ATLAS

Armed Conflicts, Peacekeeping, Transitional Justice:
Law As Solution

Explanatory Report

Recommendations on International Humanitarian Law and Human Rights Law in Situations of Armed Conflict

Scientific Committee

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SEVENTH FRAMEWORK PROGRAMME

These recommendations and explanatory report are the result of an intense work from the scientific committee together with an important group of experts and academics on international law, international humanitarian law and human rights law. A round-table meeting was held in Brussels on October 20, 2010 to discuss a draft version of the recommendations with stakeholders, experts and academics. Their comments and suggestions were very important to enhance the quality of this final version.

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Introductory Note*

These recommendations are addressed to the European Union, and particularly in regards to its multifaceted actions in the international plane. The European Union is a key player in international relations, a mediator in political crisis, a major donor of humanitarian aid and development aid and, a guardian of international peace and security. Yet the EU is also and potentially a violator of international humanitarian law and international human rights law. Hence, this document contains recommendations regarding both negative and positive obligations, which are indeed two different categories of obligations that convey engagements of different nature from the European Union.

The recommendations are based on the assumption that the European Union is a *community based on the rule of law*, as it has been upheld by EU Courts since Les *Verts v. Parliament*. Consequently, the European Union's acts shall respect human rights, the 1945 UN Charter and, more generally, the principles of the international legal order, in which it actively participates since 1957. The conditions of accession to the European Union as well as its recent conventional practices, such as the undergoing process of accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms, clearly show in practice, the high moral standards embraced by the European Union. These recommendations are inscribed in that highly demanding framework.

The methodology that has been implemented carries along a core consequence: the recommendations do not state only what is –*sein*- but also what is ought to be –*sollen*. Hence, some recommendations are detailed and easy to be operationalised and implemented. Other recommendations are rather the expression of the *"progressive development of international law"*, following the expression of the UN Charter, and thus, are essentially programmatic and long-term oriented, needing political will and concrete complementary measures from the EU and the member states to be actualized. In spite of its strong commitment to peace, the European Union will neither eradicate conflict from the globe nor the breaches to human rights those conflicts conveyed. These recommendations are design to avoid creating unachievable expectations in civilians, who are the first victims of any armed conflict. Nonetheless, they seek to channel EU's competences with the aim of providing it with valuable tools in diminishing suffering and enhancing protection in situations of armed conflict. The EU is to undertake these objectives in harmony with the action of other international organisations such as the United Nations, NATO, and the OCDE.

For so doing, the European Union may implement actions taking place before, during and after conflicts. This threefold development of armed conflicts is reflected in the structure of these recommendations: Preventive actions from the EU, the intervention of the EU in situations of armed conflict and, at last, the role of the EU in post-conflict situations.

Finally, these recommendations bring together two branches of international law, namely, international humanitarian law and international human rights law. The former, *lex specialis* of international law, is applicable particularly to situations of international and non-international armed conflict as the ones addressed by these recommendations. The latter, a general regime, is also applicable in situations of armed conflict. We have widened the scope of this work as to promote through the complementary of these regimes the most favourable protection to civilians, a condition highly regarded by the European Union.

* *Introductory note by Hélène Tigroudja. Translated from French by David Restrepo Amariles*

GENERAL RECOMMENDATIONS*

Recommendation I

The European Union commits itself, by means of a unilateral declaration or any other adequate means, to respect international humanitarian law and international criminal law, in order to favour larger compliance with their rules as well as with human rights law. The EU commits itself to making these binding rules, as well as other applicable rules of customary international humanitarian law, clear and easily accessible to the security forces acting under its mandate.

Explanatory note

The European Union should send a clear and sharp message to the international community, regarding its firm commitment to the promotion and respect of international humanitarian law (IHL), human rights and international criminal law during armed conflicts by adopting a unilateral declaration on that respect or by adopting any other legal measure useful to achieve that objective. A sound European Foreign Security Policy must emphasize both European Union's rights and duties when acting in the international plane.

This political message will contribute to create an international consensus on the importance of political engagement for assuring the respect of international human rights and international humanitarian law worldwide. Indeed, as for IHL, the lack of compliance is clearly linked to lack of political will from the actors involved in armed conflicts. One of the conclusions reached during an ICRC seminar in 2003 stated that "when discussing existing IHL mechanisms, most participants agreed that, in principle, the existing mechanisms were not defective and indeed have great potential, but suffer from lack of use linked to lack of political will by States to seize them."[1]

Certainly more debatable, another legal measure that could be implemented by the European Unions is the ratification of international treaties on these fields, such as the European Convention on human rights, the Geneva Conventions and its Additional Protocols as well as the Rome Statue[2] establishing the International Criminal Court.

The signature and ratification of the European Union of Human rights, IHL and international criminal law instruments will surely open the path for a wider political engagement in the respect of IHL and, at the same time, it will provide a valuable example to the international community of the importance of committing to prosecute international crimes.

Now, there is certainly a controversial question that is yet to be addressed: is it legally possible for the EU to ratify international treaties in these fields? Lets give that question a short glance.

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* The Recommendations were translated from French by Anna Chrisp. The explanatory report original version is English by David Restrepo Amariles.

1 ICRC Report, *"Improving Compliance with International Humanitarian Law ICRC Expert Seminars"*. Geneva, 2003.

2 For a detailed explanation of the relations between the International Criminal Court and the European Union Cf. General Secretariat of the European Council, "The European Union and the International Criminal Court". European Union. Brussels. 2010. Available at: http://alturl.com/9hoic

The European Union is an international organization[3] according to public international law as, and thus, a subject of international law.

The International Court of Justice (ICJ) originally dealt with the notion of *subject of International law* or *international personality* of an international organization in a *Reparations Opinion* rendered in 1949[4]. The Court stated that in a legal order there are indeed several subjects of law with different legal natures, and thus considered, in that occasion, the Untied Nations as a subject of international law with a different legal nature from that of the States. The Court deduced the legal personality of the UN on the basis of its capacity and privileges to conclude international agreements, including with its member states, as well as on the basis of the content of its international mandate according to article 1 of the UN Charter. Indeed, the Court reasoned, that the UN when undertaking measures in the international sphere to accomplish its engagements and goals was in fact "exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane"[5]. Hence, the Court concluded that in spite of the lack of express attribution of legal personality to the Organization by the UN Charter, the attribution of legal personality was indispensable to achieve the ends contained in the charter itself[6].

The legal personality of the European Union was clearly established in article 47 of the Treaty on the European Union as modified by the Treaty of Lisbon – hereafter TEU: "*The Union shall have legal personality"*. Indeed the Treaty of Lisbon did not only rule out the former distinction between the European Economic Community[7] and the European Union[8], but it also equipped explicitly the post-Lisbon European Union with legal personality. In this way, former discussions regarding the legal personality of the Community and the Union were clearly settled, avoiding thereafter, debates similar to those previously held in regards to the legal personality of the UN.

Yet, according to the ICJ 1949 *Reparations Opinion*, once the legal personality of an international organization is settled, it is then necessary to establish the type of acts the international organization is entitled to undertake in accordance to its legal nature, i.e. to establish the capacity of the subject under international law. In particular, we are concerned with the capacity of the European Union to sign and ratify international treaties. This is a twofold issue. On the one hand, we have to examine the competence of the European Union according to European –internal- law to sign and ratify international treaties in the field of international humanitarian law and international criminal law, i.e. *material competence*. On the other hand, we must examine the legal capacity of the

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[3] Although there are certainly ongoing doctrinal debates on the notion of "international legal status" and "international organization" as well as on the notion of "subject of international law" and "international legal personality" there is a large consensus on the international status of the EU as an International organization, and thus as proper subject of rights and duties under international law. See: Naert, F. *"International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the law of Armed Conflict and Human Rights"*, Antwerp, Oxford, Portland. Intersentia. 2010. pp. 261-268; Amerasinghe C.F. "Principles of the International Law of International Organizations", Cambridge. Cambridge University Press. 2005. p. 69.

[4] International Court of Justice (ICJ) Reports. 1949. p. 178/8. Accessible at: http://www.icj-cij.org/docket/files/4/1835.pdf

[5] Ibid. p. 179/9.

[6] Ibid. p. 178/8

[7] Cf. Treaty of Rome, 1957, establishing the European Economic Community

[8] Cf. Treaty of Maastricht, 1992, establishing the European Union.

European Union as a subject of international law to become a contracting party of international treaties.

Concerning the material competence of the European Union according to European law, declaration number 24 of the *Declarations Concerning Provisions of the Treaties* stated that:

> *"... the fact that the European Union has a legal personality will not in any way authorise the Union to legislate or to act beyond the competences conferred upon it by the Member States in the Treaties."*

The origins of this declaration can be traced back to the *Opinion 2/94, 1996* of the Court of Justice of the European Communities. The Court stated that the former European Community had to act, internally and internationally, within the limits of the powers, explicitly and implicitly[9], conferred to it by the Community treaties as well as according to the objectives assigned to it therein[10].

Similarly, pursuant article 4 and 5 of the TEU, we must address the question of whether the post-Lisbon European Union has been explicitly or implicitly conferred with the power to enact rules on humanitarian and criminal law or, whether it would be entitled to undertake those measures pursuant article 352 of the Treaty on the Functioning of the European Union (TFEU) as they would be considered necessary for achieving the objectives of the Union.

We will focus on the powers conferred to EU by the Treaty of Lisbon. Indeed, the EU has been conferred with important competences in matters of Foreign Policy and questions relating the Union's security pursuant *Title V* of the *Treaty of Lisbon (TL)*. Article 21, paragraph 2 of the TEU clearly states that the EU should pursue common policies and actions to:

> *"(b) consolidate and support democracy, the rule of law, human rights and the principles of international law;*
> *(c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter..."*

For so doing, the EU engages itself in the international plane by means of mechanisms based on the Common Security and Defence Policy (CSDP) such as deploying peacekeeping operations and rule of law missions[11]. These activities are merely an implementation of

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[9] The theory of "EU implicit powers" according to which the former EU Community held powers others than those expressly conferred to it by the treaties if they were necessary to achieve the Communities' goals was developed by the *CJEC Opinion 2/94 of 1996*. The CJEC following an international law theory developed in a 1940 ICJ Opinion (Rec. 1954, p. 174) ruled that whenever a treaty confers the Community the legislative competence for a subject matter, the Community is entitled to adopt measures, including the adoption of international agreements, to develop the referred subject matter, even if those legislative competences were not expressly conferred to it. Yet, the Community "cannot have recourse to an alternative procedure, for example, in order to adopt a measure which would not be the very decision envisaged at a given stage or which would be adopted in conditions different from those required by the applicable provisions. (CEE v. Council of the European Union 13/07/2004, Aff. C-27/04, Rec. 2004, P. I-6649, § 81).

[10] Cf. Court of Justice of the European Communities, *Opinion 2/94 of 1996*. p. I-21, N. 23. Cf. also Treaty of Lisbon articles 4 and 5.

[11] Cf. Schwok, R. & Mérand, F. *"L'Union européenne et la securité internationale"*, Louvain-la-Neuve. Académie-Bruylant. 2009.

the material competence of the European Union in the field of Foreign Policy and Security that comprises, additionally, the use of force in the international sphere. Hence, considering that the European Union can appeal to the use of force in the international plane it seems logically to ask it to bind itself to international mechanisms providing the limits to the use of that force, i.e. treaties on international humanitarian law and international criminal law.

Now, concerning the capacity of the European Union as a subject of international law to become a contracting party of international treaties one must recall once again the ICJ 1949 *Reparations Opinion* where the Court stated that:

> *"Whereas a state possesses the totality of international rights and duties recognized by international lawn, the rights and duties of an entity such as the Organization [UN] must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice."*[12]

The treaty-making capacity of international organizations is far from being a settled issue in doctrinal discussions[13] and international treaty-based law[14]. Yet, there is a certain degree of recognition, basically on the basis of the *ICJ Reparations opinion*, that certain international organizations may have the capacity, within its powers, to create new international obligations and rights. As for the European Union its treaty-making capacity was explicitly established in matters concerning its Foreign and Security Policy by article 24 of the TL[15]:

> *" The Union may conclude agreements with one or more States or international organisations in areas covered by this Chapter."*

Article 216 of the Treaty on the Functioning of the European Union confers a wider treaty-making power to the European Union:

> *"1. The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.*

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[12] ICJ Reports. 1949, Op. cit. p. 180/10.

[13] Cassese, A. *"International Law"*, Oxford. Oxford University Press. 2001. pp. 72-74; Chiu, H. *"The Capacity of International Organizations to Conclude Treaties, and the Special Legal Aspects of the Treaties so Concluded"*, The Hague. Nijhoff. 1996; Naert, F. 2010. Op. cit. pp. 293-303.

[14] The Vienna Convention on the Law of Treaties (1969) and The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (not yet in force) do not provide any clear indication either on the inherent treaty-making capacity of International organizations or on the extent of the capacity of international organization with treaty making-power. Article 6 of The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organization states that: "*The capacity of an international organization to conclude treaties is governed by the rules of that organization."*

[15] Cf. Naert, F. 2010. Op. cit. pp. 334-346, who provides an excellent account of the debates on the treaty-making capacity of the European Union.

> *2. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States."*

It seems obvious to add that the Council pursuant article 218, N. 11 of the TFEU may request the opinion of the Court of Justice as to whether an envisaged signature and ratification of international law instruments in the field of humanitarian and criminal law by the European Union is compatible with the Treaties. Additionally, the Council may require pursuant article 218 TFEU the consent of the EU Parliament before concluding the accession.

Whether the EU opts for adopting a unilateral declaration, ratifying the treaties or implementing intermediary or mixed measures, it should made available to its forces, in a clear manner the binding rules that should guide their action in the field. Indeed, as part of the Common Foreign and Security Policy (hereafter CFSP) the European Union has launched since 2003 several peacekeeping and crisis management operations all over the world from Bosnia & Herzegovina to Asia, Africa and the Middle East.

The European Union counts up to present with more than 10 military missions including EUPOL COPPS, EUPOL, EUFOR, EULEX and other training and assistance missions such as EUBAM, EUSEC, etc[16]. Indeed, similarly to UN peacekeeping operations[17], European Union CSDP-based operations seem to be increasing in scope, complexity and size. Responding to this increasing international military role, recommendation number one proposes, following UN practices, to provide the EU military missions with a clear mandate that integrates international humanitarian law rules to be respected during the operations.

The UN has taken during the last 50 years several measures to guarantee compliance with IHL as requested by the ICRC Memorandum entitled *Application and dissemination of the Geneva Conventions* of 10 November 1961. The ICRC addressed this Memorandum to the States parties to the Geneva Conventions and Members of the UN, drawing the attention of the UN Secretary-General to the need of ensuring application of the Conventions by the forces placed at the disposal of the United Nations.

Thereafter, when the United Nations decides to deploy its forces, the UN Security Council usually stresses, in the mandate, the obligation of the forces to respect the UN Charter, international human rights law and international humanitarian Law. Additionally, the UN has recognized the applicability of IHL to UN forces in article 20 of the Convention on the Safety of United Nations and Associated Personnel (1995). It states:

> *"Nothing 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*

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[16] For a detailed information on the European Union's missions around the world, visit the website of the Council of the European Union in Security and Defence section. Available at: http://www.consilium.europa.eu/showPage.aspx?id=268&lang=EN

[17] Declaration of Mr. Guéhenno (Under-Secretary-General for Peacekeeping Operations) during his intervention in the UN Fourth Committee of the General Assembly (Political and Decolonization Committee), on 31 October 2007.

standards;"

Yet, the key UN document setting out the fundamental principles and rules on IHL binding UN forces in situation of armed conflict is the 1999 Secretary-General's Bulletin[18]. This document clearly identifies the main issues related to the application of IHL to UN forces such as the field of application of IHL, the type of violations, the means and methods of combats, the protection of civilian population, etc.[19] following recognized dispositions of international humanitarian law instruments such as the Geneva Conventions.

The European Union, in turn, seems to have overlooked a straightforward approach to the subject[20]. The IHL guidelines recently published by the EU[21] remain a timid approach to this core subject of international relations and international law. As far as the European Union does not legally bind itself by means of enforceable acts it lays back on the will of its forces, its member states and hopefully on the framework nation[22], to guarantee the due respect to the fundamental rules of war.

Yet, a firm engagement of the EU on the respect of IHL would allow it to enter into dialogue with international allies, and particularly with the United States, to ensure that the deployment of forces in external armed conflicts complies with International humanitarian law and international human rights law.

The EU could materialize its engagement to respect IHL by enacting an Interinstitutional Agreement listing the IHL norms by which all EU missions should abide during their operations. The Council will call EU forces to respect this Interinstitutional Agreement in the considerations of Council Decisions deciding to deploy military personnel in third countries. Alternatively, the EU may clearly state in each particular mandate the IHL norms binding each deployed EU-led force during its operations.

Finally, this recommendation considers that more detailed information on the IHL rules by which EU operations must abide will also be of great benefit to the troops. It will contribute to a better protection of military personnel in the field as they will have a clear concept of the actions that they are permitted to undertake and those that they are not. In that way, clear mandates to EU forces would additionally become a mechanism providing soldiers with unambiguous guidance to avoid future prosecutions for violation of IHL

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[18] Secretary-General's Bulletin ST/SGB/1999/13, 6 August 1999, on the Observance of United Nations Forces of International humanitarian law.

[19] Cf. Palwankar, U. *"Applicabilité du droit international humanitaire aux Forces des Nations Unies pour le maintien de la paix"*, Revue International de la Croix-Rouge, N. 801. pp. 245-259; Ryniker, A. *"Respect du droit international humanitaire par les forces de Nations unies*", Revue International de la Croix-Rouge, N. 836. 1999. pp. 795-805 ; Kolb, R., Poerreto, G., Vité S., "*L'applicabilité du droit international humanitaire et des droits de l'hommes aux organisations internationals*", Bruxelles. Bruylant, coll. Du Centre Universitaire de droit international humanitaire, 2005.

[20] Cf. Ferraro, T. *"Le droit international humanitaire dans la politique étrangère et de sécurité de l'Union européenne",* Revue International de la Croix-Rouge, Vol. 84, N. 846. 2002. pp. 435-461.

[21] European Union Guidelines on promoting compliance with international humanitarian law. 2005/C 327/04. 23.12.2005. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:327:0004:0007:EN:PDF

[22] The concept of *Framework* nation widely used by the Western European Union and NATO has been more recently implemented by the European Union in its CFSP. The *Framework nation* is a member state that carries specific responsibilities in an military operations over which the EU exercises political control, including planning, command and control, and legal guidelines. Cf. Recommendation N° 826 WEU, Adopted by the Assembly on 3 December 2008 at the 2nd sitting; Article 3 of the Council Joint Action 2003/423/CFSP of 5 June 2003 on the European Union military operation in the Democratic Republic of Congo (ARTEMIS). OJ. L. 143. 11.6.2003. p. 51.

norms. In this respect, an illustration on the self-understanding of UNIFIL soldiers on the Geneva conventions may be useful:

> *"UNIFIL soldiers were asked if they had ever heard of the Geneva Conventions or the laws of armed conflict. Fortunately 98% said "yes". And even more fortunate, 86% said they would like to know more about it. But then, unfortunately: "did you receive adequate instruction from your national army on meaning and relevance of the Geneva Conventions?" 71% said "no". The questionnaire continued and asked: "do you think the Geneva Conventions have any relevance in peacekeeping missions?". 71% said "yes". And then another good thing, I would say: "the last time you received military instruction on the Geneva Conventions?" 67% said "during my UNIFIL training" – the pre-deployment training. Then: "how would you rate your own understanding of the Geneva Conventions?" 65% said poor."*[23]

In brief, this recommendation, even if arguable, seems politically and legally feasible for the European Union. The European Union by legally binding itself to respect IHL, human rights and international criminal law will send a clear political message to the International Community of the ethical principles underpinning its decision-making processes and its agreements with third countries. Moreover, it will be a great opportunity for the EU to provide backing to the consolidation of international public law.

[23] Intervention of Colonel Ben Klappe: "*The Applicability of IHL to Peace Operations – the perspective of the United Nations*". Plenary Session, Round-table in International Humanitarian Law organized by the International institute of Humanitarian Law. September 6, 2008.
Accessible at: http://tableronde08.blogspot.com/2008/11/applicability-of-ihl-to-peace.html

EUROPEAN UNION ENGAGEMENT IN CONFLICT PREVENTION AND IN THE PREVENTION OF VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW

Recommendation II

The EU, when developing its foreign policy and particularly in its relations and dialogue with third states and other international organisations, commits itself to integrating the principle of respect for the conventional and customary rules of international humanitarian law as a central component of its partnerships and actions.

Explanatory note

The European Union's Foreign Policy and preventive diplomacy shall grant greater importance to the promotion and respect of international humanitarian law. Particularly, the EU may propose clauses on the respect of IHL when entering into bilateral and multilateral dialogues and agreements with third states and other international organizations. The mutual engagement on the respect of IHL is a powerful and meaningful way of assuring allies that the European Union is playing with pre-established rules by which it will also abide.

The European Unions has often declared in public statements its commitment to respect international humanitarian law and customary international humanitarian law. Moreover, the EU has preached before the international community for an early ratification of the statue of the International Criminal Court as means to try serious crimes and violations of humanitarian law:

> *"The Union particularly welcomes the adoption of the Statute of a permanent International Criminal Court to try the most serious crimes and violations of humanitarian law of concern to the international community and calls for an early ratification of this statute."*[24]

The EU guidelines on IHL do consider the importance of dialogue with third states and international organizations to promote compliance with IHL:

> *"16. The EU has a variety of means of action at its disposal. These include, but are not limited to, the following:*
> *(a) Political dialogue: Where relevant the issue of compliance with IHL should be brought up in dialogues with third States… However, the EU should also, in peace-time, call upon States that have not yet done so to adhere to, and fully implement, important IHL instruments, such as the 1977 Additional Protocols and the ICC Statue…*
> *(e) Cooperation with other international bodies: Where appropriate, the EU should cooperate with the UN and relevant*

[24] Declaration of the European Union on the occasion of the 50th anniversary of the Universal Declaration on Human Rights. Vienna, 10 December 1998. Accessible at: http://ec.europa.eu/external_relations/human_rights/docs/50th_decl_98_en.pdf

regional organisations for the promotion of compliance with IHL…"[25]

This public engagement of the European Union to promote and respect IHL could be taken further as means to prevent violations of IHL during future conflicts[26]. The promotion of compliance with IHL in third states and other international organizations is more likely to succeed when it is undertaken in times of peace and as part of mutual agreements. Dialogue is a useful instrument to create close relations with other international organizations and third states, and it constitutes, undoubtedly, the main icebreaker when dealing with delicate international issues. Yet, dialogues must be materialized in bilateral and multilateral agreements in benefit of both the European Union and the concerned states and organizations.

The European Union by agreeing to respect international humanitarian law and customary international humanitarian law as part of its foreign relations policy with third countries and other international organizations acts as a multiplier of IHL. In so doing, the EU could contribute to set strict compliance with IHL as a minimum and necessary standard in international relations worldwide. Following its position in regards to cooperation in matters of counter-terrorism with the US[27], the European Union should set strict compliance with IHL as a precondition of dialogue and cooperation in its foreign relations agenda.

[25] European Union Guidelines on promoting compliance with international humanitarian law (IHL), (2005/C 327/04), N. 16, (a), (b).

[26] The European Union counts with several important instruments on conflict prevention such as the European Security Strategy (ESS), EU Programme for the Prevention of Violent Conflicts and, the Conflict Prevention Guidelines.

[27] Cf. European Parliament, Directorate-General for External Policies of the Union, *"Current Challenges regarding respect of Human Rights in the Fight Against Terrorism"*. Briefing Paper. 2010. p. 16. On this occasion the EU affirmed that any dialogue with the US on counter-terrorism would need to press for strict compliance with international humanitarian law.

Recommendation III

To this end, and particularly in terms of its foreign aid policy towards states experiencing armed conflict or likely to experience it, the EU endeavours to employ 'conditionality' mechanisms to favour conflict prevention and the prevention of violations of international humanitarian law within these states.

Explanatory note

The European Union should recognize that respect to international law and, particularly, to international humanitarian law constitutes an important asset for development[28]. In that sense, the EU should implement mechanisms of *political and legal conditionality* as an integral part of its Development Aid and Foreign Policy to favour the implementation and respect to international humanitarian law in countries, either hosting an armed conflict or at risk of entering into an armed conflict (henceforth countries at risk).

The use of conditionality measures has been in the agenda of international relations for at least 50 years. Yet, as political intervention of donors has increased in the last 20 years, conditionality shifted from economic to political objectives. If there are ongoing debates on the ethical and strategic convenience of using conditionality measures in foreign relations[29], they remain nowadays widely accepted and practiced by the European Union. Yet, we must clarify the blurred distinction existing between political and legal conditionality[30]. The former, involves withholding assistance and cooperation in economic, social and political matters as means to meet specific foreign policy objectives such as to start peace negotiations, conduct elections or enhance rights and protection to labour unions. The latter, involves withholding humanitarian assistance and cooperation in response to violations of international humanitarian law and international human rights law.

The European Union should implement both type of conditionalities as part of its Development Aid Policy, and in general, as part of its Foreign Policy, including its CFSP[31]. The Council regulation 1257/96 does imply to a certain extent that respecting international humanitarian law is an important condition within the framework of humanitarian assistance. Nonetheless, the EU should go further by incorporating clauses of conditionality as part of bilateral and multilateral agreements signed with countries at risk. The clauses should endow the EU with the possibility of withholding humanitarian assistance and economic cooperation if IHL is not respected.

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[28] There is little or no reference at all in EU documents and policies considering respect to IHL either as an objective or as an important pillar and asset of development. Cf. "European Union Development Policy: The European Consensus on Development", European Parliament resolution on a Joint Statement by the Council and the representatives of the Governments of the Member States adopted on December 15, 2005. OJ C 286E , 23.11.2006, pp. 507–508.

[29] Barfod, M. *"Humanitarian Aid and Conditionality: European Community Humanitarian Office's (ECHO) Experience and Prospects under the Common Foreign and Security Policy"*. Report *Terms of Engagement: Conditions and Conditionality in Humanitarian Action*. Conference organized by the Overseas Development Institute and the Centre for Humanitarian Dialogue, Geneva, 2000. HPG Report, 2000. p. 38.

[30] Ibid. pp. 37-38.

[31] We do acknowledge that the Treaty of Lisbon establishes a different legal basis and procedures for taking decisions, on the one hand, on trade/aid suspension measures and, on the other hand, on CFSP-related sanctions. Cf. European Commission, External Relations, "Type of Sanctions in EU LAW: Respecting Human Rights and Fundamental Freedoms and EU/UN Sanctions: State of Play". 2009. Accessible at: http://ec.europa.eu/external_relations/cfsp/sanctions/docs/index_en.pdf

There are several agreements currently signed by the European Union that could be complemented with conditionality clauses on IHL at their renewal.

The Scheme of Generalised Tariff Preferences (GSTP)[32] establishing trade preferences to developing countries does contain, in the preamble, the possibility of adopting restrictive measures:

> *" (18) ... serious and systematic violations of the principles laid down in the conventions listed in Annex III so as to promote the objectives of those conventions and to ensure that no beneficiary receives unfair advantage through continuous violation of those conventions."*

Yet, the conventions listed in Annex III as reason for temporary withdrawal of the preferences do not include violations of International humanitarian law. The SGTP should incorporate in the next renewals IHL violations as a reason for withdrawing the trade benefits granted to countries at risk.

Similarly, other agreements such as the COTONOU agreement could be complemented with conditionality clauses on the respect of IHL. Moreover, the EU could provide support to its conditionality clauses through already existing provisions in agreements binding the beneficiaries of development aid or economic cooperation. The EU could, for example, appeal to article 2 (n) of the Georgetown Agreement as the basis of a conditionality clause, when establishing mechanisms of cooperation with the African, Caribbean and Pacific Group of States (ACP). Articles 2 sets as an objective of the ACP Group to:

> *n) contribute to strengthening regional mechanisms for the prevention, management and peaceful settlement of conflicts and by pursuing and developing cooperation between ACP States and third States,"*

Nonetheless, to guarantee the effectiveness of political and legal conditionality the EU should follow some basic criteria[33]. When appealing to conditionality measures, the EU should take into consideration that increasing compliance with IHL in the long run requires efforts to create local ownership of IHL. Additionally, the EU should be aware that objectives pursue might change depending on the target group. Similarly, the EU should create synergies with other EU and non-EU donors in order to enhance coordination in setting and achieving common IHL-related goals. Finally, the EU should decentralised donor decision-making and performance-evaluation to enable rapid engagement and disengagement in response to the local situation.

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[32] Council Regulation (EC) No 980/2005 of 27 June 2005 (OJ L 169, 30.6.2005, p. 1). The SGTP was established to contribute to EU objectives on development policy, in particular the eradication of poverty and the promotion of sustainable development and good governance in developing countries.

[33] Stokee, O. *"Aid and Political Conditionality: Core issues and State of the Art"* in: Stokee, O. (ed.) *Aid and Political Conditionality*. EADI Book Series 16. London. 1995; Frank Cass Nelson, J. *"Promoting Policy Reforms: The Twilight of Conditionality World Development"*, Vol. 24, issue 9. pp. 1551- 1559. Also Cf. Macrae, J. & Leader, N. *"New Times, Old Chestnuts. Background Papers"*, Report *Terms of Engagement: Conditions and Conditionality in Humanitarian Action*. Conference organized by the Overseas Development Institute and the Centre for Humanitarian Dialogue, Geneva, 2000. HPG Report, 2000. pp. 12-13.

Besides conditionality clauses implemented by the Council as part of the Development Aid and Foreign Policy, the European Investment Bank could play a central role conditioning investment, donation and loans to adequate work on the field of human rights and international humanitarian law[34]. The EIB could implement conditionality clauses in its agreements and joint action plans with countries at risk. Of main importance for this matter are the partnerships with African, Caribbean and Pacific countries (ACPs), Overseas Countries and Territories (OCTs) and Asia and Latin America (ALA). Similarly, the EIB's programmes for Euro-Mediterranean Investment and Partnership (FEMIP) and the EU Eastern Neighbours could be complemented with new conditionality clauses in the filed of international humanitarian law.

Finally, for operationalising decision-making concerning the activation of conditionality clause it would necessary to set up monitoring mechanisms. For so doing, the annual *Aid for Trade monitoring report* elaborated by the European Commission could include a summary section on the main efforts and failures of countries at risk in implementing and applying IHL. Another possibility would to be demand to the European Parliament Subcommittee on Human Rights to provide an annual report of IHL-Compliance by countries at risk with the aim of evaluating the possible activation of conditionality clauses.

[34] The EIB could implement conditionality clauses in its several agreements for both donation and lending with developing countries. Of main importance for this matter are the partnerships with African, Caribbean and Pacific countries (ACPs), Overseas Countries and Territories (OCTs) and Asia and Latin America (ALA). Similarly, the EIB's programmes for Euro-Mediterranean Investment and Partnership (FEMIP) and the EU Eastern Neighbours could be included

Recommendation IV

The EU endeavours to raise awareness among European businesses and other private actors who may be implicated either directly or indirectly in conflict situations on the respect for the rules of international humanitarian law.

Explanatory note

The European Union should acknowledge that new non-state actors, private in nature, and having distinctive roles to play within the conflict, are potential violators of international humanitarian law. Consequently, the EU should on the one hand, make public statements calling EU private actors to respect IHL and, on the other hand, implement mechanisms to sensitize EU private actors in the importance of respecting international humanitarian law.

Private actors can be divided, for this purposes, at least, into two[35]: multinational corporations[36] and private contractors[37].

The EU should take measures to promote awareness of, and respect for, international humanitarian law among European enterprises having industrial and commercial activities directly or indirectly related to an armed conflict in both countries hosting an ongoing armed conflict and countries at risk of entering into one (henceforth countries at risk). EU enterprises will benefit from those measures as they could prevent to engage their responsibility and the responsibility of their workers in violations of IHL, which also are often criminalized under national criminal legislations.

A study submitted in 2009 to the European Parliament on that matter encouraged the EU to:

> *"Seek to clarify the question of the possibility to prosecute multinational corporations before international courts and tribunals for violations of humanitarian law"*[38]

If this recommendation remains of actuality[39], it does not mean that private actors are currently unaccountable for violations of international law. International humanitarian law does not only bind states, armed forces and organized armed groups, but also other actors who may violate its rules within the framework of an armed conflict[40]. Multinational corporations operating in countries at risk have thus a significant risk of

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[35] This distinction is used here only for clarity purposes, although the ICRC develops further this distinction and considers it meaningful for understanding their differentiated rights and obligations under IHL. Cf. For the ICRC, their relationship with the private sector relates to both business enterprises and private military/security companies. Cf. http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/private_sector?OpenDocument

[36] The ICRC has a complete website with information on the relation between business enterprises and IHL: http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/private_sector?OpenDocument

[37] The ICRC has a complete website with information on the responsibility of private military/security companies and IHL: http://www.icrc.org/web/eng/siteeng0.nsf/html/privatisation-war

[38] Study requested by the European Parliament. Wouters, J. & Hachez, N. "*Business & human rights in EU external relations: Making the EU a leader at home and internationally"* 2009. P. 36.

[39] The responsibility of transnational corporations for the violation of IHL is indeed a core question that has been often raised since the early 2000 but that has been rarely addressed by internationalist and the legal doctrine. Cf. Banfield, J., Haufler, V., Lilly, D. *"Transnational Corporations in Conflict Zones: Public Policy Responses and a Framework for Action"*. International Alert. 2003. pp. 54-55.

[40] Cf. CEDH, Van Anraat c. Pays Bas. *Décision sur la recevabilité.* 6 juillet 2010. (requête 65389/09)

criminal and civil liability for violation of IHL, when their business enterprises or their representatives either commit or knowingly assist violations carried out by others, such as contractors, subsidiaries or clients[41]. Indeed, International humanitarian law states that not only perpetrators, but also their superiors and accomplices[42] may be held criminally liable for the commission of crimes with in the framework of an armed conflict[43]. As mentioned above, multinational corporations have a great risk of violating IHL when operating in countries at risk and, particularly, on the basis of complicity[44].

The second group of private actors who may be involved in the violation of IHL are private contractors. These are non-state actors executing activities directly related to an armed conflict. Private contractors range from NGO's and transnational corporations to private military and security companies (PMSCs). The European Union should also sensitize that EU-based private contractors, and particularly, EU-based PMSCs, to respect international humanitarian law when operating in conflict-prone zones. PMSCs can be defined as:

> *"...private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel."*[45]

In that sense, the EU should restate the importance for EU-based PMSC to comply with IHL by means of a joint declaration (Council-Parliament) supporting the Montreux Document[46] and inviting EU member states that have not joined the document to do the same.

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41 Cf. ICRC, *"Business and International Humanitarian Law. An Introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law"*, ICRC. Geneva. 2006.

42 It is interesting to note that the ICTR declared that "aiding" and "abetting" are disjunctive terms, and thus it is sufficient to prove one or the other form of participation to engage the criminal responsibility of an individual. See: Prosecutor v. Kayishema and Ruzindana (Case No. ICTR-95-1-T), Judgment, 21 May 1999, para. 197. Also Cf. Schabas, W. *"Enforcing international humanitarian law: Catching the accomplices"*, Revue International de la Croix-Rouge, Vol. 83 N. 842, 2001. op. cit. p. 443.

43 Cf. Cf. ICTY Statute, Art. 7 (1) & ICTR Statute, Art. 6 (1); Also Cf. Rome Statue, Art. 25 (3) (c).

44 Cf. Schabas, W. Op.cit. 2001. pp. 439-459; Carbonnier, G. *"The role of humanitarian organizations: the case of the International Committee of the Red Cross"* in: Bailes, A. & Frommelt, I. (Ed.). *Business and Security. Public-Private Sector Relationships in a new security environment*, Oxford. Oxford University Press. 2004. pp.164-165

45 ICRC & the Swiss Federal Department of Foreign Affairs, The Montreux Document: "On pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict". Montreux. 2008. p. 9.

46 For more information on the Montreux Document visit the website of the Federal Department of Foreign Affairs of the Swiss Federation at :
http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/psechi.html

EUROPEAN UNION INTERVENTION IN CONFLICT SITUATIONS

Recommendation V

EU intervention in conflict management or in conflict resolution is to be undertaken in full respect of the principles of the United Nations Charter, the rules established by the General Assembly and the Security Council according to their respective competencies, and in respect of state sovereignty.

Explanatory note

The European Union should take a leading role among regional organizations in contributing to the pacific settlement of conflicts with due respect to UN Charter chapter VI and in accordance with UN Security Council Resolution 1631 of 2005 and other pertinent instruments of international law. The EU is a well-positioned international actor that could provide with its intervention meaningful relief to the parties involved in emerging frictions and ongoing armed conflicts, as well as to the affected civilian population. For so doing the European Union could enhance cooperation in dispute settlement matters with international organisations such as the United Nations and NATO, and other regional organizations such as the Organizations of American States and the African Union.

The European Union when intervening into conflicts should act upon agreement of the concerned parties and with due respect to the principles of equal sovereignty and non-interference[47] as established in articles 2, paragraph 2 and 7 of the UN Charter. Nonetheless, the European Union may decide to intervene without the agreement of the concerned parties with the aim of protecting the civilian populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In non-consented interventions, the European Union should act in accordance with UN Security Council Resolution 1674 of 2006 and always in execution of a resolution of the Security Council dully recognizing the necessity to non-consented intervention for humanitarian reasons.

Armed international intervention for humanitarian reasons and the subsequent debates on its legality are fairly recent issues in international law and international relations. Indeed, when the possibility of "humanitarian intervention" was envisaged in the international scene, the doctrine also brought forth the underlying conflict between the *defence of the precept of common humanity*[48] underpinning the intervention and, the *UN charter principles of sovereignty and non-interference,* setting a limit to the use of armed force[49]. The former Secretary-General of United Nations, Kofi Annan, summarized the key controversial aspects of this issue in his Millennium Report:

> *"Some critics were concerned that the concept of "humanitarian intervention" could become a cover for gratuitous interference in the internal affairs of sovereign states. Others felt that it might*

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[47] Cf. Milojevic, *"The Principle of non-interference in the internal affairs of states"*, Law and Politics, Vol. 1. No 4. 2000. pp. 427 – 447.

[48] Cf. Report of the Secretary-General of the United Nations (Kofi A. Annan), "We the Peoples. The Role of the United Nations in the 21st Century". 2000. p 48.

[49] Cf. UN Secretary-General's report, 12 January 2009 (A/63/677) stated that: "Humanitarian intervention posed a false choice between two extremes: either standing by in the face of mounting civilian deaths or deploying coercive military force to protect the vulnerable and threatened populations" (p.6); Cf. Franck, T. *"Recourse to Force".* Cambridge. Cambridge University Press. 2002. pp. 20-44.

> *encourage secessionist movements deliberately to provoke governments into committing gross violations of human rights in order to trigger external interventions that would aid their cause. Still others noted that there is little consistency in the practice of intervention, owing to its inherent difficulties and costs as well as perceived national interests—except that weak states are far more likely to be subjected to it than strong ones.*
>
> *I recognize both the force and the importance of these arguments. I also accept that the principles of sovereignty and non-interference offer vital protection to small and weak states. But to the critics I would pose this question: if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity?"*[50]

The concept of humanitarian intervention evolved into the well know concept of *responsibility to protect* as stated in paragraphs 138 and 139 of the 2005 World Summit Outcome Document. Provisions in paragraph 139 of the Document clearly state the role of the international community and the regional organizations in implementing the *responsibility to protect* through the Security Council:

> *"139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity"*

Later on, the UN Security Council Resolution 1674 of 2006, reaffirmed the mandate to the international community under Chapters VI and VIII of the Charter to implement the *responsibility to protect* as means to prevent genocide, war crimes, ethnic cleansing and crimes against humanity against the civil population. The 2009 UN Secretary-General's report on the implementation of the *responsibility to protect* reaffirmed that there is no general mandate to intervene granted to any State or international organization, and that intervention, through the Security Council, should be evaluated on a case-by-case basis[51].

The European Union, following the 2005 World Summit, has systematically welcome the implementation of the *responsibility to protect* in the international scene. On one of the very first speeches after the Summit, Michael von Ungern-Sternberg[52], European Union Ambassador before the United Nations, acknowledged the difficulties to protect civilian population during armed conflicts and expressed the European Union's support in the implementation of the *responsibility to protect* as further developed by the Security Council Resolutions.

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[50] Ibid. p. 47-48.
[51] UN Secretary-General's report, 12 January 2009 (A/63/677)
[52] New York- Statement on behalf of the European Union by Ambassador Michael von Ungern-Sternberg, Deputy Permanent Representative of Germany to the United Nations at the United Nations Security Council, 22 June 2007.

Subsequently, several statements from EU officials have supported the need of implementing the *responsibility to protect* for preventing violationS of international humanitarian law against the civilian population[53]. More recently, Benita Ferrero-Waldner, current European Commissioner for Trade and European Neighbourhood Policy stated:

> *"We would like to see the Responsibility to Protect implemented consistently. I welcome the Secretary-General's report and proposals for making this a reality, and particularly his emphasis on the responsibility of states themselves; the importance of early prevention; and helping states build their capacity to shoulder their own responsibilities. I hope the General Assembly this Spring will move this debate forwards resituating it as a universal concept."*[54]

[53] Cf. New York - Statement by H.E. Ambassador João Salgueiro, Permanent Representative of Portugal to the United Nations on behalf of the European Union, United Nations Security Council, 20 November 2007; New York - Statement on behalf of the European Union by H.E. Mr. Martin Palouš, Permanent Representative of the Czech Republic to the United Nations at the United Nations Security Council Meeting, 14 January 2009; New York - Statement by H.E. Mr. Anders Lidén, Ambassador and Permanent Representative of Sweden to the United Nations, on behalf of the European Union, at the General Assembly Debate on the Responsibility to Protect, Sixty-third session, 97th plenary meeting, 23 July 2009.

[54] Speech by Benita Ferrero-Waldner, *"Effective multilateralism: Building for a better tomorrow"* at the United Nations Association of Spain, High Level Meeting on European Union and United Nations. 14 April, 2009.

Recommendation VI

In accordance with the applicable rules and principles of international humanitarian law the EU shall offer to mediate for the parties to the conflict, in order to put an end to the conflict as rapidly as possible.

Explanatory note

According to article 2 (1) (5) of the TEU, the European Union shall contribute to international peace and security. For so doing, the EU should systematize and professionalize its role as mediator in ongoing armed conflicts, with the aim of contributing to find effective solutions that could bring those conflicts to an end.

If Javier Solana, former High Representative for the Common Foreign and Security Policy, once expressed that "The European Union is one big mediation and conflict resolution machine, based on law and non-stop negotiations"[55], some mediation experts believe that there are still many things to be improved:

> *"As an emerging global actor, the EU has accumulated considerable experience and capacities in civilian crisis management. Whilst the role of mediation finds references in the Treaty Instruments, as well as in follow-up initiatives, mediation has not yet emerged as a conscious, institutionalised and professional practice of the EU's Common Foreign and Security Policy (CFSP)."*[56]

The role of *mediator* is slightly different from that of providing *good offices*[57]. The ICRC distinguishes these two terms in its commentaries to the First Additional Protocol to the Geneva Conventions: "good offices are limited to the role of intermediary, as in principle only a mediator can propose a solution"[58]. More accurately, conflict mediation is usually defined as a voluntary and confidential method of conflict resolution through which one or more impartial third parties – the mediators- assist warring factions to reach a consented and satisfactory solution[59]. The European Code of Conductor for Mediators in civil and commercial matters, adopts a similar definition of *mediation* and *mediator:*

> *"… mediation means any structured process, however named or referred to, whereby two or more parties to a dispute attempt by*

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[55] Solana, J. Acceptance speech of Javier Solana, EU High Representative for the Common Foreign and Security Policy, on the occasion of receiving the Carnegie-Wateler Peace Prize. 23rd November 2006. The Hague.

[56] Herrberg, A. *"Perceptions of International Peace Mediation in the EU"*, A Needs Analysis. IFP Mediation Cluster. 2008. p. 8.

[57] The Hague Convention for the Pacific Settlement of International Disputes (1899) deals with the subject of *good offices* and *mediation*. Nevertheless it does not define the former nor establishes a clear distinction between them (Convention I of 1899 & 1907, Arts. 2-8). For a first definition in international law of mediation Cf. Convention pour le règlement pacifique des conflits internationaux (1907), Art. 4. *"Le rôle du médiateur consiste à concilier les prétentions opposées et à apaiser les ressentiments qui peuvent s'être produits entre les Etats en conflit."*

[58] ICRC Commentary (199) on Article 5 of the First Additional Protocol to the Geneva Conventions. Accessible at: http://www.icrc.org/ihl.nsf/COM/470-750008?OpenDocument

[59] Cf. Mehler, A. & Ribaux, C. *"Crisis Prevention and Conflict Management in Technical Cooperation. An Overview of the National and International Debate"*. Universum Verlagsanstalt GmbH. Eschborn. 2000. p.32; Herrberg, A. *"Mediation as an instrument for conflict prevention and crisis response. An opportunity to maximise the impact of the EU's soft power"* in: European Commission's Directorate-General for External Relations (Ed.), *From Early Warning to Early Action? The Debate on the Enhancement of the EU's Crisis Response Capability Continues*. 2008. p. 209.

> *themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a third person – hereinafter "the mediator."*

Yet, if the role of the *mediator* goes beyond that of the *intermediary*, the former must meet basic principles of international public law when carrying out its mandate. In that sense, the European Union should perform its role as *mediator* in accordance with the Geneva Conventions, the UN Charter and other pertinent instruments on international humanitarian law and peace mediation.

To present the European approach to conflict-prevention and crisis response is multi-dimensional, involving the Council of Ministers, the European Commission, the European Parliament and the EU presidency. Antje Herrberg, Senior Adviser for Mediation and President of the European Peacebuilding Liaison Office, questions this multi-dimensional approach:

> *"If decisions are taken through this complicated diplomatic machinery, they could actually have a strong impact on third countries. But more often than not, such a heavy decision-making structure hampers rather than facilitates crisis management and too often it does not produce quick results."*[60]

Indeed, the European Union could institutionalize a mediation support unit attached to the High Representative of the Union for Foreign Affairs and Security Policy, or its delegate, as means to increase international impact and policy coherence[61]. The benefits of such a centralized and institutionalized system are twofold. On the one hand, it will guarantee to the parties involved in the armed conflict that the EU will carry out a neutral and objective execution of the mandate and with due respect to international law. On the other hand, it will allow policy coherence and internal political accountability of EU officials carrying out such mandates. The EU could, for example, evaluate if mediators have respected the EU guidelines to which they would be bound in their mandate as well as if they have respected EU law and international humanitarian law.

A whole coherent and transparent structure of mediation will enable the EU to gain larger international legitimacy as a main actor in international conflict resolution. Antje Herrberg rightly pointed out that "the use of this 'soft' instrument [mediation] in an adequate and systematic fashion could indeed add weight to the 'soft' power of the EU on the world stage"[62].

Finally, the EU should be aware that the role of mediator could be, in certain cases, incompatible with other mandates granted to it within the framework of the same armed conflict, such as the role of "substitute protecting power".

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[60] Herrberg, A. 2008. Op. cit. p. 209.
[61] For an extensive study on the role of mediator of the European Union, Cf. Herrberg, A., Gündüz, C. & Davis, L., *"Engaging the EU in Mediation and Dialogue. Reflections and Recommendations"*. Synthesis Report. IFP Mediation Cluster. 2009.
[62] Herrberg, A. 2008. Op.cit p. 209.

Recommendation VII

In accordance with the applicable rules and principles of international humanitarian law, such as those recorded in the Geneva Conventions and their Additional Protocols, the European Union shall offer to observe the respect of applicable humanitarian norms, maintaining total neutrality, for the parties to the conflict, whether they be states or private groups.

Explanatory note

The European Union should make a general and public statement expressing its willingness to assume the role of *substitute protecting power (*henceforth substitute)[63] within the framework of armed conflicts and upon the agreement of the concerned parties. Additionally, the EU could offer its role of *substitute* to countries either hosting an ongoing armed conflict or taking part into an international armed conflict that have not appointed to date any *protecting power*. The European Union will undertake such a mandate with efficacy and fully respecting the principle of neutrality. In any case, the EU during its mandate should not intend to contest or pretend to replace the activities of the International Committee of the Red Cross.

The European Union should put at disposal of the international community its institutions and available means to assume the role of guardian of international humanitarian law according to the concept of "substitute" of "protecting power" as defined by international humanitarian law. Article 2 of the First Additional Protocol to the Geneva Conventions defines the concept of *protecting power*:

> *"Protecting Power" means a neutral or other State not a Party to the conflict which has been designated by a Party to the conflict and accepted by the adverse Party and has agreed to carry out the functions assigned to a Protecting Power under the Conventions and this Protocol;"*

The European Union could be entrusted, as an international organization, pursuing common article 10/10/10/11 to the four Geneva Conventions, with the role of "protecting power":

> *"The High Contracting Parties may at any time agree to entrust to an organization which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers by virtue of the present Convention."*

In such a case, the EU will be acting, in accordance to article 2(d) and 5 (4) of the First Additional Protocol to the Geneva Conventions, as a "substitute" of "protecting powers":

> *Art 2. Definitions*
> *(d) "Substitute" means an organization acting in place of a Protecting Power in accordance with Article 5.*

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[63] For a detailed analysis of the role of "protecting powers" in international humanitarian law, Cf. Coulibaly, H. *"Le rôle des Puissances protectrices au regard du droit diplomatique, du droit de Genève et du droit de La Haye"*, in: Kalshoven, F. & Sandoz, Y. (Eds.). *Mise en œuvre du droit international humanitaire*. Dordrecht, Martinus Nijhoff Publishers. 1989. pp. 69-78.

Article 5, paragraph 4, complements:

> *Art 5. Appointment of Protecting Powers and of their substitute*
>
> *4. If, despite the foregoing, there is no Protecting Power, the Parties to the conflict shall accept without delay an offer which may be made by the International Committee of the Red Cross or by any other organization which offers all guarantees of impartiality and efficacy, after due consultations with the said Parties and taking into account the result of these consultations, to act as a substitute. The functioning of such a substitute is subject to the consent of the Parties to the conflict; every effort shall be made by the Parties to the conflict to facilitate the operations of the substitute in the performance of its tasks under the Conventions and this Protocol.*

Finally, it is important to highlight that the EU IHL guidelines do not make any reference to the possibility for the EU to act as a *substitute* in case of armed conflicts. Hence, the EU should complement the section "Means of action at the disposal of the EU in its relations with third countries" with a provision establishing that possibility.

APPLICABLE LAW, RESPONSIBILITY AND COMPETENT JURISDICTIONS IN SITUATIONS OF ARMED CONFLICT

Recommendation VIII

The European Union totally and utterly rejects the impunity that can result from national and international obstacles to the engagement of criminal responsibility for the authors of serious violations of international humanitarian law and human rights law.

Explanatory note

The European Union should make a public statement expressing its disagreement and rejection of national and international obstacles preventing prosecutions for the serious violations of international humanitarian law[64]. This statement will be a strong and clear political message to the international community on the engagement of the European Union to promote and respect international humanitarian law and to prosecute its violators.

The main international obstacles existing today in national and international law for trying the violations of IHL are measures concerning jurisdictional immunities and amnesties as well as prescriptions in both criminal and civil matters.

Concerning jurisdictional immunities we will address, on the one hand, the immunities of the State and their property as well as that of the State representatives and, on the other hand, the immunities of international organizations.

Concerning immunities of States and their properties we will refer only to acts *jure imperii,* i.e. those in pursuit of a sovereign activity. Sovereign immunity is a well-established concept in customary international law stating that a sovereign State cannot be tried before the tribunals of another state for acts in which the former was exercising its sovereign functions. There have been important debates[65] since the early 1950's on the scope and implementation of this type of immunity in international law. The International Law Commission (ILC)[66] played a major role in sorting out most of these discussions. Additionally, the ILC drafted two articles[67] on the matter that where discussed by the UN *Ad Hoc Committee on jurisdictional immunities of States*[68] and, later on, they ended up, with some modifications, as part of the Convention on Jurisdictional Immunities of States and

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[64] The term serious violations of international humanitarian law did not have any explicit conventional support until the ICC Statue, but it was considered a concept of international humanitarian law issued from common article 3 to the Geneva Conventions. For a more detailed definition of "serious violations of international humanitarian law", Cf. Explanatory note N° 25 of this explanatory report. Also Cf. http://www.icrc.org/web/eng/siteeng0.nsf/html/5ZMGF9

[65] For some major doctrinal debates and historical reviews of jurisdictional immunities, Cf. Cosnard, M. *"La soumission des États aux tribunaux internes",* Paris. Pédone, 1996; Pingel-Lenuzza, I., "*Les immunités des Etats en droit international"*, Bruxelles. Bruylant. 1998.

[66] For a detailed account on the work of the International Law Commission on the matter of jurisdictional immunities, Cf. "The Work of the International Law Commission". 7th Edition. 2007; "Yearbook of the International Law Commission". V. II. Part 2. 1996

[67] Cf. Draft articles on Jurisdictional Immunities of States and their property (1991), Submitted to the General Assembly of the United Nations. Yearbook of the International Law Commission, 1991, vol. II (Part Two). Accessible at: http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/4_1_1991.pdf

[68] To see the reports of the Committee, Cf. Ad Hoc Committee on jurisdictional immunities of States and their property website. Available at: http://www.un.org/law/jurisdictionalimmunities/index.html

their property adopted by the General Assembly of the United Nations[69]. The Conventions states in articles one and two as follows:

> *"Article 1*
> *The present Convention applies to the immunity of a State and its property from the jurisdiction of the courts of another State.*
>
> *Article 2*
> *1. For the purposes of the present Convention:*
> *(b) "State" means:*
> *(iii) agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State;*
> *(iv) representatives of the State acting in that capacity;"*

There is currently a pending affaire in the International Court of Justice concerning an alleged violation of the sovereign immunity of Germany by Italian courts. Germany was concerned by the increasing number of disputes before Italian courts where claimants who suffered injury during the World War two have instituted proceedings seeking financial compensation for that harm. As part of the proceedings a judicial mortgage was inscribed in the land covering the German-Italian centre of cultural encounters Villa Vigoni. Germany expressed its fears that an increasing number of such measures could be taken against other real estate serving Germany's public purposes -an not commercial- in Italy. Yet, as the Court has not handed down a final decision to date, there is no clear position of the ICJ on the issue.

Nonetheless, we consider that the European Union should publicly state that according to customary international humanitarian law grave breaches of IHL cannot not be considered within the scope of state jurisdictional immunity. Indeed sovereign immunity may conflict with several rules of customary international humanitarian law. According to the ICRC study[70], those rules are:

> *"Rule 149. A State is responsible for violations of international humanitarian law attributable to it, including:*
> *(a) violations committed by its organs, including its armed forces;*
> *(b) violations committed by persons or entities it empowered to exercise elements of governmental authority;*
> *(c) violations committed by persons or groups acting in fact on its instructions, or under its direction or control; and*
> *(d) violations committed by private persons or groups which it acknowledges and adopts as its own conduct.*
>
> *Rule 150. A State responsible for violations of international*

[69] Cf. General Assembly adopted the United Nations Convention on Jurisdictional Immunities of States and their property, 2004. Resolution 59/38.
[70] Henckaerts, J-M & Doswald-Beck, L. (ed.) *"Customary International Humanitarian Law"*. ICRC and Cambridge University Press. Vol. 1 (Rules). 2009. p. 530

humanitarian law is required to make full reparation for the loss or injury caused."

The duty for states to investigate and prosecute grave breaches to international humanitarian law also find support, among others, on the Convention on the Prevention and Punishment of the Crime of Genocide (1948), Convention against torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) and of course, on the Geneva Conventions (1949).

Following, these customary principles, national immunities granted to former head of states and governments as well as other state representatives for grave breaches of international humanitarian law should also be consider unlawful. The Inter-American Court of Human Rights and the Inter-American Commission have handed down several decisions in this sense in regards to amnesty laws in Latin America[71].

Indeed, amnesty is the along with jurisdictional immunities, one of the main obstacles to try high state officials and members of the military forces who have breached international humanitarian law. The Inter-American Commission and the Inter-American Court of Human Rights have considered these obstacles a denial to the right of judicial protection and a way of perpetuating impunity[72]. Additionally, the Inter-American Court of Human Rights has considered that amnesties are contrary to the right to truth, as it prevents victims and relatives of the victims as well as the society in general to know the violations committed in a certain moment in time[73].

The debates on the jurisdictional immunity of International Organizations[74] date from the early 1970's[75] and particularly, because national courts have considered that the source of this immunity varies from one organization to another. Some national courts have recognized the jurisdictional immunity to international organization relying on the convention creating the organization, or on the head-quarter agreements between the organization and the host State[76], or less frequently, on customary law[77]. However, some national courts have also rejected this immunity on the basis that the organisation waived its immunity, or because the State where the claimed have been filed is not a party to the convention creating the organisation, and the judge does not feel bound to grant immunity on the basis of a customary international law[78]. As Gaillard and Pingel-Lenuzza[79] rightly pointed out, it is regrettable that the European Court of Human Rights in the case *Beer and*

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[71] Cf. among others, Inter-American Court of Human Rights, *Barrios Altos vs. Perú* (2001), Inter-American Commission Resolution on the amnesty law of Chile (1997), p. 71
[72] Ibid. p. 71-72
[73] Cf. Reasoned vote of the Judge Antonio A. Cançado Trindade at the Inter-American Court of Human Rights. 2001. Also Cf. IACrHR *"El Sistema Interamericano de Protección de los Derechos Humanos en el Umbral del Siglo XXI. Informe: Bases para un Proyecto de Protocolo a la Convención Americana sobre Derechos Humanos para Fortalecer su Mecanismo de Protección"* Tomo II, 2003.
[74] Cf. Gaillard, E. & Pingel-Lenuzza, I. *"International organizations and Immunity from Jurisdiction: To Restrict or to bypass"*, The International and Comparative Law Quarterly. Vol. 51. N. 1. 2002. pp. 1-15.
[75] Report of the Council of Europe. Privileges and Immunities of International Organizations. 1970.
[76] Cf. Decision of the Supreme Court of Austria, 21 Nov 1990. Summarized in Journal du Droit International V. 120 (388), 1993.
[77] Cf. Decision by the Supreme Court of The Netherlands, 20 Dec 1985; AS v Iran-United States Claims Tribunal, 94 ILR321
[78] CA Paris, 13 Jan 1993, CEDAO v. BCCI, 120 JDI 353 (1993)
[79] Gaillard, E. & Pingel-Lenuzza, 2002. Op. cit. p. 5

Regan v. Germany[80], concerning the European Space Agency, did not affirm more clearly that only particularly convincing reasons could justify subordinating the principle of access to justice to the immunity of the international organizations.

Today, we consider that the universal duty to respect international humanitarian law and to prosecute its grave breaches is incompatible with any type of jurisdictional immunity. Yet, this recommendation does not call for the end of jurisdictional immunity of states or international organizations. It just calls the European Union to recognize that jurisdictional immunities are relative and hence, that grave breaches of international humanitarian law do not enter into the scope of this type of immunity.

Finally, the statutory limitation of prescription should also be rejected by the European Union when concerning grave breaches of IHL. By so doing, the European Union will follow and take to a higher level, the United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1964) as well as the European Convention on the Non-Application of Statutory Limitations to Crimes Against Humanity and War Crimes (1974). As article 1 of the Convention establishes that no statutory limitation shall apply to war crimes and crimes against humanity, irrespective of the date of their commissions, article 2 states that:

> *"If any of the crimes mentioned in article I is committed, the provisions of this Convention shall apply to representatives of the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission."*

Similarly, the Rome Statue establishing the International Criminal Court states in article 29 the non-applicability of statutory limitations to crimes under its subject matter jurisdiction:

> *Article 29*
> *"Non-applicability of statute of limitations*
> *The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations."*

[80] European Court of Human Rights, *Beer and Regan v Germany*, *Waite and Kennedy v. Germany* ,Judgment 18 Feb 1999, Case No 28934/95**;** Also Cf. Tigroudja H. *"L'immunité de juridiction des organisations internationales et le droit d'accès à un tribunal"*, Revue trimestrielle des droits de l'homme 2000, pp. 78 et ss.

Recommendation IX

The European Union is to qualify on the basis of international law and with the aim of effectively implementing military operations and their legal framework, the conflict situation in which it intervenes. However, this qualification that is to produced effects mainly on the institutions of the EU, should not put at risk the application of the highest standard of protection to civilians contain either international humanitarian law or human rights law.

Explanatory note

The European Union should avoid *legal uncertainty* and *legal black holes* that could arise in relation to the qualification of a conflict in which it intervenes. For so doing, the EU should qualify the conflict prior to its intervention on the basis of international law. The main objective of this recommendation is to enable the EU to frame its actions within concrete and clear legal boundaries that could contribute to carry out a meaningful and effective intervention. Consequently, the EU will be able to act and, if necessary, give instructions to its armed forces with a clear knowledge of its rights and duties under international law and in relation to the type of conflict in which it intervenes. The qualification of the conflict by the EU should be considered neither as constitutive nor declarative of a conflict, but rather as an internal means to enhance the coherence and effectiveness of its interventions.

Legal uncertainty[81] and *"legal black holes"* [82] are often related to complex factual situations that are difficult to qualify under the law. More accurately, *legal uncertainty* refers to situations in which the legal regime applicable to a factual situation is unclear and so it is, consequently, the enforceability of the law. A common situation of legal uncertainty arises when there are overlapping regimes applicable to the same factual situation, such as the application of human rights law or/and international humanitarian law in case of armed conflict[83]. *Legal black holes* refer to factual situations in which there is no applicable positive law. This issue was brought forth, for example, in relation to Guantanamo detainees, which are formally consider neither prisoners of war protected by the Geneva Conventions nor regular perpetrators under the rule of law of the United States of America[84].

The European Union has several options under international law to intervene in a conflict, some of which have already been discussed. For "intervention", this recommendation does not focus merely on armed operations related to the CFSP and CSDP listed in article 43 (1) of the TEU[85] but it also encompasses humanitarian interventions, monitoring and

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[81] Cf. Kammerhofer, J. *"Uncertainty in the Formal Sources of International Law: Customary International Law and some of its problems"*, European Journal of International Law, V. 15 (3). 2004. pp. 523-553; Ripert, G**.** *"Le Declin du droit"*, Paris. LGDJ. 1949. Chapter 6 on *L'insecurité juridique*.

[82] Cf. Steyn, J. *"Guantanamo Bay: The Legal Black Hole",* The International and Comparative Law Quarterly, Vol. 53, No. 1. 2004; Borelli, S. *"Casting light on the Legal Black Hole: International Law and Detentions Abroad in the 'War on Terror"*, International Review of the Red Cross, V. 87, N. 857. 2005.

[83] Cf. Droege, C. *"The Interplay between International Humanitarian Law and International Human Rights Law in Situations of armed conflict",* Israel Law Review. Vol. 40, N. 2. 2007. pp. 310-355; Lubell, N. *"Challenges in applying human rights law to armed conflict"* International Review of the Red Cross. Vol. 87. N. 860. 2005. pp. 737-754.

[84] Cf. Tigroudja, H. *"Quel(s) droit(s) applicable(s) à la 'guerre au terrorisme'?",* Annuaire français de droit international 2002, pp. 81-102

[85] Article 43, paragraph 1 of the TEU states:

observations missions as well as international interventions as mediator and "substitute of protecting power".

Now, it is true that by qualifying a situation there is not absolute certainty that rules are going to be respected and enforced. However, it could, on the one hand, enhance the decision-making process of the European Union in regards to the type and scope of intervention it intends to carry on. On the other hand, it will establish a clear and common legal framework for all EU instances dealing with the same intervention. In fact, depending on how the situations are legally defined, the rules that apply vary from one case to the next. The legal regimes that need to be taken into account are thus not always the same and depend on whether the situations qualify as international armed conflicts, non-international armed conflicts or, alternatively, just as situations of internal violence and tensions[86].

First, the European Union may need to distinguish if it is dealing with an international armed conflict or with a non-international armed conflict. According to common article 2 to the Geneva Conventions, international humanitarian law applies to:

> *"... all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."*

It is important at this stage to highlight that since 1949 the expression of *armed conflict* has replaced the much more narrower and debatable expression of *war.* Additionally, the same provision also applies pursing paragraph 2 of the same article:

> *"... to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."*

Now, the rules of an international armed conflict also apply to internationalized armed conflicts[87], i.e. to conflicts between governmental forces and rebel forces within a single country, when the latter are *the facto agents* of a third state.

Contrarily, non-international armed conflicts are thus conflicts in which at least one of the parties is non-governmental[88] or *the facto agents* of another state. Traditionally, non-

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"The tasks referred to in Article 42(1), in the course of which the Union may use civilian and military means, shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation. All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories."

86 Kolb, R. & Hyde, R. *"An introduction to the International Law of Armed Conflict"*, Oxford. Hart Publishing. 2008. pp. 65-72; Vité, S. *"Typology of armed conflicts in international humanitarian law: legal concepts and actual situations",* International Review of the Red Cross. Vol. 91. N. 873. 2009. pp. 69-94; Stewart, J. *"Towards a single definition of armed conflict in international humanitarian law",* International Review of the Red Cross. Vol. 85. N. 850. 2003. pp. 313-350.

87 ICJ, *Nicaragua v. United States of America*, Judgment, ICJ Reports 1986, paragraph 219.

88 "Wars of national liberation" were later on recognized as international armed conflicts during the Diplomatic Conference which led to the adoption of the two Additional Protocols of 1977. Article 1, paragraph 4 the First Additional Protocol defines these wars as "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in their exercise of their right of self-determination..."

international armed conflicts were considered exclusive internal matter for states and thus, outside the scope of international humanitarian law. This view radically changed with the adoption of the common article 3 to the Geneva Conventions that laid down minimum guarantees to be respected during these conflicts. Yet, the only conventional definition of non-international armed conflicts was provided by article 1 of the Second Additional Protocol:

> *"Art 1. Material field of application*
> *1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise 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."*

It should be noted that this definition applies only to the Second Additional Protocol. Hence, common article 3 to the Geneva Conventions may apply in situations of non-international armed conflict that are not covered by Protocol II. According to case law, and particularly that of the ICTY, the threshold of intensity required for the existence of a non-international armed conflict is higher than that for an international armed conflict:

> *"... an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."*[89]

According to case law, the threshold of *protracted armed violence* can be assed on the basis of the intensity of the violence and the organization of the parties[90]. These two components of the non-international armed conflict have to be assessed on a case-to-case basis and supported by indicative date[91].

Additionally, it is important take into account that the temporal frame[92] of reference for applying international humanitarian law may not exactly overlap with the actual combats taking place during the armed conflict:

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[89] ICTY, *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995. Paragraph 70.
[90] Cf. ICTY, *Prosecutor v. Tadić*, Judgment Trial Chamber, 1997, paragraph 561–562; ICTY, *Prosecutor v. Limaj*, Judgement Trial Chamber, 2005, paragraph 84-86; ICTY, *Prosecutor v. Boskoski*, Judgement Trial Chamber, 2008, paragraph 175; ICTR, *Prosecutor v. Rutaganda*, judgement Trial Chamber I, 1999, paragraph 93
[91] ICTY, *Prosecutor v. Haradinaj,* Judgment Trial Chamber, 2008, paragraph 49; ICTR, *Prosecutor v. Rutaganda*, judgement Trial Chamber I, 1999, paragraph 93
[92] Jenkis, D. *"The Temporal Scope of Application of International Humanitarian Law in Contemporary Conflicts"*, Background Paper prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law. Cambridge. January 27-29, 2003.

> *" International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there."*[93]

Finally, if it is clear that international humanitarian law applies to both international and non-international armed conflicts, the EU must distinguish these situations from that of internal violence and tensions, to which international humanitarian law does not apply[94].

[93] ICTY, *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995. Paragraph 70.
[94] Cf. ICRC, *How is the term 'Armed Conflict' defined in international humanitarian law?* Opinion Paper, 2008. Accessible at: http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/armed-conflict-article-170308/$file/Opinion-paper-armed-conflict.pdf

Recommendation X

Without prejudice to those situations covered by Recommendation IX, the European Union recognises that serious violations of human rights may occur outside of an armed conflict, such as crimes against humanity and genocide. In such situations, the application of relevant norms of international law, such as the 1948 United Nations Convention for the Prevention and the Repression of the Crime of Genocide, the 1950 Nuremburg Principles, the 1970 United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the 1998 Statue of the International Court of Justice, the 2006 United Nations Convention for the Protection of All Persons from Enforced Disappearance, is independent from the legal status of the state on whose territory the violations take place.

Explanatory note

The European Union should make a public statement acknowledging that serious violations to the human rights such as *genocide* and other *crimes against humanity*, may also take place during peacetime. In this way, the EU will reaffirm that provisions on *genocide* and other *crimes against humanity* are applicable beyond the strict scope of international humanitarian law, and consequently, that they should be prosecuted at all times. Additionally, the EU may call its member states to adopt legislative measures to criminalize under national law the commission of these crimes.

The concept of *crimes against humanity* finds its origins in the Charter of the International Military Tribunal of August 1945 that was intended to prosecute the "major war criminals" during the World War II. The Tribunal according to article 6 had subject matter jurisdiction over the crimes against humanity defined as:

> *"(c) ' Crimes against humanity.- ' namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated…"*

There are several particularities of *crimes against humanity* compared to other international crimes such as common crimes and war crimes[95]. *Crimes against humanity* are systematic and planned attacks committed against the civilian population. Additionally, the *mens rea* of the perpetrator is necessary for qualifying these acts as *crimes against humanity*. Indeed, the perpetrator must be ware that his acts are linked to a widespread and systematic attack directed against the civilian population.

[95] Cf. Jia, B. *"The Differing Concepts of War Crimes and Crimes Against Humanity in International Criminal Law"* in: Goodwin-Gill, G (Ed.) *The Reality of International Law,* Oxford. Clarendorf. 1999. pp. 243-271; Jurovics, Y. *"Réflexions sur la spécificité du crime contre l'humanité"*, Paris. LGDJ. 2002.

The concept of *crimes against humanity* has strongly evolved in several realms after the Military Tribunal[96]. In regards to the sources, *crimes against humanity* are considered today part of customary international law. Additionally, they have been defined by the Rome Statue and included under the subject matter jurisdiction of the International Criminal Court[97]. In regards to the content, the concept of *crimes against humanity* has evolved in terms of acts which it makes criminal offences by including the apartheid and sexual crimes. Indeed the Rome Statue states in article 7 that:

> *"1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:*
>
> *(a) Murder;*
> *(b) Extermination;*
> *(c) Enslavement;*
> *(d) Deportation or forcible transfer of population;*
> *(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;*
> *(f) Torture;*
> *(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;*
> *(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;*
> *(i) Enforced disappearance of persons;*
> *(j) The crime of apartheid;*
> *(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."*

Finally, the concept of *crimes against humanity* has also evolved in regards to its scope of application as it is not longer associated with the existence of an armed conflict[98]. Indeed, it now a settle rule of international customary law that *crimes against humanity* may be also committed in times of peace. The ICTY stated in this regard in *Prosecutor v. Tadić:*

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[96] Bassiouni, M. *"Crimes Against Humanity in International Criminal Law",* The Hague. Kluwer Law International. 1999; Frulli, M. *"Are Crimes Against Humanity more Serious than War Crimes?* EJIL, V. 12, N. 2. 2001. pp. 329-350.

[97] Article 5 of the Rome Statue states:
"The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
(a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression."

[98] Dinstein, Y. *"Crimes Against Humanity after Tadic",* Leiden Journal of International Law. V. 13. N. 2. 2000. pp 373-393.

> *"140. As the Prosecutor observed before the Trial Chamber, the nexus between crimes against humanity and either crimes against peace or war crimes, required by the Nuremberg Charter, was peculiar to the jurisdiction of the Nuremberg Tribunal... there is no logical or legal basis for this requirement and it has been abandoned in subsequent State practice with respect to crimes against humanity. Most notably, the nexus requirement was eliminated from the definition of crimes against humanity contained in Article II(1)(c) of Control Council Law No. 10 of 20 December 1945. The obsolescence of the nexus requirement is evidenced by international conventions regarding genocide and apartheid, both of which prohibit particular types of crimes against humanity regardless of any connection to armed conflict."*[99]

Indeed, similarly to *other crimes against humanity*, the crime of *genocide* does not require the existence of an armed conflict for it to be committed. The concept of *genocide* emerged with the World War II in explicit reference to the events perpetrated by the Nazi regime[100]. Hence, the term *genocide* was initially linked to the annihilation of one group of persons by another group or an individual during wartime. However, some years later, the Convention on the Prevention and Punishment of the Crime of Genocide (1948) provided conventional grounds to it, and stated in article 1, that *genocide*, "whether committed in time of peace or in time of war, is a crime under international law..."

It seems rather logical that, in consideration to the scale of the crime of *genocide,* its scope goes beyond the strict framework of IHL. The crime of *genocide,* like the *crimes against humanity*, has special constitutive features that characterize it. Article 2 of Convention on the Prevention and Punishment of the Crime of Genocide provides that:

> *"In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:*
> *(a) Killing members of the group;*
> *(b) Causing serious bodily or mental harm to members of the group;*
> *(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
> *(d) Imposing measures intended to prevent births within the group;*
> *(e) Forcibly transferring children of the group to another group."*

However, the commission of the acts previously described is not sufficient for the crime of *genocide* to be committed. The crime of *genocide* requires the perpetrator to undertake the abovementioned acts with the intention -*mens rea*- of annihilating, in part or in whole, the

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[99] ICTY, *Prosecutor v. Tadić,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995. Paragraphs 140 & 141.

[100] Schabas, W. *"Genocide in International Law: The Crimes of Crimes"*, Cambridge, CUP. 2000; Shaw, M. *"Genocide and International Law"* in: Dinstein, Y. (Ed.) *International Law at a Time of Perplexity*. *Essays in Honor of Shabtai Rosenne,* Dordrecht. Martinus nijhoff Publishers, 1989. pp. 797-820

group to which the particular individuals belong[101]. Consequently, another key element of this crime is the way in which the targeted group is defined. Today, the crime of *genocide* is limited to national, ethnical, racial and religious groups. Hence violent acts committed with the intention of annihilating other groups based on political, economic or social criteria cannot be considered constitutive of the crime of *genocide.* Finally, objective and subjective criteria should be used to identify members of targeted groups such as the participation on religious services for religious groups or peers recognition for ethnic and national groups[102].

This recommendation reinforces the well known complementarily between international human rights law and international humanitarian law. Indeed, if the latter is considered *lex specialis* of the former, it is because human rights provide undoubtedly the maximum scope of protection to individuals' human dignity at all times. In that sense, if the commission of *crimes against humanity* and *genocide* are punishable during wartime as violations of human rights law, it is *a fortiori* true that they are punishable during peacetime. The European Union by acknowledging that serious violations to the human rights such as *genocide* and other *crimes against humanity*, may also take place during peacetime, will reinforce and recall the importance to respect human dignity at all times.

[101] Alonzo-Maizlish, D. *"In Whole or in Part: Group Rights, the Intent Element of Genocide, and the "Quantification Criterion""*, New York University Law review, V. 77, N. 5. 2002. p. 1369-1403
[102] Sassoli, M. & Bouvier, A. *"How Dos law Protect in War"*, Volume I. Geneva. ICRC. 2006. p. 311.

Recommendation XI

The European Union commits, in its own name and within its legal rights, to promoting the negotiation and adoption of Status of Forces Agreements concerning its forces stationed or active on the territory of third states, in order to avoid situations of legal uncertainty or impunity resulting from the complexity of the legal status of armed forces intervening on foreign territory.

Explanatory note

The European Union should favour the negotiation of Status of Forces Agreements (SOFA) with countries hosting its forces as means to prevent *legal uncertainty*[103] and *impunity* in relation to the application of international humanitarian law. These type of agreements should be negotiated with due respect of EU's obligations under international law and in accordance with the principles of the UN Charter.

The Negotiation of SOFAs has become a common practice in UN interventions following the 1999 UN Secretary-General's bulletin[104] setting out fundamental principles and rules of international humanitarian law applicable to United Nations' forces. Section three of the bulletin states:

> *"In the status-of-forces agreement concluded between the United Nations and a State in whose territory a United Nations force is deployed, the United Nations undertakes to ensure that the force shall conduct its operations with full respect for the principles and rules of the general conventions applicable to the conduct of military personnel. The United Nations also undertakes to ensure that members of the military personnel of the force are fully acquainted with the principles and rules of those international instruments. The obligation to respect the said principles and rules is applicable to United Nations forces even in the absence of a status-of-forces agreement."*

The European Union is competent for concluding SOFAs pursuing Chapter 2 on *Common Foreign and Security Policy,* article 24 of the TEU:

> *"The Union may conclude agreements with one or more States or international organisations in areas covered by this Chapter"*

Prior to the entry into force of the Treaty of Lisbon the European concluded few SOFAs with third countries, although it was usually envisaged in the Council Joint Actions deciding on a particular intervention[105]. However, EU-led forces and their personnel would usually be covered by agreements concluded by the host nations and other

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[103] Cf. supra note 89 on legal uncertainty

[104] UN Secretary-General's Bulletin. Observance by United Nations forces of international humanitarian law. 6 August 1999, ST/SGB/1999/13

[105] Cf. Article 13 of the Council joint Action 2004/847/CFSP of 9 December 2004, OJ L 367, 12.12.2004. pp. 33; Council Joint Action 2005/557/ CFSP of 18 July 2005. Article 12. OJ L 188. 20.07.2005. p. 50; Council Joint Action 2005/190/CFSP of 7 March 2005, Article 7. OJ L 62, 9.3.2005. p. 37; Council Joint Action 2006/304/CFSP of 10 April 2006. Article 11. OJ L 112, 16.4.2006. p. 22; Council Joint Action 2007/369/CFSP of 30 May 2007, Article 8. OJ L 139. 31.5.2007. p. 36.

international organizations[106]. A clear example of this, were the European Union military operations in support of the United Nations Organisation Mission in the Democratic Republic of the Congo (MONUC) [107] during the election process and the European Military operation in Bosnia and Herzegovina. The Council joint action for the latter operation stated in its preliminary considerations:

> *"The United Nations Security Council further decided that the status of forces agreements currently contained in Appendix B to Annex 1.A of the Peace Agreement shall apply provisionally in respect to the proposed EU mission and its forces, including from the point of their build-up in Bosnia and Herzegovina, in anticipation of the concurrence of the parties to those agreements to that effect."[108]*

Similarly, the European Union civilian-military mission supporting the action to the African Union mission in the Darfur region of Sudan was covered by an agreement previously negotiated between the African Union and the Government of Sudan:

> *"The Status of Mission Agreement on the Establishment and Management of the Ceasefire Commission in the Darfur area of Sudan signed between the AU and the Government of Sudan on 4 June 2004 applies to Military Observers from the EU, covers military and civilian personnel other than CFC officials, and refers to the General Convention on the Privileges and Immunities of the Organisation of African Unity (OAU), Article VII of which covers experts on mission for the OAU."[109]*

Since 2008 several SOFA's have been negotiated directly by the European Union[110]. The European Union may continue to follow to a great extent its current practice in the negotiation of SOFAs with third countries. As it can be verified in most of the SOFAs negotiated by the EU in the last years, the EU military deployment is decided with prior authorization of the UN Security Council[111] and following a decision of the Council establishing the framework of the military operation. Then, the Presidency of the Council, assisted by the Secretary General/High Representative, negotiate the Agreement between

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[106] For originally UN Agreements applicable to EU-led forces Cf. Council Joint Action 2004/570/CFSP of 12 July 2004 on the European Union military operation in Bosnia and Herzegovina. Preliminary consideration N. 8 OJ L 252, 18.7.2004. p. 10.

[107] Council Joint Action 2006/319/CFSP of 27 April 2006, OJ L 116, 29.4.2006. pp. 98

[108] Council Joint Action 2004/570/CFSP of 12 July 2004, OJ L 252, 28.7.2004. pp. 98

[109] Council Joint Action 2005/557/ CFSP of 18 July 2005. Preliminary consideration N. 14. OJ L 188. 20.07.2005. p. 47.

[110] Cf. Agreement between the European Union and the Central African Republic on the status of the European Union-led forces in the Central African Republic, OJ L 136, 24.5.2008. pp. 46-51; Article 6, paragraph 3 of the Agreement between the European Union and the Republic of Chad on the status of the European Union-led forces in the Republic of Chad, OJ L 83, 26.3.2008, pp. 40-45; Agreement between the European Union and the Republic of Guinea-Bissau on the Status of the European Union Mission in Support of Security Sector Reform in the Republic of Guinea-Bissau, OJ L 129, 14.8.2008. pp. 66-71; Agreement between the European Union and the Somali Republic on the status of the European Union-led naval force in the Somali Republic in the framework of the EU military operation Atalanta, OJ L 10, 15.1.2009. pp. 29-34; Agreement between the European Union and the Republic of Seychelles on the status of the European Union- led forces in the Republic of Seychelles in the framework of the EU military operation Atalanta, OJ L 323, 10.12.2009. pp. 14-19

[111] Cf. Council Decision 2008/389/CFSP of April 2008, OJ L 136. 24.5.2008. p. 45; Council Decision 2009/916/CFSP of 23 October 2009, OJ L 323, 10.12.2009. p. 12

the European Union and the third state concerned by the intervention on the status of the European Union-led forces in that country.

Following the SOFAs concluded by the United Nations and the European Union, the minimum content of any Status of Forces Agreement signed between the European Union and a third country should include: scope of application, applicable law to EU forces, privileges and immunities, identification of EU personnel and jurisdiction.

Yet, the European Union should be aware that some clauses included in these agreements might conflict with conventional international humanitarian law and customary international humanitarian law. In particular, we may call EU's attention to the establishment of absolute clauses of criminal jurisdictional immunity in the host country of the operations. In accordance with this recommendation, the EU should take the necessary measures to guarantee that no *legal uncertainty* and *impunity* will follow this type of immunities in regards to violations of international humanitarian law. For more information on the question of jurisdictional immunities of the EU please refer to the explanatory note of recommendation 15.

Recommendation XII

The European Union commits, for every mission undertaken by its forces, to outlining the rules of engagement for its troops, as well as the applicable legal regime and competent jurisdiction for prosecuting violations of these rules or of other applicable conventional or customary norms, in order to avoid situations of legal uncertainty or impunity resulting from the complexity of the legal status of armed forces intervening on foreign territory.

Explanatory note

The European Union should establish on a case-to-case basis the rules framing the intervention of its armed forces in third countries as means to prevent *legal uncertainty*[112] and *impunity* in relation to the application of international humanitarian law and customary international humanitarian law. The benefits of this recommendation are twofold. On the one hand, these rules setting out the terms of engagement and responsibility of the European Union provide EU-led armed forces with unambiguous rules for action during the mission and clear parameters of responsibility in case of violation of those rules. On the other hand, it will contribute to promote a fair image of the European Union and its armed operations vis-à-vis host nations and the international community. Indeed, by so doing, the EU will show its acceptance to abide by international law during its interventions and to hold its military personnel accountable for breaches of international humanitarian law.

The Council may include in its future Decisions -former Council Joint actions on CFSP- taken with the aim of implementing EU-led armed operations the following three aspects: (i) rules of engagement, (ii) applicable legal regimes and (iii) competent jurisdictions to try the violations of those rules or other pertinent conventional and customary rules.

As for the *rules of engagement* we refer to directives issued to military forces with the aim of delineating the circumstances and limitations under which EU-led armed forces will initiate and/or continue combat engagement with other forces encountered[113]. The Council may incorporate these rules in the Decisions upon proposition of the European Union Military Committee (EUMC)[114].

As for the *applicable legal regime* we refer to the laws to which the armed operations must abide. The Council Decision should specify to which regulations the military personnel remain bound throughout the operations. The Council should take into account, among others legal instruments, pertinent UN Security Council resolutions, pertinent EU regulations, national laws of the hosting country, international humanitarian law and customary international humanitarian law. Additionally, the Council should state on the status of its armed forces, defining for example, the status of non-combatants of its peacekeeping personnel[115].

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[112] Cf. Supra note 89 on legal uncertainty

[113] Cf. Use of Force Concept for EU-led Military Crisis Management Operations - 1st Revision (doc 6877/06 COSDP 135, dated 28 February 2006); "ROE" *Department of Defense Dictionary of Military and Associated Terms*, Joint Pub 1-02 or JP 1-02. Also Cf. "ROE" in the NATO Glossary of Terms and Definitions (AAP-6)

[114] Council Decision of 22 January 2001 on the establishment of the Military Staff of the European Union (2001/80/CFSP), OJ L 27, 30.1.2001. pp. 4-6.

[115] Cf. Section 1, 1.2 of the UN Secretary-General's Bulletin. *Observance by United Nations forces of international humanitarian law*. 6 August 1999(ST/SGB/1999/131.2) states: "*The promulgation of this bulletin does not affect the protected status of members of peacekeeping operations under the 1994 Convention on the Safety of United Nations and Associated Personnel or their status as non-combatants, as long as they are entitled to the*

As for the *competent jurisdictions* we refer to courts that will prosecute the military personnel of EU-led missions for violation of the rules contained in the Council Decision and other pertinent conventional and customary rules. The Council should specify, firstly, if the military personnel taking part in the mission is subject to prosecution in their national courts, in the hosting country or in any other national or international jurisdiction. Secondly, the EU should specify if the military personnel is subject to military courts or ordinary justice. Finally, the Council may also state in a clear way the courts that will deal with the criminal and civil liability of the military personnel.

The Council may follow the structure of the 1999 UN Secretary-General's bulletin on the "Observance by United Nations forces of international humanitarian law" to identify the key issues that should be addressed in the Decision. Finally the EU should act at all times in conformity with its obligations under international law and the principles of the UN Charter.

protection given to civilians under the international law of armed conflict."

Recommendation XIII

The European Union is liable for violations of international humanitarian law and human rights law committed during armed operations on foreign territory by its own forces and by private contractors acting on its behalf. Under EU law, the European Union is to promote access, for victims of such violations, to competent EU jurisdictions or to any other court able to repair the damages suffered in an effective, rapid and adequate manner. Failing such recourse, the EU encourages member-states to provide access to effective reparation in national courts for victims of violations committed by persons acting on behalf of the EU.

Explanatory note

The European Union should be liable for the breaches of international humanitarian law and other pertinent laws committed by private contractors it hires to participate in EU-led armed operations. Additionally, the EU should ensure effective access to European Unions' justice to the victims of those violations pursuant articles 67 (4) of the TFEU:

> *"4. The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters."*

This recommendation seeks to complement the commitment of the EU to sensitize private contractors in the implementation and respect of IHL as asserted in recommendation N° 5. As for private contractors we refer to both companies providing commercial and civil services to military forces as well as to private military and security companies (PMSCs) directly involved in the warfare[116].

The Third Geneva Convention considers in article 4, paragraph 4 the involvement of private actors in the framework of an armed conflict and their relation with the armed forces they accompany:

> *"Art 4. A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:*
> *"(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model."*

Nonetheless, there is no further development in the Geneva Conventions on their particular responsibility and duty to respect international humanitarian law[117]. Therefore,

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[116] Cf. ICRC. *"International humanitarian law and the challenges of contemporary armed conflicts"*, Report prepared for the 30th International Conference of the Red Cross and Red Crescent. Geneva. 26 to 30 November 2007. pp. 24-28. Accessible at: http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/ihl-30-international-conference-101207/$File/IHL-challenges-30th-International-Conference-ENG.pdf

[117] Cf. Faite, A. *"Involvement of Private Contractors in Armed Conflict: Implications under International Humanitarian Law"*, Defence Studies, V. 4. N° 2. 2004.

commercial and civil service providers in times of war are bound by IHL as all other actors taking part, directly or indirectly, in an armed conflict. Indeed IHL, does not only bind states, national armed forces and organized armed groups, but also other actors taking part in the armed conflict, including private contractors.

Concerning private military and security companies[118], there is no specific reference to PMSCs either in international humanitarian law or customary international humanitarian law[119]. However, following the general scope of application of IHL, we can also state that IHL binds PMSCs[120] when they are operating within the framework of an armed conflict[121]. It is important to note that IHL is not concerned with the lawfulness or legitimacy of PMCS, nor of the hiring of them by states or other actors to perform particular activities. IHL regulates the behaviour of these companies when they are operating within the framework of an armed conflict[122].

National states and international organizations[123] both contracting and hosting PMSCs are key players to uphold these organizations accountable for violations of IHL and, particularly, taking into account that, under certain circumstances, their responsibility could be engaged for acts committed by those companies[124]. The risk that PMSCs violate IHL increases when they take part directly in the conflict. Philip Spoerri, ICRC director for international law stated that:

> *"Ideally, States should not task private contractors to take an active part in combat operations… Combat functions in armed conflicts should remain the responsibility of governments and should not be outsourced to private contractors."*[125]

Additionally, there is a clear legal regime of responsibility in international law for acts committed by State organs. Article 3 of the Fourth Hague Convention (1907) and Article 91 of Protocol I point out that belligerent parties are responsible for violations of international humanitarian law committed by their organs, including their armed forces. Yet, there are currently no conventional rules in force laying down explicitly the responsibility of the State for acts committed by PMSCs it has hired. The International Law

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118 Cf. supra note 53 on the definition of PMSCs.

119 Doswald-Beck, L. "*Private military companies under international humanitarian law" in:* Chesterman, S. & Lehnardt, L. (Eds.), *From Mercenaries to Market. The rise and regulation of private military companies*, Oxford. Oxford University Press. 2009. pp. 115-138.

120 *Cf.* Ibid; Falco, V. *"Human Rights and International Humanitarian law in the Common Security and Defence Policy: Legal Framework and perspectives for PMSC Regulation", EUI Working papers. 2009. Schabas, W. 2001. Op. cit;* Krahmann, E. *"Regional Organizations: What role for the EU?",* Presentation Workshop with regard to Private Military/Security Companies on the 16-17 January 2006 in Küsnacht, Switzerland.

121 Cf. Gillard, E-C. *"Business goes to war: private military/security companies and international humanitarian law",* Revue International de la Croix-Rouge, Vol. 88. N. 863. 2006. pp. 525-572

122 Ibid.

123 Cf. Den Dekker, *G. "The regulatory context of private military and security services at the European Union level (Addendum)."* PRIV-WAR Report, National Reports Series 04/09. 2010. pp. 1-11.

124 Cf. Lehnardt, C. *"Private military companies and state responsibility"* in: Chesterman, S. & Lehnardt, L. (Eds.), *From Mercenaries to Market. The rise and regulation of private military companies*, Oxford. Oxford University Press. 2009. pp. 139-157.

125 Cf. ICRC documents. Governments acknowledge duty to control private military and security companies. Accessible at http://www.icrc.org/Web/eng/siteeng0.nsf/html/montreux-document-feature-170908

Commission submitted to the UN General Assembly[126] a set of draft articles on the *Responsibility of States for internationally wrongful acts*". Article 5 states that:

> *"The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."*[127]

In the same sense, the International Court of Justice in its 2007 judgement in *Bosnia and Herzegovina v. Serbia and Montenegro*[128], stated the possibility of holding the latter responsible for acts committed under its direction or control by an external agent even if they were not performed by State organs. It seems then clear that when states or international organizations hire PMSCs to take active part in combat operations, the former remain responsible for the violations of international humanitarian law and other related and pertinent laws the latter commits under its direction or control, i.e. in execution of the contract. The ICRC referred to these issues stating that:

> *"States cannot absolve themselves of their obligations under international humanitarian law by contracting PMSCs. They remain responsible for ensuring the relevant standards are met. Should the staff of the PMSCs commit violations of international humanitarian law, the state that has hired them may be responsible if the violations can be attributed to it, in addition to the company and its staff."*[129]

The EU should ensure that the victims of violations of IHL performed by private contractors it has hired could effectively claim reparation before European Union's jurisdictions on the basis of non-contractual liability pursuant article 340, paragraph 2 of the TFEU:

> *"In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties"*

If necessary, the EU should ensure that victims could access to national courts within the EU to claim reparation for the wrongful acts committed by private contractors it has hired within the framework of an armed conflict. Article 67 of the TFEU states in paragraphs 1 and 4 that:

> *"1. The Union shall constitute an area of freedom, security and*

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126 Cf. UN General Assembly Resolution 56/83 of 12 December 2001; UN General Assembly Resolution 59/35 of 2 December 2004.
127 Cf. Commentaries to the draft articles on "Responsibility of States for internationally wrongful acts" adopted by the International Law Commission in its 53rd Session (2001). Accessible at: http://www.ilsa.org/jessup/jessup06/basicmats2/DASRcomm.pdf
128 ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro* (2007), paragraphs 398- 407
129 Cf. ICRC FAQ on the privatisation of war. Accessible at: http://www.icrc.org/web/eng/siteeng0.nsf/html/pmsc-faq-150908

justice with respect for fundamental rights and the different legal systems and traditions of the Member States.

4. The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters."

Recommendation XIV

The European Union reaffirms its commitment to the legal protection of persons subject to trial. Accordingly, the EU commits itself to waiving jurisdictional immunities granted on the basis of international law and/or national legislation, regarding civil claims linked to allegations of serious breaches of international humanitarian law committed by armed forces acting under its mandate.

Explanatory note

Consistently with recommendation IX the European Union should waive jurisdictional immunities granted to it for grave breaches of international humanitarian law[130] committed by its armed forces. This waiver of immunity should be a general EU policy and not a case-by-case decision as currently practice by the EU in the Status of Forces Agreements negotiated with third countries[131]. By so doing, the EU will put into practice its commitment to the promotion and respect of international humanitarian law, as well as its duty under international law, to cooperate in the prosecution of grave breaches of international humanitarian law[132].

Particularly, international crimes that amount to the level of *jus cogens* constitute *obligatio erma omnes* which are non-derogable. Legal obligations arising from the *jus cogens* status of such crimes include the duty to prosecute or extradite, the non-applicability of statues of limitations for such crimes, the non-applicability *of any type* of immunities[133], the non-applicability of the defence of "obedience to superior orders", the universal application of this obligation, universal jurisdiction over the perpetrators, etc.

Indeed, the jurisdictional immunity granted to international organizations[134], and thus to the EU, have to be re-evaluate in the larger framework of the evolution of the rule of law in the international sphere and the rules of customary international humanitarian law. Regarding the former:

> *"Today, the conditions exist for the regime of immunity of international organisations, in turn, to undergo a major evolution. Just as the reinforcement of the authority of the State made possible its submission to the rule of law, so international organisations have achieved a sufficiently solid foundation in the international legal order for private persons to be able to have their disputes with those organisations heard, when this is required by the imperatives of*

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130 Cf. Articles 50, 51, 130 and 147 of the Four Geneva Conventions. Articles 11 (4), 85 and 86 of Additional Protocol I to the Geneva Conventions.

131 Cf. Article 6, paragraph 3 of the Agreement between the European Union and the Central African Republic on the status of the European Union-led forces in the Central African Republic, OJ L 136, 24.5.2008. p. 48; Article 6, paragraph 3 of the Agreement Article between the European Union and the Republic of Chad on the status of the European Union-led forces in the Republic of Chad, OJ L 83, 26.3.2008, p. 42

132 Cf. ICTY *Prosecutor v. Tadić.* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction. Appeals Chamber, 2 October 1995. para. 79.

133 Cf. Bassiouni, C. *"Accountability for Violation of International Humanitarian Law and Other serious violations of Human Rights"*, Law and Contemporary Problems. V. 59. N° 4. 1996. p. 390. Accessible at: http://www.law.duke.edu/journals/journalsource/lcp/lcptoc59dfall1996.htm

134 Cf. Lalive, J-F. "L'immunité de juridiction des Etats et des organisations internationals", Collected Courses of the Hague Academy of International Law. Vol 84. 1953; Seidl-Hohenveldern, I. "L'immunité de juridiction et d'exdcution des Etats et des organisations internationales", 1 Droit International 109, 1981.

justice."[135]

Additionally, as considered in recommendation IX, jurisdictional immunity may conflict with several rules of customary international humanitarian law applicable by analogy to the EU. According to the ICRC study[136], those rules are:

> *"Rule 149. A State is responsible for violations of international humanitarian law attributable to it, including:*
> *(a) violations committed by its organs, including its armed forces;*
> *(b) violations committed by persons or entities it empowered to exercise elements of governmental authority;*
> *(c) violations committed by persons or groups acting in fact on its instructions, or under its direction or control; and*
> *(d) violations committed by private persons or groups which it acknowledges and adopts as its own conduct.*
>
> *Rule 150. A State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused."*

Once more we state that the existing universal duty to respect international humanitarian law and to prosecute grave breaches of it is incompatible with any type of jurisdictional immunity. Following recommendation IX, this recommendation does not call for the end of jurisdictional immunity for international organizations. It just calls the European Union to acknowledge that as a "*Communauté de droit*"[137] there are limitations to its jurisdictional immunity, and particularly, in regards to grave breaches of international humanitarian law.

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[135] Gaillard, E. & Pingel-Lenuzza, I. "International organizations and Immunity from Jurisdiction: To Restrict or to bypass" The International and Comparative Law Quarterly. Vol. 51. N. 1. 2002. p. 2.
[136] Henckaerts, J-M & Doswald-Beck, L. (ed.) "Customary International Humanitarian Law". ICRC and Cambridge University Press. Vol. 1 (Rules). 2009. p. 530
[137] Cf. Cour de justice des Communautés européennes (CJCE), Arrêt du 23 avril 1986 "Les Verts", in: *Recueil de la Jurisprudence de la Cour*. 1986, n° II, p. 1365.

ENHANCING THE PROTECTION OF PERSONS TOUCHED BY ARMED CONFLICT

Recommendation XV

In situations of armed conflict, the European Union must rapidly identify the most vulnerable populations and intervene in an effective and efficient manner to take adequate measures to protect them. To do so, the EU is to designate a special representative for each conflict situation who is responsible for the protection of vulnerable populations. This representative may in turn create special groups dedicated to the protection of specific categories of people.

Explanatory note

The European Union should clearly identify the different categories of vulnerable population in the area of influence of the armed operations and should take measure to ensure their adequate protection[138]. This recommendation seeks to prevent violations of international humanitarian law, by both, the parties involved in the conflict and the European forces, against the most vulnerable population.

The protection of the non-combatants in an armed conflict is one of the core objectives of international humanitarian law[139]. However, the protection granted to them by conventional IHL focuses mainly on victims of international armed conflicts[140] and considerably fewer attention is granted to those affected by non-international armed conflict[141]. Hence, the European Union should rely on both conventional and customary international humanitarian law to identify the categories of vulnerable population and design comprehensive and effective measures to protect them. Jean-Marie Henckaers, ICRC's head of project of customary law stated regarding the protection of vulnerable population in non-international armed conflicts:

> *"The majority of armed conflicts are non-international, and current treaty law doesn't regulate them in sufficient detail. These conflicts are subject to far fewer treaty rules than are international conflicts... Customary law therefore provides men, women and children caught up in such conflicts with essential protection. Respect for customary law reduces the human cost of conflict"*[142]

The European Union will establish a "High Commissioner or High Representative for specially protected persons and groups"[143] in order to centralized the activities of promotion, control and follow-up relating to the protection of vulnerable populations in

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138 For an interesting compilation of articles on the protection of vulnerable populations in times of armed conflict, Cf. Sorel J.-M. & Popescu, C.-L. *"La protection des personnes vulnérables en temps de conflit armé"*, Bruxelles, Bruylant, 2010.

139 Kolb, R. & Hyde, R. *"An introduction to the International Law of Armed Conflict"*. Oxford. Hart Publishing. 2008. pp. 221-228;

140 Cf. First Protocol Additional to the Geneva Conventions, relating to the protection of Victims of International armed conflicts.

141 Cf. Second Protocol Additional to the Geneva Conventions, relating to the protection of Victims of non-International armed conflicts.

142 Interview to Jean-Marie Henckaers, ICRC's head of project of customary law. 9 August 2010. Accessible at: http://www.cicr.org/web/eng/siteeng0.nsf/htmlall/customary-law-interview-090810

143 This idea was already brought forth during an ICRC regional expert seminar, Cf. ICRC Report, "*Improving Compliance with International Humanitarian Law ICRC Expert Seminars"* Geneva, October 2003. p. 19/26

armed conflict. Prior to the intervention, the EU will set up a sub-commission or a Council working group[144] under the direction of the High Commissioner to identify the categories of vulnerable population that may be affected during the armed conflict and the EU military intervention. The findings of the Commission should be published and made available to the Head of Mission of the European Union Military and/or Police mission. The report should also establish the measures of protection to be taken prior and during the armed conflict, including measures of enhanced protection to those groups in high risk.

As for the categories of vulnerable population, the sub-commission will take into account the protection of civilians[145] in general, the protection of displaced population, the protection of vulnerable groups of women and men against rape and sexual violence and the protection of children, including child soldiers.

The report will help the European Union to provide strict guidance to its forces during the intervention. The report should help the forces to clearly distinguish the difference between civilian and combatants, emphasizing the concept of direct participation in hostilities[146]. For so doing, the EU will clarify to its forces the constitutive elements of direct participation in hostilities, the beginning and end of direct participation in hostilities, the temporal scope of loss of protection to civilians during the hostilities, the precautions and presumptions in situation of doubt as well as the consequences for those taking temporary participation in hostilities of regaining civilian protection.

144 Cf. Guideline 15 (a) of the European Union Guidelines on promoting compliance with International Humanitarian Law on the creation of Council Working groups for monitoring the application and compliance with IHL.

145 The ICTY defined the concept of civilians for situations of international armed conflict as "persons who are not, or no longer, members of the armed forces". Cf. *Prosecutor v. Blaskic,* Judgment of 3 March 2000, § 180.

146 Cf. Melzer, N. *"Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law"*, Geneva, ICRC. 2009; Also Cf. Protocol Additional I to the Geneva Convention (1977), Art. 31

Recommendation XVI

In situations of armed conflict, the European Union must rapidly identify the most vulnerable categories of sites or property and intervene in an effective and efficient manner to take adequate measures to protect them.

Explanatory note

The European Union should clearly identify and ensure the safeguard of the different categories of sites and properties that may require special protection in the area of influence of the armed operations. This recommendation seeks, on the one hand, to prevent the destruction and usurpation of those sites and properties during and after the armed conflict. On the other hand, it seeks to provide clear guidance of action to EU-led forces during their armed operations in the task of ensuring their adequate protection.

Prior to the intervention the EU will set up a sub-commission or a Council working group[147] in charge of identifying the sites and properties that require special protection during the armed conflict. The inventory of the sub-commission should be published and made available to the Head of Mission of the European Union Military and/or Police mission. If possible, the inventory should also be communicated to the parties involved in the armed conflict. Additionally, the sub-commission should also establish measures of protection to be taken prior and during the armed conflict, including measures of enhanced protection to cultural property according to article 10 and 11 of the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1999).

The sub-commission should clearly identify the type of sites and properties that will be placed under protection of EU forces as well as the legal basis in international law, international humanitarian law and human rights law justifying those measures. Several international law instruments lay down the general prohibition to destroy the enemy's property when it is not demanded by the necessities of war finds. The Hague Convention (IV) of 1907 sets in articles 22 and 23 limits to the means used in warfare:

> *"Art. 22. The right of belligerents to adopt means of injuring the enemy is not unlimited.*
> *Art. 23. In addition to the prohibitions provided by special Conventions, it is especially forbidden*
> *(g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;"*

Additionally, the First Geneva Convention states in article 50:

> *"Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."*

147 Cf. Guideline 15 (a) of the European Union Guidelines on promoting compliance with International Humanitarian Law on the creation of Council Working groups for monitoring the application and compliance with IHL.

As for key sites, the EU will identify main infrastructures that guarantee electricity and water[148] supply to the civilian population as well as other basic sites such as those providing medical services and groceries supply. Additionally, the EU may pay special attention to schools and religious sites.

In regards to cultural property[149], the EU could implement, when possible, safeguarding measures according to article 5 of the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1999):

> *"Preparatory measures taken in time of peace for the safeguarding of cultural property against the foreseeable effects of an armed conflict pursuant to Article 3 of the Convention shall include, as appropriate, the preparation of inventories, the planning of emergency measures for protection against fire or structural collapse, the preparation for the removal of movable cultural property or the provision for adequate in situ protection of such property, and the designation of competent authorities responsible for the safeguarding of cultural property."*

More detailed information on the protection of cultural property is provided in the explanatory note of recommendation XXIII.

[148] Lorenz, F. *"The Protection of Water Facilities under International Law",* UNESCO, IHP, WWAP. Technical documents in hydrology. PC Series, N.1. Accessible at: http://unesdoc.unesco.org/images/0013/001324/132464e.pdf

[149] Also Cf. Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954; First Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954.

Recommendation XVII

Throughout its interventions during and after an armed conflict, the EU is to particularly focus on the specific protection of women and on combating the particular violence that women suffer in times of conflict and the ostracism that often results from rape, forced pregnancy and other atrocities committed against their integrity and dignity in the aftermath of an armed conflict.

Explanatory note

The European Union should develop and implement a gender-based policy to respond to the increasing number of challenges raised by gender issues during armed conflicts. The increasing trend to asymmetric and non-international armed conflicts has modified the strategies and war methods used by the opposing parties in armed conflicts. Women have been particularly affected by these new warfare conditions that include several means that impair their dignity. Hence, the protection of women in situation of armed conflict requires the implementation of programmes and interventions that integrate a gender perspective in a clear and systematic way[150].

The European Union has made considerable efforts to enhance the conditions of women worldwide and, particularly, to combat all forms of discrimination against women in times of peace. However, the European Union continues to "lack a strategic plan or framework to guide EU response to women in armed conflict"[151].

The *EU guidelines on violence against women and girls combating all forms of discrimination against them* sets undoubtedly valuable objectives and parameters on the protection of women during armed conflict. Yet, the guidelines address the general issue of violence against women in all types of situations and they remain short in addressing the complex situation of women in armed conflicts. Additionally, the *European Union Guidelines on promoting compliance with international humanitarian law (IHL)* does not address at all the issue of women's protection during armed conflicts.

Then, the most significant EU document on the protection of women during armed conflict is probably the 2000 European Parliament Resolution on the participation of women in peaceful conflict resolution[152] following a report of the Committee on Women's Rights and Equal Opportunity[153]. The Parliament condemned in its resolution rape, sexual slavery and all forms of sexual violence and misconduct against women. Additionally, the Parliament called upon member states to ratify the Treaty of Rome for the ICC, to increase funding for victims of the abovementioned crimes, to integrate a gender perspective in the planning of refugee camps as well as to provide gender-sensitive training to local actors. In spite of

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150 Cf. Inter-American Court of Human Rights. *Miguel Castro Castro v. Perú.* Judgement of 25 November 2006. para. 229 (f) (g), para. 259 (n), (o), (p), (q), (r), (s), (t), (x), (y), (z), para. 303 ; Also Cf. Krill, F. *"The protection of women in international humanitarian law",* International Review of the Red Cross, N. 249. 1985. pp. 337-363; Askin, K. *"Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunal: Current Status",* AJIL, Vol. 93/1, 1999. pp.97-123; Guenivet, K. *"Violences sexuelles: la nouvelle arme de guerre"*, Paris. Michalon. 2001.

151 Sherriff, A. & Barnes, K. "*Enhancing the EU Response to Women and Armed Conflict with particular reference to development policy"*, Study for the Slovenian EU Presidency. Discussion paper N.84. April 2008.

152 European Parliament Resolution, 30 November 2000. (2000/2025(INI). Also Cf. EU Parliament Resolution of 17 December 1993 on the rape of women in the former Yugoslavia. OJ C 21, 25.1.1993, p. 158.

153 European Parliament. *"Report on participation of women in peaceful conflict resolution"*, 20 October 2000. Rapporteur: Maj Britt Theorin.

this resolution, it is still necessary to take more systematic and long-term measures to ensure that EU forces will provide adequate protection to women during armed conflicts.

EU forces should focus in preventing the use of rape, forced pregnancy, slavery, sexual abuse and exploitation against women. These acts are undoubtedly the most systematic and widespread manifestations of violence against women during armed conflicts. Hence, EU military operations should provide periodic reports establishing the difficulties encountered during the operations to ensure protection to women against those crimes in order to modify and adapt the protection measures

Although the Geneva Conventions granted special protection to women "with all the due regard to their sex"[154] there is limited conventional protection in times of war against the types of violence previously mentioned. Nonetheless, customary international humanitarian law largely prohibits the use of gender-violence during armed conflicts[155].

The ICTY[156] made a great contribution to fight against these acts by qualifying their commission during armed conflicts as war crimes. In *Prosecutor v. Furundžija*, the Court stated:

> *"Indeed, due to the nature of the International Tribunal's subject-matter jurisdiction, in prosecutions before the Tribunal forced oral sex is invariably an aggravated sexual assault as it is committed in time of armed conflict on defenceless civilians; hence it is not simple sexual assault but sexual assault as a war crime or crime against humanity."*[157]

Latter on the UN Security Council called all parties involved in armed conflicts to respect the rights of women and girls in times of armed conflict:

> *"9. Calls upon all parties to armed conflict to respect fully international law applicable to the rights and protection of women and girls, especially as civilians, in particular the obligations applicable to them under the Geneva Conventions of 1949 and the Additional Protocols thereto of 1977, the Refugee Convention of 1951 and the Protocol thereto of 1967, the Convention on the Elimination of All Forms of Discrimination against Women of 1979…"*[158]

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154 Article 14 (2) Geneva Convention III. Also Cf. Art. 12 of Conventions I and II; Arts. 25, 88, 97 and 108 of Convention III; Arts. 14, 16, 21-27, 38, 50, 76, 85, 89, 91, 97, 124, 127 and 132 of Convention IV; Arts. 70, 75, 76 of Protocol I; Arts. 5 (2) and 6 (4) of Protocol II.

155 Cf. Henckaerts, J-M & Doswald-Beck, L. (ed.) "Customary International Humanitarian Law". ICRC and Cambridge University Press. Vol. 1 (Rules).

156 ICTY, *Prosecutor v. Furundžija* (IT-95-17/1) ''Lašva Valley'', 10 December 1998; ICTY, *Prosecutor v. Kunarac et al.* (IT-96-23 & 23/1) "Foča", 22 February 2001, p. 447-456. Also Cf. Special Court for Sierra Leone Case SCSL-04-15-T, 2 March 2009. p. 48, para.144; Also Cf. Inter-American Court of Human Rights, *Miguel Castro Castro v. Perú.* 2006. Op. cit. para 312 on the qualification of certain sexual acts committed against women as torture.

157 ICTY, *Prosecutor v. Furundžija*, 1998. Op. cit. para. 184.

158 UN Security Council Resolution 1325, 2000.

Today, the Rome Statue for the ICC provides in articles 7 and 8 a solid and conventional definition of these acts as crimes against humanity and war crimes:

> *Article 7*
> *"1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:*
> *g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;"*
>
> *Article 8*
> *2. For the purpose of this Statute, "war crimes" means:*
> *(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:*
> *(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;*

Recommendation XVIII

The European Union is to take into consideration the extreme vulnerability of children during interventions in armed conflict and in post-conflict situations. Special protection measures must be taken, including the preservation and safeguard of the child's physical and mental integrity, and the recognition of their special needs in terms of health, education, culture and the development of their well-being. The European Union is to be particularly vigilant regarding the situation of young girls in armed conflict and actively seek to protect them from all forms of violence and exploitation, including that of a sexual nature. The European Union is likewise attentive to the situation of child soldiers and actively pursues demilitarisation, health, social and educational care and where possible encourages their return to childhood.

Explanatory note

The European Union should develop and implement a children-needs sensitive policy to ensure that children rights are respected during the intervention of its forces in armed conflicts. Children are a particular vulnerable population during armed conflicts[159]. They have increasingly been conscripted, enlisted and trained to participate in combats while at the same time they are privileged targets among the civilian population[160]. The protection of children in situation of armed conflict requires the implementation of coordinated actions that integrate their needs in a clear and systematic way. Rather than promoting new regulations, the EU should focus on supporting and applying the exiting ones.

The European Union has made considerable efforts to enhance the protection of children during armed conflicts[161]. The *EU guidelines on children and armed conflict* lays down important objectives and measures to protect children from the effects of armed conflict, to end the use of children in armed forces and armed groups, and to end impunity for crimes against children.

The EU guidelines emphasize se the importance of providing adequate protection to children during crisis management operations and assistance in the post-conflict stage. Guidelines 17 states:

> *"Crisis management operations: during the planning process, the question of protection of children should be adequately addressed.*

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[159] Cf. UN General Assembly of 14 December 1974. *Declaration on the Protection of Women and Children in Emergency and Armed Conflict.* A/RES/29/3318; UN General Assembly/Security Council of 10 November 2003. *Promotion and Protection of the Rights of Children. A*/58/546-S/2003/1053; UN General Assembly/Security Council of 20 February 2004. *Promotion and Protection of the Rights of Children*. A/58/546/Corr.1-S-S/2003/1053/Corr.1: UN Security Council Resolutions 1261 (1999), 1314 (2000), 1640 (2003), 1612 (2005), 1888 (2009), 1889 (2009).

[160] Cf. Abbott, A.B. *"Child Soldiers: The use of Children as Instruments of War"* Suffolk Transnational Law Review. V. 23/2. 2000. pp. 499-537. Bouvoier, A. & Dulti M. T. *"Children in Armed Conflict"*, The International Journal of children's Rights. The Hague, Kluwer Law International. V. 4/2, 1996. pp. 115-212; Happold, M. *"Child Soldiers in International Law: The legal Regulation of Children's Participation in Hostilities",* Netherlands International Law review, V. 47/1. 2000. pp. 27-52

[161] Cf. Resolution on children and armed conflict adopted by the EU-ACP Joint Parliamentary Assembly , June 2003; Council Resolution on Corporate Social Responsibility (doc. 5049/03; European Initiative for Human Rights and Democracy; European Instrument for Democracy and Human Rights; Council Conclusions on Checklist for integration of the protection of children affected by armed conflict into ESDP; Comprehensive EU concept for missions in the field of rule of law in crisis management, including annexes (doc. 9792/03).

> *In countries where the EU is engaged with crisis management operations, and bearing in mind the mandate of the operation and the means and capabilities at the disposal of the EU, the operational planning should take into account, as appropriate, the specific needs of children, bearing in mind the particular vulnerability of the girl child. In pursuit of the relevant UNSC resolutions, the EU will give special attention to the protection, welfare and rights of children in armed conflict when taking action aimed at maintaining peace and security."*

The guidelines also establish an implementation and follow-up procedure to ensure they will be effectively and consistently applied. The follow-up procedure establishes their review and update on a regular basis in coordination pertinent working groups, Special Representatives, Heads of Mission, Heads of Mission of civilian operations and EU Military Commanders. If there is indeed little to add to these guidelines, we consider that EU military missions should be provided with more detailed and standardized guidelines for their operation.

EU missions should clearly identify prior to the military intervention the needs of children in the area of influence of the operation in accordance with the EU guidelines. The planning should also include the objectives of the intervention in terms of children protection and the measures through which the mission intends to attain those objectives. Finally, the EU operation should provide periodic reports establishing the difficulties encountered during the operations in order to modify and adapt the protection measures. The EU parliament sub-committee on human rights should follow-up the actions undertaken by EU forces in this issue and include a short summary of it in its in its annual report.

There are several instruments in international law advocating for the protection of children rights during armed conflict. The conventional prohibition of enlisting children has its foundation in the Geneva Conventions and additional protocols[162]. Particularly, article 4(3)(c) of Additional Protocol II states:

> *"Art 4 Fundamental guarantees*
> *3. Children shall be provided with the care and aid they require, and in particular:*
> *(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;"*

Additionally, on the basis of customary international humanitarian law and particularly Sierra Leone's case-law[163] the recruitment of child soldiers is considered today a war crime in non-international armed conflicts. This qualification enhances undoubtedly the protection for children being recruited and used as child soldiers.

The Rome Statue for the ICC following the development of customary international humanitarian law stated that:

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[162] Articles 14, 17, 23, 24, 38, 50, 76, 82, 89, 94 and 132 of Convention IV; Articles 70 and 77-78 of Protocol I.
[163] Special Court for Sierra Leone Trial Judgement, *Prosecutor v. Fofana and Kondewa,* SCSL-04-14-A, 28 May 2008, para. 139. [CDF Appeal Judgement]; AFRC Appeal Judgement, para. 295.

> *"2. For the purpose of this Statute, "war crimes" means:*
> *(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:*
> *(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities."*

Finally, other important instruments of protection are the Convention on the Rights of the Child (1989), the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2000) and regional mechanisms as the African Charter on the Rights and Welfare of the Child (1999)[164] and the Montevideo Declaration on the Use of Children as Soldiers (1999)[165].

[164] African Charter on the Rights and Welfare of the Child. 0AU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999.
[165] Conferencia Latinoamericana y del Caribe sobre el uso de niños como soldados. "*Declaración de Montevideo"*, Adopted on 8 July 1999.

Recommendation XIX

During its interventions in armed conflict and post-conflict situations, the European Union is to take into consideration the extreme vulnerability of religious, ethnic, national and other minorities, whose standing and security deteriorate in times of conflict. Special protection measures must be taken, including the preservation of the rights of minorities in times of armed conflict and the condemnation of any law adopted during a conflict with the aim of depriving minorities of their previous entitlements, such as their property rights.

Explanatory note

The European Union should take measures to ensure the protection of human rights of religious, ethnic, national and other civilian minorities potentially affected by the armed conflict[166]. The EU will instruct its forces to respect and guarantee the respect of civilian and minorities' human rights during armed conflict. Indeed, the UN General Assembly[167], and Security Council[168], the UN high Commissioner for Human Rights[169] and UN Sub-commissions[170] as well as other international organizations[171], have deplored the frequent lack of respect during armed conflicts of relevant provisions in international human rights[172] and have called, the international community, to take measures to enhance compliance with international human rights law during armed conflict.

International humanitarian law and international human rights law are complementary legal regimes[173]. The former is considered *lex specialis* of the latter and they are certainly not mutually exclusive regimes. The need of safeguarding human rights during wartime is fully recognized by the Geneva Conventions. Article 3 of the four Geneva Conventions states that:

> *"Art. 3. 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:*

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166 Cf. *Lubell, N. "Challenges in applying human rights law to armed conflict"* International review of the Red Cross. V. 87. N° 860. 2005. pp. 737- 754.

167 Cf. Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General. Pursuant Security Council Resolution 1564/2004, 2005

168 UN Security Council Resolutions 237 (1967), 1034 (1995), 1635 (2005), and 1653 (2006).

169 UN Office of the High Commissioner for Human Rights. *"Fact Sheet N° 13, International humanitarian law and human rights"*, 1991. Accessible at: http://www.ohchr.org/Documents/Publications/FactSheet13en.pdf

170 Resolution 1989/24, Sub-commission on Prevention of Discrimination and Protection of Minorities E/CN.4/1989/24 (16 February 1989)

171 Cf. Abresch, W. *"A Human Rights Law of International Armed Conflicts: The European Court of Human Rights in Chechnya"* Working Paper, Extrajudicial Execution Series, N° 4. Centre for Human Rights and Global Justice, New York University. 2005.

172 Cf. UN High Commissioner for Human Rights. "*Expert Consultation: The protection of human rights of civilians in armed conflict", Concept one.* Geneva, 31 March 2010. Para. 7. Accessible at: http://www2.ohchr.org/english/events/docs/protection_civilians/concept_note.pdf

173 Cf. ICJ Advisory opinion on *Legality of the Threat or Use of Nuclear Weapons,* ICJ Reports 1996; ICJ *DRC v. Uganda, Case concerning Armed Activities on the Territory of the Congo*, Decision of 19 December 2005; Also Cf. Resolution 2005/63 (20 April 2005) of the Commission on Human Rights. It states: *"human rights law and international humanitarian law are mutually reinforcing"* and considers that *"the protection provided by human rights law continues in armed conflict situations, taking into account when international humanitarian law applies as lex specialis.".* Also Cf. ICJ Advisory opinion on *the Legal Consequences of Wall in Palestina* (9 june 2004). Reports 2004. P. 136.

> *(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."*

First and Second Additional Protocols to the Geneva Conventions clearly reaffirm the duty to respect human rights law of the civilian population, weather of not their liberty has been restricted. For international armed conflicts article 75 of the First Additional Protocol states that:

> *"Art 75. Fundamental guarantees*
> *1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such person."*[174]

For non-international armed conflicts article 5 (1) of the Second Additional Protocol states that:

> *"Art. 4 Fundamental guarantees*
> *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, honour 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."*

It is important to note that these provisions recalling the importance of respecting human rights[175] during armed conflict contained in the First and Second Additional Protocol adopted by consensus[176].

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[174] This rule is also considered in Customary International humanitarian law. Cf. Ibid. p. 389. *"Rule 127. The personal convictions and religious practices of persons deprived of their liberty must be respected."*

[175] Provisions on human rights can be found in: The International Covenant on Civil and Political Rights and the Convention on the Rights of the Child and Regional human rights treaties provide that everyone has the right to freedom of "thought, conscience and religion" or, alternatively, "conscience and religion". The above-mentioned rights are specifically listed as non-derogable in the International Covenant on Civil and Political Rights and the American Convention on Human Rights. The Convention on the Rights of the Child and the African Charter on Human and Peoples' Rights do not allow for the possibility of derogations at all. Core rights on the respect of one's religion are also laid down in the Universal Declaration on Human Rights, Article 18; American Declaration on the Rights and Duties of Man, Article III (limited to freedom of religion); Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief, Article 1; EU Charter of Fundamental Rights, Article 10.

[176] Ibid. Note. 508. p. 376;

Finally, the EU should particularly ensure the protection of ethnic, religious and national minorities targeted by the opposing parties during armed conflicts on the basis of their ethnic, religious or national condition. The EU should identify the most vulnerable minority groups in the area of influence of the armed operation in order to adopt appropriate measures of protection. A follow-up procedure should be implemented to ensure that the protective measures are effectively applied and adapted according to the circumstances encountered in the field. The follow-up mechanism will include a review and update procedure of the protective measures in coordination with pertinent working groups, Special Representatives, Heads of Mission, Heads of Mission of civilian operations and EU Military Commanders.

This recommendation calls the EU to place human rights at the core of its military operations during armed conflicts. The EU should stick to the highest standard of protection when possible, i.e. that of human rights, while complying at all times with the rules of warfare, i.e. international humanitarian law. Particularly, the EU should ensure that minorities are fully respect by the parties involved in the conflict as well as by the EU military.

Recommendation XX

During its interventions in armed conflict and post-conflict situations, the European Union is to take into consideration the extreme vulnerability of displaced persons, who are often the targets of violence and are living in a situation where they face acute economic vulnerability and significant health risks. Special measures of protection must be taken to support both the safe return, without risk of retaliation or intolerable economic consequences, of such populations to their original lives, as well as the recovery of their property. When this is impossible, the European Union encourages the establishment of an adequate and fair system of compensation.

Explanatory note

The European Union should develop and implement a clear policy to protect and assist internally displaced population in countries bearing armed conflicts[177]. In that sense, the European Union should, following the Council of Europe[178], express, in a public statement, its support to the *Guiding Principles on Internal Displacement*[179]. Additionally, the EU should commit itself to abide by them during armed operations and to implement them in post-conflict situations.

Forced displacement is currently one of the most urgent humanitarian issues to be addressed worldwide[180] as the number of internally displaced population continues to rise steadily in several countries undergoing armed conflicts such as Sudan, Iraq and Colombia[181]. The European Union has already implemented certain assistance mechanisms to provide relief to persons affected by this phenomenon, including measures for the temporary admission and residence in EU soil[182] as well as *in situ* programmes on humanitarian aid, voluntary return and protection of their properties and possessions[183]. Yet, in spite of these measures, the EU is in need of a twofold general action plan in the field.

On the one hand, the EU needs to increase protection in the field, to populations at risk of

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177 Cf. Bugnion, F. *"Réfygiés, personnes déplacées et droit international humanitaire"* Revue Suisse de droit international et droit européen. V. 3, 2001. pp. 277-288; Lavoyer, J-P. *"Refugees and Internally Displaced persons: International Humanitarian Law and the Role of ICRC"* International review of the Red Cross. N. 305. 1995. pp. 162-180.

178 The Council of Europe already acknowledged that importance of the *Guiding Principles on Internal Displacement* and called all the member states to guide its actions in this field in accordance with them. Cf. Recommendation (2006) 6 *on internally displaced persons*. Adopted by the Committee of Ministers of the Council on 5 April 2006.

179 UN Commission on Human Rights. *"The Guiding Principles on Internal Displacement"* (E/CN.4/1998/53/ADD.2); Also Cf. Kälin, W. *"Guiding Principles on Internal Displacement. Annotations"*. Washington. The American Society of International Law. 2008; Couldrey, M. & Herson, M. *"Ten Years of the Guiding Principles on Internal Displacement"*. Oxford, Forced Migration Review. 2008.

180 In 2009, the Internal Displacement Monitoring Centre estimated that the number of internally displaced persons amount of 27, 100,000. Cf. "*Internal Displacement. Global Overview of Trends and Developments in 2009."* IDMC, NRC. May 2010. P. 8.

181 Cf. Inter-American Court of Human Rights. *Caso de la "Masacre de Mapiripan" vs. Colombia.* Judgement 15, September 2005, series C n°122, §§167-189; *Caso de las Masacres de Ituango vs. Colombia*. Judgement 1 July 2006, Series C n° 148, §§ 208 and ss.; Also Cf. Petterson, B. *"Arable Land and Forced Displacement in Colombia"* Forced Migration Review, V. 7. 2000. p. 40.

182 Council Directive 2001/55/EC of 20 July 2001. OJ L 212. 7.8.2001. p. 12-23;

183 Cf. e.g. European Commission Financial Agreement *"Support to Georgia IDPs Action Plan: 2008 Part 1"*. Other actions are undertaken under the European neighbourhood Policy (ENP); EC Economic rehabilitation Programmes; European Commission Humanitarian Aid Programme ECHO.

forced displacement, in countries in which the EU has military operations. EU-led forces should be instructed to provide "enhanced protection" to populations that could be directly affected during the armed conflict and who might be compelled to abandon their own territory. First, EU-led forces should attempt to secure the territories that could be targeted by the opposing parties in the armed conflict, with the aim of preventing forced displacement. When EU-forces are unable to secure the zone, they should provide protection to civilians during the process of migration and guarantee their temporary resettlement in a safe area[184]. The EU should always consult the affected population with the aim of deciding on the appropriate relocation sites and the ways of minimizing the adverse effects of displacement[185].

The EU will undertake the protection of displaced persons on the basis of article 17 of the Second Additional Protocol to the Geneva Conventions that prohibits the forced movement of civilians during wartime and, particularly, in non-international armed conflicts:

> *"Article 17.*
> *The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.*
> *2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict."*

When the adopted measures were not sufficient to prevent the displacement of the population, EU-forces will attempt to safeguard the properties and possessions of the displaced population in accordance with principle 21 of the *Guiding Principles on Internal Displacement:*

> *"Principle 21*
> *1. No one shall be arbitrarily deprived of property and possessions.*
> *2. The property and possessions of internally displaced persons shall in all circumstances be protected, in particular, against the following acts:*
> *(a) Pillage;*
> *(b) Direct or indiscriminate attacks or other acts of violence;*
> *(c) Being used to shield military operations or objectives;*

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184 Cf. "*Handbook for Applying the Guiding Principles on Internal Displacement"* OCHA, 1999. pp. 15-23; ICRC Reference Document, *"Humanitarian Action in Times of Armed Conflict and Other Disasters"* 27th International Conference of the Red Cross and Red Crescent, Geneva, 1999. Final Goal 2.3. Accessible at: http://www.icrc.org/web/eng/siteeng0.nsf/html/5MLHUW

185 Cf. ibid. Final Goal. 2.3. The ICRC identified in the above Reference Document insecurity in camps as one of the main threats to displaced population. The ICRC stated that: *"A major reason for this insecurity is that camps may be perceived as constituting a security threat to one of the parties to a conflict, for instance because it suspects that armed elements from the enemy side hide among the civilians, or undertake recruitment and training in the camps. In such cases, there may be a serious risk that the camps are attacked or forcibly dismantled."*

(d) Being made the object of reprisal; and
(e) Being destroyed or appropriated as a form of collective punishment.
3. Property and possessions left behind by internally displaced persons should be protected against destruction and arbitrary and illegal appropriation, occupation or use."

The second field of action for the EU concerns the assistance to displaced populations in post-conflict stages. The EU should take measures to ensure coordination among the different programmes it runs in post-conflict stages with the aim of creating synergies that could tackle more effectively the consequences of forced displacement.

When the European Union participates in post-conflict dialogues it should ensure that displaced persons' rights to peaceful resettlement and reparation are guaranteed. The EU will also request the states to guarantee the right to property of displaced populations who had to left their properties and possessions for reasons linked to the armed conflict. For so doing, the EU should increase and deepen its cooperation with other regional organizations dealing with this issue such as the African Union[186], Organization of American States[187] and the Council of Europe[188].

[186] Cf. African Union, "*Decision on the Situation of Refugees, Returnees and Displaced Persons"* (RI/00250) of 18 January 2005; African Union, "*Decision on the Situation of Refugees, Returnees and Displaced Persons"* (RI/00249) of 7 February 2005; AU Protocol on the Protection and Assistance to Internally Displaced Population (2006); AU Protocol on the Property Rights of Returning Persons (2006)
[187] Organization of American States (OAS), Resolution 2229, 2006.
[188] Cf. Recommendation (2006) 6 *on internally displaced persons*. Adopted by the Committee of Ministers of the Council on 5 April 2006

Recommendation XXI

During its interventions in armed conflict and post-conflict situations, the European Union is to take into consideration serious damage done to the environment and to cultural property. Special protection measures must be taken to secure cultural zones, combat pillage and the illegal sale of cultural goods and to promote programs to restore the environment. To this end and with full respect for the division of competencies between the member-states and the EU, the latter supports the criminalisation of damage to cultural property or the environment during armed conflicts. The EU also encourages its member-states to ratify the existing conventions and treaties on this subject.

Explanatory note

The European Union should take measures to ensure that its armed forces will provide adequate protection to cultural property[189] and the environment during its operations[190]. For so doing, the EU should establish a sub-commission or Council working group on this issue. The working group will focus on setting down adequate guidelines to EU military forces with the aim of ensuring safeguard of and respect for the environment and cultural property during the operations.

As for the Cultural property the sub-commission or Council working group should, prior to or at the early state of the intervention, establish an inventory[191] of the sites requiring protection. According to article 5 of the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1999):

> *"Preparatory measures taken in time of peace for the safeguarding of cultural property against the foreseeable effects of an armed conflict pursuant to Article 3 of the Convention shall include, as appropriate, the preparation of inventories…"*

Following the inventory, the sub-commission or working group should establish clear and adequate measures of protection to be implemented by EU armed forces. The report laying down the measures as well as the inventory should be publish and made available to the Head of Mission of the European Union Military and/or Police mission. The Head of Mission should instruct its forces to implement the measures required and to report back the difficulties encountered in the field. The Head of the Mission, on its turn, should report back to the sub-commission or working group the progress of the operation in regards to

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[189] Cultural property is well defined in article 1 of the Hague Convention on Cultural Property. It includes museums, libraries, archives, archaeological sites and monuments of architecture, art or history, whether religious or secular. Cf. Bugnion, F. *"La genèse de la protection juridique des biens culturels en cas de conflict armé",* International Review of the Red Cross. V. 86, N° 854. 2004. pp. 313- 324; Frigo, M. *"Cultural Property v. Cultural heritage: A "Battle of Concepts" in International Law",* International Review of the Red Cross. V. 86, N° 854. pp. 367- 378

[190] This duty was already establish to member states who have ratified the Hague Convention on Cultural Property (1954) by the latter's article 7:
" Art. 7. 1. The High Contracting Parties undertake to introduce in time of peace into their military regulations or instructions such provisions as may ensure observance of the present Convention, and to foster in the members of their armed forces a spirit of respect for the culture and cultural property of all peoples.
2. The High Contracting Parties undertake to plan or establish in peacetime, within their armed forces, services or specialist personnel whose purpose will be to secure respect for cultural property and to co-operate with the civilian authorities responsible for safeguarding it. »

[191] Cf. Explanatory note of recommendation N. 17.

the protection of cultural property. The latter's report may additionally propose to modify or complement the measures taking into account the particularities and setbacks encountered in the field.

The EU will pay particular attention to cultural property needing enhanced protection pursuing article 10 of the Second Additional Protocol to the Hague Convention:

> *"Article 10 Enhanced protection*
> *Cultural property may be placed under enhanced protection provided that it meets the following three conditions:*
> *a. it is cultural heritage of the greatest importance for humanity;*
> *b. it is protected by adequate domestic legal and administrative measures recognising its exceptional cultural and historic value and ensuring the highest level of protection;*
> *c. it is not used for military purposes or to shield military sites and a declaration has been made by the Party which has control over the cultural property, confirming that it will not be so used."*

Additionally, the EU should call all member states[192] to ratify as soon as possible the Second Additional Protocol to the Hague Convention (1999)[193]. Article 15 of this protocol sets out the serious offences against protected cultural property and calls contracting parties to criminalized those acts under their national law:

> *Article 15 Serious violations of this Protocol*
> *1. Any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts:*
> *a. making cultural property under enhanced protection the object of attack;*
> *b. using cultural property under enhanced protection or its immediate surroundings in support of military action;*
> *c. extensive destruction or appropriation of cultural property protected under the Convention and this Protocol;*
> *d. making cultural property protected under the Convention and this Protocol the object of attack;*
> *e. theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.*
>
> *2. Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make such offences punishable by appropriate penalties. When doing so, Parties shall comply with*

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[192] To see the EU member states that have not ratified the convention yet Cf. UNESCO Legal Instruments Section at: http://portal.unesco.org/la/convention.asp?KO=15207&language=E&order=alpha

[193] Cf. Tigroudja H, *"Les règles du droit international général applicables à la protection du patrimoine culturel en temps de conflit armé"* in: Nafziger, J. & Scovazzi, T., *Le patrimoine culturel de l'humanité/ The Cultural Heritage of Mankind*, The Hague. Martinus Nijhoff Publishers, 2008; Henckaerts, J-M. *"New Rules for the Protection of Cultural Property in Armed Conflict"*, International Review of the Red Cross. N° 835. pp. 593-620; Mainetti, V. *"Des nouvelles perspectives pour la protection des biens culturels en cas de conflit armé: l'entrée en vigueur du deuxième Protocole relatif à la Convention de la Haye de 1954"*, International Review of the Red Cross. V. 86, N° 854. pp. 337- 366

> *general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act."*

The protection of the environment[194] during periods of armed conflict is particularly addressed in the First Additional Protocol to the Geneva Conventions. Articles 35 lays down the general rule of international humanitarian law setting limits to the right to choose means of warfare and prohibits those means of a nature to cause superfluous injury or unnecessary suffering. Additionally, paragraph 3 states:

> *"3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment."*

Article 55 is entirely devoted to the environment and is undoubtedly the most important protection in conventional international humanitarian law granted to the environment[195]:

> *"Art 55. Protection of the natural environment*
> *1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.*
> *2. Attacks against the natural environment by way of reprisals are prohibited."*

The International Court of Justice introduced the principles of necessity and proportionality to case-law protection of the environment. In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* the Court stated that:

> *"States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality"*[196]

The sub-commission or working group entrusted with the mission of protecting cultural property according to this explanatory note should follow the same procedure to ensure the protection of the environment. First, the sub-commission or working group should establish an inventory of environmental sites that require protection during the operations. This inventory should be published and made available to the Head of Mission of the European Union Military and/or Police mission together with the proposed

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[194] Cf. Dinstein, Y. *"Protection of the Environment in international Armed Conflict"* in: Frowein, J.A. & Wolfrum, R. (Eds.), *Max Planck Yearbook of United Nations Law*. V. 5, 2001. pp. 523- 549

[195] Also Cf. Convention on the prohibition of military or any other hostile use of environmental modification techniques, New York, 10 December 1976.

[196] For case-law protection of the environment Cf. ICJ Advisory opinion on *Legality of the Threat or Use of Nuclear Weapons,* ICJ Reports 1996. 226 et seq., (242, para. 30)

measures of protection to be implemented by EU forces. The EU forces will implement those protection measures and report back to the Head of Mission the difficulties encountered in the field. The Head of Mission should report back to the sub-commission or working group on the appropriateness of the measures implemented and may propose, if pertinent, to modify or complement them.

THE EUROPEAN UNION AND POST-CONFLICT SITUATIONS

Recommendation XXII

The European Union promotes access for victims to criminal and civil justice in territories where armed conflict has taken place. To do so, the EU encourages and assists states to restore as rapidly as possible their legal institutions and to put in place adequate, accessible and effective means of recourse for criminal and civil matters to enable the compensation of damages suffered and the prosecution of authors of violations of international humanitarian law.

Explanatory note

The EU should greatly emphasize in its post-conflict programmes the importance of providing effective access to justice to victims of violations of international humanitarian law. Indeed, the European Union is a major donor for programmes focusing on the reconstruction of institutional structures of post-conflict societies and hence, a key player in policing the implementation of the rule of law and democracy. Yet, even if the European Union's programmes largely deal with judiciary and security sector reforms they lack of measures to promote that victims of international humanitarian law violations have an effective access to justice in the countries theatre of operations.

The European Union implements a multidimensional approach in its foreign policy and post-conflict interventions. Following article 21 (1)[197] of the TEU, the EU sets up its post-conflict intervention taking into account the promotion of democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms as well as other foundational values of the EU. The judicial reform and the strengthening of justice –related sectors of the state are always within the priorities of the EU's post-conflict programmes. However, we consider that the EU should not only focus on structural issues such as guaranteeing the separation of powers, training judges and prosecutors and improving the infrastructure but also in ensuring that justice will be rendered for violations of international humanitarian law.

Indeed, it is well know that domestic jurisdictions are key players in post-conflict stages as it is their primary responsibility to prevent and to repress violations of international humanitarian law. In that sense, the EU should include as part of post-conflict programmes the implementation of coherent and reliable policies to ensure that domestic courts of post-conflict states will prosecute the violators of international humanitarian law and will provide reparation to the victims of those aggressions.

The *Rule of Law Missions*[198] are probably EU's major instruments for intervening in post-conflict societies. They have been implemented as part of the CFSP to promote the restoration of the State in post-conflict societies on the basis of the respect to democratic principles, the rule of law and human rights. Rule of Law Mission deal largely with

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[197] Article 24,"(1) The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law."

[198] Council Joint Action 2005/190/CFSP on the European Union Integrated Rule of Law Mission for Iraq, EUJUST LEX. OJ L 62. 9.3.2005. pp. 37-41; Council Joint Action 2008/124/CFSP on the European Rule of Law Mission in Kosovo, EULEX KOSOVO. OJ. L. 42. 16.2.2008. pp. 92-98

judiciary reforms and other justice-related issues but they focus on the role of the state towards the future rather than on the role of the state in dealing with past abuses. Hence, the issue of the prosecution of human rights violations and the reparation to victims is largely left to the good will of the state in transition. The following citation can illustrate the approach of the Rule of Law Missions towards the judiciary.

The EUJUST LEX Iraq, stated in its preliminary considerations that:

> *"(3) The European Council agreed that the EU could usefully contribute to the reconstruction and the emergence of a stable, secure and democratic Iraq through an integrated mission, which could inter alia promote closer collaboration between the different actors across the criminal justice system and strengthen the management capacity of senior and high-potential officials from the police, judiciary and penitentiary and improve skills and procedures in criminal investigation in full respect for the rule of law and human rights."*[199]

Similarly, the Council Joint Action leading to the Rule of Law Mission for Kosovo stated in article 2:

> *Articles 2*
> *"In carrying out its objective the EUPT Kosovo shall focus on the following tasks:*
> *8. Contributing to a comprehensive and integrated EU approach, taking into account assistance in the police and judiciary area provided in the framework of the SAP."*[200]

Additionally to the Rule of law Missions, the European Union has made appeal to other instruments to contribute to the development and stabilization of post-conflict societies. Indeed, instruments such as the Community Assistance for Reconstruction, Development and Stabilization (CARDS), the Instrument for Pre-accession (IPA)[201], the European Instrument for Democracy and Human Rights, as well as several individual partnerships[202] aim to enhance institutional capacity and economic development in post conflict societies. Yet, these instruments lack, like the *Rule of Law Missions,* the means to deal with humanitarian law violations both in terms of prosecution of perpetrators and reparation to victims. Some authors[203], have brought forth that programmes such as the Community Assistance for Reconstruction, Development and Stabilization (CARDS) although focusing on issues concerning the reconstruction of civil society after the conflict have " ignored the

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[199] EUJUST LEX Iraq, 2005. Op. cit. p. 37
[200] Council Joint Action 2006/304/CFSP of 10 April 2006 on the establishment of an EU Planning team (EUPT Kosovo) regarding the possible EU crisis management operation in the field of rule of law and possible other areas in Kosovo. OJ L 112. 24.05.2006. pp. 19-23
[201] Council Regulation (EC) 1085/2006 establishing an instrument for Pre-Accession (IPA). OJ L 210, 2006.
[202] e.g. Council Regulation (EC) 2666/2000 on assistance for Albania, Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia and Former Yugoslav Republic of Macedonia.
[203] Rangelov, I & Theros, M. "*Transitional Justice in Bosnia and Hezegovina: Coherence and Complementarity on EU Institutions and Civil Society",* in: Ambos, K., Large, J., Wierda, M. (Eds.) *Building a Future of Peace and Justice. Studies on Transitional Justice, Peace and Development.* Berlin, Springer, pp. 372.

right to justice and reparation for human right abuse and the subject of missing persons"[204]

This recommendation calls the EU to take measures to deal with the problems that have been identified relating to the access to justice in post conflict societies for violations of international humanitarian law. Yet, we do not claim that everything in post-conflict societies has to be done by national criminal and civil courts. Contrarily, we consider that alternative justice mechanisms could be effective and meaningful means for dealing with international humanitarian law violations as far as they do not promote impunity. Additionally, alternative justice mechanisms are also an important feature in dealing with the prevention of future IHL violations.

[204] Community Assistance for Reconstruction, Development and Stabilization (CARDS). Council Regulation (EC) 2666/2000. OJ L 306. 7.12.2000. p. 1-6

Recommendation XXIII

In accordance with EU law and the competencies of its member-states, the European Union encourages and supports the adoption by its members of legislation establishing extraterritorial civil or criminal jurisdiction for serious violations of international humanitarian law, regardless of the attachment between the crime and the place of jurisdiction.

Explanatory note

The European Union should call its member states to adopt legislations criminalizing *serious violations* of international humanitarian law under their national law and institute universal jurisdiction for trying the perpetrators. In the same sense, the EU should also call member states to adopt legislations providing the victims of those violations with effective actions on reparation before national courts. This recommendation seeks to prevent impunity for serious violations of international humanitarian law and to ensure effective access to justice to the victims of those acts.

The term *serious violations of international humanitarian law* relates to common article 3 to the Geneva Conventions, which considerably differs from the term *grave beaches* of international humanitarian law[205]. As for the term *grave breaches*, each of the Geneva Conventions contain provisions defining what acts constitute *grave breaches* of the Conventions[206]. Additionally, the conventions specify particular breaches of the Conventions for which the High Contracting Parties have a duty to prosecute those responsible. According to the ICTY:

> *"In other words, for these specific acts, the Conventions create universal mandatory criminal jurisdiction among contracting States. Although the language of the Conventions might appear to be ambiguous and the question is open to some debate it is widely contended that the grave breaches provisions establish universal mandatory jurisdiction only with respect to those breaches of the Conventions committed in international armed conflicts."*[207]

The ICTY further reasoned that the international armed conflict element attributed to the *grave breaches* provisions of the Geneva Conventions was a necessary and functional limitation in light of the intrusion on State sovereignty that such mandatory jurisdiction represents. According to the Tribunal:

> "*State parties to the 1949 Geneva Conventions did not want to give other States jurisdiction over serious violations of international humanitarian law committed in their internal armed conflicts - at least not the mandatory universal jurisdiction involved in the grave breaches system."*[208]

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[205] ICRC, Working paper prepared for the Preparatory Committee for the Establishment of an International Criminal Court New York, 13 February, 1997. Accessible at: http://www.iccnow.org/documents/3PretCmtWarCrimesRedCross.pdf

[206] Articles 50, 51, 130 and 147 of the Four Geneva Conventions. Articles 11 (4), 85 and 86 of Additional Protocol I to the Geneva Conventions.

[207] ICTY *Prosecutor v. Tadić.* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction. Appeals Chamber, 2 October 1995. para. 79

[208] Ibid. para. 80.

Today *grave beaches* to the Geneva Conventions have become part of international criminal law, as they have been incorporate in the Rome Statue of the ICC. The jurisdiction of the Court for *grave braches* of IHL also concern non-international armed conflicts as it was also concluded, based on its statues, by the ICTY in *Prosecutor v. Tadić*[209].

The term *serious violations of international humanitarian law* did not have any explicit conventional support until the ICC Statue, but it was considered a concept of international humanitarian law issued from common article 3 to the Geneva Conventions[210]. More recently, it has been considered a term belonging to customary international humanitarian law applicable in both international and non-international armed conflicts[211]. Article 3 (b) (c) of the Rome Statue for the ICC defined war crimes[212] as "serious violations of the laws and customs of war applicable in international armed conflict" and "serious violations of the laws and customs in an armed conflict not of an international character". Other international *ad-hoc* criminal tribunals have also provided in their statues jurisdiction over *"serious violations of international law"*[213]. The *laws and customs of war* included, according to the ICTY[214], all laws and customs of war in addition to those listed in the article 3 of its Statue. Among all those laws, *serious violations*[215] are those that do not meet the minimum standards set out in common article 3 to the Geneva Conventions, as they endanger protected persons or objects or as they breach important values. The ICTY interpreting article 3 of its Statues stated that for a violation to be serious:

> *"... it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a "serious violation of international humanitarian law" although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby "private property must be respected" by any army occupying an enemy territory;"*[216]

The main ground for establishing universal jurisdiction, as means to punish perpetrators of *serious violations of international humanitarian law,* no matter whom the perpetrator might be, is the idea that they protect the core of humanity shared by all individuals and nations. Additionally, practical arguments have been added to support universal jurisdiction such as the fact that domestic prosecution will be possible during armed conflict, while international tribunals often only work after armed conflict; or that national

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[209] ICTY *Prosecutor v. Tadić*. 1995. Op cit. para. 83.
[210] Cf. Boot, M. *"Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court"*, Antwerp, Oxford, Portland. Intersentia. 2002. pp. 265-266
[211] Cf. Henckaerts, J-M & Doswald-Beck, L. (ed.) 2009. op. cit. p. 565. Rule 156 states: *"Serious violations of international humanitarian law constitute war crimes."*
[212] ICRC advisory Service on International Humanitarian Law. *"Penal Repression: Punishing War Crimes"*. Accessible at: http://www.ehl.icrc.org/images/resources/pdf/penal_repression.pdf
[213] Cf. ICTY Statute, article 1; ICTR Statute, article 1; Statute of the Special Court for Sierra Leone, article 1(1).
[214] ICTY, *Delalic´ Case*, Case No. IT-96–21-T, Judgement, Trial Chamber II, 16 November 1998, para. 111
[215] On the use of the term *"serious violations*" on Military manuals Cf. Henckaerts, J-M & Doswald-Beck, L. (ed.) 2009. op. cit. p. 568
[216] ICTY *Prosecutor v. Tadić*. 1995. op cit. para. 94.

civil courts will complement the function of the ICC as they cannot decide on reparations to victims of those violation. In any case, measures to repress serious violations of international humanitarian law are always welcome[217], not only because they have a deterrent effect, but also because they promote overall compliance with IHL.

Although several European countries such as Belgium, Spain, France and the United Kingdom have provisions on universal jurisdiction for certain criminal matters, the EU should call the rest of the member states to adopt similar legislations[218]. The EU should also call member states to enlarge the scope of their legislations as to include jurisdiction for civil claims on reparation, open to victims of *"serious violations"* of IHL, independently of the nationality of the claimants, the nationality of the perpetrator and the place of the events.

Other international organizations have already taken similar steps and have called its member states to comply with international law and to adopt measures to prevent impunity for international crimes. The Inter-American Commission on Human Rights[219], acknowledging the importance of universal jurisdiction for punishing the perpetrators of those crimes, called the member states of the Organization of American States to adopt legislative measures to criminalize international crimes such as genocide, war crimes and crimes against humanity as well as to try the perpetrators of those crimes and provide reparation to its victims.

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[217] The ICRC reports the support of several IHL experts on the implementation of universal jurisdiction for *"serious violations"* of IHL". Cf. Report prepared by the International Committee of the Red Cross Geneva, October 2003. "Improving Compliance with International Humanitarian Law ICRC Expert Seminars".

[218] Frydman, B. & Hennebel, L. *"Le contentieux transnational des droits de l'homme : une analyse stratégique"*, Revue trimestrielle des droits de l'homme. N° 77. 2009. pp. 73-136; Schabas, W. *"National Courts Finally Begin to Prosecute Genocide, The Crimes of Crimes"*, Journal of International Criminal Justice. V. 1. Issue 1. pp. 39-63; Reydams, L. *"Belgium's first Application of Universal Jurisdiction: The Butare Four Case"*, Journal of International Criminal Justice. V. 1. Issue. 2. 2003. pp. 428-436; David, E. *"Le champs d'application de la loi belge du 16 juin 1993 relative à la répression des infractions graves au droit international humanitaire"* Revue de droit militaire. 1997. p. 111 & seq.; Jouet, M. *"Spain's Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin America, China, and Beyond"*, Journal of International and Comparative Law. V. 35. 2007. pp. 495 & seq.

[219] Inter-American Commission of Human Rights. Resolution 1/13 of 24 October 200" on *"Sobre juzgamiento de crimes internacionales"*. Accessible at: http://www.cidh.org/reso.1.03.htm