International Law <<http://www.yjil.org/docs/pub/37-1-roberts-sivakumaran-lawmaking-by-nonstate-actors.pdf>> accessed 20 April 2015, 107-152.

⁴⁷⁶ Jann K Kleffner, 'The applicability of international humanitarian law to organised armed groups' (2011) 93 (882) International Review of the Red Cross <<https://www.icrc.org/eng/assets/files/review/2011/irrc-882-kleffner.pdf>> accessed 20 April 2015, 443-461, 445.

⁴⁷⁷ See the 'Deeds of Commitment' by Geneva call at <<http://www.genevacall.org/how-we-work/deed-of-commitment/>> accessed 30 May 2015.

⁴⁷⁸ Kate Mackintosh, 'International Responses to Acute Crisis: Supporting Human Rights through Protection and Assistance' in DFID and University of Essex/Human Rights Centre (1998) – Conference on The Promotion and Protection of Human Rights in Acute Crisis, 17-54.

a) Field operations to protect civilians

Initiatives to protect civilians from violence or to protect human rights in situations of violent conflict and crises, range from the deployment of troops in the course of the conflict to post-conflict peacekeeping operations and human rights field operations.

There is no consensus on providing humanitarian assistance against the will of the State concerned, however military action, under state consent, has been undertaken to protect civilians in recent years. One of the most significant achievements has been the creation of safe areas, areas off-limits for military targeting, for civilian protection. In practice, however, the establishment of these safe areas has proven to be flawed in their aim of protecting from violence, due to organisational purposes and failure to make them strategically neutral.⁴⁷⁹ Furthermore, the existence of safe areas and other forms of protection within the boundaries of the state concerned may erode the right to leave one's country and to seek asylum as outlined in Article 14 of the UDHR⁴⁸⁰ At the same time, the creation of these areas places limits on the duty of national authorities to provide protection to the population under its jurisdiction, strengthening the existing obligation on the international community to fill this gap. The danger exists that such civilian resettlement can result in benefit to any party to the conflict, therefore the right to freedom of movement should be carefully considered to avoid political manipulation of these initiatives. This is in line with the need to provide non-discriminatory protection, free from political implications.

Human rights are playing an increasing role in post-conflict stabilisation, resulting from the idea of a 'wider peacekeeping' or integrated approach that has been developed since the end of the Cold War. This tendency is made visible with the inclusion of a human rights component in the missions and its integration into specific elements within the same. The state of human rights post conflict is also an appropriate indicator to assess the progress of peace. Furthermore, tackling on-going human rights concerns at the political level can prevent the recurrence of conflicts. The military and police (civil) components of peace-keeping operations can also contribute to human rights work in terms of reconciliation and prevention of conflict.⁴⁸¹

Human rights field operations are an important development in the international community's response to conflict.⁴⁸² Within post-conflict peace-building operations, the human rights component is intended towards short-term stabilisation and long-term structural developments. Strong political support for these reforms is necessary to support these efforts in terms of authority and on a financial basis.⁴⁸³

Despite all the progress achieved in field operations efforts continue to ensure the effective protection of civilians at the universal and regional levels.⁴⁸⁴ One of the most required improvements was the

⁴⁷⁹ *Ibid.*

⁴⁸⁰ *Ibid.*

⁴⁸¹ United Nations Department of Peacekeeping Operations and Department of Field Support, *Civil Affairs Handbook* (New York 2012) <http://www.un.org/en/peacekeeping/documents/civilhandbook/Civil_Affairs_Handbook.pdf> accessed 30 May 2015.

⁴⁸² See Michael O'Flaherty (ed.) *The Human Rights Field Operation. Law, Theory and Practice* (Ashgate 2007).

⁴⁸³ Kate Mackintosh, 'International Responses to Acute Crisis: Supporting Human Rights through Protection and Assistance' in DFID and University of Essex/Human Rights Centre (1998) – Conference on The Promotion and Protection of Human Rights in Acute Crisis, 17-54.

⁴⁸⁴ *Ibid.*

institutionalisation of human rights within operations, such that ‘a stable base is required from which to work on logistics and recruitment, on training and standard methodologies, and on lessons learned and evaluation’.⁴⁸⁵ Both the EU and UN have reinforced their commitment to address human rights issues and thus incorporate human rights components in their peace operations aimed at the promotion and protection of human rights on the ground as well as human rights mainstreaming within the mission.⁴⁸⁶ Other issues of concern are the dependence of UN human rights operations on the political will; their transparency in terms of public reporting function; lack of resources and capabilities; the co-ordination of activities with relevant actors, and proper follow-up of the activities of human rights field operations together with those of the UN human rights mechanisms.⁴⁸⁷

b) Humanitarian assistance and its impact on the protection of civilians

Humanitarian assistance provided in the form of emergency relief can have an impact on human rights and analysis of this is warranted to maximise the protection of human rights and to reduce the potential for human rights violations.

Assistance may have a negative impact on protection efforts, as these activities are less politically sensitive and they may replace some of the protection initiatives. This tendency can be appreciated in international responses to conflict during the 1990s, and particularly with regards to UNHCR performance.⁴⁸⁸ There were also diverging views about the fact that relief may also prolong conflict by sustaining warring parties support of oppressive regimes.⁴⁸⁹

Providing assistance without consent from the authorities concerned is also controversial, despite the fact that relief aid should be provided based on the protection needs of the beneficiaries and furthermore, the fact that humanitarian assistance can positively contribute to support human rights and prevent conflict. Within the UN system, human rights could be taken into greater consideration at the planning stage of humanitarian assistance through consultation with the High Commissioner for Human Rights.⁴⁹⁰

Not all humanitarian organisations agree over how far protection goals can be integrated into assistance.⁴⁹¹ For some, humanitarian assistance is already provided within a protection framework,

⁴⁸⁵ *Ibid.*

⁴⁸⁶ See Jeannette Boehme, Human Rights and Gender Components of UN and EU Peace Operations. Putting Human Rights and Gender Mandates into Practice (Deutsches Institut für Menschenrechte/German Institute for Human Rights 2008) <http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/study_human_rights_and_gender_components.pdf>, accessed 10 September 2015.

⁴⁸⁷ UN, Uniting our Strengths for Peace – Politics, Partnership and People. Report of the High-Level Independent Panel on United Nations Peace Operations (2015) <http://www.un.org/sg/pdf/HIPPO_Report_1_June_2015.pdf> accessed 15 September 2015, 21-28.

⁴⁸⁸ This tendency has been criticised as a general feature of international response to conflict in the 1990s, and has been a particular subject of debate around the work of UNHCR.

⁴⁸⁹ Kate Mackintosh, ‘International Responses to Acute Crisis: Supporting Human Rights through Protection and Assistance’ in DFID and University of Essex/Human Rights Centre (1998) – Conference on The Promotion and Protection of Human Rights in Acute Crisis, 17-54.

⁴⁹⁰ *Ibid.*

⁴⁹¹ *Ibid.*

namely that of international humanitarian law, and the principle of neutrality recognised therein must remain paramount. Trends towards 'human rights conditionality' in assistance are rejected as an abandonment of humanitarianism.⁴⁹² Others are in favor of making use of a human rights framework in planning their relief activities.⁴⁹³

It has also to be noted that the contribution of aid workers to human rights monitoring and advocacy is also subject to discussions. Due to their field presence, relief workers have access to relevant human rights information. This is particularly relevant in missions which are exclusively humanitarian, which do not integrate human rights activities. In this event, information may be facilitated by human rights monitoring bodies or human rights violations may be publicly denounced. However these actions entail more risks, therefore the potential adverse consequences need to be considered and communication needs to be reinforced.⁴⁹⁴

It can be concluded that human rights analysis at the planning and implementing stage of responses to crisis, can reinforce protection. Both protection and assistance initiatives have repercussions on the civil and political rights of individuals. In order to gauge the impact of these activities, it is necessary to set clear protection goals.⁴⁹⁵

D. The EU and humanitarian assistance

1. Overview

The EU is collectively the world's largest relief donor, comprising of Union and EU Member State bilateral contributions.⁴⁹⁶ The European Commission, through the Humanitarian Aid and Civil Protection department (ECHO), provides coordination among the EU Members States on humanitarian action and policy. ECHO's mandate for the administration of aid was first regulated by Council Regulation 1257/96.⁴⁹⁷ EU funded humanitarian projects are executed through partnerships with UN agencies, NGOs and other international organisations.⁴⁹⁸

The Treaty of Lisbon upholds the EU's commitment to provide assistance, relief, and protection to victims of natural or man-made disasters around the world.⁴⁹⁹ The EU's humanitarian policy under Article 214 of the Treaty on the Functioning of the European Union, the Humanitarian Aid Regulation⁵⁰⁰ and the

⁴⁹² *Ibid.*

⁴⁹³ *Ibid.*

⁴⁹⁴ *Ibid.*

⁴⁹⁵ *Ibid.*

⁴⁹⁶ Art. 4(4) of the TFEU states that the EU has competence in the areas of development cooperation and humanitarian aid without prejudice to Member States'; Council of the European Union, 'European Consensus on Humanitarian Aid' (2008) 2008/C 25/01 <[http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:42008X0130\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:42008X0130(01)&from=EN)> accessed 20 April 2015, para. 5.

⁴⁹⁷ Council Regulation (EC) No. 1257/96 concerning humanitarian aid (20 June 1996) OJ L 163, 2.7.1996, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1996R1257:20090420:EN:PDF>> accessed 20 April 2015, 1.

⁴⁹⁸ European Commission ECHO, 'Funding for humanitarian aid' <http://ec.europa.eu/echo/funding-evaluations/funding-humanitarian-aid_en> accessed 20 April 2015.

⁴⁹⁹ Art. 214 of the TFEU.

⁵⁰⁰ Regulation (EC) No 1257/96 concerning humanitarian aid (20 June 1996) OJ L 163, 2.7.1996, 1 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1996R1257:20090420:EN:PDF>> accessed 20 April 2015.

European Consensus on Humanitarian Aid have the collective aim to save and preserve life, to prevent or reduce suffering and to safeguard the integrity and dignity of individuals by providing relief and protection during humanitarian crises.

The European Consensus on Humanitarian Aid laid down guiding principles for EU humanitarian assistance, namely the humanitarian principles of humanity, neutrality, impartiality and independence.⁵⁰¹ This document further defines the common objectives of EU humanitarian aid to 'provide a needs-based emergency response to preserve life, prevent and alleviate human suffering and maintain human dignity'.⁵⁰² At the local level, the EU is also committed to provide 'preparedness and recovery to increase the resilience to emergencies'. It stresses the importance of 'capacity building activities to prevent and mitigate the impact of disasters and to enhance humanitarian response'.⁵⁰³

It should be noted that the EU is also committed to respect and to promote compliance with international law, with emphasis on IHRL, IHL and Refugee Law.⁵⁰⁴ Accordingly, the EU adopted the Guidelines on promoting compliance with international humanitarian law in 2005, updated in 2009.⁵⁰⁵ This commitment is also reflected in each of its partnership agreements. Since the Commission implements its humanitarian programmes through partner organisations, it is necessary to ensure that they also adhere to common humanitarian principles.⁵⁰⁶

2. Challenges

a) Providing independent humanitarian aid while ensuring coherence among external policies

The main challenge for the EU as a humanitarian aid provider is to respect the principle of independence, given that humanitarian policies are an integral part of the EU's external action. The relevant EU documents on humanitarian assistance underline the separate nature of humanitarian aid in comparison with other external policies, i.e. development cooperation or Common Foreign and Security Policy (CFSP).⁵⁰⁷

⁵⁰¹ Council of the European Union, 'European Consensus on Humanitarian Aid' (2008) 2008/C 25/01 <[http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:42008X0130\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:42008X0130(01)&from=EN)> accessed 20 April 2015, paras. 10-14.

⁵⁰² *Ibid*, para. 8.

⁵⁰³ *Ibid*, para. 9.

⁵⁰⁴ *Ibid*, para. 16.

⁵⁰⁵ Council of the European Union, 'EU Guidelines on promoting compliance with international humanitarian law (IHL)' (2009) OJ C-327 <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XG1215%2801%29&from=EN>> accessed 20 April 2015.

⁵⁰⁶ European Union, Framework Partnership Agreement with Humanitarian Organisations (2014) FPA – 01/01/2014 <http://ec.europa.eu/echo/files/partners/humanitarian_aid/fpa/2014/FPA_NGO_en.pdf> accessed 20 April 2015, Art. 3.2

⁵⁰⁷ Jan Orbie et al., 'Humanitarian Aid as an Integral Part of the European Union's External Action: The Challenge of Reconciling Coherence and Independence' (2014) 22 (3) *Journal of Contingencies and Crisis Management*, 158-159.

The Lisbon Treaty seems to have strengthened the independence of EU humanitarian aid with its insertion in a separate chapter.⁵⁰⁸ Nonetheless, pursuant to the Article 214(1) TFEU, EU humanitarian aid shall be conducted ‘within the framework of the principles and objectives of the external action of the Union.’ A strict interpretation of the wording of this provision may lead to the conclusion that humanitarian aid can be used as an instrument to achieve objectives contained in Article 21 TEU, such as ‘preserve peace, prevent conflicts and strengthen international security’.⁵⁰⁹ Subject to Article 21(3) TEU, the EU needs to ensure coherence among its external policies, including humanitarian aid, which may endanger the independence of EU’s humanitarian aid policy. To preserve the independence and needs-based approach of humanitarian aid policy, Article 214(2) TFEU is to be interpreted as restricting the humanitarian aid objectives to those ‘in compliance with the principles of international law and with the principles of impartiality, neutrality and non-discrimination’.⁵¹⁰

At the institutional level, humanitarian aid does not fall under the competence of the EEAS, unlike development cooperation. However some humanitarian actors and ECHO itself have expressed their concerns about the integration of humanitarian aid policy in the EU’s external action, together with a broad interpretation of the coordinating role of EEAS, which may damage the principle of independence and politicise humanitarian policy.⁵¹¹

It can be concluded that the Treaty of Lisbon reinforces the independence of humanitarian aid policy, while the European Consensus on Humanitarian Aid consolidates the applicability of humanitarian principles. Nonetheless, the pursuance for greater coherence among the EU external policies poses a risk of politicisation of humanitarian aid delivery.

Despite the distinct nature of humanitarian assistance, it can only be effective when linked to other policies, particularly to development cooperation. The European Consensus affirms that EU humanitarian aid should take into consideration long-term development objectives.⁵¹² Certainly humanitarian and development policies come closer in certain scenarios, particularly pursuant to the objective of strengthening resilience, which ‘lies at the junction between humanitarian and development assistance’.⁵¹³ The European Consensus document further recognises that humanitarian assistance is

⁵⁰⁸ Peter Van Elsuwege and Jan Orbie, ‘The EU’s Humanitarian Aid Policy after Lisbon: Implications of a New Treaty Basis’ in Inge Govaere and Sara Poli (eds.), *EU Management of Global Emergencies: Legal Framework for Combating Threats and Crises* (Brill 2014) 20–45.

⁵⁰⁹ TEU, Art. 21.2(c)

⁵¹⁰ Jan Orbie et al., ‘Humanitarian Aid as an Integral Part of the European Union’s External Action: The Challenge of Reconciling Coherence and Independence’ (2014) 22 (3) *Journal of Contingencies and Crisis Management*, 160.

⁵¹¹ Caritas, *Bridging the gap between policy and practice* (2011) <http://www.caritas.eu/sites/default/files/bridgingthegap_endefinite.pdf> accessed 20 April 2015; Oxfam, *Fit for Purpose? The European External Action Service one year On* (2012) <<http://www.oxfam.org/sites/www.oxfam.org/files/bp159-fit-for-purpose-eeas-230111-en.pdf>> accessed 20 April 2015

⁵¹² Council of the European Union, ‘European Consensus on Humanitarian Aid’ (2008) 2008/C 25/01 <[http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:42008X0130\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:42008X0130(01)&from=EN)> accessed 20 April 2015, para. 22.

⁵¹³ In 2012 the European Commission, in a Communication to the European Parliament and the Council ‘The EU Approach to resilience: Learning from Food Security Crisis’, proposed a new policy on resilience. The Commission outlines a strategy to increase national resilience capabilities and reduce the vulnerability of people affected by disasters combining humanitarian and development aid. See European Commission, Communication to the

usually delivered in situations where other instruments related to crisis management, civil protection and consular assistance are in place, and the EU has to ensure coherence, complementarity and efficiency in its response to crises.⁵¹⁴

b) Humanitarian aid and crisis management operations

EU humanitarian aid is not a CSDP tool,⁵¹⁵ but in conflict-related scenarios both humanitarian aid and security and defence mechanisms may potentially co-apply, as the EU pursues coherence and complementarity in its response to crises.⁵¹⁶

i. The use of civil protection resources and military assets in response to humanitarian situations

Pursuant of Article 40 TEU, the implementation of CFSP measures should not be done at the expense of policies listed in Articles 3 to 5, including humanitarian aid under Article 4. Thus this provision ensures the independence of EU humanitarian aid in relation to potential foreign policy and military influences. Article 43 TEU on EU's CSDP allows the EU to resort to civilian and military means to support humanitarian operations.⁵¹⁷ The European Consensus on Humanitarian Aid upholds that 'the use of civil protection resources and military assets in response to humanitarian situations must be in line with the [applicable] Guidelines [...] to safeguard compliance with the humanitarian principles'.⁵¹⁸ Similarly it states that 'in complex emergencies, recourse to civil protection assets should be the exception'.⁵¹⁹ Furthermore, the European Consensus states that

In order to avoid a blurring of lines between military operations and humanitarian aid, it is essential that military assets and capabilities are used only in very limited circumstances in support of humanitarian relief operations as a 'last resort', i.e. where there is no comparable civilian alternative and only the use of military assets that are unique in capability and availability can meet a critical humanitarian need.⁵²⁰

European Parliament and the Council 'The EU Approach to resilience: Learning from Food Security Crisis', COM(2012) 586 final (30.10.2012) http://ec.europa.eu/echo/files/policies/resilience/com_2012_586_resilience_en.pdf http://ec.europa.eu/echo/files/policies/resilience/com_2012_586_resilience_en.pdf accessed 20 April 2015.

⁵¹⁴ Council of the European Union, 'European Consensus on Humanitarian Aid' (2008) 2008/C 25/01 <[http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:42008X0130\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:42008X0130(01)&from=EN)> accessed 20 April 2015, para 22.

⁵¹⁵ *Ibid*, para. 15

⁵¹⁶ *Ibid*, para. 22.

⁵¹⁷ TEU Art. 43 (1).

⁵¹⁸ Council of the European Union, 'European Consensus on Humanitarian Aid' (2008) 2008/C 25/01 <[http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:42008X0130\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:42008X0130(01)&from=EN)> accessed 20 April 2015, para. 57. The applicable rules are the Guidelines on the Use of Military and Civil Defense Assets in complex emergencies and the Oslo Guidelines on the Use of Military and Civil Defense Assets in International Disaster Relief.

⁵¹⁹ Council of the European Union, 'European Consensus on Humanitarian Aid' (2008) 2008/C 25/01 <[http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:42008X0130\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:42008X0130(01)&from=EN)> accessed 20 April 2015, para. 60.

⁵²⁰ *Ibid*, para. 61.

Respect for international humanitarian law requires that EU military operations supporting humanitarian assistance are subject to strict conditions. The preparations for a potential EUFOR Mission to Libya in 2011 was assessed positively as it provided guarantees towards the neutrality of humanitarian assistance and an independent need-based assessment. On April 2011 the Council adopted a decision on EUFOR Libya, a military operation to support humanitarian assistance operations in Libya, although it was never launched. It was decided that the deployment of EUFOR Libya would be conditional upon request by the UN Office for Coordination of Humanitarian Affairs (UNOCHA) and after all civilian alternatives had been explored and exhausted. The condition for such deployment secured that the decision to resort to military assets would be based on a needs-based assessment by OCHA and with respect to humanitarian principles.⁵²¹

It should be noted that military assets themselves remain under military control, ‘the humanitarian operation as a whole must remain under the overall authority and control of the responsible humanitarian organisation.’⁵²² Therefore it is imperative that the humanitarian operation retains its civilian nature.⁵²³

With respect to the needs-based assessment and neutral nature of humanitarian assistance, the EU when making allocation decisions, must ensure ‘balance of response between different crises based on need’. Forgotten crises and those neglected needs in response to specific crises receive special attention from the EU.⁵²⁴ ECHO ensures a need-based approach through a two-phase assessment procedure. At an initial stage, ECHO has tools which provide evidence on the needs in specific countries and individual crises. The second phase focuses on the context of the crisis and response analysis.⁵²⁵ ECHO also supports and contributes to the improvement of needs assessments and evidence-based decision-making in the humanitarian sector as a whole.⁵²⁶

ii. The EU’s comprehensive approach to external conflict and crises

This approach has already been applied as the organising principle for EU action in the Horn of Africa, the Sahel and the Great Lakes. The EU has been enhancing its comprehensive approach to external conflicts and crises in practice, and through statements. Being aware of the danger that this approach poses to the

⁵²¹ Caritas, *Bridging the gap between policy and practice* (2011) <http://www.caritas.eu/sites/default/files/bridgingthegap_endefinite.pdf> accessed 20 April 2015, 19 and 33.

⁵²² Council of the European Union, ‘European Consensus on Humanitarian Aid’ (2008) 2008/C 25/01 <[http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:42008X0130\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:42008X0130(01)&from=EN)> accessed 20 April 2015, para. 63.

⁵²³ *Ibid*, para. 63.

⁵²⁴ ECHO has two evaluation mechanisms: the Global Vulnerability and Crisis Assessment (GVCA) and the forgotten crisis assessment (FCA). These tools serve to determine where to allocate EU humanitarian aid on a needs basis and with due respect to the principles of impartiality and independence. The GVCA and FCA facilitate a consistent and balanced allocation of resources across different regions. See European Commission ECHO, ‘Global Vulnerability and Crisis Assessment / Forgotten Crisis Assessment’ <http://ec.europa.eu/echo/resources-campaigns/online-databases/global-vulnerability-and-crisis-assessment-forgotten-crisis_en> accessed 30 April 2015. Both tools are available at <<http://echo-global-vulnerability-and-crisis.jrc.ec.europa.eu/PublicVisualization.aspx>> accessed 30 May 2015.

⁵²⁵ See European Commission ECHO, ‘Assessing needs, vulnerability and risk’ (2014) <http://ec.europa.eu/echo/what/humanitarian-aid/needs-assessments_en> accessed 30 May 2015.

⁵²⁶ The EU follows the work of the Inter-agency Standing Committee (IASC) in the application of the Operational Guidance on Coordinated Assessments in Humanitarian Crises and the MIRA (Multi-cluster/sector initial rapid assessment). ECHO also provides funding for global needs assessment initiatives under the Enhanced Response Capacity (ERC), supporting the development of the Index for Risk Management (InfoRM).

delivery of humanitarian aid in line with the humanitarian principles, all EU institution agree on the following:

[H]umanitarian aid shall be provided in accordance with its specific *modus operandi*, respectful of the principles of humanity, neutrality, impartiality and independence, solely on the basis of the needs of affected populations, in line with the European Consensus on Humanitarian Aid.⁵²⁷

The EU's reaction to conflict in Syria serves to illustrate the challenge posed by this recent trend towards more comprehensive responses. In June 2013 a comprehensive EU response to the Syrian crisis was announced by the European Commission and High Representative of the EU for Foreign Affairs and Security Policy.⁵²⁸ This broad strategy was aimed at facilitating a political solution to the crisis, the prevention of regional destabilisation and humanitarian aid.⁵²⁹ The comprehensive approach consists of 'pointing to the mobilisation of the entire range of instruments available to the EU and its Member States in crisis management to achieve a more holistic, sustainable response addressing multiple facets of crises in a coherent manner'.⁵³⁰ This approach entails the risk that EU humanitarian aid is perceived as a foreign policy tool.

Moreover, humanitarian exceptions and safeguards embedded in foreign policy tools may not always be effective. For instance, restrictive measures are used by the EU as part of an integrated and comprehensive policy approach.⁵³¹ EU restrictive measures are aimed to 'maintain and restore international peace and security', however Member States will endeavour to 'reduce to the maximum extent possible any adverse humanitarian effects or unintended consequences for persons not targeted or neighbouring countries'.⁵³² To secure this end, Council Decisions imposing sanctions always contain legal safeguards in the form of humanitarian exceptions to the restrictions imposed. In practice, the fulfilment of these exemptions encounter many obstacles. Economic sanctions have the potential to affect negatively the humanitarian assistance provided in the targeted country, not only by increasing the

⁵²⁷ European Commission, 'The EU's comprehensive approach to external conflict and crises', JOIN(2013) 30 final, (11 December 2013) <http://www.eeas.europa.eu/statements/docs/2013/131211_03_en.pdf> accessed 30 May 2015, 4. The Council reaffirms this statement in its conclusions. Council of the European Union, Council conclusions on the EU's comprehensive approach (Brussels, 12 May 2014) <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/142552.pdf> accessed 30 May 2015, para. 12, 4.

⁵²⁸ European Commission and High Representative of the EU for Foreign Affairs and Security Policy (2013), Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Towards a Comprehensive EU Approach to the Syrian Crisis', JOIN (2013) 22 (Brussels, 24.6.2013).

⁵²⁹ Jan Orbie et al., 'Humanitarian Aid as an Integral Part of the European Union's External Action: The Challenge of Reconciling Coherence and Independence' (2014) 22 (3) Journal of Contingencies and Crisis Management, 162.

⁵³⁰ Andrea Pontiroli et al., 'Losing Principles in the Search for Coherence? A Field-Based Viewpoint on the EU and Humanitarian Aid' (2013) The Journal of Humanitarian Assistance <<http://sites.tufts.edu/jha/archives/tag/comprehensive-approach>> accessed 30 May 2015.

⁵³¹ Council of the European Union, 'Basic principles on the use of restrictive measures (sanctions)', 10198/1/04 Rev 1 (Brussels, 7 June 2004) <<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2010198%202004%20REV%201>> accessed 30 May 2015, para. 5.

⁵³² *Ibid*, para. 1, 6.

humanitarian needs, but hindering efforts to provide humanitarian assistance. Humanitarian aid agencies working in Syria claim that international sanctions against the country have propagated a shortage of supplies and restricted the transfer of funds.⁵³³

Resorting to these 'humanitarian exceptions' may contribute to increased violence against civilians.⁵³⁴ Should this be the outcome of the application of these humanitarian safeguards, the EU would be found to be acting inconsistently with its humanitarian objectives and core values.

The EU is aware that the co-existence of different crisis management measures has potentially serious risks for a principled delivery of humanitarian aid. Consequently, the EU has been gradually defining the boundaries of civil-military operations and their relationship with the humanitarian sector. The operation EUFOR Tchad/RCA, as part of the EU's comprehensive approach towards the crisis in Darfur, was aimed at providing greater security to enable humanitarian assistance and free movement of humanitarian aid personnel.⁵³⁵ EUFOR Tchad/RCA set new benchmarks for civil-military cooperation, reinforcing communication between humanitarian actors and military personnel, while respecting the independence of humanitarian aid.⁵³⁶

⁵³³IRIN news, 'Sanctions hit humanitarian aid to Syria' (25 January 2013) <<http://www.irinnews.org/report/97335/sanctions-hit-humanitarian-aid-to-syria>> accessed 30 May 2015.

⁵³⁴ In May 2011 the EU imposed a full arms embargo on Syria in response to the violent repression by Syrian government forces of peaceful protests and the following violent conflict in the country. In 2013 the Council authorised the supply of certain equipment to Syrian opposition forces. See OXFAM, 'EU foreign ministers must bite the bullet and extend the arms embargo on Syria, says Oxfam' (24 May 2013) <<http://www.oxfam.org.uk/media-centre/press-releases/2013/05/eu-foreign-ministers-must-bite-the-bullet-and-extend-the-arms-embargo-on-syria-says-oxfam>> accessed 30 May 2015.

⁵³⁵ UN Security Council Resolution 1778 (2007) on the establishment of the UN Mission in the Central African Republic and Chad (MINURCAT) adopted on 25 September 2007 <<http://www.refworld.org/docid/46fb5c9d2.html>> accessed 30 May 2015; Council Joint Action 2007/677/CFSP of 15 October 2007 on the European Union military operation in the Republic of Chad and in the Central African Republic <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007E0677&from=EN>> accessed 30 May 2015; Council Decision 2008/101/CFSP of 28 January 2008 on the launching of the European Union military operation in the Republic of Chad and in the Central African Republic (Operation EUFOR Tchad/RCA) <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008D0101&qid=1435745108318&from=EN>> accessed 30 May 2015; EEAS, EU Military Operation in Eastern Chad and North Eastern Central African Republic (EUFOR Tchad/RCA) (March 2009) <http://www.eeas.europa.eu/csdp/missions-and-operations/eufor-tchad-rca/pdf/01032009_factsheet_eufor-tchad-rca_en.pdf> accessed 30 May 2015.

⁵³⁶ Damien Helly, 'Lessons from EUFOR Tchad/RCA' EUISS Seminar Reports (Paris, 18 March 2010) <http://www.iss.europa.eu/uploads/media/Lessons_from_EUFOR_Tchad_Report.pdf> accessed 30 May 2015, 9. UN OCHA, 'Reference Document: Humanitarian Civil-Military Liaison Arrangements and Coordination Mechanisms during the Mandate of EUFOR TCHAD/RCA' (2009) <<https://docs.unocha.org/sites/dms/Documents/CivMil%20Ref%20Doc%20EUFOR%20TCHAD-RCA.pdf>> accessed 30 May 2015.

E. Conclusion

Protecting civilians from the worst effects of violence and abuse has become prominent on international political, humanitarian and human rights agendas. However, there are different conceptions of protection and a high degree of uncertainty, not just about how to protect civilians, but about what the protection agenda consists of: protection of who or what, against what kinds of threats, by whom? Although the past two decades have seen unprecedented willingness within the international community to intervene in the internal affairs of States, international political and military action to protect vulnerable populations has remained grossly inconsistent and in some instances, has aggravated the problem. Moreover, interventions and policies tend to prioritise stability over human rights considerations, especially when it is the human rights of vulnerable groups that are at stake. The forthcoming FRAME report 10.3 will address the EU's legal and policy framework on protection of civilians, including vulnerable groups, and will test the consistency and coherence of CSDP policy through the analysis of practice (case-studies).

IV. The interaction between IHRL, IHL and IRL

A. Introduction

The interest in research concerning the relationship between IHRL and IRL is fairly recent. Traditionally, these three bodies of international law, in particular IHRL and IHL, were considered autonomous because of their different origins: IHL precedes IHRL by almost one century. Milanovic notes that the reason for this dissonance is that the international legal system '[...] can simultaneously tend towards fragmentation, because it tries to accommodate a number of widely diverging values and interests, and towards harmonisation, because without a measure of unity a legal system would soon stop being one, and divide into several particular regimes [...]'.⁵³⁷ This phenomenon is expressed in the interplay between IHRL, IHL and IRL.

As other scholars have noted, even if they were not created with the idea that they should be applied together, there were basic principles when drafting the Universal Declaration of Human Rights that were inspired from the drafting of the Geneva Conventions of 1949.⁵³⁸ In practice, these three branches of international law have never really been autonomous from another. Some authors point out that armed conflict constitutes one of the main causes of massive displacement of population.⁵³⁹ Some authors contend that despite the fact that there is an indubitable convergence between these three branches of law, this does not mean that there is a resulting substantive and/or procedural clarity. This convergence is based on the fact that IHL, IHRL and IRL all have a similar goal: the protection of the person.⁵⁴⁰ Besides this, the current phenomenon regarding mass movement of persons has required that IHRL, IHL and IRL reinforce their protection goals.⁵⁴¹

The study of the relationship and interaction between IHRL, IHL and IRL, based on legal literature, poses a series of issues. First of all, on the basis of the literature surveyed, there are two main ways of approaching the matter: the majority of authors address the relationship between IHRL, IHL and IRL in a general perspective. This means that the authors address the relationship between these legal areas, mainly through the concepts of *lex specialis* and complementarity. Other scholars analyse the relationship between these legal areas by examining specific rules of these bodies of international law.

⁵³⁷ Marko Milanovic, 'Norm Conflicts, International Humanitarian Law and Human Rights Law' in *Human Rights and International Humanitarian Law Vol. 19* (Collected Courses of the Academy of European Law, 2010) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1531596> accessed 20 January 2015, 1-36, 13.

⁵³⁸ Cordula Droege, 'The interplay between International Humanitarian Law and International Human Rights Law in situations of armed conflict' (2007) 40 (2) *Israel Law Review*, Hebrew University International Law Research Paper No. 14-07 <<http://ssrn.com/abstract=1032149>> accessed 19 December 2014, 310-355, 314.

⁵³⁹ François Bugnion, 'Refugees, internally displaced persons, and international humanitarian law' (2014), 25 (5) *Fordham International Law Journal*, <<http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1990&context=ilj>> accessed 15 September 2015, 1397.

⁵⁴⁰ Antonio Augusto Cançado Trindade et al. 'Derecho internacional de los derechos humanos, derecho internacional de los refugiados y derecho internacional humanitario: Aproximaciones y convergencias' (1994) *Actas del Seminario 10 años de la Declaración de Cartagena sobre Refugiados – Declaración de San José sobre Refugiados y Personas Desplazadas (Memoria del Coloquio Internacional)* San José: ACNUR/IIDH/Gobierno de Costa Rica, 187-267.

⁵⁴¹ *Ibid*, 195.

With regard to IRL, there is a consensus that IRL needs to be applied in complementarity with other bodies of law to provide a more protective approach.⁵⁴² The provisions of IRL are so precise that complementarity is necessary to secure the fullest protection. Refugee law is usually considered a part of human rights law, and there are many instances where human rights bodies and IRL bodies act together.

Concerning the relationship between IHL and IRL, scholars have noted that when the Geneva Conventions were drafted, a uniform definition of 'refugee' did not exist.⁵⁴³ This is the reason why the definition of refugee under these conventions is narrower than the one offered by IRL. Actually the definition formulated in the Geneva Conventions '[...] presents some key characteristics which highlight the added value of IRL and IHRL for regulating the transfer of protected persons [...].'⁵⁴⁴ However, both IHL and IRL originated because of the need to regulate the protection of persons who are under the power/protection of a State of which they are not nationals.⁵⁴⁵ As a consequence, it is argued that IHL and IRL should be applied together in contexts of armed conflict, as each of these branches of law cannot independently offer a complete or broad level of protection for refugees.

In accordance with this theoretical approach, the main advantages IHL poses to refugees is that it awards them protection as well as preventing displacement.⁵⁴⁶ Regarding the applicability of IHL, theoretical analysis follows in three stages: *refugees in war*, *refugees from war* and *refugees in post-war contexts*.

As regards refugees in war, it is noted that there is no provision for refugees in non-international armed conflicts.⁵⁴⁷ However, it should be recalled that, as long as they are not participating directly in hostilities, *refugees benefit from prohibition of attack*, as they are not lawful targets, they are civilians.⁵⁴⁸ Regarding the protection of refugees under international humanitarian law in general, it is rightly pointed out that:

The crux of the matter is then whether refugees are 'protected persons' under international humanitarian law. There is, however, no unequivocal answer to this question. International

⁵⁴²Michelle Foster, 'Non-Refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law'(2009) 2 *New Zealand Law Review*, , <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1605822> accessed 20 January 2015, , 259.

⁵⁴³Vicent Chetail, 'Armed Conflict and Forced Migration: A systemic Approach to International Humanitarian Law, Refugee Law and Human Rights Law' in Andrew Clapham & Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014) <<http://ssrn.com/abstract=2308857>> accessed 20 January 2015,727.

⁵⁴⁴ *Ibid*, 729.

⁵⁴⁵ Rachel Brett & Eve Lester, 'Refugee law and international humanitarian law: parallels, lessons and looking ahead' (2001) 83 (843) *International Review of the Red Cross*, <https://www.icrc.org/eng/assets/files/other/713-726_brett_lester.pdf> accessed 16 September 2015, ,713.

⁵⁴⁶ Alice Edwards, 'Crossing Legal Borders: The Interface Between Refugee Law, Human Rights Law and Humanitarian Law in the "International Protection" of Refugees', in Roberta Arnold & Nöelle Quévinet (eds), *International Humanitarian Law and Human Rights Law. Towards a New Merger in International Law* (Brill 2008), 431.

⁵⁴⁷Vicent Chetail, 'Armed Conflict and Forced Migration: A systemic Approach to International Humanitarian Law, Refugee Law and Human Rights Law' in Andrew Clapham & Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014) <<http://ssrn.com/abstract=2308857>> accessed 20 January 2015,704.

⁵⁴⁸François Bugnion, 'Refugees, internally displaced persons, and international humanitarian law' (2014), 25 (5) *Fordham International Law Journal*, <<http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1990&context=ilj>> accessed 15 September 2015, 1404.

humanitarian law instead provides a piece-meal frame of protection which depends on a complex set of various factors, including the ratification of AP I, the nationality of refugees, and the time of the arrival on the territory of the States parties. While some are protected persons under AP I, the great majority of refugees caught in international armed conflicts are not covered by this last instrument. In such a case, they must accordingly fulfil the ordinary conditions required by international humanitarian law to be considered as protected persons.⁵⁴⁹

In addition when refugees fulfil the conditions to be considered protected persons, they also benefit from the elementary considerations of humanity, as established in the *Corfu Channel* case and in the *Military and Paramilitary activities in and against Nicaragua* case heard by the ICJ.⁵⁵⁰

Nonetheless, since Article 73 of Additional Protocol I requires that refugees need to have been considered as such before the beginning of hostilities, this leaves certain refugees unprotected, and is therefore a shortcoming of international humanitarian law, considered by some as a direct contradiction of humanitarian principles.⁵⁵¹

Article 44 of AP I offers protection to refugees ‘from measures of constraint they may be subjected to on the grounds of their nationality, even though they may have fled from groups of their nationality’. This provision is important because otherwise these persons would not be afforded protection by IHL because they would be considered subjects of their State. However, as they are refugees, by definition the State is denying them protection. Therefore, IHL rightly fixes the problem through Article 44.⁵⁵² However, this prohibition does not prevent the detaining power from taking security measures against refugees, and

⁵⁴⁹ Vicent Chetail, ‘Armed Conflict and Forced Migration: A systemic Approach to International Humanitarian Law, Refugee Law and Human Rights Law’ in Andrew Clapham & Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014) <<http://ssrn.com/abstract=2308857>> accessed 20 January 2015, 704. Along this line see also Pablo Antonio Fernández Sánchez, ‘The Interplay between International Humanitarian Law and Refugee Law’ (2010) 1 (2) *Journal of International Humanitarian Legal Studies*, 329 – 381.

⁵⁵⁰ Pablo Antonio Fernández Sánchez, ‘The Interplay between International Humanitarian Law and Refugee Law’ (2010) 1 (2) *Journal of International Humanitarian Legal Studies*, , 354. See *Corfu Channel, (U.K. v. Albania) Judgment*, ICJ (9 April 1949) <<http://www.icj-cij.org/docket/files/1/1645.pdf>> accessed 10 July 2015; *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America); Merits*, ICJ (27 June 1986) <<http://www.icj-cij.org/docket/files/70/9619.pdf>> accessed 10 July 2015.

⁵⁵¹ Vicent Chetail, ‘Armed Conflict and Forced Migration: A systemic Approach to International Humanitarian Law, Refugee Law and Human Rights Law’ in Andrew Clapham & Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014) <<http://ssrn.com/abstract=2308857>> accessed 20 January 2015, 706.

⁵⁵² François Bugnion, ‘Refugees, internally displaced persons, and international humanitarian law’ (2014), 25 (5) *Fordham International Law Journal*, <<http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1990&context=ilj>> accessed 15 September 2015, <<http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1990&context=ilj>> accessed 15 September 2015, 1397-1420, 1407.

could even include their internment.⁵⁵³ However, in these situations of internment, IRL must revert to IHRL, when IHL does not apply.⁵⁵⁴

Nonetheless, it could be argued that IHL provides a more protective regime in some circumstances. One of the reasons for this is that the 1951 Refugee Convention does not contain a set of minimum rights that cannot be limited in any circumstances. In time of war, IHL contains provisions that limit the scope of measures that can be taken against refugees, because it requires States to restrain from harm as much as possible and to apply special measures to protected persons.⁵⁵⁵ As noted,

More fundamentally, enclosing refugees under the generic label of protected persons fails to address their specific needs. On the one hand, the definition of protected persons under international humanitarian law does not include all refugees and other persons in need of protection. Besides the cases mentioned before, it excludes all nationals of a belligerent state who flee to a state that is not a party to the conflict during and/or because of the hostilities. On the other hand, even if refugees correspond to the definition of protected persons, they benefit as such from the same guarantees as ordinary aliens within the territory of a party to the conflict. As demonstrated above, the only two provisions specifically devoted to refugees in GC IV are conspicuously weak and ambiguous.⁵⁵⁶

Assuming that the protection granted to refugees by IHL is insufficient, scholars turn to the interaction between IHRL and IRL. First, it is noted that the Refugee Convention excludes from its beneficiaries, refugees who have committed war crimes and crimes against humanity, showing a definite influence of IHL.⁵⁵⁷ It could be argued that refugee law has taken, or at least taken inspiration from, some concepts, principles or rules of IHL. For instance, it is indicated that the exclusively civilian character of refugee camps is inspired by the principle of distinction from IHL, therefore providing additional protection.⁵⁵⁸

To support this argument for the influence of IHL on the UN Refugee Convention, some authors consider in particular article 8 of the referred instrument, pointing out that it is almost an exact reproduction of article 44 of GC IV, but that it offers wider protection, because it applies in times of peace as well as in times of armed conflict.

⁵⁵³Vicent Chetail, 'Armed Conflict and Forced Migration: A systemic Approach to International Humanitarian Law, Refugee Law and Human Rights Law' in Andrew Clapham & Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014)

<<http://ssrn.com/abstract=2308857>> accessed 20 January 2015, 708.

⁵⁵⁴ Rachel Brett & Eve Lester, 'Refugee law and international humanitarian law: parallels, lessons and looking ahead' (2001) 83 (843) *International Review of the Red Cross* <https://www.icrc.org/eng/assets/files/other/713-726_brett_lester.pdf> accessed 16 September 2015, , 720.

⁵⁵⁵Stephane Jaquemet, 'The cross-fertilization of international humanitarian law and international refugee law' (2001) 83 (843) *International Review of the Red Cross*, , 652.

⁵⁵⁶ Vicent Chetail, 'Armed Conflict and Forced Migration: A systemic Approach to International Humanitarian Law, Refugee Law and Human Rights Law' in Andrew Clapham & Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014) <<http://ssrn.com/abstract=2308857>> accessed 20 January 2015, 710.

⁵⁵⁷ *Ibid*, 711.

⁵⁵⁸ Stephane Jaquemet, 'The cross-fertilization of international humanitarian law and international refugee law' (2001) Vol. 83 No. 843 *International Review of the Red Cross*, 651-674, 652.

Notwithstanding, an effective convergence between IHL, IRL and IHRL

[...] even when exceptions are clearly justified on the ground of national security, this does not suspend the basic guarantees granted by international humanitarian law and human rights law. Indeed, the three branches of international law must be applied cumulatively so that possible restrictions and exceptions permitted by one of them – can be overridden or conditioned by the rules and guarantees under the other branches [...].⁵⁵⁹

Concerning the situation of *refugees from war*, it is noted that the phenomena of massive influxes of displaced persons represents the most controversial topic of international refugee law.⁵⁶⁰ It is argued that IHRL complements the weak provisions of IRL on this topic, taking in to consideration that the prohibition of non-refoulement is contained in all regional human rights treaties. It is also asserted that:

In any event, the continuing applicability of human rights law in times of armed conflict obviates the limits and ambiguities of both refugee law and humanitarian law. The human rights prohibition of collective expulsion suffers from no exception or derogation. It further applies to any non-citizens - whether documented or not – who are within the jurisdiction of the state and without regard to the risk of ill-treatment in the country of destination. One could still content that the prohibition of collective expulsion does not apply to massive influx, because the term ‘expulsion does not cover ‘refusal of entry or rejection at the border’. Such a line of reasoning is, however, not convincing.⁵⁶¹

Even though each of the three bodies of international law cover refugees from war, their scope varies from one regime to another. Nonetheless, the notion of persecution under IRL is regarded as a serious violation of human rights. Any grave violation of humanitarian law corresponds in substance to a violation of human rights ‘for the purpose of the refugee definition’.⁵⁶²

Finally, with regards to *refugees in post-war contexts*, one of the main issues concerns repatriation after the end of hostilities. In the context of the European Union, this issue is of special importance due to the fact that most of the refugees coming from Africa and the Middle East are fleeing armed conflicts. In the context of the European Union, Directive 2011/95/EU regulates the protection afforded to refugees as well as subsidiary protection for those who do not qualify as refugees. The refugee protection system in the EU has been developed against the backdrop of the Refugee Convention. Authors argue that European courts should give primacy to the Refugee Convention system, because even if fleeing an armed conflict

⁵⁵⁹ Vicent Chetail, ‘Armed Conflict and Forced Migration: A systemic Approach to International Humanitarian Law, Refugee Law and Human Rights Law’ in Andrew Clapham & Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014) <<http://ssrn.com/abstract=2308857>> accessed 20 January 2015, 714.

⁵⁶⁰ Armed conflict is one of the main causes of massive refugee flux. One of the most notable cases at present is the one concerning Syrian refugees. These phenomena test the receiving state’s capacity to respond and comply with its international obligations regarding the reception of refugees and their rights once they are in its territory.

⁵⁶¹ Vicent Chetail, ‘Armed Conflict and Forced Migration: A systemic Approach to International Humanitarian Law, Refugee Law and Human Rights Law’ in Andrew Clapham & Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014) <<http://ssrn.com/abstract=2308857>> accessed 20 January 2015, 721.

⁵⁶² *Ibid*, 723.

per se does not meet the criteria in the Refugee Convention, persons fleeing from an armed conflict may in fact be persecuted for one of the reasons set out in the convention. Only if this is not the case, should subsidiary protection be applied.⁵⁶³

Regarding this issue in the broad framework of IHRL, IHL and IRL, first, it should be noted that voluntary repatriation has not developed in the framework of refugee law but is found within the practice of States and is within the policies of the UNHCR.⁵⁶⁴ This issue has been addressed in the development of human rights law, universally protecting the right to enter one's own country. As it has been highlighted,, IHRL provides an indispensable yardstick for framing the legal content of both return and reintegration of displaced persons in their own countries. Although much remains to be done for ensuring their basic rights in peace-building processes, it contributes to fill the silence in the Refugee Convention, highlighting the vital interplay between these two branches of international law for the purpose of promoting a holistic approach to refugee protection.⁵⁶⁵

Regarding the protection provided by IHL, the scenario is quite different. Scholars argue that there is an absolute obligation of repatriation under this body of law when dealing with prisoners of war, which cannot be renounced. This obligation would require States to enforce repatriation at any price, conflicting with the principle of non-refoulement in IHRL and IHL. On this problematic issue, it is stated

This is probably the only case of a true conflict of norms between international humanitarian law, refugee law, and human rights law. The absolute duty to repatriate prisoners of war without delay is in contradiction with, and is superseded by, the international refugee law, when these prisoners have a well-founded fear of being persecuted in the destination State. The refugee law prohibition of forcible repatriation does not apply when prisoners of war have committed war crimes or any other acts falling under the exclusion clause of Article 1F or under the exception of the non-refoulement duty of Article 33(2). Yet, even in such a case, human rights law still prevails over the humanitarian law obligation of repatriation as it bans any forcible return where there is a real risk of torture, degrading or inhuman treatment.⁵⁶⁶

Other authors have stressed the applicability of IHRL regarding due process of law before, during and after the process of refugee petition.⁵⁶⁷ It is also contended that the adoption of Common Article 3 of the

⁵⁶³ Evangelia Tsourdi, 'What Protection for Persons Fleeing indiscriminate violence? The Impact of the European Courts on the EU Subsidiary Protection System' in David James Cantor & Jean-François Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian law* (Martinus Nijhoff Publishers 2014) 286-287.

⁵⁶⁴ For an overview see: Marjoleine Zieck, *UNHCR and Voluntary Repatriation of Refugees: a Legal Analysis* (Martinus Nijhoff 1997).

⁵⁶⁵ Vicent Chetail, 'Armed Conflict and Forced Migration: A systemic Approach to International Humanitarian Law, Refugee Law and Human Rights Law' in Andrew Clapham & Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014) <<http://ssrn.com/abstract=2308857>> accessed 20 January 2015, 729.

⁵⁶⁶ *Ibid*, 731.

⁵⁶⁷ Antonio Augusto Cançado Trindade et al. 'Derecho internacional de los derechos humanos, derecho internacional de los refugiados y derecho internacional humanitario: Aproximaciones y convergencias' (1994) *Actas del Seminario 10 años de la Declaración de Cartagena sobre Refugiados – Declaración de San José sobre Refugiados y Personas Desplazadas (Memoria del Coloquio Internacional)* San José: ACNUR/IIDH/Gobierno de Costa Rica, 187-267,189.

Geneva Conventions of 1949 brought IHL and IHRL closer.⁵⁶⁸ It is noted that IHL could benefit from the stronger and more institutionalised IHRL supervisory mechanisms, both conventional and extra-conventional,⁵⁶⁹ given that IHL does not provide for such implementation and enforcement machinery. This view is shared by Milanovic

Thus, even if human rights substantively added nothing to IHL, i.e. if the relationship between IHL and IHRL was such that IHRL in wartime brought no less, but also no more protections for individuals than IHL, there would still be a point in regarding IHL and IHRL as two complementary bodies of law. IHL, now (jurisdictionally) framed in human rights terms, could be enforced (or tried to be enforced) before political bodies, such as the Human Rights Council or UN political organs more generally, or through judicial and quasi-judicial mechanisms, such as the International Court of Justice, the European Court of Human Rights, the UN treaty bodies, or domestic courts.⁵⁷⁰

However, this author also argues that the joint application of IHL and IHRL can be possible at the price of 'watering down' IHRL in order to make its application achievable. This means that human rights cannot be applied in the usual manner.⁵⁷¹ In his view, there will be some scenarios where the joint application of IHRL and IHL is not possible and where the solution to the problem will be through the political process, as is the case on the principle of non-refoulement and repatriation of prisoners of war under IHL provisions.⁵⁷²

B. Approaches to the relationship between IHL, IHRL and IRL

The majority of the existing scholarly literature on this topic focuses on the relationship between IHL and IHRL. The reason for this is that the relationship between IHRL and IHL is considered to be the more conflictive one, and that the relationship between IHRL and IRL tends to be more harmonious, as their respective norms do not collide with each other in theory or in practice. Departing from this consideration, the following section will present the most important thematic contents of the literature: whether the relationship of these three bodies is one of law as *lex specialis* or if it is one of complementarity. It will continue by describing the normative and applicable interaction among these bodies of law, based on authors' opinions on the analysis of specific norms.

Most of the legal literature available on this topic is centered on the question of how to jointly apply IHRL, IHL and IRL. Contemporary legal literature poses no doubt that these three bodies of law, as a whole, can in some way or another be applied together, both in times of peace and in times of armed conflict. The discussion is centered instead on how these bodies of law should be applied. Professor Cançado Trindade follows a different approach however. Instead of focusing on the technique that should be used to apply these bodies of law together, the basis of his arguments are on their procedural and operative

⁵⁶⁸ *Ibid*, 223.

⁵⁶⁹ *Ibid*, 250.

⁵⁷⁰ Marko Milanovic, 'Norm Conflicts, International Humanitarian Law and Human Rights Law' (2010) 19 *Human Rights and International Humanitarian Law* (Collected Courses of the Academy of European Law) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1531596> accessed 20 January 2015, 2.

⁵⁷¹ *Ibid*, 3.

⁵⁷² *Ibid*, 5.

convergence. In this line, Cançado Trindade notes that one of the main divergences between these three bodies of law resides in the procedural element of legitimation *ad causam*. While IHRL has recognised the individual right to petition, IHL and IRL have not done so.⁵⁷³ Therefore, while an individual can present a petition to IHRL bodies, this is not case for IHL and IRL, given that there are no supervision mechanisms to accept individual claims.

It is also noted that the convergence of IHL, IHRL and IRL is not only substantive and procedural, but also operational.⁵⁷⁴ In this regard, the work of the International Committee of the Red Cross (ICRC) with detainees, refugees and displaced persons is recalled, as well as the UNHRC's work regarding human rights. An example of this operational convergence is the fact that both the ICRC and the UNHRC succeeded at integrating this approach at the II World Conference on Human Rights (1993).⁵⁷⁵ Furthermore, authors note that, in practice, there has been an improvement in the cooperation between the ICRC and the UNHRC.⁵⁷⁶

According to Cançado Trindade, in order to examine the causes of migration one has to take into account the effectiveness of human rights.⁵⁷⁷ One of the main causes of massive migration, apart from armed conflict, is a context of massive human rights violations. These violations could concern the right to life and integrity, in situations of violence that do not amount to an armed conflict, but could also be social

⁵⁷³Regional as well as universal systems of human rights protection allow for individuals to present petitions to their respective organs. In respect of regional systems, an individual can present a petition to the Inter-American Commission of Human Rights, the European Court of Human Rights and the African Commission on Human and Peoples' Rights. In the universal system, an individual can present a petition to one of the committees, which are the monitoring bodies of the UN human rights treaties. There are no monitoring bodies with decision-making power in IHL or in IRL.

⁵⁷⁴Antonio Augusto Cançado Trindade et al. 'Derecho internacional de los derechos humanos, derecho internacional de los refugiados y derecho internacional humanitario: Aproximaciones y convergencias' (1994) *Actas del Seminario 10 años de la Declaración de Cartagena sobre Refugiados – Declaración de San José sobre Refugiados y Personas Desplazadas (Memoria del Coloquio Internacional)* San José: ACNUR/IIDH/Gobierno de Costa Rica, 187-267, 190.

⁵⁷⁵The II World Conference on Human Rights took place from 14 to 25 June of 1993, in Vienna, Austria. The Vienna Declaration and Program of Action was adopted at the end of its sessions. This document declared that: [...] The World Conference on Human Rights reaffirms that everyone, without distinction of any kind, is entitled to the right to seek and to enjoy in other countries asylum from persecution, as well as the right to return to one's own country. In this respect it stresses the importance of the Universal Declaration of Human Rights, the 1951 Convention relating to the Status of Refugees, its 1967 Protocol and regional instruments. It expresses its appreciation to States that continue to admit and host large numbers of refugees in their territories, and to the Office of the United Nations High Commissioner for Refugees for its dedication to its task. It also expresses its appreciation to the United Nations Relief and Works Agency for Palestine Refugees in the Near East [...] (Paragraph 23).

⁵⁷⁶Alice Edwards, 'Crossing Legal Borders: The Interface Between Refugee Law, Human Rights Law and Humanitarian Law in the "International Protection" of Refugees', in Roberta Arnold & Nöelle Quévinet (eds), *International Humanitarian Law and Human Rights Law. Towards a New Merger in International Law* (Brill 2008), 430. For a more detailed review of the work of the ICRC and the UNHCR see: David P. Forsyth, 'Humanitarian protection: The International Committee of the Red Cross and the United Nations High Commissioner for Refugees' (2001), 83 (843) *International Review of the Red Cross* <<https://www.icrc.org/eng/resources/documents/misc/57jrea.htm>> accessed 16 September 2015, 675-697.

⁵⁷⁷Antonio Augusto Cançado Trindade et al. 'Derecho internacional de los derechos humanos, derecho internacional de los refugiados y derecho internacional humanitario: Aproximaciones y convergencias' (1994) *Actas del Seminario 10 años de la Declaración de Cartagena sobre Refugiados – Declaración de San José sobre Refugiados y Personas Desplazadas (Memoria del Coloquio Internacional)* San José: ACNUR/IIDH/Gobierno de Costa Rica, , 198.

rights such as the right to food and health. There is a duty of prevention in the IHRL framework.⁵⁷⁸ This duty of prevention can be translated into an effective early warning mechanism.⁵⁷⁹ Moreover, human rights must be respected before, during and even after (in the final phase of durable solutions) of the asylum request process. Therefore, human rights should be considered in their totality (including economic, social and cultural rights). It is impossible to deny that poverty is at the root of many refugee waves. Given the relationship mentioned above, it is not surprising either that many of the universally recognised human rights apply directly to refugees, and that, similarly, some refugee law provisions apply to the human rights domain, such as the principle of non-refoulement.⁵⁸⁰

C. Areas of convergence and divergence of IHL, IHRL and IRL and the relation with EU law

This sub-section seeks to analyse the interaction between IHRL, IHL and Refugee Law with regard to the protection of refugees in times of armed conflict and the implications that such interactions have for the European Union (EU) and its Member States. To this end, the convergence, divergence and existent relationships between the norms in these three areas of International Law related to the protection of refugees during armed conflict will be analysed. Secondly, the main jurisprudential and supervisory body related decisions that develop the normative interaction and resolve their main conflicts, will be examined. Both topics will be addressed in light of the relevance they might have for the EU and its Member States.

1. Synallagmatic character and suspension of rights

The normative framework to be analysed in this section with regards to Refugee Law, deals with the Convention relating to the Status of Refugees of 1951⁵⁸¹ and the Protocol relating to the Status of Refugees of 1967,⁵⁸² norms directly related to the protection of refugees that have been ratified by EU Member States. In regards to IHL, the four Geneva Conventions⁵⁸³ and their two Additional Protocols⁵⁸⁴ that

⁵⁷⁸ *Ibid*, 202.

⁵⁷⁹ *Ibid*, 202.

⁵⁸⁰ *Ibid*, 189.

⁵⁸¹ The Convention on the Status of Refugees (CSR) was adopted on 28 July 1951 and entered into force on 22 April 1954. As of March 2015, it has 145 States Parties. The CSR is available at <<http://www.unhcr.org/3b66c2aa10.html>> accessed 3 February 2015.

⁵⁸² The Protocol on the Status of Refugees was adopted on 31 January 1967 and entered into force on 4 October of that same year. As of March 2015 it has 146 States Parties. The Protocol is available at <<http://www.unhcr.org/3b66c2aa10.html>> accessed 3 February 2015.

⁵⁸³ The four Geneva Conventions were adopted on 12 August 1949 and entered into force on 21 October 1950. As of March 2015 they have 196 States Parties. These are: Convention for the Amelioration of the Condition of the Wounded and sick in the Field (Convention I), Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Member of Armed Forces at Sea (Convention II), Convention relative to the Treatment of Prisoners of War (Convention III) and Convention relative to the Protection of Civilian Persons in Time of War (Convention IV). The four Geneva Conventions have been ratified by EU Member States and are therefore fully applicable. They are available at <<https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions>> accessed 5 February 2015

⁵⁸⁴ The Additional Protocol relating to the Protection of Victims of International Armed Conflicts (Protocol I) and the Additional Protocol relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) were adopted on 8 June 1977 and entered into force on 7 December 1978. As of March 2015, Protocol I has 174

regulate the protection of victims during armed conflicts⁵⁸⁵ are analysed. It is important to note that the UN Charter prohibits the use of force by States in article 2.4.: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations'. This obligation is developed by the different branches of international law that are analysed within this section. Because IHRL represents a much larger normative body, selected norms relevant to international and regional human rights treaties are taken into account, such as the Covenant on Civil and Political Rights⁵⁸⁶ (ICCPR), the European Convention on Human Rights⁵⁸⁷ or the American Convention on Human Rights⁵⁸⁸ (ACHR). When appropriate, however, articles relevant to other treaties on specific issues or EU norms will also be indicated.

The first point of convergence between these norms can be found in the overcoming of the synallagmatic character of International Law itself. Given that the ultimate objective of these norms is the protection of the individual and his dignity, as well as the establishment of State obligations toward individuals, these three normative bodies lose, in part, their reciprocal character and limit the State's willingness in relation to non-compliance with international obligations adopted. For example, Article 60.5 of the Vienna Convention on the Law of Treaties⁵⁸⁹ points out that States cannot suspend or terminate a treaty in light of a breach by one of the parties when such breach concerns '[...] 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 [...]'.⁵⁹⁰

In addition, in the case of IHL, the four Geneva Conventions establish that '[...] a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with the release and repatriation of the persons protected by the present Convention have been terminated [...]'.⁵⁹⁰

States Parties and Protocol II has 168 States Parties. The Additional Protocols to the Geneva Conventions are applicable to EU Member States as long as they have been duly ratified by them. They are available at <<https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions>> accessed 5 February 2015.

⁵⁸⁵ On the definition and characteristics of IHL and armed conflict, see Elisabeth Salmón, *Introducción al Derecho Internacional Humanitario* (IDEH-PUCP/CICR 2012).

⁵⁸⁶ The International Covenant on Civil and Political Rights (ICCPR) was adopted on 16 December 1966 and entered into force on 23 March 1976. As of March 2015 it has 168 States parties including EU Member States. The ICCPR is available at <<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>> accessed 5 February 2015.

⁵⁸⁷ The European Convention on Human Rights (ECHR) was adopted on 4 November 1950 and entered into force on 3 September 1953. As of March 2015 it has 47 States Parties and EU ratification of the ECHR is in process. The ECHR is available at <http://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 5 February 2015.

⁵⁸⁸ The American Convention on Human Rights (ACHR) was adopted on 22 November 1969 and entered into force on 18 July 1978. As of March 2015 it has 114 States Parties. The ACHR is available at <http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm> accessed 5 February 2015.

⁵⁸⁹ The Vienna Convention on the Law of Treaties (VCLT) was adopted on 23 May 1969 and entered into force on 27 January 1980. As of March 2015 it has 114 States Parties. The VCLT is available at <<http://www.oas.org/legal/english/docs/Vienna%20Convention%20Treaties.htm>> accessed 5 February 2015.

⁵⁹⁰ Convention I, Art. 63. The same text is reproduced in the other Geneva Conventions: Convention II Art. 62, Convention III Art. 142 and Convention IV Art. 158. In addition, in relation to non-international armed conflicts, we find a similar article in Protocol II Art. 25.

Finally, in the case of Refugee Law, even though the Convention on the Status of Refugees does not include a clause of this sort, it does include explicit reference to overcoming legislative reciprocity in regards to the rights of refugees. In this sense, it explicitly points out that:

Article 7. - Exemption from reciprocity

1. Except where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally.
2. After a period of three years' residence, all refugees shall enjoy exemption from legislative reciprocity in the territory of the Contracting States.
3. Each Contracting State shall continue to accord to refugees the rights and benefits to which they were already entitled, in the absence of reciprocity, at the date of entry into force of this Convention for that State.
4. The Contracting States shall consider favourably the possibility of according to refugees, in the absence of reciprocity, rights and benefits beyond those to which they are entitled according to paragraphs 2 and 3, and to extending exemption from reciprocity to refugees who do not fulfil the conditions provided for in paragraphs 2 and 3. [...]

The importance granted to the protection of individuals is also reflected in the conditionality clauses present both in human rights treaties and IHL norms. These types of provisions relativise the suspension of human rights obligations during situations of armed conflict or states of emergency by establishing the intangibility of a group of rights independently of the situation existing in a State. For example, in the case of the European Convention, Article 15 provides that:

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2 [right to life], except in respect of deaths resulting from lawful acts of war, or from Articles 3 [prohibition of torture], 4 (paragraph 1) [prohibition of slavery] and 7 [no punishment without law] shall be made under this provision.⁵⁹¹

In addition, there are human rights treaties that, by virtue of not having a suspension clause, remain completely in force during breaches of peace. As it has been noted, the main human rights treaties of the universal human rights protection system (UHRS), except for the ICCPR, do not contain a suspension of rights clause.⁵⁹² Among the treaties in the European human rights system that do not include these types of provisions, reference should be made to the European Convention on the Legal Status of Migrant

⁵⁹¹ Similar provisions are found in CCPR Art 4.2 and the ACHR Art. 27.

⁵⁹² Vicent Chetail, 'Armed Conflict and Forced Migration: A systemic Approach to International Humanitarian Law, Refugee Law and Human Rights Law' in Andrew Clapham & Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014) <<http://ssrn.com/abstract=2308857>> accessed 20 January 2015, 716.

Workers,⁵⁹³ the Council of Europe Convention on Action against Trafficking in Human Beings⁵⁹⁴ and the Council of Europe Convention on preventing and combating violence against women and domestic violence.⁵⁹⁵ In that sense, the European normative framework for the protection of some vulnerable groups is extremely protective, because it applies the whole treaty in all possible situations including armed conflicts.

In addition, Common Article 1 to the four Geneva Conventions points out that '[...] the High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances [...]' and Common Article 3 to the Geneva Conventions lists a series of actions that [...] remain prohibited at any time and in any place [...].⁵⁹⁶

It should be pointed out that the conducts described by Common Article 3 coincide with acts that run counter to the minimum non-derogable acts covered by human rights treaties. The same occurs in the case of non-international armed conflicts to the degree that Protocol II covers a series of fundamental guarantees protected at any time or place.⁵⁹⁷

⁵⁹³ The European Convention on the Legal Status of Migrant Workers was adopted on 24 November 1977 and entered into force on 1 May 1983. As of March 2015, it has 11 States Parties. It is available at <<http://conventions.coe.int/Treaty/en/Treaties/Html/093.htm>> accessed 9 February 2015.

⁵⁹⁴ The Council of Europe Convention on Action against Trafficking in Human Beings was adopted on 16 May 2005 and entered into force on February 2008. As of March 2015 it has 43 States Parties. It is available at <<http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm>> accessed 9 February 2015.

⁵⁹⁵ The Council of Europe Convention on preventing and combating violence against women and domestic violence was adopted on 11 May 2011 and entered into force on 1 August 2014. As of March 2015 it has 16 States Parties. It is available at <<http://conventions.coe.int/Treaty/EN/Treaties/Html/210.htm>> accessed 9 February 2015.

⁵⁹⁶ Common Art. 3 to the four Geneva Conventions: 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) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised 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.

⁵⁹⁷ Protocol II, Art. 4: (1) All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honor and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.

This convergence between IHRL and IHL regarding the protection of human rights at all times and places, loses strength in the case of Refugee Law, which normatively seems to be more flexible in terms of restriction of rights. In fact, Article 9 of the Convention on the Status of Refugees stipulates that:

Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisional measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.

Thus, this provision allows for the restriction of the rights of refugees on the ground of national security interests, be it in a case of armed conflict or another grave and exceptional circumstance such as a state of emergency, without establishing limits with regard to provisional measures that can be established, or to rights that can be restricted. In order not to limit human rights protections, these lagoons must be interpreted and complemented by previously mentioned IHRL and IHL provisions, which serve as limits to State power granted by the Law of Refugees. In that sense, is important to consider the General Comment N° 29 where the HRC has added that the suspension of rights in different situations to those of an armed conflict, must be duly justified on the basis of grave harm to the life of the nation in order to be covered by Article 4 of the ICCPR.⁵⁹⁸ It adds that certain rights, not yet found in the Article 4.2 list, are also not open to suspension since '[...] legal obligation to narrow down all derogations to those strictly required by the exigencies of the situation established both for States parties and for the Committee a duty to conduct a careful analysis under each article of the Covenant based on an objective assessment of the actual situation [...]'.⁵⁹⁹ Finally, the HRC proposes a non exhaustive list of rights that cannot be derogated under any situation even if they were found in Article 4 of the ICCPR: *humane treatment for persons deprived of liberty, prohibition on taking of hostages, kidnappings or arbitrary arrests, protection of the rights of minorities, prohibition on incitement to racial or religious hatred*, among others. This prohibition on

(2) Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever: (a) violence to the 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) slavery and the slave trade in all their forms; (g) pillage; (h) threats to commit any of the foregoing acts.

(3) Children shall be provided with the care and aid they require, and in particular: (a) they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care; (b) all appropriate steps shall be taken to facilitate the reunion of families temporarily separated; (c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities; (d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured; (e) measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.

⁵⁹⁸ UNHRC, *General Comment 29* (2001) op. cit., para. 1.

⁵⁹⁹ *Ibid*, para. 6.

suspensions follows the recognition of these rights and prohibitions as *norms of general international law*.⁶⁰⁰

2. The determination of who is a refugee

Complementarity between the three branches of International Law on the protection of refugees is also made evident in relation to the definition of the term “refugee” itself. That is, the decision on the criteria over which to grant refugee status to an individual⁶⁰¹ falls specifically under Refugee Law and IHL instruments. For example, Article 73 of Protocol 1 points out that:

Persons who, before the beginning of hostilities, were considered as stateless persons or refugees under the relevant international instruments accepted by the Parties concerned or under the national legislation of the State of refuge or State of residence shall be protected persons within the meaning of Parts I and III of the Fourth Convention, in all circumstances and without any adverse distinction

Refugee Law is also complemented and expanded by IHL, IHRL and ICL. In that sense, the Convention Relating to the Status of Refugees excludes from its sphere of application any individual that may have perpetrated a war crime or a crime against humanity,⁶⁰² which constitute grave violations to IHL or human rights.

An additional example can be found in IHRL where the starting point is the basic definition established by Refugee Law, which is then expanded to cover new scenarios. In the African context, for example, the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa⁶⁰³ notes that: ‘[...] The term “refugee” shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place

⁶⁰⁰ *Ibid*, para. 13. In addition, in another document the HRC points out that the prohibition on torture or other grave, cruel, inhuman or degrading acts cannot be suspended even in emergency situations. UNHRC, *General Comment 20 (1992)* op. cit., para. 1.

⁶⁰¹ The definition for refugee is located in Article 1.A(2) of the Convention on the Status of Refugees:

‘[...] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it [...]’.

It must be noted that this definition was broadened to any individual, in addition to events established during the Second World War, by Article 1 (2) of the Protocol on the Status of Refugees.

⁶⁰² Convention on the Status of Refugees, Article 1.F (a) - The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes [...].

⁶⁰³ The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa was adopted on 10 September 1969 and entered into force on 20 June 1974. As of March 2015 it has 45 States Parties. It is available at <<http://www.unhcr.org/45dc1a682.html>> accessed 10 February 2015.

outside his country of origin or nationality [...]'.⁶⁰⁴ Moreover, in the case of Latin America, the Cartagena Declaration on Refugees⁶⁰⁵ proposes:

[...] enlarging the concept of a refugee, bearing in mind, as far as appropriate and in the light of the situation prevailing in the region, the precedent of the OAU Convention (...) and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order [...].⁶⁰⁶

In the EU, Union law has broadened the notion of the act of persecution to achieve refugee status, incorporating concepts from IHL and IHRL. In this context, Directive 2011/95/EU states:

In order to be regarded as an act of persecution within the meaning of Article 1(A) of the Geneva Convention, an act must: (a) be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms [...].⁶⁰⁷

This rule represents a paradigm of the existent relationship between the three branches of International law analysed in this report, as it includes elements from the three bodies of law - refugee, persecution according to IHL and non-derogable rights according to IHRL - in order to achieve comprehensive protection of the individual under EU Member State jurisdictions. This protection also covers people who do not qualify for refugee status by creating the category *person eligible for subsidiary protection*, defined as:

⁶⁰⁴OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Article 1.2.

⁶⁰⁵ The Cartagena Declaration on Refugees was adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia from 19 - 22 November 1984. It is available at <http://www.oas.org/dil/1984_cartagena_declaration_on_refugees.pdf> accessed 10 February 2015.

⁶⁰⁶ Cartagena Declaration on Refugees, 3rd conclusion.

⁶⁰⁷Directive 2011/95/EU, of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, article 9.1 (a). The Directive is available at <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32011L0095&qid=1424713452684>> accessed 10 February 2015. On access to international protection for refugees, see also Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0033&from=EN>> accessed 15 February 2015 and Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (Dublin Convention) <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003R0343&from=IT>> accessed 15 February 2015.

[...] a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm [...] and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country [...].⁶⁰⁸

This grants individuals who do not meet the threshold imposed by the definition of refugee, but fear grave harm in the context of armed conflict, or the violation of one of their human rights, similar protection to that provided by Refugee Law. In this context: Serious harm consists of: (a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict'.⁶⁰⁹ In addition, subsidiary protection granted by this EU law provision is the same as that granted to refugees, with minimum non-substantial changes.⁶¹⁰ This is extremely important in relation with the context of massive migration flows from Syria and Libya. In the last case, the situation may not be qualified as a internal armed conflict, but it can reach the serious human rights harm level and eligibility for subsidiary protection can therefore apply..

To this end, the case of forced displacement of people may qualify for temporary types of protection, without considering whether they qualify as refugees, and the individual procedure required for this. In this sense, Council Directive 2001/55/EC defines temporary protection as follows:

[...] a procedure of exceptional character to provide, in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, immediate and temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection [...].⁶¹¹

Although this norm does not seem to expand the concept of refugee to a concept of mass influx, that is the granting of status of refugee in a non-individualised manner, it does establish a new minimum protection regime that can or cannot precede the granting of that status. Moreover, individuals who are granted such temporary protection also receive recognition of certain rights, for example, family

⁶⁰⁸ Directive 2011/95/EU, article 2(f).

⁶⁰⁹ *Ibid*, article 15.

⁶¹⁰ *Ibid*, articles 20 – 35.

⁶¹¹ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, article 2(a). The Directive is available at <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001L0055&from=ES>> accessed 15 February 2015. To access this regime, however, it is necessary that '[...] The existence of a mass influx of displaced persons shall be established by a Council Decision adopted by a qualified majority on a proposal from the Commission, which shall also examine any request by a Member State that it submit a proposal to the Council [...]'. *Ibid*, Article 5(1).

reunification, accompaniment of minors, work, health and education by EU Member States,⁶¹² developments in line with those established by the Convention Relating to the Status of Refugees.

3. Protection of refugees in situations of armed conflict

In the previous subchapter, the protection to refugees in non-conflict situations has been analysed, however the protection of refugees in territories affected by armed conflict is also important to consider. The rights that they possess in this context are not only provided for by special norms regarding refugees, but also by human rights and humanitarian law. Refugees therefore have double protection: as refugees and as civilians.⁶¹³ Protocol 1 states that 'Persons who [...] were considered as [...] refugees [...] shall be protected persons within the meaning of Parts I and III of the Fourth Convention, in all circumstances and without any adverse distinction [...]'.⁶¹⁴

In terms of IHL, the Geneva Conventions and their Additional Protocols include various provisions that refer to the protection of refugees. Among these is Article 44 of Convention IV,⁶¹⁴ which establishes the inapplicability, for refugees, of control measures for foreign nationals of an enemy State, given that the refugee no longer holds the protection of the State of which it is a national. This article adapts to the context of armed conflict that is provided by Article 8 of the Convention relating to the Status of Refugees,⁶¹⁵ and illustrates the special situation of an individual in a situation of refuge, with reference to other foreigners present in the territory of the State.

In addition, IHL seeks to regulate the situation of refugees in the territory occupied by the State from which they fled. Article 70 of Geneva Convention IV points out that:

[...] Nationals of the occupying Power who, before the outbreak of hostilities, have sought refuge in the territory of the occupied State, shall not be arrested, prosecuted, convicted or deported from the occupied territory, except for offences committed after the outbreak of hostilities, or for offences under common law committed before the outbreak of hostilities which, according to the law of the occupied State, would have justified extradition in time of peace.

This situation presents a scenario whereby the Law of Refugees, and specifically the right to non-refoulement is rendered useless and IHL and IHRL constitute the bodies of law which provide protection for the refugee.

⁶¹² *Ibid*, Articles 8 – 19.

⁶¹³ Pablo Antonio Fernández Sánchez, 'The Interplay between International Humanitarian Law and Refugee Law' (2010) 1 (2) Journal of International Humanitarian Legal Studies, 353 – 357.

⁶¹⁴ Convention IV, article 44.- In applying the measures of control mentioned in the present Convention, the Detaining Power shall not treat as enemy aliens exclusively on the basis of their nationality 'de jure' of an enemy State, refugees who do not, in fact, enjoy the protection of any government.

⁶¹⁵ Convention on the Status of Refugees Article 8.- With regards to exceptional measures which may be taken against the person, property or interests of nationals of a foreign State, the Contracting States shall not apply such measures to a refugee who is formally a national of the said State solely on account of such nationality. Contracting States which, under their legislation, are prevented from applying the general principle expressed in this article, shall, in appropriate cases, grant exemptions in favour of such refugees.

With regards to the right of non-refoulement of refugees by which 'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion [...]',⁶¹⁶ a broader scope could be found in situations of armed conflict. In this sense, Geneva Convention IV states that a protected person may not be transferred to where the person fears persecution, but also, may not be transferred to the jurisdiction of any State that is not part of the Geneva Conventions.⁶¹⁷

Thus, this creates a strong relationship between IHRL, IHL and Refugee Law in the normative sphere characterised by important convergences with regard to situations where a person can request refugee status, the definition of this category and the rights and duties that States must respect and enforce toward them. All of these topics have also been addressed at a jurisprudential level,⁶¹⁸ which has allowed comprehensive protection for this vulnerable group to further expand.

D. Expansion of the relationship between IHL, IHRL and IRL by judicial and monitoring bodies

The normative relationship between IHRL, IHL and IRL analysed in the segment above has also been developed through jurisprudential decisions and monitoring bodies. Through these decisions, treaty provisions have been interpreted and points of convergence have ultimately been expanded between these three normative bodies. However it should be noted that not all these decisions directly apply to EU Member States, either because they are not directly connected with the cases or because they do not belong to the European human rights system. Thus, first this subsection will address decisions relating to the European System of Human Rights, the EU Court of Justice (CJEU) and international treaty monitoring bodies directly applicable to the European context. Key jurisprudential decisions of other protection systems such as the Inter American and the African system and that of the ICJ will be analysed subsequently.

1. European and international jurisprudence

One of the central themes analysed by European and international jurisprudence is that of expulsion or return of individuals requesting refugee status, to their places of origin. The norms examined under this section indicate that a State cannot return an individual to a place where his/her rights might be affected or to a State that has not ratified the Geneva Conventions. Interpreting the ICCPR, the Human Rights Committee has stated in its General Comment 31:

⁶¹⁶ Convention on the Status of Refugees Article 33.1.

⁶¹⁷ IV Convention, Art. 45. 'Protected persons shall not be transferred to a Power which is not a party to the Convention. '[...] Protected persons may be transferred by the Detaining Power only to a Power which is a party to the present Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the present Convention. If protected persons are transferred under such circumstances, responsibility for the application of the present Convention rests on the Power accepting them, while they are in its custody [...]'.
⁶¹⁸ See infra D in this section.

Moreover, the Article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 [right to life] and 7 [prohibition of torture] of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed [...].⁶¹⁹

On this matter, the CJEU has also adopted decisions with regard to IHRL, IHL and Refugee Law in relation to the application of the Dublin Convention, which determines that an EU Member State is responsible for examining a foreigner's refugee request presented in EU territory. In the specific case of non refoulement and the possibility of grave harm to the life or physical integrity, the CJEU, in agreement with jurisprudence and decisions by human rights protection systems, has determined that an asylum seeker may not be transferred to a Member State where he or she runs the risk of being subject to inhumane treatment.⁶²⁰

Moreover, the CJEU has pointed out that EU law also prohibits EU Member States from refoulement of an asylum seeker to an EU State whose asylum process does not respect the prohibition on inhuman or degrading treatment. The court indicated that the Dublin Convention was adopted within a context where it was assumed that all States respected human rights and Refugee Law, and therefore that treatment received by asylum seekers in any Member State would be respectful of the law. However, in practice this does not occur in all refugee request cases so '[...] if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the [Charter of Fundamental Rights of the European Union], of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision [...]'.⁶²¹

It should be noted that the ECHR takes this notion covered by the EUCJ in the case *Tarakhel v. Switzerland*, where Swiss authorities returned an Afghan couple and their six children to Italy even when this State did not have protection guarantees for these asylum seekers.⁶²² In addition, the ECHR jurisprudence not only establishes that a person that has requested refugee status cannot be returned in cases where there is danger of violating Article 3 of the Convention or to States where the refugee request process does not

⁶¹⁹ UNHRC, General Comment 31 (2004) *Nature of the Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.1, para. 12. In the same sense, UNHRC, *General Comment 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)* (1992) U.N. Doc. HRI/GEN/1/Rev.1 at 30, para. 9.

⁶²⁰ *Various issues C-411/10, C-493/10 NS, M.E.* (2013) ECJ, Judgment of 21 December 2013 <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=117187&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=31034>> accessed 20 February 2015, para. 78 – 106.

⁶²¹ *Ibid*, para. 86.

⁶²² *Tarakhel v. Switzerland*, Application No. 29217/12, Judgment, European Court of Human Rights (4 November 2014) <[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-148070#{"itemid":\["001-148070"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-148070#{)> accessed 15 February 2015.

meet adequate human rights protection standards, but also has established jurisprudential rules regarding how the refoulement process must be carried out.

In the *Hirsi Jamaa and Others v. Italy* case, upon fleeing Lybia, a group of Somali and Eritrean migrants were detained by Italian coastguards when they were found on a boat close to Lampedusa (a port south of Italy), transferred on to a military vessel and finally returned to Lybian authorities. Addressing this case, the ECHR stressed that State obligations on non-refoulement had to be respected not only on the territory of the State but also in any sphere within its jurisdiction. In this sense it affirmed that

[...] 72. In keeping with the essentially territorial notion of jurisdiction, the Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention [...] 74. Whenever the State through its agents operating outside its territory exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual [...].⁶²³

With these jurisprudential decisions, the European framework for the protection of individuals from refoulement is one of the most complete in the world. The EU Member States' obligations cover the whole process from when the individual enters the State's jurisdiction until the refoulement process is completed.

Additionally, in *Hirsi Jamaa and Others v. Italy* case, the ECHR analysed the prohibition on refoulement of groups of individuals without an individual evaluation of their condition or the possibility that each member of the group may personally challenge the expulsion act or decision. The prohibition on collective expulsions, covered by Article 4 of Protocol 4 of the European Convention, had already been defined by the former European Commission of Human Rights in the *Becker v. Denmark* case (repatriation of approximately 200 Vietnamese children from Denmark) as '[...] any measure of the competent authority compelling aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group [...]'.⁶²⁴ In the judgment, the ECHR addresses and pieces together the various arguments that it has developed throughout time on the issue and concludes that

184. In their case-law, the bodies of the Convention have furthermore indicated that the fact that a number of aliens are subject to similar decisions does not in itself lead to the conclusion that there is a collective expulsion if each person concerned has been given the opportunity

⁶²³ *Hirsi Jamaa and Others vs. Italy*, Application No. 27765/09, Judgment, European Court of Human Rights (23 February 2012) <[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109231#{"itemid":\["001-109231"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109231#{)> accessed 20 February 2015.

⁶²⁴ *Becker v. Denmark*, Application No. 7011/75, Decision, European Commission of Human Rights (3 October 1975) <[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"appno":\["7011/75"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{)> accessed 22 February 2015, 236.

to put arguments against his expulsion to the competent authorities on an individual basis [...]. Lastly, the Court has ruled that there is no violation of Article 4 of Protocol No. 4 if the lack of an expulsion decision made on an individual basis is the consequence of the applicants' own culpable conduct [...].⁶²⁵

The HRC indicates that the ICCPR also prohibits collective expulsion in so far as:

'[...] Article 13 [...] entitles each alien to a decision in his own case and, hence, article 13 would not be satisfied with laws or decisions providing for collective or mass expulsions. This understanding [...] is confirmed by further provisions concerning the right to submit reasons against expulsion and to have the decision reviewed by and to be represented before the competent authority or someone designated by it [...].'⁶²⁶

In addition, as indicated by the HRC, the forced transfer of people through expulsion is one of the prohibitions that cannot be suspended in any context.⁶²⁷ Finally, the Committee for the Elimination of Racial Discrimination (CERD) recommended to all States Parties to the Convention on the Elimination of all Forms of Racial Discrimination, that they avoid collective expulsions as this can violate the principle of non-discrimination.⁶²⁸ In conclusion, EU Member States cannot expel individuals out of their territory without considering individually their situations, especially if they are part of a vulnerable group, such as women and children.

Qualifying an individual as a refugee is not only an individual process, but is also one that should respect certain guarantees in terms of human rights, especially if we consider that those who request refugee status have been characterised by the ECtHR as a '[...] vulnerable population group in need of special protection [...]'.⁶²⁹ One of the most developed jurisprudential themes refers to the detention of those requesting refugee status, where the State must respect minimum guarantees in order not to violate the prohibition on torture or other inhumane or degrading treatment.⁶³⁰

⁶²⁵ *Hirsi Jamaa and Others vs. Italy*, Application No. 27765/09, Judgment, European Court of Human Rights (23 February 2012) <[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109231#{"itemid":\["001-109231"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109231#{)> accessed 20 February 2015.

⁶²⁶ UNHRC, *General Comment No. 15: The Position of Aliens Under the Covenant* (1986) U.N. Doc. HRI/GEN/1/Rev.1 <<http://www.refworld.org/docid/45139acfc.html>> accessed 20 February 2015, para. 30.

⁶²⁷ UNHRC, *General Comment 29, States of Emergency (article 4) (2001)* U.N. Doc. CCPR/C/21/Rev.1/Add.11 <http://www1.umn.edu/humanrts/gencomm/hrc29.html#_edn1> accessed 20 February 2015, para. 13 (d)

⁶²⁸ CERD, *General recommendation No. 30 on discrimination against non-citizens* (2004) <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fGEC%2f7502&Lang=en> accessed 20 February 2015, para. 26.

⁶²⁹ *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgment, European Court of Human Rights (21 January 2011) <[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103050#{"itemid":\["001-103050"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103050#{)> accessed 23 February 2015, para. 251.

⁶³⁰ The ECtHR develops the content of the prohibition as follows:

[...] As regards the types of "treatment" which fall within the scope of Article 3 of the Convention, the Court's case-law refers to "ill-treatment" that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering [...]. Where treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be

In the case of *M.S.S. v. Belgium and Greece*, the ECtHR listed various situations where such prohibition was violated:

The Court has held that confining an asylum-seeker to a prefabricated cabin for two months without allowing him outdoors or to make a telephone call, and with no clean sheets and insufficient hygiene products, amounted to degrading treatment within the meaning of Article 3 of the Convention [...]. Similarly, a period of detention of six days, in a confined space, with no possibility of taking a walk, no leisure area, sleeping on dirty mattresses and with no free access to a toilet is unacceptable with respect to Article 3 [...]. The detention of an asylum-seeker for three months on police premises pending the application of an administrative measure, with no access to any recreational activities and without proper meals has also been considered as degrading treatment [...]. Lastly, the Court has found that the detention of an applicant, who was also an asylum-seeker, for three months in an overcrowded place in appalling conditions of hygiene and cleanliness, with no leisure or catering facilities, where the dilapidated state of repair of the sanitary facilities rendered them virtually unusable and where the detainees slept in extremely filthy and crowded conditions amounted to degrading treatment prohibited by Article 3 [...].⁶³¹

Another important point for consideration concerns the rights of refugees held in detention centers. In this regard, the ECtHR has indicated that there is no obligation to provide them with a home or to grant them an economic stipend that allows them to reach a certain standard of living.⁶³² However, it has noted that it '[...] cannot exclude that State responsibility could arise for "treatment" where an applicant, in circumstances wholly dependent on State support, found herself faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity [...]'⁶³³. In this sense, the *M.S.S.*

characterised as degrading and also fall within the prohibition of Article 3 [...]. Moreover, it is sufficient if the victim is humiliated in his or her own eyes [...]. Finally, in considering whether a treatment is "degrading" within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3. Even the absence of such a purpose cannot conclusively rule out a finding of a violation of Article 3 [...].'

Budina v. Russia, Application no. 45603/05, Final decision on admissibility, European Court of Human Rights (18 June 2009) <[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"appno":\["45603/05"\],"itemid":\["001-93434"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{)> accessed 23 February 2015.

⁶³¹ *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgment, European Court of Human Rights (21 January 2011) <[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103050#{"itemid":\["001-103050"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103050#{)> accessed 23 February 2015, para. 222.

⁶³² *Ibid*, para. 249.

⁶³³ *Ibid*, par. 253. Also in: *Budina v. Russia* (2009) ECtHR op. cit.; *O'Rourke v. The United Kingdom*, Application no. 39022/97 Final decision on admissibility, European Court of Human Rights (26 June 2001) <[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"appno":\["39022/97"\],"itemid":\["001-5933"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{)> accessed 25 February 2015

v. *Belgium* case established that the State incurs a responsibility for inaction in the face of a situation that runs contrary to the human dignity of a refugee-seeker.⁶³⁴

There are important differences in the European context between IHL and EU law with regards to the definition of internal armed conflict and, therefore, of the situations from which a person may request subsidiary protection. EU law is more protective as it is less restrictive with regards to the characteristics that must be fulfilled, in order for a situation to qualify as an internal armed conflict, from which people applying for protection come, according to Directive 2011/95/EU⁶³⁵.

In the Judgment of January 30, 2014, the CJEU decided that in EU law, the concept of internal armed conflict must be interpreted autonomously from the definition granted by IHL.⁶³⁶ This set prejudicial concerns with regards to the interpretation that was granted to the term internal armed conflict in Directive 2004/83/CE.⁶³⁷ Article 15(c) defines serious harm as '[...] serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict [...]'. In other words, what needed to be defined was whether or not the definition given by IHL was to be adopted, specifically Common Article 3 of the four Geneva Conventions. The CJEU affirmed that:

[...] it should be noted that the EU legislature has used the phrase 'international or internal armed conflict', as opposed to the concepts on which international humanitarian law is based (international humanitarian law distinguishes between 'international armed conflict' and 'armed conflict not of an international character'). [...] In those circumstances, it must be held that the EU legislature wished to grant subsidiary protection not only to persons affected by 'international armed conflicts' and by 'armed conflict not of an international character', as

⁶³⁴ *M.S.S. v. Belgium and Greece (2011) ECtHR* op. cit., para. 263:

[...] In the light of the above and in view of the obligations incumbent on the Greek authorities under the Reception Directive [...], the Court considers that the Greek authorities have not had due regard to the applicant's vulnerability as an asylum-seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living on the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs. The Court considers that the applicant has been the victim of humiliating treatment showing a lack of respect for his dignity and that this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. It considers that such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention [...].

⁶³⁵ Almaz Teffer, 'Diakit : The CJEU interprets the concept of 'internal armed conflict' for the purpose of granting subsidiary protection under EU law', *EDAL European Database of Asylum Law* (2014) <<http://www.asylumlawdatabase.eu/en/journal/diakit%C3%A9-cjeu-interprets-concept-%E2%80%99internal-armed-conflict%E2%80%9999-purpose-granting-subsi>> accessed 16 September 2015.

⁶³⁶ *Issue C-285/12 (2014) ECJ, Judgment of 30 January 2014* <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=125322&pageIndex=0&doclang=ES&mode=lst&dir=&occ=first&part=1&cid=138415>> accessed 17 February 2015.

⁶³⁷ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0083&qid=1424814148206&from=EN>> accessed 10 February 2015.

defined in international humanitarian law, but also to persons affected by internal armed conflict, provided that such conflict involves indiscriminate violence [...].⁶³⁸

According to the CJEU, without a definition for internal armed conflict in European law:

[...] the meaning and scope of that phrase must [...] be determined by considering its usual meaning in everyday language [...] [that is] a situation in which a State's armed forces confront one or more armed groups or in which two or more armed groups confront each other [in addition] the finding that there is an armed conflict must not be made conditional upon the armed forces involved having a certain level of organisation or upon the conflict lasting for a specific length of time: it is sufficient if the confrontations in which those armed forces are involved give rise to the level of violence [necessary for] creating a genuine need for international protection on the part of the applicant, who faces a real risk of serious and individual threat to his life or person [...].⁶³⁹

Requirements to qualify a situation as an internal armed conflict are less stringent than those established by IHL, broadening, therefore, the possibilities for individuals who request subsidiary protection in the European context. It must be noted that in 2007, the EUCJ had already issued a judgment regarding Article 15c of the Directive 2004/83/CE, where it had indicated that existence of threats to the liberty and individual integrity of an individual where valid, without significant evidence, when the degree of violence of the conflict was such that there were sufficient reasons to believe that the individual, by virtue only of being in the territory of the conflict, ran a high risk of suffering those threats.⁶⁴⁰ Thus, not only are IHL requirements not fully applicable, but in some cases, it could be argued that exact evidence of persecution or threat of violence against individual applicants may not be required to gain protection.

A similar position can be found in the ECtHR's jurisprudence to the degree that violent situations in themselves or membership in a specific group, are enough to prove the harm to which an individual may be subject to in cases of expulsion. In this regard, in the 2008 case of *NA. V. United Kingdom*, the Court stated that:

[...] From the foregoing survey of its case-law, it follows that the Court has never excluded the possibility that a general situation of violence in a country of destination will be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention. Nevertheless, the Court would adopt such an approach only in the most extreme cases of general violence, where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return. [...] Exceptionally, however, in cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the Court has considered that the protection of Article

⁶³⁸ *Issue C-285/12* (2014) ECJ, Judgment of 30 January 2014, para. 20 – 21.

⁶³⁹ *Ibid*, para. 27 – 35.

⁶⁴⁰ *Issue C-465/07* (2007) EUCJ, Judgment of 17 February 2007 <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=76788&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=361329>> accessed 15 February 2015.

3 of the Convention enters into play when the applicant establishes that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned [...]. In those circumstances, the Court will not then insist that the applicant show the existence of further special distinguishing features if to do so would render illusory the protection offered by Article 3 [...].⁶⁴¹

Thus, this sets out that the expulsion of an asylum seeker to his/her place of origin may breach Article 3 of the Convention, when there is a general situation of extreme violence at this location or when the asylum seekers' specific characteristics make him/her particularly vulnerable to said context.⁶⁴² In order to determine this situation, the ECHR uses the control parameters found in IHL, that is: means and methods of combat, protection of civilian population, forced recruitment, amongst others. For example, in 2011 it established that Mogadishu was undergoing extreme violence, employing the following criteria:

[...] first, whether the parties to the conflict were either employing methods and tactics of warfare which increased the risk of civilian casualties or directly targeting civilians; secondly, whether the use of such methods and/or tactics was widespread among the parties to the conflict; thirdly, whether the fighting was localised or widespread; and finally, the number of civilians killed, injured and displaced as a result of the fighting [...].⁶⁴³

2. Other international or regional decisions

The interaction between IHRL, IHL and Refugee Law has also been addressed by the jurisprudence of jurisdictional bodies whose judgments are not directly applicable to the European sphere. In this case, the examples can serve as interpretative guidelines or simply as ideas to consider in future decisions.

⁶⁴¹ *NA. v. The United Kingdom*, Application no. 25904/07, Judgment, European Court of Human Rights (6 August 2008) <[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-87458#{"itemid":\["001-87458"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-87458#{)> accessed 17 February 2015, para. 115 – 117.

⁶⁴² It must be noted that the Committee Against Torture (CAT) seems more restrictive in so much as it establishes that

[...] 5. With respect to the application of article 3 of the Convention to the merits of a case, the burden is upon the author to present an arguable case. This means that there must be a factual basis for the author's position sufficient to require a response from the State party. 6. Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable. 7. The author must establish that he/she would be in danger of being tortured and that the grounds for so believing are substantial in the way described, and that such danger is personal and present. All pertinent information may be introduced by either party to bear on this matter [...].

CAT, *General Comment 1, Communications concerning the return of a person to a State where there may be grounds he would be subjected to torture (article 3 in the context of article 22)* (1998) U.N. Doc. A/53/44, annex IX at 52 <https://www1.umn.edu/humanrts/cat/general_comments/CAT_C1XX_Misc1_1997.htmlhttps://www1.umn.edu/humanrts/cat/general_comments/CAT_C1XX_Misc1_1997.html> accessed 20 February 2015.

⁶⁴³ *Sufi and Elmi v. The United Kingdom*, Applications nos. 8319/07 and 11449/07, Judgment, European Court of Human Rights (28 November 2011) <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105434#_Toc405480582> accessed 17 February 2015, para. 241.

Regarding the minimum non-derogable rights in any circumstance, the Inter American Court of Human Rights (I/A Court of H.R.) in its Consultative Opinion No. 8 points out that the ACHR is not favorable to the suspension of rights and State obligations regarding these, but rather, it considers that, in order to suspend rights, requirements provided by the conventional norm must be strictly fulfilled.⁶⁴⁴ In addition, given that not all rights may be suspended even in the gravest of situations, it is key that '[...] there are ideal means for the control of provisions that are issued in order that these be reasonably adapted to the needs of the situation, and they not exceed the strict limits imposed by the Convention or derived from it [...]'.⁶⁴⁵

The ICJ had already issued an opinion in this same vein, in the Advisory Opinion about the Legality of the Threat or Use of Nuclear Weapons of 1996, indicating that '[...] The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency [...]'.⁶⁴⁶ However it should be noted that in order to apply Article 4 ICCPR, a state of emergency must be formally declared, a list of suspended rights must be issued and there must be valid justification for such suspensions. If these requirements are not fulfilled, then human rights obligations are fully applicable, even in cases of armed conflict.

An example of a non-valid justification for the suspension of rights can be found in the case of Israel and the construction of the Palestine Wall. In 2004, the ICJ indicated that:

To sum up, the Court, from the material available to it, is not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives. The wall, along the route chosen, and its associated regime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order. The construction of such a wall accordingly constitutes breaches by Israel of various of its obligations under the applicable international humanitarian law and human rights instruments.⁶⁴⁷

⁶⁴⁴ *Consultative Opinion OC-8/87, Habeas corpus under suspension of guarantees*, Inter-American Court of Human Rights (30 January 1987) <http://www.corteidh.or.cr/docs/opiniones/seriea_08_esp.pdf> accessed 25 February 2015. The opinion indicates: '[...] 21. It is clear that no right recognized by the Convention can be suspended unless the strict conditions pointed out in Article 27.1 are met. In addition, even when these conditions are met, Article 27.2 establishes that a certain category of rights may not be suspended in any case. Thus, far from adopting a favourable criteria for the suspension of rights, the Convention establishes the opposite principle, that is, that all rights must be respected and guaranteed unless very special circumstances justify the suspension of some rights, while others can never be suspended even in the gravest of emergencies [...]'.⁶⁴⁵

⁶⁴⁵ *Consultative Opinion OC-9/87, Judicial Guarantees in States of Emergencies*, Inter-American Court of Human Rights (6 October 1987) <http://www.corteidh.or.cr/docs/opiniones/seriea_09_esp.pdf> accessed 25 February 2015, para. 21

⁶⁴⁶ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) ICJ, 8 July 1996 <<http://www.icj-cij.org/docket/files/95/7495.pdf>> accessed 25 February, para. 25.

⁶⁴⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) ICJ, 9

Finally the ICJ has also commented on actors that must respect human rights obligations in the case of territorial occupation, pointing out that the Occupying Power is also responsible for human rights violations carried out by other actors, in territories under their control.⁶⁴⁸ With this in mind, the protection of the rights of refugees in occupied territory, as analysed above, becomes an obligation for actors other than the Occupying Power.

In terms of the Inter American System of Human Rights, in general, both the Inter American Commission (IACHR) and the Inter American Court (I/A Court of Human Rights) coincide, regarding the application of IHRL in situations of armed conflict. However, there are differences concerning the applicability of IHL as a normative source. The Inter American Commission at first sought competence for establishing IHL violations indicating that '[...] in cases [...] which involve situations of armed conflict, and particularly where the State makes special reference to the armed conflict, the Commission should apply humanitarian law to analyse the actions of State agents in order to determine whether they have exceeded the limits of legitimate action [...]'.⁶⁴⁹

However, the Inter American Court indicated that considering IHL violations fell outside the jurisdiction of the Inter American system's bodies, given that these only have jurisdiction regarding the ACHR and not over the Geneva Conventions, although they can serve as important interpretative guidelines in the jurisprudential development of the system.⁶⁵⁰

Regarding refugee protection, the I/A Court of Human Rights has expressed its opinion in various judgments regarding existent rights in the framework of a refugee request process. Nonetheless, in the case of *Familia Pacheco Tineo vs. Bolivia*, the Court collected these opinions and drafted a list with minimum conditions that must be met in proceedings concerning refugee requests. With this ruling of the Court in mind, it can be concluded that within the framework of the Inter American system, every refugee or refugee seeker has the right for the State to comply with the following:

[...] a) the claimant must be guaranteed necessary facilities, including competent interpretation services, and, depending on the case, access to counsel and legal representation in order to present his request before authorities. In this sense, the claimant must receive necessary guidance in regards to procedures to be followed in a manner and

July 2004 <<http://www.icj-cij.org/docket/files/131/1671.pdf>> accessed 25 February 2015, para. 137.

⁶⁴⁸ *Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*. (Judgment) ICJ, 19 December 2005 <<http://www.icj-cij.org/docket/files/116/10455.pdf>> accessed 25 February 2015, para. 179.

⁶⁴⁹ *Arturo Ribón Avilán and 10 others ('The Milk') (Colombia) Report No. 26/97*, Inter-American Commission on Human Rights OEA/Ser.L/V/II.98 (30 September 1997) <<https://www.cidh.oas.org/annualrep/97eng/Colombia11142.htm>> accessed 20 February 2015, para. 168.

⁶⁵⁰ *Las Palmeras v. Colombia* (Preliminary Objections) Inter-American Court of Human Rights (4 February 2000) <http://www.corteidh.or.cr/docs/casos/articulos/seriec_67_ing.pdf> accessed 30 June 2015, para. 32 – 33. For more information on this issue, see Elizabeth Salmón Garate 'Institutional Approach between IHL and IHRL. Current trends in the Jurisprudence of the Inter-American Court of Human Rights' (2014).

language that he can understand, and depending on the case, must be granted the opportunity to get in touch with a UNHCR representative;

b) The request must be examined, with objectivity, in the framework of the procedure established for that effect, by a competent and clearly identified authority, and include a personal interview;

c) Decisions adopted by competent bodies must be duly and expressly justified;

d) In order to protect the rights of claimants who might be facing risks, the asylum procedure must, at all stages, respect the protection of the information of the claimant and the claim itself as well as the principle of confidentiality;

e) If the claimant is not recognized as a refugee, he/she must be granted information regarding how to appeal and be granted a reasonable time frame for this process, according to the system in place, so that the decision adopted may be formally reconsidered; and

f) The review procedure or appeal must have a suspension effect and the claimant must be allowed to remain in the country until the competent authority adopts a decision on the case, and even while the appeal mechanism is pending, unless it is demonstrated that the request is manifestly out of grounds [...].⁶⁵¹

In the last clause, explicit reference is made to the right of review of a decision determining whether to grant refugee status, a procedure that is different to that established by Article 25 of the ACHR.⁶⁵² This ensures that the individual requesting refugee status must, under national law, be able to access two legal mechanisms if his request is denied: an administrative review process before a higher body than that which issued the denial and a judicial recourse, for example an *habeas corpus* or a writ of protection, that meets the standards of the ACHR.

Lastly, the African Commission for Human and Peoples Rights has noted that

[...] The Commission does not wish to call into question nor is it calling into question the right of any State to take legal action against illegal immigrants and deport them to their countries of origin, if the competent courts so decide. It is however of the view that it is unacceptable to deport individuals without giving them the possibility to plead their case before the competent national courts [...].⁶⁵³

⁶⁵¹ *Caso Familia Pacheco Tineo vs. Bolivia* (Judgment) Inter-American Court of Human Rights (25 November 2013) <<http://www.acnur.org/t3/fileadmin/Documentos/BDL/2013/9390.pdf?view=1>> accessed 25 February 2015, para. 159.

⁶⁵² ACHR, Art. 25(1) 'Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties'.

⁶⁵³ *Federation Internationale des Liges des Droits de l'Homme and Others v. Angola*, Comunicación Nº 156/96, African Commission for Human Rights (11 November 1997) <<http://www1.umn.edu/humanrts/africa/comcases/159-96.html>> accessed 25 February 2015, para. 20.

This not only recognises the duty of the State in providing an adequate review process of requests for refugee status but also prohibits collective expulsions in the African context.

As it has been noted, interpretations of the relationship between IHRL, IHL and IRL from other human rights protection systems are in line with those of the European Human Rights System and the CJEU. International jurisprudence reaffirms that there is a convergence between IHRL, IHL and Refugee Law norms regarding the protection of human rights at all times and places, and that in areas where there are lagoons or divergences, the interplay between these three branches of International law can allow for the comprehensive protection of the individual.

E. Conclusion

This section has analysed the relation between IHL, IHL and IRL through literature, normative and jurisprudence review. It describes the relationship between these three branches of IL and the EU Member States' obligation to protect refugees. Two overall approaches have been taken by the literature. First, the relationship between these three branches of law has been regarded as complementary, with the aim of enhancing the protection afforded to refugees. This approach has also been taken in an operational manner, by the ICRC and the UNHCR. Second, concerning the relationship between specific norms of these three legal areas, where special attention has been paid to norms regarding internment and non-refoulement, IHRL, IHL and IRL should be applied together to enhance the protection of refugees.

With respect to the interaction of IHRL, IHL and IRL, it is important to conclude that the three normative frameworks have the protection of the human beings as a central theme. In that sense, this three way interaction has made the protection of individuals seeking refuge in armed conflict situations possible, because IHL and Refugee Law must be interpreted according to IHRL norms such as the non-derogable rights that every State must respect in all contexts. In the case of EU Member States, the normative protection is wider because EU Law includes new forms of protection like the notion of the person who is entitled to protection developed by Directive 2011/95/EU. This category gives similar protection to individuals that are not refugees, but who fear a real risk to suffering serious harm in their State of origin, like torture or the death penalty. In the same vein, another example of these obligations on EU Member States is the temporary protection for displaced individuals, imposed by Council Directive 2001/55/EC.

This normative relationship has also been developed through jurisprudential decisions and monitoring bodies. In this respect the ECtHR and CJEU jurisprudence are remarkable, in that they have determined that an asylum seeker may not be transferred by a EU Member State to another Member State, where he or she runs the risk of being subject to inhumane treatment, or where the asylum process does not respect the prohibition of inhuman or degrading treatment. As similarly indicated by the HRC and the Inter-American Court, in EU territory, collective expulsions are prohibited and the process involved in the deportation of someone out of a EU Member State jurisdiction must be on an individual basis and must respect the right to due process. In conclusion, the EU normative and jurisprudential frameworks have built a European legal space where human beings should receive protection, not only related to minimum standards within Refugee Law, but also with regard to the recognition of the specific rights of this vulnerable group.

V. Serious violations of human rights and humanitarian law and the responsibility to protect

A. Introduction

The experience of Kosovo (1998-1999) was a turning point that resulted in extensive debate about international military intervention to protect human rights. After the brutal conflict in Bosnia and Herzegovina, the international community was quick to condemn the violence in Kosovo. Security Council Resolutions 1160 and 1199 of 1998 identified the Federal Republic of Yugoslavia (FRY) as the primary culprit and called on the FRY to achieve a political solution.⁶⁵⁴ The resolutions stopped short of a decision to take 'all necessary measures' or to authorise Member States to do so. In March 1999, following lack of adherence by the Yugoslav side and continued violence as well as the refusal of FRY to accept the Rambouillet accords, NATO allegedly commenced air strikes against the FRY. After 11 weeks, the defeated Serb troops retreated from Kosovo. NATO justified the military intervention on humanitarian grounds as decisive for ending the military conflict in Kosovo and for stopping killings, forced displacement and other human rights violations there. Nonetheless, NATO's actions were controversial and considered by some to be a violation of the prohibition of the use of force.⁶⁵⁵

In the aftermath of Kosovo, many attempts were made to find a legal justification for the intervention. Efforts were also made to determine whether developments in Kosovo amounted to acceptance of 'humanitarian intervention' (military action to prevent or end human rights violations, without the consent of the State within whose territory the force is applied) as a legal form of action. Some authors have found that the intervention in Kosovo has not resulted in any change in international customary law.⁶⁵⁶

Since then, there has been no evidence of consistent State practice regarding unilateral humanitarian action. In addition, there is no general acceptance (*opinio juris*) of such action, evident in the fact that various countries, including China, Russia, India, Japan, Indonesia and South Korea were unsupportive of NATO's intervention. In the aftermath, 133 States including the G-77 declared that they reject the so-called 'right' of humanitarian intervention.⁶⁵⁷

In response to the legal deficiencies exposed by Kosovo and NATO's justification of humanitarian intervention, the then UN Secretary General, Kofi Annan called for fresh thinking on the issue. In response,

⁶⁵⁴See Security Council Resolutions 1160, UN Doc. S/Res/1160 (1998) <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1160%281998%29>; 1199, UN Doc. S/Res/1199 (1998) <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1199%281998%29>; 1998, UN Doc. S/Res/1998 (2011) <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1998%282011%29> accessed 20 June 2015.

⁶⁵⁵ See for instance Peter Hilpold, (ed), *The Responsibility to protect (R2P): A New Paradigm of International Law?* (Brill/Nijhoff 2015()); Alain Pellet, 'L'imputabilité d'éventuels actes illicites - Responsabilité de l'OTAN ou des États membres' in Christian Tomuschat (ed) *Kosovo and the International Community - A Legal Assessment*, (Kluwer 2002) 193-202.

⁶⁵⁶ See Aidan Hehir, *Humanitarian Intervention after Kosovo Iraq, Darfur and the Record of Global Civil Society* (Palgrave Macmillan 2008).

⁶⁵⁷Declaration of the Group of 77 South Summit, Havana, Cuba, 10-14 April 2000, <http://www.g77.org/Declaration_G77Summit.htm> accessed 20 July 2015, 54.

on the initiative of Canada, the International Commission on Intervention and State Sovereignty (ICISS) published in 2001 its seminal report entitled *The Responsibility to Protect*. It aims to find some new common ground on issues of humanitarian intervention. The report states that while the responsibility to protect resides first and foremost with the State whose people are directly affected, a 'residual responsibility' lies with the broader community of States, and that this residual responsibility is 'activated when a particular State is clearly either unwilling or unable to fulfill its responsibility to protect or is itself the actual perpetrator of crimes or atrocities'.⁶⁵⁸

'Humanitarian intervention' and the 'responsibility to protect' (R2P) share the conviction that sovereignty is not absolute. However, the R2P doctrine shifts away from State-centred motivations towards the interests of victims by focusing not on the right of States to intervene but on a responsibility to protect populations at risk. In addition, it introduces a new way of looking at the essence of sovereignty, moving away from issues of 'control' and emphasising 'responsibility' to one's own citizens and the wider international community.⁶⁵⁹

Another contribution of R2P is to extend the intervention beyond a purely military intervention and to encompass a whole continuum of obligations:

- The responsibility to prevent: addressing root causes of internal conflict. The ICISS considered this to be the most important obligation.⁶⁶⁰
- The responsibility to react: responding to situations of compelling human need with appropriate measures that could include sanctions, prosecutions or military intervention.⁶⁶¹
- The responsibility to rebuild: providing full assistance with recovery, reconstruction and reconciliation.⁶⁶²

R2P is referred to in the ICISS report as an 'emerging guiding principle', which has yet to achieve the status of a new principle of customary international law.⁶⁶³ The UN High-Level Panel on Threats Challenges and Change endorsed R2P as an 'emerging norm', in its report *A More Secure World: Our Shared Responsibility*.⁶⁶⁴ R2P as an 'emerging norm' was confirmed by the UN Secretary-General's 2005 report, *In Larger Freedom: Towards Development, Security and Human Rights for All*, which centred on the idea

⁶⁵⁸Report of the International Commission on Intervention and State Sovereignty, XI- XIII, 27-34. <<http://iilj.org/courses/documents/ReportoftheInternationalCommissiononInterventionandStateSovereignty.XI-XIII.27-34.pdf>> accessed 28 July 2015.

⁶⁵⁹ Gareth Evans, 'From humanitarian intervention to the responsibility to protect' (2006) 24 Wisconsin International Law Journal <<http://heinonline.org/HOL/LandingPage?handle=hein.journals/wisint24&div=35&id=&page=>>> accessed 28 July 2015, 703-722.

⁶⁶⁰ Report of the International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect', (2001) <<http://responsibilitytoprotect.org/ICISS%20Report.pdf>> accessed 28 July 2015, 19-27.

⁶⁶¹ *Ibid*, 29-37.

⁶⁶² *Ibid*, 39-45.

⁶⁶³ Report of the International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect', (2001) <<http://responsibilitytoprotect.org/ICISS%20Report.pdf>> accessed 28 July 2015, 15.

⁶⁶⁴ Report of the Secretary General's High Level Panel on Threats, Challenges and Change, 'A more secure world: our shared responsibility' (2004) <<http://www.responsibilitytoprotect.org/index.php/about-rtop/core-rtop-documents?module=uploads&func=download&fileId=102>>, accessed 28 July 2015, 106.

that threats facing humanity can only be solved through collective action. At the same time, the report acknowledged the sensitivities involved in R2P.⁶⁶⁵

In 2005, the concept of R2P was incorporated into the outcome document of the high-level UN World Summit meeting. UN member States recognised the responsibility of each individual State to protect its population from genocide, war crimes, ethnic cleansing, and crimes against humanity, as well as a corresponding responsibility of the international community to help States to exercise this responsibility through peaceful means or through collective action, should peaceful means prove inadequate. This document was adopted by the General Assembly in its Resolution 60 of 2005 on the World Summit Outcome.⁶⁶⁶

The R2P framework has been criticised for not being gender-responsive, in that it largely neglects the differing needs and capacities of men and women; and fails to acknowledge that women are disproportionately represented among the poor and marginalised in weak unstable States. In this respect it has been recommended that decision-making structures that emphasise the equal participation of women should be incorporated in the framework.⁶⁶⁷

B. The implementation of the responsibility to protect

Unlike treaties, General Assembly resolutions are not binding under international law but are solely recommendatory. Nonetheless, it has been argued that the World Summit Outcome document has particularly high political and moral significance since its commitments were undertaken by world leaders.⁶⁶⁸ In addition, it addresses fundamental issues involving the obligation to provide protection from genocide, war crimes and crimes against humanity. These obligations reflect well established norms and principles of IHL and IHRL treaties and customary international law. Additionally, it has been emphasised that the R2P doctrine rests on an established obligation under international law: the prevention and punishment of genocide as stipulated in the Genocide Convention.⁶⁶⁹

Alongside uncertainty over the legal force of R2P, there are various other challenges involved with its implementation. It has been held that the inclusion of R2P in the Outcome Document was derived in part from a concession whereby the notion of legitimate intervention without Security Council approval, which was integral to the original ICISS proposal), was dropped in favour of Security Council authorisation.⁶⁷⁰ As such, the original notion of R2P, in its adoption by the General Assembly, has lost a core aspect.

In addition, the concept of complementarity, whereby the primary responsibility to protect lies with the State and the subsidiary responsibility with the international community, can result in an additional

⁶⁶⁵ *Ibid*, 35.

⁶⁶⁶ UN General Assembly Resolution 60/1, (2005), ≤ http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/60/1&Lang=E, accessed 29 July 2015, paras 138-139.

⁶⁶⁷ Jennifer Bond and Laurel Sherret, A sight for Sore Eyes: Bringing Gender Vision to the Responsibility to Protect Framework, (2006) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2129575>, accessed 28 July 2015, 80.

⁶⁶⁸ Dorota Gierycz, 'The responsibility to protect: a legal and rights-based perspective' (2010) Vol. 2 Issue 3 Global Responsibility to Protect, 250-266.

⁶⁶⁹ *Ibid*.

⁶⁷⁰ See for instance Alex J. Bellamy, 'Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit', (2006) Vol. 20, Issue 2 Ethics & International Affairs <<http://onlinelibrary.wiley.com/doi/10.1111/j.1747-7093.2006.00012.x/full>>, accessed 28 July 2015, 143-169.

threshold for collective security action. Domestic authorities may invoke their primary responsibility to argue against any exercise of protection by international actors, which may be accepted by the international community. Such was the case in Darfur, where Security Council members claimed that it was premature to impose sanctions against Sudan, since the crisis had not yet reached the stage where the domestic government had demonstrated a clear failure to exercise its responsibility to protect.⁶⁷¹ Moreover, none of the key documents that endorse R2P provide meaningful guidance on how to deal with violations of the responsibility to protect by States and the international community.

An additional challenge is raised by the context of disasters. The devastating effects of cyclone Nargis in Burma and the refusal by the government to allow access to affected populations resulted in arguments to extend the concept of R2P to disaster situations. Some members of the ICISS argued that R2P was not meant to protect people from the impact of natural disasters; whereas others argued that R2P could be invoked if a government's failure to respond, in the face of immense need and the threat of large-scale loss of life, amounted to a crime against humanity. Collective action was ultimately not adopted in the case of Burma, nor did the UN General Assembly endorse such an expansion in the coverage of R2P. Nonetheless, the concept of R2P could still be important in developing a legal framework for assessing the appropriate role of the international community in the aftermath of disasters.⁶⁷²

Finally, in response to the rapidly destructing situation in Libya in 2011, the UN Security Council adopted Resolution 1970 in March 2011, which deplored the gross and systemic human rights violations in the country, called for an end to hostilities and for the observance of human rights, and set in place a number of coercive measures. Resolution 1973 reiterated the responsibility of the Libyan government to protect the Libyan population and authorised coercive military intervention, without the consent of the Libyan government. Two days after this resolution, a military coalition under the umbrella of NATO began bombing Libyan government positions, with the aim of protecting the civilian population against gross human rights abuses. With ensuing concerns of a stalemate between the government and rebels, the goal of the intervention shifted to one of regime change. The subsequent military victory of the NATO coalition was seen as sufficient to conclude that the R2P operation was a success. The intervention was also seen by some to have advanced the cause of R2P: opposing Security Council countries had refrained from using a veto, and swift action had been taken. The intervention has been severely criticised, particularly by Security Council members who had abstained from the vote on Resolution 1973, for 'mission creep'. Had regime change been specified as a goal from the outset, it is unlikely that Security Council endorsement would have materialised. Residual concerns over 'mission creep' have been used to explain to some extent

⁶⁷¹ Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) Vol. 101, No. 1 American Journal of International Law <http://www.jstor.org/stable/4149826?seq=1#page_scan_tab_contents>, accessed 29 July 2015, 99-120.

⁶⁷² Rebecca Barber, 'The responsibility to protect the survivors of natural disaster: Cyclone Nargis, a case study' (2009) 14 Journal of Conflict and Security Law <<http://jcsf.oxfordjournals.org/content/14/1/3.short>>, accessed 29 July 2015, 3-34.

why the UN Security Council has failed to act in the case of Syria, despite reports of violations of a scale going beyond those experienced in Libya.⁶⁷³

C. The EU's approach to the responsibility to protect

1. Introduction

The UN Secretary-General's 2011 report on 'the role of regional and sub-regional arrangements in implementing the responsibility to protect' highlights the potential for regional organisations to make R2P operational. At the same time the document acknowledges that the 'assets and needs differ from country to country and region to region' and that its 'implementation ⁶⁷⁴ [...] should respect institutional and cultural differences'.⁶⁷⁵

It is commonly agreed that the EU has a great potential to turn the principle of R2P into a reality. The EU is in a better position than other regional organisations lacking either mandate, means or intergovernmental agreements to engage in crisis management and much less in mass atrocity prevention. Besides the possible legal responsibilities, and its capacity to operationalise the norm of R2P, the EU should also have a strong interest in strengthening its capacity to prevent atrocity crimes. These mass atrocities may not only hamper EU and national development policies; these events can lead to destabilisation, with the economic, political and security risks this implies.⁶⁷⁶ For instance, the Syrian crisis initiated in 2011 is causing refugee crises in the region, with considerable migration flows to Europe. Furthermore, failure to take action against serious crimes undermines the EU's perception as a 'normative power' and its credibility as a global human rights actor.

It should be kept in mind that one of the main objectives of the European Security Strategy (ESS) agreed in 2003, is to help build a 'rule-based international order [...] upholding and developing International Law'. Additionally Member States, as parties to the Geneva Conventions, have the obligation *to respect and to ensure respect* for IHL worldwide.⁶⁷⁷ The link between human rights and security plays an important role in the further realisation of R2P by the EU. Common security concerns should not be disregarded as

⁶⁷³ Spencer Zifcak, 'The responsibility to protect after Libya and Syria' (2012), Vol. 13 Melbourne Journal of International Law, <<http://www.law.unimelb.edu.au/files/dmfile/downloadaddad11.pdf>> accessed 29 July 2015. <<http://www.law.unimelb.edu.au/files/dmfile/downloadaddad11.pdf>> accessed 29 July 2015.

⁶⁷⁴ UN General Assembly, 'The role of regional and sub-regional arrangements in implementing the responsibility to protect', A/59/744, 3, para. 7. <<http://www.un.org/en/ga/president/65/initiatives/Report%20of%20the%20SG%20to%20MS.pdf>> accessed 29 July 2015.

⁶⁷⁵ UN General Assembly, 'The role of regional and sub-regional arrangements in implementing the responsibility to protect', A/59/744, 3, para. 8. <<http://www.un.org/en/ga/president/65/initiatives/Report%20of%20the%20SG%20to%20MS.pdf>> accessed 29 July 2015.

⁶⁷⁶ The EU and the Prevention of Mass Atrocities - An Assessment of Strengths and Weaknesses, 2013. <http://massatrocitiestaskforce.eu/Report_files/The%20EU%20and%20the%20prevention%20of%20mass%20atrocities%20-%20an%20assessment%20of%20strenghts%20and%20weaknesses.pdf> accessed 29 July 2015, 30.

⁶⁷⁷ See Oxfam International, 'The Responsibility to Protect and the European Union' (March 2008) <<http://responsibilitytoprotect.org/files/Oxfam%20R2P%20and%20EU%20Mar%2008%20final%203.pdf>>, accessed 28 July 2015.

Member States are ready to share in the responsibility for global security because ‘in an era of globalisation, distant threats may be as much a concern as those that are near to hand’.⁶⁷⁸ In connection with these concerns, the mass atrocities addressed under the R2P theory are likely to fuel the EU’s main areas of concern i.e. terrorism, State fragility and regional conflicts.⁶⁷⁹

This section will examine the EU’s support of R2P, both its formal endorsement and the operationalisation of the principle of responsibility to protect. It will also address the main challenges and show how EU Member States have contributed to the development of the concept of responsibility to protect.

2. The EU’s formal endorsement of the responsibility to protect

Title V of the TEU on *General Provisions on the Union’s External Action and Specific Provisions on CFSP*, serves as a legal basis for the EU engagement on the R2P. Article 21 explicitly mentions the obligation to assist the population or country in need – in case the government of the State concerned finds itself unable to protect its own population.⁶⁸⁰

In 2005, EU Member States played a leading role in the UN World Summit agreeing on the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.⁶⁸¹ Even prior to this UN Summit, in the June 2005 Presidency Conclusions, the European Council highlighted ‘the importance which it attributes to the concept of responsibility to protect, which must be implemented by the Security Council’.⁶⁸² Since then, a growing number of EU documents have referred to the concept of R2P.

The 2006 European Consensus on Development emphasises the Union’s support for R2P and its commitment to contribute to a ‘strengthened role for the regional and sub-regional organisations in the process of enhancing international peace and security, including their capacity to coordinate donor support in the area of conflict prevention’.⁶⁸³ In its December 2008 report on the implementation of the European Security Strategy, the Council explicitly refers to the necessity for all States to ‘take responsibility for the consequences of their actions and hold a shared responsibility to protect populations

⁶⁷⁸European Security Strategy, *A Secure Europe in a Better World* (2003), <<http://www.iss.europa.eu/uploads/media/solanae.pdf>>, accessed 29 July 2015, 11.

⁶⁷⁹Oxfam International, ‘The Responsibility to Protect and the European Union’ (March 2008) <http://responsibilitytoprotect.org/files/Oxfam%20R2P%20and%20EU%20Mar%2008%20final%20_3_.pdf>, accessed 29 July 2015.

⁶⁸⁰ TEU Art. 21.2(g).

⁶⁸¹UN General Assembly, ‘2005 World Summit Outcome’, A/RES/60/1, 24 October 2005, 30. <<http://www.un.org/womenwatch/ods/A-RES-60-1-E.pdf>>, accessed 29 July 2015, paras. 138-139.

⁶⁸² Presidency Conclusions of the Brussels European Council, 16 and 17 June 2005, 10255/1/05, para 37.

⁶⁸³ Joint declaration by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on the development policy of the European Union entitled ‘The European Consensus’, [Official Journal C 46 of 24.2.2006]. Article 37 The European Consensus on Development http://www.dev-practitioners.eu/fileadmin/Redaktion/Documents/Reference_Documents/european_consensus_2005_en.pdf accessed 20 July 2015.

from genocide, war crimes, ethnic cleansing and crimes against humanity'.⁶⁸⁴ The document further adds that 'the EU should continue to advance the agreement reached at the UN World Summit in 2005, that we hold a shared responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity'.⁶⁸⁵

Nevertheless, a closer look reveals that there are quite a few references to the EU's particular support for R2P outside of the UN context, both through public statements and in EU documents.⁶⁸⁶ The two most relevant mentions are those in the 2006 European Consensus for Development document and the 2008 Progress Report on the implementation of the European Security Strategy. However, they are too general to serve towards the operationalisation of the norm of R2P, as they follow the UN wording without elaborating on it any further.⁶⁸⁷

At the institutional level, the EP has been particularly supportive of R2P, advocating for a greater EU commitment towards implementing it.⁶⁸⁸ The European Parliament has also passed a number of resolutions demanding the protection of civilians in conflict zones, in compliance with the responsibility to protect.⁶⁸⁹ It should be noted that most of these resolutions call for UN action to protect civilians and are not aimed specifically at EU Member States.⁶⁹⁰

Little mention of R2P is made in country or regional strategic documents. There are a few references to R2P in EU–Africa summit declarations,⁶⁹¹ and within EU crisis management missions and operations, such

⁶⁸⁴ Report on the Implementation of the European Security Strategy, (2008), <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/EN/reports/104630.pdf>, accessed 25 July 2015, 2.

⁶⁸⁵ Report on the Implementation of the European Security Strategy, (2008), <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/EN/reports/104630.pdf> accessed 25 July 2015, 12.

⁶⁸⁶ Chiara de Franco, Christoph Meyer and Karen Smith, "Living by Example? The European Union and the Implementation of the Responsibility to Protect (R2P)" (2015) <<http://onlinelibrary.wiley.com/doi/10.1111/jcms.12240/epdf>> accessed 28 July 2015, 4.

⁶⁸⁷ Jan Wouters and Philip de Man, The Responsibility to Protect and Regional Organisations: The example of the European Union (2013), KU Leuven Working Papers, No. 101, <https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp101-110/wp101-de-man.pdf> accessed 28 July 2015, 18.

⁶⁸⁸ European Parliament, 'The UN Principle of the 'Responsibility to Protect' (R2P). Recommendation to the Council'. Document no. 2012/2143(INI), 18 April 2013. <<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0180&language=EN>> accessed 29 July 2015.

⁶⁸⁹ See *inter alia* European Parliament, *Report with a proposal for a European Parliament recommendation to the Council on the UN principle of the 'Responsibility to Protect' ('R2P')* (4 April 2013) 2012/2143(INI) <<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0130&language=EN>>.

⁶⁹⁰ See for instance <<http://www.responsibilitytoprotect.org/index.php/europe>> accessed 29 July 2015.

⁶⁹¹ See *inter alia* Andrej Kirn, 'The European Union's Role in Promoting and Implementing the Responsibility to Protect in Africa: Turning Political Commitments into Effective Action' (2011) Vol. 1 Bruges Regional Integration & Global Governance Paper. <http://www.cris.unu.edu/fileadmin/workingpapers/BRIGG_papers/BRIGG_2011-1.pdf> accessed 29 July 2015; EU-Africa Summit, Declaration Fourth EU-Africa Summit 2-3 April 2014, file:///C:/Users/Administrador/Downloads/142096%20(1).pdf >accessed 15 September 2015, paras. 11 and 20.

as EUFOR Tchad/RCA (2008–09) and EUFOR RCA (2014), where the objective of protecting civilians is included in their mandates.⁶⁹²

Despite the apparent EU's weak references to R2P, the EU has, on the other hand, shown stronger commitment towards conflict prevention and human rights promotion in its treaties and in a number of policy documents.⁶⁹³ The prevention of mass atrocities, embedded in conflict prevention and support to third States under the second pillar of the R2P strategy, is to be preferred over coercive responses under the third pillar strategy.

It can therefore be concluded that 'the EU has accepted but not (yet) internalised the emerging norm that attributes the international community with the responsibility to protect people from four core crimes: genocide, crimes against humanity, war crimes and ethnic cleansing'.⁶⁹⁴ The EU and its Member States have all supported the development of the concept of responsibility to protect at the UN level,⁶⁹⁵ but less emphasis has been put on its inclusion within EU external relations. As will be seen, this weak formal adherence to the principle translates into a limited operationalisation of the R2P.

3. The EU's operationalisation of the responsibility to protect

The expectation of the EU to implement R2P in its external action, not only results from the EU's endorsement of the norm, but more importantly, is a result of its 'long-standing role conception as an active promoter of human rights and conflict prevention'.⁶⁹⁶ The EU has the capacity to operationalise

⁶⁹² See Chiara de Franco, Christoph Meyer and Karen Smith, "Living by Example? The European Union and the Implementation of the Responsibility to Protect (R2P)", (2015), <<http://onlinelibrary.wiley.com/doi/10.1111/jcms.12240/epdf>>, accessed 28 July 2015, 5.

⁶⁹³ Foundation for the International Prevention of Genocide and Mass Atrocities, 'The EU and the Prevention of Mass Atrocities - An Assessment of Strengths and Weaknesses, 2013'. <http://massatrocitiestaskforce.eu/Report_files/The%20EU%20and%20the%20prevention%20of%20mass%20atrocities%20-%20an%20assessment%20of%20strengths%20and%20weaknesses.pdf> accessed 29 July 2015, 29; European Council of Gothenburg, 'EU Programme for the Prevention of Violent Conflicts', 15-16 June 2001; European Commission, 'Communication on Conflict Prevention'. COM(2001)211 final, 11 April 2001; European Council, 'A Secure Europe in a Better World: European Security Strategy', Brussels, 12 December 2003; European Council, 'Report on the Implementation of the European Security Strategy: Providing Security in a Changing World', Brussels, 11 December 2008; Council of the European Union, 'Concept on Strengthening EU Mediation and Dialogue Capacities', doc. 15779/09, 10 November 2009; Council of the European Union, 'Comprehensive approach to the EU implementation of the United Nations Security Council Resolutions 1325 and 1829 on women, peace and security', doc 15671/08, 1 December 2008; European Commission, 'Towards and EU Response to Situations of Fragility', COM(2007)643 final, 25 October 2008, Council of the European Union, 'EU Strategic Framework and Action Plan on Human Rights and Democracy', 11855/12, 25 Jun 2012.

⁶⁹⁴ Chiara de Franco, Christoph Meyer and Karen Smith, "Living by Example? The European Union and the Implementation of the Responsibility to Protect (R2P)", (2015), <<http://onlinelibrary.wiley.com/doi/10.1111/jcms.12240/epdf>> accessed 28 July 2015, 2.

⁶⁹⁵ Sarah Brockmeier, Gerrit Kurtz & Julian Junk, 'Emerging norm and rhetorical tool: Europe and a responsibility to protect', (2014) 14 (4) Conflict, Security & Development <http://www.tandfonline.com/doi/abs/10.1080/14678802.2014.930587#.VbtHj_nGB7k> accessed 29 July 2015, 429-460, 430.

⁶⁹⁶ Chiara de Franco, Christoph Meyer and Karen Smith, "Living by Example? The European Union and the Implementation of the Responsibility to Protect (R2P)" (2015), <<http://onlinelibrary.wiley.com/doi/10.1111/jcms.12240/epdf>> accessed 28 July 2015, 2.

R2P, as it is credited with a wide range of tools and policies in the realm of prevention and rebuilding,⁶⁹⁷ nonetheless, it has not met this expectation in the operationalisation of the principle.⁶⁹⁸

Despite the formal acknowledgement of R2P, it is unclear to what extent the EU has operationalised the R2P in its external action.⁶⁹⁹ In this sense, David Curran proposes that an analysis of the EU's approach to protection of civilians could be useful to understand its approach to R2P, as the latter may have a high civilian protection component.⁷⁰⁰

Of additional interest is the analysis of the role of the EU in relation to two of the three-pillar strategy outlined by the UN Secretary-General Ban Ki-moon in his 2009 Report.⁷⁰¹

The EU can play a distinct role depending on the proximity and familiarity with the territory where the mass atrocities occur and its relationship with the involved parties. The role of the EU might be largely limited to offering technical assistance in State-to-State learning processes. On the other hand, the EU has a potential leverage by establishing 'threshold membership standards of a political and economic nature (...) for prospective members to bring about significant institutional and legislative grass-roots changes to the benefit of their populations'.⁷⁰² Echoing the EU's successful integration process, the 2009

⁶⁹⁷ Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Brookings Institute Press 2008) 183-184.

⁶⁹⁸ Chiara de Franco, Christoph Meyer and Karen Smith, 'Living by Example?' The European Union and the Implementation of the Responsibility to Protect (R2P)' (2015) <<http://onlinelibrary.wiley.com/doi/10.1111/jcms.12240/epdf>> accessed 28 July 2015, 4.

⁶⁹⁹ For instance, the Union's Rule of Law Mission in Kosovo: UN Doc. S/RES/1244 (1999), paras. 5 and 17, Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO [2008] OJ L42/92 (last amended by Council Decision 2011/752/CFSP of 24 November 2011 [2011] OJ L310/10), which acknowledged the need 'to prevent, on humanitarian grounds, possible outbreaks of violence, acts of persecution and intimidation in Kosovo, taking account, as appropriate, of the responsibility towards populations as referred to in Resolution 1674 by the United Nations Security Council on 28 April 2006' (recital (3) in the preamble); and the Union's military operation in Chad and the Central African Republic (EUFOR Chad/RCA): UN Doc. S/RES/1706 (2006) para. 12, UN Doc. S/RES/1769 (2007) paras. 1 and 23, *Report of the Secretary-General on Chad and the Central African Republic*, UN Doc. S/2007/488, UN Doc. S/RES/1778 (2007) para. 6, Council Joint Action 2007/677/CFSP of 15 October 2007 on the European Union military operation in the Republic of Chad and in the Central African Republic [2007] OJ L279/21 (repealed by Council Joint Action 2009/795/CFSP of 19 October 2009 [2009] L283/61), Council Decision 2008/101/CFSP of 28 January 2008 on the launching of the European Union military operation in the Republic of Chad and in the Central African Republic (Operation EUFOR Tchad/RCA) [2008] L34/39, European Parliament resolution 2009/C 259 E/20 of 24 April 2008 on the situation in Chad [2009] C259E/106.

⁷⁰⁰ David Curran, 'An Examination of the Level of Standby Effectiveness in the EU for RtoP Style Deployments' in Daniel Fiott, Robert Zuber and Joachim Koops (eds) *Operationalizing the Responsibility to Protect. A Contribution to the Third Pillar Approach* (Madariaga – College of Europe Foundation 2012) 34-35.

⁷⁰¹ UN General Assembly, Report of the Secretary-General 'Implementing the responsibility to protect' (12 January 2009) A/63/677, <<http://responsibilitytoprotect.org/implementing%20the%20rtoP.pdf>> , accessed 15 September 2015, paras. 22 and 42. Secretary-General Ban Ki-moon outlined a three-pronged approach to implement the responsibility to protect. To this end, the first pillar encompasses the protection responsibilities of the States (prevention) and the second and third pillars require the international community to step in if this obligation is not met, either by providing assistance to States in the fulfilment of their obligations or, by timely and decisive action as a last resort.

⁷⁰² Jan Wouters and Philip de Man, *The Responsibility to Protect and Regional Organisations: The example of the European Union* (2013) KU Leuven Working Papers, No. 101,

implementation report of the UNSG asks regional organisations to consider introducing R2P criteria into integration policies and review mechanisms at the regional level.⁷⁰³ For instance, the report states that ‘the arrest of former Bosnian Serb General, Ratko Mladic in May 2011, is evidence that these policies can aid the cause of accountability for atrocity crimes under some circumstances’.⁷⁰⁴ In this case, it was alleged that the detention of one of the most wanted war crimes suspects was partly motivated by EU-Serbia negotiations towards integration.⁷⁰⁵

The following section will focus on the second and third pillar of the R2P strategy, with special focus on prevention under the second pillar, the CSDP missions and the use of coercive measures in response to mass atrocities.

a) The role of the EU under the second pillar of the responsibility to protect

As already stated above, the EU and its Member States are more willing to contribute to prevention and assist States to uphold their responsibility to protect populations. The ICISS report provides that ‘prevention is the single most important dimension of the responsibility to protect’⁷⁰⁶ and it further states that ‘it is high time for the international community to be doing more to close the gap between rhetorical support for prevention and tangible commitment’.⁷⁰⁷ The second pillar sets out the parallel commitment of the international community to encourage and assist States to fulfil their responsibility [to protect]⁷⁰⁸ by bolstering their capacity to avoid, minimise or contain mass atrocities. In this sense, ‘[p]revention, building on pillars one and two, is a key ingredient for a successful strategy for the responsibility to protect’.⁷⁰⁹ The scope of R2P strategy goes beyond the security of individuals and communities. Based on the increasingly widely accepted concept of human security, prevention implies dealing with long-term

<https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp101-110/wp101-de-man.pdf> accessed 28 July 2015, 5.

⁷⁰³ UN General Assembly, Doc. A/63/677, (2011) <<http://unispal.un.org/UNISPAL.NSF/0/EEF9DE1F698AA70D8525755100631D7C>>, accessed 29 July 2015, para. 22

⁷⁰⁴ UN General Assembly A/65/877-S/2011/393 (2011) <<http://www.un.org/en/ga/president/65/initiatives/Report%20of%20the%20SG%20to%20MS.pdf>> accessed 29 July 2015.

⁷⁰⁵ Viktor Peskin, *International Justice in Rwanda and the Balkans Virtual Trials and the Struggle for State Cooperation* (Cambridge University Press 2009), 88-90.

⁷⁰⁶ International Commission on Intervention and State Sovereignty (ICISS), ‘The Responsibility to Protect’, December 2001, XI. <<http://responsibilitytoprotect.org/ICISS%20Report.pdf>>, accessed 29 July 2015.

⁷⁰⁷ International Commission on Intervention and State Sovereignty (ICISS), ‘The Responsibility to Protect’, December 2001, 19. <<http://responsibilitytoprotect.org/ICISS%20Report.pdf>> accessed 29 July 2015.

⁷⁰⁸ UN General Assembly, ‘Responsibility to protect: State responsibility and prevention’, A/67/929, 9 July 2013. <http://www.un.org/ga/search/view_doc.asp?symbol=A%2F67%2F929&Submit=Search&Lang=E> accessed 29 July 2015, 1, para.2.

⁷⁰⁹ UN General Assembly, ‘Implementing the responsibility to protect’, A/63/677, 12 January 2009. <http://www.un.org/ga/search/view_doc.asp?symbol=A%2F63%2F677&Submit=Search&Lang=E> accessed 30 July 2015, 9.

injustices such as poverty or inequality, which compromise human rights and increase the risk of violent conflict.⁷¹⁰

When EU Member States agreed on the R2P concept, 'it was to help prevent as much as to halt mass atrocities'.⁷¹¹ Human rights promotion and prevention of violent conflict are declared fundamental objectives of the EU's external action. Prevention of mass atrocities should be considered as implicit in these wider objectives, as it is not explicitly stated.⁷¹²

In this sense, the EU has contributed to the deterring of conditions that could give rise to atrocity crimes, through initiatives to curb discrimination and xenophobia and by means of its high standards for membership accession.⁷¹³ From the civil humanitarian organisations perspective, research has indicated that the EU has offered little support to humanitarian activities for preparedness and prevention, and that the concept of linking relief, rehabilitation and longer-term development efforts (LRRD) is applied inconsistently.⁷¹⁴

In the context of the role of the EU under the second pillar of R2P, reference should be made to the EU mechanisms for identification and warning about mass atrocities. Aware of the importance of conflict prevention, the EU has made some efforts to improve its capacity to prevent mass atrocities.⁷¹⁵ The EU Conflict Early Warning System (EWS), a risk management tool for conflict prevention, together with conflict risk analysis, enables decision-makers to take decisions on prevention and/or crisis response, based on a deeper understanding of the root causes, actors and dynamics of a conflict situation.⁷¹⁶ An Early Warning and Conflict Analysis Team within the Conflict prevention, Peace building and Mediation Instruments Division of the EEAS, provides advice and training to EEAS personnel to enhance their understanding of conflict dynamics and contributes to early warning mechanisms.

The Task Force on the EU Prevention of Mass Atrocities underlines that even though mass atrocity prevention and conflict prevention can be complementary, they are nonetheless different areas. Conflict prevention alone is not sufficient to effectively prevent mass atrocities, as they can occur in times of peace or in a post-conflict scenario. Some examples of mass atrocities occurring outside of armed conflict include

⁷¹⁰Oxfam International, 'The Responsibility to Protect and the European Union' (March 2008) <<http://responsibilitytoprotect.org/files/Oxfam%20R2P%20and%20EU%20Mar%2008%20final%203.pdf>>, accessed 29 July 2015.

⁷¹¹Oxfam International, 'The Responsibility to Protect and the European Union' (March 2008) <<http://responsibilitytoprotect.org/files/Oxfam%20R2P%20and%20EU%20Mar%2008%20final%203.pdf>> accessed 29 July 2015.

⁷¹² The EU and the Prevention of Mass Atrocities - An Assessment of Strengths and Weaknesses, 2013. <http://massatrocitiestaskforce.eu/Report_files/The%20EU%20and%20the%20prevention%20of%20mass%20atrocities%20-%20an%20assessment%20of%20strengths%20and%20weaknesses.pdf> accessed 29 July 2015, 56.

⁷¹³ UNGA, 'The role of regional and sub-regional arrangements in implementing the responsibility to protect', A/59/744, 6. <<http://www.un.org/en/ga/president/65/initiatives/Report%20of%20the%20SG%20to%20MS.pdf>>

⁷¹⁴ NGO Voice, 'The European Consensus on Humanitarian Aid' (2014) <http://resources.daraint.org/voice/study_consensus_humanitarian_aid.pdf> accessed 30 July 2015, 35-36.

⁷¹⁵ See inter alia the summary of the conclusions <http://www.iss.europa.eu/uploads/media/TFPMA-Round_Table.pdf> accessed 29 July 2015.

⁷¹⁶ See for instance, <http://eeas.europa.eu/cfsp/conflict_prevention/docs/201409_factsheet_conflict_earth_warning_en.pdf> accessed 29 July 2015.

the massacres in Zimbabwe, which occurred in the 1980s, or the Andijan massacre in Uzbekistan in 2005. Therefore, the Task Force recommended the integration of atrocity risk indicators for risk assessment and early warning into the broader general frameworks in the EU's conflict prevention policy.⁷¹⁷

There are some examples of success in conflict prevention such as the EU performance during the former Yugoslav Republic of Macedonia crisis in 2000-2001 and in the Democratic Republic of the Congo elections in 2006.⁷¹⁸ However it is difficult to indicate if these actions also prevented potential mass atrocities, as there was no systematic assessment method or indicators to identify the risks.

Concerning EU efforts to prevent mass atrocities, it should be noted that despite the lack of a specific 'mass atrocities warning mechanism', there may be clear, imminent risk indicators that mass atrocities could be perpetrated. The EU have recourse to structural or operational measures to help the State strengthen its capacity to prevent or halt mass atrocities. These measures might fall into one of the following categories: positive measures or incentives, negative measures or sanctions or even conditionality to try to halt or reverse the escalation towards mass atrocities.⁷¹⁹ There are other instruments which may indirectly contribute to prevention of mass atrocities such as financial instruments,⁷²⁰ human rights clauses and conditionality in sector policies.⁷²¹

Field missions can help to protect populations under the second or third pillar in many ways: electoral monitoring missions, peacekeeping missions, fact-finding and monitoring missions to mention some. The main drawback of EU's civilian and military missions is that they do not last long enough to contribute to peace-building.⁷²² For this purpose it is essential to incorporate a mass atrocity lens into the EU policy-making process, particularly for mission planning, to enhance the operationalisation of the principle R2P.

There are some challenges to be highlighted. Measures taken to build State capacity for the prevention of mass atrocity crimes, represent a less controversial and potentially more effective way to enforce R2P than other more interventionist means under the third pillar. Yet some actions under the second pillar

⁷¹⁷ See Budapest Centre for the International Prevention of Genocide and Mass Atrocities, 'The Distinction between Conflict Prevention and Mass Atrocity Prevention' <<http://www.genocideprevention.eu/what-is-mass-atrocities-prevention/>> accessed 29 July 2015.

⁷¹⁸ EEAS, EU Conflict Early Warning System <http://eeas.europa.eu/factsheets/docs/factsheets_europe_day_2014/factsheet_eu-conflict-early-warning_system_en.pdf> accessed 29 July 2015.

⁷¹⁹ The EU and the Prevention of Mass Atrocities - An Assessment of Strengths and Weaknesses, 2013. <http://massatrocitiestaskforce.eu/Report_files/The%20EU%20and%20the%20prevention%20of%20mass%20atrocities%20-%20an%20assessment%20of%20strenghts%20and%20weaknesses.pdf>, accessed 29 July 2015, 54.

⁷²⁰ 58 task force. European Instrument for Democracy and Human Rights (EIDHR), Instrument for Stability, Development Cooperation Instrument (DCI), European Neighbourhood Partnership Instrument (ENPI), Instrument for Pre-accession (IPA) and European Development Fund (EDF) under the Cotonou Agreement.

⁷²¹ For example, the EU's Generalised System of Preferences (GSP) sets out standards under which third countries could be granted an increased access to the EU market. The standards consist of the ratification of human rights treaties including the Genocide Convention.

⁷²² The EU and the Prevention of Mass Atrocities - An Assessment of Strengths and Weaknesses, 2013. <http://massatrocitiestaskforce.eu/Report_files/The%20EU%20and%20the%20prevention%20of%20mass%20atrocities%20-%20an%20assessment%20of%20strenghts%20and%20weaknesses.pdf>, accessed 29 July 2015, 63.

could be considered intrusive, as actions taken under this pillar require consent of the host.⁷²³ Political will to act is essential, particularly in implementing long-term and preventative strategies. When mass atrocities have already occurred, it is necessary to examine the degree of involvement of the host State or non-state armed group(s) in the perpetration of these crimes, in order to seek accountability and promote reconciliation, so as to avoid further violations.⁷²⁴

b) The role of the EU under the third pillar of the responsibility to protect

The third pillar comes into play when a State fails to protect its population. In this event, the international community has a responsibility to take collective action in a timely and decisive manner to prevent or halt the commission of mass atrocities. There are a wide range of measures under the third pillar, from diplomatic, humanitarian or other peaceful means to security actions, which can help protect populations from atrocities.⁷²⁵

EU Member States tend to directly provide protection under the UN umbrella. Although no explicit mention of the R2P principle can be found in EU missions mandates, the EU contributes to UN initiatives through human rights investigations, fact-finding missions or support to peace-keeping operations. The UN also relies to a large extent on regional organisations in the framework of Chapter VIII UN Charter, in the context of conflict prevention and crisis management.⁷²⁶ Besides, Member States prefer to contribute to military interventions led by the regional organisation they belong to.⁷²⁷ An example of the role of the EU as a crucial R2P partner is the launching of military operations in support to the UN operation in the Democratic Republic of the Congo in 2003 and 2006.⁷²⁸

The Outcome Document and the ICISS report agree that regional organisations should take part in the implementation of R2P, but do not agree on the extent to which these organisations should be able to act autonomously. According to the Outcome document, any use of force requires authorisation by the UN Security Council while the ICISS report contemplates the possibility of post authorisation as the Security Council may fail to respond adequately and timely to mass atrocities.⁷²⁹ Moreover, the EU would encounter many difficulties though acting autonomously, because its means of restraint are more limited. The EU for instance, has not as yet developed its own military or police force and it relies on Member

⁷²³ See for instance, At a Glance, An Educational Tool by the International Coalition for the Responsibility to Protect, < <http://responsibilitytoprotect.org/Clarifying%20Pillar%20Two.pdf> > accessed 29 July 2015, 7.

⁷²⁴ *Ibid.*

⁷²⁵ UN General Assembly, 'Implementing the responsibility to protect', A/63/677, 12 January 2009, 22, para. 49. < <http://daccess-ddsny.un.org/doc/UNDOC/GEN/N09/206/10/PDF/N0920610.pdf?OpenElement> > accessed 29 July 2015.

⁷²⁶ Jan Wouters, Philip de Man, Marie Vicent, 'The Responsibility To Protect And Regional Organisations: Where Does The EU Stand?' (2011), KU Leuven Policy Brief 18, < http://ghum.kuleuven.be/ggs/publications/policy_briefs/pb18.pdf > accessed 30 July 2015, 15.

⁷²⁷ *Ibid.*, 4-5.

⁷²⁸ ARTEMIS and EUFOR RD Congo respectively.

⁷²⁹ Gert de Baere, 'Some Reflections on the EU and the Responsibility to Protect' (2012) KU Leuven Working Paper No. 79. < https://lirias.kuleuven.be/bitstream/123456789/336069/1/WP79_DeBaere+%282%29.pdf > accessed 29 July 2015, 12.

States contributions for EU civilian and military missions. Its capacity to engage in coercive acts is de facto limited even if the actions were backed by sufficient political will.⁷³⁰

The EU has coercive and non-coercive means of different intensity, which serve to react under the third pillar of the responsibility to protect. While the EU might have resorted to them in response to serious crimes, there are no explicit references to R2P in its adoption. In order to illustrate EU's actions against mass atrocities, the response to the Libyan crisis constitutes a good example to examine to what extent the EU operationalised the R2P principle.

In strife-torn Libya the Security Council demanded an end to violence recalling the Libyan State's responsibility to protect its population, and adopted measures under Chapter VII, namely international sanctions (travel ban, asset freeze and arms embargo) and referred the situation to the ICC.⁷³¹ The UN Security Council Resolution 1973 appealed to the parties involved in armed conflicts to comply with their 'primary responsibility to take all feasible steps to ensure the protection of civilians'.⁷³² The Security Council also authorised Member States, with prior notification to the Secretary-General, to act 'nationally or through regional organisations or arrangements [...] to take all necessary measures [...] to protect civilians and civilian populated areas under threat of attack [...], while excluding a foreign occupation force of any part of the Libyan territory'.⁷³³

EU CSDP missions and operations had refrained from taking an active role in possible humanitarian interventions until 2011, with the adoption of the Council Decision 2011/210/CFSP on a European Union military operation in support of humanitarian assistance operations, in response to the crisis situation in Libya (EUFOR Libya).⁷³⁴ In this case the decision did not explicitly refer to R2P, but to UNSCR 1973 recalling UNSCR 1970, both expressly recalling the responsibility to protect norm. The EU mission was aimed at guaranteeing the protection of civilians and to support humanitarian assistance in the region.⁷³⁵ The mission's mandate was to 'contribute to the safe movement and evacuation of displaced persons' and 'support with specific capabilities, the humanitarian agencies in their activities'.⁷³⁶ In the end, the mission was never launched, as request from UN OCHA was a condition for the deployment.

⁷³⁰ The EU and the Prevention of Mass Atrocities - An Assessment of Strengths and Weaknesses, 2013. <http://massatrocitiestaskforce.eu/Report_files/The%20EU%20and%20the%20prevention%20of%20mass%20atrocities%20-%20an%20assessment%20of%20strenghts%20and%20weaknesses.pdf>, accessed 29 July 2015, 66.

⁷³¹ UN Security Council Resolution, UN Doc. S/RES/1970 (2011) <[http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1970\(2011\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1970(2011))> accessed 29 July 2015.

⁷³² UN Security Council Resolution, UN Doc. S/RES/1973 (2011) <[http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1973\(2011\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1973(2011))> accessed 29 July 2015.

⁷³³ UN Security Council Resolution, UN Doc. S/RES/1973 (2011) <[http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1973\(2011\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1973(2011))>, accessed 29 July 2015.

⁷³⁴ 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) [2011] OJ L89/17 (Corrigendum [2011] OJ L203/36).

⁷³⁵ Preamble, 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).

⁷³⁶ Art. 1, 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) [2011] OJ L89/17.

Even though the ‘third pillar of the Secretary-General’s strategy to implement R2P has not proven to be the EU’s forte’,⁷³⁷ there are other means beyond CSDP missions. Restrictive measures have proven to be a useful tool to implement the third pillar of the responsibility to protect. Sanctions are coercive measures that can be imposed on a country or on individuals within a State, in order to pressurise or compel a government to refrain from committing or permitting mass atrocities against civilians.⁷³⁸ The sanctions policy has gradually been institutionalised and the EU has opted for ‘smart sanctions’ aimed at reducing the humanitarian consequences for the population.⁷³⁹ Consensus on the adoption of restrictive measures might encounter less opposition, as military or security capabilities are not required. However, the decision-making process is not free from setbacks deriving from its inter-governmental nature. In the context of the Libyan crisis, in February 2011, the EU together with the US first imposed an asset freeze on the Qaddafi regime, followed by UN targeted financial sanctions; an asset freeze, travel ban and arms embargo. Even though NATO’s military intervention was decisive in the falling of Qaddafi’s regime, the sanctions imposed by the UN, EU and US contributed to decrease the regime’s firepower and the support from the Libyan elite, otherwise the war could have lasted longer. In response to the Libyan crisis, the EU has not only implemented those sanctions approved by the Security Council, but has imposed additional sanctions subject to periodic reviews.⁷⁴⁰

There are other non-coercive policies, which serve to support any pillar of R2P, such as promoting compliance with IHL⁷⁴¹ and support for institution-building under the instrument for stability⁷⁴² of protection of civilians in CSDP missions and operations.⁷⁴³ The EU is also contributes to the prevention and to the ending of impunity of perpetrators of serious war crimes, by supporting the effective functioning of the International Criminal Court (ICC) and other international criminal tribunals.⁷⁴⁴

⁷³⁷ Gert de Baere, ‘Some Reflections on the EU and the Responsibility to Protect’, (2012), KU Leuven Working Paper No. 79 < https://lirias.kuleuven.be/bitstream/123456789/336069/1/WP79_DeBaere+%282%29.pdf > accessed 29 July 2015, 17.

⁷³⁸ See Rocio Alamillos, ‘EU Sanctions Policy: A New Human Rights Tool? The Case of Belarus’ (2015) in Wolfgang Benedek et. al. (eds.), *European Yearbook on Human Rights 2015* (Neuer Wissenschaftlicher Verlag/Intersentia 2015) 213-226.

⁷³⁹ See for instance, At a Glance, An Educational Tool by the International Coalition for the Responsibility to Protect, <<http://responsibilitytoprotect.org/The%20Role%20of%20Sanctions%20FINAL.pdf>> accessed 29 July 2015.

⁷⁴⁰ Council Decision 2011/137/CFSP of 28 February 2011 concerning restrictive measures in view of the situation in Libya [2011] OJ L58/53, last amended by Council Decision 2011/137/CFSP (OJ L 58, 3.3.2011, p. 53); and Council Regulation (EU) No 204/2011 of 2 March 2011 concerning restrictive measures in view of the situation in Libya [2011] OJ L58/1; last amended by Council Regulation (EU) No 204/2011 (consulted on 22 July 2015).

⁷⁴¹ Updated European Union Guidelines on Promoting Compliance with international humanitarian law (IHL) [2009] OJ C303/12 < <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:ah0004> > accessed 29 July 2015.

⁷⁴² Regulation (EC) No 1717/2006 of the European Parliament and of the Council of 15 November 2006 establishing an Instrument for Stability [2006] OJ L327/1.

⁷⁴³ See at <<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2013047%202010%20INIT>> accessed 22 July 2015.

⁷⁴⁴ See at <http://www.consilium.europa.eu/uedocs/cmsUpload/l_15020030618en00670069.pdf > accessed 22 July 2015.

D. Conclusion

This part of the report has shown that the EU and its Member States have been very supportive of the development of the emerging concept of R2P in international fora, but despite this, to date there has been little impact in EU practice, despite EU capacity to operationalise it. Nonetheless, at the declaratory level, there is a clearer commitment to human security and protection of civilians, which may serve as basis for R2P-type responses.

The EU has good reason to put further emphasis in the operationalisation of the R2P, as humanitarian issues (and human rights in a broader sense) are closely linked to its security concerns. The Union has a far more comprehensive range of tools at its disposal than many other global players with capacity to intervene. However the identification of the risk of mass atrocities remains poor in security assessment practice, as no specific indicators have been included. A risk awareness mechanism of this type is crucial to identify those situations where EU actions are required, particularly concerning prevention under the second pillar of the R2P strategy.

EU capabilities are more limited under the third pillar approach, however as David Curran suggests ‘through operationalising protection of civilians [in EU crisis management operations], the EU is developing capacities for timely and effective responses to R2P style [interventions].’⁷⁴⁵ EU missions mandates to date have not included any specific mention of the R2P principle, while the protection of civilians has been included in some mandates, policy documents and trainings.⁷⁴⁶ This operationalisation of the protection of civilians approach could be a feasible manner for the EU to intervene when a State fails to protect its population, thus constituting a EU type intervention that does not rely expressly on the R2P norm but fits into the third pillar approach.

⁷⁴⁵ David Curran, ‘An Examination of the Level of Standby Effectiveness in the EU for RtoP Style Deployments’ Daniel Fiott, Robert Zuber and Joachim Koops (eds.) *Operationalizing the Responsibility to Protect. A Contribution to the Third Pillar Approach* (Madariaga – College of Europe Foundation 2012) 46.

⁷⁴⁶ See *inter alia* EUFOR RD Congo mandate, Joint Action 2006/319/CFSP on the European Union military operation in support of the United Nations Organisation Mission in the Democratic Republic of the Congo (MONUC) during the election process (2006) OJ L 116/99, <[http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/monuc-jo_l_116\(2006\)_/monuc-jo_l_116\(2006\)_en.pdf](http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/monuc-jo_l_116(2006)_/monuc-jo_l_116(2006)_en.pdf)>, accessed 15 September 2015; Council of the European Union, Draft on the protection of civilians in CSDP Missions and Operations (2010) 13047/2/10, EEAS, Protection of Civilians - a key topic successfully introduced in the ESDC’s Academic Programme (22 November 2014) <http://eeas.europa.eu/csdp/structures-instruments-agencies/european-security-defence-college/news/2014/20141122_en.htm>, accessed 15 September 2015.

VI. Legal and policy analysis of the relationship between the protection of human rights and the promotion of democracy and international criminal law

A. Introduction

This section of the study includes a legal and policy analysis of norms, case law and documents, as well as scholarly doctrine, on the relationship between the protection of human rights and the promotion of democracy and international criminal law. Specific reference is made to four different dimensions; the first refers to the relationship between human rights and promotion of democracy in transition processes from war to peace; the second deals with the roles of truth, justice and reparation as integral components of any process of transition; the third refers to the EU's contribution to the enhancement of human rights protection through the promotion of international criminal law; and finally, analysis is provided on the role of the EU and its member states in the promotion of the ICC.

The section presents an overview of the literature reviewed and an analysis of its contents on transitional justice and ICL, taking the promotion of democracy as a general framework.

The main aim is to analyse to what extent transitional justice and the application of ICL contributes to the promotion of democracy in conflict and post-conflict situations. In general terms, transitional justice and the ICC are considered paths against impunity. In fact, as the ICC is a high-profile example of an institution that furthers transitional justice, this section looks primarily at it as the main case study.⁷⁴⁷ The literature favourable to the development of transitional justice and the ICC advocates that they have responded to the international normative vacuum during the last decades, during which the human rights protection system has gained weight. In this context, impunity regarding international crimes is no longer acceptable and ICL is one of the ways to deal with it.

B. The relationship between human rights and the promotion of democracy in transition processes from war to peace

Transitional justice is understood as 'a range of mechanisms that can be implemented within a framework that includes both judicial and non-judicial mechanisms, such as prosecutions, reparations, truth-seeking and institutional reform'.⁷⁴⁸ Underlying this concept, the collective models for achieving the enforcement of IHRL, IHL and more recently ICL have contributed dramatically to transitional justice. In fact, international criminal justice is considered the most influential approach to transitional justice.⁷⁴⁹ The evolution of IHRL and IHL has provided a considerable shift from the adoption of a series of human rights treaties, and the assertion by a growing number of States of universal jurisdiction over major crimes, to the establishment of UN-sponsored tribunals for former Yugoslavia and Rwanda in order to attribute

⁷⁴⁷ Laura Davis, *EU Foreign Policy, Transitional Justice and Mediation: Principle, Policy and Practice*, (Routledge 2014) 59.

⁷⁴⁸ UN Secretary General, 'Rule of Law Tools for Post-Conflict States: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies', UN Doc. S/2004/616, 23 August 2004, para. 8.

⁷⁴⁹ Peter Dixon and Chris Tenove, 'International Criminal Justice as a Transnational Field: Rules, Authority and Victims' (2013) *The International Journal of Transitional Justice*, 7, 393-412.

individual criminal responsibility.

Accountability for serious crimes is recognised by several instruments deriving from IHL and IHRL, such as the Geneva Conventions of 1949 and the Additional Protocols of 1977; the Convention on the Prevention and Punishment of the Crime of Genocide; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the Rome Statute of the International Criminal Court itself. All EU Member States are parties to these various treaties.

This first section deals with two main issues directly related to the promotion of democracy and transition processes: the holistic concept of transitional justice and the necessity of independent courts.

1. A holistic concept of transitional justice

The concept of transitional justice was historically developed within the paradigm of international human rights: the pursuit of justice for egregious violations of human rights, often of a systematic nature. Several international treaties, particularly in the field of human rights, include this principle, either explicitly⁷⁵⁰ or implicitly. In addition, human rights treaty monitoring bodies have reaffirmed the importance this principle has in the interpretation of several rights and provisions included in these treaties. However, there is nothing to preclude transitional justice from addressing the commission of other crimes, such as economic crimes and corruption.⁷⁵¹ A unique characteristic of transitional justice, compared to the field of human rights or the fight against impunity, is that transitional justice explores areas of social and *political change* that go beyond the exclusively legal focus.⁷⁵²

In fact, in the Secretary-General's 2004 Report to the Security Council on the rule of law and transitional justice in conflict and post conflict societies, transitional justice was defined as 'the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation'.⁷⁵³ Along the same lines, five years later, the Annual Report of the UNHCHR paid particular attention to transitional justice, and conceived it as both judicial and non-judicial processes and mechanisms, such as truth-seeking, prosecution initiatives, reparations programmes, institutional reform, or an appropriate combination thereof.⁷⁵⁴

Moreover, the characteristics of the transition of the particular society in question determine the different ways in which mechanisms of transitional justice are developed. As Hemi Mistry affirms, the ultimate aim of transitional justice is to bring about the reconciliation of opposing parties in society, and to resolve the problem of how one group may live in peace with another group, which has been responsible for violent acts or repression against them. Consequently, responsibility and accountability for such acts of violence

⁷⁵⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms, Preamble, 4 November 1950. While not a treaty, the Universal Declaration of Human Rights also refers to the rule of law.

⁷⁵¹ Hemi Mistry, 'Transitional Justice and the Arab Spring' (2012) Chatham House Meeting Summary 1 February 2012, <<https://www.chathamhouse.org/publications/papers/view/182300>> accessed 30 March 2015.

⁷⁵² Paige Arthur, 'How Transitions Reshaped Human Rights' (2009) 31 HRQ 321.

⁷⁵³ UN Secretary General, 'Rule of Law Tools for Post-Conflict States: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies', UN Doc. S/2004/616, 23 August 2004, para. 8.

⁷⁵⁴ Annual Report of the UNHCHR. 'Analytical study on human rights and transitional justice', A/HRC/12/18, 6 August 2009.

and repression in accordance with the rule of law are vital for transitional justice.⁷⁵⁵

Another function of transitional justice is one of truth-seeking: to establish an acceptable historical record of what took place during the previous period, the harm suffered, and what actions were committed by individuals and collective society; and to acknowledge those injustices. At the same time, the aim is to restore public trust in the apparatus of the State, by institutional reform and the establishment of the rule of law. In this regard, the two most important institutions of concern are the security services and the justice system including the judiciary.

As the EU is committed to promoting peace, to the protection of the EU's rights and to the strict observance and the development of international law,⁷⁵⁶ and one of the objectives of the Union's Common Foreign and Security Policy (CFSP) is 'to consolidate and support democracy, the rule of law, human rights and the principles of international law',⁷⁵⁷ transitional justice can help towards meeting these aims. However, the EU lacks policies, operational guidelines and tools for implementing these commitments.⁷⁵⁸ Therefore, the development of the EU's own approach to transitional justice would be a contribution to its rules and practices.⁷⁵⁹ Furthermore, the EU could achieve a stage on which to act in terms of the promotion of democracy related to transitional justice, in the current situation resulting from the 'Arab Spring' of 2011. Despite the fact that the situation in each individual country involved is unique, a common denominator is that all suffered from violations of human rights by the regimes formerly in power. There is very little transitional justice at the moment due to on-going armed conflicts and political tension in the region.

2. Courts in transition processes

As domestic courts derive from and decide in the name of the national public order,⁷⁶⁰ similar conditions are required from international criminal courts. A problem relating to post-conflict justice is often that domestic courts may have difficulties impartially addressing committed atrocities. In these situations, international courts may provide an avenue. The concern at this point is whether international criminal courts are the most adequate form of justice for the victims. To gain legitimacy, international criminal courts need to be more communicative and attentive to social needs than they have been to date. A country in transition is a country which is emerging from one particular order and usually is uncertain and unsure as to how to respond to the challenge of the new. These countries face the problem of dealing with the past on the one hand and the challenge of new directions on the other. In addition, they face the problem of ensuring a sustainable peace so that democracy and economic growth can flourish.⁷⁶¹ The

⁷⁵⁵Hemi Mistry, 'Transitional Justice and the Arab Spring', (2012) Chatham House Meeting Summary 1 February 2012 <<https://www.chathamhouse.org/publications/papers/view/182300>> accessed 30 March 2015.

⁷⁵⁶TEU, Art. 3, paras. 1 and 5.

⁷⁵⁷TEU Art. 21, 2, b).

⁷⁵⁸Laura Davis, 'The EU and Transitional Justice' (2010) Democratization and Transitional Justice Cluster, International Center for Transitional Justice <www.initiativeforpeacebuilding.eu/pdf/EUTransJustice0610.pdf> accessed 30 March 2015.

⁷⁵⁹*Ibid.*

⁷⁶⁰Armin von Bogdandy and Ingo Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification' (2012) EJIL 23 (1) 7-41.

⁷⁶¹Alexander L. Boraine, 'Transitional Justice: A Holistic Interpretation' (2006) 60 (1) *Journal of International Affairs* 17.

promotion of democracy is the guarantee for the protection of human rights, the rule of law and good governance. A democratic political system is sustained by and propagates the principles of transparency, participation, inclusion, and accountability. The challenge is how to build democracy through political and judicial institutions, which rest on foundations that have to be built over time, resulting in: strong institutions, responsible and accountable government, a free press, the rule of law, and citizens who have a say in how they are governed.

As genocide, crimes against humanity and war crimes are usually associated with on-going conflicts, the ICC intervenes in the context of active or recently concluded conflicts, although there is no such a requirement in the ICC Statute. Of the nine situations in which the ICC has opened official investigations to date, seven constituted on-going violent political conflicts (Democratic Republic of Congo, 2 cases in Central African Republic, Uganda, Darfur, Libya and Mali) while the other two had recently terminated (Kenya and Cote d'Ivoire (this one involving a non-state party)).⁷⁶² None had official peace negotiations occurring at the time that the ICC became involved.⁷⁶³

Recently, ICC intervention has polarised domestic debates in contexts such as Sudan, Colombia or Kenya where it interfered with electoral politics or the interests of domestic political actors. The problem is to determine to what extent ICC interventions affect conflict processes. In fact, in on-going conflicts, the pursuit of justice may obstruct the pursuit of peace through negotiations. Moreover, the critique based on the exclusive focus on punitive 'trial' justice is to be faced by the courts. Therefore, a consensus is emerging in scholarly literature, although certainly not yet in policy practice, that international criminal courts ought to be part of a wider package of transitional justice instruments at different policy levels.⁷⁶⁴

C. The role of truth, justice and reparation as integral components of any process of transition

As justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives,⁷⁶⁵ justice, truth and reparation are integral components of any process of transition. In the framework of the debate on the role of international criminal justice, the tension regarding the priority of peace versus justice is reflected in two types of arguments. One argument defends the importance of achieving peace irrespective of seeing justice done to the perpetrators. Furthermore, the courts are understood to be politically biased; they may threaten to unravel a fragile peace agreement and

⁷⁶²See the situations and cases currently at the ICC in http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx accessed 30 June 2015. In addition, the Office of the Prosecutor (OTP) is currently conducting preliminary examinations in a number of situations including Afghanistan, Colombia, Georgia, Guinea, Honduras, Iraq, Palestine, Nigeria and Ukraine.

⁷⁶³ Mark Kersten, 'Bringing Conflict into the Peace versus Conflict Debate' (2014) <http://justiceinconflict.org> accessed 30 March 2015. As stated by the author, in Libya, the rebels and their political wing, the National Transitional Council, were deemed to be the 'acceptable' side by the ICC, despite allegations that they too had committed atrocities. In the case of northern Uganda, the legitimacy of President Yoweri Museveni and the Ugandan military (the UPDF) was bolstered by the ICC's myopic focus on their adversaries – Joseph Kony and the Lord's Resistance Army (LRA).

⁷⁶⁴ Marlies Glasius, 'Do International Criminal Courts Require Democratic Legitimacy?' (2012) EJIL 23 (1) 43.

⁷⁶⁵ UN Secretary General, 'Rule of Law Tools for Post-Conflict States: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies', UN Doc. S/2004/616, 23 August 2004.

consequently they impede real peace processes and discriminate against one of the parties (for example as is the case in the African processes regarding ICC).⁷⁶⁶ On the contrary, the arguments favourable to the judicial processes are that prosecution individualises guilt and marginalises abusive leaders, and that it strengthens the rule of law and has a deterrent effect.

1. Victims

The focus of tension is also isolated on the ICC, where the question is whether the institution is really helpful to the victims of war crimes and crimes against humanity and the wider societies that have suffered from such crimes.⁷⁶⁷ In fact, the Preamble of the Rome Statute of the ICC emphasises the interest of the victims in a prominent way, when compared with the Statutes of the ICT for the former Yugoslavia (ICTY) and the ICT for Rwanda (ICTR). Equally, transitional justice places the victims at the centre, particularly taking into account that in transitional societies there are often vast numbers of victims. Taking into account the complexity of the victim identity the key issue is the victims participation in international criminal proceedings, which is non controversial in domestic civil law jurisdictions, but which cannot be so simply translated into the international criminal arena.⁷⁶⁸ The first international standard related to the concept of victim is contained in the Declaration of Basic Principles of Justice for the Victims of Crime and Abuse of Power adopted in 1985.⁷⁶⁹ It defines them as ‘persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States’.⁷⁷⁰ As the term was not considered sufficient in order to offer participatory rights to victims in the framework of the ICC, a causal *connection* between the alleged harm and the accused was added as an additional requirement.⁷⁷¹

The ICC intervention through victims’ participation can empower survivors and engender individual healing and social trust, promoting accountability and the rule of law in post-conflict transitioning societies.⁷⁷² Victim participation in international criminal proceedings strengthens the capacity for autonomous political organisation and for the use of other kinds of mediation and local processes. This is also related to the nature of the Courts procedure and the potential on retributive and restorative justice.⁷⁷³ However, problems arise when the victim has to demonstrate that the suffering is linked to the

⁷⁶⁶Philip Alston and Ryan Goodman, *International Human Rights* (Oxford University Press 2013) 1391.

⁷⁶⁷*Ibid.* Mark Findlay, Ralph Henham, *Beyond Punishment: Achieving International Criminal Justice* (Pelgrave Macmillan 2009); Stephan Parmentier and Elmer Weitekamp, ‘Dealing with War Crimes in Bosnia: Retributive and Restorative Options in the Eyes of the Population’, in Adam Crawford, (ed.), *International and Comparative Criminal Justice and Urban Governance* (Cambridge University Press 2011) 140-167.

⁷⁶⁸Harry Hobbs ‘Victim Participation in International Criminal Proceedings: Problems and Potential Solutions in Implementing an Effective and Vital Component of Justice’ (2014) 49 Texas International Law Journal 4, 1-33.

⁷⁶⁹ Declaration of Basic Principles of Justice for the Victims of Crime and Abuse of Power, General Assembly Resolution 40/34, 29 November 1985, 96th plenary meeting.

⁷⁷⁰*Ibid.*, Annex, para.1.

⁷⁷¹ Rules of Procedure and Evidence, ICC-ASP/1/3, Rule 85 (a) defines victims as ‘natural persons who have suffered harm as a result of the commission of any crime’.

⁷⁷²*Ibid.*

⁷⁷³Mark Findlay and Ralph Henham, *Beyond Punishment: Achieving International Criminal Justice* (2009); Stephan Parmentier and Elmar Weitekamp, ‘Dealing with War Crimes in Bosnia: Retributive and Restorative Options in the Eyes of the Population’, in Adam Crawford (ed.), *International and Comparative Criminal Justice and Urban*

commission of the crime, de facto or de jure. In this sense, the ICC declared that ‘the harm alleged by a victim (...) must be linked with the charges confirmed against the accused’.⁷⁷⁴ This restricts the potential of victim participation in criminal trials, limiting their role to one of witness.⁷⁷⁵

2. International criminal justice and truth and reconciliation commissions

Parallel with this tension, another debate displayed at international level is the relationship between international criminal justice and Truth and Reconciliation Commissions (hereinafter ‘TRCs’). Both institutions have experienced strong growth during the past two decades. Originally, both of them employed radically different methods.⁷⁷⁶ TRCs are established to explore the immediate past of a particular society that has emerged from repression, with the goal of achieving reconciliation by means of exploring the historical record.⁷⁷⁷ In theory, TRCs are antithetical to prosecution as far as they represent extrajudicial commissions for the inquiry of the events of the past. But very often TRCs are established because the new regime lacks the power to embark on prosecution (due to the fact that conditional amnesty is implicit to many TCR processes as was the case in the example of South Africa) and because peace is placed above justice (as was the case of Guatemala in the past).⁷⁷⁸

In situations of transition from mass violence, the ICC can, nevertheless, defer to a national programme whereby only the most responsible are prosecuted and low-level offenders are dealt with by non-prosecutorial alternatives such as truth commissions.⁷⁷⁹

The Rome Statute left unresolved whether the prosecutor in certain situations may choose not to prosecute.⁷⁸⁰ However, the initial conflicts between the two mechanisms have been replaced by a complementary approach, promoting the parallel functioning of international trials and truth commissions.⁷⁸¹ The approach to the justice sector, in the words of the Secretary General of United

Governance (2011), at 140; Kamari Maxine Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge University Press 2009); Mark Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press 2007); Helena Cobban, ‘Think Again: International Courts’ (2006) 153 *Foreign Policy* 22.

⁷⁷⁴*Prosecutor v. Lubanga*, Judgment on the Appeals of the Prosecutor and the Defense Against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, ICC No. ICC-01/04-01/06-1432, (11 July 2008), Reasons para. 2.

⁷⁷⁵ Mariana Pena, ‘Victim Participation at the International Criminal Court: Achievements Made and Challenges Lying Ahead’ (2009-2010) *Journal of International and Comparative Law*, 16 (2) 497-516.

⁷⁷⁶ John Dugard ‘Possible Conflicts of Jurisdiction with Truth Commissions’ in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.) *The Rome Statute of the ICC: A Commentary* (Oxford University Press 2002) 693-704.

⁷⁷⁷ Priscila B. Hayner, *Unspeakable Truths, Confronting State Terror and Atrocity* (Routledge 2001).

⁷⁷⁸ John Dugard ‘Possible Conflicts of Jurisdiction with Truth Commissions’ in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.) *The Rome Statute of the ICC: A Commentary* (Oxford University Press 2002) 693-704.

⁷⁷⁹ Darryl Robinson, ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’ (2003) 14 (3) *European Journal of International Law*, 481-505, Jamal Benomar, ‘Justice After Transition’ in Neil J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, (United States Institute of Peace Press 1995) 32-41 and Emily Schabacker ‘Reconciliation or Justice and Ashes: Amnesty Commissions and the Duty to Punish Human Rights Offenders’ (1999) 12 *New York International Law Review* 1-31.

⁷⁸⁰ Carsten Stahn, ‘Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court’ (2005) 3 (3) *Journal of International Criminal Justice*, 695-720.

⁷⁸¹ Philippe Flory ‘International Criminal Justice and Truth Commissions’ (2015) 13 *Journal of International Criminal Justice* 19-42.

Nations, must be comprehensive in its attention to all of its interdependent institutions, sensitive to the needs of key groups and mindful of the need for complementarity between transitional justice mechanisms.⁷⁸²

As the ICC's jurisdiction is extensive, Dugard affirms that 'it will be called upon to decide whether to recognise the process and decisions of a TRC, either as a bar to prosecution or as a factor to be considered in mitigation of punishment'.⁷⁸³ Contemporary international legal order gives no place to unconditional amnesty, however an intermediate solution such as TRCs is considered an option that may contribute to the achievement of peace and justice in a society in transition, more effectively than mandatory prosecution.⁷⁸⁴ Nevertheless, in order to attain a more accurate picture of the effects of the ICC on the situations in which it intervenes, there is a need to better integrate theories and insights from conflict and peace studies, as well as conflict resolution, into the field of international criminal justice – and vice versa.

In the context of the ICC, most attention is paid to the way in which the Court treats individuals and how those singled out for prosecution are affected, whilst those who are not prosecuted receive little or no attention. Nevertheless, as far as conflict resolution is concerned, a party which the ICC does not focus on, is as important as the one who is. As Kersten says, 'the logical corollary of labelling ICC-targeted parties is that those parties and actors who are not targeted are considered acceptable'.⁷⁸⁵

3. Reparations

As regards reparation to victims, in recent decades, the rights of victims of violations of human rights to obtain reparation has been progressively recognised in IHRL and in the jurisprudence of international tribunals of human rights. This kind of reparation is understood in a wide sense, to include, apart from the traditional economic compensation, symbolic aspects aimed at providing full and fair satisfaction.⁷⁸⁶ Additionally, medical and psychosocial aspects are included, which contributes to the rehabilitation of those who have suffered the consequences of human rights violations. Within this integral concept of reparation,⁷⁸⁷ remembrance policies take on importance and memory becomes an essential ingredient to the reparation owed to the victims.

However, the Statutes of the Tribunals for the former Yugoslavia and Rwanda overlook victims as they cannot take part in a personal capacity in the criminal proceedings and are not entitled to obtain

⁷⁸² UN Secretary General, 'Rule of Law Tools for Post-Conflict States: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies', UN Doc. S/2004/616, 23 August 2004.

⁷⁸³ John Dugard 'Possible Conflicts of Jurisdiction with Truth Commissions' in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.) *The Rome Statute of the ICC: A Commentary* (Oxford University Press 2002) 693-704.

⁷⁸⁴ John Dugard, 'Dealing With Crimes of a Past Regime: Is Amnesty Still an Option?' (1999) 12 *Leiden Journal of International Law* 1001-1015.

⁷⁸⁵ Mark Kersten, 'Bringing Conflict into the Peace versus Conflict Debate' (2014) <http://justiceinconflict.org/2014/12/09/bringing-conflict-into-the-peace-versus-justice-debate/> accessed 30 March 2015.

⁷⁸⁶ Declaration of Basic Principles of Justice for the Victims of Crime and Abuse of Power, General Assembly Resolution 40/34, November 1985.

⁷⁸⁷ Felipe Gómez Isa, 'El derecho de las víctimas a la reparación por violaciones graves y sistemáticas de los derechos humanos' in Felipe Gómez Isa, *El derecho a la memoria* (Diputación Foral de Guipúzcoa 2006) 23-75.

compensation for the harm they suffered.⁷⁸⁸ The Rome Statute appears to be a new step forward as within it, victims are able to take part in the criminal process and to present their views and concerns considering the victims reparation, including restitution, indemnification and rehabilitation.⁷⁸⁹

The first decision of the ICC establishing the principles and procedures to be applied to reparations, was adopted on the 7th August 2012, regarding the situation in the Democratic Republic of the Congo in the *Case of the Prosecutor v. Thomas Lubanga Dyilo*.⁷⁹⁰ The Trust Fund for Victims of the ICC, created according to Article 79 of the Statute,⁷⁹¹ suggested that the Chamber is entitled to apply international law and the standards that have been established in the relevant jurisprudence of the human rights courts, as well as 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 Serious Violations of International Humanitarian Law from 2005.⁷⁹²

Subsequently, the Appeals Chamber of the ICC delivered its judgment on the appeals against the Trial Chamber's 'decision establishing the principles and procedures to be applied to reparations' in the case against Thomas Lubanga, and confirmed the Trial Chamber's finding that reparations programmes should include measures to reintegrate former child soldiers in order to eradicate the victimisation, discrimination and stigmatisation of these young people. It also highlighted that a gender-inclusive approach should guide the design of the principles and procedures to be applied to reparations. The Appeals Chamber found that the Trial Chamber did not err in deciding to award reparations only on a collective basis, and not on an individual basis, and highlighted that the number of victims is an important factor in determining that reparations on a collective basis are more appropriate.

One of the latest contributions of the ICC can be found in the principles of reparation as modified on the 3rd of March 2015.⁷⁹³ The Appeals Chamber found that the Trial Chamber erred in not making Mr Lubanga personally liable for the collective reparations due to his current state of indigence. The Appeals Chamber

⁷⁸⁸ Claude Jorda and Jérôme de Hemptinne, 'The Status and Role of the Victim', in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.) *The Rome Statute of the ICC: A Commentary* (Oxford University Press 2002) 1387-1419, at 1388.

⁷⁸⁹ *Ibid.*

⁷⁹⁰ Judgment regarding the situation in the Democratic Republic of the Congo in the Case of the *Prosecutor v. Thomas Lubanga Dyilo* (Decision establishing the principles and procedures to be applied to reparations) Trial Chamber, ICC No. ICC-01/04-01/06 (7 August 2012) <<http://www.icc-cpi.int/iccdocs/doc/doc1447971.pdf>> accessed 30 March 2015.

⁷⁹¹ The Trust Fund for Victims is funded by voluntary contributions from States, international organizations and other donors. The money collected allows the Fund to fulfill its two mandates, namely the mandate of general assistance to victims in situations where the ICC is active, and the mandate to contribute to the implementation of orders for reparations to victims in particular cases before the Court. The potential of the Fund is analysed in Pedro De Greiff and M Wierda, 'The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints', in K. De Feyter et al., *Out of the Ashes. Reparations for Victims of Gross and Systematic Human Rights Violations* (Intersentia 2005) 225-244.

⁷⁹² 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, UNGA. Res. 60/147, U.N. Doc. A/RES/60/147 (16 December 2005).

⁷⁹³ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012 with amended order for reparations (Annex A) and public annexes 1 and 2, ICC Case No. ICC-01/04-01/06 (3 March 2015).

held that reparations orders must establish and inform the convicted person of his personal liability with respect to the reparations awarded, and that if the Trust Fund for Victims advances its resources in order to enable the implementation of the order, it will be able to claim the advanced resources from Mr. Lubanga at a later date.⁷⁹⁴ This is one of the key amendments of the principle, because it links the responsibility of reparations intrinsically with the convicted. Therefore, Lubanga becomes liable for the reparation of the victims.

Apart from the ICC, the so-called Extraordinary Chambers in the Courts of Cambodia is the first court of this kind which allows victims to participate directly in the proceedings as parties. They can seek collective and moral reparations. In addition, the victims support session is mandated to develop and implement non-judicial measures to serve the broader interests of victims.⁷⁹⁵ In the same vein, the Special Tribunal for Lebanon's approach to reparations is of especial relevance. The Pre-Trial Judge's decisions of 8 May 2012 on Victims' Participation in the Proceedings, authorised 58 of the 73 applicants to participate in the proceedings in the Ayyash et al. case⁷⁹⁶.

4. Domestic *versus* international criminal law

The emergence of the individual criminal accountability model for basic human rights violations means that the disjuncture between the treatment of crime in the domestic and the international realms starts to narrow. In this sense, the Rome Statute blends international and domestic criminal justice systems, with States incorporating Rome Statute definitions of crimes into their criminal codes.⁷⁹⁷ In fact, the EU Council Regulation 2003/444 declares that the ICC 'is an essential means of promoting respect for international humanitarian law and human rights, thus contributing to freedom, security, justice and the rule of law, as well as contributing to the preservation of peace and the strengthening of international security, in accordance with the purposes and principles of the Charter of the United Nations'.⁷⁹⁸ However, this new individual criminal accountability model does not apply to the whole range of civil and political rights but, rather, only to a small subset of rights sometimes referred to as the 'rights of the person' or 'core crimes', especially the prohibitions on torture, summary execution, and genocide, as well as on war crimes and crimes against humanity. This new regulatory model involves an important convergence of international law (human rights, humanitarian, and international criminal law) and domestic criminal law.⁷⁹⁹

Since the 1980s, heads of state and high government officials no longer enjoy the near immunity of the

⁷⁹⁴ICC, Appeals judgment on reparations in the Lubanga case, Questions and Answers (3 March 2015) <http://www.icc-cpi.int/iccdocs/PIDS/publications/Lubanga_QA_03-15_Eng.pdf> accessed 30 March 2015.

⁷⁹⁵Extraordinary Chambers in the Courts of Cambodia, 'Meaningful reparation for Khmer Rouge victims', <www.ecc.gov.kh> accessed 10 September 2015.

⁷⁹⁶ Special Tribunal for Lebanon, *Prosecutor v. Ayyash et al*, Case No. STL-11-O/PT/PTJ, Decision on Victim's Participation in the Proceedings, 8 May 2012, paras. 103 and 104. See also, *Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Bradeddine, Hussein Hassan Oneissi and Assad Hassan Sabra*, Case No. STL-11-01/PT/PTJ, Third Decision on Victims' Participation in the Proceedings, 28 November 2012.

⁷⁹⁷ Peter Dixon and Chris Tenove, 'International Criminal Justice as a Transnational Field: Rules, Authority and Victims' (2013) *The International Journal of Transitional Justice*, 7, 393-412.

⁷⁹⁸Council Common Position 2003/444/CFSP of 16 June 2003 on the International Criminal Court, [2003] OJ L150.

⁷⁹⁹Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*, (The Norton Series in World Politics, W.W. Norton & Company Ink. 2011).

past regarding massive violations of human rights. International and domestic courts have become more active in the prosecution of political leaders, thus leading governments to be more respectful of basic human rights. Some have argued that this new proactive approach could have a negative effect, as leaders fearing prosecution, may simply entrench themselves in power and continue to commit crimes against their nationals.⁸⁰⁰ Nevertheless, ICL has contributed to the assumption that individuals may be criminally responsible for certain acts that constitute international crimes, regardless of the law of their own state. Immunities, to which such officials are entitled under international law, have been set-aside in ICL. However, some tensions remains between the requirements of justice and the need to conduct international relations smoothly, as indicated in the following points:⁸⁰¹

- a. The conciliation of the fundamental principles of criminal responsibility with the jurisdiction of national courts. Particularly, the doctrine examines the interaction between domestic legal systems and the international courts and tribunals, including questions of primacy, complementarity and cooperation. Specifically, in the case of Libya, Democratic Republic of Congo and Central African Republic this problem has emerged.

Only the Preamble and Article 1 of the Rome Statute contain the principle of complementarity. It is also indirectly addressed in Article 17 regarding admissibility issues without being expressly mentioned. Even though it is not defined anywhere in the Rome Statute, the principle of complementarity is conceived as 'central to the philosophy of the Court'.⁸⁰² It is considered the pivotal procedural step balancing the 'complex relationship between national legal systems and the ICC'.⁸⁰³ Under Article 17 (1), a case will be determined inadmissible where:

- i. The case is being investigated or prosecuted by a State, which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- ii. The case has been investigated by a State, which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- iii. The person concerned has already been tried for conduct, which is the subject of the complaint, and a trial by the Court is not permitted under Article 20, paragraph 3;
- iv. The case is not of sufficient gravity to justify further action by the Court.

The principle of complementarity encourages national authorities to exercise their authority to investigate and prosecute international crimes.⁸⁰⁴ Article 17 presumes that national authorities

⁸⁰⁰Kathryn Sikkink, 'Human Rights Trials Strengthen the Rule of Law', *The New York Times* (4 March 2013).

⁸⁰¹Joanne Foakes, 'Immunity of International Crimes?' (2011) Chatam House Briefing Paper 1-2.

⁸⁰² William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 336.

⁸⁰³ William Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press 4rd ed. 2011) 66-67.

⁸⁰⁴Mohammed El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law', (2002) 23 *Michigan JIL* 869-896.

will investigate cases unless exceptions exist.⁸⁰⁵ The transition from primacy to complementarity is due to the fact that the strong invasion into sovereignty was admitted because the ad hoc tribunals were given a very limited territorial jurisdiction, this being due to the fact that they were temporal institutions and specifically created to face threats to peace and security.⁸⁰⁶

- b. Referrals by the Security Council and the political constraints it imposes on the ICC when it decides to refer a case to the Court. The tendency to be selective and arbitrary due to the fact that only some situations of mass atrocity are referred by the Security Council to the ICC, implies an excessive strengthening of the SC powers and is weakening of the controls of the ICC. The present case of Libya is the clearest example of this situation.

Additionally, opinions are divided between those who assume that complementarity applies in all situations and those who argue against that it always applies, except when a situation is referred to the Court by the SC.⁸⁰⁷ The non-applicability of the principle of complementarity can be deduced from two facts: firstly, because the Rome Statue implicitly suggests that complementarity is not applied, and secondly, because the power of the Security Council established by the United Nations Charter extends to the point of conferring primacy over the Court. The problem is to what extent does the responsibility to maintain international peace and security empower the Security Council to annul sovereignty and the principle of complementarity?⁸⁰⁸

In particular, the Security Council has referred the situation in Darfur and in Libya – both involving non-State Parties.⁸⁰⁹ After a thorough analysis of available information, the Prosecutor has opened and is conducting investigations in both of the above-mentioned situations. As established by the ICC, the Council must act within the parameters of Article 13 b) of the Rome Statue. Therefore, the Council will only refer a situation to the Court if it meets the Chapter VII criteria, i.e., the situation constitutes a threat to international peace and security. However, since Article 13 b) does not explicitly refer to the Courts complementarity regime in this case, the question is if the principle extends to the Security Council referrals. The problem has been reflected in the impasse created between the ICC and the Libyan National

⁸⁰⁵Harry Hobbs, 'The Security Council and the Complementary Regime of the International Criminal Court: Lessons from Libya (1 June 2012)' (2013) 9 *Eyes on the ICC*, <<http://ssrn.com/abstract=2428624>> accessed 30 March 2015, 19-51.

⁸⁰⁶Bartram Brown, 'Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals' (1998) (28) *Yale Journal of International Law* 383.

⁸⁰⁷Jahn Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford University Press 2008) 165-166; Jens David Ohlin, 'Peace, Security, and Prosecutorial Discretion', in Carsten Stahn, Göran Sluiter, (eds.), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff 2009) 185; M. Cherif Bassiouni, 'Observations Concerning the 1997-1998 Preparatory Committee's Work' (1997) 25 *Denver Journal of International Law and Policy* 397; Michael Newton, 'The Complementarity Conundrum: Are We Watching Evolution or Evisceration?' (2010) 8 *Santa Clara Journal of International Law*, 115; Rosanna Lipscomb, 'Restructuring the ICC Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan (2006) 106 *Columbia Law Review* 182.

⁸⁰⁸The first referral by the Security Council to the Prosecutor was the situation in Darfur. See Security Council Resolution 1593 (2005), 31 March 2005.

⁸⁰⁹The UN Security Council has referred the situation in Libya by Resolution 1970 (2011), 26 February 2011. Resolution 1593 (2005) was adopted with four abstentions, including of China and the US, and later in 2011, Resolution 1970 was unanimously accepted.

Transitional Council (LNTC), due to the uncertainty as to the applicability of the principle of complementarity under Security Council referrals.⁸¹⁰

- c. Referrals by States. The first three situations before the ICC have been referred to the Court by the States Parties themselves (the Democratic Republic of Congo, Uganda and the Central African Republic). This practice (also known as 'self-referral') is an unforeseen invention developed after the Rome Statute came into force. One original intention of the establishment of the ICC was to address the lack of capacity of States to conduct a trial themselves. However, in some respects, it allows States to focus attention on non-State actors (rather than State agents) and thus foisting on the ICC their obligations to prosecute international crimes.⁸¹¹ Recently, Mali has referred the situation occurring on its territory to the Court.⁸¹²

D. The EU's contribution to enhance human rights protection through the promotion of democracy and international criminal law

The introduction by the EU of a range of human rights provisions in the TEU reflects the shifting of the EU towards its commitment to human rights.⁸¹³ Obligations of the EU regarding human rights can be classified in general terms into two types. Internally, the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights (Article 2 of the TEU). Additionally, the TEU establishes that the EU in its relations with the wider world shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.⁸¹⁴

More precisely, the TEU lists as one of the objectives of EU foreign policy 'to preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the UN

⁸¹⁰ Harry Hobbs, 'The Security Council and the Complementarity Regime of the International Criminal Court', *EYES ON THE ICC* (2012-2013) 19-51. In the case of Libya, in a unanimous vote, the United Nations Security Council adopted Resolution 1970 of 26th February 2011. The UN Security Council's unanimous adoption of resolution 1970 (2011) referring the situation in Libya to the Court, reflects the growing recognition, even among non member States of the Rome Statute, of the importance of the role the ICC plays in combating impunity. It condemned the response of the Gaddafi government to popular protests in Libya, particularly due to the violence carried out against the civil population. It also imposed a series of international sanctions including an arms embargo on the country, banning international travel for 16 Libyan leaders and freezing the assets of Colonel Gaddafi and members of his family and instructing the international prosecutor to investigate the violence in the country, and it approved a series of other measures. The Court responded rapidly as it was unsure of the reaction the Security Council would undertake. In fact, it adopted Resolution 1973 which created a legal basis for military intervention.

⁸¹¹ Darryl Robinson, 'The Controversy over Territorial State Referrals and Reflection on ICL Discourse' (2011) 9 *Journal of International Criminal Justice* 355-384.

⁸¹² Ministère de la Justice, République du Mali, *Renvoi de la situation au Mali*, 13 Juillet 2012.

⁸¹³ Gránie de Búrca, 'The Road Not Taken: The EU as a Global Human Rights Actor', (2011) 105 *AJIL* 649-694 and Ingolf Pernice, 'The Treaty of Lisbon and Fundamental Rights', in Stefan Griller and Jaques Ziller (eds.), *The Lisbon Treaty. EU Constitutionalism without Constitutional Treaty?* (Springer New York 2008).

⁸¹⁴ TEU Art. 3 para. 5.

Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders' (Article 21.2.c of the TEU). As it is affirmed in a FRAME Report,⁸¹⁵ these principles were reinforced when the EU adopted the Charter of Fundamental Rights in 2000, and strengthened still further when the Charter became legally binding with the entry into force of the Lisbon Treaty in 2009.⁸¹⁶

According to this legal framework, the Council adopted its landmark Strategic Framework and corresponding Action Plan for Human Rights and Democracy ('Strategic Framework'), as the roadmap to mainstream human rights into 'all areas of its external action without exception'.⁸¹⁷ The new Action Plan on Human Rights and Democracy (2015-2019), adopted by the Council in 2015, contains a specific chapter dedicated to ending impunity, strengthening accountability and supporting transitional justice. It refers to the following measures:⁸¹⁸

'To conduct a comprehensive evaluation of the implementation of Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court (ICC) and the Action Plan on its implementation; formalise the establishment of an EU/ICC Roundtable, allowing relevant staff to identify common areas of interest, exchange information on relevant activities and ensure better co-operation between the two organisations.

To develop and implement an EU policy on Transitional Justice including through a mapping exercise to identify the EU's experiences, challenges and lessons learned in its support to TJ; provide concrete guidance and training to EU mission staff working on TJ [...]'.

Leaving aside the internal focus of the human rights policy, the EU and its Member States are bound by human rights obligations when they are involved in external action in the field of international security. In that context, the EU is also committed to foster compliance with IHL and ICL. Therefore, it can be affirmed that the intersection between international criminal justice and the EU is found in human rights protection.⁸¹⁹ In fact, international criminal tribunals are regarded as an instrument for the indirect protection of human rights.⁸²⁰

⁸¹⁵ FRAME Deliverable 12.1, *Reporting Mapping Legal and Policy Instruments of the EU for Human Rights and Democracy support* <<http://www.fp7-frame.eu/wp-content/materiale/reports/05-Deliverable-12.1.pdf>> accessed 20 May 2015.

⁸¹⁶ FRAME, 'Report Mapping Legal and Policy Instruments of the EU for Human Rights and Democracy Support', <www.fp7-frame.eu/reports> accessed 20 May 2015, 5.

⁸¹⁷ Council of the European Union, 'Human Rights and Democracy: EU Strategic Framework and EU Action Plan', 11855/12 [2012] Annex II and Annex III. (Strategic Framework on Human Rights and Democracy or Strategic Framework).

⁸¹⁸ Council of the European Union, 'Council Conclusions on the Action Plan on Human Rights and Democracy 2015-2019' 10897/15 [2015]. (New Action Plan on human rights and democracy). Section 22.

⁸¹⁹ Carmen Quesada Alcalá, 'Los retos de la Unión Europea ante la justicia penal internacional en el siglo XXI', in Luis N. González Alonso (dir.) and Assier Garrido Muñoz (coord.), *La Unión Europea y el multilateralismo eficaz ¿Un compromiso consistente con Naciones Unidas?* (Iustel 2011) 311-341.

⁸²⁰ The Rome Statute establishes in its article 21 (3) that the 'application and interpretation of law by the Court must be consistent with internationally recognised human rights'. See Concepción Escobar Hernández, 'La protección

When the international community has engaged in ambitious post-conflict ‘state-building’ projects in, among others, Bosnia-Herzegovina, Timor-Leste, Kosovo, Iraq and Afghanistan, in some instances, the EU took the lead; in others, third states or other relevant multilateral actors were directly involved. Recently, with the Arab revolutions, the contribution that the EU can make to state-building and the promotion of the rule of law and democracy locally was again put to the test. The EU’s engagement also encompasses its contribution to building global frameworks for seeking justice, e.g., by including the promotion of the ICC and the Rome Statute in accession procedures for new Member States and through so-called ‘ICC clauses’ in agreements with third countries.

1. The duty to collaborate with the ICC

The ICC is located at the crossroads of human rights, the rule of law and compliance with international law, so the issue is particularly well suited to reflect on the extent of the EU’s commitment to the values contained in the institution.⁸²¹ Additionally, as the ICC is an instrument for the application of certain rules, but not for the execution of them, it does not have the tools to arrest the persons looked for, nor to execute the sanctions. Therefore, the ‘arms and the legs’ of the ICC are the executive powers of State members and the effectiveness of the Court depends on their collaboration.⁸²² Substantially, the Court obtains assistance from States regarding:

- Surrender persons to the Court: States Parties shall, in accordance with the provisions of the Statute and the procedure under their national law, comply with requests for arrest and surrender and shall authorize, in accordance with its national procedural law, transportation through its territory of a person being surrendered to the Court by another State (Art. 89, par.1 and 3 and 92 par. 1).
- Collaboration in investigations and prosecutions: States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court related to: the identification and whereabouts of persons or the location of items; the taking of evidence, including testimony under oath, and the production of evidence; the questioning of any person being investigated or prosecuted; the service of documents, including judicial documents; the temporary transfer of persons; the examination of places or sites; the execution of searches and seizures; the provision of records and documents (Art. 93.1).
- Access to the territory of State Parties: in order to interview or to take evidence from a person, the Prosecutor may directly execute the measures, following consultations with the requested State (Art. 99.4).

After the Kampala Review Conference (31 May - 11 June 2010), the EU adopted Council Decision 2011/168/CFSP⁸²³ which provides for the particular objective of advancing universal support for the Rome

internacional de los derechos humanos (I)’ in Manuel Díez de Velasco, *Instituciones de Derecho Internacional Público* (Tecnos, 18th edition 2013), 663-696.

⁸²¹ As it is seen in the following pages, the first commitment was recognised in the Council Common Position 2001/443/CFSP of 1 June 2001 on the International Criminal Court, [2001] OJ L155. Elene Aoun, ‘The EU and International Criminal Justice: Living Up to Its Normative Preferences?’ (2012) 5 JCMS 21-36.

⁸²² Eric David, *La Cour Pénale Internationale* (Académie de Droit International de La Haye (Martinus Nijhoff 2005) 358-360.

⁸²³ Council Decision 2011/168/CFSP, 21 March, 2011, para.6.

Statute by promoting the widest participation and cooperation with the Court. In the same vein, the EU's response to non-cooperation with the ICC by third states, has been documented by the COJUR ICC Working Party.⁸²⁴ The lack of collaboration can concern different actors (a Rome Statute State Party or a State not party), different forms of cooperation (such as the execution of an arrest warrant or seizure of assets) and can occur at different points in the proceedings (before or after the confirmation of charges).⁸²⁵

2. The relevant contribution of EU's institutions

The main tools which have guided the EU and its Member States in their activities relating to the ICC are two Common Positions from 2001 and 2003 and the Decision of the Council adopted in 2011, including through initiatives contained in the Action Plans agreed upon on the Common Positions and the Council Decision.

However, initially, the EU-15 did not manage to formulate a common approach to the Rome Conference (15 June–17 July 1998).⁸²⁶ The main stumbling block was that France, as opposed to the other members of the EU, shared with the United States a preference for an institution that would be under the control of the United Nations Security Council. The rest of the EU group were in favour of an independent tribunal. An agreement was reached when France secured the 'opt-out' Article 124 of the Rome Statute, which permits States to refuse ICC jurisdiction over war crimes committed on their territory or by their own national for a period of up to seven years.⁸²⁷ (Notably, on August 13, 2008, France withdrew its invocation of Article 124 and Colombia's seven years period of curtailed jurisdiction ended on October 31, 2009 (Colombia is the other State who invoked Article 124). Nevertheless, no common position was defined until the Preparation Committee negotiations on crucial texts had taken place and most governments felt comfortable going forward without the United States.⁸²⁸ At present, all 28 EU Member States are now States Parties to the Rome Statute with the ratification in 2011 by the Czech Republic.⁸²⁹ EU Member States are also parties of the Agreement on Privileges and Immunities of the International Criminal Court

⁸²⁴ Council of the EU, 16993/13/COJUR 8, 27 November 2013.

⁸²⁵ *Ibid*, para. 3.

⁸²⁶ African States played an invaluable role in ensuring that the Rome Conference negotiations succeeded and were among the first to ratify the Rome Statute (Senegal being the very first state to do so). Additionally, three of the situations currently before the Court were self-referred by States party to the Rome Statute: Uganda, the Democratic Republic of the Congo and Central African Republic. All of the situations currently under investigation by the ICC concern African States.

⁸²⁷ Shana Tabak, 'Article 124, War Crimes, and the Development of the Rome Statute' (2009) 40 *Georgetown Journal of International Law* 1069-1099. To date only two countries have invoked it: France and Colombia.

⁸²⁸ Bruce Broomhall, *International Justice and the International Criminal Court-Between Sovereignty and the Rule of Law* (Oxford University Press 2003) 178; Elene Aoun, 'The EU and International Criminal Justice: Living Up to Its Normative Preferences?' (2012) 5 *Journal of Common Market Studies* 21-36.

⁸²⁹ See the list of States parties of the Rome Statute <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en> accessed 30 June 2015. It took some time for the EU to convince the Czech Republic to become a State party of the Rome Statute. For a broader discussion, see Antonis Antoniadis and Olympia Bekou, 'The European Union and the International Criminal Court: an awkward symbiosis in interesting times' (2007) 7 (4) *International Criminal Law Review*, 621-655.

(APIC).⁸³⁰

The EU has played a key role in supporting and contributing to the establishment of the ICC financially as well as politically. The Statute of Rome would not have entered into force without the support provided by the EU – or at least, it might have come into force significantly later than July 2002.⁸³¹ In fact, the principles of the Rome Statute of the ICC are fully in line with the principles and objectives of the Union. 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 are in conformity with Articles 2 and 3 of the TEU.

As the Rome Statute creates an international criminal jurisdiction complementary to national jurisdiction, it implies that the parties must be international subjects with capacity to attribute to them *ius puniendi* and exercise it, which may only correspond to States. An international organisation such as the EU lacks the power to create and apply its own criminal law. Therefore, the EU as such, cannot be a party to the Rome Statute. The competences attributed by the TFEU to the EU in matters related to political and judicial cooperation in the criminal area are a complement and a tool for the coordination of the State members action, which are not equivalent to the original *ius puniendi*.⁸³²

However, the EU enjoys the status of Observer in the Assembly of States Parties, the political organ charged to deal with the Court's administrative and institutional issues. This double dimension of the EU as Observer and its State Members as States Parties, has to be considered when evaluating the EU's policy regarding the ICC. Each State Member develops its own policy towards this international institution, with one of its chapters consisting of certain policy positions in order to become part of the EU. On the other hand, the EU has formulated a common policy towards the Court, specifically through the Council. The EU's support of the concept and mechanisms of transitional justice is inferred, when the policy provisions of the Commission, Council and EEAS are taken into consideration.

a) The Council

Three years after the adoption of the Rome Statute, the Council adopted Common Position 2001/443/CFSP of 11 June 2001 on the International Criminal Court.⁸³³ Based on the framework of the CFSP, the objective of this first Common Position was to pursue and support an early entry into force of the Rome Statute and the widest participation on the establishment of the Court. Since then, the political support to the Court has been a constant chapter of the CFSP, renewed through Council Common Position 2003/444/CFSP, of 16 June 2003 on the International Criminal Court and Council Decision 2011/168/CFSP, of 21 March 2011 on the International Criminal Court and repealing Common Position 2003/444/CFSP.⁸³⁴

⁸³⁰ See the Agreement on Privileges and Immunities of the International Criminal Court (2002) <[http://legal.un.org/icc/apic/apic\(e\).pdf](http://legal.un.org/icc/apic/apic(e).pdf)> accessed 30 June 2015.

⁸³¹ Alexandra Kemmerer 'Like Ancient Beacons: The European Union and the International Criminal Court – Reflections from afar on a Chapter of European Foreign Policy' (2004) 5 (12) GLJ 1449-1467.

⁸³² Fernando Val, 'La Unión Europea y la CPI: una década de avances' (2012) Papeles para la Paz 104, 50-57.

⁸³³ Council Common Position 2001/443/CFSP of 1 June 2001 on the International Criminal Court, [2001] OJ L155.

⁸³⁴ Council Common Position 2003/444/CFSP of 16 June 2003 on the International Criminal Court, [2003] OJ L150 and Council Decision 2011/168/CFSP, of 21 March 2011 on the International Criminal Court and repealing Common Position 2003/444/CFSP [2011] OJ L 76/56. (The European Union also agreed on an Action Plan to follow-up on the Common Position on 4 February 2004).

During the period between the adoption of the two Council Common Positions, the adoption of the international agreements mentioned in Article 98(2) of the Rome Statute emerged. They are referred to by several terms, including Article 98 agreements, bilateral immunity agreements (BIAs), impunity agreements, and bilateral non-surrender agreements.⁸³⁵ Starting in 2002, the United States began negotiating these agreements with individual countries, and concluded at least one hundred such agreements. Countries that sign these agreements with the United States agree not to surrender Americans to the jurisdiction of the International Criminal Court.

Although formally agreed according to Article 98.2 of the Rome Statute, its compatibility with the treaty is questionable, in particular when the agreements are reached with States which are parties to the Statute. They are doubtful for different reasons: a) these agreements are fulfilled after the entry into force of the Statute with the exclusive aim of eluding unilaterally one of the most relevant obligations of the Rome Statute: the surrender of the accused individuals to the Court;⁸³⁶ b) they imply the refusal to surrender any US citizen and not only those carrying out official duties abroad, which is contrary to that deduced from the reference made to the official capacity of an individual inferred from the term 'sending State' of Article 98.2 of the Rome Statute; c) the refusal to surrender is absolute and unconditional, without any demands that the US national who has not been handed over to the ICC should face trial either in the USA or in the State party to the bilateral agreement and in whose territory the individual has supposedly committed the crime. According to Article 58 (1) (ii) of the Vienna Convention on the Law of Treaties, an agreement between certain parties suspending the operation of a provision of a treaty must not be incompatible with the object and purpose of the treaty. It can be concluded, therefore, that these treaties are not compatible with the Rome Statute. The European Commission was demanding with candidate States during the Bilateral Agreements, not to enter these agreements, shaming those tempted to comply with American demands.

In the framework of Common Position of 2003, the EU concluded the Cooperation and Assistance Agreement between the EU and the ICC (28 April 2006).⁸³⁷ The agreement covers areas such as cooperation with the Prosecutor, exchange of information, testimony of staff of the European Union and the waiving of privileges and immunities. In order to facilitate cooperation and assistance, the

⁸³⁵ Art. 98(2) of the Rome Statute establishes: '*Cooperation with respect to waiver of immunity and consent to surrender*: The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender'.

⁸³⁶ See Concepción Escobar Hernández 'La Corte Penal Internacional: un instrumento al servicio de la paz' (2003) 21 *Revista de Filosofía Política* 5-35; Concepción Escobar Hernández, 'Algunos obstáculos en el proceso de constitución efectiva de la Corte Penal Internacional: la Resolución 1422 del Consejo de Seguridad de las Naciones Unidas y los acuerdos bilaterales celebrados por Estados Unidos' (2002) 54 (2) *Revista Española de Derecho Internacional* 999-1004.

⁸³⁷ Agreement of 28 April 2006 between the International Criminal Court and the European Union on cooperation and assistance, [2006] OJ L 115 (28 April 2006). The Preamble of the Agreement confirms that the collaboration framework between the two institutions will be the CFSP: 'Considering the fundamental importance and the priority that must be given to the consolidation of the rule of law and respect for human rights and humanitarian law, as well as the preservation of peace and the strengthening of international security, in conformity with the United Nations Charter and as provided for in Article 11 of the Treaty on European Union'.

agreement also provides for the establishment of regular contacts between the Court and the European Union and the establishment of the European Union Focal Point for the Court.⁸³⁸ The Agreement legally obliges the EU to cooperate with the Court, the first agreement to legally bind the EU and an international organisation.

The Council also adopted several Decisions in the area of Justice and Home Affairs, with a view to strengthening co-operation among Member States on the fight against impunity of those who have committed genocide, crimes against humanity and war crimes.⁸³⁹ On 15 April 2008, the Council of the European Union agreed on security arrangements for the protection of classified information exchanged between the EU and the ICC.

Having committed at the Kampala Review Conference in 2010, to update its ICC-related instruments, the EU adopted Council Decision 2011/168/CFSP of 21 March 2011 on the ICC, to update its Common Position on the ICC, which was first adopted in 2001 and reviewed in 2003.⁸⁴⁰ The objectives of the Decision are to advance universal support for the Rome Statute by promoting the widest possible participation in it, to preserve the integrity of the 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. To follow up the Decision, the EU agreed the new Action Plan on 12 July 2011. The Action Plan includes several new elements, including concrete measures to be taken on the issues of cooperation with the Court and on the application of complementarity, such as avoiding non-essential contact with individuals subject to ICC arrest warrant, and supporting training for judges and prosecutors. It also encourages the Council Presidency together with the Commission, the EEAS and the Member States to make implementation of the Action Plan a priority.

It must be mentioned that, at a lower dimension, the COJUR-ICC, which works as the Council's working group dedicated to the ICC, contributes to the strengthening of the EU's support for the Court. As a forum where national delegates discuss Court related issues and sort their differences, they contributed to the adoption of the Action Plan of 2011.⁸⁴¹

b) The Parliament

The European Parliament has been one of the earliest and most consistent supporters of the ICC and international criminal justice. Specifically, the Committee on Foreign Affairs (AFET) and the sub-Committee on Human Rights (DROI) can recommend legislative proposals concerning matters relating to international criminal justice and the EU's support for the ICC which are then put to the plenary for

⁸³⁸General Secretariat of the Council, 'The European Union and the International Criminal Court' (May 2010) <http://eeas.europa.eu/human_rights/icc/docs/2010_euandicc_en.pdf> accessed 30 March 2015, 27.

⁸³⁹Decision No 2002/494/JHA of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes [2002] OJ L167; Framework Decision 2002/584/JHA of 2002 on the European arrest warrant and the surrender procedures between Member States, [2002] OJ L 190; and Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes [2003] OJ L118.

⁸⁴⁰ Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court, [2011] OJ L76.

⁸⁴¹Council of the European Union, 12080/11, on the Action Plan to follow-up on the Decision on the ICC (Council Decision 2011/168/CFSP on July 2011), 12 July 2011.

consideration.⁸⁴²

On 17 November 2011, following the drafting of an own-initiative report, the European Parliament adopted the Report on 'EU support for the International Criminal Court (ICC): Facing challenges and overcoming difficulties,'⁸⁴³ committing the Parliament to play an active role in promoting the fight against impunity and the ICC in all EU policies.

Among the most concrete measures suggested in the Report, the Parliament encourages the EU Member States to amend Article 83 of the TFEU to add the crimes under the jurisdiction of the ICC to the list of crimes for which the EU has competences; more specifically, it urges the EU Member States to transfer competences to the EU in the area of identification and confiscation of assets of persons indicted by the ICC, notwithstanding the fact that judicial proceedings are initiated by the ICC.⁸⁴⁴

The Parliament supports, in addition, the ICC's policy of 'positive complementarity', which implies to support the capacity of national courts to investigate and prosecute war crimes.⁸⁴⁵ In this vein, it recognises the current efforts by the Commission to establish an 'EU Complementarity Toolkit' aimed at developing national capacities for the investigation and prosecution of alleged international crimes, and encourages the Commission to ensure its implementation, with a view to integrating complementarity-related activities into aid programmes and achieving better coherence among the various EU instruments.⁸⁴⁶

Groups of Members of the European Parliament (MEPs) also play an important role in demonstrating the EU's commitment to the ICC. In particular, the informal 'Friends of the ICC' group of MEPs as well as other individual MEPs have adopted a proactive role in advancing support for the ICC.⁸⁴⁷

According to the pertinent Parliament's Report of 2011, despite the strong level of support provided by the EU and its Member States to the Court, much remains to be done on the political and diplomatic level. The suggestions provided by the Parliament can be summarised in these main points:

- To ensure that the EU and its Member States structures in charge of the ICC are able to respond to the Court's requests in a timely and effective manner. Ensuring adequate staffing and training levels within the European External Action Service (EEAS), both in Brussels and countries under preliminary examination.
- To integrate the Rome Statute into national legislations of the EU Member States.
- To facilitate the witness relocation and actively participate in and contribute to the ICC Special Fund for Relocations created by the ICC.

⁸⁴² European Parliament, 'Mainstreaming Support for the ICC in the EU's Policies' EXPO/B/DROI/2013/28, Directorate-General for external policies of the Union, Policy Department (March 2014) 20.

⁸⁴³ European Parliament, 'Report on EU support for the ICC: facing challenges and overcoming difficulties' (2011/2109 INI), 25 April 2011.

⁸⁴⁴ *Ibid*, 7.

⁸⁴⁵ *Ibid*, 5.

⁸⁴⁶ *Ibid*, 14.

⁸⁴⁷ The 'EP friends of the ICC' is an informal group of Members of the European Parliament belonging to different political groups and different nationalities who are committed to actively support the ICC.

- To ensure that the CSDP facilitates the Court's requests in a timely and effective manner.⁸⁴⁸

Additionally, a new report of the European Parliament entitled 'Mainstreaming support for the ICC in the EU's Policies' from 2014, claims that more efforts are required of the EU itself and its Member States regarding cooperation with the Court. These recommendations can be summarised as follows:⁸⁴⁹

a) Regarding Member States:

- To make more use of the asset tracing, freezing and recovery capabilities within the EU.
- To consider the possibility of tracing, freezing and confiscating assets upon request directly from the ICC, rather than through Member States.
- To consider the adoption of an Action Plan and Task Force to increase efficiency in combating impunity within the EU;
- To add core international crimes (namely, genocide, crimes against humanity, war crimes) to the list of crimes over which Europol has competence;
- To make use of the European Arrest Warrant for ICC-related arrests, provided that the conditions for its application are present;

b) Regarding the Union:

- The European Parliament should continue to provide high profile political support to encourage cooperation with the ICC by states (both Member States as well as third states);
- Greater emphasis by the EEAS and Commission should be placed on adopting concrete measures to respond to non-cooperation with the ICC to complement the political statements in response to non-cooperation;
- The Spokesperson of the High Representative should continue to issue statements regarding non-cooperation;
- The Council should continue to include clauses in its statements and conclusions reminding states and parties to on-going situations subject to ICC investigations of their obligations to cooperate with the ICC.

c) The Commission

The European Commission also pushes for greater loyalty towards the ICC. It contributed to the elaboration and the implementation of the Action Plans and, as mentioned before, was assertive with candidate states during the BIA affairs, shaming those tempted to comply with American demands. The Commission further promoted the commitment to the ICC as a core EU value by referring to it when reporting on the progress made towards accession by candidate states. However, the Commission did not consider the failure of the Czech Republic to ratify the Rome Statue as an obstacle to its accession to the EU in 2003.⁸⁵⁰ Equally, further inquiry is needed to better grasp the differentiated evolution of the third

⁸⁴⁸European Parliament, 'Report on EU support for the ICC: facing challenges and overcoming difficulties' (2011/2109 INI), 25 April 2011, 17-18.

⁸⁴⁹ European Parliament, 'Mainstreaming Support for the ICC in the EU's Policies' EXPO/B/DROI/2013/28, Directorate-General for external policies of the Union, Policy Department (March 2014) 66-67.

⁸⁵⁰ Elene Aoun, 'The EU and International Criminal Justice: Living Up to Its Normative Preferences?' (2012) 5 Journal of Common Market Studies 21-36. As mentioned before, Czech Republic had finally ratified the Rome Statue on 21 July 2009.

pillar policies and mechanisms with regard the persons responsible for genocide, crimes against humanity and war crimes and the ICC in general.⁸⁵¹

d) *Other measures, institutions and bodies*

Together with the Council instruments, the EU has used other political and diplomatic measures, including statements, declarations, *démarches*,⁸⁵² political and human rights dialogues and ICC clauses as important forms of support for the ICC. In the framework of its political declarations and dialogue, the EU has called for cooperation with the ICC in the context of the Syrian crisis, seeking ways to refer the situation in Syria to the ICC and to support complementary accountability mechanisms.⁸⁵³ As for EU bilateral relations with third countries, the EU also seeks cooperation to strengthen action in support of the universality of the Rome Statute. In this regard, the EU has successfully included ICC clauses in agreements with ACP countries, such as the Cotonou Agreement (revised in 2010).⁸⁵⁴ Within this framework, recipient countries commit to cooperation and dialogue with the EU on good governance, democratic principles, the rule of law and human rights, including support for the ICC.⁸⁵⁵ However, the ICC related clause has only been used as an ‘advocacy tool’ and has not been effectively implemented.⁸⁵⁶ Other ICC-clauses can be found in the EU-Singapore Partnership and Cooperation Agreement adopted on 14 October 2013 and the EU-Thailand Partnership and Cooperation Agreement initialled on 7 November 2013.⁸⁵⁷

Additionally, regional fora such as the African Union and multilaterally, the United Nations, have been used to ensure new ratifications and implementation of the Rome Statute through diplomatic outreach and technical assistance.⁸⁵⁸ Moreover, the EU and its Member States have been active on the Security Councils referral of situations involving non-State Parties to the Statute to the ICC, such as the cases of Darfur, Libya and Syria. In the case of the trial of Kenya’s President Uhuru Kenyatta, the European

⁸⁵¹ *ibid.*

⁸⁵² Since 2002, the EU has carried out over 430 demarches targeting more than 130 countries and international organisations, at the rate of approximately 35 to 45 per year, to encourage the ratification and implementation of the Rome Statute as well as the Agreement on Privileges and Immunities. In <http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP12-POA-2013-EU-ENG.pdf> accessed 11 July 2015.

⁸⁵³ 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, 6 February 2015, 15.

⁸⁵⁴ The Cotonou Agreement succeeded the Yaoundé (1964-1975) and Lomé (1975-2000) Agreements. The consolidated version of the Cotonou Agreement is available at <http://ec.europa.eu/europeaid/where/acp/overview/documents/cotonou-consolidated-fin-ap-2012_en.pdf> accessed 20 May 2015.

⁸⁵⁵ Art. 11 of the Cotonou Agreement forms the ‘standard clause’ to be followed when negotiating agreements, although it is necessary to adopt a case-by-case approach taking into account the different positions on the ICC of the countries with which the EU enters into agreements. See in this respect, General Secretariat of the Council, *The European Union and the International Criminal Court* (General Secretariat of the Council 2010) 12-13.

⁸⁵⁶ Jan Wouters and Sudeshna Basu, ‘The creation of a global criminal justice system: the European Union and the International Criminal Court’, Working paper No. 26 (Leuven Centre for Global Governance Studies, June 2009), 1-28, 20.

⁸⁵⁷ EU Annual Report on Human Rights and Democracy in the World in 2013, 23 June 2014, 34.

⁸⁵⁸ See the Statement on behalf of the European Union and its Member States by Gilles Marhic, Minister Counsellor, Delegation of the European Union to the United Nations, at the 68th United Nations General Assembly on Agenda item 75 (31 October 2013) New York at <http://eeas.europa.eu/human_rights/icc/eu-statements-and-declarations/icc_eu_statement_unga_31102013> accessed 30 June 2015.

members of the Security Council helped to block a motion to postpone the case in 2013.⁸⁵⁹

Furthermore, the Strategic Framework on Human Rights and Democracy adopted by the Council on 25 June 2012 highlights some outcomes and actions for the EU. One of the outcomes is specifically 'responding to violations and ensuring accountability'.⁸⁶⁰ In order to achieve this aim, three main actions are contained in the Strategic Framework:

- Implement the updated Decision on the ICC (2011/168/CFSP), adopted on 21 March 2011 and the associated action plan, including promoting ratifications and implementation of the Rome Statute.
- Give State's primary duty to investigate grave international crimes, and promote and contribute to strengthening the capacity of national judicial systems to investigate and prosecute these crimes.
- Develop policy of transitional justice, so as to help societies to deal with abuses of the past and fight against impunity⁸⁶¹

In terms of their implementation, the EU maintained its systematic *démarche* campaigns in support of the ICC. Additionally, under the EIDHR, funding of more than EUR 30 million has been provided to the global ratification campaigns undertaken by civil society organisations and ICC projects.⁸⁶² Actions of a similar manner are also included in the new Action Plan on Human Rights and Democracy for the next period, 2015-2019.⁸⁶³

As far as other EU institutions and bodies are concerned, in the framework of the European External Action Service (EEAS), we have to acknowledge the work of the High Representative (HR), who plays an essential role in strengthening the EU's commitment to the ICC and international criminal justice at a high level. The HR has called upon cooperation of African states regarding the arrest warrant of Sudanese president Al-Bashir during his visits to several African countries.⁸⁶⁴ In addition, the HR has also reiterated the support

⁸⁵⁹ European Council on Foreign Relations (ECFR) *European Foreign Policy Scorecard 2015* (London, January 2015) <http://www.ecfr.eu/page/-/ECFR125_SCORECARD_2015.pdf> accessed 7 July 2015, 99. <http://www.ecfr.eu/page/ECFR125_SCORECARD_2015.pdf> accessed 7 July 2015, 99.

⁸⁶⁰ Council of the European Union, 'Human Rights and Democracy: EU Strategic Framework and EU Action Plan', 11855/12 [2012] Annex III (Strategic Framework on Human Rights and Democracy).

⁸⁶¹ *Ibid*, 25-26.

⁸⁶² EU Annual Report on Human Rights and Democracy in the World in 2013, 23 June 2014, 34, 45-59.

⁸⁶³ See Council of the European Union, Council Conclusions on the Action Plan on Human Rights and Democracy 2015 – 2019, 10897/15 (Brussels, 20 July 2015) Action No. 22 <<http://data.consilium.europa.eu/doc/document/ST-10897-2015-INIT/en/pdf>> accessed 23 July 2015; Joint Communication to the European Parliament and the Council, Action Plan on Human Rights and Democracy (2015-2019) 'Keeping human rights at the heart of the EU agenda' <https://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy_en.pdf> accessed 23 July 2015.

⁸⁶⁴ EEAS, Statement by the Spokesperson of EU High Representative Catherine Ashton on the visit of Sudanese President Al-Bashir to the Democratic Republic of the Congo, 140227/01, Brussels (27 February 2014) <http://eeas.europa.eu/statements/docs/2014/140227_01_en.pdf> accessed 7 July 2015.

of the international community and the EU itself to end the long-running campaign of terror being carried out in Uganda by Joseph Kony and the Lord's Resistance Army.⁸⁶⁵

In the same framework, Regional EU Special Representatives (EUSR) also have an important role to play in promoting the universality of the Rome Statute. Nevertheless, of all the EUSRs appointed to conflict and crisis situations, only those covering Sudan, Mali, Mauritania and Niger are mandated to support the ICC.⁸⁶⁶ Specific Representatives, such as the Special Representative for the African Union or the ones appointed to the Sahel and Horn of Africa, could play an important role in regions where the ICC is particularly active, assisting partners to cooperate with the Court and fulfil their responsibilities within the system of international criminal justice.⁸⁶⁷

The EEAS could also contribute to the process of mainstreaming support for international criminal justice and the ICC in all areas of the EU's external action, especially in the context of crisis management structures and missions under the Common Security and Defence Policy (CSDP). EULEX Kosovo is the only CSDP mission that has been mandated to support war crimes investigations, despite the presence of numerous CSDP missions in countries where the ICC is active.⁸⁶⁸ In this regard, the EEAS could undertake different actions to strengthen the promotion of the ICC, for instance, the inclusion of the theme of ICC and international criminal justice related issues in human rights strategies and country strategies and the provision of relevant training to EU staff and Member States officials. In addition, EU delegations are required to monitor the cooperation with the ICC by third states, such as situation countries and States Parties, and to provide direct support to the Court on the ground.⁸⁶⁹

E. Conclusions

International criminal law and transitional justice were not the main aim of the EU's foreign policies in their origins. However, the many subsequent efforts made by the EU to ensure a role in these fields can be observed through the numerous references given to them in the provisions of the European Council, the Commission and the EEAS, among other instruments. While in total, they form a body of measures and statements to this end, a comprehensive EU policy for ICL and transitional justice does not exist.

⁸⁶⁵ European Union, Declaration by the High Representative on behalf of the European Union: EU supports Joint Operations Centre to combat Kony's Lord's Resistance Army, 8955/1/12 REV 1 PRESSE 162, Brussels (19 April 2012) <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/cfsp/129645.pdf> accessed 7 July 2015.

⁸⁶⁶ See Council Decision 2013/527/CFSP of 24 October 2013 amending and extending the mandate of the European Union Special Representative for the Horn of Africa; See Council Decision 2014/130/CFSP of 10 March 2014 extending the mandate of the European Union Special Representative for the Sahel.

⁸⁶⁷ European Parliament, 'Mainstreaming Support for the ICC in the EU's Policies' EXPO/B/DROI/2013/28, Directorate-General for external policies of the Union, Policy Department (March 2014) 22.

⁸⁶⁸ See Art. 3 d) Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO.

⁸⁶⁹ European Parliament, 'Mainstreaming Support for the ICC in the EU's Policies' EXPO/B/DROI/2013/28, Directorate-General for external policies of the Union, Policy Department (March 2014) 21-22.

Conclusions

The purpose of this report has been to examine two different dimensions of the applicable regulatory frameworks to human rights violations in situations of conflict. First, the report has analysed *the relationship between the protection of human rights, international humanitarian law, international refugee law and the law of humanitarian assistance, with a focus on vulnerable groups in society (children, internally displaced persons and refugees)*. Second, it has addressed *the relationship between the protection of human rights and promoting democracy and international criminal law and the extent to which the application of international criminal law contributes to the promotion of democracy in post-conflict situations*.

The report has paid particular attention to vulnerabilities or specific needs of different groups in view of the impact of violent conflict on their human rights, as noted in the previous FRAME Report 10.1. This report has provided a legal analysis of the applicable normative frameworks in situations of conflict with a focus on their relationship and mutual interactions. It has identified the key applicable legal frameworks and the areas where they converge or conflict in providing protection to vulnerable groups in society (such as children, women, refugees, internally displaced persons).

In line with the research objectives of the report, this conclusion makes some general assessments before dealing with specific issues.

A. General assessments

In its developments after the Second World War, IHL has enlarged the group of protected persons, to include those who do not participate, or are no longer participating, in hostilities. To this end, it elaborates on the protected status of civilians, victims and non-combatants in armed conflict, through detailed provisions on their treatment, status and rights.

In situations not covered by the Geneva Conventions, in particular internal conflict, civilians are protected by other international branches of international law, which in any case remain applicable in situations of armed conflict. These include human rights law and its inalienable rights, such as the right to life and the prohibition of torture and slavery, international refugee law and international criminal law. More recent IHL-related instruments have extended the scope of the law regarding the means of warfare, in particular those that are indiscriminate or have massively disproportionate effects on the civilian population, such as anti-personnel mines and cluster munitions.

The increasing convergence between these bodies of law responds to attempts made to bridge the protection gap in armed conflict and violent crises. Human rights law constitutes a powerful political tool in structuring the relationship between the individual and the State. However, in weak or failed States, or where part of the territory is contested, the capacity or will to fulfil the sovereign responsibility of protection may be absent. In such cases, the State may retain legal capacity but in practical terms may have lost the ability to exercise it.

As a result, States in which individual rights are most vulnerable to violation may be precisely those which are least able to offer protection. In situations of violent insecurity, non-state actors are often the primary

abusers of human rights and perpetrators of human rights violations. They may also be in de facto control of significant parts of the country or population, sometimes for prolonged periods, and yet not subject to the same legal obligations as State authorities to protect the human rights of civilians in areas under their control.

The analysis of the regulatory frameworks on human rights violations in situations of conflict has shown that they can operate at the same time, combining to create a comprehensive legal framework for protection and assistance. However, the contours and consequences of the interaction between the applicable legal frameworks still remain unclear with respect to setting priorities about *whom* to protect and *how* to provide protection and assistance. There is a need for further research about criteria and (legal, policy) mechanisms to set priorities for protection, including those featuring at the EU agenda for protection of civilians. They will be examined in a forthcoming FRAME report 10.3.

B. The relationship and interactions between IHRL and IHL

An effective convergence between human rights law and international humanitarian law can be developed to extend human rights protection to the victims of conflict and insecurity in particular with regard to vulnerable groups by supporting the incorporation of human rights (ideation, law and policy) in the existing legal frameworks which regulate situations of armed conflict, and by developing human rights law to incorporate explicit provisions governing the interpretation and application of human rights in situations of conflict and violent crisis.

The first conception is formulated under the terms ‘human rights based jus in bello’ referring to ‘a legal framework which governs all questions of armed conflicts in their various forms, which is constituted at its core international humanitarian law, and where human rights law is applied in a complementary or cumulative fashion, while at the same time providing the foundational normative value and operational direction’. This approach ‘goes beyond reconciling norms of international human rights and international humanitarian law’, in so far as human rights are the underlying values of the norms regulating armed conflict, thus aiming at ensuring ‘the highest possible level of protection’. This was the viewpoint advocated in the UN Declaration of Minimum Humanitarian Standards in 1990 which laid out a set of principles ‘applicable in all situations, including internal violence, disturbances, tensions and public emergency, and which cannot be derogated from under any circumstances’. However, this Declaration has no legally binding effect.

The second conception, favouring human rights taking on a greater meaning in conflict situations, will require the development of human rights law rather than IHL, to incorporate explicit provisions governing the interpretation and application of human rights in situations characterised by violent instability, whether armed conflict or a state of ‘emergency’. Such provisions may refer to IHL, or go much further in their requirements to apply the same standards of human rights to those affected by conflict. One example of such a development is the UN Convention on the Rights of the Child of 1989 and its Optional Protocol relating to armed conflict. The CRC is one of the only human rights instruments that formally recognises a complementarity between human rights and international humanitarian law. Thus, the 2000 Optional Protocol asserts that humanitarian law may not in itself remove the need for an explicit articulation of how human rights are to be applied in conflict. The CRC adapts the provisions of a human

rights treaty explicitly to situations of conflict, so that both the rights of the child and the duties of relevant parties in these contexts are clearly stated. The Convention and 2000 Optional Protocol can be considered unique instruments in guaranteeing human rights in conflict.

It is indeed necessary to follow this model of human rights instrument and more detailed guidance on the implementation of human rights in situations of conflict that may be provided by human rights mechanisms.

In the light of the jurisprudence of the ECtHR, which has implications for EU Member States, the Court holds regard to the realities of armed conflict in interpreting and applying the Convention. However, the Court has not been willing to engage and provide more details on how IHL may affect IHRL in conflict situations. At least the need for interpretation of the ECHR in the light of other fields of international law, including IHL, has been acknowledged.

The legal analysis of jurisprudence, decisions of human rights monitoring bodies and practice, point out that an effective convergence between IHL and IHRL, in particular with regard to non-international armed conflicts, can provide a legal basis to extend the applicability of IHRL to non-state actors. IHRL prohibits acts such as genocide, regardless of who the perpetrator may be, and while the official definition of torture requires that the perpetrator is a State official or acting in another official capacity, many non-state armed groups do act in such a capacity. In any event only to the members of non-state armed groups might be held individually responsible under ICL. In this ambit, the convergence between IHL and IHRL can be further developed to extend human rights compliance to non-state actors. In addition to that the practice of the United Nations, as well as that of other international and regional organisations, including the EU, shows that efforts are increasingly being made to hold armed groups accountable at the international level for the violation of international norms. A certain degree of engagement between humanitarian actors and armed groups is also desirable to ensure compliance with IHL and therefore to secure access to people in need of humanitarian assistance.

As for International Organisations participating in an armed conflict, no clear practice as regards IHRL and IHL obligations exists. Even though international Organisations are not, as a general rule, parties to the relevant treaties, their Member States and/or contributing States to peace operations have ratified some of them. The next report in the series, FRAME 10.3, will address the law and practice of the EU in the ambit of CSDP, including crisis management operations and missions and identify the sources of IHL obligations of EU and Member States.

C. The interplay between IHRL, IHL and the legal regime for humanitarian assistance

The research revealed that while protecting civilians from the worst effects of violence and abuse has become prominent on international political, humanitarian and human rights agendas, there are however different conceptions of protection. Despite an increasingly willingness within the international community for humanitarian action, the resort to political and military action to protect vulnerable populations remains inconsistent and it may even result counterproductive under certain circumstances. The main cause for such inconsistency is that security is often prioritised over human rights

considerations, particularly when it comes to the human rights of vulnerable groups. These questions will be specific subject of study in the forthcoming FRAME report 10.3, addressing EU's legal and policy framework on protection of civilians, with a focus on vulnerable groups, and analysing the consistency and coherence of CSDP policy through the analysis of practice (case-studies).

D. The interaction between IHRL, IHL and IRL

The research revealed that there are two existing approaches to the interaction between IHRL, IHL and refugee law. First, a complementary relationship between these three legal branches of law has often been regarded as a way to enhance the protection afforded to refugees. This is the main approach by the ICRC and the UNHCR at the operational level. Regarding the relationship between specific norms of these three legal areas, special attention should be paid to those on internment and non-refoulement of refugees where the complementary application of IHRL, IHL and IRL is necessary to offer a solid protection in this regard.

At the EU level a higher degree of protection is provided as additional forms of protection are stipulated under EU Law, e.g. by the Directive 2011/95/EU.. The Directive broadens the scope of protection at EU level to include those who do not qualify as 'refugees' under the commonly agreed definition and to grant temporary protection under certain circumstances.

The ECHR and CJEU jurisprudence have also contributed to enhance the protection of asylum seekers within the EU as the individuals may not be transferred by a EU Member State to another Member State where there were a risk of being subject to inhumane treatment or where the asylum process does not respect the prohibition on inhuman or degrading treatment.

E. Violations of human rights and humanitarian law and the responsibility to protect

The operationalisation of the second R2P pillar by regional organisations, and the EU in particular, is desirable in terms of prevention of mass atrocities and to assist States in meeting their primary responsibility to protect their populations. The role of the EU as middle-level mediator might be seen as less intrusive than if it were delivered by single States, and therefore encounter less opposition from the receiving State.

In order to advance the development and implementation of the R2P norm, it is necessary to provide an adequate framework as an 'inter-institutional Consensus on R2P', including a common understanding of the implications of R2P for the EU's external action and the role its actions and instruments can play in situations of concern'. It is recognised that the EU should make more effective use of the full range of existing EU policy tools and external action instruments, to address, in a coherent and timely manner, situations of fragility in partner countries. The EU response should therefore combine political, diplomatic, development, security and humanitarian instruments.

Additionally other EU non-coercive policies may also serve to support any pillar of R2P: promoting compliance with international humanitarian law, support for institution-building under the instrument for stability of protection of civilians in CSDP missions and operations. The EU is also determined to

contribute to the prevention and to end impunity of perpetrators for such serious crimes by supporting the effective functioning of the International Criminal Court and other international criminal tribunals.

D. Legal and policy analysis of the relationship between the protection of human rights and the promotion of democracy and international criminal law

The last section of this report revealed that since the entry into force of the Rome Statute, the EU has become a vocal promoter of the ICC worldwide. The EU Member States have overcome a major challenge by ratifying the Rome Statute and the APIC which has improved the credibility of the EU's external and internal policy. However, much remains to be done on the political and diplomatic level, as well as the practical level, for the EU to become an effective key partner to the International Criminal Court.

In order to successfully play its role in assisting the Court to overcome its current challenges and difficulties, some actions are required by the EU and its member states. The EU must first be more proactive and show a robust position in advocating for full cooperation with the ICC in situations where the Court's arrest warrants are ignored or investigations jeopardised, as was the case for Sudan, Libya and Kenya. Second, effective coordination and cooperation is required between national European authorities in order to ensure that the EU does not become a safe haven for impunity. A significant amount needs to be done in the area of Justice and Home Affairs, particularly in the case of Syria, where large numbers of people involved in the commission of international crimes in the course of that conflict (whether as perpetrators, victims or witnesses) are likely to be found within EU borders, as a result of the influx of refugees and asylum seekers arising from the on-going conflict. This will require effective coordination and cooperation between national European authorities. Third, the EU needs to be consistent in promoting universality of the Rome Statute regarding key non-parties, particularly the permanent members of the UN Security Council (notably Russia, China and the United States) to ensure adequate cooperation with the Court. Fourth, closer monitoring of the constant implementation of ICC clauses in agreements with third countries, as well as the impact of its political statements and declarations, is necessary to strengthen the EU's actions.

Finally, it is recommended that the EU design a comprehensive and coherent policy of transitional justice that includes support and recourse to international criminal tribunals, especially to the ICC. Support for war crime investigations should be specifically included in the mandate of EU CSDP missions and Special Representatives.

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